



Victorian
Law Reform
Commission

Review of the Victims of Crime Assistance Act 1996

REPORT JULY 2018





Published by the Victorian Law Reform Commission

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Preface

The genesis of this report was a reference to the Commission by the Victorian Attorney-General, the Hon. Martin Pakula MP, in December 2016 that asked the Commission to review the provision of state-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996* (Vic). The Commission was asked, in particular, to consider specified matters raised by Recommendation 106 of the Victorian Royal Commission into Family Violence. Then, in July 2017, supplementary terms of reference were issued by the Attorney-General, expanding the reference to consider the effectiveness of the *Victims of Crime Assistance Act 1996* (Vic) and the Victims of Crime Assistance Tribunal for all victims, including family violence victims. This was a substantial broadening of the first terms of reference. In particular, the supplementary terms of reference asked the Commission to consider whether ‘there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model’.

This the Commission has done. As is its hallmark, in fulfilling the reference, the Commission has consulted widely, including with the general community, victims, stakeholders, academics, the legal profession and relevant courts and tribunals. The result of the Commission’s consultations, research and consideration is this report.

The Commission has given particular attention to the present process of victim assistance in Victoria, both in itself and in the wider context of the developing understanding and recognition of the proper rights and needs of victims. The Commission has concluded that that understanding and recognition requires a new process in Victoria of state-funded assistance for victims of crime, removed from the court process and from the present Victims of Crime Assistance Tribunal.

Accordingly, the principal recommendation of this report is that the *Victims of Crime Assistance Act 1996* (Vic) should be repealed, and be replaced with an Act establishing a new state-funded financial assistance scheme for victims of crime, separate from the court and tribunal system, and instead sited within the Office of the Victims of Crime Commissioner, in a significantly expanded role of the Commissioner. As is appropriate for a recommendation of a new scheme, the report spells out in detail the purposes and procedures of the recommended scheme and considers its sustainability for the State.

The Commission acknowledges the ready cooperation of the Victims of Crime Assistance Tribunal and of the Magistrates’ Court of Victoria in the reference, and thanks the Tribunal and the Court for their participation. The Tribunal and the Court, together with the Children’s Court of Victoria, made a valuable submission to the Commission, in which a number of reforms were proposed. Those reforms if implemented would constitute significant improvement to the present system. However, the Commission considers that contemporary understanding of victims’ rights and needs has moved beyond the present Victorian system even in a reformed model and that a new setting and a new start is required.

The *Victims of Crime Assistance Act 1996* (Vic) predicates Victoria’s state-funded assistance scheme for victims of crime as a corollary to the criminal trial process and acts through judicial decision makers. Victims frequently consider their path to assistance is through an adversarial process, with the spectre of perpetrator involvement. In the past twenty years, understanding of the lasting impacts of criminal acts on victims—and the need for appropriate, trauma-informed and therapeutic early interventions to assist victims in dealing with those impacts—have developed significantly. Understanding who is a victim of a criminal act, and what constitutes a criminal act, likewise has developed. Properly understood, the test for victim assistance proposed by the Commission—that there was a criminal act which caused harm to the victim—does not involve a finding of who committed the crime. In deciding victim assistance, there is no finding of guilt about an alleged perpetrator, which is a matter for the courts.

In 2016, the Commission published a major report, *The Role of Victims of Crime in the Criminal Trial Process*, which recommended that the role of victims should be understood, and acted upon, by reference to contemporary knowledge about the rights of victims, and not embedded in the past. The present report progresses that path. It is informed by contemporary understanding that all victims of crime should properly be acknowledged, respected and supported.

I express my warm thanks to all those who have participated in this reference; and to my fellow Commissioners and the research team led by team leader Anna Beesley and supported by policy and research officers Claire Gallagher and Alexia Staker and research assistant Claerwen O’Hara and other Commission staff who contributed to this reference.

I commend the report to you.



The Hon. Philip Cummins AM
Chair, Victorian Law Reform Commission

July 2018

Terms of reference

First terms of reference

[Referral to the Victorian Law Reform Commission pursuant to section 5(1)(a) 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.

Supplementary terms of reference

[Referral to the Commission pursuant to section 5(2)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 7 July 2017.]

Supplementary terms of reference—Review of the *Victims of Crime Assistance Act 1996*

In November 2016, the Victorian Law Reform Commission was asked to consider the operation and effectiveness of the *Victims of Crime Assistance Act 1996* (VOCA Act) for family violence victims in response to recommendation 106 of the Family Violence Royal Commission (the first reference).

The Commission is asked to expand the first reference to consider the operation and effectiveness of the VOCA Act and the Victims of Crime Assistance Tribunal for all victims, including family violence victims in achieving the purposes set out in section 1 of the VOCA Act.

The Commission is asked to provide a single report incorporating the first reference and the expanded reference to the Attorney General no later than the 27 July 2018.

In conducting the review and making its recommendations, the Commission is asked to bear in mind that a state-funded assistance scheme for victims should seek to achieve outcomes for victims that:

- are fair, equitable and timely
- are consistent and predictable
- minimise trauma for victims and maximise the therapeutic effect for victims.

The state-funded scheme must also be efficient and sustainable for the state.

In particular, the Commission is asked to consider whether:

1. the VOCA Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
2. the VOCA Act recognises the appropriate people as victims.
3. the tests for eligibility for assistance and the evidence required to meet those tests can be simplified to avoid unnecessary or disproportionate costs being incurred
4. the definition of ‘act of violence’, the time limits, categories of assistance and structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime
5. the basis of the formula in section 8A of the VOCA Act used to quantify special financial assistance is the most appropriate way to calculate the amount payable by the state for harm arising from crime
6. it is appropriate and fair to award assistance to aid recovery in exceptional circumstances (as allowed by section 8 of the VOCA Act) and whether there are other ways to promote the recovery of victims from the effects of crime
7. it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or to be called to give evidence
8. any processes, procedures or requirements under the VOCA Act cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi administrative model.

Glossary

Abuse of people with disability	In this report, describes physical, sexual, financial and psychological abuse and neglect perpetrated against people with physical and/or intellectual disability.
Act of violence	In this report, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to specified criminal offences that directly result in injury or death to one or more persons.
Administrative	In this report, describes a system administered, or a decision made, by a government department or agency rather than judges or magistrates.
Balance of probabilities	The standard of proof in civil proceedings. Often described as 'more likely than not' or 'more probable than not'. This is a lesser standard than beyond reasonable doubt . The balance of probabilities is the standard of proof required under the <i>Victims of Crime Assistance Act 1996</i> (Vic) and the proposed Act .
Beyond reasonable doubt	The standard of proof in criminal proceedings. This is a higher standard than the balance of probabilities .
Causation	In this report, describes the relationship of cause and effect between a criminal offence and a victim's injury, death or significant adverse effect .
Centres Against Sexual Assault (CASAs)	Specialist support services for victims of sexual assault funded by the Victorian Department of Health and Human Services.
Child	A person under the age of 18 years.
Child abuse	In this report, describes physical, sexual, emotional and psychological abuse and neglect perpetrated against a child .
Common law	Law that derives its authority from decisions of the courts rather than from legislation.
Compensation	In this report, describes a monetary payment intended to compensate in part or in whole for an injury suffered as a result of the commission of a criminal offence . While this term is sometimes used to describe victims' financial assistance schemes in other jurisdictions, this report uses the term ' financial assistance ' to refer to money that a victim may be eligible to receive under the <i>Victims of Crime Assistance Act 1996</i> (Vic) or the proposed Act and proposed scheme .

Criminal act	In this report, generally refers to a term defined in the proposed Act as a criminal offence that gives rise to eligibility for financial assistance for the victim under the proposed scheme . Criminal act is also a term defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). In that context, it refers to a relevant offence that gives rise to eligibility for financial assistance for the victim under that Act.
Criminal offence	A crime against the state. The main criminal offences in Victoria are specified in the <i>Crimes Act 1958</i> (Vic). The main categories of criminal offences are indictable offences , indictable offences triable summarily , and summary offences .
Directions hearing	A brief hearing in front of a judicial officer in which orders are made about what should happen next in a case before a court or tribunal, such as how the case should be managed and the timeframes to apply.
Director of Public Prosecutions (DPP)	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 criminal offences under Victorian law. The Office of Public Prosecutions conducts criminal prosecutions on behalf of the Director of Public Prosecutions.
Existing scheme	In this report, describes Victoria's current scheme for state-funded financial assistance for victims of crime established under the <i>Victims of Crime Assistance Act 1996</i> (Vic) and administered by the Victims of Crime Assistance Tribunal (VOCAT) .
Elder abuse	In this report, describes physical, sexual, financial and psychological abuse and neglect perpetrated against older people.
Family member	In this report, includes a person's child, parent, spouse, domestic partner or relative, including grandparents, grandchildren, brothers, sisters, aunts, uncles, nieces and nephews, as well as a person who is regarded in Aboriginal or Torres Strait Islander tradition or custom as a family member.
Family violence	In this report, has the meaning as defined in the <i>Family Violence Protection Act 2008</i> (Vic). Refers to behaviour by a person towards a family member 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.
Family violence intervention order	A civil order made under the <i>Family Violence Protection Act 2008</i> (Vic) by a court, which contains conditions to protect a victim of family violence .
Family violence safety order	A notice issued pursuant to the <i>Family Violence Protection Act 2008</i> (Vic) by police when attending an incident of family violence, which contains conditions to protect a victim of family violence .

