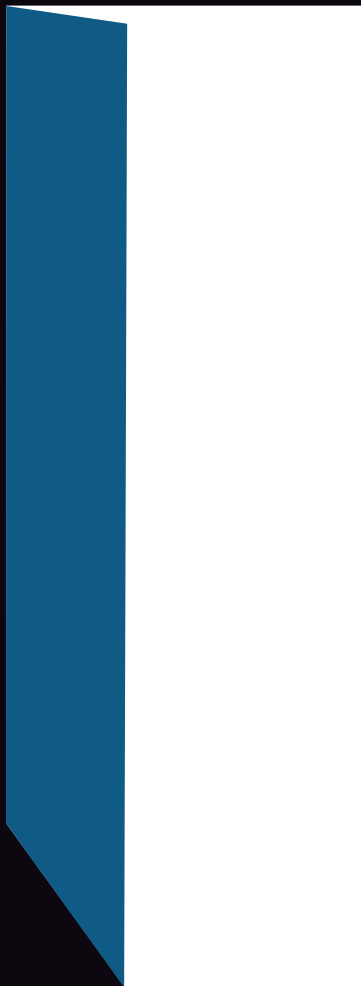




Victorian  
Law Reform  
Commission

# Family Violence and the Victims of Crime Assistance Act 1996

CONSULTATION PAPER JUNE 2017



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CONSULTATION PAPER JUNE 2017



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## Preface

Family violence victims are victims of crime.

As recognised by the Victorian Royal Commission into Family Violence, the *Victims of Crime Assistance Act 1996* (Vic) (the Act) has a role in helping family violence victims rebuild their lives and recover. However, as also recognised by the Royal Commission, victims of family violence face significant barriers in accessing the Act.

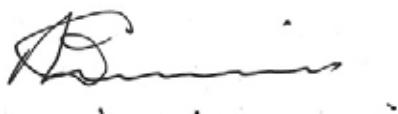
On 22 December 2016, the Victorian Attorney-General, the Honourable Martin Pakula MP, asked the Victorian Law Reform Commission (the Commission) to review and report on the provision of state-funded financial assistance to victims of family violence under the Act.

The reference to the Commission is a small but important part of the Victorian Government response to the recommendations of the Royal Commission.

The reference seeks answers to the question: what changes should be made to the Act to better assist victims of family violence rebuild their lives and recover? The answer must be tempered by the need to ensure the Act provides an appropriate balance between the rights of victims and procedural fairness, including where the alleged perpetrator has not been prosecuted or convicted.

The issues raised by this reference will attract a range of views, and the Commission will be consulting widely with victims, persons affected, professionals, stakeholders and the community. This consultation paper is therefore an important step in the Commission's consultation process.

I warmly encourage anyone with an interest in the issues discussed in this paper to make a written submission to the Commission by 28 July 2017.



**The Hon. P. D. Cummins AM**

Chair

Victorian Law Reform Commission

June 2017



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# Call for submissions

The Victorian Law Reform Commission (the Commission) invites your comments on this consultation paper.

## What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on page xxiv, that seek to guide submissions.

You do not have to address all of the questions to make a submission.

You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but nonetheless relates to the issues outlined in the terms of reference.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

## What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

## How do I make a submission?

You can make a submission in writing, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions, though we prefer them to be in writing, and we encourage you to answer the questions contained in each chapter and set out on page xxiv.

Submissions can be made by:

Completing the online form at [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

Email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

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## Assistance

Please contact the Commission if you need an interpreter or other assistance to make a submission.

## Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published. The name of the submitter is published unless we are asked not to publish it.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the Commission's report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. Submissions may be confidential because they include personal experiences or other sensitive information. These submissions will not be published on the website or elsewhere. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at [www.foi.vic.gov.au](http://www.foi.vic.gov.au).

## Confidential submissions

When you make a submission, you must decide whether you want your submission to be public or confidential.

**Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the Commission's report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published unless we are asked not to publish it.

**Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

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## **Anonymous submissions**

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au).

**Submission deadline: 28 July 2017**

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## Terms of reference

[Referral to the Victorian Law Reform Commission pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) on 22 December 2016.]

### ***Victims of Crime Assistance Act 1996* and Victims Assistance Program**

The Victorian Law Reform Commission is asked to review and report by 31 January 2018 on the provision of State-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996*.

In conducting the review, the Commission should consider the following matters raised by Recommendation 106 of the Royal Commission into Family Violence:

1. The eligibility test and whether this should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury
2. Within the total financial assistance currently available, have regard to the categories and quantum of awards with regard to the cumulative impact of family violence behaviour on victims
3. The requirement to notify a perpetrator, especially where the matter has not been reported to police, or no charges have been laid, or the prosecution is discontinued or the person is acquitted
4. The matters giving rise to refusal of an application except in special circumstances
5. Procedural matters to expedite the making of an award.

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# Glossary

<b>Aboriginal</b>	In this paper, a generic term to refer to both Aboriginal and Torres Strait Islander people, unless otherwise specified.
<b>Act of violence</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to a <b>criminal act</b> or a series of <b>related criminal acts</b> , whether committed by one or more persons, that directly results in injury or death to one or more persons.
<b>Balance of probabilities</b>	The <b>standard of proof</b> in civil proceedings. Often described as ‘more likely than not’ or ‘more probable than not’. This is a lesser standard than <b>beyond reasonable doubt</b> . The balance of probabilities is the standard of proof required under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
<b>Beyond reasonable doubt</b>	The <b>standard of proof</b> in criminal proceedings. This is a higher standard than the <b>balance of probabilities</b> .
<b>Common law</b>	Law that derives its authority from decisions of the courts rather than from legislation.
<b>Compensation</b>	Monetary payment intended to compensate in part or in whole for an injury suffered as a result of the commission of a <b>criminal offence</b> . While this term is sometimes used to describe victims’ financial assistance schemes in other jurisdictions, this paper uses the term ‘ <b>financial assistance</b> ’ to refer to money that a victim may be eligible for under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
<b>Child</b>	A person under the age of 18 years.
<b>Criminal act</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to an act or omission constituting a <b>relevant offence</b> , or which would constitute a relevant offence if the person had not been incapable of being criminally responsible for it on account of age, mental impairment or other legal incapacity preventing them from having a required fault element, or the existence of any other lawful defence.

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<b>Criminal offence</b>	A crime against the state. Most criminal offences are specified in the <i>Crimes Act 1958</i> (Vic). The main categories of criminal offence are <b>indictable offences</b> , <b>indictable offences triable summarily</b> , and <b>summary offences</b> .
<b>Director of Public Prosecutions (DPP)</b>	The official who makes decisions about whether to prosecute serious criminal matters and is independent of government. The Victorian Director of Public Prosecutions is responsible for prosecuting <b>criminal offences</b> under Victorian law. The <b>Office of Public Prosecutions</b> conducts criminal prosecutions on behalf of the Director of Public Prosecutions.
<b>Family member</b>	In this paper, has the meaning as defined in the <i>Family Violence Protection Act 2008</i> (Vic). Includes a relative, a person who is or has been a person's spouse or domestic partner or with whom they have or have had an intimate personal relationship, and a child who regularly resides with the relevant person or a child of a person with whom the relevant person has or has had an intimate personal relationship.
<b>Family violence</b>	In this paper, has the meaning as defined in the <i>Family Violence Protection Act 2008</i> (Vic). Refers to behaviour by a person towards a <b>family member</b> that is physically abusive, sexually abusive, emotionally abusive, psychologically abusive, economically abusive, threatening, coercive, or in any other way controls or dominates the family member and causes them to fear for their safety or that of someone else. Also includes behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of the above behaviour.
<b>Family violence intervention order</b>	A civil order made under the <i>Family Violence Protection Act 2008</i> (Vic) by a court, which contains conditions to protect a <b>victim of family violence</b> .
<b>Family violence safety notice</b>	A notice issued pursuant to the <i>Family Violence Protection Act 2008</i> (Vic) by police when attending an incident of <b>family violence</b> , which contains conditions to protect a <b>victim of family violence</b> .
<b>Financial assistance</b>	In this paper, refers to money that a <b>victim</b> may be eligible to receive under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
<b>Indictable offences</b>	Serious crimes which attract higher maximum penalties. Usually triable before a judge and jury.
<b>Indictable offences triable summarily</b>	Less serious <b>indictable offences</b> which can be heard before a magistrate.
<b>Judicial officer</b>	A judge or magistrate.
<b>Koori</b>	In this paper, used to describe the traditional inhabitants of Victoria.

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<b>Lawyer</b>	Includes barristers (sometimes referred to as counsel) and solicitors.
<b>LGBTIQ</b>	Refers to lesbian, gay, bisexual, <b>trans*</b> , intersex and queer persons.
<b>Offender</b>	Used to describe a person who has been found guilty or who has pleaded guilty to a <b>criminal offence</b> . The term 'alleged offender' is used to describe a person who is alleged to have committed a criminal offence, but who may not have been charged with or convicted of that offence.
<b>Office of Public Prosecution (OPP)</b>	The independent statutory authority that institutes, prepares and conducts criminal prosecutions in the County and Supreme Courts on behalf of the <b>Director of Public Prosecutions</b> .
<b>Perpetrator</b>	In this paper, generally used to refer to any person who is alleged to have used <b>family violence</b> , whether or not the behaviours have been reported to police or whether or not there has been a criminal prosecution or conviction. It includes <b>offenders</b> , alleged offenders and respondents in <b>family violence intervention order</b> matters.
<b>Practice Direction</b>	A procedural guideline issued by a judge or magistrate to guide the practice of a court or tribunal.
<b>Primary victim</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to a person who dies, is injured or suffers a <b>significant adverse effect</b> as a direct result of an <b>act of violence</b> committed against them or as a direct result of them intervening in an act of violence.
<b>Prosecutorial body</b>	In this paper, refers to either Victoria Police, which prosecutes less serious ( <b>summary offences</b> ) or the Victorian <b>Office of Public Prosecutions</b> , which prosecutes more serious offences ( <b>indictable offences</b> ).
<b>Quantum</b>	A specified amount. In this paper, used to describe the amount of financial assistance that a victim can receive under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
<b>Related criminal acts</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to two or more <b>criminal acts</b> that share a common factor, including criminal acts that are committed against the same person at approximately the same time, and criminal acts that are committed against the same person over a period of time and are committed by the same person or group of persons.

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<b>Related victim</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to a person who is a close family member of, a dependent of, or a person who has an intimate personal relationship with, a person who dies as a direct result of an <b>act of violence</b> .
<b>Registrar</b>	In this paper, a staff member of the <b>Victims of Crime Assistance Tribunal</b> with specific powers to make decisions as delegated by the Chief Magistrate.
<b>Relevant offence</b>	In this paper, a <b>criminal offence</b> that gives rise to eligibility for <b>financial assistance</b> for the <b>victim</b> under the <i>Victims of Crime Assistance Act 1996</i> (Vic). It is limited to offences against the person, including offences involving assault, an injury or a threat of injury to a person, sexual offences, and the offences of stalking, child stealing and kidnapping.
<b>Restitution</b>	In this paper, refers to restitution orders made under the <i>Sentencing Act 1991</i> (Vic). Restitution orders require a person convicted of a criminal offence to restore or return something lost or stolen, or its equivalent, to its rightful owner.
<b>Secondary victim</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to a person who is injured as a direct result of witnessing an <b>act of violence</b> or as a direct result of finding out about an act of violence that has been committed against their <b>child</b> .
<b>Significant adverse effect</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to any grief, distress, trauma or injury experienced or suffered by a <b>primary victim</b> as a direct result of an <b>act of violence</b> .
<b>Special financial assistance</b>	In this paper, a category of <b>financial assistance</b> that may be awarded to a <b>primary victim</b> under the <i>Victims of Crime Assistance Act 1996</i> (Vic) as an expression of the state's sympathy if they suffered any <b>significant adverse effect</b> as a direct result of an <b>act of violence</b> perpetrated against them.
<b>Standard of proof</b>	The degree of certainty required to prove something.
<b>The Royal Commission into Family Violence</b>	A 13-month inquiry, ordered by the Victorian Government, into Victoria's response to <b>family violence</b> . Chaired by the Hon. Marcia Neave AO, it ran from February 2015 to March 2016. The released report consists of eight volumes and contains 227 recommendations.
<b>Trans*</b>	In this paper, an umbrella term to refer to all transgender, transsexual and gender non-conforming persons.
<b>Trauma-informed practice</b>	In this paper, a practice that involves modifying aspects of service provision to ensure a basic understanding of how trauma affects the life of an individual seeking a service.



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<b>Victim</b>	In this paper, refers to a person who has suffered harm as a direct result of an <b>act of violence</b> . This paper refers to <b>primary victims, secondary victims</b> and <b>related victims</b> , as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). See also the definition of <b>victim of family violence</b> .
<b>Victim of family violence</b>	A person who has experienced <b>family violence</b> , whether or not the family violence constitutes a <b>relevant offence</b> for the purposes of the <i>Victims of Crime Assistance Act 1996</i> (Vic). Includes child victims of family violence.
<b>Victims of Crime Assistance Tribunal (VOCAT)</b>	The tribunal established under the <i>Victims of Crime Assistance Act 1996</i> (Vic) to provide <b>financial assistance</b> to <b>victims</b> of violent crime committed in Victoria. It is located within the Magistrates' Court of Victoria.
<b>Victorian Civil and Administrative Tribunal (VCAT)</b>	The tribunal established under the <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) that hears civil and administrative legal cases in the State of Victoria. It is empowered to review final decisions of the <b>Victims of Crime Assistance Tribunal</b> .

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# Summary

## Introduction

- 1 On 22 December 2016, the Attorney General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission (the Commission) to review and report on the provision of state-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996* (Vic) (the Act). The terms of reference ask the Commission to consider five specific matters raised by the Victorian Royal Commission into Family Violence (the Royal Commission). These are outlined below. In this consultation paper, the Victorian Royal Commission will be referred to as the Royal Commission, unless the context otherwise requires.
- 2 The Act established the Victims of Crime Assistance Tribunal (VOCAT) which determines applications for financial assistance. The operation of the Act and VOCAT are the main focus of this consultation paper.
- 3 Key issues raised by this reference are outlined below. Detailed discussion of these key issues is in Parts Two and Three of this consultation paper. Part One provides background and contextual information only, and does not raise specific consultation questions.

## Eligibility for assistance

- 4 The terms of reference ask the Commission to consider the eligibility test and whether this should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury. This is discussed in detail in Chapter 6.
- 5 A person is eligible for financial assistance under the Act if they are the 'primary', 'secondary' or 'related' victim of an 'act of violence' that directly results in their suffering injury, death or a significant adverse effect.
- 6 Different categories of victims are eligible for different kinds of assistance. However, in all cases there must have been an 'act of violence'. Under the Act, an act of violence is defined as a 'criminal act' or 'a series of related criminal acts' that occurred in Victoria and that 'directly resulted in injury or death to one or more persons'. Criminal acts include assault, injury, threats, sexual offences, stalking, child stealing, kidnapping, conspiracy and attempts of these offences. The act of violence must directly result in injury, that is, actual physical bodily harm, mental illness or disorder (or exacerbation of) and pregnancy. 'Injury' does not include injury arising from property loss or damage.
- 7 Additional financial assistance can also be claimed if a victim has suffered a 'significant adverse effect', defined as any grief, distress, trauma or injury as a direct result of the act of violence. This is described as 'special financial assistance' in the Act.

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## Issues

- 8 The main issues facing victims of family violence with respect to the eligibility criteria are the definition of ‘act of violence’, the definition of ‘injury’, causation and the victim categories.
- 9 The act of violence requirement means that victims of family violence are only able to access financial assistance if they have experienced physical or sexual violence, a threat of injury, or stalking. Victims of non-criminal forms of family violence, such as economic, emotional and psychological abuse are excluded, as are victims of family violence that is criminal in nature but not an offence against the person. The definition of act of violence is much narrower than the definition of family violence in the *Family Violence Protection Act 2008* (Vic).
- 10 Another potential barrier for victims of family violence is the definition of injury. If a victim of family violence has not suffered physical injury or does not suffer from a mental disorder or illness, they may be ineligible for assistance. There are cases where victims of family violence, who have experienced significant mental harm, have had their applications refused because they do not suffer from a recognised mental illness or disorder.
- 11 Victims of family violence can also encounter difficulties in establishing that their injury was a direct result of the act of violence, particularly if there may be other contributing factors.
- 12 In addition, the distinction between primary, secondary and related victims can be problematic for child victims of family violence. Children who experience family violence can suffer severe psychological and developmental trauma and consequences. This is equally the case for child victims who are the direct subject of the violence and those who hear, witness or are otherwise exposed to it. However, under the Act, this second group of child victims are not recognised as primary victims. This not only has the potential to fail to acknowledge and recognise their experience of family violence but it also affects the categories and quantum of awards that they receive.
- 13 To address the above issues, the Commission will consider whether family violence could be defined in the Act and whether the Act could be amended to expand the range of injuries covered by it. Alternatively, or additionally, the Commission will consider whether the Act could be amended to include a broader range of injuries for victims of family violence or to remove the requirement for proof of injury for victims of family violence.

## Assistance available

- 14 The terms of reference ask the Commission to consider, within the total financial assistance available, the categories and quantum of awards with regard to the cumulative impact of family violence behaviour on victims. This is discussed in detail in Chapter 7.
- 15 The Act limits the amount of assistance that can be awarded to a particular victim. The maximum award for primary victims is \$60,000 plus \$10,000 of special financial assistance. The maximum award for secondary victims and any one related victim is \$50,000. There are different categories of award available to primary, secondary or related victims.
- 16 There are three main categories of award that primary victims can access—expenses actually incurred or reasonably likely to be incurred; in exceptional circumstances, an amount for other expenses actually incurred or reasonably likely to be incurred to assist in recovery; and special financial assistance.

- 17 Special financial assistance is a lump sum awarded as a symbolic expression by the state of the community's sympathy and recognition of harms suffered. Special financial assistance is classified into four categories, A, B, C and D, based on the severity of the act of violence, with Category A covering the most serious offences and Category D the least.
- 18 Related criminal acts can be treated as a single act of violence, which can limit awards available to some victims of crime.

## Issues

- 19 The main issues facing victims of family violence, including child victims, with respect to the financial assistance available are the related criminal acts provision and the categories of special financial assistance.
- 20 The related criminal acts provision can disproportionately reduce the awards for victims of family violence, including child victims, because family violence often involves repeated acts of abuse by the same offender, which is a factor relevant to whether acts are considered related.
- 21 Concerns have also been raised that the special financial assistance categories do not sufficiently take into account the cumulative harm of individual acts of violence because the relevant categories are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.
- 22 To address the above issues, the Commission will consider whether the related criminal acts provision and the special financial assistance categories could be amended. This could involve adding further criteria when assessing related acts, excluding family violence from the operation of the related criminal acts provision entirely, or amending the Act so that only acts of violence committed at the same time are considered related.
- 23 The Commission will also consider how the Act could be amended to take into account the cumulative harm of family violence, including to children, by amending the special financial assistance categories to enable a higher award for a series of acts of family violence. Another option is to incorporate a 'pattern of family violence' into one of the higher categories. The Commission will also consider adopting separate categories for family violence or removing the categories of special financial assistance entirely, enabling VOCAT to consider family violence and other factors to determine awards up to the maximum amount.

## Form and timing of applications

- 24 The Royal Commission specifically identified the time limit for making an application as a potential barrier for victims of family violence. This is discussed in detail in Chapter 8.
- 25 An application for assistance to VOCAT must be made in writing in the prescribed form within two years of the act of violence occurring. VOCAT is obliged to strike out applications made outside this two-year time limit, unless they consider it appropriate not to strike the application out.

## Issues

- 26 Concerns were raised that the VOCAT application form is tailored towards victims of a one-off act of violence making it difficult for victims of family violence to complete. The application time limit was also raised as a significant barrier.
- 27 It can take victims of family violence a long time to disclose their experiences of family violence. The reasons for this are varied and complex. The fact that it may take a victim of family violence longer to lodge an application for assistance means that the time limit of two years can have a disproportionate impact on their eligibility.

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- 28 To address these matters, the Commission will consider how the application form could be made more accessible for victims of family violence by using language that is not confined to singular acts of violence. The Commission will also consider how the Act could be amended to remove difficulties in relation to the time limitation, such as increasing the time limit for applications relating to family violence or making family violence an explicit factor that VOCAT must consider when making a decision about whether or not to strike out a late application. A further option is to remove the time limit for victims of family violence.

## VOCAT hearings

- 29 The terms of reference require the Commission to consider the requirement to notify a perpetrator, especially where the matter has not been reported to police, or no charges have been laid, or the prosecution is discontinued or the person is acquitted. This is discussed in detail in Chapter 9.
- 30 Under the Act, VOCAT may give notice of a hearing to any other person whom it considers to have a legitimate interest in the matter, including an alleged perpetrator who may also elect to appear at a hearing. Some procedural protections already exist for victims in these circumstances under the Act. VOCAT has issued a Practice Direction on the procedure to be followed in these circumstances.
- 31 VOCAT may also determine an application without a hearing.

## Issues

- 32 The main issue raised concerns notification of alleged perpetrators, due to the safety risks that commonly arise in applications involving family violence.
- 33 Alleged perpetrators are sometimes notified and may participate in proceedings. This can be a deterrent for victims of family violence to apply to VOCAT.
- 34 Given these issues, the Commission will consider whether the Act could be amended to remove the notification provision, either entirely or specifically for vulnerable victims, such as family violence victims. However, this consideration also raises concerns about procedural fairness.
- 35 Another option is to amend the Act to explicitly list the safety concerns associated with family violence as a factor VOCAT must have regard to when considering whether to notify an alleged perpetrator, as well as strengthening existing evidentiary and procedural protections.

## Making an award

- 36 The terms of reference require the Commission to review the matters giving rise to refusal of an application for financial assistance except in special circumstances. These matters are outlined in sections 52, 53 and 54 of the Act. This is discussed in detail in Chapter 10.
- 37 Under section 52 of the Act VOCAT must refuse to make an award if an act of violence was not reported to police within a reasonable time or the applicant failed to provide reasonable assistance to police or prosecution, unless special circumstances exist.
- 38 Section 54 of the Act also requires VOCAT to consider a number of other specified matters including the character, behaviour (including past criminal activity) and attitude of the applicant before, during and after the act of violence. This includes any provocation or 'condition or disposition' of the applicant that may have contributed to the injury. These are sometimes referred to as 'contributory conduct' or 'provocation' clauses. VOCAT must also consider whether a perpetrator will benefit from the award.

## Issues

- 39 The main issues raised relate to the requirements to report to police, to assist police and prosecution, the contributory conduct and provocation clauses, and the perpetrator benefit provisions. Many of these provisions have complex case law interpretation of the Act.
- 40 In determining whether an act of violence was reported to police within a reasonable time, case law indicates differing interpretations of what is considered a reasonable time for reporting and also differing interpretations of what might result in special circumstances mitigating a delay in reporting. This can lead to uncertainty in cases of family violence where a delay in reporting to police is often a characteristic.
- 41 In relation to whether a victim provided reasonable assistance to police or prosecution, there are no prescribed positive actions a victim must undertake. However, guidance in the VOCAT application form indicates victims must report the matter to police, make a formal report and sworn statement. Due to the nature and dynamics of family violence, these requirements can be problematic for victims of family violence.
- 42 Special circumstances can mitigate a failure to provide reasonable assistance to police and prosecution. However, special circumstances require something out of the ordinary and some case law decisions have emphasised family violence is a common circumstance.
- 43 In addition to the above issues, contributory conduct clauses have been criticised as victim blaming in family violence cases and the Act provides no guidance about what might be considered as resulting in a benefit to the perpetrator.
- 44 These issues together raise concerns that the Act fails to recognise the dynamics and characteristics of family violence. To address this, the Commission will consider how the Act could be amended to recognise family violence for the purposes of sections 52, 53 and 54.
- 45 Suggestions include an overarching provision which enables, or requires, VOCAT to consider the nature and dynamics of family violence when making a determination, exempting victims of family violence from some of the considerations under these provisions, or amending specific provisions to more explicitly reference family violence.

## VOCAT procedures and time frames

- 46 The terms of reference require the Commission to consider procedural matters to expedite the making of an award. This is discussed in detail in Chapter 11.
- 47 VOCAT must act 'expeditiously' (that is, promptly) to determine applications. Close to 50 per cent of all VOCAT applications are finalised within nine months.
- 48 After receiving relevant documentation, VOCAT may determine an application with or without conducting a directions hearing or a final hearing, depending on the preference of the applicant, as well as the Tribunal's need for a hearing. In practice, many straightforward applications are decided without the need for a hearing. More complex cases are usually determined at a hearing.

## Issues

- 49 The main issue raised in relation to time frames relates to the fact that although VOCAT must act promptly, it must also have regard to matters that can sometimes affect the time it takes to finalise an application, including awaiting the outcome of a criminal investigation, trial or inquest. The Tribunal has also observed an increase in the complexity of applications, particularly relating to family violence which impacts timeliness.

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- 50 Delays in determining VOCAT applications relating to family violence can have profound impacts on victims. Financial hardship can be a significant consequence of family violence and the economic impacts of family violence can impede a victim's ability to leave an abusive relationship and obtain safety.
- 51 In considering procedural matters to expedite the making of an award, the Commission will consider options such as case triaging, development of a Practice Direction to clarify some more complex provisions of the Act, a separate family violence stream and VOCAT specialisation for magistrates.
- 52 The Commission will also consider the benefits of administrative models where commissioners or government assessors make determinations, as well as the connection between VOCAT and other support agencies. Consideration is also given to how interim awards could better reflect the administrative and case management processes used in making other awards of assistance, such as family violence flexible support packages which are administered by government-funded community organisations.

## **Review, variation and refund of awards**

- 53 Although limited data and information is available with respect to review and refund of awards, variation has been raised as a concern for family violence victims. Review, variation and refund of awards is discussed in Chapter 12.
- 54 VOCAT has broad discretion to vary awards, although variations must be consistent with the Act. For example, an award must still assist a victim's recovery from the act of violence.
- 55 In 2015–16, VOCAT varied 986 awards for expenses already incurred and 588 for expenses not yet incurred.

## **Issues**

- 56 The main issues raised concern variation of awards. Family violence victims frequently require variations, particularly in relation to additional counselling. The variation process is not always easy and can be complicated by the need to repeatedly engage a lawyer.
- 57 At the same time, variation allows VOCAT to assist victims as their needs and circumstances change.
- 58 The Commission will consider the usefulness of award variations in addressing the specific needs of family violence victims and what, if any, barriers may have been experienced by victims during the variation process.

## **VOCAT awareness and accessibility**

- 59 Concerns have been raised that there are relatively few VOCAT applications compared to the number of reported incidents of family violence in Victoria. This raises issues of awareness and accessibility of VOCAT. This is discussed in detail in Chapter 13.
- 60 Although there is limited data available which provides a comprehensive picture of the number of family violence victims who use VOCAT, the Royal Commission found that some victims were unaware of their eligibility under the Act.
- 61 The Act has also been described as complex and difficult for victims to understand. A victim's experience of VOCAT is therefore likely to be enhanced by victim support and the availability of legal representation.

- 62 Although VOCAT has close links with support agencies, these support mechanisms are not integrated with VOCAT. Some Australian states and territories have combined victim support and compensation/financial assistance schemes which aim to connect information, support and financial assistance.

### Issues

- 63 The Commission raises issues of awareness and accessibility to determine whether other changes or reform might be required to support possible legislative change.
- 64 The Commission will consider how aspects of the current system work together, including VOCAT, lawyers, victim support and family violence services, and how better integration might improve knowledge about and accessibility of the service for victims of family violence.

## VOCAT—beyond financial assistance

- 65 Financial assistance and compensation go beyond monetary benefits—they can make a statement to the community about the unacceptability of family violence and the process itself can help recognise a victim’s experience.
- 66 However, at the time of the introduction of the Act, in 1996, there was little community acknowledgment of family violence or its harms. As such, family violence is not explicitly recognised under the Act.
- 67 These issues are discussed in detail in Chapter 14.

### Issues

- 68 The main issues raised relate to the potentially therapeutic aspects of VOCAT and the Act’s lack of recognition of family violence.
- 69 Victoria is one of the few Australian jurisdictions that uses judicial decision makers. For some victims, this provides an acknowledgment from the justice system that there has been a crime and that they have suffered harm. However, research has found that this is not the experience of all victims of crime. The Commission has been advised that one of the reasons the VOCAT process can be retraumatising for victims is because it is not a trauma-informed process.
- 70 In addition, the Act’s failure to recognise family violence—or to conceive of family violence itself as an act of violence—remains one of the fundamental challenges of ensuring the Act appropriately responds to harms caused by family violence.
- 71 To address these issues, the Commission will consider how trauma-informed practice could underpin any possible changes to the Act or VOCAT procedures. Consideration could also be given to how VOCAT could be more integrated with the support system, particularly given the models in other jurisdictions that combine compensation and victim support.
- 72 The Commission will also consider how broader recognition of family violence could be incorporated in the Act, such as a general provision acknowledging the dynamics of family violence and re-envisioning the Act as applicable in circumstances involving some forms of family violence. This would need to closely mirror any potential changes to eligibility under the Act.



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## Fulfilment of the purpose and objectives of the Act

- 73 The purpose of the Act is to provide assistance to victims of crime. The Act also has a number of further objectives, discussed in detail in Chapter 14.
- 74 The first stated objective of the Act is to ‘assist victims of crime to recover from the crime by paying them financial assistance for expenses incurred, or reasonably likely to be incurred, by them as a direct result of the crime’. The Commission considers that a number of provisions of the Act make it difficult for the Act to assist family violence victims to recover from crime. These include the eligibility criteria, the quantum generally awarded in family violence matters, application time limits, perpetrator notification provisions, requirements to report to and assist police, as well as VOCAT delays.
- 75 The second stated objective of the Act is to ‘pay certain victims of crime financial assistance (including special financial assistance) as a symbolic expression by the State of the community’s sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime’. The Commission considers that although victims of family violence are sometimes determined to be ‘certain victims’ under the Act, the special financial assistance categories may not sufficiently take into account the cumulative harm of individual acts of violence because the categories are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.

### Issues

- 76 Overall, the Commission will consider a range of structural, legislative, procedural and perceived barriers currently limiting VOCAT’s ability to assist victims of family violence to recover, thereby impacting the Act’s fulfilment of its purpose and objectives.
- 77 To enable the Act to better fulfil its purpose and objectives, the Commission will also consider how the Act can provide for:
- recognition of a broader definition of family violence—beyond the notion of a single act of violence and potentially incorporating non-violent forms of abuse
  - recognition of the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence in a family violence context
  - acknowledgment of the difficulties faced by family violence victims in reporting to police, assisting prosecution and applying for assistance, without applying prescriptive time frames
  - prioritisation of a victim’s safety and wellbeing and a trauma-informed approach
  - more timely access to financial assistance at the point of crisis and better integration with existing supports
  - more flexibility and adaptability as circumstances change, without further burdening victims with having to continue to access lawyers in order to obtain support such as counselling.

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# Questions

## Chapter 6 Eligibility for assistance

### Eligibility test generally

- 1 How do the eligibility requirements of the Act impact on family violence victims, including child victims?
- 2 Should the eligibility criteria be broadened to take into account the unique dynamics and characteristics of family violence? If so, how should this be done?
- 3 How should the Act deal with patterns of non-criminal behaviour that result in injury?

### Expanding the definition of an 'act of violence'

- 4 Should the definition of an 'act of violence' be amended to include family violence? If so, how should this be done? How should the experience of child family violence victims be included in this definition?
- 5 Should other offences not currently covered by the definition of an 'act of violence' also be included in the definition of 'act of violence'? If so, what offences should be included?
- 6 Alternatively, should there be separate eligibility criteria for victims of family violence? If so, what criteria should there be?

### Expanding the definition of 'injury'

- 7 Should the definition of 'injury' be expanded to include the non-physical and/or psychological injuries often experienced by victims of family violence? If so, what injuries should be included?
- 8 Should the definition of 'injury' be amended to better reflect the cumulative impact of family violence over time? If so, how should this be done?

### Other barriers to accessibility

- 9 What non-legislative barriers exist for family violence victims in accessing the Act?
- 10 How should non-legislative barriers to access be addressed?

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## Chapter 7 Assistance available

### **'Related criminal acts'**

- 11 Should the definition of 'related criminal acts' be amended to have regard to the cumulative impact of family violence on victims? If so, how should this be done?
- 12 Should the definition of 'related criminal acts' be amended to ensure that acts are not just related merely because they are committed by the same offender? If so, how should this be done?
- 13 Alternatively, should family violence be excluded from the operation of the 'related criminal acts' provision? If so, how should this be reflected in the Act?
- 14 Should the Act be amended to give victims of family violence an opportunity to object if claims are to be treated as 'related'?

### **Ensuring that the special financial assistance categories account for the cumulative harm of family violence**

- 15 Should a series of 'related criminal acts' occurring in the context of family violence be included as a circumstance in which the maximum amount of special financial assistance is increased? If so, how should this be achieved?
- 16 Should the special financial assistance categories be amended to better take into account the cumulative harm of family violence? If so, how should this be done?
- 17 Alternatively, should the maximum award for special financial assistance be available to all victims of family violence so that the amount they receive is not based on categories of offences but instead on the discretion of VOCAT?

### **Ensuring that the special financial assistance categories account for child victims of family violence**

- 18 Should special financial assistance be available to all child victims, including those who hear, witness or are otherwise exposed to family violence?
- 19 Should the special financial assistance categories be amended to better take into account the experiences of child victims of family violence? If so, how should this be done?

## Chapter 8 Form and timing of applications

### **Form of application**

- 20 Does the VOCAT application form present difficulties for victims of family violence? If so, how should these difficulties be addressed?

### **Timing of application**

- 21 Should different time limits apply to family violence applications in recognition of the dynamics of family violence? If yes, what time limits (if any) should apply?
- 22 Should family violence be included as a factor the Tribunal must have regard to in determining whether to hear and determine an application made out of time?

## Chapter 9 VOCAT hearings—notification, appearance and open court provisions

### The notification provision

- 23 Is the notification provision a deterrent for family violence victims in making applications under the Act?
- 24 Should the notification provision be amended to recognise the safety concerns of family violence victims, including those of child victims? If yes, what changes should be made?

### Protection of victims of family violence

- 25 Should the Act be amended to include increased protections for family violence victims, including child victims, during VOCAT hearings? If yes, what procedural and evidentiary protections should be provided?

## Chapter 10 Making an award

### Mandatory refusal

- 26 Should the requirement to report incidents to police be explicitly excluded for victims of family violence?
- 27 Alternatively, should the police reporting requirement be amended to recognise reports made by victims of family violence to other persons? If so, what other reporting should be recognised?
- 28 Should the requirement to provide reasonable assistance to police and prosecution be explicitly excluded for victims of family violence?
- 29 If the police reporting requirement is to be retained for family violence victims, should family violence also be specified as a matter the Tribunal may consider in determining whether a report was made to police within a reasonable time? If so, how should this be reflected in the Act?
- 30 If the reasonable assistance requirement is to be retained for family violence victims, should family violence also be specified as a matter the Tribunal may consider? If so, how should this be reflected in the Act?

### Is family violence a ‘special circumstance’?

- 31 Should family violence be expressly considered ‘special circumstances’ for the purpose of the mandatory refusal provisions? If so, how should family violence be treated?

### Section 54 considerations

- 32 What are the effects of the section 54 considerations for victims of family violence? Do these factors result in awards to family violence victims not being made or being reduced disproportionately compared to other victims of crime?
- 33 Should some, or all, of the section 54 considerations be excluded for victims of family violence? If so, what considerations should be excluded?
- 34 Alternatively, should family violence be specified as a factor that VOCAT must have regard to in exercising its discretion under section 54 to make an award? If so, how should this be reflected in the Act?
- 35 How do the contributory conduct provisions under section 54 of the Act currently affect victims of family violence as compared to other victims of crime?
- 36 How do the perpetrator benefit provisions under section 54 of the Act currently affect victims of family violence as compared to other victims of crime?

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## Chapter 11 VOCAT procedures and time frames for the making of awards

- 37 What are the effects of the current time frames and procedures for the making of awards for victims of family violence?
- 38 How could the time frames and procedures for the making of awards to victims of family violence be changed to better meet their needs?
- 39 Do section 32(3) and section 41 require legislative change to better accommodate family violence victims' need for speedy determinations? Or could a Practice Direction provide sufficient guidance?
- 40 What benefits could be achieved for victims of family violence by initiatives such as specialisation or a separate VOCAT family violence list?
- 41 What benefits might be achieved by enabling all magistrates to make interim VOCAT awards at the same time as hearing other matters? How would this work in practice?

## Chapter 12 Review, variation and refund of awards

- 42 In what circumstances are VOCAT applications refunded? What are the experiences of victims of family violence?
- 43 How often are VOCAT awards for family violence victims varied? What are the reasons for variation?
- 44 How could the variation process be improved or streamlined to make it more accessible and timely for family violence victims?
- 45 Should some categories of award, such as counselling, be awarded differently to other categories, such as special financial assistance, to make access easier and quicker for victims?
- 46 When might victims of family violence seek review of a VOCAT award?

## Chapter 13 Awareness of VOCAT and accessibility for family violence victims

- 47 How do family violence victims learn about the availability of VOCAT? What is the best way to inform victims of their potential eligibility under the Act?
- 48 How should information about VOCAT be made more accessible for victims of family violence, including those speaking languages other than English?
- 49 Is the VOCAT system easy to navigate without legal representation? If not, why? How should the system be improved to make it more accessible for victims of family violence without legal representation?
- 50 Do victims of family violence find it difficult to secure legal representation? If yes, why? How should this be remedied?
- 51 Should the provision of state-funded financial assistance under the Act be better integrated with victim support services or specialist family violence support? If so, how should this be done?
- 52 What learnings from the VOCAT Koori List might be able to be applied to improving accessibility and knowledge of the scheme for victims of family violence? Could similar benefits be realised in the family violence space?
- 53 What aspects of other jurisdictions' models should be replicated in Victoria to assist victims of family violence to access VOCAT?

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## Chapter 14 VOCAT—beyond financial assistance for victims of family violence?

- 54 To what extent is VOCAT a therapeutic process for victims of family violence, including for child victims?
- 55 If VOCAT, or aspects of it, is not therapeutic for family violence victims, including child victims, what legislative or other changes should be made so that it is?
- 56 How would a trauma-informed VOCAT process help improve family violence victims' experience of VOCAT, including for child victims?
- 57 Are there other approaches that should be considered to improve the VOCAT process or access to it for victims of family violence, including child victims?
- 58 What factors currently impact on consistency in practice, procedure and the making of awards to family violence victims, including to child victims? How should this variability best be addressed?
- 59 How might transparency in process and determination of awards be improved?
- 60 How do the rights of perpetrators—to be notified or to appear—fit with the purpose of the Act, which is to provide assistance to victims of crime? What changes, if any, should be made to the Act to appropriately balance the rights of perpetrators and the rights of victims of family violence?

## Chapter 15 Fulfilment of the purpose and objectives of the Act

- 61 The purpose of the Act is to 'provide assistance to victims of crime'. Is this purpose realised for victims of family violence, including child victims? If not, why not?
- 62 If the purpose of the Act is not being realised for victims of family violence, including for child victims, how should this be done?
- 63 Should the purpose and objectives of the Act be amended to expressly recognise family violence? If yes, how should this be done?
- 64 The Act states that 'certain victims of crime' should be awarded financial assistance as a symbolic expression by the state. Are family violence victims, including child victims, adequately covered by the current special financial assistance provisions? If not, how should this be done?
- 65 The Act aims to complement other services provided by government to victims of crime. Is this achieved for family violence victims? If not, how should this be done?
- 66 In assessing any proposals for change, what criteria and considerations should the Commission have regard to? How should the experience of family violence victims, including child victims, be taken into account?

## PART ONE: THE CURRENT SYSTEM

# Introduction

- 2 Referral to the Commission
- 2 The Commission's approach

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# 1. Introduction

## Referral to the Commission

- 1.1 On 22 December 2016, the Attorney-General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission to review and report on the provision of state-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996* (Vic).

### The terms of reference

[Referral to the Victorian Law Reform Commission pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) on 22 December 2016.]

The Victorian Law Reform Commission is asked to review and report by 31 January 2018 on the provision of State-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996*.

In conducting the review, the Commission should consider the following matters raised by Recommendation 106 of the Royal Commission into Family Violence:

- 1) The eligibility test and whether this should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury
- 2) Within the total financial assistance currently available, have regard to the categories and quantum of awards with regard to the cumulative impact of family violence behaviour on victims
- 3) The requirement to notify a perpetrator, especially where the matter has not been reported to police, or no charges have been laid, or the prosecution is discontinued or the person is acquitted
- 4) The matters giving rise to refusal of an application except in special circumstances
- 5) Procedural matters to expedite the making of an award

## The Commission's approach

### Reference framework

- 1.2 This reference to the Victorian Law Reform Commission (the Commission) is part of the response by the Victorian Government to the recommendations of the Victorian Royal Commission into Family Violence (the Royal Commission).
- 1.3 Fundamentally, this reference seeks answers to the question: what changes should be made to the *Victims of Crime Assistance Act 1996* (Vic) to better assist victims of family violence rebuild their lives and recover?



- 1.4 In this consultation paper, the *Victims of Crime Assistance Act 1996* (Vic) is referred to as ‘the Act’ unless the context otherwise requires.
- 1.5 State-funded financial assistance and compensation to victims<sup>1</sup> has been described as a core component of a just legal response to family violence.<sup>2</sup> The United Nations Committee on the Elimination of all Forms of Discrimination against Women has provided a General Recommendation for states to develop effective compensatory provisions to protect women against all violence, including family violence.<sup>3</sup> Isobelle Barrett Meyering describes the provision of state-funded financial assistance as good practice within a broader legal response to family violence.<sup>4</sup> The Australian Law Reform Commission and New South Wales Law Reform Commission have also confirmed that such schemes are an important element of victim support.<sup>5</sup>
- 1.6 The benefits of state-funded financial assistance for victims of family violence are both practical and symbolic.<sup>6</sup> For such victims, the benefits can include enabling a victim to leave an abusive relationship by providing immediate financial assistance to relocate. The process itself may also validate a victim’s experiences. This can be particularly important for victims of family violence, given such violence is often associated with low prosecution and conviction rates.<sup>7</sup>
- 1.7 However, as recognised by the Royal Commission, victims of family violence face significant barriers in accessing state-funded financial assistance under the Act.<sup>8</sup>
- 1.8 These barriers are not unique to Victoria. Previous reviews have also found that other state and territory schemes may not adequately recognise the nature and dynamics of family violence, potentially discriminating unfairly against victims of family violence as compared to other victims of crime.<sup>9</sup> Academic literature has also observed similar barriers:
- one of the greatest impediments to women’s access to victim compensation is the legislative requirements of the schemes themselves...[V]ictim compensation schemes, like the criminal law, are largely premised on a ‘stranger violence model’. The schemes assume that the victim does not know the assailant, that the violence is a random act and that the victim is not dependent on the assailant.<sup>10</sup>
- 1.9 While state-funded financial assistance is accepted as a core component of responding to the harms of family violence, it is not established that such assistance is being realised for victims of family violence. Therefore, this reference considers what changes should be made to the Act to assist family violence victims to rebuild their lives and recover.

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1 ‘Compensation’ and ‘state-funded financial assistance’ are terms used in different jurisdictions to refer to payments made by the state to victims of crime. Refer to [1.19] for discussion of terminology used in this report, including ‘state-funded financial assistance’ and ‘compensation’. See also, for example, Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 2.

2 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 189; Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 1.

3 United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 11th sess (1992).

4 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 1.

5 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 188.

6 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 189 and *Victims of Crime Assistance Act 1996* (Vic) s 1.

7 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 3.

8 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

9 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 1389.

10 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 5.

## Scope of the reference

- 1.10 The terms of reference ask the Commission to review and report on the operation of the Act as it applies to victims of family violence. Specifically, the Commission has been asked to consider the following matters raised by Recommendation 106 of the Royal Commission:
- the eligibility test under the Act
  - the categories and quantum (amount) of awards
  - requirements to notify a perpetrator about a Victims of Crime Assistance Tribunal (VOCAT) application
  - the matters giving rise to refusal of an application
  - procedural matters to expedite (speed up) the making of an award.
- 1.11 Accordingly, the terms of reference require the Commission to consider how the purpose and objectives of the Act are realised for family violence victims. That is, to what extent the Act:
- assists family violence victims to recover from crime by paying financial assistance for expenses incurred or likely to be incurred as a direct result of the crime<sup>11</sup>
  - pays family violence victims financial assistance (including special financial assistance) as a symbolic expression by the state of the community's sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime<sup>12</sup>
  - allows family violence victims to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources.<sup>13</sup>
- 1.12 The Act's purpose and objectives also state that:
- awards of financial assistance (including special financial assistance) are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise<sup>14</sup>
  - the scheme is intended to complement other services provided by government to victims of crime.<sup>15</sup>
- 1.13 By examining how the Act's purpose and objectives are realised for family violence victims, the terms of reference require the Commission to consider whether the Act unfairly limits access to financial assistance for victims of family violence as compared to other victims of crime.<sup>16</sup> The terms of reference also require the Commission to examine what changes should be made to the Act to help family violence victims rebuild their lives and recover.
- 1.14 Given the defined scope of the reference, it is not intended to re-examine broader matters relating to the family violence service system.<sup>17</sup> These issues have been extensively covered by the Royal Commission, which undertook over 800 community consultations, held 25 days of public hearings and assessed almost 1000 written submissions.<sup>18</sup>

11 *Victims of Crime Assistance Act 1996 (Vic)* s 1(2)(a).

12 *Ibid* s 1(2)(b).

13 *Ibid* s 1(2)(c).

14 *Ibid* s 1(3).

15 *Ibid* s 1(4).

16 Previous reviews have found that a number of provisions in victims' compensation legislation may not adequately recognise the nature and dynamics of family violence and may potentially discriminate unfairly against victims of family violence as compared to other victims of crime. See, eg, Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 1389; Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws: Final Report*, Project No 104 (2014) 173.

17 The family violence service system includes specialist family violence services, police, courts and legal services, victim support, child and family services, health services and housing and homelessness services. Refer to discussion in Chapter 4, which summarises some of the core components of the family violence service system.

18 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria's Plan for Change* (2016) 1.

- 1.15 The breadth and depth of the Royal Commission’s examination of current programs, laws and policies provide a solid foundation for this reference to focus specifically on the provision of state-funded financial assistance to victims of family violence under the Act.
- 1.16 This reference will not re-examine broader matters regarding victims of crime, compensation or victim assistance programs. These issues have recently been considered by the Victorian Law Reform Commission’s report *The Role of Victims of Crime in the Criminal Trial Process*, which, amongst other things, considered improvements to the victim support system more generally.<sup>19</sup>
- 1.17 However, this consultation paper will refer to the findings and recommendations of the Royal Commission and the Victorian Law Reform Commission’s victims of crime reference to the extent they provide context for, and raise matters directly relevant to, this reference.
- 1.18 Consistent with the terms of reference, this reference will not review the total financial assistance currently available under the Act. This issue is outside the scope of this reference.

## Terminology

- 1.19 This part explains why the Commission has used particular terminology in this consultation paper, noting there is not universal agreement about the use of particular terms.<sup>20</sup>

## Victims of family violence

- 1.20 The terms of reference use the words ‘victims of family violence’ to describe people affected by family violence. This reference retains the use of ‘victims of family violence’ to ensure consistency with both the terms of reference and the legislative framework in Victoria providing for victim support and rights.<sup>21</sup>
- 1.21 The terms of reference do not define either ‘victim’ or ‘family violence’. It is beyond the scope of this reference to consider or review definitions of either ‘victim’ or ‘family violence’. Therefore, the Commission uses the term ‘family violence’ as defined in the *Family Violence Protection Act 2008* (Vic).<sup>22</sup> That is, ‘family violence’ means any behaviour that:
- is physically, sexually, emotionally, psychologically or economically abusive
  - is threatening, coercive, controlling, dominating and causes a family member to fear for the safety or wellbeing of themselves or another family member
  - causes a child to hear, witness or otherwise be exposed to the effects of the above behaviours.<sup>23</sup>
- 1.22 For the purposes of this reference, a ‘victim of family violence’ is therefore any person who has been the victim of any of the above behaviours, whether or not there has been a criminal prosecution or conviction in relation to them.<sup>24</sup> Not all behaviours captured by the definition of ‘family violence’ constitute criminal offences. The Royal Commission

19 See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) xvii and Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 166–74. The Victorian Government has also recently indicated it will seek advice from the Sentencing Advisory Council about ways to improve court orders for compensation for victims of crime, see Office of the Premier (Vic), ‘Supporting Victims of Crime in the Justice System’ (Media Release, 7 May 2017) 1.

20 For discussion of terminology, see Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) v and Centre for Innovative Justice, *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (RMIT University, 2015) 12–13.

21 While acknowledging concerns about the term ‘victim’, maintaining this terminology ensures consistency with the terms of reference and victim-related legislation in Victoria, including the *Victims of Crime Assistance Act 1996* (Vic) and *Victims’ Charter Act 2006* (Vic). The Commission notes the government’s use of ‘victim survivors’ and discussion of terminology in Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) v.

22 *Family Violence Protection Act 2008* (Vic) s 5.

23 *Ibid* s 5(1).

24 Other terms such as ‘domestic violence’ and ‘intimate partner violence’ used in other reports and literature will be accepted as encompassing the range of behaviours outlined in the *Family Violence Protection Act 2008* (Vic). See, for example, The Lookout, *Fact Sheet 7—Family Violence Statistics* (2016) 1.

also used the definition of family violence from the *Family Violence Protection Act 2008* (Vic).<sup>25</sup>

### Perpetrators of violence

- 1.23 The terms of reference use the term ‘perpetrator’ to describe someone who uses family violence.
- 1.24 For the purposes of this reference, ‘perpetrator’ means any person who is alleged to have used family violence, whether or not the behaviours have been reported to police or whether or not there has been a criminal prosecution or conviction. This approach is consistent with the terminology used in the terms of reference and the legislative framework under the *Family Violence Protection Act 2008* (Vic).<sup>26</sup>
- 1.25 The Commission notes that the term ‘perpetrator’ is not used in the Act but is used, although not defined, in the *Family Violence Protection Act 2008* (Vic).

### ‘Financial assistance’ and ‘compensation’

- 1.26 Some reports and literature refer to state-funded financial assistance as ‘victim compensation’ or ‘victim compensation schemes’.<sup>27</sup>
- 1.27 Victoria’s legislative framework expressly provides that the Act does not establish a ‘compensation scheme’ and that any awards are not intended to reflect the level of compensation that may be available through other avenues. However, other jurisdictions and academic literature sometimes use the term ‘compensation’ to refer to state-funded financial assistance schemes similar to what is provided for under the Act. Where discussing or referring to that literature, the Commission may adopt consistent terminology for comparative purposes only.
- 1.28 For the purposes of this reference, the term ‘financial assistance’ refers to the provision of state-funded financial assistance under the Act. Where other forms of financial assistance are referred to, the consultation paper expressly notes the difference.<sup>28</sup>

### Preliminary meetings

- 1.29 As part of its preliminary research, the Commission conducted meetings with representatives of key stakeholders from the courts and judiciary, government departments, family violence advocacy or service provision, legal services and victim support.
- 1.30 The purpose of these preliminary meetings was to enable the Commission to gain a better understanding of the key issues, including impacts on victims of family violence, and proposals for reform raised in submissions to the Royal Commission, to assist with identifying proposals and options for reform for this consultation paper.
- 1.31 Preliminary meetings do not form part of the Commission’s formal consultations for this reference. Formal consultations will be conducted in conjunction with the publication of this consultation paper, along with a call for public submissions.

### Consultation paper

- 1.32 The findings of the Royal Commission, including submissions made to it, the Commission’s preliminary consultations, and other research form the basis of this consultation paper.

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25 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 2.

26 ‘Perpetrator’ is intended to include people who use family violence; offenders (people who have been criminally prosecuted for crimes related to family violence); alleged offenders (people who are alleged to have committed crimes relating to family violence); as well as respondents in family violence intervention order matters, whether or not criminal matters have proceeded.

27 See, eg, Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 2.

28 For example, family violence flexible support packages are also state-funded financial assistance; these are discussed in Chapter 11 as a comparison to the financial assistance available under the Act.

- 1.33 The structure of this consultation paper is based on its terms of reference and the issues identified by the Royal Commission and during the preliminary consultations.
- 1.34 Part One of this consultation paper provides background information about the scope of the reference and our approach. It also provides an overview of family violence in our community and recent policy and reform activities.
- 1.35 Part One also introduces the family violence and victim assistance system. It provides an overview of state-funded financial assistance for victims of family violence under the Act and refers to similar schemes across other states and territories and internationally.
- 1.36 Part Two of this consultation paper examines the key issues relevant to this reference. These issues include eligibility, the category and quantum (amount) of awards, the form and timing of applications, VOCAT notification provisions, factors relevant in the determination of awards, timeliness of awards and review, variation and refunding of awards as they impact on victims of family violence.
- 1.37 Part Two of this consultation paper also discusses possible options for reform and asks specific questions to guide the public and stakeholders in preparing submissions during the consultation phase.
- 1.38 Part Three of this consultation paper provides broader contextual analysis of the Act and associated issues including community awareness and accessibility of the scheme as it relates to family violence victims. Part Three also examines aspects of the Act and VOCAT that extend beyond the provision of financial assistance. This includes consideration of VOCAT's potential role as a therapeutic forum for acknowledging victims of crime.
- 1.39 Finally, Part Three summarises some of the key issues raised for the purposes of examining whether the purpose and objectives of the Act are realised for victims of family violence.
- 1.40 This consultation paper does not represent any final conclusions or views on the matters raised.

### **Formal consultation process**

- 1.41 The next stage of the reference will involve consulting with key stakeholders, interested organisations and individuals to further examine the issues raised in this consultation paper, seeking views on the questions posed, and to develop and test options for reform of the Act.
- 1.42 The Commission intends to consult with the judiciary, victim support and advocacy organisations (government and non-government), family violence support and advocacy organisations, government departments, legal services and key academics.
- 1.43 In particular, the Commission seeks the views of individuals with direct experience of VOCAT processes, victim and family violence support workers who assist family violence victims to access VOCAT, and members of the legal profession whose work interacts with VOCAT. The Commission also welcomes submissions from members of the broader community.
- 1.44 The feedback and information the Commission receives from submissions and formal consultation, combined with additional research, will inform its recommendations to the Attorney-General.
- 1.45 A report setting out the Commission's recommendations will be provided to the Attorney-General by the reporting date of 31 January 2018. Within 14 sitting days of receipt of the report, the Attorney-General must table the report in the Victorian Parliament. The Victorian Government will decide whether to implement the Commission's recommendations. Legislative change will be decided by the Victorian Parliament.



# The Victims of Crime Assistance Tribunal (VOCAT)

- 10** The structure of VOCAT
- 10** Specialisation within the VOCAT structure
- 11** The procedure and process of VOCAT
- 14** VOCAT demand

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## 2. The Victims of Crime Assistance Tribunal (VOCAT)

- 2.1 Before turning to a consideration of the issue of family violence under the *Victims of Crime Assistance Act 1996* (Vic) (the Act), this chapter provides an introduction to the Victims of Crime Assistance Tribunal (VOCAT).
- 2.2 VOCAT is the key body to which the terms of reference relate, as it determines all applications for financial assistance made under the Act.
- 2.3 This chapter gives an overview of the structure, procedure and processes of VOCAT, as well as the demand for its services.

