

Submission to the Victorian Law Reform Commission

REVIEW OF THE VICTIMS OF CRIME ASSISTANCE ACT 1996

To: Victorian Law Reform Commission

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INTRODUCTION

The Law Institute of Victoria (LIV) welcomes the opportunity to contribute to shaping a better Victims of Crime Assistance Tribunal (VOCAT) system for all Victorians, particularly those affected by family violence.

The LIV is Victoria's peak body for lawyers and represents more than 19,500 people working and studying in the law in Victoria, interstate and overseas.

The LIV has a long history of contributing to the development of effective and just state and federal legislation, and has undertaken extensive advocacy on various law reform and policy issues. The LIV welcomes the Victorian Government's commitment to reviewing the VOCAT system, particularly in the context of family violence. The LIV is extensively involved in consultations with the Victorian Government and relevant stakeholders from across the family violence system in Victoria to implement the recommendations of the Royal Commission into Family Violence and we welcome the opportunity to share our experiences and insight with the Victorian Law Reform Commission (VLRC) with respect to the VOCAT system.

This submission has been prepared by a working group in consultation with LIV members who have extensive practice experience in family law, as well as personal injury and VOCAT applications. Comments made in this submission reflect members' experience of VOCAT matters and respond to the policy concerns raised in the Consultation Papers.

Please contact familylawsection@liv.asn.au if you have any queries in relation to this submission.

Structure of this submission

The LIV's submission is divided into two sections. The first responds to the initial Consultation Paper relating to family violence. The second section responds to the supplementary Consultation Paper.

INITIAL CONSULTATION PAPER

Eligibility for assistance and assistance available

Definition of ‘act of violence’

The LIV agrees that the current VOCAT system fails to recognise the broad range of violent conduct experienced by victims of family violence. Such forms of recognised family violence include emotional or psychological abuse, economic abuse, and coercion.¹ The inability to access financial assistance due to the current eligibility requirements can not only intensify financial hardship for victims, it may also serve to invalidate their own experiences of family violence. While LIV members acknowledge that accounting for these wider forms of violence is a challenging task, it is submitted that reform is required to remove the current legislative barriers preventing victims of family violence from accessing financial assistance through VOCAT.

Definition of ‘injury’

The LIV supports expanding the definition of injury to include non-recognised mental disorders or illnesses suffered by victims of family violence. LIV members endorse a less restrictive definition of injury to accommodate the complexities of family violence and increase accessibility to VOCAT for victims.

The victim categories

The LIV submits that the current distinction between primary, secondary, and related victims can unfairly reduce the financial assistance available to child victims of family violence. Children who witness or are exposed to family violence are currently only considered secondary or related victims. As a result, the scheme fails to recognise the experiences of children exposed to family violence and the serious consequences it may have both psychologically and developmentally. The LIV recommends identifying children as primary victims of family violence, ensuring they are entitled to full financial assistance, including special financial assistance in appropriate matters.

VOCAT and Family Law proceedings

Some LIV members have expressed concern about the treatment of VOCAT awards in family law proceedings. It has been noted that compensation awarded to a victim through VOCAT remains assessable for both property settlements and spousal support. Although outside the scope of this Review, the LIV is mindful that an award through VOCAT should not ultimately end up in the hands of a perpetrator and would encourage the VLRC to formally raise this issue in its findings.

¹ *Family Violence Protection Act 2008* (Vic) s5 (1)

Awareness and accessibility of VOCAT

The LIV agrees that many victims of family violence are unaware of the existence of VOCAT or their entitlements to financial assistance under the Act. The LIV notes that while some victims of crime are made aware of VOCAT through police, social workers, or magistrates, referrals to VOCAT will vary greatly depending on individual experience. In responding to questions 47 and 48 of the Consultation Paper, the LIV submits that increased training is needed to help professionals in the broader family violence system to identify when and where a victim is or may be eligible for financial assistance through VOCAT. The LIV also considers it important to improve both the readability and reach of publicly available information on VOCAT, including ensuring information is accessible for victims of family violence who come from culturally and linguistically diverse communities.