Financial assistance	In this report, refers to money that a victim may be eligible to receive under the <i>Victims of Crime Assistance Act 1996</i> (Vic) or under the proposed scheme .
First consultation paper	The consultation paper published by the Victorian Law Reform Commission in June 2017 on the First terms of reference .
First terms of reference	The terms of reference issued on 22 December 2016 pursuant to section 5(1)(a) of the <i>Victorian Law Reform Commission Act 2000</i> (Vic), under which 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 <i>Victims of Crime Assistance Act 1996</i> (Vic).
Flexible support package (FSP)	Victorian state-funded support package (of up to \$7000) administered by community organisations to assist victims of family violence by meeting expenses such as relocation costs or security measures to improve safety at home.
Hearing de novo	A review hearing in which the court or tribunal reviewing the original decision is not bound by that decision and considers the matter ‘afresh’ (that is, as if for the first time). The <i>Victims of Crime Assistance Act 1996</i> (Vic) uses the term ‘hearing de novo’ to describe a review of a final decision made by a judicial registrar, in which the Victims of Crime Assistance Tribunal considers the application afresh.
Immediate needs	In this report, refers to one of the six streams of assistance under the proposed scheme . An award under this stream of assistance may be made to assist with a victim’s urgent and immediate needs, including urgent medical expenses or an immediate need for counselling. The immediate needs stream of assistance would replace interim awards under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
Indictable offences	Serious crimes which attract higher maximum penalties. Usually triable before a judge and jury.
Indictable offences triable summarily	Less serious indictable offences which can be heard before a magistrate.
Interim award	An award made under the <i>Victims of Crime Assistance Act 1996</i> (Vic) for urgent assistance pending the final determination of an application for assistance.
Intersectionality	In this report, refers to different parts of a person’s identity intersecting which may result in overlapping forms of discrimination or disadvantage.
Judicial	Describes a system administered, or a decision made, by a judicial officer .
Judicial officer	A judge or magistrate.
Koori	In this report, used to describe the traditional inhabitants of Victoria.
Lawyer	Includes barristers (sometimes referred to as counsel) and solicitors.

LGBTIQ	Refers to people who identify as lesbian, gay, bisexual, trans* , intersex or queer.
Lump sum payment	In this report, refers to money awarded to victims under the <i>Victims of Crime Assistance Act 1996</i> (Vic) or the proposed scheme which is not awarded for specific expenses incurred or reasonably likely to be incurred. Under the <i>Victims of Crime Assistance Act 1996</i> (Vic), lump sum payments take the form of 'special financial assistance' . Under the proposed scheme , lump sum payments would take the form of a 'recovery payment' .
Neglect	In this report, refers to the failure to provide someone with necessities such as food, shelter, medical care or other requisite forms of assistance.
Offender	Used to describe a person who has been found guilty or who has pleaded guilty to a criminal offence . 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.
Offender recovery	In this report, refers generally to mechanisms in other jurisdictions by which the state can recover money from the responsible offender in relation to financial assistance awarded to the victim under that state's victims of crime financial assistance scheme. In this report, the Victorian Law Reform Commission uses the term offender contribution to distinguish from a victim's recovery from a criminal act. In this report, the term offender recovery is used where relevant to refer to other jurisdictions' schemes.
Office of Public Prosecutions (OPP)	The independent statutory authority that institutes, prepares and conducts criminal prosecutions in the County and Supreme Courts on behalf of the Director of Public Prosecutions .
Perpetrator	In this report, generally used to refer to any person who is alleged to have used violence or other forms of abusive behaviour, including family violence, elder abuse, child abuse or abuse of people with disability , whether or not the behaviours have been reported to police, whether or not there has been a criminal prosecution or conviction, and whether or not the behaviours constitute a criminal offence . It includes offenders , alleged offenders and respondents in Family Violence Intervention Order matters.
Practical assistance	In this report, refers to one of the six streams of assistance under the proposed scheme . It would include the following sub-categories for which assistance may be provided to victims: health expenses; housing expenses; safety-related expenses; financial support; expenses for education and returning to work; lost or damaged clothing worn at the time of the criminal act ; and other expenses reasonably incurred to access assistance provided under the proposed scheme or to attend justice-related appointments.
Practice Direction	A procedural guideline issued by a judicial officer to guide the practice of a court or tribunal.

Primary victim	In this report, 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 significant adverse effect as a direct result of an act of violence committed against them or as a direct result of them intervening in an act of violence.
Proposed Act	In this report, means the Act to establish the proposed scheme .
Proposed model	In this report, means the Victorian Law Reform Commission's proposed state-funded financial assistance model for victims of crime to be led by an independent, dedicated and specialised decision maker whose powers and functions are prescribed in legislation, comprising the proposed Act and the proposed scheme .
Proposed scheme	In this report means the Victorian Law Reform Commission's proposed state-funded financial assistance scheme for victims of crime to be established under the proposed Act to replace the existing scheme established under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
Prosecutorial body	In this report, refers to either Victoria Police, which prosecutes less serious offences (summary offences) or the Victorian Office of Public Prosecutions , which prosecutes more serious offences (indictable offences).
Quantum	A specified amount. In this report, used to describe the amount of financial assistance that a victim can receive under the <i>Victims of Crime Assistance Act 1996</i> (Vic) or could receive under the proposed scheme .
Quasi-judicial	Describes an administrative body which exercises powers and procedures resembling those of a court or judicial officer , such as conducting hearings.
Recognition statement	In relation to a successful application to the proposed scheme , refers to a statement signed by the scheme decision maker on behalf of the state, which acknowledges the effects of the criminal act on the victim and expresses the state's condolences.
Recovery expenses	Refers to an award made to a victim under the <i>Victims of Crime Assistance Act 1996</i> (Vic) in exceptional circumstances for expenses actually and reasonably incurred, or reasonably likely to be incurred, to assist in the victim's recovery from the act of violence .
Recovery payment	Refers to a lump sum payment that could be awarded to a victim under the proposed scheme to assist the victim in their recovery. A recovery payment would be made under the recovery stream of assistance and would combine the current functions of special financial assistance and recovery expenses under the <i>Victims of Crime Assistance Act 1996</i> (Vic).

Recovery plan	Under the proposed scheme , victims who receive a recovery payment may request a recovery plan, under which the recovery payment (or a portion thereof) would be held in trust and administered by a scheme case manager for the purpose of paying for agreed specified expenses to assist in the victim’s recovery. Recovery plans would be mandatory for child victims until they turn 18.
Reference objectives	The outcomes and objectives identified in the supplementary terms of reference , and which are used in this report as the criteria to assess the effectiveness of both the existing scheme and other models of state-funded financial assistance for victims of crime.
Registrar	In this report, a staff member of the Victims of Crime Assistance Tribunal with specific powers to make decisions as delegated by the Chief Magistrate.
Related criminal acts	In this report, refers to two or more criminal acts that share a common factor, including criminal acts that are committed against the same person at 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.
Related victim	In this report, 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 act of violence .
Relevant offence	In this report, a criminal offence that gives rise to eligibility for financial assistance for the victim 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, certain sexual offences, and the offences of stalking, child stealing and kidnapping.
Restitution	In this report, 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.
Restorative justice	Refers to a broad range of practices which attempt to repair the harm caused by crime, including facilitated meetings between offenders and victims, family conferences and community circle sentencing.
Royal Commission into Family Violence	A 13-month inquiry, ordered by the Victorian Government, into Victoria’s response to family violence. Chaired by the Hon. Marcia Neave AO, it ran from February 2015 to March 2016. The report consists of eight volumes and contains 227 recommendations.
Scheme decision maker	In this report, refers to the person under the proposed scheme who decides applications and makes other decisions under the proposed Act.

Secondary victim	In this report, 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 act of violence or as a direct result of finding out about an act of violence that has been committed against their child .
Significant adverse effect	In this report, 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 primary victim as a direct result of an act of violence .
Special financial assistance	In this report, a lump sum payment of financial assistance that may be awarded to a primary victim under the <i>Victims of Crime Assistance Act 1996</i> (Vic) as an expression of the state's sympathy if the victim suffered any significant adverse effect as a direct result of an act of violence perpetrated against them.
Specialisation	In this report, refers to specialised decision makers determining certain types of applications for state-funded victims of crime financial assistance under the <i>Victims of Crime Assistance Act 1996</i> (Vic) or the proposed scheme . An example of specialisation is VOCAT's Koori List , which manages applications made by victims of crime who are of Aboriginal or Torres Strait Islander origin.
Standard of proof	The degree of certainty required to prove something.
Statement of reasons	Refers to a comprehensive written statement of reasons for the decision maker's decision under the proposed scheme in relation to an application for assistance, irrespective of the success of the application.
Stream of assistance	Under the proposed scheme , there would be six streams of assistance under which applicants could apply for financial assistance: immediate needs , funeral expenses, counselling, practical assistance , recovery payments or recovery plans and recognition.
Supplementary consultation paper	The consultation paper published by the Victorian Law Reform Commission in August 2017 on the supplementary terms of reference .
Supplementary terms of reference	The terms of reference issued on 7 July 2017, pursuant to section 5(2)(a) of the <i>Victorian Law Reform Commission Act 2000</i> (Vic), under which the Attorney-General asked the Victorian Law Reform Commission to review and make recommendations in relation to the operation and effectiveness of the <i>Victims of Crime Assistance Act 1996</i> (Vic) and the Victims of Crime Assistance Tribunal for all victims of crime.
Support and safety hubs	Services launched by the Victorian Government in 2017 to provide a range of information, services and support for victims and perpetrators of family violence in the one place.

Trans*	In this report, an umbrella term to refer to people who identify as transgender, transsexual or gender non-conforming.
Trauma-informed practice	In this report, a practice that involves modifying aspects of service provision to ensure a basic understanding of how trauma impacts the life of an individual seeking a service.
Victim	In this report, refers to a person who has suffered harm as a result of a criminal offence or other form of abuse. Under the proposed Act , it is a defined term that is not limited to the person against whom a criminal act was committed and includes people who witness a criminal act and family members of the direct victim.
Victim categories	Refers collectively to the categories of primary victim , secondary victim and related victim , as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic).
Victim-centred	Describes an approach that prioritises victims' wishes, safety and wellbeing in all matters and procedures.
Victim conference	In relation to a successful application to the proposed scheme , refers to a voluntary conference with the decision maker or deputy decision maker to provide a forum for victims to be acknowledged and heard, and for the impacts of the criminal act on the victim to be acknowledged by the decision maker on behalf of the state.
Victims Assistance Program (VAP)	A program coordinated by the Victims Support Agency through contracted community-based organisations which provides practical support, information, assistance and therapeutic interventions for victims of violent criminal offences in Victoria.
Victims of Crime Assistance Tribunal (VOCAT)	The tribunal established under the <i>Victims of Crime Assistance Act 1996</i> (Vic) to provide financial assistance to victims of violent crime committed in Victoria. It is located within the Magistrates' Court of Victoria.
Victims of Crime Consultative Committee	The committee established under the <i>Victims of Crime Commissioner Act 2015</i> (Vic) to provide advice to the Attorney-General on policies, practices and service delivery and on any other matter that the Attorney-General refers to it. The Committee comprises a chairperson, the Victims of Crime Commissioner, victims of crime and representatives from courts, police, the Adult Parole Board, the OPP and victims' support services.
Victorian Civil and Administrative Tribunal (VCAT)	The tribunal established under the <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) that hears civil and administrative legal cases in Victoria. It is empowered to review final decisions of the Victims of Crime Assistance Tribunal .