### The structure of VOCAT

- 2.4 VOCAT is established by the Act to hear and determine applications for financial assistance made by victims of crime.<sup>1</sup>
- 2.5 VOCAT consists of tribunal members, who are magistrates. It comprises the Chief Magistrate and all magistrates and reserve magistrates under the *Magistrates' Court Act 1989* (Vic).<sup>2</sup> Each VOCAT hearing is constituted by a single tribunal member.<sup>3</sup>
- 2.6 Although located within the Magistrates' Court of Victoria, VOCAT is a separate entity with its own jurisdiction. A diagram showing how VOCAT fits with the other jurisdictions of the Magistrates' Court is set out at Appendix A.
- 2.7 In addition, the Chief Magistrate has delegated tribunal powers to 10 judicial registrars to determine certain types of application, including interim awards of financial assistance.<sup>4</sup> In 2015–16, judicial registrars determined almost 22 per cent of final awards.<sup>5</sup>
- 2.8 The Chief Magistrate appoints supervising magistrates to support the operation of VOCAT. Supervising magistrates encourage best practice across VOCAT and represent VOCAT in its dealings with other members of the judiciary, staff and community.<sup>6</sup>
- 2.9 VOCAT operates in all 51 Magistrates' Court venues across Victoria.<sup>7</sup>

### Specialisation within the VOCAT structure

- 2.10 In 2006, VOCAT established a specialist Koori List which is now a permanent part of VOCAT operations. The list was created to ensure that the purposes and objectives of the Act could be achieved for Koori applicants.<sup>8</sup>

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1 *Victims of Crime Assistance Act 1996* (Vic) s 19.

2 *Ibid* s 19(2).

3 *Ibid* s 21(1).

4 *Victims of Crime Assistance Tribunal, Annual Report 2015–16* (2016) 13 and 25.

5 *Ibid* 28.

6 *Ibid* 14.

7 *Ibid* 13.

8 *Victims of Crime Assistance Tribunal, Koori VOCAT List Pilot: Review and Recommendations* (2010) 9.



- 2.11 The Koori List does not apply any different legal considerations. All determinations are made within the framework of the Act. However, the list enables VOCAT to be more responsive to the circumstances of Koori victims of crime.<sup>9</sup>
- 2.12 VOCAT has stated that key to the success of the Koori List is the procedural flexibility and informality available under the Act which enable the Tribunal to respond flexibly to applicants' circumstances.<sup>10</sup> This may involve sitting at a table to hear participants, rather than at the bench, adopting a more informal approach and receiving culturally specific information from community representatives.<sup>11</sup>
- 2.13 Furthermore, while VOCAT itself does not have a specialist family violence list, magistrates who sit in the Family Violence Court Division are able to hear and determine VOCAT applications in conjunction with other civil or criminal family violence matters.<sup>12</sup> In dealing with a VOCAT application, the Family Violence Court Division has the same functions, powers and duties as VOCAT.<sup>13</sup>
- 2.14 The Family Violence Court Division is a separate division of the Magistrates' Court of Victoria.<sup>14</sup> The Family Violence Court Division is discussed in more detail in Chapter 4.

## The procedure and process of VOCAT

- 2.15 VOCAT is not a court. VOCAT hearings are less formal than court hearings<sup>15</sup> and VOCAT is not bound by the rules of evidence.<sup>16</sup>
- 2.16 VOCAT's procedure, however, remains a legal process, which is bound by the provisions of the Act.<sup>17</sup>
- 2.17 In deciding applications for financial assistance made by victims of crime, VOCAT has a duty to act fairly, expeditiously (promptly) and according to the merits of the case.<sup>18</sup>
- 2.18 In addition, VOCAT must give a party to the matter a reasonable opportunity to call or give evidence, examine, cross-examine or re-examine witnesses and to make submissions.<sup>19</sup>
- 2.19 VOCAT has the power to issue a warrant for arrest against a witness who has been served with a summons to attend a VOCAT hearing and who has failed to do so.<sup>20</sup>
- 2.20 VOCAT also has broad investigative powers to make any enquiry and order any document or report that it requires.<sup>21</sup>
- 2.21 The diagram below shows the process of VOCAT and how it may be accessed by victims of family violence.

9 Ibid 10.

10 Ibid 9.

11 Ibid 13–14.

12 *Magistrates' Court Act 1989* (Vic) s 41(2).

13 Ibid s 41(2)(b).

14 Ibid s 4H; Magistrates' Court of Victoria and Children's Court of Victoria, *Submission No 978 to Royal Commission into Family Violence, Royal Commission into Family Violence* (June 2015) 10.

15 Section s 38(1)(a) of the *Victims of Crime Assistance Act 1996* (Vic) provides that the Tribunal is not required to conduct itself in a formal manner.

16 *Victims of Crime Assistance Act 1996* (Vic) s 38. See also Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 25.

17 Section 20 of the *Victims of Crime Assistance Act 1996* (Vic) provides that the Tribunal has the functions, powers and duties conferred on it by the Act. See also, Victims Support Agency (Vic), *Counselling for Victims of Crime* (2011) 63.

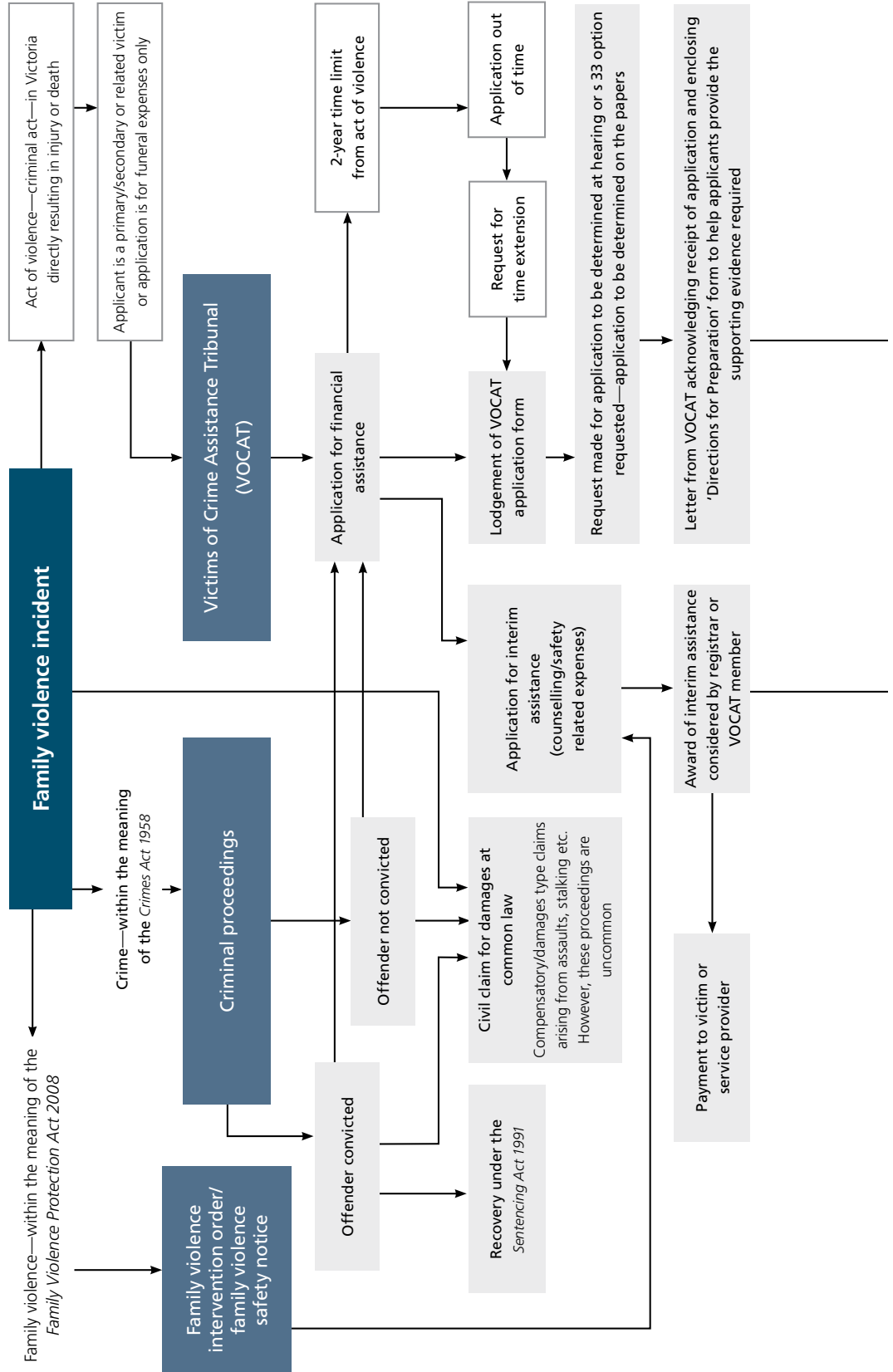
18 *Victims of Crime Assistance Act 1996* (Vic) s 32(1).

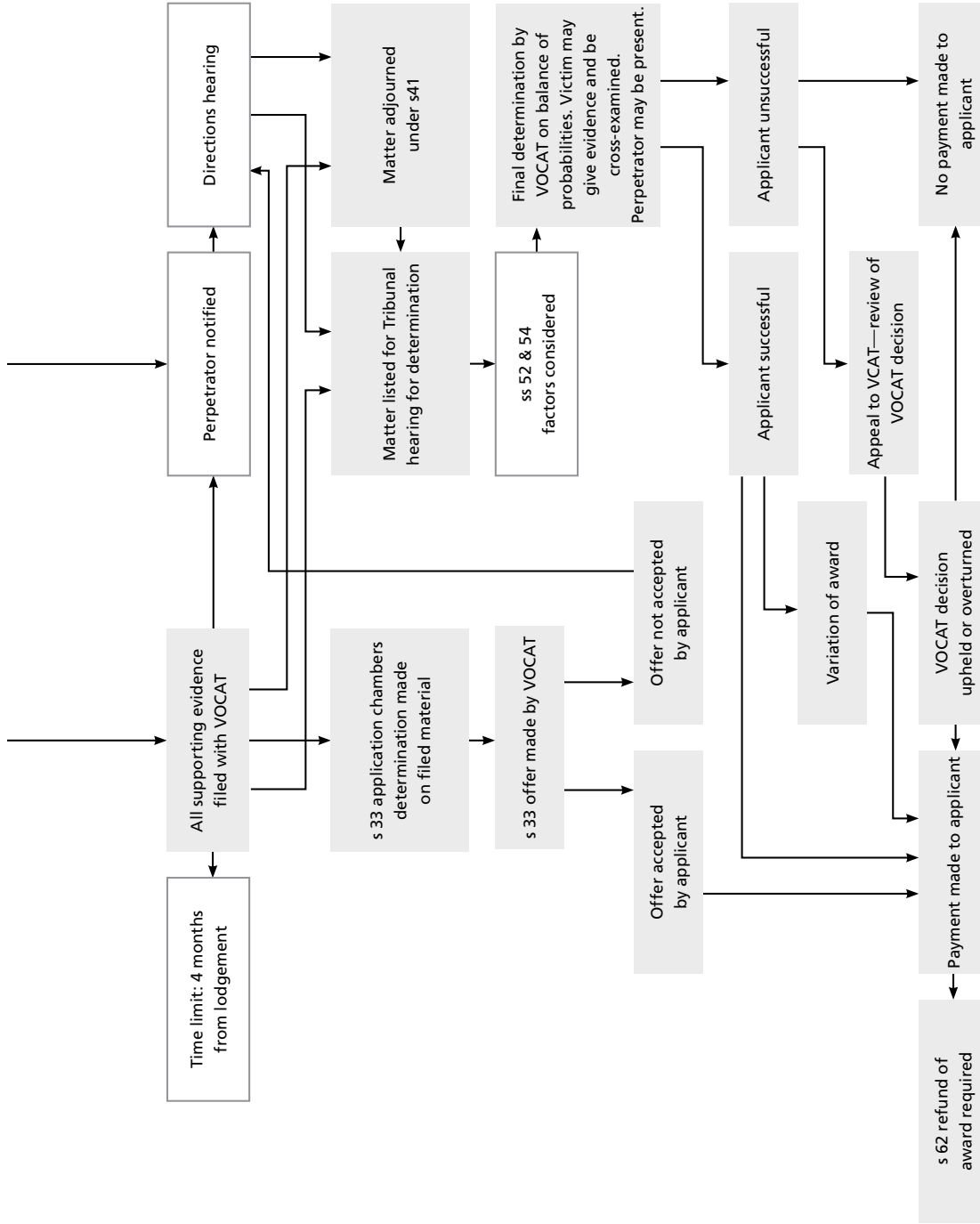
19 Ibid s 38(1)(c).

20 Ibid s 37(1A).

21 Ibid s 39.

## The VOCAT Process for Family Violence Victims in context\*





\* Victims of family violence also have access to financial assistance through administrative schemes such as Family Violence Flexible Support Packages.

## VOCAT demand

- 2.22 In its submission to the Victorian Royal Commission into Family Violence, the Magistrates' Court stated there had been a 337 per cent increase in VOCAT's caseload between 2001–02 and 2013–14.<sup>22</sup>
- 2.23 In 2015–16 there were 6221 applications to VOCAT, representing an increase of 2.8 per cent from 2014–15.<sup>23</sup> In 2015–16, there were 4161 awards of financial assistance made.<sup>24</sup> This is a decrease of 6.7 per cent from the previous financial year.
- 2.24 The average amount of financial assistance awarded by VOCAT in 2015–16 was \$7784.<sup>25</sup>

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22 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 45.

23 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 32.

24 Ibid.

25 Ibid 33.

# Family violence in the community

**16** **Introduction**

**16** **Dynamics and characteristics of family violence**

**17** **Prevalence and community impacts**

**20** **Current policy context—an overview of recent relevant reviews and reforms**

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## 3. Family violence in the community

### Introduction

- 3.1 This chapter defines family violence and describes its dynamics and characteristics.
- 3.2 This chapter also provides an overview of the current policy and reform context to clarify how this reference complements and intersects with other reform activities.

### Dynamics and characteristics of family violence

- 3.3 Family violence includes a broad range of behaviours, not limited to acts of physical or sexual violence. Family violence also encompasses psychological, emotional, cultural, spiritual and financial abuse.<sup>1</sup> As discussed in Chapter 6, family violence may not always constitute a criminal offence, and so may not be an ‘act of violence’ within the meaning of the *Victims of Crime Assistance Act 1996* (Vic) (the Act).
- 3.4 Family violence has distinct characteristics and dynamics. Perpetrators of family violence are motivated by a desire for coercion, control and domination which can take the form of restricting access to money, communication devices and transport, or limiting a person’s contact with friends and family with the aim of isolating or, in some cases, imprisoning victims in their home.<sup>2</sup> Perpetrators of family violence exercise power and control over another person with the intent to intimidate, humiliate, undermine or isolate a victim.<sup>3</sup>
- 3.5 Family violence is rarely experienced as a ‘one-off’ event. Victims often experience family violence over a long period of time. Family violence manifests as a pattern of behaviour involving an escalating spiral of violence. Family violence is also characterised by periods of increased risk such as during pregnancy, separation or attempted separation.<sup>4</sup>
- 3.6 The cumulative harm of family violence has a severe impact on victims’ health and wellbeing, and makes social and economic disadvantage even worse, limiting a victim’s ability to escape violence or seek help and support.<sup>5</sup>
- 3.7 It is widely accepted that family violence is a gendered crime:

While both men and women can be perpetrators or victims of family violence, overwhelmingly the majority of victims are women and children, and the majority of perpetrators are men.<sup>6</sup>

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1 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) vi.  
2 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume I* (2016) 18–19.  
3 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) vi.  
4 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume I* (2016) 20–3.  
5 Ibid 37. See also Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) 2.  
6 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) vi.

- 3.8 The Victorian Royal Commission into Family Violence (the Royal Commission) found that the most common manifestation of family violence is intimate partner violence committed by men against their current or former female partners.<sup>7</sup>

## Prevalence and community impacts

### Prevalence and reported incidents of family violence

- 3.9 The Royal Commission comprehensively examined the prevalence of family violence and determined that overall, it is difficult to definitively determine what proportion of the population has experienced family violence—that is, the *prevalence* of family violence.<sup>8</sup> This is because family violence still remains hidden. Many victims may not report incidents of family violence or identify as victims. Victims may seek information or support but not report a matter to police. There may also be poor or inconsistent information collection by agencies supporting victims.<sup>9</sup>
- 3.10 However, the Royal Commission found that Victoria has experienced a significant increase in reported incidents of family violence.<sup>10</sup> Victoria’s Crime Statistics Agency has reported that in 2016 there were 78,628 family violence incidents.<sup>11</sup> Although these incidents fall within the definition of family violence under the *Family Violence Protection Act 2008* (Vic), they may not necessarily constitute criminal offences.
- 3.11 The number of finalised family violence intervention order applications in the Magistrates’ Court of Victoria nearly doubled between 2000–01 and 2013–14, from 16,889 to 35,135 finalised applications.<sup>12</sup> In addition, criminal charges for contraventions of a family violence intervention order have more than tripled since 2004–05.<sup>13</sup> In 2015–16, family violence concerns were indicated in almost 50 per cent of reports to child protection.<sup>14</sup>
- 3.12 Research indicates that family violence affects a significant proportion of Australia’s population,<sup>15</sup> and that it is prevalent across all cultures, ages and socio-economic groups.<sup>16</sup> However, there are greater barriers to detection of, and responses to, family violence for some specific groups.<sup>17</sup> These include Aboriginal people, people with a disability, people from diverse cultural, linguistic and faith backgrounds, members of the LGBTIQ community, older people, people who work in the sex industry, people in prison or exiting prison and people who live in regional, rural and remote areas.
- 3.13 Despite increased detection and reporting, and the associated increase in proactive interventions by police and courts, family violence still remains hidden, under-reported and often undetected in our community. KPMG’s 2017 report *The Cost of Family Violence in Victoria* found that a high proportion of family violence is not reported to police.<sup>18</sup> KPMG estimated that in 2015–16, over 160,000 people experienced family violence in Victoria, more than double the 78,628 family violence incidents reported by Victoria’s Crime Statistics Agency in 2016.<sup>19</sup>

7 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 2.

8 Ibid 18.

9 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume I* (2016) 47.

10 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 18.

11 Crime Statistics Agency, *Family Incidents* (19 May 2017) <[www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents-2](http://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents-2)>.

12 Magistrates’ Court of Victoria and Children’s Court of Victoria, *Submission No 978 to Royal Commission into Family Violence, Royal Commission into Family Violence* (June 2015) 20.

13 Ibid 20.

14 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) 3.

15 Centre for Innovative Justice, *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (RMIT University, 2015) 15.

16 Janet Phillips et al, *Domestic Violence: Issues and Policy Challenges*, Research Paper Series 2015–16 (Parliamentary Library, Parliament of Australia, 2015) 4.

17 See, eg, Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) 3.

18 KPMG, *The Cost of Family Violence in Victoria*, Summary Report (2017) 5.

19 Crime Statistics Agency, *Family Incidents* (19 May 2017) <[www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents-2](http://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents-2)>. The Crime Statistics Agency publishes recorded crime statistics every quarter and annually for each year ending in December. Latest crime statistics for family incidents is for the year ending December 2016.

## Effects on children and young people

- 3.14 Given the broader family violence data issues outlined above, ascertaining the extent to which children and young people are experiencing family violence is difficult. The Royal Commission concluded that the under-reporting of family violence made it difficult to determine the prevalence of family violence for children and young people, as with the general population. However, the Royal Commission also acknowledged that many homes in which family violence occurs will be homes in which children and young people reside.<sup>20</sup>
- 3.15 In this context, Victoria Police data analysed by the Royal Commission indicated children were present in around 35 per cent of family violence incidents. However, this figure is likely to represent only a portion of all actual family violence incidents against children and young people because of low family violence reporting rates.<sup>21</sup> The Royal Commission described children and young people as ‘silent victims’ because not only is there a lack of data, the family violence system has historically focused on the safety and wellbeing of women.<sup>22</sup>
- 3.16 The devastating effects of family violence on children and young people are now well established. These effects can be linked back to unborn children whose mother may be experiencing elevated levels of stress as a result of family violence, of which hormonal effects can be transferred to the foetus.<sup>23</sup> Infants have been found to be highly sensitive to prolonged periods of stress, and young children can suffer a range of physical, emotional and mental health effects arising from family violence occurring in the home.<sup>24</sup> Significantly, these effects occur irrespective of how a child or young person experiences family violence. As the Royal Commission found, the effects of hearing, witnessing or otherwise being exposed to violence are similar to the effects of experiencing direct physical violence.<sup>25</sup>
- 3.17 Aside from the physical, emotional and mental health effects, the Royal Commission also highlighted the connection between experiencing family violence as a child and later criminal offending behaviour. The intergenerational effects mean victims of family violence can also later become perpetrators of family violence themselves.<sup>26</sup>
- 3.18 Despite strong evidence confirming the physiological, psychological and emotional impacts of family violence, the Royal Commission found this knowledge has not been adequately translated into appropriate responses by the service system, including the legal system. The Royal Commission found that children and young people are not ‘passive’ witnesses or ‘secondary victims’, and that they should be recognised as ‘victims in their own right’.<sup>27</sup>

## Impacts for victims of family violence in rural and regional communities

- 3.19 Although many issues faced by victims of family violence in metropolitan and regional areas may be similar, research suggests that living in a regional community can compound family violence victimisation.<sup>28</sup>
- 3.20 Accordingly, access to justice and support for victims of family violence in rural and regional communities was examined by the Royal Commission. The Royal Commission defined communities outside of Greater Melbourne as ‘regional’, based on the Australian Bureau of Statistics’ Estimated Resident Population statistics.

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20 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume II* (2016) 103.

21 Ibid.

22 Ibid 101.

23 Ibid 105.

24 Ibid 106.

25 Ibid 107.

26 Ibid 111.

27 Ibid 142.

28 Amanda George and Bridget Harris, *Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria* (Deakin University School of Law’s Centre for Rural and Regional Law and Justice, 2014) 46; Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume V* (2016) 223.



- 3.21 The Estimated Resident Population statistics show that as at 30 June 2016, 4,641,636 of Victoria's population resided in Greater Melbourne and 1,428,000 (that is, approximately 24 per cent) resided in regional Victoria.<sup>29</sup>
- 3.22 The Royal Commission found that family violence victims living in regional communities are affected by a number of specific issues, including:
- geographic and social isolation
  - privacy implications of reporting violence or seeking help in a small community
  - cultural norms in small communities
  - access to firearms and other weapons
  - cross-jurisdictional issues in towns that border other states, including services being located across state borders
  - surviving and recovering after natural disasters
  - 'intersectional disadvantage'—that is, some diverse groups being further disadvantaged by their rural or regional location.<sup>30</sup>
- 3.23 Similarly, research by Deakin University in 2013 found that 'there are a range of issues unique to women living in rural and regional locations that compound barriers to safety including limited availability of services and geographic isolation'.<sup>31</sup>
- 3.24 Of particular relevance to this reference, the Royal Commission found a lack of family violence court specialisation in regional areas compared to metropolitan locations, leading to differences in court experiences for victims of family violence.<sup>32</sup> The Royal Commission also found barriers to accessing legal services in regional areas, including barriers to accessing lawyers from Victoria Legal Aid and Community Legal Centres.<sup>33</sup>
- 3.25 Other services, including medical and psychological services, can also be difficult for regional and rural victims of family violence to access. Services might not be available in a particular community and people may have to travel to access them. In some communities, multiple services may operate from the same location, posing privacy or safety issues.<sup>34</sup>
- 3.26 The Royal Commission concluded that 'people experiencing family violence in rural, regional and remote communities face particular challenges. These include geographical and social isolation, greater economic vulnerability, cultural factors and a lack of access to services'.<sup>35</sup>
- 3.27 In light of the issues identified above, the Royal Commission found that regional communities pose specific challenges for government and the community in responding to family violence.<sup>36</sup>

### Costs of family violence to the community

- 3.28 Family violence has significant social, economic and community impacts. These impacts are felt beyond the individuals and families directly affected by violence. They manifest in an increased burden on government and community services, as well as the broader economy. For example, family violence is the single largest cause of homelessness for women.<sup>37</sup> Intimate partner violence contributes to more death, disability and illness in women aged 18–44 than any other preventable risk factor.<sup>38</sup>

29 Australian Bureau of Statistics, *Regional Population Growth, Australia 2015–16*, cat no 3218.0 (2017) <www.abs.gov.au>.

30 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume V* (2016) 216–23.

31 Lucinda Jordan and Lydia Phillips, *Women's Experiences of Surviving Family Violence and Accessing the Magistrates' Court in Geelong, Victoria* (Deakin University School of Law's Centre for Rural and Regional Law and Justice, 2013) 9.

32 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume V* (2016) 224.

33 Ibid 225.

34 Ibid 225.

35 Ibid 229.

36 Ibid 216.

37 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria's Plan for Change* (2016) 2.

38 Ibid.

- 3.29 It has been estimated that violence against women costs Australia \$21.7 billion a year, representing an approximate cost of \$7.8 billion to each state and territory for health, administration and social welfare costs.<sup>39</sup>
- 3.30 KPMG's 2017 report *The Cost of Family Violence in Victoria* estimated the total cost of family violence in Victoria as \$5.3 billion in 2015–16.<sup>40</sup> In particular, service delivery for family violence was estimated at \$1.7 billion, with over \$1 billion of this going to justice-related services from Victoria Police, the courts and legal support services.<sup>41</sup> Costs to individuals and their families were estimated at \$2.6 billion.<sup>42</sup>

## Current policy context—an overview of recent relevant reviews and reforms

- 3.31 This part provides an overview of key recent reviews and reforms relevant to this reference.
- 3.32 These reviews and reforms provide a broader context for consideration of current issues in relation to family violence victims' experience of the Victims of Crime Assistance Tribunal (VOCAT) and also reinforce that this reference is a small part of broader system changes and reforms being implemented in Victoria in relation to family violence.
- 3.33 For example, in response to Recommendation 37 of the Royal Commission, the Victorian Government has committed to developing a network of support and safety hubs.<sup>43</sup> Once these hubs are established, victims will be able to visit a single venue to access information and support, rather than having to seek these via multiple avenues.
- 3.34 These reforms are intended to improve linkages between victims, victim and family violence support services and the justice system, including VOCAT.<sup>44</sup> Five support and safety hubs are to be set up by the end of 2017.<sup>45</sup>

## Royal Commission into Family Violence

- 3.35 The Victorian Royal Commission was established on 22 February 2015. The Commission was asked to report on how Victoria's response to family violence can be improved by providing practical recommendations to stop family violence.<sup>46</sup>
- 3.36 As acknowledged by the Royal Commission, Victoria has been at the forefront of family violence policy development and reform for the past 15 years, providing a strong basis for improved responses to family violence in Victoria.<sup>47</sup> Key reforms already implemented in Victoria include:
- introduction of the *Family Violence Protection Act 2008* (Vic)
  - development of Victoria Police's *Code of Practice for the Investigation of Family Violence*
  - establishment of specialist family violence court divisions and services within the Magistrates' Court of Victoria.<sup>48</sup>

39 PricewaterhouseCoopers Australia, *A High Price to Pay: The Economic Case for Preventing Violence Against Women* (2015) 2.

40 KPMG, *The Cost of Family Violence in Victoria*, Summary Report (2017) 2.

41 Ibid 7.

42 Ibid 8.

43 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria's Plan for Change* (2016) 36. In May 2017, the Victorian Government announced funding of \$448.1 million to establish 17 support and safety hubs, with the first hubs to be launched in Barwon, Bayside Peninsula, Inner Gippsland, Mallee and North-East Melbourne regions from late 2017: Department of Treasury and Cabinet (Vic), *Getting on with the Job, Victorian Budget 17/18 Overview* (2017) 20.

44 See, eg, 'Case Study: Marla's Experience in the Future', which envisages a support and safety hub connecting victims with a lawyer to assist with an application to VOCAT: Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria's Plan for Change* (2016) 40–1.

45 Ibid 20.

46 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 1.

47 Ibid 5.

48 Ibid.

- 3.37 The Royal Commission comprehensively assessed all components of the government's and community's response to family violence. On 29 March 2016, the Royal Commission handed down its final report.
- 3.38 The Royal Commission concluded that despite a sustained effort to address family violence in the community through structural and procedural reform, serious limitations to the existing approach remained.<sup>49</sup>
- 3.39 In making 227 recommendations, the Royal Commission has proposed an agenda for change across Victoria's health, justice and social service systems.<sup>50</sup> The recommendations aim to improve outcomes for victims of family violence, improve perpetrator accountability and bring about change in community attitudes towards family violence.
- 3.40 The Royal Commission recommendations encompass significant reforms to:
- risk assessment and management, pathways to services and information sharing
  - specialist family violence services and creating a safe home
  - responses to children and young people's experience of family violence (including the child protection system) as well as to adolescents who use family violence
  - sexual assault and family violence responses
  - police operations and leadership
  - court responses, offences and sentencing, restorative justice and family law
  - prevention and perpetrator interventions
  - health and wellbeing approaches, including in the workplace
  - family violence and diversity, vulnerable cohorts and impacts on specific communities
  - governance arrangements, industry planning and investment in data and research (including ongoing review of family violence deaths).<sup>51</sup>
- 3.41 This reference directly relates to matters raised by Recommendation 106 of the Royal Commission, which recommends that:
- The Victorian Law Reform Commission consider the matters the Commission raised in this report in relation to the Victims of Crime Assistance Tribunal and the Victim Assistance Program in its Victims of Crime in the Criminal Trial Process review. To the extent that these matters do not fall within the terms of reference for that review, the Attorney-General should amend the terms of reference or ensure that a separate review of these matters is carried out.<sup>52</sup>
- 3.42 Recommendation 106 formed part of the Royal Commission's findings about 'recovery and wellbeing' for victims of family violence. These findings emphasised that the cumulative effects of family violence can be made worse by difficulties victims have in navigating the justice and service system, including attempting to gain social and financial independence.<sup>53</sup>
- 3.43 The Royal Commission's findings about access to VOCAT for victims of family violence are not specifically set out in Recommendation 106. Instead, the recommendation refers to 'matters raised'.

49 Ibid.

50 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria's Plan for Change* (2016) 2.

51 This is a high level thematic summary of the 227 recommendations. For a comprehensive list, see Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 45–106.

52 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 87.

53 Ibid 65.

- 3.44 Matters raised by the Royal Commission in relation to VOCAT included:
- eligibility requirements for VOCAT and the Victims Assistance Program (VAP); ensuring victims of family violence do not face additional barriers to accessing assistance; and the merits of a combined VOCAT/victim support system
  - the ‘criminal’ threshold for accessing VOCAT, which excludes family violence victims when conduct is not criminal in nature
  - whether a victim of a breach of a family violence intervention order should be eligible to access VOCAT
  - whether the Act adequately takes into account the cumulative harm and long-term effects of family violence
  - whether the Act should be amended to increase the maximum amount of special financial assistance that can be awarded to victims of family violence to the Category A maximum amount where there are related criminal acts
  - whether the Act should be amended to ensure the nature and dynamics of family violence are appropriately taken into account by VOCAT with respect to notification provisions, time limits for applications and consideration of the conduct of applicant victims
  - whether magistrates need increased education and training in relation to family violence dynamics as they relate to VOCAT applications.
- 3.45 The Royal Commission recommended the Victorian Law Reform Commission (VLRC) consider these matters either as part of its reference relating to the role of victims in the criminal trial process or as part of a separate review.<sup>54</sup> The VLRC report, *The Role of Victims of Crime in the Criminal Trial Process*, was delivered to the Victorian Attorney-General on 31 August 2016. Its terms of reference did not cover the matters specified in Recommendation 106 of the Royal Commission. Accordingly, the Victorian Attorney-General referred these matters to the VLRC in this reference.

### **Victorian Government response: *Ending Family Violence: Victoria’s Plan for Change***

- 3.46 The Victorian Government has committed to implementing all recommendations of the Royal Commission. *Ending Family Violence: Victoria’s Plan for Change* outlines how the Victorian Government intends to implement the 227 recommendations of the Royal Commission.<sup>55</sup> The government has acknowledged that implementation of the recommendations is ambitious and the breadth and scale unprecedented.<sup>56</sup>
- 3.47 There are four broad outcomes articulated in the plan:
- 1) Family violence and gender inequality are not tolerated.
  - 2) Victim survivors, vulnerable children and families, are safe and supported to recover and thrive.
  - 3) Perpetrators are held to account, engaged and connected.
  - 4) Preventing and responding to family violence is systemic and enduring.
- 3.48 VOCAT is a key component of victim support and recovery, and directly relates to Outcome 2: Victim survivors, vulnerable children and families, are safe and supported to recover and thrive.

54  
55  
56

Ibid 87.  
Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) IX.  
Ibid.

- 3.49 The plan also articulates key improvements to family violence support which are relevant to, although out of the scope of, this reference, including expanding specialist family violence courts across the state and establishing support and safety hubs.<sup>57</sup>

### Other relevant reviews

#### Victorian Law Reform Commission—The Role of Victims of Crime in the Criminal Trial Process

- 3.50 In October 2014, the Victorian Law Reform Commission (the Commission) was asked to review the role of victims of crime in the criminal trial process. As part of this review, and of direct relevance to this reference, the Commission was asked to consider the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process.
- 3.51 In August 2016, the Commission delivered its report, *The Role of Victims of Crime in the Criminal Trial Process*. The Commission made recommendations aimed at improving the legislative framework and practical operation of restitution and compensation orders against offenders.<sup>58</sup> However, the Commission also acknowledged that for some victims of crime, state-funded financial assistance through VOCAT might be the only means of obtaining financial reparation.<sup>59</sup>
- 3.52 The Commission also identified some preliminary concerns with access to VOCAT for victims of family violence. In a roundtable with magistrates, the Commission was told that the Act does not accommodate the particular dynamics and characteristics of family violence and is framed around a conception of crime as a single violent act.
- 3.53 Section 52 of the Act requires VOCAT to refuse an application where an act of violence has not been reported ‘within a reasonable time’ or where a victim has failed to provide ‘reasonable assistance’ to investigatory or prosecutorial bodies. Stakeholder proposals included that section 52 be amended to list family violence as a factor VOCAT should be able to take into account when deciding not to refuse an application.
- 3.54 Although raising the above matters, the Commission acknowledged that further consideration of these issues was beyond its terms of reference.
- 3.55 However, the Commission did make recommendations relating to restricting access to, and use of, VOCAT records to protect victims of crime during the VOCAT and criminal trial process. Given victims apply for assistance from VOCAT to help them with their recovery, the Commission found that victims should not be discouraged from seeking financial assistance out of fear that an offender or family violence perpetrator may access or use their VOCAT records in a criminal proceeding.<sup>60</sup>

57 In May 2017, the Victorian Government announced funding of \$448.1 million to establish 17 support and safety hubs and \$269.4 million to enhance the response of Victoria’s legal system to family violence, including implementation of the specialist family violence court model in several locations across the state: Department of Treasury and Cabinet (Vic), *Getting on with the Job, Victorian Budget 17/18 Overview* (2017) 20.

58 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) xxvii–xxviii.

59 Ibid xx.

60 Recommendations 50 and 51 recommended that documentation in VOCAT proceedings should be inadmissible as evidence in criminal proceedings except in certain circumstances, and that such documents must not be subpoenaed.

## Australian Law Reform Commission and New South Wales Law Reform Commission review

- 3.56 In 2010, the Australian Law Reform Commission and New South Wales Law Reform Commission jointly undertook a review of legal responses to family violence across Australian jurisdictions. The terms of reference asked the commissions to examine:
- the interaction in practice of state and territory family/domestic violence and child protection laws with the *Family Law Act 1975* (Cth) and relevant Commonwealth, state and territory criminal laws
  - the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.<sup>61</sup>
- 3.57 The terms of reference also asked the commissions to consider what improvements could be made to relevant legal frameworks to protect the safety of women and their children.<sup>62</sup>
- 3.58 The review also considered state and territory victim compensation and financial assistance schemes and their application for victims of family violence. The review found that compensating victims of crime is part of a trend towards greater recognition of victims of crime and affirmed that such schemes are an important element of victim support.<sup>63</sup>
- 3.59 The review recommended changes to victims' compensation legislation to ensure victims of family violence are not disadvantaged. In particular, they recommended that applicable state and territory legislation be amended to:
- expand the definition of 'act of violence' or 'injury' to include 'family violence'
  - ensure acts are not treated as 'related acts' merely because they are committed by the same person (and legislation should allow a victim to object if claims are to be treated as 'related')
  - ensure compensation is not denied on the basis that it would advantage or benefit an offender, specifically as these provisions discriminate against victims of family violence.<sup>64</sup>
- 3.60 These issues largely remain unresolved in Victoria and were raised again by the Royal Commission. The Victorian Law Reform Commission considers these issues in detail in Part Two of this consultation paper.

61 Australian Law Reform Commission, *Terms of Reference* (Family Violence, 2009) <[www.alrc.gov.au/inquiries/family-violence/terms-reference](http://www.alrc.gov.au/inquiries/family-violence/terms-reference)>.

62 Ibid.

63 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 182.

64 Ibid 1395.

# Victoria's family violence and victim assistance system

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- 26** Specialist family violence services
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## 4. Victoria's family violence and victim assistance system

### Introduction

- 4.1 The Victorian Royal Commission into Family Violence (the Royal Commission) acknowledged that for victims of family violence there is no single pathway into the 'family violence system'.<sup>1</sup> Instead, the system is made up of a number of distinct but often overlapping parts.<sup>2</sup>
- 4.2 Broadly, the family violence 'system' comprises:
- specialist family violence (including specialist women's and children's) services
  - police
  - courts and legal services
  - victim support services (including specialist sexual assault services)
  - child protection and family services
  - housing and homelessness services
  - health services (including mental health, drug and alcohol services).<sup>3</sup>
- 4.3 Support can be accessed via multiple 'doors' and at different points or stages. Victims may have only one touch point in the system or may access different components of it simultaneously.<sup>4</sup>
- 4.4 This chapter provides a brief overview of the key aspects of this system that are relevant to this reference: specialist family violence services, the police, the courts, legal services and victim support services. These parts of the system intersect either directly or indirectly with state-funded financial assistance under the *Victims of Crime Assistance Act 1996* (Vic) (the Act).<sup>5</sup>

### Specialist family violence services

- 4.5 Specialist family violence services are predominantly community-based services whose core business is working with women and children.<sup>6</sup> There are 28 specialist family violence support services in Victoria.<sup>7</sup>

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1 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 19.

2 The Royal Commission further acknowledged that the elements of the family violence system at times remain 'siloes' and fragmented, leading to increased complexity for victims attempting to access support: *ibid.*

3 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume I* (2016) 75.

4 For example, victims may be pursuing a family violence intervention order in the Magistrates' Court while seeking legal advice for family law proceedings, accessing housing services for relocation and attending a community health centre for mental health support.

5 The child protection, housing and broader health service responses do not directly relate to how victims of family violence might seek assistance under the Act so are not discussed here in detail.

6 The service system reflects the gendered nature of family violence and responds to areas of greatest need: Australia's National Research Organisation for Women's Safety, *Women's Specialist Domestic Violence and Family Violence Services: Their Responses and Practices with and for Aboriginal Women—Key Findings and Future Directions*, Report No 1 (ANROWS Compass, 2017) 2.

7 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume I* (2016) 80.



- 4.6 Specialist family violence services are generally government-funded and provide:
- emergency assistance (for example, following a referral from police), including via a 24-hour telephone service
  - case management or specialist support/outreach
  - accommodation assistance
  - counselling.
- 4.7 Specialist family violence services administer the government’s family violence flexible support packages which assist victims to escape violence by helping them meet expenses such as rental or relocation costs, clothing and books for children or security measures to improve safety at home.<sup>8</sup>
- 4.8 The Victorian Law Reform Commission (the Commission) heard during preliminary consultations that some specialist family violence services advise victims of family violence about the Victims of Crime Assistance Tribunal (VOCAT), and in some circumstances, may assist them to prepare an application or access legal assistance to do so. However, the Commission was also told that VOCAT is not usually a core part of their service as women and children often require urgent case management, housing, financial or counselling assistance, and that the VOCAT process can take time and can be complicated for non-legal services to assist with. This means VOCAT is often not pursued immediately, limiting its ability to assist family violence victims during this ‘crisis’ stage.

## The police

- 4.9 Victoria Police is often the first point of contact for victims of family violence. The *Victoria Police Code of Practice for the Investigation of Family Violence* (the Code of Practice) and the *Family Violence Protection Act 2008* (Vic) together provide the legislative and procedural framework for police responses to both victims and perpetrators.<sup>9</sup>
- 4.10 Victoria Police has established specific roles and organisational structures to support an enhanced response to family violence. This includes the appointment of family violence liaison officers and family violence advisers, and the establishment of family violence teams and a Family Violence Coordination Unit.<sup>10</sup> In 2015, Victoria Police established Australia’s first Family Violence Command to assist Victoria Police to develop a more effective response to family violence.<sup>11</sup> The command acts as a central point of accountability for family violence within Victoria Police.<sup>12</sup>
- 4.11 As outlined further below, police have a number of options to respond to victims and perpetrators, including pursuing civil avenues on behalf of victims to protect their safety, as well as criminal options to address perpetrator offending. In addition, police may facilitate referrals to other services within the family violence or broader service system.
- 4.12 Victoria Police’s website states that all victims of family violence have the right to access specialist family violence support services and that police will offer direct referrals to these services. VOCAT is listed as a specific point of referral for family violence victims.<sup>13</sup>

8 Victorian Government, *One Year on from the Royal Commission into Family Violence* (2017) 6. Community organisations manage these in various Department of Health and Human Services areas, eg, Eastern Domestic Violence Service administers flexible support packages in the East Division: Eastern Homelessness Network, *EDVOS Flexible Support Packages* (2017) < <http://ehn.org.au/news/foryourclients/964-edvos-flexible-support-packages.html>>.

9 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2015) <[www.police.vic.gov.au/content.asp?Document\\_ID=43361](http://www.police.vic.gov.au/content.asp?Document_ID=43361)>.

10 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2014) 50–1.

11 Victoria Police, *Australia’s First Family Violence Command* (2015) <[www.vicpolice.com.au/cops-and-bloggers/speeches](http://www.vicpolice.com.au/cops-and-bloggers/speeches)>.

12 Victoria Police, Submission No 923 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (2015) 45.

13 Victoria Police, *Support and Welfare Services* (2017) <[www.police.vic.gov.au/content.asp?document\\_id=43365](http://www.police.vic.gov.au/content.asp?document_id=43365)>.

## Civil responses

- 4.13 Civil responses available to police include issuing a family violence safety notice or applying for a family violence intervention order under the *Family Violence Protection Act 2008* (Vic).<sup>14</sup>
- 4.14 Family violence safety notices are now the most common civil action taken by police.<sup>15</sup> Family violence safety notices enable police to place immediate restrictions on a perpetrator when attending a family violence incident outside of court hours.<sup>16</sup> Family violence safety notices provide immediate protection for an affected family member because a police officer can include in the notice protections similar to those in an intervention order, such as excluding a respondent from the family home. Family violence safety notices can be made without the consent of the victim.<sup>17</sup> A family violence safety notice also operates as an application for a family violence intervention order and as a summons for the respondent to attend court.<sup>18</sup> Police may also apply on victims' behalf for a family violence intervention order.<sup>19</sup>

## Criminal responses

- 4.15 Under the Code of Practice, police are required to pursue criminal charges where there is evidence of a criminal offence, regardless of civil options also pursued.<sup>20</sup>
- 4.16 Criminal options include pursuing charges for breaches of a family violence intervention order or a family violence safety notice.<sup>21</sup> The Code of Conduct requires police to lay charges for breaches of a family violence intervention order or a family violence safety notice.<sup>22</sup>

## The courts and legal services

### Courts

- 4.17 As noted in its submission to the Royal Commission, a high proportion of the Magistrates' Court of Victoria's work is dedicated to family violence.<sup>23</sup> As such, the Magistrates' Court has established specialist family violence responses, most notably the Family Violence Court Division and the Specialist Family Violence Service.
- 4.18 Currently, the Family Violence Court Division operates out of two Magistrates' Court locations and the Specialist Family Violence Service operates out of three.<sup>24</sup> There are plans to expand the Specialist Family Violence Service model to a further five court locations by 2019.<sup>25</sup>
- 4.19 While the Family Violence Court Division and Specialist Family Violence Service are constituted (and operate) differently, they both aim to promote and enhance the safety of victims and make access to court easier.
- 4.20 The Family Violence Court Division has been operating since June 2005 at the Ballarat and Heidelberg Magistrates' Courts as a separate division of the court established under

14 Police have several civil options to pursue, depending on the risks of the affected family member and may include applying for a family violence safety notice, application and warrant, application and summons, application for a family violence interim intervention order or variation of an existing family violence intervention order: Victoria Police, *Code of Practice for the Investigation of Family Violence* (2014) 31.

15 Victoria Police, Submission No 923 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (2015) 43.

16 Applications for family violence safety notices can only be made before 9.00 am and after 5.00 pm on weekdays, weekends or public holidays: Victoria Police, *Code of Practice for the Investigation of Family Violence* (2014) 32.

17 Ibid; *Family Violence Protection Act 2008* (Vic) s 24.

18 Victoria Police, Submission No 923 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (2015) 43.

19 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2014) 31.

20 Ibid 23.

21 Ibid 28.

22 Ibid.

23 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 1.

24 Ibid 10–11.

25 Department of Premier and Cabinet (Vic), *Family Violence Rolling Action Plan 2017–2020* (2017) IX.

the *Magistrates' Court Act 1989* (Vic).<sup>26</sup> Features of the Family Violence Court Division include specially appointed and gazetted magistrates, dedicated family violence registrars, applicant and respondent support workers and a range of specialist outreach workers for both applicants and respondents.<sup>27</sup> Magistrates are able to hear related matters at the same time as intervention order matters; this includes family law, VOCAT and criminal matters.<sup>28</sup> Alternative arrangements are available for victims to give evidence and eligible respondents can be ordered to participate in a men's behaviour change program.<sup>29</sup>

- 4.21 The Specialist Family Violence Service is not a separate division of the Magistrates' Court, but is a specialist initiative established in the Frankston, Sunshine and Werribee courts between 2005 and 2006. Key features include dedicated family violence registrars and applicant support workers, as well as specially trained court staff and magistrates.<sup>30</sup> Magistrates in the Specialist Family Violence Service cannot mandate participation in a men's behaviour change program.<sup>31</sup>
- 4.22 Given the volume of family violence-related work across Magistrates' Court locations, and the limited court locations of both the Family Violence Court Division and Specialist Family Violence Service, the majority of family violence matters continue to be dealt with in the mainstream Magistrates' Courts.<sup>32</sup> However, as noted above, the Victorian Government has recently announced the expansion of specialist family violence courts.<sup>33</sup>
- 4.23 Of particular relevance to this reference is VOCAT. As discussed in Chapter 2, VOCAT is a separate jurisdiction and is constituted by magistrates of the Magistrates' Court of Victoria. VOCAT operates in all 51 Magistrates' Court venues across Victoria.<sup>34</sup>
- 4.24 Specialist approaches to family violence in other Victorian courts is limited. The County Court has identified concerns that it does not have family violence risk assessment or case management processes.<sup>35</sup> There are no specialist approaches to family violence in the Supreme Court. The Supreme Court's submission to the Royal Commission emphasised that although the matters coming before the Trial Division of its criminal court are the most serious in nature, the numbers are small and predominantly concern homicide.<sup>36</sup>

## Legal services

- 4.25 Victims of family violence access legal services to assist with a range of separate, yet often interrelated, matters resulting from family violence. This might include intervention order proceedings, criminal law matters, family law proceedings and VOCAT applications.
- 4.26 Victoria Legal Aid and community legal centres provide a range of support and assistance to both victims and perpetrators of family violence, including legal assistance in family violence intervention order matters and criminal charges relating to family violence, such as breaches of family violence intervention orders or other criminal acts.
- 4.27 Specialist legal services also provide enhanced support and assistance for particular groups. Women's Legal Service Victoria provides support only to female clients and the Aboriginal Family Violence Prevention and Legal Service provides support predominantly to Aboriginal clients, although some clients may be non-Aboriginal but have Aboriginal children.

26 *Magistrates' Court Act 1989* (Vic) s 4H; Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 10.

27 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 10.

28 Ibid.

29 Ibid.

30 Ibid 11.

31 Ibid.

32 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume I* (2016) 84.

33 Department of Treasury and Cabinet (Vic), *Getting on with the Job, Victorian Budget 17/18 Overview* (2017) 20.

34 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 13.

35 County Court of Victoria, Submission No 835 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 10–11.

36 Supreme Court of Victoria, Submission No 705 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (29 May 2015) 1.

- 4.28 Importantly, legal services also assist victims of crime to access VOCAT by completing VOCAT applications and supporting documentation as well as representing victims and making submissions at VOCAT hearings. These services may be delivered by private practitioners as well as Victoria Legal Aid or Community Legal Centres.

## Victim and witness assistance

- 4.29 Support for victims and witnesses in Victoria is delivered predominantly through government agencies and government-funded programs administered by community organisations.<sup>37</sup>
- 4.30 The Department of Justice and Regulation coordinates the delivery of:
- the Victims of Crime Helpline
  - the Victims Assistance Program (VAP)
  - the Victims Register
  - the Prisoner Compensation Quarantine Fund
  - the Child Witness Service.<sup>38</sup>
- 4.31 With the exception of the Child Witness Service, these programs and initiatives are coordinated by the Victims Support Agency (VSA) within the Department of Justice and Regulation.
- 4.32 The VAP provides a range of practical support, information and assistance, including assistance with VOCAT applications. Services are for victims of violent crime, including family violence victims.
- 4.33 Witness assistance in Victoria is provided by the Child Witness Service (part of the Department of Justice and Regulation) and the Office of Public Prosecutions' Witness Assistance Service. While family violence victims are potentially able to get assistance through the Witness Assistance Service, this service only provides assistance for witnesses in prosecutions pursued by the Director of Public Prosecutions.<sup>39</sup>

37 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 166. Non-government victim support and advocacy organisations also provide support to victims of crime, as do private practitioners such as counsellors or psychologists. Court Network also provides assistance to victims or witnesses but their service extends to all court users. The Victims Support Agency within the Department of Justice and Regulation is the official Victorian Government agency assisting victims of violent crime.

38 Victims Support Agency (Vic), *Victims Support Agency* (2017) <[www.victimsofcrime.vic.gov.au/](http://www.victimsofcrime.vic.gov.au/)>.

39 The Witness Assistance Service receives referrals in matters prosecuted by the Director of Public Prosecutions. In specific cases referral is mandatory.

# Financial assistance available for victims of crime

- 32** Introduction
- 32** International law and other Australian jurisdictions
- 33** Options available in Victoria
- 35** The *Victims of Crime Assistance Act 1996*

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## 5. Financial assistance available for victims of crime

### Introduction

- 5.1 This chapter begins with an introduction to compensation and state-funded financial assistance, as recognised in international law and internationally, to provide a broader context for consideration of Victoria's system.
- 5.2 This chapter also:
- provides an overview of the financial assistance options available in Victoria for victims of crime
  - introduces the *Victims of Crime Assistance Act 1996 (Vic)* (the Act)
  - explains why for some victims, financial assistance through the Victims of Crime Assistance Tribunal (VOCAT) might be the only option available.

### International law and other Australian jurisdictions

- 5.3 State-funded financial assistance and compensation for victims<sup>1</sup> has been described as a core component of a just legal response to family violence.<sup>2</sup>
- 5.4 Consequently, international instruments have recognised the rights of victims of crime to receive assistance and compensation. In 1985, the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.<sup>3</sup> This Declaration provides that 'victims should receive the necessary material, medical, psychological, and social assistance through governmental, voluntary, community-based and indigenous means'.<sup>4</sup> Furthermore, it states that 'when compensation is not fully available from the offender or other sources, states should endeavour to provide financial compensation to victims of crime and their families'.<sup>5</sup> While the Declaration itself is non-binding, it provides a valuable articulation of the international community's minimum standards in relation to the treatment of victims of crime.
- 5.5 In the specific context of family violence, the United Nations Committee on the Elimination of all Forms of Discrimination against Women has issued a General Recommendation for party states to develop effective compensatory provisions to protect women against all violence, including family violence.<sup>6</sup>

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1 'Compensation' and 'state-funded financial assistance' are terms used in different jurisdictions to refer to payments made by the state to victims of crime. See, eg, Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 2.

2 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 189; Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 1.

3 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 95th plen mtg, UN Doc A/RES/40/34 (29 November 1985).

4 *Ibid* [14].

5 *Ibid* [12].

6 United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against Women*, 11th sess (1992).

- 5.6 Victims' compensation is an important feature in some regional human rights systems. In the Council of Europe there is the *European Convention on the Compensation of Victims of Violent Crimes*,<sup>7</sup> which obliges party states to compensate victims of intentional and violent offences resulting in bodily injury or death.<sup>8</sup>
- 5.7 State-funded financial assistance and compensation schemes are a common feature in common law countries, although they vary in scope and design. For example, New Zealand has a comprehensive, no-fault personal injury compensation scheme that covers all New Zealand residents and visitors to New Zealand. This one scheme covers injuries that occur in all aspects of life—including at work, on the roads or as a victim of crime.<sup>9</sup>
- 5.8 In the United Kingdom, the Criminal Injuries Compensation Authority awards compensation to victims of violent crime according to *The Criminal Injuries Compensation Scheme 2012*. A 'crime of violence' must have occurred for a payment to be made.<sup>10</sup> Types of payment include payment for injury, loss of earnings, special expenses, bereavement and funeral expenses.<sup>11</sup>
- 5.9 In Canada, all provinces/territories except Newfoundland and Nunavut have financial compensation for victims of violent crime. However, as these programs are administered by individual provinces and territories, their rules and standards differ.<sup>12</sup>
- 5.10 All Australian states and territories have state-funded financial assistance or compensation schemes for victims of crime.<sup>13</sup> A comparative summary table can be found at Appendix B.
- 5.11 As shown in Appendix B, legislative provisions in some states and territories closely mirror provisions in Victoria. Most schemes aim to promote victim recovery and some expressly provide for acknowledgment and recognition by the state and the community of the harm caused by an act of violence. Most require a person to have suffered injury as a result of an act of violence, with some jurisdictions specifically recognising family violence.
- 5.12 However, Victoria and South Australia are the only two Australian jurisdictions with judicial decision makers. The majority of Australian jurisdictions have an administrative system, with decision makers being government-appointed commissioners or assessors. Furthermore, some schemes explicitly define or provide for family or domestic violence,<sup>14</sup> while others, like Victoria, do not.
- 5.13 The next part of this chapter outlines the broader compensation and restitution options available to victims of crime in Victoria and sets out the relevant legislative framework in Victoria under the Act.

## Options available in Victoria

- 5.14 In Victoria, victims of crime can:
- seek compensation or restitution under the *Sentencing Act 1991* (Vic)
  - pursue a civil action against an offender for an award of damages
  - apply for state-funded financial assistance under the Act.<sup>15</sup>

7 Council of Europe, *European Convention on the Compensation of Victims of Violent Crimes*, opened for signature 24 November 1983, ETS 116 (entered into force 2 January 1988).

8 Ibid art 2.

9 Accident Compensation Corporation, *Am I Covered?* (2016) < [www.acc.co.nz/making-a-claim/am-i-covered/index.htm](http://www.acc.co.nz/making-a-claim/am-i-covered/index.htm) >.

10 Ministry of Justice (UK), *The Criminal Injuries Compensation Scheme 2012* (2012) 36.

11 Ibid 13.

12 Canadian Resource Centre for Victims of Crime, *Financial Assistance* (2017) < <https://crcvc.ca/for-victims/financial-assistance/> >.

13 *Victims of Crime Assistance Act 1996* (Vic), *Victims Rights and Support Act 2013* (NSW), *Victims of Crime (Financial Assistance) Act 2016* (ACT), *Victims of Crime Assistance Act 2009* (Qld), *Victims of Crime Assistance Act 2006* (NT) *Victims of Crime Act 2001* (SA), *Victims of Crime Assistance Act 1976* (TAS), *Criminal Injuries Compensation Act 2003* (WA).

14 *Victims' Rights and Support Act 2013* (NSW) ss 40(5) and 44(3); *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 9 and pt 1.2, div 1.2.2 of sch 1; *Victims of Crime Assistance Act 2006* (NT) s 31(3)(a) and *Victims of Crime Assistance Regulations 2007* (NT) regs. 5 and 22, sch 3. See also *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) ss 29, 30 and 96, which, once in force, will amend the *Victims of Crime Assistance Act 2009* (Qld).