Some members of the LIV have also noted that magistrates in the Family Violence Court Division are able to determine VOCAT matters during other civil and criminal hearings. In responding to question 41 of the Consultation Paper, the LIV supports the proposal to extend this power to all magistrates. This would not only alleviate strain on the VOCAT system, but also ensure timely awards to victims of family violence while preventing the need to commence a second court proceeding. This approach would increase accessibility of VOCAT to victims of family violence already engaged in the judicial system. The LIV is conscious that for this approach to succeed, participating magistrates must be trained to ensure financial assistance is awarded consistently and with full regard for the experiences of victims of family violence. The LIV has further comments on the involvement of magistrates in relation to the Supplementary Consultation paper, under the heading: Enhancing the benefits of the current model.

LIV members agree that the VOCAT process is complex and can be difficult for victims of family violence to navigate without the support of legal representation. Some victims of family violence may be reluctant to seek assistance through VOCAT for fear of having to endure further legal proceedings. Where a claim relates to numerous historical events or requires the compilation of supporting evidence, as is often the case in family violence matters, legal representation can be of significant practical importance. Yet, for some victims of crime, accessing legal representation can be difficult.

LIV members also acknowledge that some lawyers are unwilling to take on VOCAT matters as the legal costs do not cover the work required. The LIV recommends the VLRC explore options for ensuring that all victims of family violence, both in metropolitan and regional areas of Victoria, can easily access high quality legal advice or representation as may be required to help them engage with and gain support through VOCAT.

VOCAT requirements and time frames

Mandatory refusal

Under s52, VOCAT must refuse to make an award if a victim does not report their matter to the police within a reasonable time. This is reflected in the VOCAT application form, which indicates victims must report the matter to police and make a sworn statement. Due to the nature of family violence and the way victims typically respond to the experience, these requirements can represent a barrier to victims gaining support from VOCAT.

Research has estimated that less than half of family violence victims report their matter to the police.² There are several reasons why a victim of family violence may choose not to disclose their abuse. These factors include, but are not limited to, shame, fear of further abuse, fear of the judicial system, family loyalty, guilt, threats from the perpetrator, and a lack of awareness or understanding of family violence and the resources available to victims. The LIV also notes that some victims of family violence may have a negative relationship with police, inhibiting their likelihood to disclose any abuse. In responding to questions 26 and 27, the LIV submits that s52(a)(i) should be broadened to account for factors which may inhibit a victim of family violence from disclosing their abuse to police. LIV members acknowledge this could be achieved by either explicitly excluding the requirement for victims of family violence, or expanding the list of professionals to whom a victim can make a report to (as has been adopted in other Australian jurisdictions).

Further, under s52, VOCAT must refuse an application if the applicant fails to provide reasonable assistance to the police or prosecution. As stated above and supported by research, LIV members note that some victims of family violence may distrust the police and authority figures, resulting in resistance to cooperation and assistance. Moreover, some victims of family violence may fail to assist in a police investigation for fear of retaliation from the perpetrator. The LIV supports amending the Act to recognise the inherent difficulties that may be encountered by family violence victims when assisting the police and prosecution.

Time limits for making an application

In responding to questions 21 and 22 of the consultation paper, the LIV submits that the current two-year time limit for making a VOCAT application poses a significant barrier for victims of family violence. As raised by the Royal Commission into Family Violence, the LIV agrees the inherently complex nature of family violence can make it difficult for victims to disclose their experiences within two years of the act of violence occurring. Moreover, some LIV members have noted that there is greater need to clarify when the two-year time limit begins. This is notably so where family violence occurs during childhood or repeatedly over a significant period of time.

² Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Report No 117 (2011) 107-124

Extension of time limits

The LIV considers the current mechanisms for ensuring that an out of time application is given full consideration before being struck out are too limited. The LIV notes that while s29(2) and s29(3) of the Act directs the Tribunal to consider ‘particular circumstances’ surrounding an out of time application, some victims of family violence may still remain ineligible for financial assistance. One solution to this issue would be to increase the time limit for victims of family violence and other complex crimes. Although, some LIV members are concerned that any adjustment to the approach to considering time frames needs to ensure the scheme does not simply become stricter for other acts of violence. In summary, the LIV submits that any revised VOCAT system must not unfairly exclude victims of family violence from their entitlement to financial assistance and compensation,

The therapeutic value of VOCAT

The LIV submits that the therapeutic values of VOCAT should continue to be prioritised and acknowledged as of paramount importance for victims of family violence and crime more broadly.

For many victims of family violence, VOCAT is not only a source of financial assistance. Importantly, it also provides a powerful opportunity to recognise and acknowledge the suffering experienced by victims of family violence. For many, recognition is the therapeutic value of VOCAT that proves most meaningful, with some noting that ultimately no monetary award can repair the trauma of family violence experienced by victims. Some LIV members consider this to be one of greatest strengths of VOCAT’s judicial system. For many victims of family violence, a VOCAT hearing may be the only opportunity to have their experiences heard and validated by a judicial member.

Some legal practitioners have noted that victims of family violence may continue to find the judicial structure of VOCAT an intimidating and distressing experience. The LIV considers it of fundamental importance that VOCAT is not a re-traumatising experience for victims and steps are needed to mitigate the risk of this occurring, with priority given to a victim’s safety and wellbeing. While only a small number VOCAT applications will result in a hearing, the LIV submits that VOCAT should prioritise a trauma-informed practice where Tribunal Members are trained to hear family violence matters. The LIV has further comments on the involvement and training of magistrates in relation to the Supplementary Consultation paper, under the heading: Enhancing the benefits of the current model.

SUPPLEMENTARY CONSULTATION PAPER

Reforming the existing scheme

Concerns with the current model

The supplementary terms of reference require the consideration of whether the current scheme is achieving outcomes that are fair, equitable and timely, are consistent and predictable, and that minimize trauma for victims and maximize the therapeutic effect for victims.³

It is evident that the current system is failing to achieve a number of these objectives. Most notably, the Tribunal is currently failing to deliver timely award decisions. The average processing time for VOCAT applications for the 2015-16 year was between nine and 12 months, and a number of applications made by family violence victims required particularly lengthy time periods of between 18 months to two years to be determined.⁴ VOCAT's 2015-16 Annual Report explained that the number of pending cases had increased from the previous year, and that this increase was due to 'a higher number of new applications in the reporting period, an increase in the number of interim awards sought and an increase in the overall workload of the Magistrates' Court'.⁵ In light of research that suggests that the vast majority of victims who need financial assistance require it within three months of the crime,⁶ these processing times are inadequate. Delayed processing times are capable of impacting a victim's recovery time and potentially impeding VOCAT's objective of providing a therapeutic experience for victims.

The LIV recognizes that delays for some types of claims are not experienced. For example, the LIV is aware that loss of earnings benefits for people incapacitated for work as a result of a crime with an unequivocal entitlement and reasonably-based calculations are frequently able to be processed quickly. It is also acknowledged that deferral of a claim is sometimes necessary, as often the nature and degree of harm may not be apparent within a short period of time. The LIV therefore considers that while reform is necessary in order to improve the timeliness of decisions, it must not be done at the risk of undercompensating victims in respect of lost earnings or non-economic loss.

Recommended improvements

The LIV supports the implementation of the following measures for the purposes of improving the timeliness of VOCAT response and help to victims:

- Expanding the role of judicial registrars to allow them to determine a larger portion of the small and simple applications. This approach would allow the use of magistrates to be reserved for more complex matters.

³ Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 202.

⁴ Ibid 204.

⁵ Victims of Crime Assistance Tribunal, *Annual Report 2015-2016* (2016) 36.