**Victim levy
(or offender levy)**

Refers generally, in the context of a criminal justice system, to a standard amount levied on all people found guilty of certain **criminal offences**, with monies received often directed to an allocated victims' fund, often used as a dedicated revenue stream for a state-funded financial assistance scheme. In some jurisdictions this is called an 'offender levy'.

**Victims Support Agency
(VSA)**

An agency in the Victorian Department of Justice and Regulation which coordinates services for victims of crime, including the Victims of Crime Helpline, the **Victims Assistance Program** and the Victims Register.

**Victim Survivors' Advisory
Council**

Established by the Victorian Government in response to the **Royal Commission into Family Violence**. Advises the Victorian Government on the various experiences of family violence and the contemporary Victorian service system from the perspective of family violence victims.

Executive summary

Introduction

- 1 This report completes the Victorian Law Reform Commission's review of the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) as required in response to both the first and supplementary terms of reference provided by the Attorney-General on 22 December 2016, and 7 July 2017, respectively.
- 2 The first terms of reference respond to Recommendation 106 of the Victorian Royal Commission into Family Violence. Fundamentally, the first terms of reference ask the Commission to consider what changes should be made to the VOCAA to better assist family violence victims rebuild their lives and recover. As part of this, the first terms of reference at matter three ask the Commission to consider the requirement to notify a perpetrator, especially where the act of violence has not been reported to police or no charges have been laid, or the prosecution is discontinued or the person is acquitted.
- 3 The supplementary terms of reference ask the Commission to expand its review to consider the operation and effectiveness of the VOCAA and the Victims of Crime Assistance Tribunal (VOCAT) for all crime victims. This was a significant expansion of the scope of the first terms of reference.
- 4 A number of outcomes and objectives for any state-funded financial assistance scheme are identified in the supplementary terms of reference (reference objectives). The supplementary terms of reference ask the Commission at matter eight to consider whether any processes, procedures or requirements under the VOCAA cause unnecessary delay to the provision of assistance to victims of crime. In considering this question, the supplementary terms of reference ask the Commission to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model. Plainly, consideration of whether delay is 'unnecessary' involves reference to the whole of the VOCAA to identify provisions or procedures which might bear upon or cause delay, and reference to legislation or processes in other jurisdictions in which the outcome is more timely. The supplementary terms of reference also expand the initial terms of reference by asking whether 'it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or to be called to give evidence'.
- 5 The Commission published a consultation paper on the first terms of reference in June 2017. A supplementary consultation paper on the further terms of reference was published in August 2017. The consultation papers were based on preliminary consultation meetings with key stakeholders, as well as the Commission's own analysis of the current law and research. In response to both consultation papers 60 written submissions were received.

- 6 Between August and November 2017 consultation meetings were conducted in Melbourne and throughout regional Victoria with key stakeholders, interested organisations and individuals including: the judiciary; victim support and advocacy organisations (government and non-government); family violence support and advocacy organisations; government departments; legal services and key academics, to examine the issues raised in the consultation papers, seek views on the questions posed and to test options for reform.
- 7 The views expressed by stakeholders in consultation meetings and the written submissions received, as well as the Commission’s own further research, have informed development of the recommendations and the preparation of this report. The Commission warmly acknowledges these contributions to law reform.
- 8 This report and the Commission’s conclusions address both the technical issues in relation to the existing Act and scheme, including in relation to the role of alleged perpetrators, and also the broader question of the appropriate model. The Commission has adopted a holistic approach to reform proposals, with victims’ needs at the centre of the Commission’s process and recommendations.
- 9 Research, and the Commission’s findings, demonstrate that a victim-centred justice process is one that takes into account victims’ needs—for emotional support, information, practical support, including safety and security, financial assistance, and to be treated with dignity and respect throughout the justice process.
- 10 The Commission’s recommendations aim to fulfil each of these needs.
- 11 The Commission recognises that for some victims of crime, financial assistance may represent more than monetary assistance—it can serve to recognise their victimisation and validate their experiences, including the significant ongoing impacts.
- 12 The Commission’s recommendations aim to ensure that a victim-centred financial assistance scheme does more than simply provide financial assistance.
- 13 The Commission also acknowledges that state-funded financial assistance is only one aspect of the broader victims’ support landscape in Victoria. In particular, the Commission acknowledges the review currently being undertaken by the Sentencing Advisory Council (SAC) on restitution and compensation orders for victims of crime. As also acknowledged by SAC in its issues and options paper *Restitution and Compensation Orders* released in March 2018, the government will need to consider this report and SAC’s recommendations together to ensure a complementary approach to victim assistance, including state-funded financial assistance and other avenues such as restitution and compensation.
- 14 The Commission’s conclusions are summarised below and its 100 recommendations are listed at pages xxix–xlvi.

State-funded financial assistance

- 15 After setting the context for this review in Chapters 1 and 2, this report in Chapter 3 outlines the history and purpose of state-funded financial assistance and discusses contemporary state-funded financial assistance schemes.
- 16 Chapter 4 describes Victoria’s existing scheme as provided for under the VOCAA, including the operation of VOCAT, noting that the VOCAA and VOCAT are one component of a broader victims’ rights and support framework in Victoria. Chapter 4 also summarises a number of reviews and inquiries, and research relevant to the operation of VOCAT.

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- 17 Chapter 5 discusses key issues with Victoria’s existing scheme as identified to the Commission by stakeholders. These issues include eligibility, assistance available, time limits for making an application, timeliness of awards, decision making under the VOCAA, VOCAT hearings and evidentiary processes, in particular perpetrator notification and the right to appear provisions, and awareness and accessibility of the existing scheme. These issues reflect the matters identified in both the first and supplementary terms of reference. This discussion of key issues with the existing scheme provides the basis for the Commission’s consideration of the need for a new model of state-funded financial assistance for crime victims.
- 18 Chapter 6 considers the current law in relation to alleged perpetrator notification and appearance provisions under the VOCAA and the effects of such provisions on victim safety and wellbeing. It notes that the significant effects are unlikely to be ameliorated through legislative or procedural protections. The Commission also considers that alleged perpetrators do not have a legal interest in the matter of state-funded financial assistance for victims of crime that needs to be met by matters of procedural fairness. This is because such a decision has no bearing on other legal matters. The Commission considers that an alleged perpetrator’s interest can be categorised, in the context of state-funded financial assistance, as a reputational interest rather than a legal interest. Accordingly, the Commission proposes that perpetrator notification and appearance provisions be removed, and that this reflects a trauma-informed approach that prioritises victims’ safety and wellbeing.

The need for a new model

- 19 Chapter 7 assesses victims’ needs and outlines stakeholder views on models of assistance. Chapter 7 also considers whether the existing court-based model as established by the VOCAA and VOCAT, and with the ability for alleged perpetrators to be notified and involved, is meeting the reference objectives. Chapter 7 concludes that the existing scheme is not meeting the reference objectives. In particular, the Commission finds that the current model is not victim-centred or beneficial in its approach because of its prioritisation of procedural and evidentiary processes over victims’ needs and the delays experienced by victims in accessing financial assistance quickly. The Commission determines that there is a need for a new model to more effectively deliver assistance to crime victims.
- 20 Chapter 8 provides an overview of possible models—a reformed judicial model as submitted by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria, and an administrative model. To guide discussion about possible models of assistance, Chapter 8 also outlines the importance of validation for victims of crime.
- 21 Chapter 8 then assesses each possible model against the reference objectives having regard to stakeholder views and relevant research. The Commission acknowledges that VOCAT could be reformed and that a reformed VOCAT model as proposed by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria contains significant reforms and would likely result in improved assistance for victims, particularly if there were also technical reforms to the VOCAA. However, the Commission concludes that a reformed judicial model no longer represents a contemporary model that would most effectively deliver assistance to victims, especially in terms of timeliness, minimising trauma and reducing reliance on legal representation, and that it would also not be the most efficient or sustainable model for the state.

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- 22 In the Commission's view, the most effective model to meet each of the reference objectives and to deliver Victoria's state-funded financial assistance scheme is a new administrative model, focussed on assisting victims in their recovery from a criminal act, separate from Victoria's criminal court system and any potential for involvement by the alleged perpetrator. Accordingly, the Commission recommends that a new state-funded financial assistance scheme be established, led by an independent and dedicated decision maker whose powers and functions are prescribed in legislation (proposed scheme), and that the VOCAA be repealed and replaced with a new Act (proposed Act) which establishes the proposed scheme and incorporates the legislative reforms recommended in this report.
- 23 The Commission's proposal for a new model of state-funded financial assistance represents a significant departure from the current model. In recommending this significant change, the Commission has strived to ensure victim needs are at the centre of its reform proposals.
- 24 The proposed scheme places victims' needs at the centre, providing for a beneficial approach that meets not only financial and practical needs, but prioritises victims' safety and wellbeing and provides a forum for acknowledgment and recognition. Most significantly, the proposed scheme removes financial assistance from Victoria's court system, thereby removing any need for victims to attend court, be called to give evidence and cross-examined, or be required to face an alleged perpetrator at a hearing.
- 25 Chapter 9 outlines options for establishing an administrative scheme with an independent and dedicated decision maker. Having regard to Victoria's existing victims' support landscape, approaches in other Australian jurisdictions with administrative schemes, and stakeholder views on the essential characteristics of a scheme decision maker, the Commission recommends that the functions of Victoria's Victims of Crime Commissioner be expanded to include the functions and powers necessary to administer the proposed Act and scheme. This approach will ensure that the proposed scheme does not create additional complexity by adding to the victims services and functions already available in Victoria. The Commission also recommends that the office of the Victims of Crime Commissioner be provided with appropriate funding and staffing and that the Victims of Crime Commissioner be supported by deputy decision makers and case managers, with the Victims of Crime Commissioner able to delegate some functions.
- 26 Chapter 10 details key components of the proposed scheme. Having regard to Victoria's existing scheme, approaches in other Australian jurisdictions with administrative schemes and stakeholder views, the Commission considers that the proposed scheme should also provide for non-pecuniary victim recognition. The Commission therefore recommends that the proposed Act should provide that all eligible victims are entitled to receive a recognition statement which, on behalf of the state, acknowledges the effect of the criminal act. The Commission also recommends that all eligible victims be entitled to request a victim conference with the scheme decision maker or deputy decision maker. Victim conferences would provide a respectful forum for victims to be acknowledged and heard. Victim conferences would not be for the purpose of determining any application or the amount of an award. As also discussed in Chapter 6, it is not recommended that the existing perpetrator notification and appearance provisions of the VOCAA be replicated in the proposed Act. Removing perpetrator notification reflects a trauma-informed approach that prioritises victims' safety and wellbeing.