15 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 131.

- 5.15 Consideration of broader compensation or restitution schemes available to victims is beyond the Victorian Law Reform Commission's (the Commission) terms of reference. However, the options for victims in Victoria are summarised below to provide context for the operation of VOCAT, and to understand why VOCAT might be the only option for financial assistance or redress for some victims of family violence.

### Compensation and restitution orders under the Sentencing Act

- 5.16 Restitution and compensation orders can be made under Part 4 of the Sentencing Act.<sup>16</sup> Orders are made as part of the sentencing process and can be made for loss or injury caused as a direct result of the offence where an offender has pleaded guilty or been found guilty.<sup>17</sup>
- 5.17 Restitution orders relate specifically to restoration of stolen goods connected to theft. A compensation order can be made against the offender for the value of any loss or damage as a result of an offence. Compensation orders can also be made for any injury directly caused, as well as for pain and suffering and some expenses incurred (or likely to be incurred).<sup>18</sup>
- 5.18 As family violence offences are still significantly under-reported,<sup>19</sup> access to restitution and compensation under the Sentencing Act may not be relevant for many family violence victims. In addition, such orders rely on the offender's ability to pay and the successful enforcement of such orders. Given the often complex and interconnected financial relationship between family violence victims and perpetrators, such orders may further disadvantage a victim of family violence financially. Victims may also be too fearful to pursue these orders, given their relationship with the perpetrator.

### Civil action for award of damages

- 5.19 Victims of crime can sue the offender for damages in a civil action. Civil action can be a significant financial and procedural burden for victims of crime, and the Sentencing Act's provisions were intended to be a faster and cheaper alternative to pursuing civil proceedings.<sup>20</sup>
- 5.20 As with compensation and restitution orders under the Sentencing Act, civil action may be impractical for victims of family violence. Unlike other victims of crime, victims of family violence have, or have had, a relationship with their offender and may have financial ties to the perpetrator of violence. Pursuing a civil action requires hiring a lawyer, potentially at high cost, and is likely to be impractical and undesirable for many victims of family violence.

### State-funded financial assistance under the Victims of Crime Assistance Act

- 5.21 The Victims of Crime Assistance Act gives victims of violent crime an avenue for state-funded financial assistance to aid their recovery in circumstances where they cannot obtain financial assistance from other sources.<sup>21</sup>
- 5.22 Awards of financial assistance are for expenses incurred, or likely to be incurred.<sup>22</sup> In some circumstances, lump sum payments can be awarded as a symbolic expression of the community's sympathy and recognition of the effects of crime.<sup>23</sup>

16 *Sentencing Act 1991* (Vic) Part 4; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process, Consultation Paper* (2016) 130–1.

17 *Sentencing Act 1991* (Vic) Part 4; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process, Consultation Paper* (2016) 130–1.

18 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process, Consultation Paper* (2016) 132.

19 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume I* (2016) 47.

20 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process, Consultation Paper* (2016) 133–4.

21 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(c).

22 *Ibid* s 1(2)(a).

23 *Ibid* s 1(2)(b).



- 5.23 For the reasons outlined above, state-funded financial assistance under the Act is often the only option available to victims of family violence.<sup>24</sup> The Act is described in the next section.

## The *Victims of Crime Assistance Act 1996*

### Policy intent

- 5.24 When the Act was introduced, the Second Reading Speech articulated a broad intent to develop a model more responsive to the needs of victims in order to ‘... maximise the potential for a victim’s recovery from the psychological and physical effects of a violent offence’.<sup>25</sup>
- 5.25 The then-Attorney-General, the Hon. Jan Wade MP, described the Act as establishing an integrated model of assistance for victims of crime.<sup>26</sup>
- 5.26 She stated the Act would address the needs of victims of violent crimes and achieve an appropriate balance between the interests of victims, the state and the rights of offenders. Furthermore, the Act would:
- address the physical and psychological needs of a victim of crime by ensuring that appropriate services were available to help the victim make a speedy recovery
  - wherever practicable, ensure that convicted offenders made good the harm caused by their crimes by paying compensation for pain and suffering to the victim
  - ensure that procedures within the criminal justice system provided a quick and economical means for the redress of harm suffered as a result of the offender’s criminal conduct
  - ensure that services provided by the state to victims of crime were affordable.<sup>27</sup>
- 5.27 However, the Act removed the provision of state-funded compensation for ‘pain and suffering’ for victims, which had been available under Victoria’s preceding criminal injuries compensation laws. To address this omission, the *Victims of Crime Assistance (Amendment) Act 2000* (Vic) introduced awards of special financial assistance for primary victims ‘who suffer significant adverse effects as a direct result of an act of violence’,<sup>28</sup> although this amending legislation did not reinstate compensation for pain and suffering. These provisions are discussed in more detail below and in Part Two of this paper.

### Overview of the Act

- 5.28 Part One of the Act sets out the Act’s purpose and objectives and defines key terminology.
- 5.29 Part Two of the Act sets out eligibility for assistance.
- 5.30 Part Three of the Act establishes VOCAT, details the form and timing for applications, sets out the procedures and powers of the Tribunal and outlines the procedures for the making of awards.
- 5.31 Part Four of the Act sets out procedures for review, variation and refund of awards and Part Five contains miscellaneous provisions.

24 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence* (Women’s Legal Service Victoria, 2015) 56.  
 25 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1023 (Jan Wade, Attorney-General).  
 26 Ibid 1024.  
 27 Ibid.  
 28 See Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 2000, 1911–6 (Rob Hulls, Attorney-General).

## Purpose and objectives

- 5.32 The purpose of the Act is to 'provide assistance to victims of crime'.<sup>29</sup>
- 5.33 The objectives of the Act are:
- to assist victims of crime to recover by paying them financial assistance for expenses incurred, or reasonably likely to be incurred, as a direct result of the crime; and<sup>30</sup>
  - to pay certain victims of crime financial assistance (including special financial assistance) as a symbolic expression by the state of the community's sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime; and<sup>31</sup>
  - to allow victims of crime to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources.<sup>32</sup>
- 5.34 The Act's purpose and objectives also state that:
- Awards of financial assistance (including special financial assistance) are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise.<sup>33</sup>
  - The scheme provided by the Act is intended to complement other services provided by government to victims of crime.<sup>34</sup>

## Eligibility

- 5.35 Primary, secondary or related victims of an act of violence are eligible to apply for financial assistance under the Act.<sup>35</sup> Victims must be the victim of an 'act of violence' which has directly resulted in 'injury' or death.<sup>36</sup>
- 5.36 An 'injury' is actual physical harm, mental illness or disorder (or exacerbation of these) and pregnancy. An injury does not extend to loss or damage to property.<sup>37</sup>
- 5.37 Eligibility, particularly as it relates to victims of family violence, is discussed in Chapter 6.

## Establishment of VOCAT

- 5.38 The Act establishes VOCAT, described in Chapter 2, as the body to hear and determine applications for financial assistance made by victims of crime.<sup>38</sup>
- 5.39 The Act prescribes the functions, powers and procedures of VOCAT and requires that in all matters before it, VOCAT must act:
- fairly
  - according to the substantial merits of the case
  - with as much expedition (promptness) as the requirements of the Act and a proper determination of the matter permit.<sup>39</sup>

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29 *Victims of Crime Assistance Act 1996* (Vic) s 1(1).

30 *Ibid* s 1(2)(a).

31 *Ibid* s 1(2)(b).

32 *Ibid* s 1(2)(c).

33 *Ibid* s 1(3).

34 *Ibid* s 1(4).

35 *Ibid* s 25(1).

36 *Ibid* s 3(1).

37 *Ibid*.

38 *Ibid* ss 19.

39 *Ibid* s 32.

- 5.40 VOCAT describes its role as one of hearing and determining applications for financial assistance made by victims of 'violent crime' and as providing a 'sympathetic and compassionate forum for applicants to relate their experience as victims of crime'.<sup>40</sup>
- 5.41 VOCAT has acknowledged it has an important role to play in providing practical and flexible assistance to victims of family violence, including in providing a therapeutic forum for victims to tell their story and have their experiences acknowledged.<sup>41</sup>



## PART TWO: RELEVANT ISSUES

# Eligibility for assistance

- 40** Introduction to Part Two
- 40** Introduction to Chapter 6
- 41** Who is eligible?
- 46** How do the current eligibility criteria affect victims of family violence?
- 51** Discussion and options for reform

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## 6. Eligibility for assistance

### Introduction to Part Two

- 6.1 This part of the consultation paper provides an overview of the key issues relevant to victims of family violence and the *Victims of Crime Assistance Act 1996* (Vic) (the Act), as identified in the terms of reference.
- 6.2 The key issues are:
- the eligibility test for financial assistance
  - categories and quantum (amount) of awards
  - the form and timing of applications
  - the notification of the alleged perpetrator
  - how awards are decided, including mandatory refusal of an award
  - timeliness of awards
  - review, variation and refund of awards.
- 6.3 Each chapter in this part outlines the relevant provisions of the Act, considers how these provisions may affect victims of family violence, and discusses options for reform.
- 6.4 This part draws on reports and inquiries that relate to the terms of reference, on academic literature, and on information derived from preliminary consultations with key stakeholders. It also uses case law to highlight how the Act functions with respect to victims of family violence. As very few decisions of the Victims of Crime Assistance Tribunal (VOCAT) are publicly available, the Victorian Law Reform Commission (the Commission) mainly relies upon review decisions of the Victorian Civil and Administrative Tribunal (VCAT) and the Supreme Court of Victoria.

### Introduction to Chapter 6

- 6.5 This chapter provides an overview of the eligibility criteria that an applicant must meet in order to be granted financial assistance under the Act. The chapter outlines:
- the different categories of victim under which an applicant can apply for assistance
  - the requirement for there to have been an 'act of violence'
  - the requirement for there to have been 'injury', 'death' or a 'significant adverse effect'
  - the requirement that the injury, death or significant adverse effect is the 'direct result' of the act of violence
  - the use of the 'balance of probabilities' as the standard of proof to determine any question of fact.

- 6.6 The first matter in the terms of reference asks the Commission to consider ‘the eligibility test and whether this should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury’.
- 6.7 This chapter details the difficulties that victims of family violence can experience because of the narrow definitions used in the eligibility criteria.
- 6.8 Finally, the chapter sets out some options for reform, to improve access for victims of family violence, and poses questions for consideration.

## Who is eligible?

- 6.9 A person is eligible for financial assistance under the Act if they are the ‘primary’, ‘secondary’ or ‘related’ victim of a criminal act that directly results in injury, death or a significant adverse effect.

### Primary, secondary and related victims

- 6.10 Under the Act there are three categories of victim who may be eligible for assistance:
- primary victims
  - secondary victims
  - related victims.
- 6.11 Depending on the category under which a person makes an application, she or he will be eligible for different kinds of assistance. The categories and quantum (amount) of financial assistance available are discussed in more detail in Chapter 7. This chapter focuses on eligibility.

### Primary victims

- 6.12 Under the Act, there are two ways that a person can be a primary victim:
- Section 7(1) states that ‘a primary victim is a person who is injured or dies as a direct result of an act of violence committed against him or her’. Section 8A(1) adds that a person is also a primary victim ‘if he or she experiences or suffers a significant adverse effect as a direct result of an act of violence’.
  - Section 7(2) provides that a person is also a primary victim if they are injured or die as a direct result of trying to arrest a perpetrator of an act of violence, trying to prevent an act of violence or trying to aid or rescue a victim of an act of violence.
- 6.13 To qualify as a primary victim under section 7(2), the attempt to arrest, prevent, aid or rescue must be proactive.<sup>1</sup> This means that if a person accidentally interrupts an act of violence, even if it ultimately prevents the offence or assists the victim, she or he is not a primary victim. In the case of *Smith v Victims of Crime Assistance Tribunal*,<sup>2</sup> a daughter who went to check on her mother and inadvertently interrupted an assault by her father was found to be a secondary, rather than primary, victim.
- 6.14 Section 7(2) also provides that the person intervening in an act of violence only has to ‘believe on reasonable grounds’ that someone has committed an act of violence, or that someone is the victim of an act of violence, in order to be a primary victim on this basis.

<sup>1</sup> *Smith v Victims of Crime Assistance Tribunal* [2003] VCAT 1489 (22 October 2003) [25].

<sup>2</sup> *Ibid.*

## Secondary victims

6.15 The Act provides that there are two ways that a person can be a secondary victim:

- Section 9(1) states that a person is a secondary victim if they are present at the scene of an act of violence and are injured as a direct result of witnessing that act.<sup>3</sup>
- Section 9(2) states that a person is a secondary victim if they are the parent or guardian of a primary victim, who is under 18 at the time of the event, and they are injured as a direct result of subsequently becoming aware of the act of violence against their child.<sup>4</sup>

6.16 The Act provides that a person is not a secondary victim under section 9(2) if they commit or are criminally responsible for the act of violence committed against the primary victim.<sup>5</sup>

## Related victims

6.17 A person is a 'related victim' under the Act if there is a primary victim who has died as a direct result of an act of violence and the person is:

- a 'close family member' of the deceased primary victim
- a 'dependent' of the deceased primary victim
- someone who has an 'intimate personal relationship' with the deceased primary victim.<sup>6</sup>

6.18 The term 'close family member' is defined in the Act as meaning a 'person who had a genuine personal relationship with the victim at the time of the death' and is the spouse, parent, guardian, step-parent, child (including by guardianship), step-child, brother, sister, step-brother or step-sister of the victim.<sup>7</sup> This list is exhaustive and excludes other types of family member.

6.19 A 'dependent' means an individual who was wholly or substantially dependent on the victim's income before the commission of the act of violence, or the child of a victim who would have been dependent on the victim but who was born after their death.<sup>8</sup>

6.20 'Intimate personal relationship' is not defined in the Act. However, the term 'intimate personal relationship' has been the subject of judicial consideration. In *Reid v Victims of Crime Assistance Tribunal*,<sup>9</sup> VCAT held that some or all of the following factors could indicate the existence of an 'intimate personal relationship':

- an ongoing sexual relationship
- an ongoing emotional commitment
- an ongoing provision of comfort, support and advice of a personal nature
- an ongoing sharing of confidences, intimacies and personal information
- an ongoing sharing of social contacts and attendances at social functions.<sup>10</sup>

3 *Victims of Crime Assistance Act 1996* (Vic) s 9(1).

4 *Ibid* s 9(2).

5 *Ibid* s 9(3).

6 *Ibid* s 11(1).

7 *Ibid* s 3(1).

8 *Ibid*.

9 [2002] VCAT 373 (24 May 2002) [15].

10 *Ibid* [15].



- 6.21 In that case, VCAT also held that the following factors (in the absence of other indicators) may not constitute an ‘intimate personal relationship’:
- financial or other material support
  - a sharing of residential property
  - occasional contact personally or by correspondence or telephone
  - meeting or sharing at times of family events, including religious, ethnic or other holiday periods.<sup>11</sup>
- 6.22 Based on these factors, VCAT found in *Reid v Victims of Crime Assistance Tribunal* that a close relationship between an aunt and a niece did not constitute an ‘intimate personal relationship’.<sup>12</sup>
- 6.23 In addition, in order to be a related victim or a secondary victim, there must be a primary victim. In *McKenna v Victims of Crime Assistance Tribunal*,<sup>13</sup> VCAT held that the mother of an unborn child, who died in the womb as the result of an act of violence, was not a related victim.<sup>14</sup> This is because the unborn child was not a ‘person’ for the purposes of the definition of a primary victim in the Act.<sup>15</sup>
- 6.24 The Act also excludes related victims from applying if they commit or are criminally responsible for the act of violence in question.<sup>16</sup>

### The need for an ‘act of violence’

- 6.25 To be eligible for assistance under any of the three victim categories, the Act requires that there must have been an ‘act of violence’.
- 6.26 An ‘act of violence’ is defined under the Act as a ‘criminal act’ or ‘a series of related criminal acts’ that occurred in Victoria and that ‘directly resulted in injury or death to one or more persons’.<sup>17</sup>
- 6.27 The Act defines a ‘criminal act’ as an act or omission that is a ‘relevant offence’. The following offences are ‘relevant offences’ under the Act:
- an offence that involves an assault, an injury or a threat of injury to a person and which is punishable by imprisonment<sup>18</sup>
  - sexual offences, including rape, indecent assault, incest, sexual offences against children, sexual offences against persons with a cognitive impairment, and other sexual offences (such as sexual offences involving abduction, detention and an offensive weapon)<sup>19</sup>
  - the offences of stalking, child stealing and kidnapping<sup>20</sup>
  - conspiracy, incitement or an attempt to commit any of the offences listed above.<sup>21</sup>
- 6.28 A ‘criminal act’ also includes an act or omission that would have constituted one of the relevant offences if the perpetrator had not been incapable of criminal responsibility due to their age, mental impairment or the existence of any other defence.<sup>22</sup>

11 Ibid [16].

12 Ibid [18]–[26].

13 [2003] VCAT 1488 (22 October 2003).

14 Ibid [42]–[44].

15 Ibid.

16 *Victims of Crime Assistance Act 1996* (Vic) s 11(2).

17 Ibid s 3(1).

18 Ibid.

19 Ibid. The sexual offences listed in s 3(1) of the Act are offences against Subdivisions (8A), (8B), (8C), (8D), or (8E) of Division 1 of Part 1 of the *Crimes Act 1958* (Vic), any corresponding previous enactment (sexual offences) and the common law offences of rape or assault with intent to rape.

20 *Victims of Crime Assistance Act 1996* (Vic) s 3(1). The offences referred to are those contained in ss 21A(1), 63 and 63A of the *Crimes Act 1958* (Vic) and any corresponding previous enactment.

21 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

22 Ibid. See also *BVB v Victims of Crime Assistance Tribunal* [2010] VSC 57, in which the fact that the perpetrators were children did not prevent the primary victim from making an application for assistance, and *Gulcan v Victims of Crime Assistance Tribunal* [2007] VCAT 2372, in which the fact that the driver of a car was suffering an epileptic fit when they struck the primary victim did not stand in the way of their claim.

6.29 In a number of cases, VCAT has held that an ‘act of violence’ must involve an offence against the person and does not include offences against property.<sup>23</sup> This means that a person whose house is the subject of the offence of arson, for example, is not eligible for assistance under the Act.<sup>24</sup>

### The requirement of ‘injury’ or ‘death’

6.30 The Act requires that the ‘act of violence’ must directly result in ‘injury’ or ‘death’. However, the requirement to establish injury or death varies depending on the category of victim:

- For primary victims, it needs to be established that the act of violence directly resulted in their death or injury.
- Secondary victims applying under section 9(1) need to establish that they were injured as a direct result of witnessing the act of violence. Secondary victims applying under section 9(2) as a parent of a primary victim need to establish two injuries:
  - first, that the act of violence directly resulted in the death or injury of their child as the primary victim, and
  - second, that they personally suffered injury as a direct result of becoming aware of the act of violence.
- Related victims need to establish that the act of violence directly caused the death of their close relation as the primary victim (see [6.17]–[6.24] for the types of relationship covered by the Act).

6.31 ‘Injury’ is defined in the Act as including:

- actual physical bodily harm
- mental illness or disorder or an exacerbation of a mental illness or disorder, whether or not flowing from nervous shock, and
- pregnancy.<sup>25</sup>

6.32 In the case of *RBA v Victims of Crime Assistance Tribunal*,<sup>26</sup> VCAT considered the meaning of ‘actual physical bodily harm’. It held that while it does not include transitory pain that lasts for a matter of minutes, it can include pain that lasts for a period of days.<sup>27</sup> In that case, the applicant, who had experienced pain for a number of days following an incident of anal intercourse, was found to have suffered ‘actual physical bodily harm’.

6.33 The term ‘mental illness or disorder’ is also not defined in the Act. It appears to be generally understood by VCAT to mean any mental injury that constitutes a recognised psychiatric or psychological disorder.<sup>28</sup>

6.34 However, in some cases, the presence of psychiatric symptoms without a diagnosis of a disorder has been enough to qualify as a ‘mental injury or disorder’ under the Act. For example, in *AVA v Victims of Crime Assistance Tribunal*,<sup>29</sup> which concerned an application by a child in relation to her mother’s partner having taken indecent photos of her while she was asleep, VCAT had found that the applicant’s ‘shyness and anxiety problems’ did not constitute a mental injury.<sup>30</sup> On appeal, however, VCAT found that the presence of anxiety symptoms without an anxiety disorder still amounted to a mental injury for the purposes of the Act.<sup>31</sup>

23 See *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004) [15]; *Purcell v Victims of Crime Assistance Tribunal* (13 June 2011) [18]; *Matthews v Victims of Crime Assistance Tribunal* [2012] VCAT 1099 (27 July 2012) [18]–[19].

24 *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004); *Matthews v Victims of Crime Assistance Tribunal* [2012] VCAT 1099 (27 July 2012).

25 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

26 [2009] VCAT 2225 (26 October 2009).

27 *Ibid* [21].

28 See, eg, *RBA v Victims of Crime Assistance Tribunal* [2009] VCAT 2225 (26 October 2009) [20]. While VCAT accepted that the applicant was a ‘traumatised person’, it found that there was no evidence that she suffered a mental illness or disorder.

29 [2010] VCAT 2078 (23 December 2010).

30 VCAT cited in *AVA v Victims of Crime Assistance Tribunal* [2010] VCAT 2078 (23 December 2010) [29].

31 *Ibid* [74]–[75].

- 6.35 In addition, the Act deems a person to be suffering an injury if VOCAT is satisfied on medical or psychological evidence that treatment or counselling is required as a result of 'trauma' associated with an act of violence.<sup>32</sup> VCAT has interpreted the word 'trauma' to 'include not only physical injury but also psychological injury of a "startling experience which has a lasting effect on mental life; a shock"'.<sup>33</sup>
- 6.36 The Act expressly provides that 'injury' does not include injury arising from property loss or damage.<sup>34</sup>

### Significant adverse effect

- 6.37 Under the Act, financial assistance can also be claimed if a victim has experienced or suffered a 'significant adverse effect'.
- 6.38 There are two circumstances in which this can occur:
- First, a primary victim may be eligible for 'special financial assistance' under section 8A if he or she suffers a 'significant adverse effect' as a direct result of an act of violence. The category of 'special financial assistance' is discussed in more detail in Chapter 7.
  - Second, a secondary victim may make a claim for assistance in relation to an act of violence that results in a 'significant adverse effect' for the primary victim.<sup>35</sup> However, in this scenario, the secondary victim still needs to establish that he or she personally suffered an 'injury' as a result of witnessing or learning about the act of violence.<sup>36</sup>
- 6.39 A 'significant adverse effect' is defined in the Act to include 'any grief, distress, trauma or injury experienced or suffered by the victim as a direct result of the act of violence'.<sup>37</sup>
- 6.40 However, as with 'injury', the Act provides that a 'significant adverse effect' does not include any property loss or damage.<sup>38</sup>

### Causation

- 6.41 As already noted, the Act requires that an act of violence must 'directly result' in the victim's injury, death or a significant adverse effect.
- 6.42 The 'but for' test is frequently used by VCAT to establish that the act of violence directly resulted in the injury.<sup>39</sup> This means that the test is 'but for the act of violence, would the victim have experienced the injury?'
- 6.43 However, despite using it frequently, VCAT has not held that the 'but for' test is the only way to establish causation under the Act. In *JM v Victims of Crime Assistance Tribunal*,<sup>40</sup> the judge stated:
- it is unnecessary for me to decide whether satisfaction of the 'but for' test is in fact a prerequisite. I add by way of comment that the argument in support of the 'but for' test seems compelling.<sup>41</sup>
- 6.44 Accordingly, there is a possibility that a causal connection may be established in another way. What this might be remains unclear.

32 *Victims of Crime Assistance Act 1996* (Vic) s 3(2).

33 *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002) [83].

34 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

35 *Ibid* s 3(3).

36 *Ibid* s 9.

37 *Ibid* s 3(1).

38 *Ibid*.

39 See, eg, *L v Victims of Crime Assistance Tribunal* [2004] VCAT 496 (27 July 2004); *JM v Victims of Crime Assistance Tribunal* [2002] VCAT 496 (17 June 2002).

40 [2002] VCAT 496 (17 June 2002).

41 *Ibid* [14].

## Standard of proof

- 6.45 The standard of proof for establishing both that an act of violence occurred and that it directly resulted in an injury is the ‘balance of probabilities’.<sup>42</sup> This is a lower standard of proof than the criminal standard of ‘beyond reasonable doubt’. (See the Glossary for the meaning of the ‘balance of probabilities’.)
- 6.46 In determining whether this standard has been met in applications made under the Act, VCAT has frequently applied the test set out in *Briginshaw v Briginshaw*.<sup>43</sup> In that case, Mr Justice Dixon said:
- when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found ... The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.<sup>44</sup>
- 6.47 In other words, under this test, the strength of the evidence required to determine whether or not a fact exists on the ‘balance of probabilities’ may vary depending on the seriousness of an allegation.<sup>45</sup>
- 6.48 In the context of the Act, in which VCAT must find whether or not a ‘criminal act’ occurred, the allegation will almost always be of a serious nature. This means that VCAT proceedings might require a higher standard of evidence than some other civil matters.
- 6.49 However, in a number of cases, VCAT has held that while the *Briginshaw* test is relevant, the beneficial intent of the Act should also be taken into account when making a determination of fact with respect to an application for financial assistance.<sup>46</sup> In particular, it has pointed to the Act’s stated purpose to recognise the effect of an act of violence on victims of crime and to express the community’s sympathy and condolence.<sup>47</sup>

## How do the current eligibility criteria affect victims of family violence?

- 6.50 The eligibility criteria for making a claim for assistance under the Act can be problematic for victims of family violence.
- 6.51 The narrow definitions in the Act of an ‘act of violence’ and ‘injury’ can make it difficult for victims of family violence to make a successful claim for assistance. Moreover, even where a victim of family violence meets these definitions, there can be perceived barriers to accessibility for this group of victims.
- 6.52 This part discusses how the eligibility criteria can be a barrier for victims of family violence.

## Legislative barriers

- 6.53 The main legislative issues facing victims of family violence with respect to the eligibility criteria are:
- the definition of ‘act of violence’
  - the definition of ‘injury’

42 *Victims of Crime Assistance Act 1996* (Vic) s 31.

43 (1938) 60 CLR 336. For VCAT’s application of this test, see, eg, *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [16]; *Kirk v Victims of Crime Assistance Tribunal* [2007] VCAT 971 (13 June 2007) [37]; *Rajah v Victims of Crime Assistance Tribunal* [2002] VCAT 1422 (6 December 2002) [17].

44 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–2.

45 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 171. See also *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [16].

46 *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002) [48]; *FG v Victims of Crime Assistance Tribunal* [2011] VCAT 2449 (1 September 2011) [34].

47 *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002) [48].

- causation
- the victim categories.

### Definition of act of violence

- 6.54 The Victorian Royal Commission into Family Violence (the Royal Commission) identified the definition of an ‘act of violence’ as one of the key barriers facing victims of family violence.<sup>48</sup>
- 6.55 The requirement that the victim has endured certain ‘criminal acts’ against the person means that victims of family violence are only able to access the scheme if they have experienced physical violence, sexual violence, a threat of injury, or stalking.<sup>49</sup>
- 6.56 Accordingly, victims of non-criminal forms of family violence, such as economic abuse, emotional and psychological abuse, intimidation, harassment, and context-specific harms that occur in a particular culture or tradition are excluded from recognition under the Act.<sup>50</sup>
- 6.57 Moreover, victims of a form of family violence that is criminal in nature but which does not constitute an offence against the person, are also precluded from making a claim to VOCAT. The difficulty experienced by victims of family violence who are subjected to property offences, for example, is illustrated by *Purcell v Victims of Crime Assistance Tribunal*.<sup>51</sup> In that case, VCAT found that, the applicant’s claim for assistance in respect of family violence by her former de facto partner lacked merit. This was because the applicant only provided evidence of property damage, which VCAT held did not constitute an ‘act of violence’ for the purpose of the Act.<sup>52</sup>
- 6.58 In their submission to the Royal Commission, the Magistrates’ Court of Victoria and the Children’s Court of Victoria noted that the definition of ‘act of violence’ was much narrower than the definition of ‘family violence’ in the *Family Violence Protection Act 2008* (Vic).<sup>53</sup>
- 6.59 The definition of family violence in section 5(1) of the Family Violence Protection Act is:
- a) behaviour by a person towards a family member of that person if that behaviour—
    - i) is physically or sexually abusive; or
    - ii) is emotionally or psychologically abusive; or
    - iii) is economically abusive; or
    - iv) is threatening; or
    - v) is coercive; or
    - vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
  - b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).
- 6.60 The Royal Commission noted that the discrepancies between the definition of ‘act of violence’ in the Act and the definition of ‘family violence’ in the *Family Violence Protection Act 2008* (Vic) can ‘produce anomalous results in terms of eligibility’<sup>54</sup> as ‘two victims of

48 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

49 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 5.

50 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 194. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

51 [2011] VCAT 1463 (3 June 2011).

52 Ibid [18].

53 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78; Magistrates’ Court of Victoria and Children’s Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 57.

54 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

family violence who experience much the same conduct may have differing abilities to access the scheme.<sup>55</sup>

- 6.61 To demonstrate this point, the Royal Commission gave the example of two victims of family violence who each receive a text message in breach of an intervention order. The first victim, who receives a text message containing a threat of harm, is eligible to access the scheme. The second victim, who receives a text message that breaches an intervention order but does not contain a threat of harm, is not eligible to access the scheme.<sup>56</sup>
- 6.62 Furthermore, even where a ‘criminal act’ is alleged that would constitute an ‘act of violence’ under the Act, victims of family violence can have difficulty proving the allegation.<sup>57</sup> The case law indicates that this is particularly so in relation to sexual offences, where the dynamics of family violence can make it difficult to establish a lack of consent.
- 6.63 In one case, in which the applicant claimed that her husband had manipulated her into performing unwanted sexual activity by making it appear that the house was under surveillance, both VOCAT and VCAT had difficulty accepting that the applicant had not consented to the sexual activity in question.<sup>58</sup> In the first VCAT decision, the Deputy President found that the whole relationship ‘had an air of fantasy about it’ and that her lack of consent was only in ‘hindsight’.<sup>59</sup> In the second VCAT decision, in which the applicant’s claim was ultimately accepted, the Deputy President questioned how someone in the applicant’s position could ‘believe something that is so far-fetched and preposterous ...?’<sup>60</sup>
- 6.64 In another case, the VCAT Senior Member cast doubt on the applicant’s claim that she had been raped by her former boyfriend, because of the affectionate Facebook messages that she had written to him later in life, in which she had described her former love for him and her dismay at his lack of support during her ensuing pregnancy and late-term abortion.<sup>61</sup> Her claim for assistance was rejected by VCAT.

### Establishing an injury

- 6.65 Another potential barrier for victims of family violence is the definition of ‘injury’. This is because if a victim of family violence has not suffered physical injury and they do not suffer from a mental disorder or illness, it may be difficult for them to receive financial assistance.<sup>62</sup>
- 6.66 As mentioned above, there are case examples in which victims of family violence who have experienced significant mental harm as a result of the violence have had their claims for mental injury refused because they do not suffer from a recognised mental illness or disorder.<sup>63</sup>
- 6.67 Furthermore, while section 3(2) deems ‘trauma’ to be an injury for the purposes of the Act, it requires that medical or psychological evidence must be provided to demonstrate that the trauma requires counselling or treatment. This may prevent some victims of family violence from being able to claim that they have suffered an injury.

55 Ibid.

56 Ibid.

57 Whittlesea Community Connections, *Victims of Crime Assistance Tribunal Capacity Building Project: Discussion Paper* (2011) 73.

58 See *BR v Victims of Crime Assistance Tribunal* [2009] VSC 152 (23 April 2009) and *RBA v Victims of Crime Assistance Tribunal* [2009] VCAT 2225 (26 October 2009). This matter began as an application before VOCAT, which was rejected and subsequently appealed to VCAT. VCAT again rejected the claim by the applicant, who then sought judicial review of VCAT’s decision in the Supreme Court. The Supreme Court overturned VCAT’s decision for insufficient reasons and remitted it to VCAT. In the second hearing before VCAT, the applicant’s claim was accepted.

59 Cited in *BR v Victims of Crime Assistance Tribunal* [2009] VSC 152 (23 April 2009) [17].

60 *RBA v Victims of Crime Assistance Tribunal* [2009] VCAT 2225 (26 October 2009) [18].

61 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017), [131] and [134].

62 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 5.

63 See, eg, *RBA v Victims of Crime Assistance Tribunal* [2009] VCAT 2225 (26 October 2009). The applicant’s claim was ultimately accepted on the basis of physical injury. See also the first instance VOCAT decision in *AVA v Victims of Crime Assistance Tribunal* [2010] VCAT 2078 (set aside by VCAT).

- 6.68 Some victims of family violence may also be deterred from applying for assistance if it means they must undergo a formal psychiatric assessment to establish that they are suffering from a mental disorder or illness.<sup>64</sup> Psychiatric assessments, which are distinct from psychological counselling, are a non-therapeutic tool used to assess the level of mental injury.<sup>65</sup> If administered poorly, there is a risk that psychiatric assessments could re-traumatise victims.<sup>66</sup>
- 6.69 Preliminary consultations undertaken by the Commission also identified that the need to prove mental injury with psychiatric or psychological assessments can result in victims of family violence being directed away from frontline and community-based services. Stakeholders noted that victims of family violence are sometimes redirected from family violence counselling and social work services, which may be of the greatest benefit to their recovery, to medical professionals so they can obtain medical reports that support their VOCAT application. This was identified as a particular concern for victims of family violence living in rural or remote areas, where there are few practising psychiatrists or psychologists, as it can result in them seeking support outside of their community.
- 6.70 In addition, as noted above, victims of family violence whose primary injury is property damage or destruction are barred from receiving assistance under the scheme.

### Causation

- 6.71 Victims of family violence can encounter difficulties in establishing that their injury was a 'direct result' of the act of violence. This is particularly so if they are suffering from a mental disorder or illness and there are other contributing factors.
- 6.72 The applicant in *NF v Victims of Crime Assistance Tribunal*<sup>67</sup> sought assistance on the basis of having witnessed his father beat his stepfather to death. VOCAT initially refused his claim for counselling costs on the grounds that the incident in question was only one of many causes of the difficulties that he faced. The other issues to which VOCAT pointed included a sexual assault, a period in residential care, and a period in youth detention. However, this decision was later set aside by VCAT, which found that the applicant's 'need for counselling [was] directly attributable to the act of violence, even if other layers of trauma in his life may have heightened the need'.<sup>68</sup>
- 6.73 In *CS v Victims of Crime Assistance Tribunal*,<sup>69</sup> both VOCAT and VCAT rejected the victim's application partly because there were a number of other very serious matters in her life that had had a significant effect on her but were unrelated to the sexual assaults by family members for which she was making a claim. VCAT stated that 'the State should not be required to pay unlimited counselling for treatment of issues that may be unrelated to any injury caused by the act of violence'.<sup>70</sup>

### The victim categories: child victims of family violence

- 6.74 The distinction between primary, secondary and related victims sits uneasily with child victims of family violence.
- 6.75 While some children are victims of family violence due to it being perpetrated directly against them, others are victims by hearing, witnessing or otherwise being exposed to the effects of family violence.<sup>71</sup> Both scenarios can have far-reaching developmental and

64 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 5.

65 Ibid.

66 Ibid.

67 [2012] VCAT 1740 (16 November 2012).

68 Ibid [56].

69 [2006] VCAT 1061 (9 June 2006).

70 Ibid [58].

71 See, eg, the definition of family violence in s 5(1) of the *Family Violence Protection Act 2008* (Vic).

psychological consequences for children<sup>72</sup> However, under the *Victims of Crime Assistance Act 1996* (Vic), children who hear, witness or are otherwise exposed to the effects of family violence are only able to apply as secondary or related victims.<sup>73</sup>

- 6.76 This is highlighted by the case of *NF v Victims of Crime Assistance Tribunal*.<sup>74</sup> As mentioned above, the applicant witnessed his father beat his stepfather to death. He initially applied to VOCAT as a secondary victim. However, after VOCAT refused his application, he made a request to amend his application to apply as a related victim. On appeal, VCAT accepted this amendment, holding that he 'was a secondary victim but he was also a related victim.'<sup>75</sup> However, it is notable that NF was unable to apply as a primary victim, despite the severe psychological impact of the violence on him.<sup>76</sup>
- 6.77 This is problematic, as the classification of certain child victims of family violence as secondary or related victims fails to acknowledge their lived experience of family violence and the devastating effect that it may have on them. As the Royal Commission stated, 'children and young people experiencing family violence should be recognised as victims in their own right.'<sup>77</sup>
- 6.78 In addition, categorising such child victims as secondary or related victims impacts the categories and quantum of award for which they are eligible. As discussed further in Chapter 7, the different victim categories affect the types and quantum of awards that an applicant can receive. In particular, only primary victims are able to apply for special financial assistance,<sup>78</sup> which is a lump sum payment for which the applicant is not required to establish that she or he has suffered an injury.
- 6.79 As it is often difficult to anticipate the level of injury and suffering that a child victim of abuse will experience in the future,<sup>79</sup> it is beneficial for all child victims of family violence to be able to access lump sum payments, irrespective of how they experience family violence.

### Perceived barriers to access and lack of awareness of the Act

- 6.80 Even where a victim of family violence may qualify for assistance under the Act, there are perceived barriers to accessibility.
- 6.81 The Royal Commission found that some victims were unaware of their eligibility for assistance on the basis of family violence.<sup>80</sup> It heard from one woman who said that she had only discovered that she could make an application as a victim of family violence after she had applied to VOCAT as a victim of a sexual assault.<sup>81</sup> Service providers also submitted to the Royal Commission that VOCAT was underused by victims of family violence.<sup>82</sup>
- 6.82 This lack of awareness may be attributed to a lack of support and referral services for victims of family violence. This is a particular issue for certain groups of victims. For example, the Royal Commission received a submission from Gay and Lesbian Health Victoria noting the lack of support and referral services for gay, bisexual and trans<sup>\*83</sup>

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72 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume II* (2016) 106. See also Kelly Richards, *Children's Exposure to Domestic Violence in Australia*, Trends and Issues in Crime and Criminal Justice No.419 (Australian Institute of Criminology, 2011), 2; Monica Campo, *Children's Exposure to Domestic and Family Violence: Key Issues and Responses*, CFCA Paper No. 36 (Australian Institute of Family Studies, 2015); K. O'Brian et al, 'Lifting the Cloak of Silence: Resilient Australian Women's Reflected Memories of Their Childhood Experiences of Witnessing Domestic Violence' (2013) 28 *Journal of Family Violence* 95, 96; United Nations Children's Fund, *Behind Closed Doors: The Impact of Domestic Violence on Children* (UNICEF, 2006).

73 The definition of 'primary victim' in s 7 of the *Victims of Crime Assistance Act 1996* (Vic) only extends to persons who are injured or die 'as a direct result of an act of violence committed against him or her.'

74 [2012] VCAT 1740 (16 November 2012).

75 Ibid [21].

76 The applicant suffered from chronic post-traumatic stress disorder and substance abuse, *ibid* [40]-[46].

77 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume II* (2016) 142.

78 *Victims of Crime Assistance Act 1996* (Vic) s 8A(1).

79 Forster and Parkinson describe this as the 'sleeping effect of childhood abuse' see Christine Forster and Patrick Parkinson, 'Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework' (2000) 23(2) *University of New South Wales Law Journal* 172.

80 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 81.

81 Ibid.

82 Ibid.

83 The term 'trans\*' is used here as an umbrella term to denote transgender, transsexual and gender non-conforming persons.



men who have experienced family violence.<sup>84</sup> It also may be due to beliefs in particular communities that crimes can only be committed by ‘evil’ strangers<sup>85</sup> and therefore to a lack of understanding that family violence can give rise to eligibility under the Act.

## Discussion and options for reform

- 6.83 This section considers options for reform that could improve access to financial assistance under the Act for victims of family violence.
- 6.84 In particular, it discusses the possibility of amending the definitions of an ‘act of violence’ and ‘injury’ under the Act.

### Including ‘family violence’ in the definition of an ‘act of violence’

- 6.85 A way of overcoming some of the issues discussed in this chapter would be to change the definition of an ‘act of violence’ to better accommodate victims of family violence.
- 6.86 The Australian Law Reform Commission and New South Wales Law Reform Commission in their joint report, *Family Violence—A National Legal Response*,<sup>86</sup> recommended that ‘act of violence’ be defined to explicitly include family violence, and that victims’ compensation schemes should ensure that evidence of a pattern of family violence can be considered.<sup>87</sup> The Australian Law Reform Commission reiterated this recommendation in its submission to the Victorian Law Reform Commission in relation to its *Victims of Crime in the Criminal Trial Process* reference.<sup>88</sup>
- 6.87 If this recommendation were to be implemented, there are a number of different ways that ‘family violence’ could be defined in the Act. This part discusses three options:
- using the definition of ‘family violence’ from section 5 of the *Family Violence Protection Act 2008* (Vic)
  - using a definition of ‘family violence’ that is limited to offences against the person
  - using a definition of ‘family violence’ that includes non-violent offences, such as breaches of family violence intervention orders and property offences.

### ‘Family violence’ as defined in the *Family Violence Protection Act 2008* (Vic)

- 6.88 One way of implementing the recommendation of the Australian Law Reform Commission and New South Wales Law Reform Commission to explicitly include ‘family violence’ as an ‘act of violence’ in the Act, is by importing the definition of ‘family violence’ found in section 5 of the *Family Violence Protection Act 2008* (Vic).
- 6.89 As mentioned above, this is a broad definition which includes non-criminal behaviour, such as economic and psychological abuse, threats and coercion.
- 6.90 This approach is supported by Christine Forster, who argues that victims’ financial assistance schemes should adopt family violence-specific provisions, which define family violence broadly to include the full range of behaviours that constitute family violence, including financial and emotional abuse.<sup>89</sup>
- 6.91 This is the approach that Queensland recently adopted in an amendment to its *Victims of Crime Assistance Act 2009* (Qld).<sup>90</sup> Once the amendment comes into force, the Queensland scheme will explicitly include ‘domestic violence’ within its definition of an

84 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016), 81.

85 See, eg, Matthew Willis, *Non-disclosure of Violence in Australian Indigenous Communities*, Trends and Issues in Crime and Criminal Justice No 405 (Australian Institute of Criminology, 2011) 3.

86 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010).

87 Ibid 1395 (Recommendation 29-5).

88 Australian Law Reform Commission, Submission No 1 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 18 August 2015, 2.

89 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 207.

90 See *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) (not yet in force)

'act of violence'.<sup>91</sup> 'Domestic violence' is also defined, and has the same meaning that it does in the *Domestic and Family Violence Protection Act 2012* (Qld).<sup>92</sup> This definition, which is similar to the definition of 'family violence' in the *Family Violence Protection Act 2008* (Vic), encompasses physical and sexual abuse, as well as psychological and emotional abuse, economic abuse and behaviour that is threatening, coercive or dominating.<sup>93</sup>

- 6.92 Moreover, this option would enable child victims of family violence to be recognised as primary victims under the Act, irrespective of how they experience the family violence. This is because, as discussed earlier, the definition of 'family violence' in the *Family Violence Protection Act 2008* (Vic) includes 'behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, [family violence]' <sup>94</sup>
- 6.93 However, in their joint submission to the Royal Commission, the Magistrates' Court and Children's Court expressed concern about expanding the eligibility criteria to allow victims of non-criminal acts of family violence to access the scheme.<sup>95</sup>
- 6.94 The Courts considered that 'applications falling under the expanded category may be more complex to determine, and result in unintended consequences'.<sup>96</sup> In particular, they submitted that it could lead to increased notification of alleged perpetrators due to concerns about the need to accord procedural fairness.<sup>97</sup> The problems associated with alleged perpetrator notification in the context of family violence are discussed in Chapter 9.
- 6.95 The Australian Law Reform Commission and New South Wales Law Reform Commission were also of the view that the definition of family violence in victims' financial assistance schemes should be limited to criminal acts. The Commissions stated that 'the adoption of a definition that captures non-criminal conduct would clearly be in direct conflict with the purposes of [victims' compensation] schemes, as they are presently framed'.<sup>98</sup>

### 'Family violence' limited to offences against the person

- 6.96 The New South Wales victims' assistance scheme explicitly includes family violence as part of an 'act of violence'.<sup>99</sup> However, it limits family violence to criminal offences against the person. The *Victims' Rights and Support Act 2013* (NSW) defines 'domestic violence' as a personal violence offence (within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)) against a family member.<sup>100</sup>
- 6.97 This approach could be implemented in the Victorian Act by inserting a definition of 'family violence' into the Act that is limited to personal violence offences, such as physical and sexual assault.
- 6.98 Although this approach would not necessarily expand the existing eligibility criteria, it could enable decision makers to take into account the family violence context in which particular acts take place. This approach could help to highlight aggravating factors surrounding particular criminal acts, such as emotionally abusive behaviour, while ensuring consistency with the other relevant offences included in the Act's definition of an 'act of violence', as well as with the Act's object and purpose.

91 Ibid s 29.

92 Ibid s 96(2).

93 *Domestic and Family Violence Protection Act 2012* (Qld) s 8. However, note that unlike s 5(1) of the *Family Violence Protection Act 2008* (Vic), this definition does not include behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, family violence.

94 *Family Violence Protection Act 2008* (Vic) s 5(1)(b).

95 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to the Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015), 58.

96 Ibid.

97 Ibid.

98 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 285.

99 *Victims Rights and Support Act 2013* (NSW) s 19(3).

100 *Ibid* s 19(8)(f). The offender must be the victim's spouse, former spouse, de facto partner, former de facto partner, person with whom the victim had a personal intimate relationship, person with whom the victim was living (including in a residential facility), person with whom the victim had a relationship of dependence, parent, guardian, step-parent, child (including by guardianship), step-child, brother, sister, half-brother, half-sister, step-brother and step-sister.

## Incorporating non-violent criminal offences

- 6.99 Another option for reform, which sits in the middle ground, is to insert a crime-based definition of ‘family violence’ into the Act that includes non-violent crimes in that definition. This would ensure that the acts of family violence that give rise to eligibility for assistance would remain generally consistent with the purpose of the Act, as they would maintain a criminal character. However, by expanding the definition to include other forms of crimes, the scheme would be opened up to victims of family violence which is not of a sexual or physical nature.
- 6.100 In addition to offences against the person, the Australian Capital Territory victims of crime financial assistance legislation provides for a separate category of ‘domestic violence offences’ which can give rise to eligibility for financial assistance. The ‘domestic violence offences’ listed in that Act are all of a non-violent nature, and include property offences, such as destroying or damaging property, arson and trespass, driving offences, offences involving offensive weapons, and contravention of family violence protection orders.<sup>101</sup>
- 6.101 The Victorian Act could incorporate this approach by including in its definition of ‘family violence’ a list of non-violent criminal acts that are frequently committed in the family violence context.
- 6.102 In particular, the definition of ‘family violence’ in the Act could include breaches of family violence intervention orders. Section 123 of the *Family Violence Protection Act 2008* (Vic) makes it an offence to contravene a family violence intervention order with a penalty of level 7 imprisonment (maximum 2 years) or a level 7 fine (maximum 240 penalty units) or both. Moreover, section 123A makes it an offence punishable by level 6 imprisonment (maximum 5 years) or level 6 fine (maximum 600 penalty units) or both, to contravene a family violence intervention order with the intention of causing physical or mental harm or fear for safety.
- 6.103 The inclusion of these offences in the definition of ‘family violence’ would create a connection between the Act and the *Family Violence Protection Act 2008* (Vic), even if the same definition of ‘family violence’ is not used. Furthermore, it would overcome the anomaly that the Royal Commission identified in terms of eligibility under the Act, whereby two victims of family violence who experience substantially similar conduct may have differing abilities to access the scheme. As described above, the Royal Commission noted that because of the definition of an ‘act of violence’ under the Act, victims of breaches of intervention orders which do not involve assault, injury or the threat of injury, are currently ineligible for financial assistance.<sup>102</sup>
- 6.104 Another class of offence that could be included in the definition of ‘family violence’ in the Act is crimes against property. As outlined above, property damage and economic abuse are common forms of family violence that can have far-reaching consequences for victims.
- 6.105 There has been consideration of whether an ‘act of violence’ should be expanded to include property offences outside the context of family violence.
- 6.106 For example, as part of its reference on victims of crime in the criminal trial process, the Commission received a submission that the eligibility criteria in the Act should be expanded to include property offences such as property damage, burglary and online fraud.<sup>103</sup> Victoria Police also submitted that it was open to this option, noting that victims of non-violent offences tend to suffer from the same type of psychological, emotional and social impacts as victims of crimes against the person.<sup>104</sup>

101 *Victims of Crime (Financial Assistance) Act 2016* (ACT), div. 1.2.2, pt 1.2 of sch 1.

102 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

103 Dianne Hadden, Submission No 21 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (2015) 11 [49].

104 Victoria Police, Submission No 26 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (12 October 2015) 31–2.

- 6.107 However, the Commission decided there was no compelling reason for such an expansion.<sup>105</sup> In arriving at this conclusion, the Commission took into account the Magistrates' Court's submission that 'expanding eligibility to victims of non-violent and property crimes would substantially increase the number and complexity of claims and the costs of the scheme'.<sup>106</sup>
- 6.108 In addition, the Commission noted Victoria Police's submission that the expansion of crimes compensation schemes to cover property offences could act as a disincentive for individuals to obtain property insurance.<sup>107</sup> It also referred to the New Zealand Law Commission's consideration of this issue in its 2010 report, *Compensating Crime Victims*,<sup>108</sup> which found that state-funded compensation for property loss would provide little social benefit and could create fundamental problems, such as those relating to property insurance.<sup>109</sup>
- 6.109 It should be noted, however, that concerns relating to property insurance may not be applicable in the context of family violence. This is because victims of family violence may already be precluded from making insurance claims for property damage which results from the actions of a family member whose name is also on the insurance policy. Therefore, by limiting the property offences that can give rise to eligibility for assistance under the Act to those committed as part of family violence, the Act may not operate as a disincentive to taking out property insurance.

### Changing the requirements for 'injury'

- 6.110 Another option for reform is to expand the injuries covered by the Act. Meyering writes that the definition of 'mental injury' in the Victorian Act is one of the most restrictive in Australia.<sup>110</sup> She contrasts it with other jurisdictions, which refer to 'psychological or psychiatric harm',<sup>111</sup> 'mental and nervous shock'<sup>112</sup> and 'impairment of ... mental health'.<sup>113</sup>
- 6.111 Any one of these less restrictive variations could be adopted in Victoria. This would make the scheme more accessible to victims of family violence who do not have a recognised mental disorder or illness. It would also reduce the need to obtain a psychiatric assessment report, thereby allowing victims of family violence to pursue counselling or other services that are suited to their needs, rather than medical reports geared only toward their legal application.
- 6.112 Alternatively, or additionally, the Act could be amended to include a broader range of injuries for victims of family violence. Both the Australian Capital Territory and Queensland schemes recognise an expanded category of injuries for victims of sexual offences and family violence, including a sense of violation, a reduced sense of self-worth, increased fear or feelings of insecurity, and reduced capacity to participate in sexual activity.<sup>114</sup> The Victorian Act could also recognise such injuries in relation to family violence.
- 6.113 Another option for reform is to remove the requirement of proof of injury for victims of family violence. Forster suggests that this would have 'the potential to provide victims of family violence with an easier and less traumatic means of accessing compensation for their non-financial losses'.<sup>115</sup>

105 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 246 [9.100].

106 Ibid 245 [9.99].

107 Ibid [9.98].

108 Ibid 246 [9.100].

109 New Zealand Law Commission, *Compensating Crime Victims*, Report No 121 (2010) 26–7.

110 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 5.

111 *Victims Rights and Support Act 2013* (NSW) s 18.

112 *Criminal Injuries Compensation Act 2003* (WA) s 3; *Victims of Crime Act 2001* (SA) s 4.

113 *Victims of Crime Assistance Act 1976* (Tas) s 2(2).

114 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 9(1)(c). The *Victims of Crime Assistance Act 2009* (Qld) currently only recognises this expanded range of injuries in relation to victims of sexual offences, see s 27(1)(f). However, the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) (not yet in force) will amend this provision so that it also applies to victims of domestic violence, see s 30.

115 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 207.

- 6.114 This is the approach of the Northern Territory victims' financial assistance scheme in relation to sexual offences. The *Victims of Crime Assistance Regulations 2007* (NT) set out a range of sexual offences that constitute 'compensable violent acts' for which a lump sum can be awarded to a victim without evidence of injury.<sup>116</sup> This approach could be applied to family violence in the Victorian Act.
- 6.115 Forster advocates for a model of financial assistance whereby victims of family violence can access set categories of award depending on the severity of the family violence, without requiring proof of injury.<sup>117</sup> This model could be incorporated into the Act by explicitly adding different forms of family violence to the categories of special financial assistance. The categories of special financial assistance are discussed further in Chapter 7. As the Victorian scheme currently stands, this would mean that victims of family violence would only need to prove that they had suffered a 'significant adverse effect' in order to be eligible for assistance. Alternatively, the Act could be amended so that victims need only to establish that the family violence occurred.
- 6.116 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the eligibility criteria in the Act to better accommodate victims of family violence. Specific questions for consideration are set out below.

## Questions

### Eligibility test generally

- 1 How do the eligibility requirements of the Act impact on family violence victims, including child victims?
- 2 Should the eligibility criteria be broadened to take into account the unique dynamics and characteristics of family violence? If so, how should this be done?
- 3 How should the Act deal with patterns of non-criminal behaviour that result in injury?

### Expanding the definition of an 'act of violence'

- 4 Should the definition of an 'act of violence' be amended to include family violence? If so, how should this be done? How should the experience of child family violence victims be included in this definition?
- 5 Should other offences not currently covered by the definition of an 'act of violence' also be included in the definition of 'act of violence'? If so, what offences should be included?
- 6 Alternatively, should there be separate eligibility criteria for victims of family violence? If so, what criteria should there be?

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*Victims of Crime Assistance Regulations 2007* (NT) reg. 17 and schedule 1.  
Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 207.

## Questions

### **Expanding the definition of 'injury'**

- 7 Should the definition of 'injury' be expanded to include the non-physical and/or psychological injuries often experienced by victims of family violence? If so, what injuries should be included?
- 8 Should the definition of 'injury' be amended to better reflect the cumulative impact of family violence over time? If so, how should this be done?

### **Other barriers to accessibility**

- 9 What non-legislative barriers exist for family violence victims in accessing the Act?
- 10 How should non-legislative barriers to access be addressed?

# Assistance available

**58** Introduction

**58** Categories and quantum of awards

**64** How do the categories and quantum of awards affect victims of family violence?

**67** Discussion and options for reform

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## 7. Assistance available

### Introduction

- 7.1 This chapter outlines the different forms of financial assistance available to victims of crime under the *Victims of Crime Assistance Act 1996* (Vic) (the Act). In particular, this chapter considers:
- the categories and quantum of awards, including the total financial assistance available and the different types of assistance that victims of crime can access
  - the reduction of awards for ‘related criminal acts’.
- 7.2 This chapter relates to the second matter in the terms of reference, which asks the Commission to consider, within the total financial assistance available, the categories and quantum of awards with regard to the cumulative impact of family violence behaviour on victims.
- 7.3 The chapter then considers the ways in which the provisions dealing with the categories and quantum of awards do not take into account the cumulative harm caused by a pattern of family violence, which may occur over a long period of time and involve multiple acts of violence.
- 7.4 Finally, this chapter outlines options for reform to improve the adequacy of the financial assistance for victims of family violence and poses questions for consideration.

### Categories and quantum of awards

- 7.5 The categories and quantum of awards available to victims of crime are set out in sections 8, 10, 13 and 15 of the Act and are organised according to the class of victim under which an applicant makes a claim for financial assistance.
- 7.6 Special financial assistance for primary victims is dealt with under section 8A of the Act and the *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) (the Regulations).
- 7.7 Section 4 of the Act sets out how the Victims of Crime Assistance Tribunal (VOCAT) should treat ‘related criminal acts’.