⁶ Victorian Law Reform Commission, above n 1, 204.

- Increasing the number and availability of judicial registrars to respond is necessary and indeed, overdue, to process claims more quickly than the current rate. The LIV considers the current deployment of judicial registrars is insufficient to meet existing role requirements and this resourcing issue needs urgent attention.
- Amending sections 32 and 41 in order to provide for timely determinations and ensure an application is not automatically adjourned until related matters in the civil and criminal courts have been decided. Further, the LIV urges the Act be amended to allow reliance on evidence from other sources to support a finding of harm, such as TAC or Workcover.
- Implementing an administrative triage function to assess and prioritise all VOCAT applications to increase the likelihood that the needs of victims who require immediate assistance are met. It is the LIV's view that a triage function would be enhanced by ensuring independent legal advice is readily accessible so that claimants who are identified as needing fast-tracked assistance are also warmly referred for high quality legal support.

A need for a different model

Enhancing the benefits of the current model

The LIV notes that there are many benefits of the current judicial model. As discussed in the Consultation Paper, offering victims of crime a hearing and providing them with an opportunity to tell their story to a judicial officer in a court-like environment can be a therapeutic process.⁷ In some cases, the opportunity to have their harm formally recognised and receive an apology on behalf of the State of Victoria is more rewarding than the monetary award they receive.⁸ This may particularly be the case for victims of crimes that have not had their matter addressed through the criminal justice system.

In order to maximise the therapeutic benefit, it is the LIV's view that magistrates in the VOCAT jurisdiction should undertake some form of victim training to ensure those hearing applications are trauma-informed. A greater awareness of the ways in which trauma can impact an individual's life will promote an environment where victims feel well-understood.

Consistent with ensuring magistrates' entitlement to a safe workplace and in recognition that conducting VOCAT matters can be confronting and may pose a risk of vicarious trauma, the LIV also recommends that magistrates be permitted to opt out of presiding over the VOCAT list either temporarily or on an ongoing basis.

The introduction of a different model

The Consultation Paper suggests that an alternative option to the current scheme is a hybrid administrative and judicial system.

The LIV considers introducing an administrative system to operate alongside the current judicial system would allow smaller and simpler claims (including interim claims) to be processed in a timely manner, and would allow victims with only the objective of receiving financial support in the short term to achieve that objective and avoid any unwanted delays or judicial processes.

⁷ Ibid 206.

⁸ Ibid.

A move to a hybrid system would also significantly reduce the burden on the Tribunal and therefore improve the processing times of more complex applications.

If a hybrid system were to be implemented, the LIV proposes that the following criteria must be met in order for a matter to be considered suitable to be determined through an administrative process:

- Victims of crime must opt out of the judicial system and into the administrative system. This is so applicants are by default afforded the greater protection that the more formal processing of the judicial system provides, and maintain the choice of having their application assessed administratively;
- Victims of crime must have obtained legal advice prior to opting into the administrative system. This is to ensure that victims are fully informed of their options and are fully aware of the implications of choosing one processing stream over another; and
- Victims of crime may only opt into the administrative stream if there has already been a finding of fact that the crime they have been a victim of was committed. The finding of fact may be evidenced by a criminal conviction, a Workcover claim, or a Transport Accident Commission claim. This approach would ensure that those processing a claim through the administrative system are not required to perform judicial functions.

LIV members have expressed concern that a hybrid model would not sufficiently serve victims, as an administrative process may lead to a risk of people being unfairly excluded or refused (or even overwhelmed and giving up). However, these risks may be mitigated if VOCA-funded claimants can readily access high quality legal advice from experienced practitioners before they were permitted to opt in to an administrative model. This approach would also ensure those with complex matters are identified and properly represented, that their other entitlements are not overlooked (for example, entitlements through the *Sentencing Act 1991*, a TAC claim, or a Workcover claim) and that more simplified matters (for example, matters involving only out-of-pocket expenses) can receive fair and timely assistance.