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- 27 Chapter 10 also discusses the need for case management and legal representation. Having regard to Victoria’s existing scheme, approaches in other Australian jurisdictions with administrative schemes and stakeholder views, the Commission considers that the proposed scheme should incorporate case management functions provided by scheme staff, and continue to enable victims to engage lawyers to assist with applications to the proposed scheme. The Commission considers that while case management should reduce reliance on lawyers, the proposed scheme should still enable victims to engage lawyers to ensure vulnerable victims or victims with complex needs are not disadvantaged. The Commission therefore recommends that case management be an essential component of the proposed scheme; that the scheme be able to award a lawyer the reasonable costs of a victim’s application for assistance; and that the proposed Act prevent lawyers from charging victims directly for costs in respect of a victim’s application for assistance.
- 28 Chapter 10 also discusses whether restorative justice should form part of the proposed scheme and outlines the current restorative justice landscape in Victoria. Having regard to stakeholder views which highlighted concerns with integrating restorative justice within a state-funded financial assistance scheme, the Commission recommends that the proposed Act should provide that a scheme decision maker may, where requested by a victim, refer the victim to appropriate restorative justice initiatives.
- 29 Chapter 10 also discusses specialisation, noting the current approach to specialisation within the existing scheme provided through the VOCAT Koori List. Having regard to stakeholder views on the existing approach to specialisation, the Commission considers that there is merit in a specialised approach in the proposed scheme and recommends that the proposed Act provide for the establishment of specialised case management and decision making.

The proposed Act

- 30 Chapter 11 discusses the purpose, objectives and principles of the proposed Act. The Commission considers stakeholder views on the current provisions of the VOCAA, along with the approaches taken in other jurisdictions. The Commission recommends that the purpose of the proposed Act should be to assist victims in their recovery from a criminal act. The Commission recommends that the proposed Act not include, as an objective, that only ‘certain victims’ be provided assistance as a symbolic expression by the state of the community’s sympathy. The Commission considers that such an objective can introduce subjective assessments of whether victims are ‘deserving’ victims. The Commission also considers that the VOCAA objective suggesting VOCAT be an option of last resort should not be included in the proposed Act. This is because such an objective may misrepresent state-funded financial assistance as an option of last resort, when for many victims it may be their only option; and additionally may lead to substantial delay in the provision of much-needed assistance should a victim be required to exhaust other options first.
- 31 In summary, the Commission recommends that the proposed Act provide that the objectives of the Act are to recognise victims, assist victims in their recovery and complement other services provided to victims, and that the proposed Act include further guiding principles emphasising the importance of a beneficial approach that prioritises victims’ needs, safety and wellbeing.
- 32 Chapters 12–16 discuss the technical and procedural issues with the VOCAA and VOCAT and how these issues are to be addressed under the proposed Act.

- 33 Chapter 12 discusses the eligibility test and associated matters, including the definitions of victim, criminal act and injury, as well as proving injury and causation. In relation to the eligibility test, the Commission considers that victims should continue to be required to satisfy certain eligibility criteria. The Commission recommends that a person is eligible for financial assistance where the person is a victim of a criminal act and they suffer an injury as a result of that criminal act. However, the Commission also considers that the elements of the proposed eligibility test should be reformed to address stakeholder concerns.
- 34 In relation to the definition of victim, the Commission notes stakeholder concerns that the victim categories create significant barriers for some victims. The Commission recommends that the existing victim categories be abolished and that the proposed Act include a single, comprehensive definition of victim, incorporating a range of victim experiences, to better recognise victim diversity and to not unfairly restrict certain victims from any amounts or types of assistance based on strict categories. The Commission further recommends a more inclusive definition of victim for those with a close personal relationship with a direct victim which better reflects contemporary community understandings of families and relationships.
- 35 Chapter 12 also discusses the definition of criminal act and whether eligibility should be expanded to account for non-criminal acts, including non-criminal forms of family violence.
- 36 While the Commission acknowledges the significant impact that non-criminal forms of violence may have on victims, the Commission nonetheless concludes that providing assistance to victims of non-criminal violence would be inconsistent with the purpose of state-funded financial assistance schemes for victims of crime, which aims to assist victims in their recovery from a criminal act. Accordingly, the Commission considers that a state-funded financial assistance scheme for victims of crime should reflect offences in the criminal law and that it is a matter for the Victorian Parliament to determine what type of conduct constitutes a criminal offence.
- 37 However, to bring the proposed Act in line with changes to the law and community expectations, the Commission recommends that the range of criminal offences covered by the proposed scheme be expanded to include all sexual offences, certain serious property offences and a range of additional offences that occur in the context of family violence. The Commission also recommends that the proposed Act replace the term 'act of violence' with 'criminal act' to better reflect the range of offences recommended to be included in the proposed scheme.
- 38 In relation to the definition of injury, the Commission notes stakeholder concerns that the definition of injury is too narrow and excludes some victims who have suffered a mental injury but are unable to establish a diagnosed mental illness or disorder. The Commission recommends that the definition of injury in the proposed Act not require a victim to demonstrate they have a mental illness or disorder. Under the proposed Act, injury would be defined as physical harm or psychological/psychiatric harm (or exacerbation of). Additionally, the Commission recommends that to address barriers in proving injury experienced by victims of sexual offences or family violence, and child victims who experience or are exposed to these forms of violence, such victims should not be required to prove injury under the proposed Act. The Commission also recommends that the causation requirement under the proposed Act be simplified to require that a victim has suffered an injury 'as a result of' a criminal act. Combined with the reforms to proof of injury, the Commission considers such reforms would make it easier for victims to access the proposed scheme.

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- 39 Chapter 13 discusses assistance available under the VOCAA and notes stakeholder concerns regarding both the existing structure and quantum of awards under the VOCAA. Having regard to stakeholder views and assistance available in other administrative schemes, the Commission recommends that the current categories of award be abolished and replaced with six 'streams of assistance'—immediate needs, funeral expenses, counselling expenses, practical assistance, recovery payments and recovery plans and recognition.
- 40 The Commission recommends immediate needs replace 'interim awards' to cover urgent needs such as urgent medical or safety expenses. To improve certainty for victims, these awards would not be required to be refunded, although victims would still need to meet the eligibility criteria of the proposed Act. The proposed Act would still provide for reasonable funeral expenses determined in line with guidelines. The Commission recommends that the proposed Act should provide for up to 20 counselling sessions and in exceptional circumstances, further counselling as determined by the proposed scheme decision maker according to publicly available guidelines. The Commission recommends that the 'practical expenses' stream include expenses such as medical, housing and safety-related expenses along with financial support. The Commission considers that this stream of assistance should address a victim's basic needs which have been impacted by crime, and that all expenses must still meet a 'reasonableness' threshold.
- 41 The Commission recommends the stream 'recovery payments and plans' replace the VOCAA awards of 'recovery expenses' and 'special financial assistance' to address stakeholder concerns that the existing categories exclude some victims. Under the proposed Act, the decision maker would determine the amount of a recovery payment according to a range of factors including whether the criminal act was directly perpetrated against the victim; the nature of the victim's injury; the vulnerability of the victim and whether the alleged perpetrator was in a position of power, influence or trust; whether the criminal act occurred in the context of a pattern of abuse, such as family violence or child abuse; whether there were a series of related criminal acts, as well as the victim's criminal behaviour where there is a nexus with the criminal act the subject of the application. Unlike under the VOCAA, these lump sum payments would no longer be provided as a symbolic expression of the state's sympathy and condolence, but would be provided to further assist a victim in their recovery and provide victims with choice and control to direct some funds to certain expenses to aid their recovery which may not fall within other streams of assistance.
- 42 As outlined above, the proposed Act would also include a range of recognition mechanisms, as provided for by the 'recognition' stream. The Commission recommends that the proposed Act provide that all eligible victims are entitled to receive a comprehensive statement of reasons for a decision and a recognition statement which, on behalf of the state, acknowledges the effect of the criminal act. The Commission also recommends that all eligible victims be entitled to request a victim conference with the scheme decision maker or deputy decision maker. Victim conferences would provide a respectful forum for victims to be acknowledged and heard.
- 43 In response to stakeholder concerns that the current amounts of assistance are too low, the Commission recommends that the amounts of assistance be increased and subject to indexation and that there be no collective cap on assistance for multiple victims whose claims relate to the same criminal act. To promote scheme sustainability, the Commission recommends that the proposed Act require that expenses be reasonable and that where an applicant is the victim of 'related criminal acts' that these be treated as a single act for the purposes of making an award. While the Commission acknowledges that this may disproportionately disadvantage victims who experience multiple acts committed by a single offender, including victims of family violence, the Commission considers that other