### Total financial assistance available

- 7.8 The Act limits the amount of assistance that can be awarded to a particular victim in respect of an act of violence.
- 7.9 The maximum award for primary victims is \$60,000 plus \$10,000 of special financial assistance.<sup>1</sup>



- 7.10 The maximum award for secondary victims is \$50,000.<sup>2</sup>
- 7.11 The maximum award for any one related victim is \$50,000.<sup>3</sup> However, the total maximum cumulative amount that may be awarded to all the related victims of any one primary victim is \$100,000.<sup>4</sup> In exceptional circumstances, VOCAT may award assistance to a related victim in excess of the maximum cumulative amount.<sup>5</sup>

### Current categories of award

- 7.12 Depending on whether a person applies to VOCAT as a primary, secondary or related victim, there are different categories of award available to her or him.
- 7.13 There are three main categories of award that primary victims can access:
- Expenses actually incurred or reasonably likely to be incurred for:
    - reasonable counselling services
    - medical expenses as a direct result of the act of violence
    - loss of earnings of up to \$20,000 as a direct result of the act of violence
    - loss or damage to clothing worn at the time of the act of violence
    - safety-related expenses as a direct result of the act of violence.<sup>6</sup>
  - In exceptional circumstances, an amount for other expenses actually incurred or reasonably likely to be incurred to assist in the primary victim's recovery.<sup>7</sup>
  - Special financial assistance<sup>8</sup> (discussed further below).
- 7.14 Secondary victims are able to make a claim for assistance for:
- Expenses actually incurred or reasonably likely to be incurred for:
    - reasonable counselling services
    - medical expenses actually and reasonably incurred or reasonably likely to be incurred as a direct result of witnessing, or becoming aware of, the act of violence.<sup>9</sup>
  - In exceptional circumstances, and within the limit of the total sum available to secondary victims, an amount of up to \$20,000 for loss of earnings that is suffered or reasonably likely to be suffered as a direct result of the act of violence.<sup>10</sup>
  - In exceptional circumstances, and within the limit of the total sum available to secondary victims, other expenses actually and reasonably incurred or reasonably likely to be incurred to assist in the secondary victim's recovery where:
    - the secondary victim was under 18 at the time of the act of violence, the primary victim was their family member,<sup>11</sup> and the secondary victim was injured by witnessing the act of violence<sup>12</sup>
    - the secondary victim was a parent or guardian of the primary victim, the primary victim was under 18 at the time of the event, and the secondary victim was injured by subsequently becoming aware of the act of violence.<sup>13</sup>

2 Ibid s 10(1).

3 Ibid s 13(1).

4 Ibid s 12(1). Note any amount awarded for funeral expenses of the primary victim will be deducted from this amount.

5 Ibid s 12(2).

6 Ibid s 8(2).

7 Ibid s 8(3).

8 Ibid s 8A.

9 Ibid s 10(2).

10 Ibid s 10(3).

11 A 'family member, in relation to a person' is defined in s 10A(3) of the Act as a spouse, domestic partner, former spouse, former domestic partner, a child who normally or regularly resides with that person, a person who is or has been ordinarily a member of the household of that person or a relative of that person. 'Relative' is further defined in s 10A(4) of the Act as a father, mother, grandfather, grandmother, step-father, step-mother, father-in-law, mother-in-law, son, daughter, grandson, granddaughter, step-son, step-daughter, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, brother-in-law, sister-in-law, uncle, aunt, uncle-in-law, aunt-in-law, nephew, niece, cousin, or anyone who would be a relative of the domestic partner if they were married.

12 *Victims of Crime Assistance Act 1996* (Vic) s 10A(1).

13 Ibid s 10A(2).

- 7.15 Related victims can make a claim for the following:
- Expenses actually incurred or reasonably likely to be incurred for:
    - reasonable counselling services
    - medical expenses actually and reasonably incurred or reasonably likely to be incurred or funeral expenses as a direct result of the death of the primary victim
    - distress experienced or reasonably likely to be experienced as a direct result of the death of the primary victim
    - loss of money that the related victim, but for the death of the primary victim, would have been reasonably likely to receive from the primary victim during a period of up to two years after that death
    - other expenses actually and reasonably incurred or reasonably likely to be incurred as a direct result of the primary victim's death.<sup>14</sup>
  - In exceptional circumstances, and within the limit of the total sum available to related victims, other expenses actually and reasonably incurred or reasonably likely to be incurred to assist in the related victim's recovery from the death of the primary victim.<sup>15</sup>
- 7.16 A person who incurs the funeral expenses of a primary victim, but who is not a related victim, is also able to make a claim for assistance for those expenses.<sup>16</sup> The maximum cumulative amount that may be awarded to a pool of related victims will be reduced by any award made in respect of funeral expenses.<sup>17</sup>
- 7.17 Other than claims made by primary victims for safety-related expenses and clothing worn at the time of the act of violence, the Act explicitly excludes applications for expenses incurred through loss or damage to property.<sup>18</sup>
- 7.18 As noted above, the Act expressly requires most expenses for which an application for financial assistance is made to be 'reasonable'.
- 7.19 The term 'reasonable' has been judicially considered. In *CS v Victims of Crime Assistance Tribunal*,<sup>19</sup> the Victorian Civil and Administrative Tribunal (VCAT) considered the meaning of 'reasonable' in the context of 'reasonable counselling services' under section 8(2)(a) of the Act. In that case VCAT referred to the definition of 'reasonable' in the *Oxford English Dictionary*: 'not greatly less or more than might be expected; inexpensive, not extortionate'. VCAT also drew assistance from the definition of 'reasonable' in the *Transport Accident Act 1986 (Vic)*, which requires the decision maker to have regard to the service actually rendered and the necessity of that service in the circumstances.<sup>20</sup>
- 7.20 In that case, VCAT concluded that the applicant's claim for counselling, which had been received on a weekly to fortnightly basis for five years, was unreasonable, due to there being little evidence of improvement, there having been no attempt to reduce the counselling sessions, and there being other factors in the applicant's life that VCAT considered had contributed to her need for counselling.<sup>21</sup>
- 7.21 VCAT has also considered the meaning of 'exceptional circumstances' for the purposes of making a claim for additional 'recovery expenses'. In *Mendez v Victims of Crime Assistance Tribunal*,<sup>22</sup> a case concerning a claim for financial assistance with respect to an assault by the applicant's ex-partner, VCAT held that 'exceptional circumstances' means 'circumstances out of the ordinary course'.<sup>23</sup> In *AVA v Victims of Crime Assistance*

14 Ibid s 13(2).

15 Ibid s 13(4).

16 Ibid s 15.

17 Ibid s 12(1).

18 Ibid ss 8(4) and 13(3).

19 [2006] VCAT 1061 (9 June 2006).

20 Ibid [41]–[43].

21 Ibid [51]–[63].

22 [2011] VCAT 1237 (8 July 2011).

23 Ibid [49].

*Tribunal*,<sup>24</sup> VCAT held that whether or not exceptional circumstances exist involves a consideration of ‘all of the circumstances, including the injury and the nature of the offending’.<sup>25</sup> VCAT has also considered the therapeutic value of the particular expense sought.<sup>26</sup>

- 7.22 Assistance can be awarded under the ‘recovery expenses’ category for a diverse range of items and services. In *Mendez v Victims of Crime Assistance Tribunal*,<sup>27</sup> for example, VCAT awarded the applicant financial assistance under this category for a gym membership and equipment for a beauty therapy course.<sup>28</sup> In *Hay v Victims of Crime Assistance Tribunal*,<sup>29</sup> which concerned child sexual assault (outside the context of family violence), VCAT awarded financial assistance for the removal of tattoos, finding that it would assist the applicant to obtain employment, which would likely be a key element in his recovery.<sup>30</sup>
- 7.23 The Commission also heard in preliminary consultations that the ‘recovery expenses’ category is sometimes used by victims of family violence to recover expenses flowing from financial abuse or property damage, which would otherwise be unavailable under the Act.

### Special financial assistance

- 7.24 In addition to assistance for specific expenses incurred or likely to be incurred, the Act provides that primary victims can be awarded special financial assistance.<sup>31</sup>
- 7.25 Special financial assistance is a lump sum that can be awarded as ‘a symbolic expression by the state of the community’s sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime’.<sup>32</sup> The meaning of ‘significant adverse effect’, and its implications for victims of family violence, is discussed in Chapter 6.
- 7.26 Special financial assistance is classified into four categories; A, B, C and D. These categories are based on the severity of the act of violence, with Category A covering the most serious offences and Category D covering the least serious.
- 7.27 The offences that fall into each category are set out in the schedule in the *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic). They are as follows:
- Category A: offences involving sexual penetration and attempted murder
  - Category B: offences involving attempted sexual penetration, an indecent act, an indecent assault, armed robbery, aggravated burglary and deprivation of liberty for the purpose of sexual penetration or demanding a ransom
  - Category C: offences involving an attempt to commit any of the offences in Category B, a death threat, conduct endangering life, the infliction of serious injury and robbery
  - Category D: offences involving an attempt to commit any of the offences in Category C, a threat of injury, assault, attempted assault, deprivation of liberty (other than for sexual penetration or ransom) and any other act of violence.
- 7.28 The minimum and maximum amounts for each category are prescribed in section 8A(5) of the Act. They appear in Table 1.

24 [2010] VCAT 2078 (23 December 2010).

25 Ibid [81]–[82].

26 See, eg, *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) [49]–[51]; *MK v Victims of Crime Assistance Tribunal* [2013] VCAT 1582 (10 September 2013) [78]; *Hay v Victims of Crime Assistance Tribunal* [2002] VCAT 45 (15 February 2002) [26]–[29]; *JM v Victims of Crime Assistance Tribunal* [2002] VCAT 496 (17 June 2002) [31].

27 [2011] VCAT 1237 (8 July 2011).

28 Ibid [50].

29 [2002] VCAT 45 (15 February 2002).

30 Ibid [27]–[29].

31 *Victims of Crime Assistance Act 1996* (Vic) s 8A.

32 Ibid s 1(2)(b). See also Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 79.

**Table 1: Minimum and maximum payments for each category of special financial assistance**

	Minimum amount	Maximum amount
<b>Category A</b>	\$4667	\$10,000
<b>Category B</b>	\$1300	\$3250
<b>Category C</b>	\$650	\$1300
<b>Category D</b>	\$130	\$650

- 7.29 The Regulations, however, provide for three circumstances in which a higher maximum award of special financial assistance is available for acts of violence that would ordinarily fall within a category with a lower maximum award. In practice, this is often described as an ‘uplift’.
- 7.30 First, regulation 7 provides that the Category A maximum amount is available for acts of violence in Categories B, C and D where:
- the victim has suffered a very serious physical injury
  - the victim has been infected with a very serious disease or
  - the applicant has been the victim of related criminal acts being acts of indecent assault or sexual penetration.
- 7.31 The Regulations define ‘very serious injury’ as ‘actual physical bodily harm to the body of a permanent or long term duration that involves loss of a body function, disfigurement of a part of the body, total or partial loss of a part of the body, loss of a foetus or loss of fertility’.<sup>33</sup>
- 7.32 ‘Very serious disease’ is defined as ‘a disease that is life threatening in nature and includes HIV’.<sup>34</sup>
- 7.33 Secondly, regulation 8 provides that the Category B maximum is available for acts of violence in Category C or D where the victim was a child, elderly or impaired at the time of the act of violence and:
- the victim has suffered a serious injury
  - the victim has suffered deprivation of liberty or
  - the applicant has been the victim of related criminal acts of violence.
- 7.34 ‘Serious injury’ is not defined in the Regulations. However, VCAT has held that ‘serious’ should be given its ordinary dictionary meaning of ‘not slight or negligible’<sup>35</sup> or something more than ‘superficial or trifling’.<sup>36</sup>
- 7.35 In *Moisidis v Victims of Crime Assistance Tribunal*,<sup>37</sup> VCAT found that the applicant suffered from a ‘serious injury’ due to his ongoing need to take Panadeine Forte for neck pain, his difficulties moving his neck and the fact that he continued to experience a buzzing sound in his ears and had severe headaches approximately three to four times a week.<sup>38</sup> VCAT also took into account the fact that he had symptoms of post-traumatic stress, which could develop into a post-traumatic stress disorder.<sup>39</sup>
- 7.36 In contrast, in *Tucker v Victims of Crime Assistance Tribunal*,<sup>40</sup> VCAT found that a small bite wound requiring stitches and two courses of antibiotics did not constitute a ‘serious injury’. This was because, despite leaving a residual mark, the injury presented no further

33 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 5.

34 *Ibid.*

35 *Tucker v Victims of Crime Assistance Tribunal* [2009] VCAT 2453 (19 November 2009) [13].

36 *Moisidis v Victims of Crime Assistance Tribunal* [2006] VCAT 1919 (20 September 2006) [17].

37 *Ibid.*

38 *Ibid* [18].

39 *Ibid* [19].

40 [2009] VCAT 2453 (19 November 2009).

complications nor was there any suggestion of a diagnosed mental disorder flowing from the incident.<sup>41</sup> VCAT also noted that the injury had not required any inpatient treatment and ‘it was well on its way to healing in a single month’.<sup>42</sup>

- 7.37 Thirdly, regulation 9 provides that the Category C maximum amount is available for Category D acts of violence where:
- the victim was a child, elderly or impaired at the time of the act of violence or
  - the applicant has been the victim of related criminal acts of violence.

### Treatment of ‘related criminal acts’

7.38 Under the Act, ‘related criminal acts’ can be treated as a single act of violence for the purposes of making an award.<sup>43</sup>

7.39 Criminal acts are considered ‘related’ in the following circumstances:<sup>44</sup>

- They were committed against the same person and they occurred at approximately the same time.
- They were committed against the same person, they occurred over a period of time and they were committed by the same person or group of people.
- They were committed against the same person and they share some other common feature.
- They each contribute to the injury or death for which an application is made; or
- VOCAT considers that they ought to be treated as related criminal acts.

7.40 The effect of the ‘related criminal acts’ provision is to reduce the amount of financial assistance payable to a victim of multiple related crimes.<sup>45</sup>

7.41 However, VOCAT has the discretion not to treat ‘related criminal acts’ as a single act if it considers that in ‘the particular circumstances of [the] acts, they ought not to be treated as related’.<sup>46</sup>

7.42 Furthermore, as outlined above, there are circumstances in which the existence of a series of ‘related criminal acts’ can increase the amount of special financial assistance available. To summarise, these circumstances are as follows:

- Where the applicant is a victim of a series of related criminal acts falling within Category D, the maximum award available is increased from the Category D maximum amount (\$650) to the Category C maximum amount (\$1300).<sup>47</sup>
- Where the applicant is a victim of a series of related acts of indecent assault or sexual penetration, the maximum award available for acts falling within Category B (\$3250), Category C (\$1300) or Category D (\$650) is increased to that of Category A (\$10,000).<sup>48</sup>
- Where the applicant is the victim of a series of related criminal acts and they were a child, elderly or impaired at the time that any of those acts was committed, the maximum award available for acts falling within Category C (\$1300) or Category D (\$650) is increased to the maximum available in Category B (\$3250).<sup>49</sup>

41 Ibid [14].

42 Ibid.

43 *Victims of Crime Assistance Act 1996* (Vic) s 4(4).

44 Ibid s 4(1)(a), (b) and (c).

45 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 9; Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 198–9.

46 *Victims of Crime Assistance Act 1996* (Vic) s 4(1)(a).

47 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 9(a).

48 Ibid reg 7(c).

49 Ibid reg 8(b).

## How do the categories and quantum of awards affect victims of family violence?

- 7.43 As this part outlines, victims of family violence appear to receive fewer awards and lesser amounts of assistance from VOCAT than other victims of crime.
- 7.44 This is most likely due to the Act's conception of a criminal act as an 'isolated random act of a deviant stranger'<sup>50</sup> rather than something that can occur over a long period of time and within an intimate setting. As Victoria Legal Aid submitted to the Victorian Royal Commission into Family Violence (the Royal Commission), the Act is better suited to 'one-off' acts of violence where the victim and perpetrator are not known to each other.<sup>51</sup>
- 7.45 This submission is reflected in the categories and quantum of awards available under the Act. In particular, the Royal Commission noted that the 'related criminal acts' provision and the special financial assistance categories do not sufficiently take into account the cumulative harm of family violence.<sup>52</sup>
- 7.46 This part considers the difficulties that these provisions present for victims of family violence, including children.

### Prevalence of awards for family violence victims

- 7.47 In the VOCAT *Annual Report 2015–16*, VOCAT recorded 388 applications for assistance due to family violence. Of those applications for assistance, VOCAT records that it made 113 awards.<sup>53</sup> This means that 29 per cent of family violence applications were granted.
- 7.48 This may be compared to the numbers recorded in respect of other categories of offence. In the 2015–2016 financial year, 69 per cent of applications made concerning assault were granted,<sup>54</sup> 76 per cent concerning robbery were granted<sup>55</sup> and 67 per cent concerning rape were granted.<sup>56</sup>
- 7.49 These numbers appear to indicate that applications for assistance in relation to family violence tend to be less successful than those made in relation to other criminal acts. It is not clear why this is the case. The difficulties that victims of family violence encounter in relation to the eligibility test, as discussed in the previous chapter, may contribute to the relatively low number of successful applications for this group of victims.
- 7.50 It should, however, be noted that the data may not represent the full picture. VOCAT noted in its *Annual Report 2015–16* that it only began recording the number of applications lodged in respect of family violence part way through the 2015–2016 financial year. This means that the numbers reported do not represent a full year of applications.
- 7.51 Preliminary consultations also indicated that the way that family violence matters are currently recorded is predominantly based on whether or not the applicant describes the 'act of violence' as 'family violence'. This means that some applications identified as relating to physical or sexual assault may also relate to family violence.

### Quantum of awards for family violence victims

- 7.52 There is limited data on the amount of financial assistance usually received by victims of family violence.

50 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 192–3.

51 Victoria Legal Aid, Submission No 919 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 53.

52 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

53 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 50–1.

54 VOCAT received 3092 applications in relation to assault, 2161 of which were granted: *ibid.*

55 VOCAT received 313 applications in respect of robbery, 240 of which were granted: *ibid.*

56 VOCAT received 273 applications in relation to rape, 183 of which were granted: *ibid.*

7.53 However, the Royal Commission did identify some aspects of the scheme which may result in victims of family violence receiving smaller awards compared to victims of other criminal acts. These were:

- the ‘related criminal acts’ provision
- the categories of special financial assistance.

7.54 These issues are discussed further below.

### The related criminal acts provision

7.55 As mentioned above, the Act provides that a series of ‘related criminal acts’ can be considered a single criminal act if they ‘occurred over a period of time and were committed by the same person or group of persons’.<sup>57</sup>

7.56 This provision can operate to disproportionately reduce the awards received by victims of family violence.<sup>58</sup> This is because ‘Domestic violence, almost by definition, will involve repeated acts of abuse by the same offender’.<sup>59</sup>

7.57 As the Magistrates’ Court and Children’s Court jointly submitted to the Royal Commission, the related criminal acts provision means:

that a victim of long-term, chronic family violence (a series of related acts) is placed on an equivalent footing to someone who has been injured in a one-off assault, for example in a brawl between strangers.<sup>60</sup>

7.58 As part of their report into family violence, the Australian Law Reform Commission and New South Wales Law Reform Commission received a submission from the Wirringa Baiya Aboriginal Women’s Legal Centre Inc, stating that:

... it is grossly unfair and unjust that a victim of multiple acts of violence should be disadvantaged by the fact that her offender happens to be the same person to another applicant who was the victim of different acts of violence committed by different offenders.<sup>61</sup>

7.59 Forster illustrates this point with the example of a retailer who is the victim of a series of robberies by different offenders.<sup>62</sup> While the acts of violence perpetrated against such a victim might be very similar in nature, the victim would be unlikely to have their claim reduced due to the robberies having been carried out by different perpetrators.<sup>63</sup> In contrast, a victim of a series of acts of family violence perpetrated by the same family member or group of family members, would be likely to receive a reduced award.<sup>64</sup>

7.60 Despite the issues discussed here, preliminary consultations undertaken by the Commission indicated that the fact that the ‘related criminal acts’ provision enables victims of family violence to make only one application, rather than multiple, can benefit the applicant by simplifying the process. Nevertheless, this benefit was often seen to be outweighed by the drawback of having a victim’s claim reduced.

57 *Victims of Crime Assistance Act 1996* (Vic), ss 4(1)(a)(ii) and 4(4).

58 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 199–200.

59 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 9.

60 Magistrates’ Court of Victoria and Children’s Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 59.

61 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, cited in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, Report No 114 and NSWLRC Report No 128 (2010) 1392.

62 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 200.

63 *Ibid.*  
64 *Ibid.*

## Limitations of special financial assistance for family violence victims

- 7.61 Another key issue raised in the Royal Commission was that the special financial assistance categories do 'not sufficiently take into account the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence'.<sup>65</sup>
- 7.62 This is because the relevant categories are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.<sup>66</sup>
- 7.63 The Royal Commission found that victims of family violence who are not victims of criminal acts in the higher categories, such as attempted murder or offences involving sexual penetration (Category A):
- ... may only be eligible for the amount tied to the 'less serious' offences in perhaps category D or C—despite potentially having endured these 'less serious' offences over a long period of time.<sup>67</sup>
- 7.64 The Royal Commission heard from one witness who made two separate applications to VOCAT, one for a rape by a stranger and one in respect of family violence. She received an award of \$10,000 for the rape and \$1000 for the family violence. The victim stated that she found it 'odd that [family violence] weighed less on the scale', considering the devastating effect the family violence had had on her life compared to the rape 'which was horrible ... but ... was one night of [her] life'.<sup>68</sup>
- 7.65 In their submission to the Royal Commission, the Magistrates' Court and the Children's Court also provided the example of a Koori woman who had endured years of physical and psychological abuse by her former partner, only to receive \$1300 in special financial assistance because the acts of violence that she had experienced fell within Category C.<sup>69</sup>
- 7.66 While the maximum award for a category of special financial assistance can be increased where there has been a series of 'related criminal acts', the Magistrates' Court and Children's Court pointed out to the Royal Commission that this can only be done in limited circumstances.<sup>70</sup>
- 7.67 As mentioned above, a series of 'related criminal acts' will only operate to increase the maximum award available where those acts fall within Category D (increasing the maximum to Category C),<sup>71</sup> where the acts constitute indecent assault or sexual penetration<sup>72</sup> or where the victim was a child, elderly or impaired at the time of the acts.<sup>73</sup>
- 7.68 Another concern with the availability of special financial assistance under the Act is that it may not adequately account for the experiences of child family violence victims.
- 7.69 The fact that special financial assistance can only be awarded to primary victims means that many child family violence victims are unable to access it. This is because children often experience family violence by hearing, witnessing or otherwise being exposed to it, rather than by having the violence directly perpetrated against them. As a consequence, many child victims are classified as secondary or related victims under the Act.
- 7.70 Further, even where a child is recognised as a primary victim and therefore able to claim special financial assistance, the categories of special financial assistance do not sufficiently acknowledge the long-term and far-reaching consequences of experiencing family violence as a child. While being a child at the time of the act of violence enables a primary victim to be eligible for a higher maximum award of special financial assistance

65 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

66 Women's Legal Service Victoria, Submission 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence* (19 June 2015) 53.

67 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 79.

68 Ibid.

69 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 61–2.

70 Ibid 59.

71 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 9(a).

72 Ibid reg 7(c).

73 Ibid reg 8(b).



(an ‘uplift’), this is only in limited circumstances; where the act of violence would ordinarily fall in Category C or D and the child victim also:

- suffered a serious injury
- was the victim of related criminal acts of violence or
- suffered a deprivation of their liberty.<sup>74</sup>

## Discussion and options for reform

7.71 In order to ensure that the Act takes into account the cumulative harm experienced by victims of family violence, consideration could be given to amending both the ‘related criminal acts’ provision and the special financial assistance categories. This part provides different options for reform with respect to these two parts of the scheme.

### Reframing the ‘related criminal acts’ provision

7.72 One way to overcome some of the issues outlined in this chapter is to reframe the ‘related criminal acts’ provision so that it does not unfairly affect victims of family violence.

7.73 The Australian Law Reform Commission and New South Wales Law Reform Commission in their joint report, *Family Violence—A National Legal Response*,<sup>75</sup> recommended that victims’ compensation schemes should not provide that acts are ‘related’ merely because they are committed by the same offender.<sup>76</sup>

7.74 This recommendation could be implemented by adding other criteria to the circumstances in which acts carried out by the same perpetrator or group of perpetrators are considered ‘related’. For example, section 4(a) of the Act could be amended to require that the acts were committed by the same person *and* that they share some other common factor in order to be ‘related’, rather than these being separate and distinct criteria as is currently under the Act.

7.75 The recommendation of the Australian Law Reform Commission and New South Wales Law Reform Commission could also be implemented by removing the reference to the same perpetrator or perpetrators in subsection 4(a)(ii) of the Act all together.

7.76 Both of these options would reduce the circumstances in which a victim of family violence would have her or his claim for multiple acts of violence reduced, due to the fact that those acts were performed by the same family member.

7.77 However, Forster argues that the recommendation of the Australian Law Reform Commission and New South Wales Law Reform Commission does not go far enough. She writes that the other grounds that are used to collapse multiple crimes into a single crime would still disproportionately affect victims of family violence.<sup>77</sup> This is because acts of family violence frequently share other ‘common factors’. For example, ‘the acts of violence are often similar (whether physical, sexual, emotional or economic) and typically occur ... in the same location (the family home)’.<sup>78</sup>

7.78 This means that even if the reference to the same perpetrator in section 4 of the Act were removed, related acts of family violence may still be treated as a single act. This could be because they ‘share some other common factor’ under subsection 4(1)(a)(iii) or because the ‘Tribunal considers that they ought to be treated as related criminal acts’ under subsection 4(1)(c) of the Act.

74 Ibid.

75 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010).

76 Ibid 1395 (Recommendation 29-5). The ALRC reiterated this recommendation in its submission to the VLRC in relation to the Victims of Crime in the Criminal Trial Process Reference: Australian Law Reform Commission, Submission No 1 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 18 August 2015, 2.

77 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 199.

78 Ibid 199–200.

- 7.79 In light of these concerns, another option could be to exclude family violence from the operation of the ‘related criminal acts’ provision. Alternatively, the Act could be amended so that only acts of violence committed at the same time are considered ‘related’.
- 7.80 The Australian Capital Territory legislation offers another possibility. Section 44(2) of the *Victims of Crime (Financial Assistance) Act 2016* (ACT) provides two examples of related criminal acts. Offences are considered to be related if they involve the same offender and same primary victim; or if the offences are contemporaneous or near contemporaneous (that is, they happen at the same time, or nearly so). However, section 44(3) of that Act *requires* only that related acts of violence be treated as a single act in three circumstances:
- where the series of offences are (or are likely to be) part of a single ongoing offence
  - where treating the acts separately would result in the applicant receiving an amount of financial assistance that is disproportionate to the totality of harm that they suffered
  - in circumstances prescribed by regulation.
- 7.81 This model addresses some of the unfairness of the Victorian Act by separating the circumstances in which multiple acts are considered related, and those in which they must be treated as a single act. This shifts the emphasis away from the similarity between the acts, to a consideration of the nature of the crime and the severity of the harm suffered. In doing so, this approach is less likely to result in victims of family violence having their claims reduced. This is because, while acts of family violence might be related, their cumulative harm can be significant.

### **Amending the special financial assistance categories**

- 7.82 One way to ensure that the Act takes into account the cumulative harm of persistent and protracted family violence is to amend the special financial assistance categories so that a higher award is available for a series of acts of family violence.
- 7.83 In their submission to the Royal Commission, the Magistrates’ Court and Children’s Court recommended that the regulations be amended to include a series of acts of family violence as a circumstance in which the Category A maximum is available for offences that fall within Categories B, C and D.<sup>79</sup>
- 7.84 This could be achieved by adding ‘family violence’ to regulation 7(c) of the Regulations as one of the circumstances (along with indecent assault and sexual penetration) in which a series of criminal acts can be compensated by the Category A maximum award.<sup>80</sup>
- 7.85 An alternative option is to explicitly recognise a pattern of family violence within one of the higher categories of special financial assistance. The Northern Territory victims’ assistance scheme recognises ‘domestic violence injuries’ as a distinct compensable category of injury for which a victim can receive a lump sum. ‘Domestic violence injuries’ are defined as injury resulting from a series of three or more related criminal acts committed by an offender with whom the victim is in a domestic relationship, or stalking in contravention of a domestic violence order. For this category of compensable injury, victims can be awarded between \$7500 and \$10,000. This approach could be adopted in the Victorian legislation by inserting a series of related acts of family violence into Category A or B.
- 7.86 Forster suggests a similar but more detailed model that takes into account the severity of family violence, as well as the cumulative effect of a pattern of abuse. She recommends that different forms of family violence should give rise to eligibility for different categories of special financial assistance. Forster contends that a series of acts of family violence of a sexual or physical nature should occupy the category with the highest award range, a

79 Magistrates’ Court of Victoria and Children’s Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 50.  
80 Ibid (Recommendation 25).

series of non-physical acts of family violence should occupy the second highest award range, and victims of a single act of family violence should be eligible for the lowest range.<sup>81</sup>

- 7.87 Forster’s model could be implemented in the Victorian scheme either by adopting a separate scale of categories that specifically applies to family violence or by assigning different forms of family violence (based on the type of act(s) and whether there was a pattern) to the special financial assistance categories currently listed in the Regulations. For example, a pattern of family violence that involves physical or sexual acts of violence could be listed in Category A, a pattern of other forms of family violence in Category B and single acts of family violence that do not already fall into Category A or B could be listed in Category C or D.
- 7.88 Another option, brought to the Commission’s attention during preliminary consultations, is to remove the categories of special financial assistance entirely, or at least in relation to victims of family violence. Under this approach, the maximum amount of special financial assistance for any application based on family violence would be \$10,000. VOCAT would determine the appropriate award of special financial assistance based on a variety of factors, including the severity of the criminal acts, the severity of the injuries suffered and whether there was a pattern of abuse.
- 7.89 In addition, in order to ensure that the Act better takes into account the experience of child victims of family violence and the effect of that violence, the Act could be amended so that special financial assistance is available to all child victims of family violence, whether or not they are classified as primary victims under the Act. This would enable children to be able to access a lump sum payment no matter what form their experience of family violence takes.
- 7.90 The Regulations could also be amended so that the fact that a victim was a child at the time of the act of violence is an uplift category on its own. This is the approach in the Australian Capital Territory, which provides that where a victim is under 18 years old at the time of the offence, this alone is a ‘circumstance of aggravation’.<sup>82</sup>
- 7.91 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on how to better accommodate family violence within the categories and quantum of awards available under the Act. Specific questions are set out below.

## Questions

### ‘Related criminal acts’

- 11 Should the definition of ‘related criminal acts’ be amended to have regard to the cumulative impact of family violence on victims? If so, how should this be done?
- 12 Should the definition of ‘related criminal acts’ be amended to ensure that acts are not just related merely because they are committed by the same offender? If so, how should this be done?

81 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 207.

82 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 8(1)(f)(ii).

## Questions

- 13 Alternatively, should family violence be excluded from the operation of the 'related criminal acts' provision? If so, how should this be reflected in the Act?
- 14 Should the Act be amended to give victims of family violence an opportunity to object if claims are to be treated as 'related'?

### **Ensuring that the special financial assistance categories account for the cumulative harm of family violence**

- 15 Should a series of 'related criminal acts' occurring in the context of family violence be included as a circumstance in which the maximum amount of special financial assistance is increased? If so, how should this be achieved?
- 16 Should the special financial assistance categories be amended to better take into account the cumulative harm of family violence? If so, how should this be done?
- 17 Alternatively, should the maximum award for special financial assistance be available to all victims of family violence so that the amount they receive is not based on categories of offences but instead on the discretion of VOCAT?

### **Ensuring that the special financial assistance categories account for child victims of family violence**

- 18 Should special financial assistance be available to all child victims, including those who hear, witness or are otherwise exposed to family violence?
- 19 Should the special financial assistance categories be amended to better take into account the experiences of child victims of family violence? If so, how should this be done?

# Form and timing of applications

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## 8. Form and timing of applications

### Introduction

- 8.1 This chapter outlines how an application is made to the Victims of Crime Assistance Tribunal (VOCAT) under the *Victims of Crime Assistance Act 1996* (Vic) (the Act) and the time periods within which an application must be brought. The time limit for bringing an application is distinct from the time frames for making awards, which are discussed in Chapter 11.
- 8.2 While these issues are not specifically covered in the terms of reference, an overview of this process is included because it is an integral part of making an application for financial assistance to VOCAT.
- 8.3 The Victorian Royal Commission into Family Violence (the Royal Commission) specifically identified the time limit for making an application as a potential barrier for victims of family violence.<sup>1</sup>
- 8.4 This chapter begins by outlining the required form of an application for assistance to VOCAT and the two-year time period for the making of an application.
- 8.5 This chapter then discusses the implications of the two-year time limit for applicants who are victims of family violence. In particular, the chapter notes the difficulties that can arise, given the higher rate of late applications among victims of family violence.
- 8.6 Finally, this chapter provides options for reform with respect to the time limit, and poses questions for consideration.

### Form of application

- 8.7 An application for assistance to VOCAT must be made in writing in the prescribed form.<sup>2</sup> A copy of this form, together with guidance information, is provided at Appendix C. The form must be accompanied by documentary evidence.<sup>3</sup>
- 8.8 If the applicant has not reported the act of violence to the police, the form must also be accompanied by a statutory declaration by the applicant setting out the circumstances of the act of violence and the reasons that they did not report the matter.<sup>4</sup>
- 8.9 The form has 12 parts:
  - 1) Details of the applicant.
  - 2) Section to be completed if the claim is being made on behalf of a child or a person with a disability.

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1 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 80.

2 *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(a); *Victims of Crime Assistance Rules 2010* (Vic) r 6. The prescribed form is Form 1 (2016), also available at <[www.vocat.vic.gov.au/application-assistance](http://www.vocat.vic.gov.au/application-assistance)>.

3 *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(b).

4 *Ibid* s 26(2).

- 3) The circumstances of the act of violence, including the perpetrator's name if known.
  - 4) Details of any reporting to police, including station, police officer, rank and date, and whether criminal proceedings have commenced against the perpetrator.
  - 5) The effects resulting from the act of violence, including any physical and psychological effects, as well as whether the applicant has experienced grief, stress or trauma. The form also asks whether the applicant attended hospital.
  - 6) Whether the applicant would prefer to have the matter resolved 'on the papers' or if they would like a hearing before VOCAT. If the applicant wishes to have a hearing, they can ask for the proceedings to be conducted in closed court.
  - 7) Whether the applicant has applied for assistance under any other schemes, including the Victims Assistance Program, Workcover, the Transport Accident Commission, as well as any benefits the applicant has received or is entitled to receive under a superannuation or insurance scheme.
  - 8) The type of assistance that the applicant wishes to claim from VOCAT, including expenses incurred, expenses to assist in recovery and special financial assistance. The applicant must indicate whether they are applying as a primary, secondary or related victim, or whether they are claiming funeral expenses only.
  - 9) If a death was caused by the act of violence, the applicant must also give details of the deceased.
  - 10) If the applicant is a related victim, they must list every person who they believe may be or may claim to be a related victim, and they can also apply for assistance with funeral expenses.
  - 11) The applicant's authorisation for VOCAT to obtain any other evidence necessary.
  - 12) An acknowledgment by the applicant that all information provided is true and correct.
- 8.10 The form explicitly asks whether the alleged offender is a family member or domestic partner of the victim and asks the applicant to specify their relationship to them. It also asks if there are any intervention orders relating to the matter.
- 8.11 An application for assistance and the supporting documentation can be lodged in hard copy or online via the VOCAT website.<sup>5</sup>
- 8.12 Hard-copy applications for assistance must be lodged with or posted to the VOCAT venue closest to the applicant's place of residence.<sup>6</sup> However, if there are multiple applicants in respect of one act of violence, it must be the venue closest to where the act of violence was committed.<sup>7</sup> If the Chief Magistrate nominates a venue, then the application should be lodged at that venue.<sup>8</sup>
- 8.13 A hard-copy application must lodged with the Registrar at the Melbourne Magistrate's Court if the applicant resides outside Victoria, is a related victim, or is a primary or secondary victim who is aware of the existence of a related victim.<sup>9</sup>
- 8.14 If an applicant applies online, their application will automatically be lodged with the correct venue.<sup>10</sup>

5 Victims of Crime Assistance Tribunal, *Lodging an Application* (2016) <[www.vocat.vic.gov.au/how-apply/lodging-application](http://www.vocat.vic.gov.au/how-apply/lodging-application)>. For the online application form, see Victims of Crime Assistance Tribunal, *Application for Assistance*, <<http://vocat.iapply.com.au>>.

6 *Victims of Crime Assistance Rules 2010* (Vic) r 7(1)(b).

7 Ibid.

8 Ibid r 7(1)(a).

9 Ibid r 7(2).

10 Victims of Crime Assistance Tribunal, *Where to Apply* (2016) <[www.vocat.vic.gov.au/how-apply/where-apply](http://www.vocat.vic.gov.au/how-apply/where-apply)>.

- 8.15 The VOCAT website provides information for applicants about:
- how to lodge an application
  - the different victim categories under which they can apply
  - the details required in relation to the act(s) of violence
  - the police reporting and the injury suffered
  - the required supporting documentation
  - how the VOCAT process works.<sup>11</sup>
- 8.16 The online application page also gives details of services that can help an applicant to complete the form, including the contact number for the Victims of Crime Helpline.<sup>12</sup>
- 8.17 There is no fee for filing an application for assistance, whether it is done online or in hard copy.<sup>13</sup> In addition, a lawyer cannot charge an applicant costs in respect of an application, unless those costs are approved by VOCAT.<sup>14</sup>

## Time limits

- 8.18 An application for financial assistance must be made within two years of the act of violence occurring.<sup>15</sup>
- 8.19 VOCAT is obliged to strike out applications made outside this two-year time limit, unless 'it considers that, in the particular circumstances, the application ought not to be struck out'.<sup>16</sup>
- 8.20 Where an applicant wishes to lodge an application outside the two-year time limit, she or he must request leave from VOCAT in addition to completing the usual form. An application for an extension of time is made via a statutory declaration in the prescribed form.<sup>17</sup>
- 8.21 The form requires the applicant to set out her or his reasons for not lodging the application within the time limit and to attach supporting documentation.<sup>18</sup> The applicant can state whether she or he wishes the time extension to be decided without appearing before VOCAT.<sup>19</sup>
- 8.22 In deciding whether an out-of-time application ought not to be struck out in the 'particular circumstances', VOCAT must have regard to the following factors:<sup>20</sup>
- the age of the applicant when the act of violence occurred
  - whether the applicant is intellectually disabled<sup>21</sup> or mentally ill<sup>22</sup>
  - whether the perpetrator of the act of violence was in a position of power, influence or trust in relation to the applicant
  - the physical or psychological effect of the act of violence on the applicant
  - whether the delay in making the application threatens VOCAT from being able to make a fair decision

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11 Victims of Crime Assistance Tribunal, *Lodging an Application* (2016) <[www.vocat.vic.gov.au/how-apply/lodging-application](http://www.vocat.vic.gov.au/how-apply/lodging-application)>.  
12 Victims of Crime Assistance Tribunal, *Application for Assistance, Before You Apply* (2016) <<http://vocat.iapply.com.au/#/form/537c03cfdcf1490668c3b672>>.  
13 Victims of Crime Assistance Tribunal, *Lodging an Application* (2016) <[www.vocat.vic.gov.au/how-apply/lodging-application](http://www.vocat.vic.gov.au/how-apply/lodging-application)>.  
14 *Victims of Crime Assistance Act 1996* (Vic) s 48(5).  
15 *Ibid* s 29(1).  
16 *Ibid* s 29(2).  
17 Victims of Crime Assistance Tribunal, Melbourne Magistrates' Court, *Practice Direction No. 2 of 2016 — Extension of Time for Lodgement*, 1 May 2016.  
18 Victims of Crime Assistance Tribunal, *Application for Extension of Time Form* (2016), <[www.vocat.vic.gov.au/application-extension-time-form](http://www.vocat.vic.gov.au/application-extension-time-form)>.  
19 *Ibid*.  
20 *Victims of Crime Assistance Act 1996* (Vic) s 29(3).  
21 'Intellectually disabled' within the meaning of the *Disability Act 2006* (Vic).  
22 'Mentally ill' within the meaning of the *Mental Health Act 2014* (Vic).



- whether the applicant was a child at the time of the act of violence and she or he made the application for assistance within a reasonable time after turning 18
  - all other circumstances that VOCAT considers relevant.
- 8.23 The case of *FG v Victims of Crime Assistance Tribunal*<sup>23</sup> provides an example of how these factors are used to determine whether an application should be heard out of time. In that case, VOCAT struck out the applicant's claim because it was lodged approximately 25 to 30 years after the alleged occurrence of sexual abuse by her grandfather. However, the Victorian Civil and Administrative Tribunal (VCAT) set aside this decision, finding that in the 'particular circumstances' the application ought not to be struck out.
- 8.24 In arriving at this decision, VCAT took into account the fact that the applicant had been between five and 10 years old at the time of the offences and that her grandfather had been in a position of power and trust over her, which was compounded by her fear of being excluded from her large Koori kinship group. VCAT also considered the fact that the psychological effect of the abuse meant that the applicant took many years before she told anyone and that she had not been aware of her mental injury until relatively recently. In addition, VCAT found that the delay did not threaten the Tribunal's capacity to make a fair decision, as there was sufficient evidence of the injury and the alleged perpetrator had died before the applicant had attained legal capacity.
- 8.25 Similarly, in *J v Victims of Crime Assistance Tribunal*,<sup>24</sup> VCAT overturned VOCAT's decision to strike out the applicant's application, even though it was made 35 years after the alleged sexual abuse by her brother-in-law had occurred. VCAT considered the fact that the applicant was 13 to 18 years old when the acts of violence took place, the brother-in-law's relative position of power as an adult family member and a teacher, and the particular dynamics of the applicant's family, including her isolation from her siblings, their inability to discuss sex or emotions and their excessive respect for adults and teachers. VCAT also took into account the psychological evidence that the trauma of the incidents had contributed to the applicant's delay in making a claim.
- 8.26 In contrast, in the cases of *S v Victims of Crime Assistance Tribunal*<sup>25</sup> and *BFK v Victims of Crime Assistance Tribunal*,<sup>26</sup> VCAT upheld VOCAT's decision to strike out the applications for being out-of-time. This was despite both applicants being a similar age to the applicant in *J v Victims of Crime Assistance Tribunal* when the acts of violence took place (17 and 18 years old respectively).
- 8.27 In *S v Victims of Crime Assistance Tribunal*, VCAT distinguished that case from *J v Victims of Crime Assistance Tribunal* on the basis that the perpetrator had not been in a position of power, influence or trust over the applicant and that there was no psychiatric evidence linking the trauma of the rape to the applicant's delay in making an application.<sup>27</sup>
- 8.28 In *BFK v Victims of Crime Assistance Tribunal*, VCAT found that the perpetrator had not been in a position of power, influence or trust over the applicant—despite being her boyfriend—due to the fact that he was 'only one year older than her and ... clearly troubled, rather than ... calculating and controlling'.<sup>28</sup> VCAT also held that the delay in making the application threatened the Tribunal's ability to make a fair decision, particularly in light of the alleged perpetrator's conflicting testimony and the lack of evidence supporting the applicant's claims.

23 [2011] VCAT 2449 (1 September 2011).

24 [2002] VCAT 532 (24 July 2002).

25 [2002] VCAT 1257 (7 November 2002).

26 [2017] VCAT (15 March 2017).

27 *S v Victims of Crime Assistance Tribunal* [2002] VCAT 1257 (7 November 2002) [22].

28 *Ibid* [117].

- 8.29 Beyond the specific factors listed in the Act, VOCAT also has discretion to consider ‘all other circumstances’.<sup>29</sup> This catch-all provision is typically used to consider common law factors, such as the prospect of success of the substantive case.<sup>30</sup>
- 8.30 However, the Act explicitly provides that VOCAT must not decide to further hear and determine an out-of-time application only because the applicant was unaware of Victoria’s victims of crime financial assistance scheme or the time limit.<sup>31</sup>

## Effect of the form on family violence victims

- 8.31 Preliminary consultations undertaken by the Victorian Law Reform Commission (the Commission) indicated that the application form is relatively straightforward and can often be completed without legal assistance. It was noted, however, that further requests for documentation by VOCAT can make the process more difficult to navigate and often can require legal assistance. VOCAT’s powers of investigation are discussed in Chapter 9.
- 8.32 One significant concern raised by stakeholders in relation to family violence victims and the application form was that it is tailored towards victims of a ‘one-off’ act of violence. The form uses singular language, such as ‘What was the act of violence/offence?’ and leaves a small space for the applicant to answer. It also asks for the ‘date of the act of violence’ and has a section for the time at which the act occurred. Although the form provides an option for putting in a span of dates, it also requires the applicant to insert a start and end date. The ‘reporting details’ section also asks singular questions, such as the date of the report and the police officer’s name. These issues reflect the considerations of context and continuity of family violence reviewed in Chapter 3.
- 8.33 These features of the form can make it difficult for victims of family violence to complete. They may be making an application for a series of acts that occurred over a long period of time, with no clear beginning or end, and which may have been reported multiple times to different police officers.

## Effect of the time limit on family violence victims

- 8.34 As the Royal Commission noted, the time limit of two years on making an application to VOCAT can be a barrier for victims of family violence.<sup>32</sup>
- 8.35 It can take victims of family violence a considerable amount of time to disclose their experiences.<sup>33</sup> The reasons are complex. Many victims experience family violence, especially of a sexual nature, as shameful.<sup>34</sup> This can hamper victims from pursuing financial assistance within the time limit.<sup>35</sup> Some victims of family violence may also fear reprisal from their partners or ex-partners, hindering them from making a timely application.<sup>36</sup>
- 8.36 Other victims of family violence might feel distrust towards the legal system, which can deter them from making a prompt application. Christine Forster writes that this is especially so for Aboriginal women, who are more likely to be unwilling to report family violence due to factors such as ‘a history of discrimination by institutional structures ... [and] community pressure to keep the matter from the scrutiny of the government’.<sup>37</sup>

29 *Victims of Crime Assistance Act 1996* (Vic) s 29(3)(g).

30 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017); *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002).

31 *Victims of Crime Assistance Act 1996* (Vic) s 29(4).

32 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 80.

33 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 9.

34 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 197–8.

35 Ibid 198. See also Ian Freckelton, ‘Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed’ in Chris Sumner et al (eds.), *Victimology* (Australian Institute of Criminology, 1996) 246–7.

36 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 198.

37 Ibid 195–6.

- 8.37 For some victims of family violence, it may take a while to regain enough stability in their lives to even consider making a claim. The Royal Commission heard from one woman that the two-year time limit is:
- no time at all to go through the emotional trauma of appealing to the Tribunal for compensation. It takes a lot of time and effort for a mother to gain a normality and routine in her life for herself and for her children.<sup>38</sup>
- 8.38 It can also take a long time for victims of family violence to acknowledge what has happened to them or to understand the causal link between their injuries and the family violence.<sup>39</sup> In addition, a substantial period of time may elapse between the act(s) of violence occurring and the victim developing an injury.
- 8.39 This is particularly an issue in relation to child victims of family violence, and especially where the violence is of a sexual nature. As Forster and Parkinson write, ‘the harm suffered by child sexual abuse victims ‘may not manifest itself until many years after the abuse.’<sup>40</sup> For example, in the case of *FG v Victims of Crime Assistance Tribunal*, although the alleged sexual abuse took place in the 1980s, the applicant’s resulting mental injury did not appear until around 20 years later.<sup>41</sup>
- 8.40 The fact that it may take a victim of family violence longer to lodge an application for assistance with VOCAT means that the time limit of two years can have ‘a disproportionate impact on their eligibility for compensation’.<sup>42</sup>
- 8.41 In deciding whether to grant an extension of time, section 29(3) of the Act allows VOCAT to consider certain factors that are relevant to family violence, such as whether the perpetrator was in a position of power, trust or influence over the applicant. However, on appeal, this factor has been interpreted narrowly by VCAT so as to exclude some situations of family violence. As mentioned above, in *BFK v Victims of Crime Assistance Tribunal*, VCAT held that the alleged perpetrator was not in a position of power, trust or influence over the applicant even though he was her boyfriend at the time of the act of violence.<sup>43</sup>
- 8.42 VOCAT is also able to have regard to ‘whether the applicant was a child at the time of the occurrence of the act of violence and the application was made within a reasonable time after he or she reached the age of 18.’<sup>44</sup> Although this factor acknowledges that children may experience difficulty in making an application while they are under 18, it may not assist child victims of family violence who take many years to come to terms the abuse that they have suffered if their delay is not considered ‘reasonable’.
- 8.43 Furthermore, while VOCAT frequently grants applications for an extension of time, preliminary consultations disclosed that the mere existence of a time limit can be a barrier for victims of family violence whose claims relate to events that occurred many years ago.

## Discussion and options for reform

### Ensuring that the form accounts for family violence

- 8.44 An option for reform to make the VOCAT application process easier and more accessible for victims of family violence is to use language that is not confined to singular acts of violence or singular reports to police. For example, the form could ask the applicant whether they are the victim of a single act of violence or a series of acts of violence.

38 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 80.

39 Ibid 198.

40 Christine Forster and Patrick Parkinson, ‘Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework’ (2000) 23(2) *University of New South Wales Law Journal*, 172.

41 *FG v Victims of Crime Assistance Tribunal* [2011] VCAT 2449 (1 September 2011) [53].

42 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 9.

43 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [117].

44 *Victims of Crime Assistance Act 1996* (Vic) s 29(3)(f).

- 8.45 In addition, the form could leave larger spaces for applicants who describe multiple acts of violence, so that they are able to describe the nature of the violence that they have encountered, the general time frame and the reporting details without being restricted to one or two-word answers.

### Overcoming issues of timing

- 8.46 The Act could be amended in several ways to remove the difficulties facing victims of family violence in relation to the time limit.
- 8.47 One option is to increase the time limit for applications relating to family violence. This is the approach taken in the New South Wales legislation, which provides for a 10-year time limit for victims of domestic violence, child abuse or sexual assault.<sup>45</sup> If the victim was a child at the time of the act of violence, then the 10-year time limit starts running from the day that they turn 18, rather than the act of violence.<sup>46</sup> As such, this approach acknowledges that victims of family violence may need more time to make an application for assistance, as well the fact that the time needed by child victims may be even longer.
- 8.48 Another option is to add family violence to the list of factors in section 29(3) of the Act that VOCAT must consider when making a decision on whether or not to strike out a late application. This would ensure that VOCAT takes into account the impact of family violence on making a timely application, even where it does not find that a relationship of power, trust or influence existed. This approach is similar to that employed in the Northern Territory legislation, which requires the decision maker to specifically consider 'whether the injury or death occurred as a result of sexual assault, domestic violence or child abuse'.<sup>47</sup>
- 8.49 Christine Forster supports this latter approach<sup>48</sup> because she does not think that the rationales for time limits apply in the context of family violence.<sup>49</sup>
- 8.50 According to Forster, there are three reasons for imposing time limits. The first is that time limits are in the interests of fairness, certainty and public policy.<sup>50</sup> She argues, however, that there is nothing fair or beneficial about obstructing victims of family violence in being able to apply for assistance.<sup>51</sup>
- 8.51 The second reason is that it can be difficult to obtain evidence after a long period of time has elapsed.<sup>52</sup> But, as Forster points out, this does not apply to family violence, where the most relevant evidence is usually from the parties themselves due to family violence so often occurring in an environment of secrecy.<sup>53</sup>
- 8.52 The third reason for time limits is to prevent plaintiffs from 'sleeping on their rights'.<sup>54</sup> However, as explained above, there are many reasons why victims of family violence may not pursue redress in a timely fashion. This is partly due to the fact that unlike 'stranger crimes', the cultural norms that surround family violence 'do not wholeheartedly condemn it as an unacceptable social behaviour'.<sup>55</sup>
- 8.53 Based on these arguments, Forster writes that 'an explicit exception such as that adopted by the Northern Territory seems the most beneficial option'.<sup>56</sup>
- 8.54 There is another option: remove time limits completely for victims of family violence. In the New South Wales legislation, there is no time limit for a person to make an

45 *Victims Rights and Support Act 2013* (NSW) s 40(5).

46 *Ibid.*

47 *Victims of Crime Assistance Act 2006* (NT) s 31(3)(a).

48 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 197.

49 *Ibid.*

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 *Ibid.*

55 *Ibid.* 197.

56 *Ibid.* 198.

application for financial assistance if they are the primary victim of a sexual offence committed against them when they were under 18 years of age.<sup>57</sup>

- 8.55 There are similar reasons for victims of child sexual abuse and victims of family violence making delayed applications for assistance, including feelings of shame, fear of retribution, and failure to understand what has happened to them.<sup>58</sup> Therefore, there may be good reason to adopt New South Wales' approach to victims of family violence in Victoria.
- 8.56 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on these issues and options in relation to the form of the application and the time limit for bringing an application to better accommodate victims of family violence. Specific questions are set out below.

## Questions

### Form of application

- 20 Does the VOCAT application form present difficulties for victims of family violence? If so, how should these difficulties be addressed?

### Timing of application

- 21 Should different time limits apply to family violence applications in recognition of the dynamics of family violence? If yes, what time limits (if any) should apply?
- 22 Should family violence be included as a factor the Tribunal must have regard to in determining whether to hear and determine an application made out of time?

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*Victims Rights and Support Act 2013* (Vic) s 40(7).

For the reasons that victims of sexual abuse encounter difficulties with time limits, see Christine Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2005) 32 *University of Western Australia Law Review* 264, 279–80. To compare these to those of victims of family violence, see Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 197–8.



# VOCAT hearings— notification, appearance and open court provisions

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## 9. VOCAT hearings—notification, appearance and open court provisions

### Introduction

- 9.1 This chapter gives an overview of the procedure in the Victims of Crime Assistance Tribunal (VOCAT) hearings.
- 9.2 It relates to the third matter in the terms of reference, which asks the Victorian Law Reform Commission (the Commission) to consider the requirement to notify a perpetrator, especially where the matter has not been reported to police, or no charges have been laid, or the prosecution discontinued or the person is acquitted.
- 9.3 This chapter also provides information in relation to general procedure, appearances, open hearings, VOCAT's capacity to determine an application without a hearing and alternative evidentiary arrangements.
- 9.4 This chapter then discusses the ways that VOCAT procedure, especially notification of the alleged perpetrator, can have a negative impact on victims of family violence.
- 9.5 Aspects of the VOCAT procedure can act as a disincentive for victims of family violence to make an application, may re-traumatise victims and can result in inconsistencies in the awards granted.
- 9.6 This chapter concludes by providing options for reform to improve access and safety for victims of family violence, and poses questions for consideration.

### Notification to interested persons

- 9.7 Under the *Victims of Crime Assistance Act 1996* (Vic) (the Act), VOCAT may give notice of the time and place for a hearing to any other person whom it considers to have a 'legitimate interest' in the matter.<sup>1</sup> This can include the alleged perpetrator.<sup>2</sup>
- 9.8 The Act also provides that VOCAT must not notify the alleged perpetrator or an interested third party without first providing the applicant an opportunity to be heard on whether or not they should be notified.<sup>3</sup>
- 9.9 The process for notifying an alleged perpetrator or interested third party is set out in *Practice Direction No.4 of 2008: Notification of Alleged Offenders and Third Parties*. The Practice Direction uses the phrase 'legitimate or substantial interest', while the Act uses the term 'legitimate interest' in the notification provision. This is most likely because the provision of the Act dealing with persons who are entitled to make an appearance at VOCAT refers to those with a 'substantial interest', rather than 'legitimate interest'. It is unclear whether there is any substantial distinction between these terms. For consistency

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1 *Victims of Crime Assistance Act 1996* (Vic) s 34(2).

2 *Ibid* s 34.

3 *Ibid* s 34(3).



with the Act, this chapter will only refer to ‘legitimate interest’ in the context of notification and ‘substantial interest’ in the context of entitlement to appear.

- 9.10 In relation to the notification of alleged perpetrators, the Practice Direction provides that VOCAT must advise the applicant in writing that such notification is being considered and allow 21 days for the applicant to respond.<sup>4</sup> At the conclusion of 21 days, the tribunal member will make a decision on whether the alleged perpetrator is to be notified of the application.<sup>5</sup>
- 9.11 If the tribunal member decides to notify the alleged perpetrator, the applicant has 21 days to decide whether she or he still wishes to pursue their application.<sup>6</sup> If the application proceeds, the registrar will send notification of the application to the alleged perpetrator. The alleged perpetrator then has 14 days to advise the registrar as to whether she or he intends to participate in the hearing.<sup>7</sup>
- 9.12 The same process applies for third parties other than the alleged perpetrator who VOCAT identifies as having a legitimate interest in the matter.<sup>8</sup>
- 9.13 In addition, persons who consider that they have a legitimate interest in an application for assistance, including the alleged perpetrator, can apply to VOCAT to be notified of the proceedings.<sup>9</sup> The application must be made in writing and must set out why they consider that they have a legitimate interest or should be notified of the proceedings.<sup>10</sup>
- 9.14 Unless otherwise ordered by a tribunal member, the application by the third party will be forwarded to the applicant, who then has 21 days to respond to VOCAT as to whether she or he objects to the third party or the alleged perpetrator participating in the proceeding.<sup>11</sup>
- 9.15 If the applicant does not oppose the application or VOCAT receives no response, it will be determined by a tribunal member in chambers.<sup>12</sup> If the applicant opposes the application, the matter will be referred to a tribunal member for listing advice and there may be a directions hearing.<sup>13</sup>

## Persons entitled to appear

- 9.16 In addition to the applicant, persons who are entitled to appear and be heard by VOCAT on the hearing of the matter are:
- persons who have been accepted by VOCAT as having a ‘substantial interest’ in an application for assistance, including the alleged perpetrator<sup>14</sup>
  - an officer of VOCAT or a legal practitioner assisting VOCAT<sup>15</sup>
  - the state, if it considers that it has a legitimate interest in the matter.<sup>16</sup>
- 9.17 A person or body who is entitled to appear and be heard by VOCAT is considered a party to the matter.<sup>17</sup>
- 9.18 A party may appear personally or by a legal practitioner.<sup>18</sup> They may also appear by another representative with the leave of VOCAT.<sup>19</sup>

4 Victims of Crime Assistance Tribunal, Melbourne Magistrates’ Court, *Practice Direction No. 4 of 2008: Notification of Alleged Offenders and Third Parties*, 1 January 2009, 1.

5 *Ibid.* 2.

6 *Ibid.*

7 *Ibid.*

8 *Ibid.* 2–3.

9 *Ibid.* 3.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

14 *Victims of Crime Assistance Act 1996* (Vic) s 35(1).

15 *Ibid.* s 35(2).

16 *Ibid.* s 35(3).

17 *Ibid.* s 35(4).

18 *Ibid.* s 36(1).

19 *Ibid.*

## Procedure

- 9.19 On the hearing of a matter, VOCAT is not required to conduct itself in a formal manner.<sup>20</sup> The Act does provide, however, that VOCAT has a duty to act fairly, expeditiously (promptly) and according to the substantial merits of the case.<sup>21</sup>
- 9.20 VOCAT must give a party to the matter a reasonable opportunity to call or give evidence, examine, cross-examine or re-examine witnesses and to make submissions.<sup>22</sup> Nevertheless, the decision of Justice McDonald of the Supreme Court of Victoria in *AB v Victims of Crime Assistance Tribunal*<sup>23</sup> indicates that the duty to give a party a reasonable opportunity to call evidence can be tempered by concern for the wellbeing of the applicant. In that case, the alleged perpetrator, the applicant's father, had been joined as a party to the proceedings. He wished to call the applicant's mother as a witness but the mother expressed concern that her daughter might self-harm or commit suicide if the mother were to give evidence. VOCAT excused the mother from giving evidence, ruling that 'the risks of self-harm [were] too great'.<sup>24</sup> The applicant's father appealed VOCAT's decision to the Supreme Court.
- 9.21 In dismissing the appeal, Justice McDonald stated:
- I am satisfied that there are credible arguments in support of the Tribunal having the power to excuse a witness from giving evidence in circumstances where such evidence could result in an applicant committing an act of self-harm, including suicide.<sup>25</sup>
- 9.22 Further special arrangements for vulnerable victims and witnesses are discussed in more detail below.
- 9.23 VOCAT is also not bound by the rules of evidence, and may inform itself in relation to the matter in any manner that it thinks fit.<sup>26</sup>
- 9.24 Section 39 of the Act gives VOCAT broad investigative powers. VOCAT is able to authorise a member of staff, a legal practitioner or a person appearing on behalf of the state to make any enquiry or carry out any investigation that it requires. VOCAT can also order a medical or counselling report to be prepared or submitted and it can order the applicant to provide any document VOCAT may require.
- 9.25 During preliminary consultations, the Commission heard that VOCAT makes frequent requests for further documentation, especially in family violence matters where the alleged perpetrator has not been charged or convicted, or the applicant has provided little corroborating evidence.
- 9.26 Under the Act, VOCAT also has the power to issue a warrant for the arrest of a witness who has been served with a summons to attend VOCAT but has failed to do so.<sup>27</sup>

## Alternative evidentiary arrangements

- 9.27 VOCAT is able to direct that alternative arrangements be made for the giving of evidence by a witness.<sup>28</sup> This may be done on its own initiative or on the application of a party to a proceeding.<sup>29</sup>

20 Ibid s 38(1)(a).

21 Ibid s 32(1).

22 Ibid s 38(1)(c).

23 [2015] VSC 245 (5 June 2015).

24 Victims of Crime Assistance Tribunal quoted in *AB v Victims of Crime Assistance Tribunal* [2015] VSC 245 (5 June 2015) [4].

25 *AB v Victims of Crime Assistance Tribunal* [2015] VSC 245 (5 June 2015) [43].

26 *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(b).

27 Ibid s 37(1A).

28 Ibid s 37(2).

29 Ibid.

- 9.28 Some of the alternative arrangements that can be made are:
- permitting use of closed-circuit television or other facilities that enable a witness to give evidence from a place other than the room in which VOCAT is sitting
  - using screens to remove the alleged perpetrator from the witness' direct line of vision
  - permitting a person to be beside the witness while they are giving evidence for the purpose of emotional support
  - requiring counsel to be seated while examining or cross-examining the witness.
- 9.29 These provisions have been considered by the Supreme Court of Victoria. In *AB v Victims of Crime Assistance Tribunal*,<sup>30</sup> Justice McDonald noted that these provisions highlighted the victim-centred approach of the statutory scheme.<sup>31</sup> His Honour drew on them, along with VOCAT's power to conduct a hearing without giving notice to the alleged perpetrator, to conclude that in making procedural decisions VOCAT is required to give consideration to the interests of the applicant.<sup>32</sup>

## Open court

- 9.30 The Act requires VOCAT hearings to be open to the public.<sup>33</sup> However, VOCAT can direct that whole or part of the hearing be closed to members of the public.<sup>34</sup> It can also direct that only certain persons, or classes of persons, may be present during the whole or any part of the hearing.<sup>35</sup>
- 9.31 The Act provides that a direction to close or restrict access to a hearing may be given on the application of a party or on VOCAT's own initiative.<sup>36</sup>
- 9.32 In addition, the Act requires VOCAT to close the hearing to the public if an application is made for it to be closed in the following circumstances:<sup>37</sup>
- The applicant is a primary victim and their injury resulted from a sexual offence.<sup>38</sup>
  - The applicant is a primary victim and is a child.
  - The applicant is a primary victim and has a cognitive impairment.
  - VOCAT is satisfied that the applicant is likely to suffer distress if the hearing is open to the public.
  - VOCAT is satisfied that the applicant is likely to feel intimidated if the hearing is open to the public.
- 9.33 The Act also permits VOCAT to restrict the publication of material produced as part of an application for assistance if it is satisfied that it is in the public interest to do so.<sup>39</sup> This includes the whole or part of the evidence given at a hearing,<sup>40</sup> the content of whole or part of any specified documents<sup>41</sup> and any information likely to lead to the identification of a party or another person who appears at a hearing.<sup>42</sup>
- 9.34 Section 43(3) of the Act makes it an offence to publish any material subject to such an order by VOCAT. The penalty is 100 penalty units or imprisonment for two years for a natural person and 500 penalty units for a body corporate.

30 [2015] VSC 245 (5 June 2015).

31 *Ibid* [27]–[28].

32 *Ibid* [27].

33 *Victims of Crime Assistance Act 1996* (Vic) s 42(1).

34 *Ibid* s 42(1)(a).

35 *Ibid* s 42(1)(b).

36 *Ibid* s 42(2).

37 *Ibid* s 42(3).

38 *Ibid* s 42(3)(a)(i). Specifically, an offence against Subdivisions (8A), (8B), (8C), (8D) or (8E) of Division 1 of Part I of the *Crimes Act 1958* (Vic) or any corresponding previous enactment (sexual offences) or an offence at common law of rape or assault with intent to rape, see *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

39 *Ibid* s 43(1).

40 *Ibid* s 43(1)(a).

41 *Ibid* s 43(1)(b).

42 *Ibid* s 43(1)(c).

## Determination without hearing

- 9.35 Under section 33 of the Act, VOCAT has the power to determine an application without conducting a hearing. VOCAT can do this in the following circumstances:
- The applicant has stated in the application a wish for VOCAT to determine their application 'on the papers'.<sup>43</sup>
  - The applicant consents in writing for VOCAT to do so.<sup>44</sup>
  - The application relates to the making of an interim award, unless VOCAT considers that, in the particular circumstances, a hearing is necessary or desirable.<sup>45</sup>
- 9.36 If VOCAT does determine an application 'on the papers', it must notify the applicant of its decision, including details of the amount of assistance awarded, the purpose for which assistance was awarded, any conditions to which the award is subject, the persons(s) to whom assistance is payable and any other order that it makes.<sup>46</sup>
- 9.37 Preliminary consultations undertaken by the Commission indicated that in practice, this often functions as a two-step process in which the applicant will first ask VOCAT to determine their application without a hearing and, if they are unhappy with the outcome, they will subsequently request a hearing. In this sense, the process under section 33 seems to resemble an offer of settlement in the course of civil proceedings, but one that comes from the deciding authority itself.

## Effect of notification, appearance and open court provisions on victims of family violence

### Perpetrator notification

- 9.38 In its submission to the Victorian Royal Commission into Family Violence (the Royal Commission), the Women's Legal Service identified VOCAT's discretion to notify an alleged perpetrator and invite their participation in the proceedings as a potential issue for family violence victims.<sup>47</sup> This is because it may re-traumatise victims.<sup>48</sup>
- 9.39 In addition, the Magistrates' Court and Children's Court highlighted alleged perpetrator notification as a concern due to 'the safety risks that commonly arise in applications involving family violence'.<sup>49</sup>
- 9.40 The Royal Commission noted that VOCAT advises on its website that it rarely notifies perpetrators and that it is 'always mindful of the potential discomfort and additional distress caused to applicants in the relatively few matters where an alleged offender is notified of an application'.<sup>50</sup> However, the Royal Commission heard of situations where VOCAT had invited the perpetrator to participate in the proceedings or intended to do so.<sup>51</sup>
- 9.41 The case law also reveals situations in which alleged perpetrators have been notified of VOCAT proceedings in the context of family violence. In *AB v Victims of Crime Assistance Tribunal*,<sup>52</sup> the applicant made a claim for assistance with respect to alleged physical and sexual abuse by her father. The applicant's father was given notice of her application and, pursuant to section 35(4) of the Act, he became a party to the proceeding. The father wished to call his own witnesses, including the applicant's mother. However, as noted

43 Ibid s 33(1)(a).

44 Ibid s 33(1)(b).

45 Ibid s 33(1)(c).

46 Ibid s 33(2).

47 Women's Legal Service Victoria, Submission 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence* (19 June 2015) 53.

48 Ibid. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 80.

49 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 58 and 60.

50 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 80.

51 Ibid.

52 [2015] VSC 245 (5 June 2015).

above, VOCAT excused the mother from giving evidence out of concern for the wellbeing of the applicant. (See [9.20].)

- 9.42 In *BFK v Victims of Crime Assistance Tribunal*,<sup>53</sup> the applicant made a claim to VOCAT in relation to an alleged rape by a former boyfriend. The alleged perpetrator was notified of the proceedings and later provided evidence in the form of a written statement and oral evidence at the Victorian Civil and Administrative Tribunal (VCAT) hearing. VCAT took his evidence into account in deciding that the Tribunal was no longer able to make a fair decision on the matter due to the applicant's delay in making an application and, therefore, held that the application should be struck out.
- 9.43 These cases show that alleged perpetrators are sometimes notified and do participate in proceedings, even in the highly vulnerable context of family violence and sexual assault.
- 9.44 The Commission heard during preliminary consultations that a perpetrator is more likely to be notified when the applicant has not reported the incident to the police or charges have not been laid against the alleged perpetrator, when they have been acquitted, or when there is little evidence to support an applicant's claim.
- 9.45 Reporting rates, prosecution rates and conviction rates are low in cases of family violence.<sup>54</sup> Furthermore, as family violence tends to occur in private, there is often little corroborating evidence beyond that of the applicant and the perpetrator.<sup>55</sup> These factors may lead to victims of family violence being more susceptible to the perpetrator notification procedure, despite its potential to be highly traumatic.<sup>56</sup>
- 9.46 In addition, preliminary consultations identified that even if perpetrator notification occurs rarely, the fact that it exists at all can be a deterrent for victims of family violence.

### Evidentiary protections

- 9.47 As noted above, VOCAT has the power to close the court, restrict publication of material, and permit alternative evidentiary procedures, in order to protect vulnerable applicants.
- 9.48 However, the Royal Commission was informed that these evidentiary and procedural protections do not go far enough. The Magistrates' Court and Children's Court noted in their submission that 'the specific ... provisions that protect sexual assault complainants and protected witnesses in criminal proceedings and intervention order matters do not explicitly extend to VOCAT hearings'.<sup>57</sup>
- 9.49 For example, the Courts identified that unlike the *Criminal Procedure Act 2009* (Vic) and the *Family Violence Protection Act 2008* (Vic), the Act does not specifically prohibit a victim of a sexual offence being personally cross-examined by the offender, or explicitly require questioning to be appropriately constrained.<sup>58</sup> In addition, in contrast to the *Criminal Procedure Act 2009* (Vic) and the *Family Violence Protection Act 2008* (Vic), the *Victims of Crime Assistance Act 1996* (Vic) (the Act) does not contain any explicit protections for the giving of evidence by child applicants and witnesses.
- 9.50 The Act gives VOCAT the discretion to put in place these kinds of evidentiary protections. During preliminary consultations the Commission heard that they are used in some family violence matters. However, the fact that these kinds of procedure are not explicitly incorporated into the Act may mean that such protections are underused or used inconsistently.

53 [2017] VCAT 289 (15 March 2017).

54 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 194.

55 Ibid 197.

56 Women's Legal Service Victoria, Submission 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence* (19 June 2015) 53.

57 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 60.

58 Ibid.

## Determination without hearing

- 9.51 The procedure under section 33 of the Act, which enables VOCAT to determine an application 'on the papers', can be a beneficial way for victims to have their applications determined quickly and without having to attend court. 'Section 33 determinations' also present a way for victims of family violence to avoid the alleged perpetrator participating in the hearing and any concerns they may have about giving evidence.
- 9.52 However, in its submission to the Royal Commission, Women's Legal Service Victoria expressed concern that there may be inconsistency in outcomes for victims whose applications are decided on the papers and those whose applications are determined at a hearing.<sup>59</sup>
- 9.53 Preliminary consultations undertaken by the Commission also disclosed that awards granted at a hearing tended to be for larger amounts than those awarded pursuant to a section 33 determination.
- 9.54 These issues may be a disincentive for victims of family violence to ask for their application to be determined without a hearing, despite the potential benefits that this process can offer them.

## Discussion and options for reform

- 9.55 The areas that are most in need of reform in relation to procedure, as identified by the Royal Commission, are the perpetrator notification provision and the evidentiary and procedural protections for vulnerable witnesses. This section discusses options for reform in these two areas.

### Alleged perpetrator notification

- 9.56 In their submission to the Royal Commission, the Magistrates' and Children's Courts recommended that 'section 34 (alleged perpetrator notification) operat[e] appropriately having regard to the specific safety risks which commonly arise in applications involving family violence'.<sup>60</sup>
- 9.57 This could be achieved by removing the notification provision, either entirely or specifically for vulnerable victims, such as family violence victims and, in particular child victims of family violence.
- 9.58 There were differences of opinion in the preliminary consultations with key stakeholders as to whether or not removing the perpetrator notification provision would raise procedural fairness concerns.
- 9.59 Some stakeholders considered that notifying the alleged perpetrator serves little purpose in the context of the Act, as the outcome of a VOCAT proceeding does not affect the rights and interests of an alleged perpetrator. This view is consistent with the victim-centred approach of the VOCAT process, as described by Justice McDonald in *AB v Victims of Crime Assistance Tribunal*.<sup>61</sup>
- 9.60 Other stakeholders, however, considered that it was important for the purposes of procedural fairness that persons are notified of an application being made which contains serious allegations against them and which could result in serious findings being made against them.
- 9.61 Another option is to amend the Act to explicitly list the safety concerns associated with family violence as a factor to which VOCAT must have regard when considering whether

59 Women's Legal Service Victoria, Submission 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence* (19 June 2015) 53.

60 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 60 (Recommendation 25).

61 [2015] VSC 245 (5 June 2015) [28].

to notify an alleged perpetrator. This could result in fewer notifications being made in the context of family violence.

- 9.62 A third option is to improve the evidentiary and procedural protections for victims of family violence. This option is discussed below.

### Evidentiary and procedural protections

- 9.63 The Magistrates' and Children's Courts recommended to the Royal Commission that the Act replicate the procedural and evidentiary protections in place in the *Criminal Procedure Act 2009* (Vic) and the *Family Violence Protection Act 2008* (Vic) for vulnerable victims.<sup>62</sup>

- 9.64 This would involve extending explicit protections, such as, in relation to sexual offences, prohibiting the alleged perpetrator from cross-examining the applicant and preventing inappropriate questions being asked of the applicant.

- 9.65 It would also entail ensuring that there are specific protections for child victims. For example, like the *Criminal Procedure Act 2009* (Vic), the *Victims of Crime Assistance Act 1996* (Vic) (the Act) could explicitly prohibit the cross-examination of a child victim of a sexual offence.<sup>63</sup> Moreover, in considering whether or not a child should give evidence the Act could take a similar approach to the *Family Violence Protection Act 2008* (Vic), and require VOCAT to have regard to the desirability of protecting children from unnecessary exposure to the court system and the harm that could occur to the child and to family relationships if a child gives evidence.<sup>64</sup>

- 9.66 This option for reform would ensure greater consistency in the kinds of evidentiary and procedural protections that VOCAT provides for victims who are particularly vulnerable.

- 9.67 Additionally or alternatively, the Act could be amended to include an overarching principle that guides the procedure of VOCAT hearings.

- 9.68 In its *Victims of Crime in the Criminal Trial Process Report*, the Commission made a recommendation regarding Part 8.2 of the *Criminal Procedure Act 2009* (Vic) which relates to witnesses in criminal proceedings:

The *Criminal Procedure Act 2009* (Vic) should be amended to include a guiding principle that, in interpreting and applying Part 8.2, courts are to have regard to the fact that measures should be taken that limit, to the fullest practical extent, the trauma, intimidation and distress suffered by victims when giving evidence.<sup>65</sup>

- 9.69 A similar principle regarding VOCAT procedure could be incorporated into the Act. The Act could be amended to include a guiding principle that in determining the procedure of hearings and the giving of evidence, VOCAT is to have regard to the fact that measures should be taken that limit the trauma, intimidation and distress suffered by victims when giving or hearing evidence.

- 9.70 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the Act to help ensure VOCAT processes more appropriately address the needs of family violence victims at the same time as ensuring procedural fairness. Specific questions for consideration are set out below.

62 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 60 (Recommendation 25).

63 *Criminal Procedure Act 2009* (Vic) s 123.

64 The *Family Violence Protection Act 2008* (Vic) prevents a child, other than a child who is an applicant for a family violence intervention order, from giving evidence in a proceeding under that Act unless the court grants them leave to do so. In deciding whether to grant such leave, the court must have regard to the desirability of protecting children from unnecessary exposure to the court system and the harm that could occur to the child and to family relationships if the child gives evidence, see s 67.

65 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016), 214 (Recommendation 41).

## Questions

### **The notification provision**

- 23 Is the notification provision a deterrent for family violence victims in making applications under the Act?
- 24 Should the notification provision be amended to recognise the safety concerns of family violence victims, including those of child victims? If yes, what changes should be made?

### **Protection of victims of family violence**

- 25 Should the Act be amended to include increased protections for family violence victims, including child victims, during VOCAT hearings? If yes, what procedural and evidentiary protections should be provided?



# Making an award

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## 10. Making an award

### Introduction

- 10.1 This chapter outlines the circumstances in which the Victims of Crime Assistance Tribunal (VOCAT) may make an award for financial assistance. More specifically, this chapter considers:
- when VOCAT must refuse to make an award of assistance<sup>1</sup>
  - matters the Tribunal must have regard to in determining whether or not to make an award or the amount of assistance to award.<sup>2</sup>
- 10.2 This chapter relates to the fourth matter identified in the terms of reference, which asks the Victorian Law Reform Commission (the Commission) to review the matters giving rise to refusal of an application for financial assistance except in special circumstances.
- 10.3 The matters VOCAT must have regard to in determining whether to make an award, and the amount of an award, are outlined in sections 52, 53 and 54 of the *Victims of Crime Assistance Act 1996* (Vic) (the Act). Broadly, these sections require VOCAT to consider a victim's character and behaviour before, during and after a crime. These matters may be unrelated to the act of violence itself.
- 10.4 In examining the matters VOCAT must have regard to, this chapter considers why these provisions of the Act might disproportionately impact victims of family violence as compared to other victims of crime, discusses options for reform and poses questions for consideration.

### When can an award be made?

- 10.5 VOCAT may award financial assistance to a victim of crime where it is satisfied that an act of violence occurred, that the applicant is a victim of that act of violence, and that the applicant is eligible to receive the assistance.<sup>3</sup>
- 10.6 It is not a requirement of the Act that someone needs to have been charged with or convicted of an offence for an award to be made.<sup>4</sup>
- 10.7 However, even if VOCAT determines that a victim is eligible for an award, the Act requires that in some circumstances VOCAT must nevertheless refuse to make an award of assistance. These circumstances are set out in section 52 of the Act and are discussed further below.<sup>5</sup>
- 10.8 In addition, section 54 of the Act requires that in determining whether to make an award of assistance, or the amount of assistance to award, the tribunal must consider a number

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1 *Victims of Crime Assistance Act 1996* (Vic) ss 52 and 53.  
2 *Ibid* s 54.  
3 *Ibid* s 50(1).  
4 *Ibid* s 50(4).  
5 *Ibid* s 52.

of additional specified factors.<sup>6</sup> These circumstances and considerations are discussed in this chapter.

- 10.9 There are good policy reasons for inclusion of these considerations in the Act. They enable VOCAT to refuse to make an award where it would be inconsistent with the purpose and objectives of the Act. For example, applicants who have been convicted of violent crimes may not be appropriate recipients of assistance which is a symbolic expression by the state of the community's sympathy.<sup>7</sup>
- 10.10 The Magistrates' Court of Victoria in its submission to the Victorian Royal Commission into Family Violence (the Royal Commission) has stated that these provisions allow VOCAT to balance competing factors when making a decision about financial assistance. However, the Magistrates' Court of Victoria also acknowledges that the provisions in the Act do not provide adequate guidance about the circumstances of family violence and how these factors should be considered.<sup>8</sup> The effect of this is considered below with reference to specific provisions under sections 52, 53 and 54.

## Mandatory refusal of an award under section 52 of the Act

- 10.11 Under section 52 of the Act there are two circumstances where VOCAT must, without exception, refuse to make an award of assistance:
- if it is satisfied the application has been made in collusion with the perpetrator of the act of violence
  - if an earlier application for assistance has been made by the applicant from the same act of violence.<sup>9</sup>
- 10.12 There are two further circumstances where the Tribunal must refuse to make an award of assistance, unless there are 'special circumstances':
- if it is satisfied that an act of violence was not reported to police within a reasonable time
  - if it is satisfied that the applicant failed to provide reasonable assistance to any person or body engaged in the investigation, arrest or prosecution of the perpetrator (the investigatory or prosecutorial body).<sup>10</sup>
- 10.13 Section 52 of the Act therefore provides an exception to mandatory refusal where the Tribunal considers that there are special circumstances resulting in either a failure to report to police within reasonable time, or failure to provide reasonable assistance to police or prosecution. Each of these two circumstances is considered further in this part.

## Act of violence not reported to police within a reasonable time

- 10.14 In determining whether an act of violence was reported to police within a reasonable time, section 53 provides that VOCAT may 'have regard to any matters that it considers relevant'.<sup>11</sup> This includes:
- the age of the victim at the time of the act of violence
  - whether the victim has an intellectual disability, within the meaning of the *Disability Act 2006* (Vic)

6 Ibid s 54

7 For example, in *Larson v Victims of Crime Assistance Tribunal* [2012] VCAT 1162 (6 August 2012), the applicant had a significant criminal history with prior convictions for violent offences including murder, armed robbery and reckless conduct endangering life as well as prior convictions for dishonesty, property and driving offences. VOCAT refused an award for assistance on the basis of his criminal history, which was upheld on appeal to VCAT.

8 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 57.

9 *Victims of Crime Assistance Act 1996* (Vic) s 52(b)–(c).

10 Ibid s 52(a).

11 Ibid s 53.

- whether the victim has a mental illness, within the meaning of the *Mental Health Act 2014* (Vic)
- whether the perpetrator was in a position of power, influence or trust in relation to the victim
- whether the victim was threatened or intimidated by the perpetrator
- the nature of the victim's injury.<sup>12</sup>

10.15 The concept of 'within a reasonable time' has also been the subject of judicial consideration by the Victorian Civil and Administrative Tribunal (VCAT). These cases, discussed below, demonstrate the complexity of the decision making required under sections 52 and 53 of the Act.

### What is considered a reasonable time for reporting to police?

- 10.16 In *FG v Victims of Crime Assistance Tribunal*,<sup>13</sup> VCAT overturned VOCAT's decision, ruling that the victim's VOCAT application should not have been refused under section 52 for failure to report within a reasonable time. VCAT found that the victim's significant delay in reporting to police was reasonable in the circumstances. In that case, the applicant alleged she had been repeatedly sexually abused by her grandfather between the ages of five and 10. In considering whether the applicant's failure to report was 'reasonable' under section 52, VCAT determined that it was not reasonable for the victim to report the abuse while her grandfather was alive because of the family dynamics. VCAT also accepted that it 'would have been futile to make a report to the police after his death'.<sup>14</sup>
- 10.17 Similarly in *J v Victims of Crime Assistance Tribunal*,<sup>15</sup> VCAT held that a delay of approximately 35 years in reporting alleged sexual abuse to police was reasonable given the circumstances of the case. In that case, VCAT considered the way sexual assault was viewed at the time of the offences and the power dynamics in the family relationship. VCAT noted '[the perpetrator] was an adult member of the family and a teacher. In that position he was more ... likely to be believed over the Applicant'.<sup>16</sup> VCAT recognises here that victims who experience family violence as a child face additional barriers to reporting crimes.
- 10.18 Family violence dynamics were also considered in the case of *Frost v Victims of Crime Assistance Tribunal*.<sup>17</sup> The applicant alleged she was raped by her husband in mid-1971 and continued to be a victim of sexual and physical abuse throughout their marriage until it ended in divorce in 1982. In 2001, the applicant applied for financial assistance from VOCAT, at which time VOCAT advised her to report the incidents to police. Accordingly, the applicant reported the incidents to police. However, police discouraged the applicant from taking the matter any further and the applicant's claim for financial assistance was rejected by VOCAT. Grounds for rejecting the application included for not reporting within reasonable time under section 52 of the Act. On appeal to VCAT, VCAT found that the applicant's report to police did occur within 'reasonable' time given the nature and dynamics of the relationship:

The explanation for absence of complaint by her in relation to the initial rape is one which I accept and is probably all too common. She was aged 17 at the time and frightened of the reaction of her parents and others. Thereafter, she was fearful for her wellbeing, and that of her son, of whom the offender is the father ... I accept her evidence concerning the fear which she experienced during the marriage and its ongoing legacy ...<sup>18</sup>

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12 Ibid.  
13 [2011] VCAT 2449 (1 September 2011).  
14 Ibid [72].  
15 [2002] VCAT 532 (24 July 2002).  
16 Ibid [61].  
17 [2002] VCAT 1390 (21 October 2002).  
18 Ibid.

- 10.19 All three cases described above involved circumstances of family violence and in all cases, the circumstances of family violence were not considered by VCAT as creating an exception to mandatory refusal on the basis of 'special circumstances'.<sup>19</sup> Instead, VCAT considered what a reasonable time period for reporting was in the context of the circumstances of the act of violence, the nature and dynamics of the relationship and the vulnerability of the victim.
- 10.20 However, in *S v Victims of Crime Assistance Tribunal*,<sup>20</sup> VCAT affirmed the decision of VOCAT to refuse an application on the grounds of, among other things, not reporting to police within a reasonable time under section 52. The applicant had not reported an alleged rape to police until 22 years after the alleged offence occurred. The victim was 17 years old at the time of the alleged offence. In considering the additional factors outlined in section 53, VCAT determined the applicant had not reported the alleged rape to police within a reasonable time, noting the victim was not threatened or intimidated by the alleged offenders, having only been 'mocked' by them.
- 10.21 The decision in *S v Victims of Crime Assistance Tribunal* is a narrower interpretation of section 53, requiring actual threats or intimidation to mitigate 'unreasonable' reporting time. In that case, neither VOCAT, nor VCAT on appeal, appeared to give weight to other reasons why a victim of rape might not report the matter to police, including the victim's age at the time of the offence. This was despite the victim's admission that she did not report to police at the time because she did not know what to do, was frightened and ashamed, felt dirty and was scared of the perpetrators.<sup>21</sup>
- 10.22 The implications of these cases for victims of family violence are discussed further below.

### When do special circumstances mitigate an 'unreasonable delay' in reporting to police?

- 10.23 Even where VOCAT may determine that a report was not made to police within a reasonable time, section 52 of the Act enables the Tribunal to consider any special circumstances that may have brought about that delay.
- 10.24 In *CS v Victims of Crime Assistance Tribunal*,<sup>22</sup> the applicant alleged historical sexual abuse by a number of members of her immediate and extended family. The acts of violence commenced in approximately 1936 and took place over a period of years from when the victim was between four and 14 years of age. While VOCAT refused the application because the acts of violence were not reported to police within a reasonable time, VCAT determined that special circumstances mitigated the delay in reporting, including the applicant's age at the time of the abuse and the failure of others to whom she reported the abuse (such as a psychologist) to convince her to report the abuse to police.<sup>23</sup>
- 10.25 However, in *TUN v Victims of Crime Assistance Tribunal*,<sup>24</sup> VOCAT refused an application for assistance on the basis of section 52, as the applicant had not made a report to police. The application related to an alleged assault and threat to kill by the applicant's former de facto partner.
- 10.26 VOCAT found that no special circumstances existed to justify the lack of reporting to police, particularly as the victim had applied for an intervention order. On appeal to VCAT it was submitted on behalf of the applicant that a report had not been made to police because of special circumstances, namely that her former partner was a member of a motorcycle gang with seven convictions for manslaughter, an acquaintance had been killed after making a statement to police regarding her former partner who was

19 In *Frost v Victims of Crime Assistance Tribunal* [2002] VCAT 1390 (21 October 2002), VCAT stated, 'Whilst I am quite satisfied that special circumstances exist, it is probably not necessary to go to that argument as the reporting to the police was done within a reasonable time if s 53 is applied' at [24].

20 [2002] VCAT 1257 (7 November 2002).

21 Ibid [10].

22 [2006] VCAT 1061 (9 June 2006).

23 Ibid [28]–[31].

24 [2009] VCAT 1599 (10 August 2009).

also a member of a motorcycle gang, and because she did not consider applying for an intervention order as being the same as making a report to police. VOCAT had determined that such factors did not constitute special circumstances, instead holding that such factors '... were nothing out of the ordinary or special; it was common for such victims to fear reprisals'.<sup>25</sup>

- 10.27 On appeal, VCAT found that special circumstances did exist in this case. The applicant was still anxious and distressed about the possibility of reprisal and was still genuinely fearful of the alleged offender. VCAT did, however, distinguish the applicant's experience from 'others faced with domestic violence', indicating special circumstances existed in this case because of the criminal profile of her former partner and because of 'what she knows happened to others involved with members of bikie gangs, when they went to police'.<sup>26</sup>

### **Failure to provide reasonable assistance to an investigatory or prosecutorial body**

- 10.28 As noted above, except where there are 'special circumstances', failure to provide reasonable assistance to an investigatory or prosecutorial body requires VOCAT to refuse an application for financial assistance.<sup>27</sup>
- 10.29 Unlike the 'failure to report' provisions, the Act does not provide guidance about what the Tribunal may have regard to in considering whether there are 'special circumstances'. In addition, the phrase 'special circumstances' is not defined in the Act.
- 10.30 However, the question of what constitutes 'special circumstances' has been judicially considered. In *Nichol v Victims of Crime Assistance Tribunal*,<sup>28</sup> VCAT found that for the purposes of section 52, special circumstances must be something 'out of the ordinary'.<sup>29</sup> As already noted, the extent to which family violence may, or may not, be 'out of the ordinary' for the purposes of section 52 is not clear.

### **What is failing to provide 'reasonable assistance'?**

- 10.31 Under section 52 of the Act, there are no prescribed positive actions a victim must undertake to satisfy 'reasonable assistance', such as providing a witness statement or participating in a criminal trial. However, guidance in the VOCAT application form states:

In most cases, calling the police to attend the scene of a crime is not enough. You should make a formal report, including a sworn statement (if requested), so the police can fully investigate the matter. You should give the Tribunal full details of the relevant police officer's station, rank and registration number.<sup>30</sup>

- 10.32 Due to the nature and dynamics of family violence, many victims of family violence may withdraw assistance from police investigations or prosecutions, including not making a statement after calling police.<sup>31</sup> Victims of family violence may fear the perpetrator or they may have reconciled with their partner after the violent incident. Victims of family violence may also have a distrust of police or other authority figures, or may fear the consequences of a successful prosecution of their partner, who may be providing financial security for their family.

25 Ibid [10]. In making this submission to VCAT, counsel for VOCAT was referencing VCAT's previous decision in *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840, in which it had held that for the purposes of s 52, what must be demonstrated for 'special circumstances' is something 'out of the ordinary'.

26 *TUN v Victims of Crime Assistance Tribunal* [2009] VCAT 1599 (10 August 2009) [13].

27 *Victims of Crime Assistance Act 1996* (Vic) s 52.

28 [2000] VCAT 840 (30 April 2000).

29 Ibid [23].

30 *Victims of Crime Assistance Tribunal, VOCAT Application for Assistance and Information Guide* (2016) <[www.vocat.vic.gov.au/application-assistance10](http://www.vocat.vic.gov.au/application-assistance10)>.

31 See, eg, Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015), 58. Case examples demonstrating this issue include *Purcell v Victims of Crime Assistance Tribunal* [2011] VCAT 1463 (3 June 2011) and *MK v Victims of Crime Assistance Tribunal* [2013] VCAT 1582 (10 September 2013). In *MK v Victims of Crime Assistance Tribunal*, MK reported the incident to police but refused to make a formal police statement, refused an intervention order, continued to live with her partner, and did not attend court when an intervention order was taken out on her behalf by police.

- 10.33 The Act does not provide any guidance about whether these are the kinds of factor that can be taken into account by VOCAT. This issue has, however, been the subject of judicial consideration.
- 10.34 In the case of *Nichol v Victims of Crime Assistance Tribunal*,<sup>32</sup> although the applicant assisted police in the initial stages of their investigation, the day before the hearing she withdrew the complaint and the police subsequently withdrew the charges. On review, VCAT held that, although the applicant had rendered appropriate assistance in the initial stages of the police investigation, by later withdrawing her complaint, she had not rendered reasonable assistance for the purposes of section 52 of the Act. Accordingly, VCAT refused the application noting ‘the proper characterisation of what happened is that [the applicant] pulled the rug out from under the police at the last minute’.<sup>33</sup>

### When do special circumstances mitigate failing to provide assistance to police and prosecution?

- 10.35 In the same case of *Nichol v Victims of Crime Assistance Tribunal*, it was submitted on appeal to VCAT that even if the applicant had failed to provide reasonable assistance to police and prosecution, special circumstances existed.<sup>34</sup> In particular, it was submitted that the applicant’s decision to withdraw her complaint was motivated by a concern for the welfare of the perpetrator and his need for assistance in relation to drug and alcohol abuse, and that these concerns and motivations for withdrawing assistance amounted to special circumstances.<sup>35</sup>
- 10.36 However, VCAT held that for the purposes of section 52, special circumstances require something ‘out of the ordinary’<sup>36</sup> and VCAT determined that special circumstances did not exist because the narrative of drugs, alcohol, violent crime and domestic violence was not ‘out of the ordinary at all’.<sup>37</sup> VCAT concluded that the combination of drug and alcohol abuse and family violence was ‘depressingly common’<sup>38</sup> and the circumstances resulting in the applicant not providing reasonable support and assistance to police and prosecution were not brought about by any sort of special circumstance.<sup>39</sup>
- 10.37 However, in *Rajah v Victims of Crime Assistance Tribunal*,<sup>40</sup> VCAT found the existence of special circumstances to mitigate what might otherwise be viewed as failure to assist the police. In that case the applicant was a victim of sexual and physical abuse by her mother’s former de facto husband and the circumstances of the offending and the vulnerability of the victim were accepted as giving rise to special circumstances:

In my opinion, the applicant’s failure to ... furnish the police with a written statement—is explicable by reference to her psychological state, her shame and her fear of the perpetrator ... I consider that the nature of the abuse, the high degree of vulnerability of the victim, her age, the consequential shame and embarrassment she experienced, the concern for her mother’s wellbeing and for her own, constitute special circumstances.<sup>41</sup>

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32 [2000] VCAT 840 (30 April 2000).  
 33 Ibid [21].  
 34 Ibid [7].  
 35 Ibid [8].  
 36 Ibid [12].  
 37 Ibid [23].  
 38 Ibid.  
 39 Ibid.  
 40 [2002] VCAT 1422 (6 December 2002).  
 41 Ibid [21].

## Additional matters VOCAT must consider

- 10.38 Once VOCAT has determined that an act of violence occurred, that the applicant is a victim eligible for assistance, and that there are no circumstances giving rise to mandatory refusal under section 52 of the Act, section 54 of the Act requires VOCAT to consider a number of specified matters before determining whether or not to make an award, or in determining the amount of the award. These include:
- the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) and attitude of the applicant before, during and after the act of violence<sup>42</sup>
  - provocation and any condition or disposition of the applicant that may have contributed to the injury<sup>43</sup>
  - whether the perpetrator will benefit directly or indirectly from the award.<sup>44</sup>
- 10.39 These matters are discussed further below.

### Character, behaviour and attitude of applicant

- 10.40 Section 54 of the Act requires VOCAT to have regard to the character, behaviour and attitude of an applicant in determining whether or not to make an award or the amount of assistance to award. This provision is broad, and includes considering the applicant's character, behaviour and attitude before, during or after the act of violence. The Act specifically includes a requirement for consideration of past criminal activity.<sup>45</sup>
- 10.41 In practice it appears that the past criminal activity of a VOCAT applicant is closely scrutinised.<sup>46</sup> This is significant for victims of family violence, as research indicates a connection between family violence victimisation and criminal activity.<sup>47</sup> In particular, the Royal Commission found that a substantial majority of Victorian female criminal offenders had experienced family violence.<sup>48</sup>
- 10.42 The nexus between victimisation and criminal activity in the family violence context has been attributed to the social and economic disadvantages experienced by family violence victims. However, this nexus may also be a result of the coercive behaviour exercised by an abusive partner which can lead to forced criminal behaviour.<sup>49</sup> In addition, as emphasised by the Royal Commission, there is a connection between children who experience family violence and offending later in life, either as an adolescent or adult.<sup>50</sup>
- 10.43 The past criminal activity of applicants has also been the subject of judicial consideration and is explored further below, noting not all of the cases involve circumstances of family violence.
- 10.44 In *RUM v Victims of Crime Assistance Tribunal*,<sup>51</sup> VCAT considered the fact that the applicant was a serious sex offender, lacking remorse and insight in relation to his offending. In determining not to award financial assistance, VCAT held that the objectives of the Act 'require consideration of whether an applicant is an appropriate recipient of

42 *Victims of Crime Assistance Act 1996* (Vic) s 54(a).

43 *Ibid* s 54(c) and (d).

44 *Ibid* s 54(e).

45 *Ibid* s 54(a). For related victims, consideration is given to the character, behaviour and attitude of the deceased primary victim of the act of violence; any obligations owed to the applicant by the deceased primary victim; the financial resources and financial needs of the applicant and any other related victim applicants; and the nature of the relationship: s 54(b)(i). Recent research has also highlighted drug use and addiction as a potential obstacle to financial assistance under the Act: Kate Seear and Suzanne Fraser, 'The Addict as Victim: Producing the "Problem" of Addiction in Australian Victims of Crime Compensation Laws' (2014) 25 *International Journal of Drug Policy* 826, 831.

46 See, eg, *RUM v Victims of Crime Assistance Tribunal* [2016] VCAT 367 (10 March 2016); *TNX v Victims of Crime Assistance Tribunal* [2014] VCAT 1234 VCAT (30 September 2014); *Rajah v Victims of Crime Assistance Tribunal* [2002] VCAT 1422 (6 December 2002); *MK v Victims of Crime Assistance Tribunal* [2013] VCAT 1582 (10 September 2013).

47 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume V* (2016) 239.

48 *Ibid*.

49 For discussion of family violence victims' experiences causing multiple layers of disadvantage which can contribute to offending, see Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume V* (2016) 239. The Royal Commission also found that some women might have committed offences because they were pressured to do so by a violent partner: at 237.

50 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume II* (2016).

51 [2016] VCAT 367 (10 March 2016).



a symbolic expression by the state of the community's sympathy'.<sup>52</sup> Similarly, in *TNX v Victims of Crime Assistance Tribunal*,<sup>53</sup> VCAT considered the applicant's prior convictions for causing serious injuries, failing to render assistance and the limited remorse shown by the applicant. Taking into account all those circumstances, VCAT determined it was appropriate to reduce the special financial assistance available from \$10,000 to \$8500.<sup>54</sup>

10.45 These decisions by VCAT demonstrate that a victim's eligibility for financial assistance is not solely based on the act of violence. Broad discretionary factors, including community expectations—that is, whether a victim is an appropriate recipient of 'sympathy' by the community—will inform decision making. Some academics have also suggested that victims must demonstrate they are exhibiting behaviours typically associated with 'responsible citizenship'.<sup>55</sup>

10.46 In *Rajah v Victims of Crime Assistance Tribunal*,<sup>56</sup> VCAT accepted that the applicant was a victim of sexual and physical abuse by her mother's former partner from three years of age. The applicant later abused drugs and had a significant criminal record, mostly related to her abuse of drugs and alcohol. Despite this criminal record, VCAT determined that the applicant's criminal history should not preclude her from receiving financial assistance:

I accept that the applicant was a victim of assaults, sexual and otherwise in early years and that, in all probability, the sexual assaults have resulted in her subsequent dysfunctional behaviour which has exhibited itself in the forms of drug and alcohol abuse and related criminal activities.<sup>57</sup>

10.47 The decision in *Rajah v Victims of Crime Assistance Tribunal* indicates that in some cases an applicant's past criminal behaviour may be viewed within a broader context of disadvantage and family violence victimisation.

10.48 However, in *MK v Victims of Crime Assistance Tribunal*,<sup>58</sup> VCAT declined to award the applicant special financial assistance because she had failed to report to Centrelink that she was in a de facto relationship with her partner, whom she reported was abusive. The applicant's financial instability was described by the applicant as part of the perpetrator's abuse:

MK said that at the time she had no real alternative but to continue to live in the home ... She said the partner was blackmailing her in the sense that she was in receipt of the disability pension and had not advised Centrelink she was in a de facto relationship. According to her, the Partner threatened to report her, saying that given her previous convictions, she could go to prison.<sup>59</sup>

10.49 The applicant's decision not to report the de facto relationship to Centrelink were looked upon unfavourably by VCAT under section 54 considerations, notwithstanding her vulnerability, financial insecurity and the alleged abusive relationship.

### **'Provocation' and condition or disposition of the applicant which may have contributed to injury**

10.50 In determining whether to award financial assistance or the amount to award, section 54 of the Act requires VCAT to consider whether the applicant provoked the act of violence and if so, the extent to which the act of violence was in proportion to that provocation.<sup>60</sup> Section 54 of the Act also requires VCAT to consider any condition or disposition of the

52 Ibid [18], citing Ginnane J in *Meindents v Victims of Crime Assistance Tribunal* [2012] VCAT 1204 [13].

53 [2014] VCAT 1234 (30 September 2014).

54 Ibid [22].

55 Kate Seear and Suzanne Fraser, 'The Addict as Victim: Producing the "Problem" of Addiction in Australian Victims of Crime Compensation Laws' (2014) 25 *International Journal of Drug Policy* 826, 833.

56 [2002] VCAT 1422 (6 December 2002).

57 Ibid [9].

58 [2013] VCAT 1582 (10 September 2013).

59 Ibid [19].

60 *Victims of Crime Assistance Act 1996* (Vic) s 54(c)

applicant which directly or indirectly contributed to his or her injury or death.<sup>61</sup> These are sometimes referred to as ‘contributory conduct’ or ‘provocation’ clauses.<sup>62</sup>

- 10.51 ‘Contributory conduct’ clauses such as those included in section 54 of the Act have been criticised by academics as inviting ‘victim blaming’. In particular, in family violence cases, defensive actions by victims can sometimes be misconstrued as ‘provocation’ or ‘contributing to injury’.<sup>63</sup>
- 10.52 A demonstration of the applicability of these provisions can be found in the non-family violence case of *Fallon v Victims of Crime Assistance Tribunal*,<sup>64</sup> where VCAT affirmed VOCAT’s decision to deny the applicant assistance due to provocation:
- There is no doubt in my mind that the inflammatory words uttered by Ms Fallon set in motion the chain of events ... There was no need for her to ... address her in such an aggressive and abusive manner. In my view she invited retaliation. Her behaviour was provocative and entirely out of proportion with the circumstances.<sup>65</sup>
- 10.53 In *Mendez v Victims of Crime Assistance Tribunal*,<sup>66</sup> which did involve family violence, VOCAT and VCAT took different views of the victim’s role in allegedly provoking the act.
- 10.54 VOCAT relied on the applicant’s alleged role in ‘starting the fight’ when interpreting contribution under section 54 of the Act.<sup>67</sup>
- 10.55 On appeal, the applicant’s legal counsel submitted that she did not provoke the assault by her then boyfriend:
- she did not start or provoke the fight that led to the assault. It started on the tram after her boyfriend, who was drunk, snatched her wallet and took some money from it. When he refused to return the money, she tried to get it back. There ensued a heated verbal argument which became physical, in which he kicked and punched her and she hit him while trying to defend herself.<sup>68</sup>
- 10.56 VCAT ultimately determined that although the applicant may have provoked the assault, it was outweighed by the actions of the perpetrator. VCAT made the following observations:
- I consider that any provocation by Ms Mendez is outweighed by the role of her assailant in following her on more than one tram journey when she was trying to get away from him, in refusing to leave a tram when asked by her to do so, in taking money from her immediately prior to the assault, and in brutally retaliating when she attempted to wrest that money back from him. I note that the assailant was charged, inter alia, with intentionally causing serious injury, and that Ms Mendez was not charged with any offence arising from the incident.<sup>69</sup>

## Whether perpetrator will benefit from award

- 10.57 Section 54 of the Act also provides that in determining whether to make an award or the amount of an award, VOCAT must consider whether the alleged perpetrator will benefit directly or indirectly from the award.<sup>70</sup> The Act provides no guidance about what might be considered as a direct or indirect benefit to a perpetrator.

61 Ibid s 54(d).

62 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 8; Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws, Discussion Paper, Project No 104* (2013) 154.

63 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 8.

64 [2009] VCAT 414 (12 March 2009).

65 Ibid [19].

66 [2011] VCAT 1237 (8 July 2011).

67 Ibid [31].

68 Ibid [18].

69 Ibid [53].

70 *Victims of Crime Assistance Act 1996* (Vic) s 54(e).

- 10.58 In its submission to the Commission's reference in relation to victims of crime in the criminal trial process, the Australian Law Reform Commission submitted that victims' compensation claims should not be excluded on the basis that the offender might benefit, as such provisions unfairly disadvantage victims of family violence.<sup>71</sup>
- 10.59 In the Australian Law Reform Commission and New South Wales Law Reform Commission report *Family Violence—A National Legal Response: Final Report*, the Commissions stated that exclusion in circumstances such as this 'has the effect of excluding most victims of family violence—especially where the victim continues to reside with the offender—and fails to take into account the fact the compensation award may be used to leave the offender'.<sup>72</sup>
- 10.60 The ALRC indicated that other measures should be adopted to ensure offenders do not have access to victims' compensation awards rather than restricting a victim's access to financial assistance. This included legislative mechanisms to make payments on the basis of expenses incurred, which is already provided for under the Act in Victoria.
- 10.61 The Commission has not found VOCAT appeal decisions on this point. However, some stakeholders and academics have raised concerns. Meyering has stated that the section 54 relationship clauses disproportionately impact family violence victims, who for a variety of reasons may choose to remain with, or return to, their abusive partners.<sup>73</sup> Concerns have also been raised about case precedence in the Northern Territory where the mere fact of cohabitation has been held to be sufficient to make an inference that an award would benefit a perpetrator, given such a relationship would be a 'sharing relationship'.<sup>74</sup>
- 10.62 The Royal Commission was informed by the Magistrates' and Children's Court of Victoria that the requirements of sections 52, 53 and 54, including consideration of whether the perpetrator will benefit, are often relevant in family violence applications:
- There are many examples of how these sections may become relevant. A victim may call 000 for police to attend at the time of an incident, but then be unwilling or unable to go on to make a formal police statement about the crime. She may make a formal statement, but later withdraw it. She may not support the police in their application for a full intervention order, with the result that only a "basic" order can be made to promote her safety. In cases where she has cooperated fully with investigating authorities and the perpetrator has been found guilty, she may nevertheless have reconciled with the offender; will he now benefit from an award?<sup>75</sup>
- 10.63 Similarly, in a submission to the Australian Law Reform Commission and New South Wales Law Reform joint report on family violence, Domestic Violence Victoria and others expressed concerns that excluding claims on the basis that the perpetrator may benefit fail to reflect the nature and dynamics of family violence, given financial circumstances are a critical factor in women's decisions about whether to leave a violent relationship.<sup>76</sup>

71 Australian Law Reform Commission, Submission No 1 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 18 August 2015, 2.

72 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 1393.

73 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 8.

74 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 200.

75 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 58.

76 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 1393.

## Effect of VOCAT considerations under sections 52, 53 and 54

- 10.64 Sections 52, 53 and 54 of the Act require VOCAT to consider the ways a victim behaves before, during and after a crime. These sections require VOCAT to make judgments about a victim's behaviour in:
- their everyday life, including potential and/or past criminal activity and drug and alcohol use
  - choosing to report, or not report, an act of violence
  - choosing to provide assistance, or not provide assistance, to police and prosecution
  - maintaining contact with a perpetrator, or returning to a potentially abusive relationship or family violence situation.
- 10.65 The Magistrates' and Children's Court of Victoria have highlighted that the requirements of sections 52, 53 and 54 are often relevant in family violence VOCAT applications because of the power dynamics involved in family violence. The cycle of violence may involve numerous reconciliations before a relationship ends.<sup>77</sup>
- 10.66 The Royal Commission was informed of the complex circumstances in which a victim of family violence might involve investigatory or prosecutorial agencies in a family violence situation, only to later withdraw from the process or resume a relationship with the perpetrator.<sup>78</sup> Even if a victim was to cooperate fully throughout a civil and criminal process, by the time an application is before VOCAT the victim may have reconciled with the offender and the offender may arguably benefit from an award of assistance. These circumstances are all directly relevant to the considerations of VOCAT required under sections 52, 53 and 54 of the Act.
- 10.67 Despite the additional factors specified in section 53 of the Act, and judicial consideration of these matters, concerns continue to be raised by advocacy organisations and academics that the reporting provisions unfairly disadvantage victims of family violence who, in general, are less likely to report to police.<sup>79</sup>
- 10.68 Preliminary consultations undertaken by the Commission indicated that the terminology of these provisions, in particular that '[t]he Tribunal must refuse to make an award' creates perceived barriers to VOCAT applications. That is, despite the discretion that may be exercised by VOCAT, the legislative drafting creates an assumption of refusal which influences a victim's perception of whether their application will be granted, even if their actions may be 'reasonable' or the circumstances 'special'.
- 10.69 The Commission also heard that some lawyers consider cases with 'mandatory refusal' issues to be untenable, even before VOCAT considers there are issues with an application. The question of how specific provisions of the Act might disproportionately impact victims of family violence is discussed in more detail below.

### Mandatory refusal provisions under section 52 of the Act

#### Failure to recognise the nature and dynamics of family violence

- 10.70 The provisions relating to reporting an act of violence to police within a reasonable time, and providing reasonable assistance to an investigatory or prosecutorial body, fail to adequately acknowledge and reflect the nature and dynamics of family violence. These

<sup>77</sup> Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 58.

<sup>78</sup> Ibid.

<sup>79</sup> Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 8; Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188; Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, 2015) 56. See also general concerns about sections 52, 53 and 54 of the Act and their impacts on family violence victims: Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 80.

requirements disadvantage victims of family violence who are less likely to report to police due to fear, shame or economic dependency.<sup>80</sup>

10.71 It is also noted that the Royal Commission found that many incidents of family violence remain hidden.<sup>81</sup> Research has estimated that less than half of family violence victims may make a report to police.<sup>82</sup>

10.72 Given under-reporting is a known characteristic of family violence, Forster considers that the reporting provisions in Australian law are:

another example of the schemes conceptualising crime as the random act of a stranger and failing to recognise the power dynamics that may prevent a domestic violence victim from reporting the crime ... the[se] provisions disproportionately affect victims of family violence.<sup>83</sup>

10.73 Similarly, Meyering sees such reporting provisions as further penalising women for ‘what is ultimately a systemic failure in the community’s response to gender based violence’.<sup>84</sup>

10.74 Reasons for non-reporting of family violence are complex.<sup>85</sup> For some communities, additional barriers are experienced. For example, VOCAT’s Koori List has encountered specific barriers to reporting:

some victims, particularly victims of family violence, would prefer to deal with issues ‘in-house’ rather than report them to the police. Sometimes victims will wait until the alleged offender has moved away, or died, before making an application for assistance to the Tribunal or complaint/report to the police. Sometimes these concerns will relate to the community’s historical experience of the criminal justice system and the impact that a potential sentence of imprisonment may have on a family member.<sup>86</sup>

10.75 The Royal Commission found that people from LGBTIQ communities are less likely to report because of actual or perceived discrimination and harassment.<sup>87</sup> For women living with disability, additional barriers might relate to living environments, physical and financial independence and barriers to reports being believed.<sup>88</sup> Australia’s National Research Organisation for Women’s Safety (ANROWS) states that many women with a disability lack the ability and access to report violence, as well as potentially being financially dependent on the perpetrator.<sup>89</sup>

10.76 The Commission heard during preliminary consultations that additional barriers to reporting exist for women living in rural and regional communities, as well as for Aboriginal women.