- aspects of the proposed scheme should mitigate the effects of this—for example, victims of related criminal acts would be eligible for a higher maximum recovery payment under the proposed Act.
- 44 To address concerns with variation time limits and administration, the Commission recommends that victims be able to apply for additional financial assistance during a 10-year period from the date of their initial award and beyond the 10-year time limit for some additional health-related expenses according to guidelines.
- 45 In Chapter 14, the Commission acknowledges stakeholder concerns about the current application form and recommends that all streams of assistance can be applied for using the same form and that the form accommodate varied victim experiences, including where there are multiple criminal acts or where the criminal act/s occurred in the context of a pattern of abuse. Having regard to stakeholder concerns that some victims may find it difficult to provide evidence of a criminal act, the Commission recommends that an applicant should be able to provide a broader range of documentary evidence to establish that they were the victim of a criminal act. The Commission also recommends that the evidentiary requirements for proof of injury should be broadened to enable a wider range of documentation to be submitted to prove injury. To further simplify the process for victims, the Commission recommends that the proposed scheme’s case managers should assist victims with the collection of documentary evidence.
- 46 Chapter 14 also outlines the use of application materials in other proceedings and inspection and publication of application materials. Having regard to stakeholder concerns and approaches in other jurisdictions, the Commission recommends limits on the use of application materials in other proceedings and inspection of materials. Additionally, the Commission recommends restrictions on the publication of application materials. The Commission does not recommend restricting the publication of de-identified data or media or other public reports about the scheme which exclude information that is likely to lead to the identification of any individuals the subject of an application.
- 47 Chapter 14 notes stakeholder concerns about the disadvantages experienced by some victim cohorts as a result of the two-year application time limit under the VOCAA. To address these concerns, the Commission recommends an increase of the time limit from two to three years for all victims, along with increasing the time limit further for some victims and abolishing the time limit entirely for others. Additionally, the proposed scheme decision maker would be able to consider applications made out-of-time, having regard to a range of expanded factors.
- 48 In Chapter 15, the Commission discusses the current VOCAA factors resulting in refusal of awards, or the reduction of awards, including consideration of whether a victim has reported a matter to police, co-operated with police or prosecution and their broad character and behaviour ‘at any time’. The Commission concurs with stakeholder concerns that such factors result in subjective assessments of whether victims are innocent or deserving of assistance and recommends that the proposed Act not replicate the VOCAA provisions. The Commission recommends that the proposed decision maker limit consideration of an applicant’s behaviour to consideration of criminal behaviours with a nexus between the criminal act the subject of the application. The Commission also recommends that there be no mandatory requirement for a victim to make a report to police or to assist police or with prosecution. Instead, under the proposed Act, a police report may be used by an applicant to assist them to meet evidentiary requirements for scheme eligibility.

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- 49 In Chapter 15, the Commission also notes that while a transition to an administrative model would likely lead to improvements in overall timeliness of decision making, the Commission considers further safeguards should be incorporated into the proposed scheme's design to ensure timely decision making. Accordingly, the Commission recommends that the scheme decision maker should be required to act expeditiously in the determination of applications and to support this, regulations should provide for time limits within which determinations for immediate assistance, funeral expenses, counselling and practical assistance should be made. Additionally, to address stakeholder concerns about a lack of transparency and consistency under the existing scheme, the Commission makes recommendations that the proposed Act require decision makers to provide written reasons for decisions, including decisions about accepting or rejecting applications, any factors taken into account in determining the amount of a recovery (lump sum) payment and reducing awards on the grounds that an applicant has received any other assistance from other sources.
- 50 To improve accessibility of reviews of decisions, the Commission also recommends that the proposed Act first provide victims with an internal review option, followed by an external review to the Victorian Civil and Administrative Tribunal. The Commission also recommends the establishment of a separate complaints process.
- 51 In Chapter 16, the Commission discusses the interaction of the proposed Act with other financial assistance schemes and the refund of awards. The Commission agrees with stakeholder views that there are issues of ambiguity and complexity in relation to VOCAA's consideration of other assistance or payments. The Commission considers that under the proposed scheme, victims should be entitled to receive assistance from both the proposed scheme and other sources as long as they are not provided for the same purposes. This recognises the intersection with other schemes like the TAC and WorkSafe and that the legislative purpose of particular payments might differ. Having regard to certainty for victims, reducing complexity and encouraging timely decision making, the Commission recommends that the proposed Act require a decision maker to reduce the amount of assistance if a payment has been received through other means for the same purpose; or to reduce a payment on the basis that the victim will (on the balance of probabilities) receive a payment from another source for the same purpose. To support this, the Commission also recommends that the refund provisions in the proposed Act improve certainty and consistency for victims by only requiring that an award be refunded where the decision maker has considered the amount or type of the subsequent assistance received. The Commission notes that such consideration should provide the scheme decision maker with discretion, acknowledging that requiring victims to refund awards may cause financial hardship.

Accessibility, sustainability and implementation

- 52 Chapters 17–19 discuss issues of accessibility, sustainability and implementation.
- 53 Chapter 17 discusses awareness and accessibility, including outlining the current estimate (approximately 9 per cent) of eligible victims who are accessing the existing scheme. The Commission considers that some issues of awareness and accessibility are likely to be addressed by the proposed model—an administrative scheme embedded within an independent agency whose mandate includes advocating for victims of crime. However, the Commission considers that a number of further initiatives are required to ensure improved awareness and accessibility of the proposed scheme, including community engagement and awareness raising and sector training and education. The Commission recommends that ongoing community engagement, public awareness and sector training and education activities regarding the proposed scheme be provided for by the proposed Act and that the proposed scheme be required to report annually on such activities. The Commission also recommends that the proposed scheme review and revise all forms and information so that they are in plain language and accessible formats.

- 54 Chapter 18 discusses the potential costs and sustainability of the proposed scheme. It discusses demand and operating costs for the existing scheme, noting that demand for the proposed scheme is most likely to increase year on year, as it has for VOCAT. The Commission notes that it is difficult to project demand for the proposed scheme because of major justice reforms, the availability of other forms of financial assistance, fluctuations in awareness of the proposed scheme and any reduction in technical or legal barriers through legislative change to the VOCAA or through the introduction of the proposed Act. The Commission recommends that a comprehensive demand modelling project should be undertaken to assess current unmet demand under the existing scheme, and if relevant, anticipated demand under the proposed scheme. The Commission also notes that establishment and operating costs of the proposed scheme will require further consideration given the existing scheme's salaries and operating expenditure are subsidised by the Magistrates' Court of Victoria.
- 55 Chapter 18 outlines factors and initiatives promoting sustainability of the proposed scheme, as considered throughout Parts Three and Four of the report. In addition, Chapter 18 discusses recovering money from convicted offenders. While acknowledging the current mechanisms for offender recovery under the VOCAA have not been used in practice, the Commission recommends the proposed Act enable a victim to assign their right to the state to recover monies. To support this provision and enhance its practical operation, the Commission recommends that the proposed scheme decision maker be required to advise victims of this right, and that the proposed scheme be provided funding and resourcing to pursue such recovery and enforce debts, so as not to divert resources from the provision of support to victims.
- 56 Chapter 18 also discusses whether levies should be imposed on convicted offenders ('victim levies'). The Commission discusses the operation of victim levies in other jurisdictions; the potential legal implications; the impact on impecunious offenders and enforcement costs. The Commission notes that the issue of victim levies has been a matter under consideration in Victoria since 2009. The Commission notes that while there may be some advantages to introducing victim levies, the matter of a victim levy should be addressed in its own right through a dedicated review, with regard to victims' and stakeholder views, legal implications, operational experiences in other jurisdictions, cost benefit analysis and social implications. The Commission recommends that further consideration be given by government to the introduction of a victim levy.
- 57 Chapter 19 discusses mechanisms for monitoring the operation of the proposed Act and scheme to ensure best practice. Noting stakeholder concerns about limited data collection and publication of data, the Commission recommends that the proposed Act require the scheme to publish and make publicly available data relating to all aspects of the scheme. The Commission also recommends that the proposed Act provide for a review of the operation and effectiveness of the Act and scheme not more than five years after its commencement. The Commission also recommends that transitional provisions be simpler and clearer for victims to understand and that all pending applications under the VOCAA be finalised under that Act and all new applications made on or after the commencement date of the proposed Act be determined under the proposed scheme.

Recommendations

The recommendations listed below appear in Chapters 8–19 of this report.

PART THREE: THE NEED FOR A NEW MODEL OF STATE-FUNDED FINANCIAL ASSISTANCE FOR VICTIMS OF CRIME

Chapter 8. Models of state-funded financial assistance for victims of crime

- 1 To enable state-funded financial assistance to be more effectively delivered to all victims of crime, a new state-funded financial assistance scheme should be established, led by an independent and dedicated decision maker whose powers and functions are prescribed in legislation.
- 2 The *Victims of Crime Assistance Act 1996* (Vic) should be repealed and replaced with an Act establishing the new state-funded financial assistance scheme and incorporating the legislative reforms recommended in this report.

Chapter 9. The decision maker in the proposed victims of crime financial assistance scheme

- 3 The proposed Act should establish the scheme's decision maker as the Victims of Crime Commissioner, appointed pursuant to section 7 of the *Victims of Crime Commissioner Act 2015* (Vic).
- 4 Section 7 of the *Victims of Crime Commissioner Act 2015* (Vic) should be amended to provide that the Victims of Crime Commissioner, as the scheme decision maker, should be appointed following public advertisement, and should be a person of appropriate standing and be suitably qualified.
- 5 The functions and powers of the Victims of Crime Commissioner should be expanded to include the functions and powers necessary to administer the proposed Act and scheme. These functions and powers could either be expressly provided in the *Victims of Crime Commissioner Act 2015* (Vic) by amendment to section 13, or as a provision of the proposed Act.
- 6 The proposed Act should provide that the functions and powers of the scheme decision maker are to:
 - (a) conduct victim conferences for the purposes of hearing and acknowledging, on behalf of the state, the victim and the impact of the criminal act on the victim
 - (b) provide eligible victims with a recognition statement for the purposes of acknowledging, on behalf of the state, the victim and the impact of the criminal act on the victim

- (c) administer the scheme for the provision of financial assistance to eligible victims
 - (d) receive applications for financial assistance
 - (e) decide applications for financial assistance
 - (f) pay amounts of financial assistance
 - (g) review decisions made by other scheme staff
 - (h) administer the repayment and recovery processes for payments of financial assistance made
 - (i) provide information to victims about the Act and the support services and assistance available to assist recovery from the criminal act
 - (j) publish guidance materials and resources for victims, support service providers and legal practitioners in relation to the Act
 - (k) conduct education and training, public awareness activities and research in relation to the Act
 - (l) collect and publish annual data and information in relation to the operation of the Act.
- 7 The proposed Act should provide that any person in exercising any functions or powers required under the Act must have regard to the purpose and objectives of the Act, its guiding principles, and the *Victims Charter Act 2006* (Vic).
- 8 The Victims of Crime Commissioner should be provided with the staffing and funding necessary to properly perform their functions, including the function of administering the new state-funded financial assistance scheme, consistent with section 16 of the *Victims of Crime Commissioner Act 2015* (Vic).
- 9 The proposed Act should provide that the scheme decision maker be supported by:
- (a) deputy decision makers, appointed by the Governor-in-Council on the recommendation of the Attorney-General following public advertisement, who are suitably qualified and are subject matter specialists of appropriate standing
 - (b) appropriately qualified case managers
 - (c) other staff as required for the efficient and effective operation of the Act.
- 10 The proposed Act should provide that (other than the power of delegation) the scheme decision maker may delegate:
- (a) the power to conduct victim conferences and to provide recognition statements to deputy decision makers only
 - (b) any other functions or powers under the Act, with the exception of the power to conduct victim conferences and to provide recognition statements, to any appropriately qualified member of staff.