10.77 Key legal and victim support stakeholders have previously raised concerns about section 52, describing it as complex and problematic because of the lack of guidance about the factors the Tribunal must consider in making their determination.<sup>90</sup> Some stakeholders have referred to the provisions in section 52 as a ‘barrier’ or ‘hurdle’ for family violence victims.<sup>91</sup>

80 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 189.

81 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume I* (2016) 47.

82 Emma Birdsey and Lucy Snowball, *Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services*, Issue Paper no 91 (New South Wales Bureau of Crime Statistics and Research, 9 December 2013) 1.

83 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 196.

84 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 8.

85 Janet Phillips et al, *Domestic Violence: Issues and Policy Challenges*, Research Paper Series 2015–16 (Parliamentary Library, Parliament of Australia, 2015) 1.

86 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 11.

87 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume V* (2016) 145–6.

88 Sue Salthouse and Carolyn Frohmader, ‘Double the Odds—Domestic Violence and Women with Disabilities’ (Paper presented at the Home Truths Conference, Melbourne, 15–17 September 2004) <<http://wwda.org.au/issues/viol/viol2001/odds/>>.

89 Australia’s National Research Organisation for Women’s Safety, *Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women*, State of Knowledge Paper No DD01 (ANROWS Landscapes, 2016) 27.

90 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 22.

91 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, 2015) 56.

- 10.78 The case law discussed above offers differing interpretations of what might be considered 'reasonable' in the context of family violence. In some cases, the circumstances of family violence gave rise to findings that the lack of reporting was reasonable given the circumstances. In other cases, such behaviour is considered 'unreasonable' but falls under special circumstances. Consequently, there is little available evidence indicating a nuanced, consistent approach to consideration of additional barriers to reporting for family violence victims. In addition, there appears little consideration of the different cohorts of family violence victims who encounter double disadvantage, such as women living in rural and regional communities, Aboriginal women, victims with a disability and people from LGBTIQ communities.
- 10.79 As discussed earlier in this chapter, the case law also indicates that refusing to cooperate with a criminal prosecution will be looked upon unfavourably by VOCAT. However, this characteristic is particularly relevant to the circumstances of family violence. Victims of family violence may not assist police or the prosecution because of their fear of the perpetrator or because they are still in a relationship with them or because they rely financially on the perpetrator.<sup>92</sup>

### Lack of guidance in the Act regarding the dynamics of family violence

- 10.80 By requiring the Tribunal to consider whether the alleged offender is in a position of power, influence or trust, or whether the victim was threatened or intimidated by the alleged offender, section 53 of the Act provides VOCAT with some limited guidance applicable to the characteristics of family violence.<sup>93</sup> However, family violence is not articulated as a specific factor VOCAT may have regard to in making these determinations.
- 10.81 Some academics have suggested that the additional considerations provided in section 53 go some way to reducing the subjectivity involved in determining an award, although they may not 'go far enough to acknowledge the systemic barriers to women reporting violence to or cooperating with police'.<sup>94</sup>
- 10.82 Key legal and victim support stakeholders have raised similar concerns about these provisions giving rise to a lack of clarity about what VOCAT will consider under sections 52 and 53 of the Act.<sup>95</sup>
- 10.83 The Act does not provide guidance on recognising the unique characteristics of family violence, or direct VOCAT to have regard to these characteristics and dynamics. This means sections 52, 53 and 54 of the Act may be inconsistently interpreted and applied.
- 10.84 In some cases the circumstances of family violence are viewed as creating 'reasonable' responses by victims with respect to their delay in reporting or lack of assistance to police or prosecution. However, other cases find such responses 'unreasonable', but invoke the 'special circumstances' provision. While these differing approaches may not unfairly disadvantage individual victims of crime, they raise questions about how the Act conceptualises family violence.

92 Women's Legal Service Victoria, Submission No 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence* (19 June 2015) 53; Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 8; Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 58.

93 *Victims of Crime Assistance Act 1996* (Vic) s 53(c). These considerations are only relevant to whether the matter was reported to police within a reasonable time, not whether the victim provided reasonable assistance to police or prosecution.

94 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 8.

95 Although these concerns were raised during consultations about VOCAT's Koori List, these were broader observations about the operation of sections 52 and 53. See Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 22.

- 10.85 Given the pervasiveness of family violence in the community, the lack of specific guidance in the Act with respect to family violence and how it should be judicially considered may lead to inconsistent and inappropriate outcomes.<sup>96</sup> In particular, it could be argued that family violence is not a ‘special circumstance’—a fact acknowledged in *Nichol v Victims of Crime Assistance Tribunal*. In that case, the very ‘commonality’ of family violence led VCAT to determine that no special circumstances existed because the ‘narrative’ of domestic violence was not out of the ordinary.<sup>97</sup>

### Failure to acknowledge police and community attitudes to reports of family violence

- 10.86 In addition to failing to recognise the nature and dynamics of family violence, the Act may also fail to account for police and broader community attitudes to family violence and the way in which these attitudes might affect reporting rates.
- 10.87 For some victims, family violence offences may have occurred years ago, when police and prosecutorial bodies did not respond to family violence as a crime. The Royal Commission was told that prior to around 2001, police and the broader community responded to family violence as a private matter.<sup>98</sup> Family violence was ignored or minimised. For those who were brave enough to report it, they were often dismissed or discouraged from pursuing the matter any further.<sup>99</sup>
- 10.88 The mandatory refusal provisions, in particular the police reporting requirement, may therefore not adequately recognise the fact that police attitudes to family violence can still be problematic. During the Royal Commission, Victoria Police acknowledged that responses to family violence can still be a ‘lottery’ for some victims.<sup>100</sup> This is despite considerable efforts to change police and community culture.<sup>101</sup>
- 10.89 Furthermore, during preliminary consultations, the Commission heard that some women had attempted to report matters to police but had not been ‘allowed’ to make a report. This was particularly relevant for historical abuse or when family violence was no longer occurring. The Commission also heard that even where reports might be made to police, a report may not always be recorded as an incident. This then limits the documentation available for a VOCAT application, making applications more complex for lawyers to prepare and for VOCAT to assess.
- 10.90 Reporting is also affected by perceptions of justice. Victims who are not confident the system will deliver the kind of justice outcomes they seek may choose not to face the additional trauma, effort and risk of reporting.<sup>102</sup>

## Considerations under section 54 of the Act

### Victims’ character and behaviour

- 10.91 A victim’s character and behaviour are particularly scrutinised with respect to prior offending. For this reason, some victims with past criminal records may find it difficult to secure an award of financial assistance or an award may be reduced.<sup>103</sup> The question is whether this unfairly disadvantages victims of family violence more than other victims of crime and if so, whether there should be any difference in the way a family violence victim’s character or behaviour is considered under the Act.

96 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 190.

97 *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840 (30 April 2000) [23].

98 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume III* (2016) 3.

99 *Ibid.*

100 *Ibid.* 8.

101 *Ibid.* 8.

102 Matthew Willis, *Non-disclosure of Violence in Australian Indigenous Communities*, Trends and Issues in Crime and Criminal Justice No 405 (Australian Institute of Criminology, 2011) 2.

103 See, eg, *RUM v Victims of Crime Assistance Tribunal* [2016] VCAT 367 (10 March 2016); *TNX v Victims of Crime Assistance Tribunal* [2014] VCAT 1234 (30 September 2014); *Rajah v Victims of Crime Assistance Tribunal* [2002] VCAT 1422 (6 December 2002), *MK v Victims of Crime Assistance Tribunal* [2013] VCAT 1582 (10 September 2013). See also Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal: Best Practice Manual* (Whittlesea Community Connections, 2011) 49.

- 10.92 Research indicates there may be a strong link between family violence victimisation and criminal offending, particularly for female victims of family violence.<sup>104</sup> In particular, Aboriginal women in prison have experienced high levels of victimisation:
- Very often, women and children who have been victims of violence have self-medicated their mental health and trauma with drugs and alcohol which inevitably results in adding to the chaos of their lives and increases their contact with the criminal justice system.<sup>105</sup>
- 10.93 The Royal Commission has found that women might commit crimes as a result of experiencing family violence or under duress or coercion from a violent partner<sup>106</sup> and that women in prison in Victoria have experienced family violence at much higher rates than women in the rest of the community.<sup>107</sup>
- 10.94 Given these findings, it is suggested that consideration of a victim's character and behaviour under section 54 of the Act might have a disproportionately adverse impact for victims of family violence as compared to other victims of crime. VOCAT and VCAT findings appear to show differing considerations of character and behaviour in family violence contexts and as such, it is not clear whether a family violence 'lens' is applied to offending behaviour.

### 'Contributory conduct' provisions

- 10.95 The case of *Mendez v Victims of Crime Assistance Tribunal* discussed above illustrates the complexity of applying the contributory conduct provision under section 54 of the Act. In that case, the complexity was evident when the victim was considered by both VOCAT and VCAT to have 'provoked' the assault by her boyfriend, even though VCAT subsequently found that the actions of her boyfriend 'outweighed' her provocation.<sup>108</sup>
- 10.96 While the Commission has not found other case law indicating that victims of family violence are disproportionately disadvantaged under the section 54 contributory conduct provisions, some academics have raised concerns, noting the potential for 'victim blaming' particularly in the context of family violence.<sup>109</sup>
- 10.97 In this context it is noted that concerns about contributory conduct clauses were also raised by domestic violence advocacy organisations during a Western Australian review of family and domestic violence laws.<sup>110</sup> However, the Law Reform Commission of Western Australia (LRCWA) was unable to find evidence that contributory conduct clauses disproportionately affected victims of family violence. Notwithstanding this lack of evidence, given the issues raised by advocacy organisations, the LRCWA recommended a review of how Western Australia's compensation scheme affected victims of family and domestic violence.<sup>111</sup>
- 10.98 During preliminary consultations, the Commission heard that there may be circumstances where victims are charged with criminal offences as a result of defensive actions taken against perpetrators. The Royal Commission was told by key stakeholders that police sometimes inaccurately identify victims as 'primary aggressors' when attending family violence incidents, and that some women who use violence in self-defence are identified by police as the primary aggressor.<sup>112</sup> Where a victim of intimate partner violence has retaliated against violence by her partner, police can sometimes arrest both parties, which

104 See generally Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume V* (2016) 237. See also international discussion at Her Majesty's Inspectorate of the Constabulary (UK), *Everyone's Business: Improving the Police Response to Domestic Abuse* (2014) 104.

105 Community Legal Centres NSW, Submission to New South Wales Department of Attorney General and Justice, *Review of NSW's Victims Compensation Scheme* (30 April 2012) 47.

106 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume V* (2016) 237–9.

107 Ibid 239.

108 *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) [53].

109 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 8.

110 Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws*, Discussion Paper, Project No 104 (2013) 154.

111 Ibid 174.

112 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume III* (2016) 18–21.



‘... vindicates [the perpetrator’s] story that they are both at fault, or that she “provoked” him’.<sup>113</sup>

- 10.99 The Commission raises this issue as relevant to the character and conduct provisions under section 54 of the Act, as there may be circumstances where a victim of family violence applies to VOCAT for an award of assistance, but police records indicate ‘equal fault’ or ‘provocation’, based on police records.
- 10.100 The potential impacts of these complexities and considerations under section 54 of the Act in family violence contexts merit further exploration.

### Potential for perpetrator to benefit from award of assistance

- 10.101 A lack of financial security and economic resources may be barriers to leaving abusive relationships.<sup>114</sup> A victim of family violence may be unable to leave a relationship without the financial assistance of a VOCAT award. However, at the time the application is assessed, the victim may still be residing with the perpetrator. This may raise issues of perpetrator benefit.
- 10.102 As noted earlier, the Commission is unable to determine whether the perpetrator benefit provisions are currently disproportionately affecting victims of family violence in Victoria. However, the Commission notes the academic and stakeholder concerns about these provisions, including those of the Magistrates’ Court of Victoria in its submission to the Royal Commission.<sup>115</sup>
- 10.103 Further examination of the practical interpretation of this provision is required. Further exploration is also required of how this might be determined by VOCAT. For example, if a victim of family violence has reconciled and is living with a perpetrator of family violence who is undertaking a court-mandated men’s behaviour change program,<sup>116</sup> would an award be refused or reduced by virtue of their shared living arrangements and shared finances? And if so, is this appropriate given the purposes and objectives of the Act?

### Experiences in other jurisdictions

#### Report to police within a reasonable time

- 10.104 Most Australian state and territory financial assistance schemes for victims of crime require a victim to report to police within a ‘reasonable time’.<sup>117</sup> Aside from the evidentiary benefits for supporting compensation or financial assistance claims, such provisions also encourage victims to come forward to enable the state to prosecute offences.<sup>118</sup>
- 10.105 As in Victoria, other state and territory legislative frameworks allow the relevant decision-making body to consider factors that may have resulted in failure to report within a reasonable time. For example, the Northern Territory provisions are similar to those in Victoria.<sup>119</sup> In South Australia the court cannot make a compensation order if the applicant failed to report the offence ‘without good reason’.<sup>120</sup>
- 10.106 However, in New South Wales, Queensland and the Australian Capital Territory, an act of violence can be reported to other professionals, including government agencies and health professionals such as a counsellor, psychologist or doctor in certain

113 Centre for Innovative Justice, *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (RMIT University, 2015) 23.

114 Australia’s National Research Organisation for Women’s Safety, *Building Effective Policies and Services to Promote Women’s Economic Security Following Domestic Violence*, State of Knowledge Paper no 7 (ANROWS Landscapes, 2015) 8.

115 Magistrates’ Court of Victoria and Children’s Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 58.

116 Male perpetrators of family violence can be ordered to attend a men’s behaviour change program either through a counselling order or as part of a condition on an intervention order: Magistrates’ Court of Victoria, *Court Programs* (2015) <<https://familyviolence.courts.vic.gov.au/court-programs>>.

117 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 194. See also table of Australian jurisdictions at Appendix B.

118 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 183.

119 *Victims of Crime Assistance Act 2006* (NT) s 43(b) and (c).

120 *Victims of Crime Act 2001* (SA) s 20(7).

circumstances.<sup>121</sup> Furthermore, in 2017, the Queensland Parliament passed an amendment to its legislation which will explicitly extend its alternative reporting provision to victims of domestic violence and recognise victims who report the violence to ‘domestic violence services’.<sup>122</sup>

### Requirement to assist police

10.107 As already noted, most Australian state and territory schemes require victims to assist police and prosecution. However, unlike Victoria, where a victim must establish ‘special circumstances’ if they have not provided reasonable assistance, Queensland has recently amended its victims’ of crime assistance legislation to enable the government assessor to have regard to whether the act of violence involves domestic violence.<sup>123</sup> This will make Queensland the only jurisdiction where domestic violence is an explicit consideration in determining whether a victim reasonably assisted police and prosecution.

### Contributory conduct and character of victim

10.108 In all Australian jurisdictions, there is some form of ‘contributory conduct’ clause in the relevant legislation.<sup>124</sup> Broadly, all states and territories examine the victim’s conduct before and at the time of the act of violence and consider whether their conduct may have contributed to their injuries or whether they took steps to mitigate the extent of their injuries.<sup>125</sup>

10.109 The United Kingdom has a more prescriptive approach than in Australian states and territories, refusing awards or reducing awards where applicants have an unspent conviction, calculated on a sliding scale. For example, a 10 per cent reduction is applied for unspent convictions of one penalty point, moving up to a 100 per cent reduction for unspent convictions of 10 penalty points.<sup>126</sup>

## Discussion and options for reform

### More certainty and equity for victims of family violence

10.110 Women’s Legal Service Victoria has submitted there is inconsistency in decision making in VOCAT on family violence matters, causing victims of family violence to feel confused and traumatised by the legal system.<sup>127</sup>

10.111 The Commission’s previous report in relation to victims of crime highlighted stakeholder proposals for section 52 to be amended to list family violence as a relevant factor to which VOCAT could have regard in exercising its discretion.<sup>128</sup> In particular, Victoria Legal Aid has suggested that section 52 should explicitly require consideration of the nature of the relationship between the victim and offender. Women’s Legal Service Victoria suggested that the phrase ‘special circumstances’ should be expressly defined in section 52 to recognise family violence.

121 *Victims’ Rights and Support Act 2013* (NSW) s 44(c), *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 31(3) and (4) and *Victims of Crime Assistance Act 2009* (Qld) s 81(1)(a)(ii) and (2).

122 *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) (not yet in force) s 54.

123 *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) (not yet in force) s 55(4).

124 See Appendix B. See also New South Wales Department of Attorney General and Justice, *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 98.

125 New South Wales Department of Attorney General and Justice, *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 98.

126 Ministry of Justice and Criminal Injuries Compensation Authority (UK), *Criminal Injuries Compensation: A Guide* (2014) <<https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide#co-operation-with-the-police-and-the-criminal-justice-system>>.

127 Women’s Legal Service Victoria, Submission No 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence* (19 June 2015) 52.

128 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 245.

- 10.112 Similarly, the Magistrates' Court and Children's Court in their submission to the Royal Commission recommended that family violence be included as a relevant factor to be considered under sections 52, 53 and 54: 'This would clearly direct Tribunal members to the importance of considering any relevant family violence matters in the exercise of their discretion.'<sup>129</sup>
- 10.113 In contrast, some academics have suggested that victims of family violence should not be required to report offences to police at all,<sup>130</sup> while some advocates suggest that all that should be required in such cases is a finding on the balance of probabilities that a crime occurred.<sup>131</sup>

### Recognising family violence under sections 52, 53 and 54

- 10.114 As the above discussion indicates, the Act provides little legislative guidance to enable VOCAT to exercise discretion in a consistent way when considering factors under sections 52, 53 and 54 with respect to victims of family violence.
- 10.115 Recognising family violence for the purposes of sections 52, 53 and 54 under the Act could be achieved in different ways.
- 10.116 Legislative amendment could involve creating an overarching provision which enables, or requires, VOCAT to consider the nature and dynamics of family violence when making a determination under sections 52, 53 and 54 of the Act. Alternatively, family violence matters could be exempted entirely from the mandatory refusal requirements under section 52 and from some, or all, of the section 54 considerations.
- 10.117 Another option is for the Act to be amended to explicitly require consideration of family violence when determining what is 'reasonable' as a subsection of section 52. This is the approach taken most recently in Queensland with respect to whether a victim has provided reasonable assistance to police or prosecution. The Act could also be amended to require VOCAT to have regard to family violence in considering whether there are special circumstances for the purposes of section 52.
- 10.118 The Act could also be amended to include family violence specifically in the circumstances VOCAT may have regard to under section 53. Consideration could also be given to extending the application of section 53 to consideration of whether the applicant provided reasonable assistance to police and prosecution under section 52(a)(ii).
- 10.119 An additional option is to amend section 52(a) to enable victims of family violence to report the act of violence to other bodies or agencies. This could be instead of, or in addition to, reporting to police. In this context, consideration could be given to recognising reports made to other identified people such as counsellors, support workers or other health professionals.<sup>132</sup>
- 10.120 Alternative reporting mechanisms exist in New South Wales, the Australian Capital Territory and Queensland in certain circumstances, such as where victims are considered a 'special class' of victim.<sup>133</sup>

129 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 59.

130 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 208.

131 Community Legal Centres NSW, Submission to New South Wales Department of Attorney General and Justice, *Review of NSW's Victims Compensation Scheme* (30 April 2012) 17.

132 Research indicates that low rates of reporting to police do not mean that a victim has not disclosed the family violence to other agencies or organisations, such as a women's or family violence service. See, eg, Emma Birdsey and Lucy Snowball, *Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services*, Issues Paper no 91 (New South Wales Bureau of Crime Statistics and Research, 9 December 2013) 2.

133 *Victims' Rights and Support Act 2013* (NSW) s 44(c), *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 31(3) and (4) and *Victims of Crime Assistance Act 2009* (Qld) s 81(1)(a)(ii) and (2). See also *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) (not yet in force) s 54.

- 10.121 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on whether sections 52, 53 or 54 of the Act should be amended to recognise family violence more explicitly and if so, how this might be achieved. Specific questions for consideration are set out below.

## Questions

### Mandatory refusal

- 26 Should the requirement to report incidents to police be explicitly excluded for victims of family violence?
- 27 Alternatively, should the police reporting requirement be amended to recognise reports made by victims of family violence to other persons? If so, what other reporting should be recognised?
- 28 Should the requirement to provide reasonable assistance to police and prosecution be explicitly excluded for victims of family violence?
- 29 If the police reporting requirement is to be retained for family violence victims, should family violence also be specified as a matter the Tribunal may consider in determining whether a report was made to police within a reasonable time? If so, how should this be reflected in the Act?
- 30 If the reasonable assistance requirement is to be retained for family violence victims, should family violence also be specified as a matter the Tribunal may consider? If so, how should this be reflected in the Act?

### Is family violence a 'special circumstance'?

- 31 Should family violence be expressly considered 'special circumstances' for the purpose of the mandatory refusal provisions? If so, how should family violence be treated?

### Section 54 considerations

- 32 What are the effects of the section 54 considerations for victims of family violence? Do these factors result in awards to family violence victims not being made or being reduced disproportionately compared to other victims of crime?
- 33 Should some, or all, of the section 54 considerations be excluded for victims of family violence? If so, what considerations should be excluded?
- 34 Alternatively, should family violence be specified as a factor that VOCAT must have regard to in exercising its discretion under section 54 to make an award? If so, how should this be reflected in the Act?
- 35 How do the contributory conduct provisions under section 54 of the Act currently affect victims of family violence as compared to other victims of crime?
- 36 How do the perpetrator benefit provisions under section 54 of the Act currently affect victims of family violence as compared to other victims of crime?

# VOCAT procedures and time frames for the making of awards

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## 11. VOCAT procedures and time frames for the making of awards

### Introduction

- 11.1 This chapter outlines the Victims of Crime Assistance Tribunal (VOCAT) procedures and time frames relevant to the making of an award for financial assistance, including interim awards. Consideration is given to the impact of these procedures and time frames on whether an award of financial assistance can be made to victims of family violence.
- 11.2 This chapter relates to the fifth matter identified in the terms of reference, which requires the Victorian Law Reform Commission (the Commission) to review procedural matters to expedite the making of an award.
- 11.3 This chapter then:
- considers how VOCAT's procedures and time frames might affect victims of family violence differently to other victims of crime
  - poses a number of questions for consideration and suggests options for reform to improve victim experiences of VOCAT, including proposals to improve delivery of awards.

### VOCAT processes and time frames

- 11.4 As discussed in Chapter 8, VOCAT applications commence by way of a written application in the prescribed form<sup>1</sup> accompanied by documentary evidence.<sup>2</sup>
- 11.5 If the applicant has not reported the act of violence to the police, the form must be accompanied by a statutory declaration by the applicant setting out the circumstances of the act of violence and the reasons the matter was not reported.<sup>3</sup>

### The investigation process

- 11.6 VOCAT has broad investigative powers under the *Victims of Crime Assistance Act 1996* (Vic) (the Act). Under section 39, VOCAT may:
- authorise a person to make any enquiry or carry out any investigation on behalf of the Tribunal necessary to furnish the Tribunal with the further information it requires
  - order the preparation and submission to the Tribunal of a medical report or counselling report
  - order a VOCAT applicant to lodge with the Tribunal, within a specified period, an additional statement containing particulars of matters specified in the order or any documents specified in the order.<sup>4</sup>

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1 *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(a); *Victims of Crime Assistance Rules 2010* (Vic) r.6.

2 *Victims of Crime Assistance Act 1996* (Vic) s 26(2).

3 Victims of Crime Assistance Tribunal, *VOCAT Application for Assistance and Information Guide* (2016) <[www.vocat.vic.gov.au/application-assistance](http://www.vocat.vic.gov.au/application-assistance)>.

4 *Victims of Crime Assistance Act 1996* (Vic) s 39(1).

- 11.7 In practice, the following process is usually followed by VOCAT after it receives an application. The Tribunal sends the applicant a 'Directions for Preparation' form outlining the evidence the Tribunal will need to make a determination. This may include requests for:
- a report from the applicant's treating doctor if physical injury is claimed
  - receipts or invoices for the expenses claimed
  - a copy of the applicant's police statement
  - copies of any intervention orders
  - a report from the counsellor if the applicant is seeking counselling
  - information about Medicare rebates.<sup>5</sup>
- 11.8 When requesting this information, VOCAT provides a date for filing all supporting material.<sup>6</sup> Usually VOCAT requires all supporting material to be filed within four months of the application being received.
- 11.9 VOCAT seeks information from Victoria Police to help determine whether a crime occurred, as well as the criminal history of the alleged offender and the victim. It also seeks information about a victim's injuries via medical records or from Victoria Police.<sup>7</sup>

### Process for determining an award

- 11.10 After receiving documentation from the applicant and relevant parties, a directions hearing may be required to provide guidance to the Tribunal about matters relevant to the application. It is more common to request that an applicant's lawyer attend a directions hearing than the applicant.<sup>8</sup>
- 11.11 During preliminary consultations, the Commission heard that the use of directions hearings by VOCAT members varied, including in the amount and particulars of the information requested and the purpose of the directions hearing.
- 11.12 VOCAT may determine an application with or without conducting a directions hearing or a final hearing. This depends on the preference of the applicant as well as the Tribunal's need for a hearing.<sup>9</sup>
- 11.13 Once VOCAT has the information it requires to make a decision, the Tribunal advises the applicant whether a hearing will be held. Matters that proceed to a hearing are usually those where a victim has asked for the application to be determined by a hearing, or where VOCAT considers the matters to be complex and requiring the giving of evidence and oral submissions by lawyers. Around 25 per cent of VOCAT matters are currently determined at hearings.<sup>10</sup>
- 11.14 In practice, many straightforward applications are decided without the need for a hearing.<sup>11</sup> However, as stated above, more complex cases are usually determined at a hearing and VOCAT has previously identified family violence applications as complex.

### The time frame for decision making

- 11.15 VOCAT must act 'expeditiously' (that is, promptly) to determine applications. Under the Act, VOCAT has a duty to act fairly, according to the substantial merits of the case and as promptly as the requirements of the Act and a proper determination of the matter permit.<sup>12</sup>

5 Victims of Crime Assistance Tribunal, *VOCAT Application for Assistance and Information Guide* (2016) <[www.vocat.vic.gov.au/application-assistance](http://www.vocat.vic.gov.au/application-assistance)>.

6 Ibid.

7 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.

8 Ibid.

9 *Victims of Crime Assistance Act 1996* (Vic) ss 33.

10 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 36.

11 Ibid 24.

12 *Victims of Crime Assistance Act 1996* (Vic) s 32(1).

- 11.16 However, VOCAT must also have regard to matters that can sometimes affect the time it takes to finalise an application, including:
- awaiting the outcome of a criminal investigation, trial or inquest
  - the need for further enquiries to be made by the Tribunal
  - the need to notify the alleged offender about the application and provide reasonable time for the offender to respond
  - waiting for an injury to stabilise so that an accurate prognosis can be provided to the Tribunal
  - requiring additional time to identify and communicate with all related victims of a deceased primary victim to advise them of their right to apply for financial assistance.<sup>13</sup>
- 11.17 The Act specifically enables VOCAT to make awards even where there might be related civil or *Sentencing Act 1991* (Vic) matters that have not yet been finalised. Under section 32(3), the Tribunal is not prevented from hearing and determining a VOCAT application only because there is a civil proceeding, or a proceeding under subdivision (1) of Division 2 of Part 4 of the *Sentencing Act 1991* (Vic) pending.<sup>14</sup>
- 11.18 This means that VOCAT can still decide on the result of an application, even if there is going to be a civil trial, or if a court is going to decide a matter concerning compensation or restitution under the *Sentencing Act 1991* (Vic). However, VOCAT can adjourn considering an application if necessary.<sup>15</sup> The Tribunal may adjourn the consideration of an application if there is a criminal trial or a civil trial that is related to that act of violence, and the trial is likely to be decided within six months.<sup>16</sup>
- 11.19 The effect of these provisions is that in practice, a VOCAT application generally will be adjourned until related matters in the civil and criminal courts have been decided. Applicants are advised that the Tribunal may wait until criminal charges are finalised before determining their matter.<sup>17</sup>
- 11.20 Where a hearing is requested or required, it usually occurs within six weeks of a VOCAT member deciding to conduct it or, if requested by the applicant, within six to 10 weeks of the applicant filing all supporting material.<sup>18</sup>
- 11.21 However, the Commission heard during preliminary consultations that where there are criminal proceedings pending, the practice of the Tribunal is to order an adjournment.

## Interim awards for urgent assistance

- 11.22 Section 56 of the Act empowers the Tribunal to make an interim award of assistance pending the final determination of an application.
- 11.23 Applicants who need urgent assistance, such as financial assistance for safety-related expenses, can seek an interim award. This award can often be paid before VOCAT makes a final determination.<sup>19</sup>
- 11.24 Interim awards form part of the total financial assistance available for expenses incurred, or likely to occur, up to the statutory limit of \$60,000, and must be deducted from the total amount of any assistance awarded.<sup>20</sup>

13 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.

14 *Victims of Crime Assistance Act 1996* (Vic) s 32(3).

15 *Ibid* s 41.

16 *Ibid* s 41(2).

17 Victims of Crime Assistance Tribunal, *VOCAT Application for Assistance and Information Guide* (2016) <[www.vocat.vic.gov.au/application-assistance](http://www.vocat.vic.gov.au/application-assistance)>.

18 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.

19 *Victims of Crime Assistance Act 1996* (Vic) s 56(1).

20 *Ibid* s 56(4).



- 11.25 Since 2010, primary victims have been able to apply for financial assistance for safety-related expenses of up to \$5000 without needing to demonstrate exceptional circumstances.<sup>21</sup> Applications for financial assistance for safety-related expenses require supporting documentation such as invoices, receipts or quotes.<sup>22</sup>

## Timeliness

### Why is timeliness important?

- 11.26 Delays in determining VOCAT applications relating to family violence can have profound impacts on victims. Financial hardship can be a significant consequence of family violence and the economic impacts of family violence can impede a victim's ability to leave an abusive relationship and obtain safety.<sup>23</sup> Financial challenges are particularly acute at the point of separation, when expenses may be incurred for health, housing, child care and legal assistance.<sup>24</sup>

### What is the current time frame for VOCAT awards?

- 11.27 VOCAT has implemented a number of initiatives to improve timeliness, including launching an online application form and setting up an electronic case management system.<sup>25</sup> The use of judicial registrars is also designed to save time by reserving the use of magistrates for more complex matters.
- 11.28 Close to 50 per cent of all VOCAT applications are finalised within nine months.<sup>26</sup> VOCAT's website states that after an award of financial assistance is made, it can take up to six weeks for the payment to be generated.<sup>27</sup>
- 11.29 The Commission is not aware of whether interim awards are 'fast tracked', or are subject to the same payment process and time frame. However, the Commission notes concerns raised with the Victorian Royal Commission into Family Violence (the Royal Commission) that even interim awards experience delays.<sup>28</sup> The Royal Commission was advised that although family violence services operating in some magistrates' courts have adopted procedures to make interim awards for urgent expenses related to security, relocation or medical bills, the administrative processes still result in payments taking a number of weeks, limiting their usefulness.<sup>29</sup>
- 11.30 Preliminary consultations conducted by the Commission also indicated that the interim award process was not producing timely responses for victims of family violence. Some stakeholders stated that where family violence circumstances are urgent, they no longer seek assistance through VOCAT as VOCAT delays affect client safety and do not assist with time-sensitive matters such as security or relocation.

### Increasing complexity

- 11.31 Despite the efficiencies being implemented by VOCAT, the Tribunal has observed an increase in the complexity of applications, particularly relating to family violence. As VOCAT notes, 'Applications for assistance for family violence offences are complex and continue to rise in number'.<sup>30</sup> The Chief Magistrate has also stated that applications arising from family violence require additional sensitivity and 'intense management'.<sup>31</sup>

21 Victims of Crime Assistance Tribunal, *Safety-Related Expenses*, *Victims of Crime Assistance Tribunal, Information Sheet* (September 2010).  
 22 Ibid.  
 23 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, 2015) 6.  
 24 Australia's National Research Organisation for Women's Safety, *Building Effective Policies and Services to Promote Women's Economic Security Following Domestic Violence*, State of Knowledge Paper no 7 (ANROWS Landscapes, 2015) 4.  
 25 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 9.  
 26 Ibid 36.  
 27 Victims of Crime Assistance Tribunal, *Frequently Asked Questions* (2016) <www.vocat.vic.gov.au>.  
 28 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 81.  
 29 Ibid.  
 30 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 37.  
 31 Ibid 9.

- 11.32 In the 2015–16 reporting period, there was a 12 per cent increase from the previous financial year in the number of matters proceeding to hearing rather than being determined ‘on the papers’.<sup>32</sup> This supports VOCAT’s observation of an increase in complexity of the applications being brought before it, as hearings are more likely to be required when matters are complex.
- 11.33 During preliminary consultations, the Commission heard that increased complexity affects the Tribunal’s timeliness because more information is required. The perpetrator may need to be notified and a directions hearing may be required. The Tribunal may also ultimately decide a hearing is necessary to determine the matter.

## Other urgent financial assistance for victims of family violence

- 11.34 As discussed above, other criminal compensation or civil restitution avenues are unlikely to be a viable option for many victims of family violence.
- 11.35 However, as noted in Chapter 4, Victoria’s broader family violence service system provides access to some state-funded financial assistance that is comparable to some aspects of financial assistance provided to victims of crime under the Act. Most notably this includes assistance available under family violence flexible support packages (FSPs).
- 11.36 Some aspects of FSPs overlap with the assistance available through VOCAT, although the way a victim accesses assistance is different.
- 11.37 FSPs enable family violence services to access funds to provide victims with urgent and critical support tailored to their specific needs.<sup>33</sup> Flexible support packages can be made up to \$7000, with an average cost of \$3000.<sup>34</sup>
- 11.38 FSPs are administered by community organisations across the four Department of Health and Human Services regional divisions.<sup>35</sup> FSPs are only available to victims who have a case management plan and who are escaping family violence or planning to leave an abusive relationship. FSPs are not available to victims who wish to continue to live with the perpetrator.<sup>36</sup>
- 11.39 Case managers can seek assistance under a number of categories, including:
- freedom from abuse and violence (which can include purchasing mobile phones, alarms or installing CCTV)
  - suitable and stable housing (funding travel costs, relocation costs, whitegoods, mortgage payments, utility bills)
  - physical and mental wellbeing (funding disability aids and covering pharmaceutical costs)
  - alcohol and other drugs counselling
  - family violence counselling
  - participation in learning and education activities (funding TAFE or university including books and equipment) or participation in the workforce (purchasing clothing, uniforms or travel support)
  - financial security and independence (payment of debts or financial services)
  - legal and court costs

32 Ibid.

33 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 1; Women’s Health West, *Annual Report 2015–16* (2016) 24.

34 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 1.

35 For a full list of community organisations administering flexible support packages across Victoria see: Western Integrated Family Violence Committee, *Family Violence Flexible Support Packages Announced* (2015) <[www.wifvc.org.au/media-news/2015/12/family-violence-flexible-support-packages-announced/](http://www.wifvc.org.au/media-news/2015/12/family-violence-flexible-support-packages-announced/)>.

36 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 2.

- support for social engagement, connection with culture and identity (funding a travel card, car repairs, driving lessons or cultural activities).<sup>37</sup>
- 11.40 FSPs are intended to assist victims to stabilise and improve their safety in a crisis or post-crisis situation. In this respect, there are parallels with VOCAT’s awards of financial assistance for safety-related expenses. However, the case management framework for provision of FSPs requires case managers to identify the ways in which the package will support the long-term health and wellbeing of the victim.
- 11.41 Support workers have emphasised the importance of FSPs to enabling a timely response: ‘Without the [flexible support] package we could not have achieved [relocation] in such a short time frame. This woman was with us for a month and we worked quickly to get this application in.’<sup>38</sup>
- 11.42 As FSPs are administered by community agencies via a case management approach, and agencies are not bound by rules of evidence like VOCAT, packages can be approved in approximately 14 days.<sup>39</sup>
- 11.43 During preliminary consultations, support agencies highlighted the importance of a timely and flexible response for victims in crisis. FSPs were described as more responsive than interim awards under VOCAT. Indeed, some services advised that they were directing their clients away from VOCAT and towards the use of FSPs for urgent assistance.

## Timeliness of awards in other jurisdictions—a comparison with New South Wales

- 11.44 Other jurisdictions have also encountered barriers to providing timely and responsive support and financial assistance for victims of crime, including victims of family violence. This section examines the recent experience of New South Wales, which resulted in the reform of its victim support and compensation scheme in 2013.
- 11.45 An independent review in 2012 found that the objectives of *The Victims Support and Rehabilitation Act 1996* (NSW)—to provide support and rehabilitation to victims of violent crime through counselling and compensation—were not being met. This was due to the significant delays in the provision of compensation, with an average wait of over two years.<sup>40</sup> The system was described as ‘complicated’ and requiring expert medical reports and lawyers to pursue claims.<sup>41</sup>
- 11.46 The reviewers noted that providing practical assistance shortly after a person experienced an act of violence would better assist victims to begin their healing process.<sup>42</sup> In particular, the benefits of early provision of funding for relocation assistance, security upgrades and assistance with medical expenses were noted.
- 11.47 The Victims Compensation Scheme was replaced in 2013 by a new Victims Support Scheme (VSS) designed to provide more tailored, timely and integrated victim support and compensation through the one scheme:

The VSS does not focus on specific injuries sustained by victims, but looks holistically at the impact of a violent crime on victims’ lives as a whole. The VSS focuses on providing victims with practical and financial assistance when they need it most. The new VSS has reduced the amount of lump sum payments previously available ... and instead focuses

37 Eastern Domestic Violence Service, *Family Violence Flexible Support Packages Application Form* (2017).

38 McAuley Community Services for Women, *Flexible Support Packages are Changing Lives* (2014) <[www.mcauleycsw.org.au/stories/flexible-support-packages-are-changing-lives](http://www.mcauleycsw.org.au/stories/flexible-support-packages-are-changing-lives)>.

39 Eastern Domestic Violence Service, *Family Violence Flexible Support Packages Application Form* (2017).

40 New South Wales Department of Attorney General and Justice, *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

41 New South Wales Government, Submission No 11 to Royal Commission into Institutional Responses to Child Sexual Abuse in Response to Issues Paper 7, *Royal Commission into Institutional Responses into Child Sexual Abuse* (2014) 2.

42 New South Wales Department of Attorney General and Justice, *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

on providing with minimal delay a package of practical and financial support to victims of violent crime with a smaller recognition payment.<sup>43</sup>

11.48 The VSS provides for:

- counselling
- up to \$5000 for immediate needs to cover emergency medical treatment, relocation expenses, crime scene clean-up, safety measures in the home
- funeral assistance
- economic loss—up to \$30,000 including loss of earnings, out-of-pocket justice-related expenses
- recognition payment—up to \$15,000.<sup>44</sup>

11.49 One of the key features of the scheme is timely access to support and financial assistance. Assistance is now provided in just under three months compared to over two years under the former scheme.<sup>45</sup>

## Timeliness of awards—effects on family violence victims

### Delays affect safety and financial security

11.50 The Royal Commission heard that the time taken for a final VOCAT determination was too long. It estimated the waiting period to be frequently between nine and 12 months.<sup>46</sup>

11.51 Research conducted by Women’s Legal Service Victoria similarly found that victims of family violence experienced long waits for VOCAT matters to be finalised:

The current scheme does not adequately meet the needs of women who have experienced family violence. Women who would benefit enormously from payments of compensation—those left in financial hardship by family violence—have limited access to the scheme.<sup>47</sup>

11.52 Furthermore, Women’s Legal Service Victoria noted that awards of special financial assistance are only made as part of the final VOCAT determination, meaning special financial assistance in the form of a lump sum payment is rarely available when a victim is most financially vulnerable.<sup>48</sup>

11.53 In preliminary consultations the Commission was told that some VOCAT applications by family violence victims could take 18 months to two years to be determined. The Commission also heard that some family violence victims did not receive a final determination until four years after the initial application.

11.54 The Commission notes VOCAT statistics indicating almost half of all applications are finalised within nine months.<sup>49</sup> It is possible that the complexities experienced in family violence cases are leading to the increased delays in the average time taken to complete an application in these matters.

11.55 Delays in determining VOCAT applications relating to family violence can have profound impacts on victims of family violence. Financial hardship can be a significant consequence of family violence, and the economic impacts of family violence can also impede a victim’s ability to leave an abusive relationship and obtain safety.<sup>50</sup>

43 New South Wales Government, Submission No 11 to Royal Commission into Institutional Responses to Child Sexual Abuse in Response to Issues Paper 7, *Royal Commission into Institutional Responses into Child Sexual Abuse* (2014) 2.

44 Ibid 3.

45 Ibid 5.

46 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 81.

47 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, 2015) 55.

48 Ibid 56.

49 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 36.

50 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, 2015) 6.

11.56 Women’s Legal Service Victoria stated the important role of VOCAT in assisting women who are in financial hardship after fleeing family violence, in particular noting the importance of timely payments:

If the payment is timely, it may have a role in preventing entrenched poverty. Such a payment may assist with a rental bond for a new home, basic furniture, appliances or clothes that are needed after leaving the former family home.<sup>51</sup>

## Discussion and options for reform

### Delays entrenching economic disadvantage

- 11.57 This section of the consultation paper considers options for reform:
- to streamline the process for victims of family violence
  - to clarify VOCAT processes and obligations under the Act to reduce delays
  - to improve consistency in practice.
- 11.58 This section also considers possible benefits of specialisation and integration of financial assistance with the victim support system.
- 11.59 One of the objectives of the Act is to assist victims of crime to recover from the effects of violent crime. However, delays in accessing financial assistance can potentially re-traumatise victims and in some cases, further entrench economic disadvantage when victims are most vulnerable.
- 11.60 Interim awards are designed to provide timely access to financial assistance, including for family violence victims. However, it is not clear these benefits are being realised for victims of family violence who urgently need financial assistance.
- 11.61 In preliminary consultations, the Commission heard that victims of family violence need swifter access to interim awards and earlier access to final determinations, including special financial assistance. One victim of family violence represented in the Women’s Legal Service Victoria’s research report asked whether there could be a ‘fast track’ for victims of family violence applying to VOCAT.<sup>52</sup>

### The cost of lawyers

- 11.62 VOCAT is not required to conduct itself in a formal manner and is not bound by rules or practice of evidence like a court.<sup>53</sup> However, the VOCAT process remains inherently a legal process bound by the provisions and procedures of the Act. This requires the involvement of lawyers and magistrates and the collection of evidence and submission of supporting documents.
- 11.63 The Victims Support Agency has reflected that ‘whilst VOCAT was established to provide resources to assist victims to recover from the effects of crime, it is not part of the victim service system, but an integral part of the legal system. VOCAT is therefore bound to follow legal rules and procedures in assessing claims and making awards.’<sup>54</sup>
- 11.64 In 2015–2016, VOCAT awarded legal costs (associated with VOCAT applications) totalling \$5,095,278, an average of around \$1000 per awarded applicant, demonstrating the high legal costs associated with the application process.<sup>55</sup> These legal processes take time, can be costly and may be too onerous or overwhelming for many victims of family violence. This may be particularly the case when a victim might be at crisis point fleeing from violence, relocating or have sole caring responsibilities for children.

51 Ibid 55.

52 Ibid 56.

53 *Victims of Crime Assistance Act 1996* (Vic) s 38(1).

54 Victims Support Agency (Vic), *Counselling for Victims of Crime* (2011) 63.

55 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 59.

## Lack of connection with the service system

- 11.65 The fact that VOCAT is a separate process—not part of a specialist family violence response or a case management process—is a further barrier to timeliness and accessibility for victims. Some victims may simply be unaware of VOCAT’s existence, which also impacts on the ability to provide timely assistance. Awareness of the scheme is further discussed in Chapter 13.

## Family violence ‘triaging’

- 11.66 One possible solution for improving timeliness for family violence VOCAT applications is to implement an administrative ‘triage’ function in the VOCAT registry to assess and prioritise family violence applications.
- 11.67 This initiative would require additional funding and a specialist family violence coordination team. Given the importance of integrated support for family violence victims, it may require a case management approach that provides linkages and referrals to other specialist services.

## Practice Direction—expedite the making of an award even where related matters not finalised

- 11.68 Preliminary consultations indicated that VOCAT awards are almost always delayed pending finalisation of related criminal matters.
- 11.69 One proposal is to develop a Practice Direction, consistent with sections 32 and 41 of the Act, which provides more guidance about when expediting family violence VOCAT applications is preferable. For example, a Practice Direction might provide a clearer presumption of expediting a VOCAT application when family violence circumstances exist and additional criteria are met. Although the Act already provides scope for this, the provisions in sections 32 and 41 create ambiguity about the circumstances where applications should be determined despite other related matters pending.

## Family violence VOCAT list or specialist ‘stream’

- 11.70 Another option involves the creation of a separate VOCAT family violence list, similar to the VOCAT Koori List. This would create a different VOCAT environment for VOCAT applications arising from family violence. Like the VOCAT Koori List, it could adopt a case management approach and triage urgent matters more effectively in a specialist environment.
- 11.71 The intention of the Tribunal in developing the VOCAT Koori List was to develop procedures to ensure that the purposes and objectives of the Act could be achieved in relation to Koori applicants. VOCAT relied on the procedural flexibility and the informality afforded to it under the Act to respond with maximum flexibility to the particular circumstances of a Koori applicant.<sup>56</sup> The VOCAT Koori List is a management initiative introduced by the Tribunal and it does not involve applying any different legal considerations to the determination of applications for assistance. All applications for financial assistance are considered and determined within the legislative framework of the Act. However, the VOCAT Koori List enables the Tribunal to be more responsive to the circumstances of Koori victims of crime who may otherwise have found it difficult to engage with the system.<sup>57</sup>
- 11.72 Specialisation would bring the benefits of increased collective knowledge and expertise into family violence VOCAT matters. It would ensure those dealing with the complexity of these matters are familiar with the needs of family violence victims and the nature and dynamics of family violence. The experience of the VOCAT Koori List was that specialisation increased cultural awareness and sensitivity to Koori issues.

- 11.73 A separate family violence list might also result in swifter final determinations, limiting delays between interim and final awards being made. Earlier access to the types of award made in final determinations might better meet the needs of this particular cohort of victims experiencing significant financial hardship as part of their experience of family violence.
- 11.74 Separate VOCAT streams have been previously proposed for other victim groups, including survivors of institutional child abuse.<sup>58</sup> During preliminary consultations, the Commission heard that the introduction of specialist streams has significantly changed victim experiences in other courts, pointing to a radical shift in culture and attitude. Ian Freckelton has observed that victim compensation schemes are complex and should be recognised as specialised areas of practice.<sup>59</sup>

### Appointing VOCAT-only magistrates

- 11.75 Given the increased complexity in matters coming before VOCAT,<sup>60</sup> consideration could be given to appointing VOCAT-only magistrates. This would increase specialisation across all VOCAT matters—including family violence—but would not require the infrastructure of a specialist family violence list or stream.
- 11.76 The courts have previously highlighted the benefits of specially trained and assigned magistrates, in the management of family violence matters:

Having specially trained and assigned magistrates has strengthened ... the management of family violence matters. [These] magistrates ... have undergone specialist professional development to increase their understanding of the dynamics of family violence and ... tend to become increasingly familiar with relevant issues and able to deal efficiently with matters.<sup>61</sup>

### Administrative models

- 11.77 Consideration could be given to possible benefits of administrative models where commissioners or government assessors make determinations, such as in Queensland, the Northern Territory, Tasmania, Western Australia, New South Wales and the Australian Capital Territory.
- 11.78 Further research is required to assess whether these schemes result in improved outcomes or timelier decision making for victims. It is also important to consider whether these schemes provide the same victim experience in terms of judicial validation and acknowledgment. These matters are further discussed in Chapter 14.

### Hearing VOCAT matters during other civil and criminal hearings

- 11.79 Magistrates in the Family Violence Court Division have the ability to determine VOCAT matters at the same time as dealing with other civil or criminal family violence matters.<sup>62</sup>
- 11.80 A proposal could be to extend this power to all magistrates, regardless of whether it is a specialist court location. This would enable a magistrate hearing a family violence intervention order matter or a family violence-related criminal matter—such as a breach of a family violence intervention order—to make an interim VOCAT award to support the recovery of the victim. As the Act already enables awards to be varied and refunded,<sup>63</sup> there is scope for further consideration should new information come to light later or the victim's circumstances change.

58 Department of Justice and Regulation (Vic), *A Victorian Redress Scheme for Institutional Child Abuse*, Public Consultation Paper (5 August 2015) 34.

59 Ian Freckelton, 'Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed' in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 252.

60 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 9.

61 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 30.

62 Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (2014) 28.

63 *Victims of Crime Assistance Act 1996* (Vic) Pt 4.

- 11.81 Given all magistrates are also VOCAT members, this would not pose issues of lack of knowledge or awareness of the Act. However, it does move away from suggestions made at [11.70]–[11.74] for increased specialisation. This option might increase the number of awards for family violence victims, but may not necessarily improve consistency in awards, given there would not be increased specialisation.

### **Complementing other state-funded financial assistance**

- 11.82 In preliminary consultations, the Commission heard of the more flexible financial assistance options now available for victims of family violence, specifically through FSPs.
- 11.83 Consideration may need to be given to improving the connections between VOCAT and specialist family violence organisations which provide state-funded financial assistance in other ways. A specialist family violence worker could be located within VOCAT as a support coordinator. This coordinator could make initial assessments of the specific needs of a family violence applicant and their urgency, and triage cases to reduce delays and negative impacts. Some applications for interim awards via VOCAT may be better suited to other state-funded support, such as FSPs. Later on, victims could apply to VOCAT for non-urgent financial assistance or special financial assistance.
- 11.84 A specialist family violence worker could liaise with family violence services and legal services to increase community knowledge and awareness of VOCAT and other assistance available to meet the needs of family violence victims in various ways.

### **Incorporating financial assistance with other victim support mechanisms**

- 11.85 The integrated financial assistance and victim support model introduced in New South Wales in 2013 has substantially improved the timeliness of assistance provided to victims of crime. However, concerns have been raised that there are few victims of domestic violence and sexual assault accessing financial support under the scheme.<sup>64</sup> The New South Wales government is currently reviewing the Act.<sup>65</sup>
- 11.86 Further exploration is needed of how VOCAT complements specialist family violence support and other victim support programs such as the Victims Assistance Program (VAP), and whether VAP and VOCAT could be more integrated.
- 11.87 It is valuable to consider to how the provision of interim awards could be improved by adopting the administrative and case management processes used in making other awards of assistance, such as family violence FSPs.
- 11.88 The Commission raises all of these options to prompt stakeholder consideration of the various ways in which timeliness could be improved. Some proposals could be implemented on their own, while others might be complementary or reliant on other proposals.
- 11.89 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on these issues and options for reform. Questions are set out below.

64 Community Legal Centres NSW, Submission to New South Wales Department of Justice, *Review of the Victims Rights and Support Act* (29 July 2016) 17.

65 New South Wales Department of Justice, *Statutory Reviews* (2016) <[www.justice.nsw.gov.au/justicepolicy/Pages/lpclrld/lpclrld\\_consultation/lpclrld\\_stat\\_reviews.aspx](http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrld/lpclrld_consultation/lpclrld_stat_reviews.aspx)>.



## Questions

- 37 What are the effects of the current time frames and procedures for the making of awards for victims of family violence?
- 38 How could the time frames and procedures for the making of awards to victims of family violence be changed to better meet their needs?
- 39 Do section 32(3) and section 41 require legislative change to better accommodate family violence victims' need for speedy determinations? Or could a Practice Direction provide sufficient guidance?
- 40 What benefits could be achieved for victims of family violence by initiatives such as specialisation or a separate VOCAT family violence list?
- 41 What benefits might be achieved by enabling all magistrates to make interim VOCAT awards at the same time as hearing other matters? How would this work in practice?



# Review, variation and refund of awards

**128** Introduction

**128** Review of Tribunal decisions

**128** Variation of an award

**129** Refund of awards

**129** Effect of review, variation and refund of awards on family violence victims

**130** Discussion and options for reform

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## 12. Review, variation and refund of awards

### Introduction

- 12.1 This chapter discusses the process for review of awards of financial assistance under the *Victims of Crime Assistance Act 1996* (Vic) (the Act).
- 12.2 This chapter also discusses when the Victims of Crime Assistance Tribunal (VOCAT) may vary an award or determine that an award needs to be refunded, and poses questions for consideration.

### Review of Tribunal decisions

- 12.3 Any person whose ‘interests are affected’ can apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of a final VOCAT decision.<sup>1</sup> Reviews may relate to:
- VOCAT refusing to make an award of assistance
  - the amount of assistance awarded
  - VOCAT refusing to vary an award
  - the amount of assistance awarded when reviewing an award
  - a decision that a person is required to make a refund to VOCAT
  - the amount VOCAT determines must be refunded.<sup>2</sup>
- 12.4 In practice, those affected by VOCAT decisions are usually applicants and so reviews usually relate to VOCAT refusing to make an award or the amount of an award.
- 12.5 There are relatively few reviews, with only 11 applications for review made to VCAT in the 2015–2016 financial year. In six of these matters, the application for review was struck out, withdrawn or abandoned. In three of these cases, the original award was set aside and a new award made on review.<sup>3</sup>

### Variation of an award

- 12.6 Under the Act, only the person to whom or for whose benefit an award of assistance has been made can apply for a variation of their award.<sup>4</sup> However, the Tribunal has very broad discretion and can vary awards ‘in any manner that the Tribunal thinks fit’.<sup>5</sup> VOCAT may vary the terms of an award or increase or decrease the amount of an award.<sup>6</sup>

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1 *Victims of Crime Assistance Act 1996* (Vic) s 59(1).

2 *Ibid* s 59(1)(a)–(e).

3 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 61.

4 *Victims of Crime Assistance Act 1996* (Vic) s 60(1).

5 *Ibid*. Although the Tribunal is still bound by the provisions of the Act relating to the payment of and amounts of assistance: s 60 (4).

6 *Ibid* s 60(1).

- 12.7 In considering an application for variation, VOCAT must have regard to:
- any fresh evidence
  - any change of circumstances
  - any other payments received by the applicant
  - any other relevant factors.<sup>7</sup>
- 12.8 The Tribunal must not vary an award if the application for variation is made more than six years after the original award was made, unless the applicant was then under 18.<sup>8</sup>
- 12.9 Case law indicates that the variation powers under section 60 are wide.<sup>9</sup> Variations can be made in situations ‘where new evidence is forthcoming that enables an award to be made either where no award was made at all or at a higher rate than could have been made on the material previously available’.<sup>10</sup>
- 12.10 Although there is broad provision for variation, variations must still be consistent with the Act. For example, an award for ‘other expenses actually and reasonably incurred’ under section 83 must still assist a victim’s recovery from the act of violence.<sup>11</sup> In the case of *Davis v Victims of Crime Assistance Tribunal*,<sup>12</sup> VCAT noted the ‘numerous’ awards of assistance made to the victim by way of variation for counselling, medical costs and education expenses.<sup>13</sup>
- 12.11 In 2015–16, VOCAT varied 986 awards for expenses already incurred and 588 for expenses not yet incurred.<sup>14</sup>
- 12.12 In preliminary consultations the Victorian Law Reform Commission (the Commission) heard that family violence victims frequently require award variations, particularly to pay for additional counselling.

## Refund of awards

- 12.13 The Act enables VOCAT to require applicants to refund some or all of the financial assistance awarded to them if they later receive damages, compensation, assistance or other payments of any kind for injuries suffered as a result of a violent crime.<sup>15</sup>
- 12.14 Limited data is available on how often refunds may be required. VOCAT’s annual report does not state how often refunds are required.

## Effect of review, variation and refund of awards on family violence victims

- 12.15 Given the limited data available on refund of awards, the Commission has not heard that these provisions adversely affect victims of family violence. Similarly, reviews of VOCAT awards are relatively rare (11 reviews in the 2015–2016 financial year).
- 12.16 However, provisions relating to variation of awards are of particular significance to family violence victims’ experiences of VOCAT. As the following case study from the VOCAT *Annual Report 2015–16* shows, variation of an award can assist victims of family violence with their recovery:

7 Ibid s 60(3).

8 Ibid s 60(2).

9 See, eg, *GDE v Victims of Crime Assistance Tribunal* [2009] VCAT 914 (27 May 2009).

10 Ibid [10].

11 *Davis v Victims of Crime Assistance Tribunal* [2008] VCAT 2535 (10 December 2008) [24].

12 Ibid.

13 Ibid [16].

14 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 60.

15 *Victims of Crime Assistance Act 1996* (Vic) s 62.

Tamara was involved in a domestic violence assault in 2010 by her former partner. The alleged offender would become violent when he used drugs and alcohol. The alleged offender would take all of Tamara's money, leaving her with no food or items to look after herself or her children. She reported the incidents to the police but did not want any further action taken as she was frightened of how the alleged offender would react. The Tribunal finalised her application by awarding 24 sessions of counselling and \$1300 in special financial assistance. She was also awarded \$5500 for a vehicle to assist with her recovery and \$1000 associated with the cost of a computer to assist her in achieving her study goals. Tamara was granted a variation of the award approximately 6 months later to enable her and her children to go on a family holiday in the amount of \$1779. Based on the material filed from Tamara's psychologist, the Tribunal was satisfied that the family's recovery would benefit from time away to reconnect and strengthen their bond as a family unit. Tamara recently sought a further variation so that she can attend a course educating her on the effects of Alcohol and Other Drugs ...<sup>16</sup>

- 12.17 Tamara's case study illustrates the flexibility of VOCAT in providing additional awards as situations change or new needs emerge. Variation of awards acknowledges that a victim's journey is not always predictable, and needs may change over time.
- 12.18 However, the process of applying for a variation is not always smooth for victims of family violence. The Commission heard in preliminary consultations that each variation requires the hiring of a solicitor and evidence from professionals such as counsellors. Most variations in family violence matters relate to additional sessions required for counselling, where the variation is required for therapeutic purposes. It might be more practical and beneficial if practitioners could provide more counselling sessions at their discretion, rather than victims having to re-engage lawyers to seek financial assistance for more counselling.
- 12.19 Research by the Victims Support Agency in 2011 found that some victims found the process of seeking variation of an award to obtain further counselling frustrating because it involves many visits to lawyers. One victim stated: 'You want it to be over and that dragged it on substantially longer ... which is why I think a lot of people wouldn't go through with it.'<sup>17</sup> During preliminary consultations, the Commission heard that the process was overly legalistic and burdensome, that solicitors should not need to be involved and that an administrative process would be simpler.

## Discussion and options for reform

- 12.20 Awards can be varied under equivalent legislation in most other Australian states and territories. Often, a victim's circumstances must have changed and variations must be sought within a specific time period, although these time limits vary in each jurisdiction and range from between three to seven years.<sup>18</sup>
- 12.21 Further research is required into the circumstances in which awards are varied in the context of family violence, and the value of variations in addressing the specific needs of family violence victims. In addition, barriers experienced by victims during the variation process require further exploration.
- 12.22 The Commission seeks information on family violence victims' experiences of the VOCAT refund or review process. In addition, the Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on the following questions.

<sup>16</sup> Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 18.

<sup>17</sup> Victims Support Agency (Vic), *Counselling for Victims of Crime* (2011) 33.

<sup>18</sup> See, eg, *Victims Rights and Support Act 2013* (NSW) s 40(6), *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 49, *Victims of Crime Assistance Act 2009* (Qld) s 101(3), *Victims of Crime Assistance Act 2006* (NT) s 46(1).

## Questions

- 42 In what circumstances are VOCAT applications refunded? What are the experiences of victims of family violence?
- 43 How often are VOCAT awards for family violence victims varied? What are the reasons for variation?
- 44 How could the variation process be improved or streamlined to make it more accessible and timely for family violence victims?
- 45 Should some categories of award, such as counselling, be awarded differently to other categories, such as special financial assistance, to make access easier and quicker for victims?
- 46 When might victims of family violence seek review of a VOCAT award?





## PART THREE: RELEVANT OPERATION OF THE ACT

# Awareness of VOCAT and accessibility for family violence victims

**134** Introduction

**134** VOCAT and family violence statistics

**135** Awareness of the Act

**136** Understanding of the Act and access to VOCAT

**137** Experience in other jurisdictions

**137** Discussion and options for reform

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## 13. Awareness of VOCAT and accessibility for family violence victims

### Introduction

- 13.1 This chapter considers what proportion of victims of family violence access the Victims of Crime Assistance Tribunal (VOCAT). This analysis explores the percentage of current VOCAT matters that relate to family violence. It also contrasts the recorded incidents of family violence in Victoria with the number of VOCAT applications.
- 13.2 This analysis also seeks to ascertain how aware the community is of VOCAT, and how accessible VOCAT is to family violence victims. These are different matters to the legislative barriers that may be encountered after a victim applies to VOCAT and which were examined in Part Two.
- 13.3 This chapter considers victims' awareness of VOCAT, their knowledge of the scheme and the extent to which access to the scheme is supported by the broader family violence service and support system. Consideration of these issues will enable the Victorian Law Reform Commission (the Commission) to seek that any proposed changes to the *Victims of Crime Assistance Act 1996* (Vic) (the Act) are meaningfully implemented for victims of family violence.
- 13.4 Finally, this chapter poses a number of questions for consideration.

### VOCAT and family violence statistics

- 13.5 During preliminary consultations, the Commission was told that there appeared to be relatively few VOCAT applications compared to the number of reported incidents of family violence in Victoria.
- 13.6 To understand whether victims of family violence are aware of VOCAT and their eligibility to seek financial assistance under the Act, the Commission has attempted to assess the percentage of VOCAT matters related to family violence, as well as the percentage of family violence incidents reported to police each year that might flow through to applications to VOCAT.
- 13.7 As with many other aspects of data collection with respect to family violence, it is hard to find comprehensive, reliable data about the use of VOCAT by victims of family violence.<sup>1</sup> The available data, which the Commission has used below, has limitations. The Commission acknowledges these limitations and also acknowledges that some assumptions have been made in interpreting the available data. These are also noted below.

- 13.8 VOCAT data indicates that of the 6221 VOCAT applications lodged in 2015–16, 388 (6.2 per cent) were in relation to ‘family violence’.<sup>2</sup> However, family violence as a category was not added to VOCAT’s case management system until part way through the 2015–16 financial year and so not all family violence cases for that period have been captured in the data. As such, this figure of 388 may not be an accurate indication of the number of family violence applications lodged annually with VOCAT.
- 13.9 Even if this figure is doubled to attempt to provide a more representative annual figure, the number of family violence applications would still not account for more than 10–15 per cent of the VOCAT applications lodged in the 2015–16 period. This figure falls short of VOCAT’s previous estimate that around a quarter of all applications involve family violence.<sup>3</sup> However, given the data limitations, it is difficult at this stage to definitively ascertain the percentage of VOCAT matters that relate to family violence.
- 13.10 Taking a broader view, Victoria’s Crime Statistics Agency reports 78,628 ‘family incidents’ being recorded by Victoria Police in 2016.<sup>4</sup> A ‘family incident’ is an incident where a Victoria Police Risk Assessment and Risk Management Report (also known as an L17 form) is completed and recorded on Victoria Police’s database LEAP.<sup>5</sup> Under Victoria Police’s *Code of Practice for the Investigation of Family Violence*, an L17 must be completed for every family violence incident reported to police.<sup>6</sup> Therefore, ‘family incidents’ are incidents of family violence recorded by Victoria Police, although not all such incidents involve criminal offences.
- 13.11 It is recognised that not all of the 78,628 family incidents recorded by police would fall within the scope of VOCAT.<sup>7</sup> However, the small number of family violence-related VOCAT applications recorded for 2015–16 appears disproportionate to the number of family violence incidents recorded by police for the year.<sup>8</sup>

## Awareness of the Act

- 13.12 Awareness of compensation and state-funded assistance has been raised as one of the most critical barriers to the effectiveness of any financial assistance or compensation scheme.<sup>9</sup>
- 13.13 The Victorian Royal Commission into Family Violence (the Royal Commission) found that some victims were unaware of their eligibility under the Act for assistance as a victim of family violence.<sup>10</sup> One victim only found out that she could make an application to VOCAT as a victim of family violence after she had applied to VOCAT for a separate matter.<sup>11</sup> Some service providers confirmed to the Royal Commission that VOCAT was underused by victims of family violence because there are limited referral pathways to VOCAT.<sup>12</sup>
- 13.14 Research conducted by Women’s Legal Service Victoria has found that many victims of family violence are simply unaware of the existence of VOCAT.<sup>13</sup> Women’s Legal Service

2 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 50.

3 Ibid 8.

4 Crime Statistics Agency, *Family Incidents* (19 May 2017) <[www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents-2](http://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents-2)>.

5 Ibid.

6 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2014) 17.

7 The definition of ‘family violence’ in section 5 of the *Family Violence Protection Act 2008* (Vic) is much broader than the definition of ‘act of violence’ under the *Victims of Crime Assistance Act 1996* (Vic).

8 In recent analysis prepared for the Royal Commission by the Crimes Statistics Agency, action taken by police as recorded on an L17 resulted in criminal action being taken in around 40% of recorded family incidents. See Royal Commission into Family Violence, *Commissioned Research* (2016) 45. Family violence incidents recorded by police include all types of family violence incidents, including those that would be excluded by the narrower definitions of ‘act of violence’ and ‘injury’ under the *Victims of Crime Assistance Act 1996* (Vic).

9 Betty Chan et al, ‘Support and Compensation: Lessons from Victims of Crime’ (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 26.

10 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016), 81.

11 Ibid.

12 Ibid.

13 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, September 2015) 56.

Victoria has recommended that any reform to the Act to improve accessibility for victims of family violence must also be accompanied by awareness raising, to ensure family violence victims are aware of their entitlements under the Act.<sup>14</sup>

- 13.15 Similarly, research conducted by the Victims Support Agency in 2011 found a general lack of understanding of VOCAT and the process, even among a sample group of victims who had been through the VOCAT process.<sup>15</sup> Some participants were unaware of VOCAT as a separate legal entity, referring to the process and assistance provided as being provided by 'Victims of Crime'.<sup>16</sup> Many participants in the Victims Support Agency research highlighted that they felt there was a lack of public awareness of VOCAT and that because of this, it was likely that many victims would be missing out on assistance. Some described learning about VOCAT only 'by chance'.<sup>17</sup>
- 13.16 During preliminary consultations, the Commission was informed of concerns about the lack of information about VOCAT in accessible formats and languages other than English. Some agencies were concerned that it did not seem to be a core part of any agency's role to inform victims about VOCAT and provide written information or referrals.

## Understanding of the Act and access to VOCAT

- 13.17 The Act has been described as 'complex and difficult for victims to understand'.<sup>18</sup> A victim's experience of VOCAT is therefore likely to be enhanced by victim support and the availability of legal representation.<sup>19</sup>
- 13.18 VOCAT has emphasised its close links with support agencies.<sup>20</sup> However, these support mechanisms are not integrated with VOCAT and so victims still have to access multiple services.
- 13.19 During preliminary consultations, the Commission heard that specialist family violence services or Victims Assistance Program (VAP) workers provide support and information to help victims of family violence access VOCAT. The Commission also heard that victims of family violence are unlikely to contact or navigate the VOCAT system without a lawyer. This was described as a barrier because some victims will not be able to access a lawyer. The Commission was told that sometimes lawyers will not take on VOCAT-related work because the legal costs awarded are too low given the amount of work often required.
- 13.20 Research by the Victims Support Agency highlights concerns with the legalistic nature of the VOCAT process. Some victims found it difficult to obtain a solicitor who would take on their VOCAT application, particularly in regional areas, while others who could find a solicitor found them difficult to deal with, non-communicative, difficult to contact, dismissive, insensitive, and only interested in money.<sup>21</sup>
- 13.21 The Commission was also informed during preliminary consultations that although the VOCAT application form itself might be easy enough to work through and complete without legal support, the information that is then requested by VOCAT can be overwhelming and often requires legal representation.
- 13.22 Research has highlighted victim frustration with the system of referral to VOCAT. This affects victims' ability to access VOCAT in a timely and helpful way. As previously discussed, not all specialist family violence services advise victims of VOCAT or assist

14 Ibid.  
15 Victims Support Agency (Vic), *Counselling for Victims of Crime* (2011) 57–8.

16 Ibid 57.

17 Ibid 58.

18 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 18.

19 Ibid.

20 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 21.

21 Victims Support Agency (Vic), *Counselling for Victims of Crime* (2011) 39.

victims to access VOCAT. Women’s Legal Service Victoria has also found that victims of family violence experience frustration at having to go through ‘multiple doors’ to access financial support.<sup>22</sup>

## Experience in other jurisdictions

- 13.23 In contrast to Victoria, some states and territories have combined victim support and compensation/financial assistance schemes.
- 13.24 New South Wales has a Victim Support Scheme which incorporates financial assistance and other aspects of victim support. Victims are allocated a support coordinator who develops a tailored plan to guide each victim through the criminal justice and human services system. Part of this care package may include financial assistance for immediate needs and economic loss, and a recognition payment.<sup>23</sup> Victims are advised that they do not need a lawyer as their allocated support coordinator will assist with their claim and Victims Services can obtain police reports, court papers and medical records with a victim’s consent.<sup>24</sup>
- 13.25 Similarly, in the Australian Capital Territory, Victim Support ACT administers the financial assistance scheme as well as managing and delivering victim case management services. Clients registered for case management can receive services such as assessment, court support, advocacy and therapeutic services.<sup>25</sup> This new Victims of Crime Financial Assistance Scheme was introduced in July 2016. Victim Support ACT describes the scheme as reducing barriers for victims of crime by separating the process from the court system and reducing reliance on legal representation.<sup>26</sup> Victim Support ACT assessors process applications for financial assistance and the Victims of Crime Commissioner, the head of Victim Support ACT, is the final decision maker.<sup>27</sup>

## Discussion and options for reform

- 13.26 It is not clear whether a substantial number of family violence victims who might be potentially eligible for assistance under the Act are aware of VOCAT. Additional barriers such as difficulty obtaining legal representation and lack of accessible information might also be affecting victim awareness and the number of victims who apply.
- 13.27 This issue is not unique or new. VOCAT’s Koori List was introduced because VOCAT ascertained that while the Aboriginal community was disproportionately affected by violent crime, they were also not accessing the assistance available through VOCAT at a corresponding level.
- 13.28 The Commission is considering how aspects of the current system work together, including VOCAT, lawyers, victim support and family violence services, and how better integration might improve knowledge about and accessibility of the service for victims of family violence.
- 13.29 The Commission raises these issues of awareness and accessibility to determine whether changes to improve access for family violence victims under the Act might only be legislative in nature, or whether other changes to support legislative reform might also need to be considered.

22 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, September 2015) 16.

23 New South Wales Government, *The Victims Support Scheme: A Detailed Guide* (2013) 3.

24 Ibid 11.

25 Victim Support ACT, *Annual Report 2015–2016* (2016) 14.

26 Ibid 29.

27 Victim Support ACT, *Frequently Asked Questions* (2016) <[www.victimsupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016/](http://www.victimsupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016/)>.

- 13.30 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on these issues and options. Specific questions for consideration are set out below.

## Questions

- 47 How do family violence victims learn about the availability of VOCAT? What is the best way to inform victims of their potential eligibility under the Act?
- 48 How should information about VOCAT be made more accessible for victims of family violence, including those speaking languages other than English?
- 49 Is the VOCAT system easy to navigate without legal representation? If not, why? How should the system be improved to make it more accessible for victims of family violence without legal representation?
- 50 Do victims of family violence find it difficult to secure legal representation? If yes, why? How should this be remedied?
- 51 Should the provision of state-funded financial assistance under the Act be better integrated with victim support services or specialist family violence support? If so, how should this be done?
- 52 What learnings from the VOCAT Koori List might be able to be applied to improving accessibility and knowledge of the scheme for victims of family violence? Could similar benefits be realised in the family violence space?
- 53 What aspects of other jurisdictions' models should be replicated in Victoria to assist victims of family violence to access VOCAT?

# VOCAT—beyond financial assistance for victims of family violence

**140** Introduction

**140** VOCAT as a therapeutic forum

**142** Broader recognition of family violence

**144** Discussion and options for reform

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## 14. VOCAT—beyond financial assistance for victims of family violence

### Introduction

- 14.1 Financial assistance and compensation go beyond monetary benefits. They can make a statement to the community about the unacceptability of family violence and confirm the responsibility of the state for preventing violence from occurring.<sup>1</sup> They can also recognise and validate a victim's experience by offering a symbolic expression by the state of the community's sympathy and condolence for the significant adverse effects they have experienced or suffered.<sup>2</sup>
- 14.2 This chapter considers aspects of the *Victims of Crime Assistance Act 1996* (Vic) (the Act) and the Victims of Crime Assistance Tribunal (VOCAT) that go beyond providing financial assistance to victims of crime. The chapter considers the extent to which:
- the system acknowledges victims and recognises harm caused by family violence
  - the Act recognises family violence
  - the VOCAT process is trauma-informed
  - the process is consistent and transparent
  - the rights of perpetrators and victims are balanced, having regard to the purpose of the Act—to assist victims of crime to recover.
- 14.3 As with Chapter 13, consideration of these matters is not expressly required by the terms of reference. However, the Victorian Law Reform Commission (the Commission) considers that these factors influence the way victims of family violence engage with VOCAT.
- 14.4 Finally, this chapter poses a number of questions for consideration and explores what reforms might be needed for the system to better acknowledge and recognise family violence, embed trauma-informed processes, improve its consistency and transparency, and appropriately balance perpetrator and victim rights.

### VOCAT as a therapeutic forum

#### Victim acknowledgment and recognising harm

- 14.5 During preliminary consultations, the Commission heard that one of the potential benefits of Victoria's approach to state-funded financial assistance for victims of crime is the use of judicial officers. Victoria is one of the few Australian jurisdictions that uses judicial decision makers.<sup>3</sup>
- 14.6 For some victims, the hearing of an application by a judicial officer provides an acknowledgment from the justice system that there has been a crime and that they

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1 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 192 and 208.

2 *Victims of Crime Assistance Act 1996* (Vic) s 1(2).

3 See Appendix B.



have suffered harm as a consequence.<sup>4</sup> VOCAT also considers that the structure enables ‘victims of crime [to] gain acknowledgment of their experiences by a judicial officer in the criminal justice system, but in the more flexible, informal and intimate manner afforded by an administrative tribunal’.<sup>5</sup>

- 14.7 For some victims, the importance of being heard and validated outweighs any monetary award. The experience of VOCAT’s Koori List is that ‘most victims want to hear someone say, on behalf of the State of Victoria, that we are sorry that this happened to you’.<sup>6</sup>
- 14.8 Some victims’ experience of VOCAT hearings is positive, describing Tribunal members as caring, patient and understanding.<sup>7</sup> Where an offender had not been prosecuted, victims tended to feel acknowledged and validated by the VOCAT hearing.<sup>8</sup> During preliminary consultations, the Commission was told about the powerful nature of such judicial acknowledgment, particularly in sexual offence matters where successful prosecution is rare.
- 14.9 However, research by the Victims Support Agency has found that this is not the experience of all victims of crime and that victims’ experience of VOCAT varies:
- Comments about the VOCAT hearing were mixed. While many participants made positive comments about Tribunal Members and felt acknowledged and validated by the hearing, particularly where no offender was prosecuted, some participants felt distressed by having to recount details of the crime they experienced. One participant was distressed by the Tribunal member’s comments. One felt the court did not adequately cater to the needs of disabled people and another felt there was a lack of support during and after the hearing.<sup>9</sup>
- 14.10 Some victims can be distressed by having to recount details of the crime during VOCAT hearings:<sup>10</sup>
- Having the matter heard by a tribunal member, who listens to a victim’s story and acknowledges their experience, can be a therapeutic experience for some applications. However, attending a hearing and giving evidence about the criminal act may further distress others.<sup>11</sup>
- 14.11 During the Victorian Royal Commission into Family Violence (the Royal Commission), the witness statement of Rebecca Smith highlighted how experiences of the VOCAT process can vary.<sup>12</sup>
- 14.12 Ms Smith had been through the VOCAT process as a victim of ‘stranger violence’—where she found the experience validating—as well as experiencing VOCAT for family violence matters. Although Ms Smith described the rape as horrible, she also described it as ‘one night of my life’. She compared this to the way family violence had affected her life for years. Ms Smith found the award of \$1000 for the family violence compared to one of \$10,000 for the rape to be an inadequate representation of the significant impacts family violence had had on her life.

### A trauma-informed process?

- 14.13 During preliminary consultations, the Commission was advised that one of the reasons the VOCAT process can be re-traumatising for victims is because it is not a trauma-informed process.

4 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 43.

5 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 14.

6 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 31.

7 Victims Support Agency (Vic), *Counselling for Victims of Crime* (2011) 37.

8 Ibid.

9 Ibid 59.

10 Ibid 38.

11 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper 18.

12 Victoria, Royal Commission into Family Violence, *Witness Statement of Rebecca Smith* (2016). The Royal Commission changed the name and other details of the witness to protect her identity.

- 14.14 Trauma-informed practice involves modifying aspects of service provision to ensure a basic understanding of how trauma affects the life of an individual seeking a service.<sup>13</sup> A trauma-based approach accepts victims of crime as being harmed as a result of the crime.<sup>14</sup> One of its benefits is that it avoids re-traumatisation, as the focus is on ensuring the person's physical, psychological and emotional safety.<sup>15</sup>
- 14.15 Significantly, approaches that are not trauma-informed often mirror the power and control experienced in abusive relationships.<sup>16</sup>
- 14.16 The Law Institute of Victoria has considered the importance of trauma-informed legal practice, including for the judiciary and court staff.<sup>17</sup> Victoria's *Family Violence Rolling Action Plan 2017–2020* recognises the need for the Magistrates' Court to move towards a more trauma-informed approach to family violence by 'embedding a specialist, trauma-informed response across our justice system through the expansion of the Specialist Family Violence Court model'.<sup>18</sup>
- 14.17 However, during preliminary consultations the Commission was advised that the legal framework underpinning VOCAT necessitates legal processes that are not trauma-informed, such as perpetrator notification. These processes can be re-traumatising, especially for victims of family violence, including child victims.
- 14.18 Matters of concern raised during preliminary consultations included:
- questions about not reporting the crime or not providing assistance to police and prosecution
  - questions about a victim's behaviour or past conduct, including unrelated criminal activity
  - inappropriate and irrelevant lines of questioning, including questions about what special financial assistance funds might be spent on, or why the victim had not left an abusive relationship earlier
  - perpetrator notification provisions.
- 14.19 During preliminary consultations the Commission heard that some stakeholders 'shield' their clients from the non-therapeutic aspects of VOCAT, such as section 52 and section 54 queries which can re-traumatise victims.

## Broader recognition of family violence

- 14.20 In Part Two, this paper discussed some problematic sections of the Act that do not expressly acknowledge family violence or allow adequate consideration of the dynamics and characteristics of family violence in making awards. However, more broadly, the Act is silent on the issue of family violence.
- 14.21 At the time of the introduction of the Act, in 1996, there was little community acknowledgment of family violence or its harms. Improved justice responses did not commence until the early 2000s. There are now four Australian jurisdictions that explicitly recognise family violence under their equivalent legislation.<sup>19</sup>
- 14.22 The Act's failure to recognise family violence—or to conceive of family violence itself as an 'act of violence'—remains one of the fundamental challenges of ensuring the Act appropriately responds to harms caused by family violence. As noted earlier, the

13 Jenna Bateman, Corinne Henderson and Dr Cathy Kezelman, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia*, Position Paper and Recommendations (Mental Health Coordinating Council, 2013) 5.

14 Ibid 8.

15 Ibid 5.

16 Ibid 9.

17 Cathy Kezelman and Pam Stavropoulos, 'Dealing with Trauma' (2016) 90(10) *Law Institute Journal* 36.

18 Department of Premier and Cabinet (Vic), *Family Violence Rolling Action Plan 2017–2020* (2017) 7.

19 *Victims' Rights and Support Act 2013* (NSW) ss 44(3) and 40; *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 9 and pt 1.2, div 1.2.2 of sch 1; *Victims of Crime Assistance Act 2006* (NT) s 31(3)(a) and *Victims of Crime Assistance Regulations 2007* (NT) regs. 5 and 22, sch 3. See also *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) ss 29, 30 and 96, which, once in force, will amend the *Victims of Crime Assistance Act 2009* (Qld).

Act conceives of crime as an ‘isolated random act of a deviant stranger’<sup>20</sup> rather than something that can occur over a long period of time and within an intimate setting. As Victoria Legal Aid submitted to the Royal Commission, the Act is better suited to ‘one-off’ acts of violence where the victim and perpetrator are not known to each other.<sup>21</sup>

- 14.23 This omission is why many stakeholders during preliminary consultations referred to the Act as only conceptualising ‘stranger violence’, with some likening the Act to a ‘bar room brawl’ model of victim financial assistance. Other stakeholders felt that the Act’s barriers for family violence victims were so significant that it raised questions about the purpose of the Act and whether it could actually ever apply to family violence victims.

### Consistency and transparency in practice and awards

- 14.24 During preliminary consultations, the Commission heard that the inconsistency of VOCAT decisions, and the variability in the acknowledgment and validation of victims, significantly shape family violence victims’ experiences. This variability also affects the extent to which the VOCAT process may be recommended by support agencies working with victims of family violence as a positive experience. There is a limit to how much a victim can be assured of a ‘validating’ VOCAT experience.
- 14.25 The Commission also heard that one of the barriers often encountered by those supporting victims of family violence through the VOCAT process was the extent to which the process could be explained or predicted. In particular, the Commission heard there was variability in:
- the length of the process
  - what will be requested by VOCAT
  - what questions the victim will be asked
  - whether the perpetrator will be notified
  - the quantum of awards.
- 14.26 These issues are not new. Variability in the processes and decision making of VOCAT has also been raised in previous reviews.<sup>22</sup>
- 14.27 During preliminary consultations the Commission heard that this variability is compounded by a lack of transparency in the VOCAT process itself. It is difficult to know, for example, whether the award offered during the section 33 process is consistent with that offered in similar cases. Some stakeholders also told the Commission that the quantum of awards made ‘on the papers’ seemed to be lower than if a hearing was held, and that determinations made ‘on the papers’, as opposed to those made at hearing, lacked transparency.
- 14.28 As with the issues of variability in process and decision making, concerns about transparency in process are not new. In a submission to the then-Victorian Department of Justice’s 2010 review of victim compensation, the Federation of Community Legal Centres stated that there was a need for more transparency and equity in the VOCAT process.<sup>23</sup>

### The rights of perpetrators

- 14.29 During preliminary consultations, the Commission heard that some stakeholders felt that the Act operates to place the rights of the alleged offender before the rights of the victim. This contrasts with the stated purpose of the Act, which is ‘to provide assistance to victims of crime’.<sup>24</sup>

20 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine*, 188, 192–3.

21 Victoria Legal Aid, Submission No 919 to Royal Commission into Family Violence *Royal Commission into Family Violence* (2015), 53.

22 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 42.

23 Federation of Community Legal Centres, *Submission to Victorian Department of Justice, Reviewing Victims of Crime Compensation: Sentencing Orders and State-Funded Awards* (February 2010) 7.

24 *Victims of Crime Assistance Act 1996* (Vic) s 1(1).

- 14.30 This issue was raised particularly in the context of the provisions for notifying perpetrators. Some stakeholders felt that these provisions are counter-productive and contradict the purpose of the Act. They considered the provisions to be inconsistent with a victim-centred approach that should be the foundation of the VOCAT process. Furthermore, some stakeholders also noted that in practice, where perpetrators are notified, it is rare for them to then engage with the VOCAT process by attending hearings or providing submissions.
- 14.31 In this context, some stakeholders felt that the procedural fairness intent of such provisions is outweighed by their negative impacts on victims of crime, particularly victims of family violence, and that this works against the purpose and objectives of the Act.
- 14.32 However, other stakeholders considered that it was important in the interests of procedural fairness that perpetrators be notified if an application is made containing serious allegations against them, particularly where criminal charges have not been laid or a prosecution does not proceed.

## Discussion and options for reform

### Towards trauma-informed practice?

- 14.33 For some victims of crime, the potential for a judicial officer to hear their matter in a court-like environment can be a validating experience. Some victims might find therapeutic benefit in having their story heard and their experiences acknowledged.
- 14.34 However, the Commission heard during preliminary consultations that this experience is not universal. Some stakeholders consulted felt that this variability in experience was because the framework underpinning the Act and the operation of VOCAT is not trauma-informed.
- 14.35 Ian Freckelton has reflected more broadly on the intrinsic lack of understanding and training of decision-makers within financial assistance and compensation schemes, stating that ‘Decision makers who have never encountered DSM-IV or standard works on trauma and victim impact are put in the position of having to deal with this sensitive area’.<sup>25</sup>
- 14.36 Some jurisdictions in Australia have an administrative scheme rather than a court or tribunal-based scheme. This removes the opportunity for acknowledgment of a victim by a judicial officer, but also reduces the potential for adverse outcomes through a more legalistic process.
- 14.37 In the Northern Territory, the Crime Victims Services Unit manages provision of financial assistance, which is allocated by legally qualified assessors. There is no requirement to attend a hearing. In the Australian Capital Territory, an assessor from Victim Support ACT will assess applications.<sup>26</sup> As in the Northern Territory, there is no requirement to attend a hearing. In New South Wales, support coordinators from Victims Services develop a care package, which might include financial assistance and recognition payments.<sup>27</sup>
- 14.38 One proposal is to consider how trauma-informed practice could be embedded within VOCAT and how this might improve experiences for victims of family violence. Such practice might include specialised training or specialist staff—or a combination of both. It might also involve broader structural or procedural changes, such as a specialist family violence list or specialist magistrates, as discussed in Chapter 11. These strategies could be underpinned by a trauma-informed approach.

25 Ian Freckelton, ‘Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed’ in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 251. The ‘DSM-IV’ refers to the Diagnostic and Statistical Manual of Mental Disorders which is the authoritative guide to the diagnosis of mental disorders.

26 Victim Support ACT, *Processing of Your Application* (2016) <[www.victimssupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016/](http://www.victimssupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016/)>.

27 Victims Services, Department of Attorney General and Justice (NSW), *The New Victims Support Scheme: A Detailed Guide* (2013) 3.

- 14.39 Consideration could also be given to how VOCAT can be integrated with the broader service system, particularly given the models in other jurisdictions that combine compensation and victim support.

### Recognising family violence

- 14.40 Family violence could also be recognised in the purpose and/or objectives of the Act itself. Such inclusion may improve family violence victims' experiences of the VOCAT process, as Tribunal members would be required to have regard to the circumstances of family violence. The provision could be general, acknowledging the dynamics of family violence and re-envisaging the Act as applicable in circumstances involving family violence. However, any such recognition of family violence would need to be carefully considered alongside any potential expansion of eligibility criteria, as discussed in Chapter 6.
- 14.41 Such an amendment to the purpose and objectives of the Act would be a significant departure from the Act's original intent. It was introduced at a time when family violence was not recognised in the law as violence unless it also involved a criminal offence such as serious physical assault, sexual assault or murder.
- 14.42 VOCAT has acknowledged that on previous occasions, when laws have been reformed to address new offences, the Act has not necessarily been updated.<sup>28</sup> For example, in responses to new sexual offending laws, VOCAT observed that 'despite the harms caused by such crimes, many of the new offences would not satisfy the eligibility requirements of the Act'.<sup>29</sup>
- 14.43 During preliminary consultations, the Commission heard that the Act has not been substantially amended since the 1990s, resulting in it 'lagging' behind both societal and other legal changes, such as the increased recognition and detection of family violence and the expanded definition of family violence under the *Family Violence Protection Act 2008* (Vic) and new sex offences.
- 14.44 The Magistrates' Court of Victoria also recognises that the *Family Violence Protection Act 2008* (Vic) challenges the way violent crime is conceptualised for the purposes of the Act. However, in its submission to the Royal Commission, the Court cautioned against widening the Act to apply to cases where family violence has occurred, but there is not necessarily an 'act of violence'. The Court was concerned that such an expansion of the definition would result in an increase in the number and complexity of applications being made to VOCAT, resulting in unintended consequences, like more matters requiring hearings and perpetrator notification.<sup>30</sup>
- 14.45 The Magistrates' Court of Victoria instead favoured an approach that enabled decision makers to take into account family violence issues where relevant.
- 14.46 An approach of 'broad recognition', possibly incorporated as a specific objective of the Act, may be consistent with the approach posited by the Magistrates' Court. Incorporating a general acknowledgment of family violence might better guide decision makers to consider family violence when applying provisions of the Act that have broad discretionary powers, such as sections 52, 53 and 54.

### Consistency and transparency in approach

- 14.47 During preliminary consultation, the Commission heard concerns from some stakeholders about the level of discretion built into the Act. Many stakeholders spoke about inconsistencies in the practice, approach and the quantum of awards being made by VOCAT members, and considered that these inconsistencies were tied to the level of discretion granted by the Act. Some stakeholders felt that the broad discretion in the Act

28 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 15.

29 Ibid.

30 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 58.

could also be used inappropriately, for example, pursuing ‘irrelevant’ lines of questioning about a victim’s past or current actions or behaviour.

- 14.48 Some stakeholders suggested more guidance in the Act might help to improve consistency in the Tribunal’s practice, even if this resulted in more prescriptive considerations, categories or award amounts. These stakeholders considered such changes would make it easier to guide victims through the VOCAT process and to manage expectations, even if there was less flexibility.
- 14.49 Consideration could therefore be given to the ways in which increased consistency and transparency could be embedded within the Act, particularly with respect to family violence victims who face additional barriers in eligibility and whose applications are frequently complex.

### Perpetrator and victim rights

- 14.50 Given the issues raised by stakeholders concerning notification of perpetrators, further consideration of these provisions is required to ensure the Act appropriately balances the rights of victims of family violence and the rights of perpetrators. The Commission heard differences of opinion during the preliminary consultations about whether removing the requirement to inform perpetrators would be contrary to the requirements of procedural fairness or whether such amendments would make the Act more consistent with its purpose and objectives.
- 14.51 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on how perpetrator and victim rights should be appropriately balanced, having regard to the purpose of the Act—to assist victims of crime. This includes considering whether the central purpose of the law is to help victims recover. Specific questions for consideration are set out below.

## Questions

- 54 To what extent is VOCAT a therapeutic process for victims of family violence, including for child victims?
- 55 If VOCAT, or aspects of it, is not therapeutic for family violence victims, including child victims, what legislative or other changes should be made so that it is?
- 56 How would a trauma-informed VOCAT process help improve family violence victims’ experience of VOCAT, including for child victims?
- 57 Are there other approaches that should be considered to improve the VOCAT process or access to it for victims of family violence, including child victims?
- 58 What factors currently impact on consistency in practice, procedure and the making of awards to family violence victims, including to child victims? How should this variability best be addressed?
- 59 How might transparency in process and determination of awards be improved?
- 60 How do the rights of perpetrators—to be notified or to appear—fit with the purpose of the Act, which is to provide assistance to victims of crime? What changes, if any, should be made to the Act to appropriately balance the rights of perpetrators and the rights of victims of family violence?

# Fulfilment of the purpose and objectives of the Act

**148** Introduction

**148** Assisting victims to recover from crime

**152** Symbolic payments to 'certain victims of crime' as recognition

**153** Recourse to financial assistance where compensation unavailable from  
other sources

**154** Complementing other government services

**155** Discussion and options for reform

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## 15. Fulfilment of the purpose and objectives of the Act

### Introduction

- 15.1 The purpose of the *Victims of Crime Assistance Act 1996* (Vic) (the Act) is to provide assistance to victims of crime.<sup>1</sup>
- 15.2 Although not a matter expressly identified for the consideration of the Victorian Law Reform Commission (the Commission) in the terms of reference, the Commission considers that a review of the provision of state-funded financial assistance to victims of family violence under the Act requires examination of whether the Act is fulfilling its purpose and objectives as far as family violence victims are concerned.
- 15.3 Accordingly, this chapter discusses how the Act assists victims of family violence ‘to recover from the crime by paying them financial assistance for expenses incurred, or reasonably likely to be incurred as a direct result of the crime’.<sup>2</sup>
- 15.4 The chapter also discusses when and how the Act pays victims of family violence ‘financial assistance ... as a symbolic expression by the State of the community’s sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime’.<sup>3</sup>
- 15.5 Finally, this chapter considers whether the Act allows victims of family violence to have recourse to financial assistance where compensation for their injury cannot be obtained from the offender or other sources,<sup>4</sup> and the extent to which the Act complements other services provided by the state to victims of crime.<sup>5</sup>
- 15.6 In considering whether the Act’s purpose and objectives are realised for family violence victims, the Commission revisits some of the issues outlined in Part Two of this paper. It does this with the following question in mind: if issues encountered under the Act disproportionately impact victims of family violence, are the aims and objectives of the Act as currently articulated, able to be realised for victims of family violence?
- 15.7 Finally, this chapter then raises issues and poses questions for stakeholder consideration.

### Assisting victims to recover from crime

- 15.8 The first stated objective of the Act is to ‘assist victims of crime to recover from the crime by paying them financial assistance for expenses incurred, or reasonably likely to be incurred, by them as a direct result of the crime’.<sup>6</sup>

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1 *Victims of Crime Assistance Act 1996* (Vic) s 1.

2 *Ibid* s 1(2)(a).

3 *Ibid* s 1(2)(b).

4 *Ibid* s 1(2)(c). It is noted that awards of financial assistance under the Act are not intended to reflect the level of compensation victims may be entitled to at common law: see *ibid* s 1(3).

5 *Victims of Crime Assistance Act 1996* (Vic) s 1(4).

6 *Ibid* s 1(2)(a).



- 15.9 Part One of this consultation paper discussed the practical and symbolic benefits of state-funded financial assistance under the Act for family violence victims. These benefits reflect the purpose and objectives of the Act.
- 15.10 The importance of access to state-funded financial assistance for victims of family violence has been widely recognised. The Australian Law Reform Commission and New South Wales Law Reform Commission identified victim compensation and financial assistance schemes as the principal method of financial redress for most victims of family violence.<sup>7</sup>
- 15.11 Australia's National Research Organisation for Women's Safety has noted that the unique circumstances of family violence victims increase their reliance on financial assistance to assist with overcoming costs associated with escaping abuse such as relocation, loss of employment or legal costs associated with ending a relationship.<sup>8</sup> Such financial disadvantage can occur even when family violence is physical or psychological in nature and there are no elements of financial or economic abuse.
- 15.12 Economic and financial security is key to a family violence victim's recovery from crime.<sup>9</sup> However, Women's Legal Service Victoria has stated that for the Act to genuinely assist victims to recover from family violence, extensive reform is required.<sup>10</sup>
- 15.13 Some of the issues encountered by family violence victims relating to specific aspects of the Act's operation were discussed in Part Two of this paper. In considering the broader question of whether the Act assists family violence victims to recover from crime, some of these matters are re-examined in this chapter.

## Eligibility

- 15.14 Fundamentally, it may be difficult for the Act to assist family violence victims to recover from crime when such victims are so often ineligible for awards of assistance. The issue of eligibility, including some options for reform, was discussed at Chapter 6.
- 15.15 The definition of an 'act of violence' is a key barrier facing victims of family violence in accessing awards under the Act. Indeed, it is one of the fundamental barriers to the achievement of the Act's key objective, which is to assist victims in their recovery from crime.<sup>11</sup> The requirement for certain 'criminal acts' limits access to the scheme to victims who have experienced physical violence, sexual violence, threat of injury or stalking.<sup>12</sup>
- 15.16 The definition of an 'act of violence' under the Act is also narrower than the definition of 'family violence' under the *Family Violence Protection Act 2008* (Vic).<sup>13</sup> Victims of non-criminal forms of family violence, such as economic abuse, emotional and psychological abuse, property damage, intimidation and harassment are therefore excluded from the scheme established under the Act. Furthermore, due to the narrow definition of an 'act of violence', children who experience family violence by hearing, witnessing or otherwise being exposed to the effects of it, are not recognised as primary victims under the Act.
- 15.17 Even where a 'criminal act' constitutes an 'act of violence' under the Act, victims of family violence can confront difficulties proving that an offence occurred,<sup>14</sup> and that they have suffered 'injury' as a result.<sup>15</sup> During preliminary consultations the Commission heard that

7 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 1389.

8 Australia's National Research Organisation for Women's Safety, *Building Effective Policies and Services to Promote Women's Economic Security Following Domestic Violence*, State of Knowledge Paper No 7 (ANROWS Landscapes, 2015) 2.

9 Ibid 4.

10 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, 2015) 55.

11 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

12 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 194. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

13 Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78; Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 57.

14 Whittlesea Community Connections, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (2011) 73.

15 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 5.

proving an offence occurred is complicated by the fact that victims of family violence may not report matters until long after an injury has occurred, and that they may encounter barriers to reporting or may be unable to produce evidence of the injury.

- 15.18 Without a broader definition of violence, more like the definition of family violence under the *Family Violence Protection Act 2008* (Vic), it may be difficult for the Act to meaningfully assist the majority of family violence victims to recover from crime. This is because the Act's applicability is limited.

### Assistance available

- 15.19 As discussed in Chapter 7, even where eligibility issues are overcome by victims of family violence, they can be disadvantaged by the quantum generally awarded in family violence matters.
- 15.20 The Act provides that a series of acts can be considered a single criminal act if they 'occurred over a period of time and were committed by the same person or group of persons'.<sup>16</sup> This provision can disproportionately reduce the awards received by victims of family violence<sup>17</sup> because 'Domestic violence, almost by definition, will involve repeated acts of abuse by the same offender'.<sup>18</sup>
- 15.21 As the Magistrates' Court and Children's Court of Victoria submitted to the Victorian Royal Commission into Family Violence (the Royal Commission), the 'related criminal acts' provision means 'that a victim of long-term, chronic family violence (a series of related acts) is placed on an equivalent footing to someone who has been injured in a one-off assault, for example in a brawl between strangers'.<sup>19</sup>
- 15.22 Similarly, the special financial assistance categories '[do] not sufficiently take into account the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence'.<sup>20</sup> This is because the relevant categories are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.<sup>21</sup>
- 15.23 A family violence victim's recovery is likely to be adversely impacted by a process that does not recognise or account for the different impacts of persistent violence. Without recognition of the cumulative effect of a pattern of abuse, the Act may be limited in its ability to truly assist these victims to recover.
- 15.24 Some child victims of family violence are also unable to access special financial assistance because they are not recognised as primary victims under the Act. In addition, even where child victims are eligible for special financial assistance, the categories do not acknowledge the long-term and far-reaching consequences of experiencing family violence as a child.

### Time limits

- 15.25 An application for assistance must be made within two years after the act of violence occurred.<sup>22</sup> The Royal Commission found that the time limit is a barrier for victims of family violence.<sup>23</sup>
- 15.26 Family violence disclosures can, and often do, take time. Even where disclosure occurs quickly, it can take time to regain enough stability to even consider making an application

16 *Victims of Crime Assistance Act 1996* (Vic), ss 4(1)(a)(ii) and 4(4).

17 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine*, 188, 199–200.

18 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 9.

19 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence* (June 2015) 59.

20 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

21 Women's Legal Service Victoria, Submission No 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence* (19 June 2015) 53.

22 *Victims of Crime Assistance Act 1996* (Vic) s 29(1).

23 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 80.

to the Victims of Crime Assistance Tribunal (VOCAT).<sup>24</sup> Disclosure is even harder for child victims and therefore, the VOCAT time limits are more challenging for such victims.

- 15.27 The fact that it may take a victim of family violence longer to lodge an application for assistance with VOCAT means that the time limit can have a disproportionate impact on them compared to other victims of crime.<sup>25</sup> Even though VOCAT may grant applications for an extension of time, the existence of a time limit may be a disincentive for some victims of family violence.
- 15.28 Moreover, given that the time limit may operate to make victims of family violence start the process before they are ready, this alone can be re-traumatising.

### **Perpetrator notification and appearance provisions**

- 15.29 During preliminary consultations, the Commission heard that the fact that a perpetrator is entitled to appear is a barrier, as it is enough to cause some victims of family violence to elect not to submit a VOCAT application.
- 15.30 These perpetrator notification provisions are particularly problematic. In a family violence context, where recovery from crime might involve preventing contact with a perpetrator, requiring a victim to see this person in a court-like atmosphere is the opposite of what they need. The potential benefits of financial assistance may be outweighed by the negative effects of the potential for contact with the perpetrator, or actual contact during a VOCAT hearing.

### **Mandatory refusal and victim character and behaviour**

- 15.31 Requiring a victim to report family violence to police, as well as provide assistance to police and prosecution, may also not assist family violence victims to recover from crime. Reporting family violence to police can sometimes re-traumatise victims as police may not always respond in a way that validates a victim's experience. Reporting to police may also cause a victim to fear reprisals from the perpetrator. These issues can impact on the recovery of a victim.
- 15.32 During preliminary consultations, the Commission heard that such requirements limit the ability of VOCAT to be victim-centred in its approach and limit the ability of victims to recover from the effects of crime. However, the Commission also heard that in considering the rights of victims, VOCAT also has to consider the rights of perpetrators and ensure due process.

### **Timeliness of awards**

- 15.33 Another key barrier to VOCAT being able to assist victims of family violence to recover from crime is the legal process that can result in delays in financial assistance, in contrast to other support programs or financial assistance which can be provided more immediately and holistically. In preliminary consultations, the Commission heard that for family violence victims, VOCAT awards simply take too long.
- 15.34 The delays victims of family violence experience in accessing financial assistance under the Act may therefore significantly affect their ability to begin recovering from the crime.

### **Variation process**

- 15.35 Preliminary consultations indicated that the process of variation is not always smooth or easy for victims of family violence. This is particularly the case where variations are sought for the purposes of awards relating to additional counselling sessions. Most variations in family violence matters relate to additional counselling.

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Ibid.  
Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 9.

- 15.36 It was suggested to the Commission that it might be more practical and beneficial if practitioners were able to provide more counselling sessions at their discretion, rather than victims having to re-engage lawyers to ask for them.
- 15.37 During preliminary consultations the Commission was advised that these variation processes, which are required under the Act, are not 'victim-centred'. Instead, they rely on victims continually engaging with a lawyer in order to ask for the help they need. This limits the extent to which the VOCAT framework may assist victims of family violence to recover from crime.

## Symbolic payments to 'certain victims of crime' as recognition

- 15.38 The second stated objective of the Act is to 'pay certain victims of crime financial assistance (including special financial assistance) as a symbolic expression by the State of the community's sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime'.<sup>26</sup>
- 15.39 This part of the consultation paper examines two aspects of this objective. First, whether family violence victims are—or can be—'certain victims' under the Act and secondly, whether the financial assistance available is an appropriate recognition of the significant adverse effects experienced or suffered by victims of family violence.

## Are family violence victims 'certain victims' under the Act?

- 15.40 As outlined in Chapter 7, special financial assistance has four categories based on the severity of the act of violence. Each category has a minimum and maximum award amount which is prescribed in section 8A(5) of the Act:
- Category A: offences involving sexual penetration and attempted murder. The maximum amount is \$10,000 and the minimum is \$4667.
  - Category B: offences involving attempted sexual penetration, an indecent act, an indecent assault, armed robbery, aggravated burglary and deprivation of liberty for the purpose of sexual penetration or demanding a ransom. The maximum amount is \$3250 and the minimum is \$1300.
  - Category C: offences involving an attempt to commit any of the offences in Category B, a death threat, conduct endangering life, the infliction of serious injury and robbery. The maximum amount is \$1300 and the minimum is \$650.
  - Category D: offences involving an attempt to commit any of the offences in Category C, a threat of injury, assault, attempted assault, deprivation of liberty (other than for sexual penetration or ransom) and any other act of violence.<sup>27</sup> The maximum amount is \$650 and the minimum is \$130.
- 15.41 During preliminary consultations the Commission heard that victims of family violence are sometimes determined to be 'certain victims' under the Act. However, they frequently fall into the lower special financial assistance categories of C and D, even after long periods of violence and abuse. The minimum amount in these circumstances is \$130. The maximum amount is \$1300.<sup>28</sup>
- 15.42 In this context, a key issue raised in the Royal Commission was that the special financial assistance categories do 'not sufficiently take into account the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence'.<sup>29</sup>

26 *Victims of Crime Assistance Act 1996* (Vic), s 1(2)(b). See also Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 79.

27 As set out in the schedule in the *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic).

28 As discussed in Chapter 7, a higher maximum award of special financial assistance may be made available for acts of violence that would ordinarily fall within a category with a lower maximum award. In practice, this is described as 'uplift'.

29 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 78.

This is because the relevant categories are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.<sup>30</sup>

- 15.43 The Royal Commission found that victims of family violence who are not victims of criminal acts in the higher categories, such as attempted murder or offences involving sexual penetration (Category A), ‘may only be eligible for the amount tied to the “less serious” offences in perhaps category D or C—despite potentially having endured these “less serious” offences over a long period of time’.<sup>31</sup>

### **Is the financial assistance available an appropriate recognition of family violence?**

- 15.44 Noting it is beyond the terms of reference to consider the total financial assistance currently available, the Commission’s preliminary research and consultations indicate that payments of special financial assistance in family violence matters are not currently recognised by many stakeholders as an appropriate symbolic expression by the state of the community’s sympathy, condolence for, and recognition of, the significant adverse effects of family violence.
- 15.45 During preliminary consultations, some stakeholders commented on the significant government investment in family violence since the Royal Commission. Stakeholders felt that this demonstrates a broader cultural shift and community acknowledgment of the harms of family violence to both individuals and the community. However, these stakeholders also felt that the current VOCAT awards are too small to adequately reflect community expectations.
- 15.46 Moreover, the Commission was advised that because payments are so low in family violence matters, some support workers will advise clients that the process is not worth it. For some victims, the fact that they are effectively ‘locked out’ of higher categories of award might be enough of a disincentive to put them off the application process. These perceptions impact the VOCAT ‘take up’ rate in family violence matters.
- 15.47 Given the limitations on special financial assistance encountered by victims of family violence, it is not clear that the current categories of award are providing the level of acknowledgment and recognition that might be expected. In addition, it is suggested that the provision of financial assistance is not timely or substantial enough to enable a victim to escape the cycle of violence.
- 15.48 Therefore, preliminary consultations and research conducted by the Commission indicate this objective of the Act is not being realised for victims of family violence.

## **Recourse to financial assistance where compensation unavailable from other sources**

### **Is VOCAT available when compensation is unavailable from other sources?**

- 15.49 The third stated objective of the Act is to allow victims to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources.<sup>32</sup>
- 15.50 Based on the research and preliminary consultation undertaken by the Commission, and the previous inquiries, a range of structural, legislative, procedural and perceived barriers limit VOCAT as an appropriate avenue for financial assistance for many family violence

30 Women’s Legal Service Victoria, Submission No 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence* (19 June 2015) 53.

31 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume IV* (2016) 79.

32 It is noted that awards of financial assistance are not intended to reflect the level of compensation victims may be entitled to at common law. See *Victims of Crime Assistance Act 1996* (Vic) ss 1(2) and 1(3).

victims. As discussed further below, given the fact that victims of family violence may be unable to access compensation from any other source, the extent to which the third objective of the Act is realised meaningfully for victims of family violence may be limited.

- 15.51 Issues encountered by the Commission during preliminary consultations and through preliminary research raise questions regarding the appropriateness of the legislative provisions themselves, and the extent to which they acknowledge the nature and dynamics of family violence. In particular, questions arise regarding the ability of the service system and legal practitioners to adequately support victims through the VOCAT process, as well as perceived barriers to the scheme and lack of knowledge of assistance available.

### **Assumption that other compensation is available**

- 15.52 The Act is intended to provide assistance for victims of crime where compensation for their injury cannot be obtained from the offender or other sources.<sup>33</sup> In support of this objective, the Act therefore expressly provides that where compensation is also obtained from the perpetrator, the person must refund the award.<sup>34</sup> However, where compensation is obtained from another source, the Tribunal has a discretion whether or not to require refund of the award.<sup>35</sup>
- 15.53 Underlying this objective is the notion that ‘the offender or other state-funded compensation schemes are primarily responsible for compensation of victims’.<sup>36</sup> Indeed, this notion is reflected in the Second Reading Speech to the Act as first enacted, which notes ‘wherever practicable convicted offenders [should] make good the harms caused by their crimes by paying compensation for pain and suffering to the victim as assessed by the courts’.<sup>37</sup>
- 15.54 In practice, and as noted earlier, VOCAT has often been the only source of compensation for family violence victims, rather than being a ‘supplement’ to other forms of compensation,<sup>38</sup> although the availability of flexible support packages means it may no longer be the only avenue of financial assistance. Yet the Act presumes that compensation is available from the offender or other sources. This is particularly problematic for victims of family violence for whom it is often impractical or unsafe to pursue other avenues of compensation.

### **Complementing other government services**

- 15.55 As expressly noted in the Act, the intention of the Act is to ‘complement other services provided by government to victims of crime’.<sup>39</sup>
- 15.56 However, the extent to which the Act and VOCAT complement other government services raises questions about the extent to which victims of family violence are required to seek information, support and assistance from different services and agencies which are not linked or able to share information effectively.
- 15.57 Government services for victims of crime and, more specifically, family violence victims, aim to be ‘victim-centred’.<sup>40</sup> However, research indicates that VOCAT is not easy to access or navigate for victims of family violence. Women’s Legal Service Victoria has found that victims of family violence must go to numerous different places to get answers about

33 Ibid s 1(2)(c).

34 Ibid s 62.

35 Ibid s 62(2).

36 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 22.

37 The *Victims of Crime Assistance Bill 1996* (Vic) Second Reading Speech, Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1024 (Jan Wade, Attorney-General).

38 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 22.

39 *Victims of Crime Assistance Act 1996* (Vic) s 1(4).

40 Department of Premier and Cabinet (Vic), *Victim-centred Justice*, (2016) <<http://www.vic.gov.au/familyviolence/our-10-year-plan/transforming-our-approach/victim-survivors-are-safe-and-supported/victim-centred-justice.html>>.

financial issues arising from family violence. Services are also often fragmented and difficult to navigate for those with little time and few resources. Victims may have to retell their stories over and over.<sup>41</sup>

- 15.58 This issue was raised during the Royal Commission and addressed by its Recommendation 37, that support and safety hubs be established.<sup>42</sup> Support and safety hubs envisage dealing with a single ‘hub’ to access a range of information and support, rather than having to seek information and support via multiple avenues. Linkages between victims, victim and family violence support services and the justice system, including VOCAT, are also expected to improve once support and safety hubs are established.<sup>43</sup>
- 15.59 Preliminary consultation and research conducted by the Commission also indicated some anomalies in the financial assistance available to victims of family violence if a victim accesses different support services or financial assistance mechanisms.
- 15.60 For example, a victim of family violence may approach a specialist family violence service wishing to urgently relocate after leaving an abusive relationship. She may be urgently assessed and a case management plan developed by a specialist family violence worker. This worker may apply for a family violence flexible support package for bond and rent for a new rental property, purchasing whitegoods and installing a security system. Funding of a few thousand dollars may be provided within a number of weeks.
- 15.61 In contrast, a victim in the same circumstances might approach a solicitor for assistance to lodge a VOCAT application. She might then be told that as she has not made a report to police, she is unlikely to be eligible under the Act. She might also be advised that even if she has reported to police, the process will take time and that she may be unlikely to receive assistance in enough time to use the money for urgent relocation costs.