Chapter 10. Key components of the proposed victims of crime financial assistance scheme

- 11 The proposed Act should provide that all eligible victims are entitled to receive:
- (a) a comprehensive written statement of reasons for a decision
 - (b) a recognition statement, signed by the scheme decision maker or a deputy decision maker on behalf of the state, which acknowledges the effects of the criminal act on the victim and expresses the state's condolences.

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- 12 The form and content of the proposed recognition statement should be developed in consultation with the Victims of Crime Consultative Committee, to ensure the statement provides appropriate recognition to victims.
- 13 The proposed Act should provide that all eligible victims are entitled to request, and to have, a private victim conference with the scheme decision maker or a deputy decision maker.
- 14 The proposed Act should provide that:
- (a) the purpose of a victim conference is to provide a respectful forum for victims to be acknowledged and heard, and for the impacts of the criminal act on the victim to be properly acknowledged by the scheme decision maker on behalf of the state, and that the purpose is not to determine any application, or the amount of any award
 - (b) victim conferences must be held in private, and only persons who are authorised by the scheme decision maker may be present during the victim conference
 - (c) victim conferences should be conducted in a trauma-informed way that aims to affirm victims' experiences, while minimising interactions or processes that could increase victims' trauma, including in deciding the time, place, structure or format of the conference
 - (d) victim conferences should be conducted in a culturally appropriate safe space, with sufficient flexibility for victims to share their story, with victims provided the opportunity to:
 - (i) discuss the impacts of the crime
 - (ii) read aloud a Victim Impact Statement or other written statement
 - (iii) have a support person/s present
 - (iv) be represented by a legal representative
 - (v) at victims' request, have a single victim conference with multiple victims in attendance.
- 15 The proposed Act should provide that:
- (a) victims participating in a victim conference are not giving evidence
 - (b) statements made and documents produced at a victim conference are not admissible in evidence in any civil or criminal proceedings, except as expressly provided for in the Act.
- 16 The proposed Act should provide that case management is an essential component of the scheme, and that case management includes providing assistance to victims, or their representatives, in meeting scheme requirements.
- 17 The proposed Act should provide that:
- (a) in applying for assistance victims have a right to be represented by a legal practitioner
 - (b) a legal practitioner is not entitled to recover from the applicant any costs in respect of a victim's application for assistance
 - (c) the scheme decision maker may award a legal practitioner the reasonable legal costs of, and incidental to, a victim's application for assistance
 - (d) to assist the scheme decision maker in determining awards for legal costs, guidelines should be developed and be publicly available.
- 18 The proposed Act should provide that the scheme decision maker may, where requested by a victim, refer the victim to appropriate restorative justice initiatives.
- 19 The proposed Act should provide for the establishment of specialised case management and decision making.

PART FOUR: THE PROPOSED ACT FOR VICTIMS OF CRIME FINANCIAL ASSISTANCE

Chapter 11. The purpose, objectives and principles of the proposed Act for victims of crime financial assistance

- 20 The proposed Act should provide that the purpose of the Act is to establish a scheme to assist victims in their recovery from a criminal act.
- 21 The proposed Act should provide that the objectives of the Act are to:
 - (a) recognise, on behalf of the state, victims and the impacts of a criminal act on a victim, through the provision of a respectful forum for victims to be heard and to have their experiences properly acknowledged by the state
 - (b) assist victims in their recovery from a criminal act through the provision of financial and other practical assistance
 - (c) complement other services provided by government to victims of crime
 - (d) enable victims to have recourse to financial assistance under the Act, noting such assistance is not intended to reflect the level of compensation that may be available at common law or otherwise.
- 22 The proposed Act should provide that in making any decision or taking any action under the Act, regard must be had to the following guiding principles:
 - (a) victim benefit—the Act and scheme are intended for the benefit of victims
 - (b) victims should be protected from undue trauma, intimidation or distress
 - (c) victims' needs, safety and wellbeing should be paramount
 - (d) in recognition that victims' needs may vary, the scheme should be flexible in the assistance provided.

Chapter 12. Eligibility for assistance under the proposed Act for victims of crime financial assistance

The eligibility test

- 23 The proposed Act should provide that a person is eligible for financial assistance where the person is a victim of a criminal act and they suffer an injury as a result of that criminal act.

Definition of victim

- 24 The proposed Act should define a victim as:
 - (a) a person against whom a criminal act was committed
 - (b) a person who was in a close personal relationship with a person who was injured or died as a result of the criminal act committed against them
 - (c) a person who was wholly or substantially dependent on the income of a person who was injured or died as a result of a criminal act, at the time of that person's injury or death
 - (d) a child of a person who was injured or died as a result of a criminal act and who would have been wholly or substantially dependent on the injured or deceased person's income if the child had been born before the person was injured or died
 - (e) a person who witnessed a criminal act

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- (f) a person under the age of 18 years who heard or was otherwise exposed to a criminal act
 - (g) a person who attempted to assist, aid or rescue another person against whom they reasonably believed a criminal act was committed, or was going to be committed, whether the attempt to do so occurred before, during or immediately after the criminal act
 - (h) a person who tried to arrest someone whom they believed on reasonable grounds had committed a criminal act, or
 - (i) a person who prevented or tried to prevent the commission of a criminal act.
- 25 For the purposes of the proposed definition of victim, the proposed Act should provide that a person ('the relevant person') was in a close personal relationship with a person against whom a criminal act was committed ('the direct victim'), where the relevant person, at the time of the criminal act:
- (a) was married to the direct victim
 - (b) was the domestic partner of the direct victim, as defined in section 9 of the *Family Violence Protection Act 2008* (Vic)
 - (c) was the intimate partner of the direct victim
 - (d) was the parent, guardian or step-parent of the direct victim
 - (e) was the child, including by guardianship, or step-child of the direct victim
 - (f) was the sibling or step-sibling of the direct victim, or
 - (g) regarded the direct victim as a family member, and the scheme decision maker considers it reasonable to have regarded the direct victim as such, having regard to the circumstances of the relationship.
- 26 For the purposes of the definition of close personal relationship, the proposed Act should define an intimate partner as a person who had an intimate relationship with a direct victim at the time of the criminal act, whether they were members of the same household or not, having regard to the circumstances of the relationship.

Defining a criminal act

- 27 The proposed Act should define a criminal act as an act or omission that has occurred in the state of Victoria and which would constitute:
- (a) an offence, punishable on conviction by imprisonment, that involved an assault on, or injury or a threat of injury to, a person
 - (b) any sexual offence, including those contained in the *Summary Offences Act 1966* (Vic)
 - (c) an offence of stalking, child stealing or kidnapping under the *Crimes Act 1958* (Vic)
 - (d) an offence of arson, aggravated burglary, home invasion, or aggravated home invasion under the *Crimes Act 1958* (Vic), regardless of whether the victim had contact with the offender at the time of the offence
 - (e) any one of the following offences:
 - (i) contravention of a family violence intervention order under the *Family Violence Protection Act 2008* (Vic)
 - (ii) contravention of a family violence intervention order intending to cause harm or fear for safety under the *Family Violence Protection Act 2008* (Vic)

- (iii) persistent contravention of family violence intervention notices and orders under the *Family Violence Protection Act 2008* (Vic)
 - (iv) destroying or damaging property under the *Crimes Act 1958* (Vic)
 - (v) threats to destroy or damage property under the *Crimes Act 1958* (Vic)
 - (vi) possessing anything with intent to destroy or damage property under the *Crimes Act 1958* (Vic)
 - (vii) burglary under the *Crimes Act 1958* (Vic)
 - (viii) theft under the *Crimes Act 1958* (Vic)
 - (ix) obtaining property by deception under the *Crimes Act 1958* (Vic)
 - (x) obtaining financial advantage by deception under the *Crimes Act 1958* (Vic)
 - (xi) blackmail under the *Crimes Act 1958* (Vic)
 - (xii) taking or using a vehicle without consent of the owner under the *Summary Offences Act 1966* (Vic)
 - (xiii) obscene, indecent, threatening language and behaviour in public under the *Summary Offences Act 1966* (Vic)
 - (xiv) intentionally or recklessly causing a bushfire under the *Crimes Act 1958* (Vic) where that offence occurred in the context of 'family violence' as defined by the *Family Violence Protection Act 2008* (Vic)
- (f) an offence of conspiracy to commit, incitement to commit or attempting to commit any of the above offences
- (g) any one of the above offences, 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.
- 28 The proposed Act should provide that additional offences may be prescribed by regulation.
- 29 Government should conduct a review to determine whether the offences contained in the *Sex Work Act 1994* (Vic) and any other offences that may have a significant physical and/or psychological impact on the victim should be recognised by the proposed Act.

Defining injury

- 30 The proposed Act should define injury as:
- (a) physical harm
 - (b) psychological or psychiatric harm
 - (c) exacerbation of any pre-existing physical, psychological or psychiatric harm, or
 - (d) any combination of (a), (b) or (c).

Proof of injury

- 31 The proposed Act should provide that an applicant must provide evidence that they have suffered an injury as a result of the criminal act, except where the applicant:
- (a) was the victim of a criminal act that would constitute a sexual offence
 - (b) was the victim of a criminal act that occurred in the context of family violence, as defined by the *Family Violence Protection Act 2008* (Vic), or
 - (c) witnessed, heard or was otherwise exposed to any of the above criminal acts and was under the age of 18 at the time of the exposure.

Causation

- 32 The proposed Act should provide that where an applicant is required to prove injury, it is sufficient if the applicant can establish that the victim's injury was a result of the criminal act.