## Discussion and options for reform

### Maximising recovery

- 15.62 Promoting ‘recovery’ is a common theme across other financial assistance and compensation schemes in Australian jurisdictions.<sup>44</sup>
- 15.63 Preliminary consultations and research conducted by the Commission indicated that access to VOCAT is challenging for many victims of family violence. This limits the extent to which the Act can provide assistance to victims of family violence as ‘victims of crime’.<sup>45</sup>
- 15.64 When the Act was introduced, the Second Reading Speech articulated a broad intent to develop a model more responsive to the needs of victims in order to ‘maximise the potential for a victim’s recovery from the psychological and physical effects of a violent offence’.<sup>46</sup> The Second Reading Speech also described the Act as establishing ‘an integrated model of assistance [for] victims of crime’.<sup>47</sup>

### What should a state-funded financial assistance scheme look like to help victims of family violence in their recovery?

- 15.65 Based on the research and preliminary consultation undertaken by the Commission, and the previous relevant inquiries referred to, there appears to be a range of barriers limiting VOCAT as an appropriate avenue for financial assistance for many family violence victims.

41 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, 2015) 62.

42 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 37.

43 See, eg, ‘Case Study: Marla’s Experience in the Future’ illustrating that a support and safety hub will connect victims with a lawyer to assist with an application to VOCAT: Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) 40–1.

44 Victoria, South Australia and Queensland expressly promote recovery as a purpose under their relevant legislation: *Victims of Crime Assistance Act 1996* (Vic) s 2, *Victims of Crime Assistance Act 2009* (Qld) s 3, *Victims of Crime Act 2001* (SA) s 3.

45 *Victims of Crime Assistance Act 1996* (Vic) s 1(1).

46 The *Victims of Crime Assistance Bill 1996* (Vic) Second Reading Speech, Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1023 (Jan Wade, Attorney-General).

47 *Ibid* 1026.

- 15.66 During preliminary consultations, the Commission was told that the legislative framework must empower victims of family violence and must send a message that family violence will not be tolerated. The Commission was told that family violence victims need to be at the centre of the process, and that the Act needs to mirror government and community expectations with respect to family violence.
- 15.67 The Commission also heard that VOCAT needs to operate more effectively and efficiently as part of the broader victim and family violence service system. Some felt that VOCAT's greatest potential benefit for victims of family violence was when it can be used as a 're-establishment fund'—that is, to provide financial assistance that will help a victim recover from crime by helping them re-establish their life.
- 15.68 Stakeholder input during preliminary consultations suggests that, in order to be a state-funded financial assistance scheme that maximises victim recovery in the context of family violence, the Act requires:
- recognition of a broader definition of family violence beyond the notion of a single 'act of violence' and potentially incorporating non-violent forms of abuse
  - recognition of the cumulative harm of persistent and protracted family violence
  - acknowledgment of the difficulties faced by family violence victims in reporting to police, assisting prosecution and applying for assistance, without applying prescriptive time frames
  - prioritisation of a victim's safety and wellbeing, and a trauma-informed approach
  - more timely access to financial assistance at the point of crisis and better integration with existing supports
  - more flexibility and adaptability as circumstances change, without further burdening victims with having to continue to access lawyers in order to obtain support such as counselling.
- 15.69 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on how the Act could maximise victim recovery in the context of family violence and what changes would need to be made to the Act. Specific questions are set out below.



## Questions

- 61 The purpose of the Act is to 'provide assistance to victims of crime'. Is this purpose realised for victims of family violence, including child victims? If not, why not?
- 62 If the purpose of the Act is not being realised for victims of family violence, including for child victims, how should this be done?
- 63 Should the purpose and objectives of the Act be amended to expressly recognise family violence? If yes, how should this be done?
- 64 The Act states that 'certain victims of crime' should be awarded financial assistance as a symbolic expression by the state. Are family violence victims, including child victims, adequately covered by the current special financial assistance provisions? If not, how should this be done?
- 65 The Act aims to complement other services provided by government to victims of crime. Is this achieved for family violence victims? If not, how should this be done?
- 66 In assessing any proposals for change, what criteria and considerations should the Commission have regard to? How should the experience of family violence victims, including child victims, be taken into account?



# Conclusion

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## 16. Conclusion

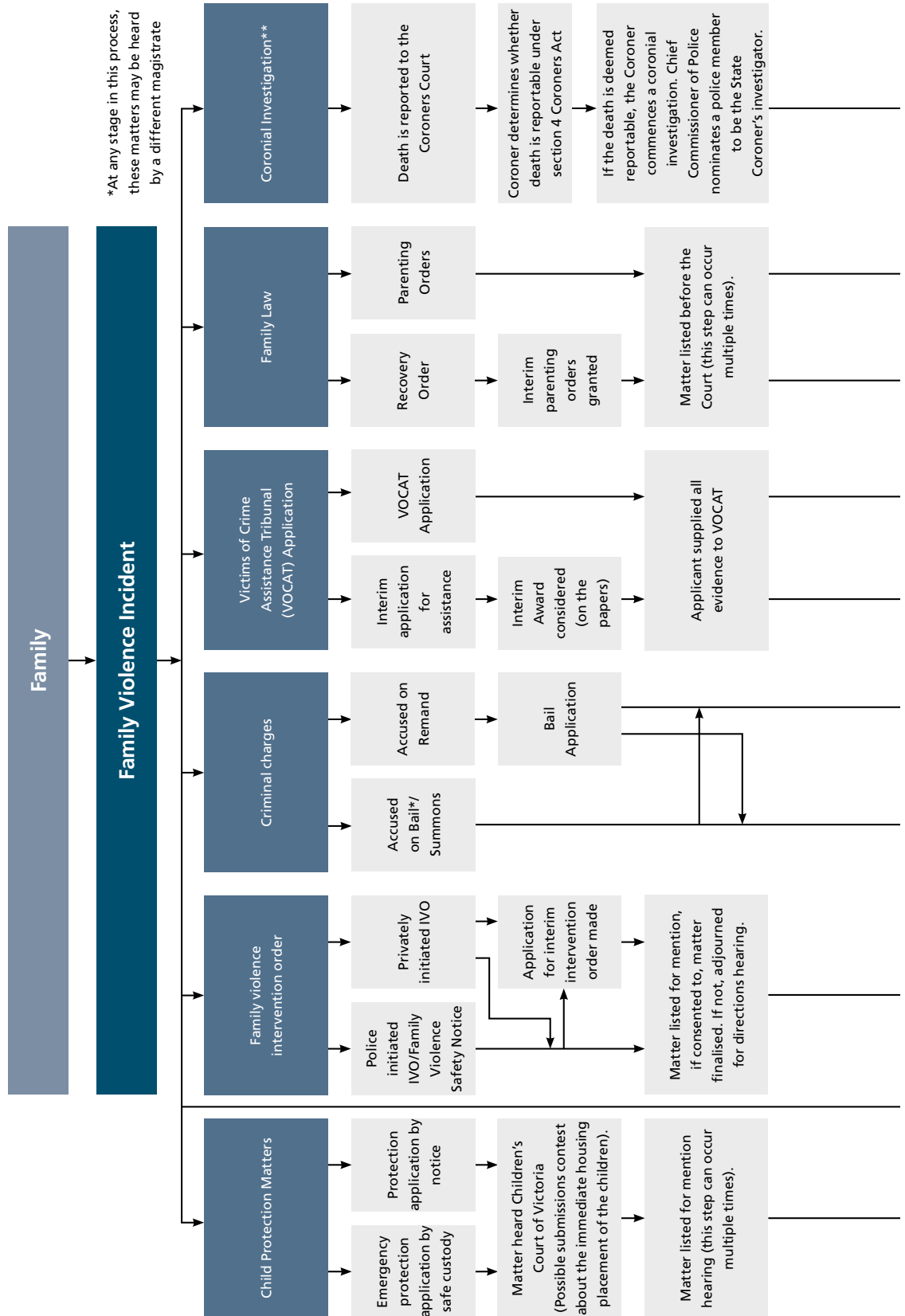
- 16.1 This consultation paper discusses a range of issues to assist the Victorian Law Reform Commission (the Commission) in understanding the operation of the *Victims of Crime Assistance Act 1996* (the Act) and how it applies to victims of family violence, including child victims. This consultation paper therefore also sets out for stakeholder and community consideration a number of options for reform aimed at ensuring that the purpose and objectives of the Act can be realised for victims of family violence.
- 16.2 In exploring the operation of the Act and its accessibility for victims of family violence, the Commission has been guided by an overarching consideration of what changes might need to be made to the Act to better assist victims of family violence rebuild their lives and recover.
- 16.3 This consultation paper does not represent concluded views on the matters raised by the terms of reference. Those conclusions will be reached following consultations and submissions, and stated in the Commission's report, to be delivered to the Attorney-General by 31 January 2018.
- 16.4 The Commission welcomes submissions from all parts of the community. It particularly invites submissions from victims, persons affected, professionals, stakeholders and the community who have had direct experience of the Victims of Crime Assistance Tribunal (VOCAT) processes and/or whose work interacts with VOCAT.
- 16.5 You can provide input into the Commission's review by responding to the specific questions posed throughout the paper. You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but nonetheless relates to the issues outlined in the terms of reference.
- 16.6 To allow the Commission time to consider your views before deciding on final recommendations, **submissions are due by 28 July 2017.**
- 16.7 Your responses to these questions will assist the Commission determine what changes are required to improve the operation of the Act for victims of family violence.

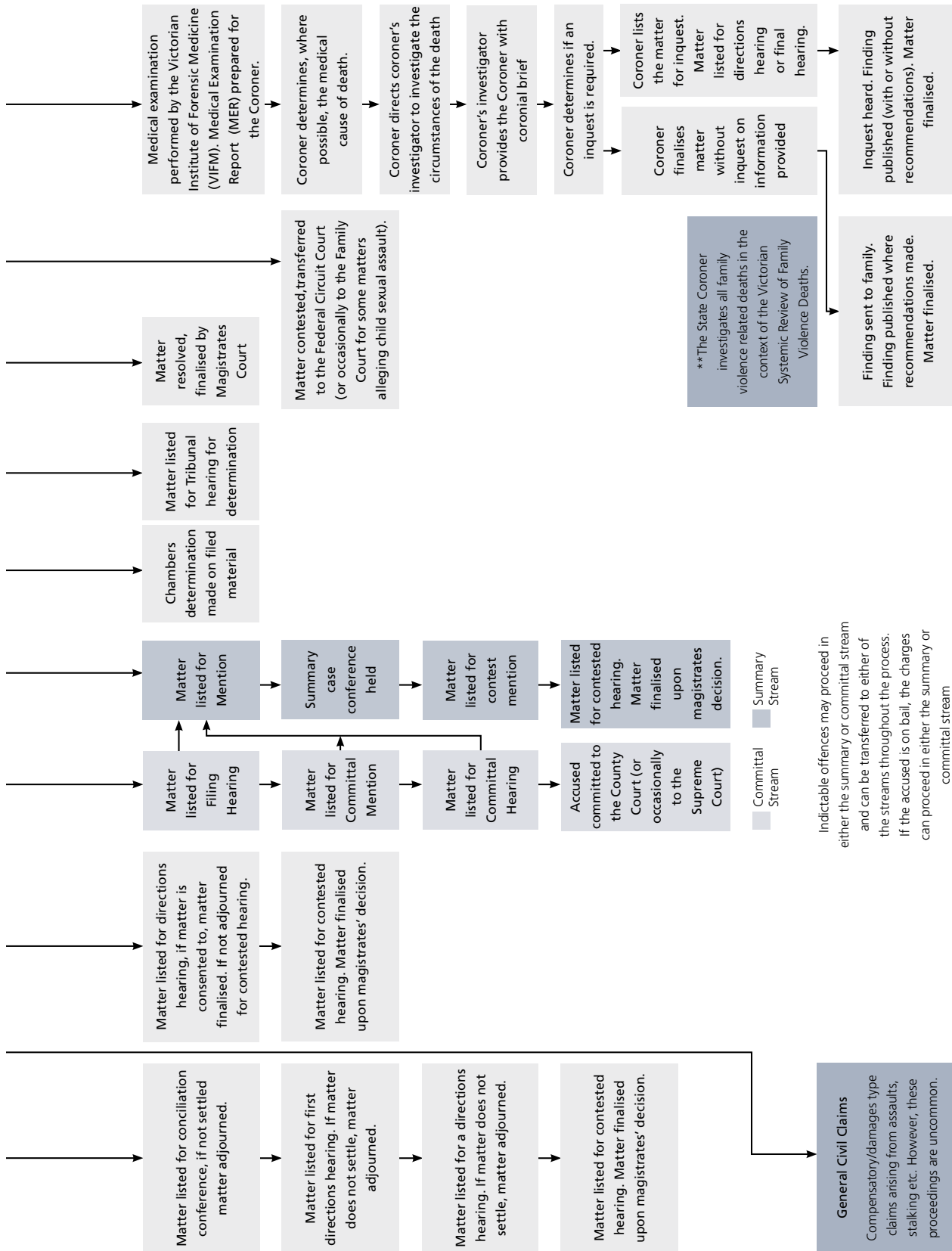


# Appendices

# Appendix A: Family Violence Incident Flowchart

## Family Violence Incident Flow Chart: Jurisdictions exercised by Victorian Magistrates





Indictable offences may proceed in either the summary or committal stream and can be transferred to either of the streams throughout the process. If the accused is on bail, the charges can proceed in either the summary or committal stream

■ Summary Stream  
■ Committal Stream

## Appendix B: Victim Compensation Schemes: Comparative Table

Victim compensation and financial assistance schemes in Australia – a comparative table<sup>1</sup>

	Victoria	ACT	NSW	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (VIC)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims' Rights and Support Act 2013</i> (NSW)	
<b>Eligibility</b>	Primary victims, secondary victims and related victims.	Primary victims, related victims and homicide witnesses.	Primary victims, secondary victims and family victims.	
<b>Proof/evidence of offence</b>	No charge or conviction required - question of fact decided on the balance of probabilities.	No charge or conviction required - must be satisfied on the balance of probabilities about any matter relevant to application including whether an offence occurred.	No charge or conviction required - documentary evidence must support that act of violence occurred on the balance of probabilities.	
<b>Types of crimes covered</b>	'Act of violence'. Violent offences resulting in injury or death. Includes assault, sexual offences, stalking, child stealing and kidnapping.	'Act of violence'. Offences resulting in injury or death. Includes offences against the person, sexual offences, robbery and female genital mutilation. Also includes specific 'family violence offences', such as property offences and breach of family violence order.	'Act of violence'. Violent offences resulting in injury or death. Specifically extends to domestic violence.	
<b>Is there a requirement for 'injury'?</b>	Yes—'injury' means actual physical bodily harm, mental illness or disorder and pregnancy. Can be 'significant adverse effect' for primary victims claiming special financial assistance.	Yes—'injury' means physical injury, mental illness and mental disorder. But recognises broader category of injuries for family violence and sexual offences, including unplanned pregnancy, violation, reduced sense of self-worth, increased fear / insecurity.	Yes—'injury' means actual bodily harm, grievous bodily harm and psychological or psychiatric harm.	

1 This table provides a summary of victims' compensation and financial assistance schemes operating in each Australian State and Territory as at May 2017. This table is not intended as a comprehensive reference. The scope of the table is limited to issues relevant to the Terms of Reference.  
2 In March 2017, Queensland passed the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld), which will amend the *Victims of Crime Assistance Act 2009* (Qld). Although it is not yet in force, this table incorporates those amendments.



	NT	QLD	SA	Tasmania	WA
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld) <sup>2</sup>	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (TAS)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Primary victims, secondary victims, family victims and related victims.	Primary victims, parent secondary victims, witness secondary victims and related victims.	Immediate victims, parent/ spouse/ domestic partner/ child of victims of homicide and dependent of immediate victims who die.	Primary victims, secondary victims, related victims.	Victims of an offence and close relatives of a person who dies as a result of an offence.
	No charge or conviction required.	No charge or conviction required – must be satisfied on the balance of probabilities that the person is eligible for the assistance.	Offence must be proved beyond reasonable doubt. But there are certain circumstances where there has been no conviction, in which the Attorney-General has the discretion to make an <i>ex gratia</i> payment.	No charge or conviction required – must be satisfied on the balance of probabilities that the death or injury was the result of criminal conduct.	Offences for which a person has been convicted ('proved offences'). But the Act also applies to 'alleged offences' in certain circumstances.
	'Violent Act'. Criminal acts that result in injury to a person.	'Act of violence'. Means crimes against the person and domestic violence, including non-criminal forms of abuse that results in death or injury.	Offences involving the use of violence, threat of violence or creates a reasonable apprehension of imminent harm, sexual offences and offences that cause death or physical injury.	Violent offences, including sexual offences, abduction, kidnapping and stalking.	Crimes, misdemeanours and simple offences that are 'proved' (i.e. the offender has been convicted) or, in certain circumstances, that are 'alleged'.
	Yes—'injury' means physical illness or injury, recognisable psychological or psychiatric disorder and pregnancy. But there is no requirement of injury for certain sexual offences ('compensable violent acts').	Yes—'injury' means bodily injury, mental illness or disorder, intellectual impairment, pregnancy and disease. But recognises broader category of injuries for domestic violence and sexual offences including violation, reduced sense of self-worth, increased fear/ insecurity, adverse impact.	Yes—for an immediate victim must be physical or mental injury, including pregnancy, mental shock and nervous shock. Grief is required for close family members and financial loss for dependents.	Yes—'injury' means impairment of bodily or mental health and pregnancy.	Either 'injury', including bodily harm, mental or nervous shock and pregnancy; or financial 'loss'.

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (VIC)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims' Rights and Support Act 2013</i> (NSW)	
<b>Is family violence specifically recognised under the Act?</b>	No, but consideration of whether alleged offender was in a position of power, influence or trust in some circumstances.	Yes. 'Act of violence' includes 'family violence offences' and the Act expressly recognises family violence-related injuries including unplanned pregnancy, violation, reduced sense of self-worth and increased fear/insecurity.	Yes, must have regard to family violence when considering whether the victim failed to take reasonable steps to mitigate the extent of an injury. Different time limits also apply for lodging an application for family violence.	
<b>Is family violence defined?</b>	No.	Yes – sets out a range of family violence offences, including arson, property damage, burglary, offences involving firearms, driving offences and breach of family violence protection order.	Yes – defined as an act that occurred in the commission of a personal violence offence (within the meaning of the <i>Crimes (Domestic and Personal Violence) Act 2007</i> )	

	NT	QLD	SA	Tasmania	WA
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld) <sup>2</sup>	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (TAS)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Yes. Specifically includes 'domestic violence injuries' as a 'compensable injury'. Domestic violence is also a factor to consider in relation to extension of time applications.	Yes. 'Act of violence' includes 'domestic violence'. The Act also explicitly recognises domestic violence-related injuries, including violation, reduced self-worth, loss of physical immunity/ capacity, increased fear/ insecurity and other adverse effects. In addition to police, victims of domestic violence can also report to counsellors, doctors, psychologists or domestic violence services. Domestic violence is a relevant factor when considering whether the victim had a reasonable excuse for failing to assist police.	No.	No.	No.
	Yes – defines 'domestic violence injuries' as injury resulting from a violent act involving a pattern of abuse committed by an offender with whom the victim is in a domestic relationship or stalking in contravention of a domestic violence order.	Yes – domestic violence has the definition that it does in the <i>Domestic and Family Violence Protection Act 2012</i> (Qld), which includes physical or sexual abuse, emotional or psychological abuse, economic abuse and behaviour that is threatening, coercive, controlling or dominating.	No.	No.	No.

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (VIC)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims' Rights and Support Act 2013</i> (NSW)	
<b>Categories of awards for primary victims</b>	Counselling, medical expenses, loss of earnings, loss/damage to clothing worn at the time, safety-related expenses and, in exceptional circumstances, expenses to assist in recovery. Can also be awarded 'special financial assistance', which is a lump sum that varies according to the type of offence. Expressly excludes property loss/ damage.	Financial assistance for immediate needs and economic loss. Can also be awarded a 'recognition payment', which is a lump sum that varies according to the type of offence.	Counselling, financial assistance for immediate needs in order to secure victim's safety/ health/ well-being, and financial assistance for economic loss. Can also be awarded a 'recognition payment', which is a lump sum that varies according to the type of offence. Expressly excludes property loss/ damage.	
<b>Quantum of awards for primary victims – maximum amount</b>	\$60,000 plus \$10,000 'special financial assistance'. Includes a maximum of \$20,000 for loss of earnings.	Total maximum of \$50,000. Includes a maximum of \$10,000 for immediate needs, \$30,000 for loss of earnings and a 'recognition payment' of up to \$26,250. But for a primary victim of a 'domestic violence offence' only, the total maximum award is \$10,000. These amounts are subject to indexation.	A maximum of \$5,000 for immediate needs, \$5,500 for counselling services, \$30,000 for economic loss, and a 'recognition payment' of up to \$10,000.	
<b>Are related criminal acts treated as a single criminal act?</b>	Yes, unless in the circumstances they ought not to be. But a higher maximum award of 'special financial assistance' is available for a series of related criminal acts in certain circumstances.	Yes, if they are likely to form a single ongoing offence or if assistance would be disproportionate if treated separately. Notice must be given to the applicant. But a series of offences is a 'circumstance of aggravation', which can result in a higher 'recognition payment'.	Yes, unless in the circumstances they ought not to be. But a higher 'recognition payment' is available for a series of related criminal acts in certain circumstances.	

	NT	QLD	SA	Tasmania	WA
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld) <sup>2</sup>	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (TAS)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Financial assistance for financial loss and counselling. Can also be awarded a lump sum for certain 'compensable injuries' and 'compensable violent acts'.	Counselling, medical expenses, incidental travel expenses, report expenses as part of application, loss of earnings, damage to clothing worn at the time, and expenses to assist in recovery in exceptional circumstances. Can also be awarded 'special assistance', which is a lump sum that varies according to the type of offence. Expressly excludes property damage.	'Compensation for the injury arising from the offence.' Includes financial and non-financial loss.	Expenses incurred as a result of the injury, medical, dental, psychological and counselling services required in the future, loss of wages or salary, pain and suffering. Expressly excludes property loss/ damage.	Compensation for the injury and any loss suffered.
	\$40,000, including a maximum of \$40,000 for a single 'compensable injury' or a single 'compensable violent act'.	\$75,000 plus \$500 for legal costs. This includes a maximum of \$20,000 for loss of earnings and 'special assistance' of up to \$10,000.	\$100,000, including a maximum of \$100,000 for non-financial loss. Amounts prescribed in the Act are subject to indexation.	\$30,000 for a primary victim of a single offence and \$50,000 for a primary victim of multiple offences.	\$75,000 for offences committed after the commencement of the Act.
	Yes. But if the related acts occur in the context of domestic violence, the victim is eligible for a lump sum for 'domestic violence injuries'.	Yes both related criminal acts and related acts of domestic violence are treated as a single offence. Must give notice to the applicant and he or she has an opportunity to object. But in certain circumstances a higher maximum award of 'special assistance' is available for a series of related criminal acts.	Yes.	Yes. But a higher maximum award is available for a victim of a 'series of offences'.	Yes.

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (VIC)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims' Rights and Support Act 2013</i> (NSW)	
<b>Time limit</b>	2 years after the act of violence. But time limit can be extended in certain circumstances, having regard to factors such as whether the offender in position of power, influence or trust.	3 years after the act of violence or the day the child victim turns 18. But time limit can be extended in certain circumstances, having regard to factors such as whether the alleged offender was in a position of power, trust or authority.	2 years after the act of violence or the day the child victim turns 18. But time limit is 10 years for victims of domestic violence, child abuse or sexual assault.  No time limit for a child victim of a sexual offence. Time limit can also be extended if primary victim subsequently dies as a direct result of the act of violence.	
<b>Decision maker/relevant agency</b>	Judicial – Magistrates sitting as members of the Victims of Crime Assistance Tribunal. Hearings if applicant elects or Tribunal requires.	Administrative – Victims of Crime Commissioner (head of Victim Support ACT). No hearings.	Administrative – Commissioner for Victims Rights (head of Victims Services, NSW Justice Department). No hearings.	
<b>Perpetrator notification</b>	Yes—discretionary.	Yes—discretionary.	Perpetrator only notified if a provisional restitution order is made.	
<b>Can a failure to report to police lead to a refusal of an application?</b>	Yes—failure to report to police in a reasonable time results in mandatory refusal, unless special circumstances exist.	Yes—failure to report to police can lead to a refusal of application. But 'special reporting class victims' can report to other professionals, including doctors, counsellors and government agencies instead. Special reporting class victims include child victims, victims of sexual offences and victims of an offender who was in a position of trust, influence or power.	Yes—must consider whether reported to police within reasonable time. May have regard to the nature of the relationship between the victim and perpetrator. Can also consider whether the act of violence was reported to a health or other relevant agency.	

	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>Tasmania</b>	<b>WA</b>
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld) <sup>2</sup>	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (TAS)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	2 years after the violent act or the day the death or injury occurs. But time limit can be extended in certain circumstances, having regard to factors such as whether the alleged offender was in a position of power, trust or authority or where the injury or death occurred as a result of sexual assault, domestic violence or child abuse.	3 years after the act of violence, the day the child victim turns 18 or the day the primary victim dies.	3 years after the offence or, if the application relates to a death, 12 months from the death. May extend the time limit for 'any proper reason'.	3 years after the offence or the day the child victim turns 18. May extend the time limit if 'special circumstances' justify the extension.	3 years after the date of the offence. But an extension of time may be granted 'if it is just to do so'.
	Administrative – assessors appointed by the Minister. No hearings.	Administrative – government assessor chosen by the scheme manager. No hearings.	Judicial –the District Court. But at first to Crown Solicitor.	Quasi-judicial – independent Criminal Injuries Compensation Commissioners. Hearings if applicant elects or Commissioner requires.	Quasi-judicial – assessors appointed by the Governor for a 5 year term. Hearings if the assessor requires.
	Yes—discretionary.	Perpetrator only notified if the State subsequently intends to recover from him or her.	Yes—mandatory unless the offender's identity or whereabouts is unknown.	Perpetrator only notified if a provisional order made that directs the offender to pay the Crown the compensation awarded.	Yes—discretionary.
	Yes—failure to report to police within a reasonable time can lead to a refusal of application, unless the circumstances prevented the report from being made.	Yes—failure to report to police can lead to a refusal of application, unless there is a reasonable excuse. But 'special primary victims' can report to a counsellor, psychologist, doctor or domestic violence service instead. 'Special primary victims' include child victims, victims of sexual offences, victims of an offender who was in a position of trust, influence or power and victims of domestic violence.	Yes—failure to report to police within a reasonable time and 'without good reason' can lead to a refusal of application.	No specific provision. But failure to report to police may constitute a failure to assist police (see below).	No specific provision. But failure to report to police may constitute a failure to assist police (see below).

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (VIC)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims' Rights and Support Act 2013</i> (NSW)	
<b>Can a failure to assist/co-operate with Police lead to a refusal of an application?</b>	Yes—failure to assist police results in mandatory refusal, unless special circumstances exist.	Yes—mandatory refusal if applicant has unreasonably failed to give assistance to police.	Yes—in determining whether or not to grant the application/ the amount of the award, Commissioner must have regard to failure to assist police.	
<b>Can an applicant's character/behaviour /contributory conduct lead to refusal of an application?</b>	Yes—in determining whether or not to make an award, must consider the applicant's character/ behaviour (including past criminal behaviour) as well as whether the applicant 'provoked' or contributed to injury. Mandatory refusal if the application is made in collusion with the alleged offender.	Yes—award must be reduced if applicant contributed to the injury or failed to mitigate extent of the injury.	Yes—must consider any behaviour (including past criminal behaviour) or whether victim contributed/ encouraged/ assisted offence or whether victim failed to mitigate injury (i.e. by not seeking medical treatment). But can consider dynamics of sexual assault/ domestic violence in relation to mitigation of injury.	
<b>Can an award be refused on the basis a perpetrator may benefit?</b>	Yes—must consider whether alleged perpetrator will benefit either directly or indirectly.	No.	No. But in making a decision as to whom the assistance should be paid, must have regard to whether alleged offender may benefit from the payment.	



	NT	QLD	SA	Tasmania	WA
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld) <sup>2</sup>	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (TAS)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Yes—mandatory refusal if applicant failed without reasonable excuse to assist the police in a material way in the investigation or prosecution of the offender.	Yes—mandatory refusal if applicant has not given reasonable assistance to police and that failure prevented the arrest or prosecution of the offender. However, domestic violence is a factor to which the decision maker must have regard in deciding whether the victim had a reasonable excuse not to assist police.	Yes—mandatory refusal if applicant refused or failed to provide information, give evidence or to co-operate in the investigation or prosecution of the offence without reasonable excuse.	Yes—mandatory refusal if the applicant failed to reasonably assist in the identification, apprehension or prosecution of alleged offender.	Yes—mandatory refusal if the applicant failed to reasonably assist in the identification, apprehension or prosecution of alleged offender.
	Yes—award must be refused if the applicant made the application in collusion with the offender or the injury/ death occurred during the commission of an indictable offence by the applicant.	Yes—award must be refused if the applicant conspired with the perpetrator or if the main reason for the act of violence was the primary victim's involvement in criminal activity.	Yes—award must be refused if the claimant was engaged in conduct constituting an indicatable offence and that conduct materially contributed to the claimant's risk of injury, unless failure to compensate would be unjust in the circumstances.	Yes—in determining whether to refuse/ reduce an award, must have regard to any behaviour, condition, attitude or disposition of the victim that appears to have directly or indirectly contributed to the injury/ death.	Yes—award must be refused if the victim was committing a separate offence at the time. Can also refuse/ reduce award if the behaviour, condition, attitude or disposition of the victim contributed to the injury/ death.
	Yes—may reduce an award where it is likely to benefit the offender because of a relationship or connection between the applicant and offender.	No.	No.	No.	Yes—mandatory refusal if there is a 'relationship or connection' between the victim and the offender and the award is likely to benefit the offender.

# Appendix C: VOCAT Application for Assistance Form

Victims of Crime Assistance Rules 2010  
Form 1 Rule 6



Victims of Crime  
Assistance Tribunal

## APPLICATION FOR ASSISTANCE

### 1. DETAILS OF PERSON WANTING ASSISTANCE

Surname	<input type="text"/>	Given Names	<input type="text"/>
Address	<input type="text"/>		
Telephone	(H) <input type="text"/> (W) <input type="text"/>	Postcode	<input type="text"/>
	(M) <input type="text"/>		
Occupation	<input type="text"/>	Date of Birth	<input type="text"/>
Sex	Male <input type="checkbox"/>	Female <input type="checkbox"/>	
Email	<input type="text"/>		

#### Are you of Aboriginal or Torres Strait Islander origin?

Persons of both Aboriginal and Torres Strait Islander origin should mark both "Yes" boxes

No  Yes, Aboriginal  Yes, Torres Strait Islander

*A person of Aboriginal or Torres Strait Islander origin means a person who is descended from an Aboriginal or Torres Strait Islander; and is accepted as an Aboriginal or Torres Strait Islander by an Aboriginal or Torres Strait Island community.*

*This information will enable the Tribunal to provide you with information to assist your application*

Have you previously made an application for assistance/criminal compensation? Yes  No

Have you previously made an application in respect of this act of violence? Yes  No

#### Please nominate which category applies to you

1. Primary Victim
2. Secondary Victim
3. Related Victim
4. Application for payment of Funeral Expenses only

**Please note:  
You can only apply in  
one category**

### 2. COMPLETE THIS SECTION IF YOU ARE MAKING THIS CLAIM ON BEHALF OF A CHILD OR PERSON UNDER DISABILITY

Your Full Name	<input type="text"/>		
Address	<input type="text"/>		
Postcode	<input type="text"/>	Telephone	<input type="text"/>
		Date of Birth	<input type="text"/>
Email	<input type="text"/>		
Relationship to Applicant (e.g. I am their parent, guardian)	<input type="text"/>		

### 3. CIRCUMSTANCES OF THE ACT OF VIOLENCE

What was the act of violence/offence?

At what address did the act of violence occur?

Date of act of violence  Or between  and  Time  am/pm

Who committed the act of violence (full name if known)?

Sex of alleged offender Male  Female  Date of Birth or approximate age

Was the alleged offender a family member or domestic partner of the victim?\* Yes  No

If Yes, how are you related to the offender? I am their:   
*(e.g. wife, son, father, step-sister, former domestic partner)*

(\* This information is for data collection purposes only)

If more than two years have lapsed since the act of violence please outline your reasons for not filing an application within this time *please attach additional material if required:*

**4. REPORTING DETAILS**

Has the act of violence been reported to the Police? Yes  No

If yes, please provide the details:

Name  Registered No   
 Rank  Police Station   
 Date of Report

If no, you must provide a statutory declaration setting out the circumstances of the act of violence and provide the reason for the failure to report the matter to police.

Statutory Declaration attached?  Yes  No

Have criminal proceedings commenced? Yes  No  Unknown

If known, provide details known to you (i.e. date and location of hearing)

Are there intervention orders relating to this matter? Yes  No  Case number (if known)

If the incident occurred in the workplace, was it reported to your employer? Yes  No

Has the act of violence been reported elsewhere? Yes  No

If yes, please provide the details:

**5. WHAT EFFECTS HAVE RESULTED FROM THE ACT OF VIOLENCE?**

Physical \* Yes  No

Psychological \* Yes  No

Grief, Stress or Trauma Yes  No

Provide details

Did you attend a hospital Yes  No

If yes, what hospital?

**6. DETERMINATION OF YOUR APPLICATION**

Would you prefer to:  Attend a hearing at the Tribunal? OR  
 Have your application determined in your absence?

Do you request that:  Proceedings be conducted in a closed Court?  
 Publication of your application be restricted?

Do you require an interpreter Yes  No  Language

If the Tribunal makes an award would you like it deposited directly into your bank account?

No  (if no selected a cheque will be sent to your postal address, please ensure this is current at all times)  
 Yes  Account name  BSB number  Account number   
 Name of Bank/Financial Institution

**7. HAVE YOU APPLIED FOR ASSISTANCE UNDER ANY OTHER SCHEMES?**


Yes  No **If "Yes", complete this section**

Have you received assistance under the Victims Assistance Program  No

Yes  Please provide details

	<i>Still Pending</i>	<i>Finalised</i>	<i>Amount Received</i>	<i>Ref/Claim No</i>
<input type="checkbox"/> Workcover	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
<input type="checkbox"/> Transport Accident Commission	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
<input type="checkbox"/> Insurance (eg. Health, income etc)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
<input type="checkbox"/> Other (please specify)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>

Please provide details of the claim under any of these schemes

 Please supply and attach details of any relevant insurance cover (life or health) or superannuation benefit entitlements held and any payments claimed, received or to be received -

By the applicant  provide details

By the deceased  provide details

#### 8. TYPE OF ASSISTANCE SOUGHT

- (a) Primary Victim**
- Special Financial Assistance (lump sum payment for significant adverse effects suffered)
  - Counselling
  - Medical Expenses
  - Safety-Related Expenses
  - Loss of Earning
  - Loss/Damage to clothing
  - Other

- (b) Secondary Victim**
- Counselling
  - Medical Expenses
  - Loss of Earnings \*
  - Other \*

- (c) Related Victim**
- Distress
  - Funeral Expenses
  - Counselling
  - Medical Expenses
  - Other \*

- (d) Application for payment of funeral expenses only**

\* Evidence of exceptional circumstances may be required.

### 9. IF DEATH WAS CAUSED BY THE ACT OF VIOLENCE

Full Name of Deceased	<input type="text"/>		
Last Known Address	<input type="text"/>		
	Postcode	<input type="text"/>	
Date of Birth	<input type="text"/>	Your relationship to the deceased, I am their: (e.g. wife, son, father, step-sister, partner)	<input type="text"/>
Date and Place of Death	<input type="text"/>		

**NOTE: YOU MUST ALSO COMPLETE THE RELATED VICTIMS PART OF THIS FORM BELOW**

### 10. THIS SECTION IS TO BE COMPLETED BY RELATED VICTIM APPLICANTS

As a related victim applicant (see definition of Related Victim) you are required to list:

- (a) every other person whom you believe may be a **related victim**; and
- (b) every other person whom you believe may alleged that he/she is a **related victim**; and
- (c) Any person whom you believe may apply because they have incurred funeral expenses as a result of the death of the primary victim.

 Attach a separate sheet if required.

<b>Name of potential victim</b>	<input type="text"/>
Age of potential victim if under 18 years of age *	<input type="text"/>
Guardian (if applicable)	<input type="text"/>
Address of potential victim	<input type="text"/>
What was the relationship of potential victim to the deceased. He/she is their:	<input type="text"/>

<b>Name of potential victim</b>	<input type="text"/>
Age of potential victim if under 18 years of age *	<input type="text"/>
Guardian (if applicable)	<input type="text"/>
Address of potential victim	<input type="text"/>
What was the relationship of potential victim to the deceased. He/she is their:	<input type="text"/>

<b>Name of potential victim</b>	<input type="text"/>
Age of potential victim if under 18 years of age *	<input type="text"/>
Guardian (if applicable)	<input type="text"/>
Address of potential victim	<input type="text"/>
What was the relationship of potential victim to the deceased. He/she is their:	<input type="text"/>

\* If the potential victim is under 18 years of age, provide the name and address of parent, guardian or administrator.

**11. AUTHORISATION OF THE APPLICANT**

I (name),  authorise the Victims of Crime Assistance Tribunal to obtain any additional evidence or documentation that the Tribunal considers necessary to enable it to determine my application.

**Signature of applicant**

**12. ACKNOWLEDGMENT OF THE APPLICANT**

I understand and acknowledge that:

- To the best of my knowledge, all information provided in this application is true and correct and that no details relevant to the application have been left out
- It is an offence under section 67 of the *Victims of Crime Assistance Act 1996* to knowingly give false or misleading information to the Victims of Crime Assistance Tribunal.

By ticking this checkbox I confirm that I have read and understood all the statements above

Full name of person (applicant) completing this application

Signature of applicant

Date

**Statutory Declaration**  
*(to be used if incident not reported to police)*

I   
of

in the State of Victoria do solemnly and sincerely declare:

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an Act of the Parliament of Victoria rendering persons making a false declaration punishable for wilful and corrupt perjury.

Declared at )  
In the State of Victoria this )  
day of 20 ) x \_\_\_\_\_

Before me: x \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*(Signature, name, address and qualification of witness)*



## VICTIMS OF CRIME ASSISTANCE TRIBUNAL

### Guide to completing the Application for Assistance form

The Victims of Crime Assistance Tribunal (the Tribunal) can provide awards of assistance to recognise and assist victims in their recovery from violent crime.

This guide has been developed to help you complete your application to the Tribunal

**Important information about the Tribunal can be found on our website:  
[www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)**

#### ELIGIBILITY

You are eligible to apply for assistance if you are the victim of a violent crime that happened in Victoria and resulted in death or injury. An injury can be:

- physical harm
- mental illness or disorder from the event, or an increase in mental illness or disorder from the event
- pregnancy

The Tribunal does not compensate loss of or damage to your property, other than loss of or damage to clothing you were wearing at the time of the violent crime and safety related expenses where appropriate.

#### HOW DO I APPLY?

If you think you may be eligible for assistance, complete the attached application form.

Sections of this guide match the sections in the application form.

You must complete all sections of the application form. If your application form is incomplete, the Tribunal will send it back to you causing delay in the Tribunal dealing with your application.

For more help in completing the form, contact the Tribunal at your local Magistrates' Court. The contact details are on our website: [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au) under *Contact Us; Tribunal location and contact information*.

#### Section 1. DETAILS OF PERSON WANTING ASSISTANCE

The Tribunal asks you to say if you are Aboriginal or a Torres Strait Islander because it has different arrangements to assist Aboriginal and Torres Strait Islander applicants.

You can apply to the Tribunal for assistance if you are a primary victim, a secondary victim or a related victim. If you are not a victim but paid for the funeral of a person who died from a violent crime, you can apply for payment of reasonable funeral expenses.

##### 1. Primary Victim

You are a primary victim if you were injured as a result of:

- a violent crime; or
- trying to prevent a violent crime; or
- trying to assist a victim of a violent crime.

A person who dies from a violent crime is also a primary victim

##### 2. Secondary Victim

You are a secondary victim if you:

- were present at the scene of a violent crime and you were injured by witnessing the crime; or
- are the parent or guardian of a child under the age 18 years and you were injured when you became aware that your child was the victim of a violent crime.

### 3. Related Victim

You are a related victim if you:

- are a close family member of a person who died from a violent crime; or
- had an intimate personal relationship with a person who died from a violent crime; or
- were a dependent of a person who died from a violent crime.

### 4. Application for payment of funeral expenses

You can apply for assistance for funeral expenses if you paid for the funeral of a person who died from a violent crime even if you are **not** a related victim.

**An applicant may only apply in one capacity.**

## Section 2. CLAIMS ON BEHALF OF A CHILD OR PERSON UNDER DISABILITY

You need to complete Section 2 if you are filling out the application form on behalf of another person.

You should complete this section if you are:

- the parent or guardian of a child under 18 or another appropriate person; or
- the guardian or administrator of a represented person, appointed under the *Guardianship and Administration Act 1986*; or
- an appropriate person to assist a person who is entitled to make an application but needs assistance doing so.

If you need to clarify whether you can complete this form on behalf of another person, you may contact your local Magistrates' Court.

## Section 3. CIRCUMSTANCES OF THE ACT OF VIOLENCE

You can only apply for assistance if the violent crime is punishable by imprisonment and it occurred in Victoria.

Examples of relevant crimes include: sexual offences such as indecent assault or rape

- murder/manslaughter
- assaults, including assaults in the home
- threats to kill or injure
- stalking
- kidnapping
- child stealing

Attempts to commit these crimes are also included.

An application must be made within 2 years after the occurrence of the act of violence or, in the case of an application by a related victim or a person who has incurred funeral expenses, within 2 years after the death of the primary victim. If more than two years has passed the Tribunal may still consider your application.

In determining whether to accept an application made out of time, the Tribunal will have regard to:

- the applicant's age at the time of the criminal act;
- whether the applicant is intellectually disabled or mentally ill;

- whether the person who is alleged to have committed the act was in a position of trust, influence or power in relation to the applicant;
- the physical or psychological effect of the act upon the applicant;
- whether the delay in making the application would cause the Tribunal any difficulties in making a fair decision;
- whether the applicant was a child at the time of the act and if so, whether the application is made within a reasonable time after reaching 18 years of age;
- all other relevant circumstances.

#### Section 4. REPORTING DETAILS

Unless there are special circumstances, you must:

- report the violent crime to the police within a reasonable time; and
- provide reasonable assistance to the police in investigating the matter, arresting or prosecuting the offender.

In most cases, calling the police to attend the scene of a crime is not enough. You should make a formal report, including a sworn statement (if requested), so the police can fully investigate the matter. You should give the Tribunal full details of the relevant police officer's station, rank and registration number. If you do not provide this information, it may lead to delays in processing your application.

If you did not report the incident to police, delayed in reporting the incident or you have not assisted the police with an arrest or their investigation, you may not be entitled to assistance. You will need to demonstrate that special circumstances prevented you from doing so. You must provide a statutory declaration setting out the circumstances of the violent crime and the reason you did not report the matter to the police or provide them with reasonable assistance in their investigation. There is a form for statutory declarations on page 7 of the application form for you to outline this information. You must sign the statutory declaration in front of a person who is authorised to witness statutory declarations. A list of these people is set out in Section 12 of this guide.

The Tribunal will obtain information about the crime and the criminal investigation from Victoria Police once the application is lodged.

#### Section 5. WHAT EFFECTS HAVE RESULTED FROM THE ACT OF VIOLENCE?

You need to tell the Tribunal if you have suffered physical or psychological injuries because of the violent crime. If you are claiming special financial assistance or distress, you should give brief details of your grief, stress or trauma.

##### *Physical injuries*

- If you are seeking assistance for physical injuries, you should forward copies of the invoices and/or receipts for your treatment. If you are entitled to a rebate from Medicare or your private health fund, you should make the claim for a rebate before sending the invoice or receipt to the Tribunal and provide details of any gap you are claiming from the Tribunal.
- You should also send copies of any doctor's reports, medical certificates or hospital discharge summaries in your possession.
- You should not request a report from your doctor, dentist or hospital without the Tribunal's authorisation because the Tribunal may not compensate you for the cost of obtaining that report. If you wish to obtain a medical or dental report, you should ask the Tribunal first.
- If you attended a public hospital, the Tribunal will obtain the hospital records. The information the Tribunal obtains from police often contains reports or statements about medical and dental treatment. This means the cost of obtaining a report or making a Freedom of Information request is not necessary.

### *Psychological injury*

- If you are seeking assistance for psychological injury and need assistance to pay for counselling, you should attach a report from a qualified psychologist or psychiatrist. Your psychologist can obtain further information about the Tribunal's requirements for preparation of psychological reports and requests for assistance for counselling from our website: [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

### *Grief, stress or trauma*

- If you suffered grief, stress or trauma because of a violent crime, you may be entitled to special financial assistance. The Tribunal awards special financial assistance in recognition of the harm suffered because of a violent crime. It is paid in addition to medical, counselling, safety-related and loss-of-income expenses. Claims for special financial assistance may be supported by psychological reports, statutory declarations or other evidence.

## Section 6. DETERMINATION OF YOUR APPLICATION

You can elect to appear before a Tribunal Member at a hearing or ask the Tribunal to decide your application in your absence.

### *Hearings*

A hearing gives you an opportunity to tell the Tribunal about how the crime has affected you. Hearings usually take about half an hour, but they may take longer. They are usually open to the public but you can ask the Tribunal to exclude members of the public. You can also ask the Tribunal for an order restricting publication of the hearing. A Tribunal hearing is less formal than a normal court hearing. You may come alone or bring a friend or family member for support.

### *Application decided in your absence*

The Tribunal decides many applications in the absence of the victim with consent. The Tribunal member reads all the documents that you and/or your lawyer have provided. If the Tribunal member needs further information they will ask for it. In some cases, the information provided is not enough and the Tribunal member will ask you to attend a hearing so it can obtain additional information.

### *Interpreters*

If you need the assistance of an interpreter at a hearing, the Tribunal will arrange for the interpreter to attend.

If the Tribunal makes an award you can have it deposited directly into your bank account or alternatively a cheque will be sent to you. It is important to ensure your banking and address details are up to date with the Tribunal at all times.

## Section 7. HAVE YOU APPLIED FOR ASSISTANCE UNDER ANY OTHER SCHEMES?

You must tell the Tribunal if you are eligible, or think you may be eligible, for financial assistance from another source, for example:

- the Victims Assistance Program
- Medicare
- private health insurance
- Workcover, if the crime occurred at work
- the Transport Accident Commission, if the crime involved a motor vehicle
- the offender, if the court makes an order at the conclusion of the criminal case. (Ask the police informant, the Office of Public Prosecutions or a lawyer)

- the offender, through a civil claim for compensation
- Victoria Police, under the Police Assistance Act, if you were injured assisting the police
- insurance, including life and income insurance
- superannuation benefits

If you are entitled to receive assistance from another source, the Tribunal may not be able to assist you. If you obtain compensation from another source, for instance, settlement of a common law claim, after the Tribunal has made an award of assistance, the Tribunal may request you to repay its award. This is to prevent people being compensated more than once for the same incident.

If you have applied for assistance from another source, you must tell the Tribunal and indicate how much you have received.

## Section 8. TYPE OF ASSISTANCE SOUGHT

Please refer to the category which applies to you (this is the category you selected in Section 1)

Tick the box for the type of assistance you are seeking. You may tick more than one box.

**The Tribunal cannot assist you with loss of, or damage to property (other than loss of or damage to clothing you were wearing at the time of the violent crime and safety related expenses where appropriate).**

### A. Primary Victim

Primary victims may receive awards of up to \$60,000 for the following expenses incurred (or reasonably likely to be incurred) as a result of the violent crime.

#### *Counselling*

The Tribunal has guidelines for the payment of counselling fees and the preparation of reports. See counselling information at [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

#### *Medical expenses*

Medical expenses must be reasonable. They include dental, optometry, physiotherapy, hospital and ambulance expenses. Claims for medical expenses must be supported by invoices and receipts and information about claims to Medicare or private health insurers.

#### *Safety-related expenses*

Safety-related expenses must be reasonably incurred or reasonably likely to be incurred as a direct result of a violent crime. Claims should be accompanied by invoices or receipts.

#### *Loss of earnings*

The Tribunal can make awards for loss earnings up to \$20,000 as a direct result of total or partial incapacity to work during a period of up to two years after a violent crime. The Tribunal has a guideline to assist in the preparation of a claim for loss of earnings which is available on the Tribunal's website.

#### *Loss or damage to clothing worn at the time of the violent crime.*

Claims should be accompanied by invoices or receipts.

#### *Other*

In exceptional circumstances, other reasonable expenses will be considered, that will assist in recovery from the crime.

#### *Special Financial Assistance*

In addition to the above expenses, the Tribunal can make awards for special financial assistance of between \$130 and \$10,000 in the following circumstances:

- Criminal acts which occurred on or after 1<sup>st</sup> July 2000,
- Childhood sexual abuse which occurred on or after 1<sup>st</sup> July 1997,
- Childhood sexual abuse prior to 1<sup>st</sup> July 2000 where no previous application has been made to the Tribunal, **provided** that the alleged offender after 1<sup>st</sup> July 1997 –
  - has been committed or presented for trial; **or**
  - has been charged and the charge has been heard and determined by the Magistrates' Court; **or**
  - having been charged dies without the charge having been determined.

## **B. Secondary Victim**

Secondary victims may receive awards of up to \$50,000 for the following expenses incurred (or reasonably likely to be incurred) as a result of the violent crime.

### *Counselling*

The Tribunal has guidelines for the payment of counselling fees and the preparation of reports. See [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

### *Medical expenses*

Medical expenses must be reasonable. They include dental, optometry, physiotherapy, hospital and ambulance expenses. Claims for medical expenses must be supported by invoices and receipts and information about claims to Medicare or private health insurers.

### *Loss of earnings*

In exceptional circumstances secondary victims may receive awards for

- loss of earnings up to \$20,000 (please refer to Primary Victim information on page 5 for details)
- other reasonable expenses that will assist in recovery from the crime

### *Other*

The Tribunal can only award reasonable expenses to assist in recovery if the secondary victim was:

- under 18 years and witnessed an act of violence against certain family members; or
- the parent or guardian of a primary victim who was injured as a direct result of becoming aware that a primary victim, under 18 years, was the victim of an act of violence.

## **C. Related Victim**

For related victims, the maximum amount the Tribunal can award to **all** applicants related to one deceased victim of a violent crime is \$100,000. The Tribunal can only increase the amount of the pool in exceptional circumstances.

To each applicant, the Tribunal may award assistance of up to \$50,000 for -

- distress
- dependency payments for up to two years
- funeral expenses
- reasonable counselling services

- medical expenses

In exceptional circumstances, the Tribunal may also award other reasonable expenses to assist a related victim to recover from the primary victim's death.

*Note: Related victims must complete sections 9 and 10 of the application.*

#### D. Funeral Expenses Only

The Tribunal may award assistance to pay for funeral expenses where a person has incurred these expenses as a direct result of the death of a primary victim and is not a related victim.

The Tribunal has a guideline about the amounts it will pay for funeral expenses available online at [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

### Section 9. IF DEATH WAS CAUSED BY THE ACT OF VIOLENCE

You must fill out the details of the deceased person.

Related victim applications must be sent to the Victims of Crime Assistance Tribunal, G.P.O. Box 882, Melbourne 3001 or lodged at 233 William Street, Melbourne

### Section 10. RELATED VICTIMS APPLICATIONS

It is important that you list every person you believe may:

- be a related victim of the deceased, or
- claim they are a related victim, or
- apply for assistance for funeral expenses.

The Tribunal uses this information to notify potential related victims about their ability to make an application for assistance.

Once all related victims have lodged their applications for assistance, the Tribunal considers all the applications relevant to the deceased primary victim.

### Section 11. AUTHORISATION OF THE APPLICANT

The Tribunal requires your authorisation to obtain any additional evidence or documents it considers necessary to determine your application. If you do not complete this section, the Tribunal will not be able to consider your application. It will be returned to you.

The additional evidence or documents the Tribunal will seek may include information from Victoria Police about the violent crime and your criminal history (if any) and your hospital records.

### Section 12. ACKNOWLEDGMENT OF THE APPLICANT

Before lodging your application, you must acknowledge that all information that has been provided is true and correct to the best of your knowledge and that you understand that providing false or misleading information to the Tribunal is a criminal offence.

### ON COMPLETION OF YOUR APPLICATION

**If you are a primary victim or secondary victim** – you must lodge your application at the Magistrates' Court venue closest to where you live. Please contact your local magistrates' court for further details.

**If you are a related victim-** you must lodge your application at the Melbourne office of the Tribunal at the Melbourne Magistrates' Court.

**If you are Aboriginal or Torres Strait Islander** you must lodge your application with the Tribunal at the Melbourne office of the Tribunal at the Melbourne Magistrates' Court so it can be managed in the Koori List. (Please see our website for more information on the Koori List)

**If you live outside Victoria**, you must lodge your application with the Tribunal's Melbourne office:

233 William Street (GPO Box 882) Melbourne 3001  
Telephone (03) 9628 7855 Toll Free: 1800 882 752

For the contact details of your nearest court see the Tribunal's website at [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au).

## WHAT HAPPENS NEXT

Once you have lodged your application, the Tribunal will send you a "Directions for Preparation" form to help you provide the evidence the Tribunal needs to decide your application. The evidence may include:

- a report from your treating doctor if physical injury is claimed
- receipts or invoices for the expenses you are claiming
- a copy of your police statement
- intervention orders
- a report from your counsellor if you are seeking counselling
- information about Medicare rebates

Please note that you should not pay for a report from a doctor or counsellor without prior approval from the Tribunal.

The Tribunal will give you a date for filing all your supporting material. Contact the Tribunal if you need extra time.

Sometimes the Tribunal will decide to wait until criminal charges are finalised before hearing your application but it is not necessary for an offender to be charged or for the charges to be finalised in every case.

Once the Tribunal has all the information it requires to make a decision, the Tribunal will advise you if it wants to hold a hearing. In some cases, even if you have elected for the Tribunal to hear the application in your absence, the Tribunal may decide that it needs to have a hearing and you will be asked to attend.

Legal advice and representation may help you and, in the majority of cases, the Tribunal will pay the reasonable costs of a legal practitioner. A legal practitioner cannot obtain legal costs from you without the Tribunal's permission.

If you need an interpreter for a hearing or you cannot attend a hearing on the date set, please advise the Tribunal as soon as possible.

## URGENT ASSISTANCE

If you need urgent assistance, the Tribunal may make an interim award. The Tribunal has a special form for applications for interim awards. You should attach all relevant supporting documents such as invoices for medical or safety-related expenses or letters from your doctor or dentist.

If you seek urgent counselling, your counsellor must provide a report and request that comply with the Tribunal's practice direction about counselling expenses. The practice direction is available either from the Tribunal or you can download it from the Tribunal's website – [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

You can obtain urgent assistance by contacting the Victims of Crime Helpline on 1800 819 817 or your local Magistrates' Court.



## WHERE CAN YOU GET HELP OR ADVICE?

Further information including copies of all forms and Tribunal practice directions can be obtained from the Tribunal website:

**[www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)**

For further information, please contact:

- The VOCAT Registrar at your local Court House
- Victims of Crime Assistance Tribunal (Principal Registry) (03) 9628 7855  
1800 882 752
- Victims Support Agency (03) 8684 6700  
1800 819 817
- Victorian Court Network Service (03) 9603 7433  
1800 681 614

To speak with a lawyer contact:

- The Law Institute of Victoria (03) 9607 9311
- Victoria Legal Aid (03) 9269 0120  
1800 677 402 (country callers)
- Aboriginal Legal Service Co-Operative (03) 9419 6024
- Aboriginal Family Violence Prevention and Legal Service (03) 9244 3333  
1800 105 303
- The Women's Legal Resource Group 1800 133 302





Victorian  
Law Reform  
Commission

**Family Violence and the Victims  
of Crime Assistance Act 1996**

**CONSULTATION PAPER**

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