Chapter 13. Assistance available under the proposed Act for victims of crime financial assistance

New streams of assistance

- 33 The proposed Act should provide that eligible victims may apply for the following streams of assistance:
- (a) immediate needs
 - (b) funeral expenses
 - (c) counselling
 - (d) practical assistance
 - (e) recovery payments and recovery plans—lump sum payments to assist in the victim's recovery
 - (f) recognition:
 - (i) recognition statement
 - (ii) victim conference (at victim's request)
 - (iii) pathway to restorative justice (at victim's request).

Immediate needs

- 34 The proposed Act should provide that an award for immediate needs:
- (a) may be made where the scheme decision maker considers it appropriate to do so
 - (b) is final and is not required to be refunded where a victim's application/s for other streams of assistance is unsuccessful
 - (c) may be taken into account in determining the amount of assistance to award a victim under other streams of assistance, where a victim's application/s for such other streams is successful.

Funeral expenses

- 35 The proposed Act should provide that an award for funeral expenses may be made by the scheme decision maker to any person who has incurred, or will incur, the funeral expenses of a person who has died as a result of a criminal act.
- 36 To assist the scheme decision maker in determining awards for funeral expenses, guidelines should be developed and should be made publicly available.

Counselling

- 37 The proposed Act should provide that an award for the reasonable costs of counselling may be made by the scheme decision maker:
- (a) on initial application, for up to 20 counselling sessions
 - (b) in exceptional circumstances, as determined on application, for such further counselling sessions as are required.
- 38 To assist the scheme decision maker in determining awards for counselling, guidelines should be developed and should be made publicly available.

Practical assistance

- 39 The proposed Act should provide that an award for practical assistance may be made by the scheme decision maker for the following expenses incurred, or reasonably likely to be incurred:
- (a) health-related expenses
 - (b) housing-related expenses, including relocation and resettlement expenses
 - (c) safety-related expenses
 - (d) financial support, including loss of earnings, dependency payments and financial counselling
 - (e) education, re-training and return-to-work expenses
 - (f) expenses for lost or damaged clothing worn at the time of the criminal act
 - (g) other expenses reasonably incurred to access assistance provided under the proposed Act, including travel and childcare expenses, and to attend justice-related appointments.

Recovery payments and recovery plans

- 40 The proposed Act should provide that a lump sum recovery payment may be awarded by the scheme decision maker up to a specified maximum amount as determined according to the victim's circumstances, including:
- (a) whether the criminal act was directly perpetrated against the victim
 - (b) the nature of the victim's injury, including whether the criminal act resulted in the victim suffering a serious injury or serious disease
 - (c) whether the criminal act resulted in the death or serious injury of a person with whom the victim was in a close personal relationship
 - (d) whether the victim was dependent on a person who died or was seriously injured as a result of a criminal act
 - (e) whether the victim was particularly vulnerable at the time of the criminal act, including because of the victim's age, or because they had a mental illness, cognitive impairment or disability
 - (f) whether the person who committed, or is alleged to have committed, the criminal act was in a position of power, influence or trust in relation to the victim
 - (g) whether the criminal act occurred in the context of a pattern of abuse, including a pattern of family violence, as defined in the *Family Violence Protection Act 2008* (Vic), or child abuse, as defined in the *Child Wellbeing and Safety Act 2005* (Vic)
 - (h) whether there was a series of related criminal acts
 - (i) whether the victim's, or direct victim's, involvement in any criminal activity was the primary reason that the criminal act that is the subject of the application was committed.
- 41 The proposed Act should provide that the scheme decision maker may, at the request of an applicant, or at the discretion of the scheme decision maker having regard to an applicant's mental illness, cognitive impairment or disability, award a recovery payment in accordance with a recovery plan which:
- (a) details how some or all of the award is to be used to assist the victim's recovery
 - (b) requires the award sum the subject of the plan to be held in trust and administered by a scheme case manager in accordance with the plan for the victim's benefit.

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- 42 The proposed Act should provide that a recovery plan is mandatory for victims who are under the age of 18 at the time the award is made.

Amounts of assistance

- 43 The proposed Act should provide that the maximum amounts that can be awarded by the scheme decision maker should be prescribed as follows, and should be subject to indexation:
- (a) the following maximum amounts:
 - (i) \$5000 for immediate assistance
 - (ii) \$15,000 for funeral expenses
 - (iii) \$80,000 for practical assistance, with a cap of \$20,000 for financial support
 - (iv) \$20,000 for a recovery payment, or \$25,000 for applicants who were the victim of two or more related criminal acts, or
 - (b) any such higher maximum amounts for any items in paragraph (a) as may be prescribed by regulation.
- 44 In making any award for expenses, the proposed Act should provide that the scheme decision maker must be satisfied that the expenses incurred, or reasonably likely to be incurred, are reasonable.
- 45 To assist the scheme decision maker in determining whether an expense is reasonable, guidelines should be developed and should be made publicly available.
- 46 The proposed Act should not include any collective cap on assistance for multiple victims whose claims relate to the same criminal act.

Related criminal acts

- 47 The proposed Act should:
- (a) provide that where an applicant is the victim of 'related criminal acts' the scheme decision maker must treat the related criminal acts as a single criminal act for the purposes of making any award of assistance
 - (b) include a definition of the term 'related criminal acts' modelled on the definition in section 4 of the *Victims of Crime Assistance Act 1996* (Vic).
- 48 To assist the scheme decision maker in determining whether two or more criminal acts are related criminal acts, guidelines should be developed and should be made publicly available.

Payment of awards

- 49 The proposed Act should provide that the scheme decision maker has the discretion to make all or part of any award:
- (a) payable to the applicant or to any other person for the applicant's benefit
 - (b) as a lump sum payment, a payment by instalments or a payment partly as a lump sum and partly in instalments.

Additional awards of assistance

- 50 The proposed Act should provide that where a victim has received an award of financial assistance, they may apply to the scheme decision maker:
- (a) for additional awards of assistance, without the need to re-establish eligibility:
 - (i) for adult victims, for a 10-year period following the date of their initial award of assistance, or

- (ii) for victims who were under the age of 18 at the time of their initial award of assistance, for a 10-year period from the date that victim turns 18, and
 - (b) after the end of the applicable time period, for awards of assistance for additional health-related expenses, without the need to re-establish eligibility, where:
 - (i) the expenses relate to an injury suffered as a result of the criminal act that persists beyond the end of the 10-year period, or
 - (ii) the injury does not develop until after the end of the 10-year period.
- 51 The proposed Act should provide that in making an award for additional health-related expenses outside the applicable time period, the scheme decision maker must be satisfied that there are exceptional circumstances justifying the making of the award.
- 52 The proposed Act should provide that where a victim has received an award of financial assistance, they must be notified in writing that the applicable time period is due to expire, one year prior to that expiration date.
- 53 To assist the scheme decision maker in determining an application for additional health-related expenses lodged outside the applicable time period, including in determining whether there may be exceptional circumstances, guidelines should be developed and made publicly available.

Chapter 14. Making an application under the proposed Act for victims of crime financial assistance

How to make an application

- 54 The proposed Act should provide that an application for assistance must be made in writing in the specified form, supported by the required documentary evidence.
- 55 The proposed Act should provide that a victim may apply for any stream of assistance within the application time limits by completing the specified application form, and that multiple streams of assistance may be applied for using the same form.
- 56 The proposed Act should provide that the scheme decision maker may obtain, with the applicant's consent, any information, evidence or documentation the scheme decision maker considers necessary to determine an application.
- 57 The proposed Act should provide that the application form:
- (a) contain an authorisation for the scheme decision maker to obtain any information, evidence or documentation necessary to enable the determination of an application
 - (b) enable applicants to:
 - (i) list multiple criminal acts by the same perpetrator
 - (ii) indicate that the criminal act/s occurred in the context of a pattern of abuse and list a range of dates over which such abuse occurred
 - (c) require applicants to provide details of any assistance they have applied for, or may be eligible for, under any other scheme, and state the circumstances in which:
 - (i) an award of financial assistance, or eligibility for an award of financial assistance, under another scheme may reduce the amount of financial assistance a victim would otherwise be eligible for under the proposed Act
 - (ii) an award of financial assistance under the proposed scheme may be required to be refunded.
- 58 The proposed Act should provide that a victim may withdraw an application made under the proposed Act at any time, by giving written notice to the scheme decision maker.

Standard of proof

- 59 In determining an application for financial assistance, the proposed Act should provide that the scheme decision maker:
- (a) must be satisfied on the balance of probabilities about the existence of any relevant matter
 - (b) may determine that a criminal act occurred regardless of the existence, status or outcome of any other legal proceedings, including where those other proceedings are pending or where the alleged offender has been acquitted in criminal proceedings relating to the alleged criminal act.

Documentary evidence requirements—evidence required to establish a criminal act

- 60 To assist the scheme decision maker in determining whether the applicant was the victim of a criminal act, the proposed Act should provide that an applicant must provide at least one of the following in support of their application:
- (a) a record of the conviction of the perpetrator
 - (b) a police report
 - (c) a Family Violence Intervention Order, Family Violence Safety Notice or Personal Safety Intervention Order
 - (d) a medical report
 - (e) a report from a psychologist
 - (f) a report from a counsellor
 - (g) a report from a social worker
 - (h) a report from a government department or agency
 - (i) a report from a family violence service
 - (j) a report from a non-government agency, as determined by the scheme decision maker.
- 61 The proposed Act should provide that where an applicant is unable to provide any of the required documentary evidence, the applicant must provide a statutory declaration stating the reasons why the documentary evidence has been unable to be provided.

Documentary evidence requirements—evidence required to establish injury

- 62 To assist the scheme decision maker in establishing that the applicant has suffered injury as a result of the criminal act, the proposed Act should provide that an applicant must provide at least one of the following in support of their application:
- (a) a medical report, including from the applicant's general practitioner
 - (b) hospital records
 - (c) a report from a psychologist or psychiatrist
 - (d) a report from a counsellor
 - (e) a report from a social worker
 - (f) a report from a family violence service
 - (g) a report from a government agency
 - (h) a report from a non-government agency, as determined by the scheme decision maker.

Documentary evidence requirements—evidence required to establish a close personal relationship

- 63 The proposed Act should provide that an applicant who had a close personal relationship with a person who died or was injured as a result of a criminal act must provide evidence of that relationship in support of their application.

Documentary evidence requirements—evidence required to establish expenses

- 64 The proposed Act should provide that an applicant must provide a written quotation, invoice, receipt, or other relevant documentary evidence in support of any claim for expenses already incurred or reasonably likely to be incurred for immediate needs, funeral expenses, counselling, and practical support.

Reducing the burden on victims—assisting victims to meet their documentary evidence requirements

- 65 The proposed Act should provide that at a victim's request, and so far as is reasonably practicable within the limits of available resources, scheme case managers must assist victims with the collection of documentary evidence and/or the completion of the relevant application forms.

Use of application materials in other proceedings

- 66 The proposed Act should provide that an application for assistance, any supporting documents, and any documents provided or prepared in connection with an application under the proposed Act are not admissible as evidence in any other legal proceedings, except:
- (a) in criminal proceedings in which the applicant is the accused
 - (b) in or arising out of proceedings relating to the application to which the applicant is a party, or
 - (c) with the applicant's consent.
- 67 The proposed Act should provide that a person is not required by subpoena, or any other procedure, to produce any application or other document that would be inadmissible following the implementation of Recommendation 66.

Inspection of application materials

- 68 Except in accordance with Recommendation 66, the proposed Act should provide that an application for assistance, any supporting documents, and any documents provided or prepared in connection with an application under the proposed Act may only be accessed by the applicant or, with the applicant's consent, by another person.

Publication of application materials

- 69 The proposed Act should provide that a person must not publish, or cause to be published, any details or documentation related to, or produced for, the purposes of:
- (a) an application to the scheme that would be likely to lead to the identification of any individual the subject of an application, including applicants and alleged offenders
 - (b) a determination of the scheme that would be likely to lead to the identification of any individual the subject of an application, including applicants and alleged offenders
 - (c) any proceeding conducted by the scheme, including a victim conference, that would be likely to lead to the identification of any individuals the subject of an application, including applicants and alleged offenders.

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- 70 The proposed Act should provide that the publication prohibition does not apply to:
- (a) the publication of de-identified data for the purpose of scheme reporting
 - (b) media or other public reports about the scheme which appropriately de-identifies individuals
 - (c) any information that would not lead to the identification of any individuals the subject of an application
 - (d) the release of any application for assistance, any supporting documents, and any documents provided or prepared in connection with an application under the proposed Act by a court or tribunal in accordance with a subpoena, where such materials are not inadmissible as a result of Recommendation 66.

Time limits for the making of an application

- 71 The proposed Act should provide that:
- (a) the time limit for making an application for immediate assistance, funeral expenses, practical assistance and/or a recovery payment is three years after the date the criminal act occurred, except where:
 - (i) the applicant was under the age of 18 when the criminal act occurred—in which case the time limit for making an application is three years from the day that the victim turns 18
 - (ii) the applicant is an adult victim of a criminal act which occurred in the context of family violence, as defined in the *Family Violence Protection Act 2008* (Vic), or constitutes a sexual offence—in which case the time limit for making an application is 10 years after the date the criminal act occurred
 - (iii) the applicant was under the age of 18 when the criminal act occurred and the criminal act occurred in the context of child abuse, as defined in the *Child Wellbeing and Safety Act 2005* (Vic), or family violence, as defined in the *Family Violence Protection Act 2008* (Vic)—in which case there is no time limit for making an application.
 - (b) there is no time limit for making an application for an award of assistance for counselling.
- 72 The proposed Act should provide that where there are related criminal acts, the application time limit commences from the date of the last criminal act.

Considering applications made out of time

- 73 The proposed Act should provide that the scheme decision maker has the discretion to accept applications made out of time and that in considering such late applications must have regard to:
- (a) the applicant's age at the time of the criminal act, including whether they were a child at the time that the criminal act occurred
 - (b) whether the applicant is intellectually disabled within the meaning of the *Disability Act 2006* (Vic) or mentally ill within the meaning of the *Mental Health Act 2014* (Vic)
 - (c) whether the alleged offender was in a position of power, influence or trust in relation to the applicant
 - (d) the physical or psychological effect of the criminal act on the applicant
 - (e) whether the applicant has or had a medical or psychological condition which affected their ability to make an application

- (f) the nature, dynamics and circumstances of the criminal act, including whether it occurred in the context of a pattern of abuse, including family violence
 - (g) whether the applicant has experienced homelessness
 - (h) the length of time taken for any related legal proceedings to finalise
 - (i) whether the delay in making the application threatens the capacity of the scheme decision maker to make a fair decision
 - (j) any other circumstances that the scheme decision maker considers relevant.
- 74 To ensure victims are not deterred from making an application outside the application time limit, the proposed Act should provide that information about time limits, including the circumstances in which out-of-time applications may be accepted and the process for making such an application, should be developed and made publicly available.

Increasing transparency and consistency of decision making

- 75 To promote transparency, predictability and consistency of decision making, the proposed Act should provide that the scheme decision maker must:
- (a) provide written reasons to the applicant for not accepting an application made out of time
 - (b) publish annual data on out-of-time applications that are refused, and applications for assistance that are refused for other reasons, including the categories and reasons for refusal.

Chapter 15. Decision making under the proposed Act for victims of crime financial assistance

Factors to be considered in determining an application

- 76 The proposed Act should provide that the scheme decision maker must refuse any application where satisfied on the balance of probabilities:
- (a) the applicant has committed the criminal act the subject of the application
 - (b) the applicant voluntarily and freely participated in, assisted in or encouraged the commission of the criminal act the subject of the application
 - (c) the application is made in collusion with the person who committed or is alleged to have committed the criminal act, or
 - (d) an earlier application has been made in relation to the same criminal act, whether or not the earlier application has been determined.
- 77 The proposed Act should provide that the scheme decision maker, in determining whether or not to make a recovery payment, or the amount of the recovery payment, must have regard to:
- (a) whether the applicant, or the direct victim if the applicant is not the direct victim, was committing an offence at the time of the criminal act the subject of the application, and that offence was the primary reason the criminal act the subject of the application was committed
 - (b) whether previous involvement in criminal activity by the applicant, or the direct victim if the applicant is not the direct victim, was the primary reason the criminal act the subject of the application was committed.

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- 78 The proposed Act should provide that for the purposes of determining whether or not to make a recovery payment, or the amount of the recovery payment, the scheme decision maker must not have regard to criminal activity related to drug and alcohol consumption.
- 79 The proposed Act should provide that where the scheme decision maker is satisfied on the balance of probabilities that an alleged perpetrator is likely to benefit from the making of a recovery payment, the scheme decision maker may determine that a recovery payment be subject to a recovery plan, with monies held in trust and administered by a scheme case manager in accordance with the recovery plan.

Timeliness of decision making

- 80 To help ensure timely decision making, the proposed Act should:
- (a) provide that the scheme decision maker must act expeditiously in the determination of applications
 - (b) prescribe specific time limits within which determinations for immediate assistance, funeral expenses, counselling and practical assistance should be made, reflecting:
 - (i) the urgent nature of requests for immediate assistance and funeral expenses
 - (ii) the need to maintain continuity in service provision for victims in relation to counselling
 - (iii) best practice, benchmarked against the average time taken to determine financial assistance applications in other schemes
 - (c) provide that where an application for assistance is unable to be determined within the relevant prescribed time period, the scheme decision maker must:
 - (i) provide the applicant with written reasons for the failure to make a decision within the prescribed time limit
 - (ii) provide the applicant with information on the expected determination timeframe
 - (iii) if the scheme decision maker considers further identified information in relation to the application is necessary, request the applicant, or another person, in writing, to provide the specified further information in relation to the application.
 - (d) provide that the scheme decision maker is not permitted to delay the determination of an application pending the outcome of any other legal proceeding.

Transparency of decision making—written reasons for decisions

- 81 The proposed Act should provide that the scheme decision maker must provide written reasons for decisions, in plain language, in relation to:
- (a) accepting an application for immediate assistance, counselling, practical assistance or a recovery payment
 - (b) rejecting an application for immediate assistance, counselling, practical assistance or a recovery payment
 - (c) the factors taken into account in determining the amount of a recovery payment
 - (d) reducing an award of assistance on the grounds that a victim has received any other assistance, payment, compensation or damages from any other source in relation to the same criminal act, or
 - (e) requiring a refund of an award.

Transparency of decision making—review of decisions

- 82 The proposed Act should enable, at the request of an applicant:
- (a) internal review of a decision by a more senior scheme decision maker
 - (b) following completion of the internal review process, an external review of the decision to the Victorian Civil and Administrative Tribunal.
- 83 The proposed Act should provide that the scheme decision maker must accompany all written reasons for decisions with information on the right of review and timeframes for review.
- 84 The proposed Act should provide that applicants have:
- (a) 28 days to seek an internal review of a decision
 - (b) 28 days after an internal review of decision to seek an external review to the Victorian Civil and Administrative Tribunal.

Transparency of decision making—complaints process

- 85 The proposed Act should provide that the scheme decision maker must establish a complaints process relating to the administration of the proposed scheme, including the conduct of any scheme staff. This complaints process should be separate and distinct to a victim's right to review or appeal a decision and should be consistent with the principles governing responses to victims of crime under the *Victims' Charter Act 2006* (Vic).

Chapter 16. Interaction with other schemes and refund of awards

Interaction with other compensation and financial assistance schemes

- 86 The proposed Act should:
- (a) provide that a victim may be entitled to financial assistance under the proposed Act, notwithstanding any assistance, payment, compensation or damages they may be eligible for or may have received from any other source, where the award made under the proposed Act is for a different purpose than the other entitlement or payment
 - (b) provide that the scheme decision maker, at the time of making an award, must reduce the amount of assistance, equivalent to any assistance, payment, compensation or damages that the victim has received from any other source in relation to the same criminal act, if that payment was for the same purpose as the award under the proposed Act
 - (c) provide the scheme decision maker with discretion to reduce the amount of assistance provided to a victim, equivalent to any assistance, payment, compensation or damages that the scheme decision maker considers on the balance of probabilities that the victim will receive from any other source in relation to the same criminal act, and for the same purpose as an award under the proposed Act
 - (d) provide the scheme decision maker with the power to investigate and obtain information to assist in determining, at the time of making an award, whether to reduce the amount of assistance provided to a victim, equivalent to any assistance, payment, compensation or damages that the victim has received from any other source.
- 87 To assist the scheme decision maker in determining an application where a victim may be eligible for or may have received assistance, payment, compensation or damages from another source, including the circumstances in which an award may be reduced, or a refund of part or all of an award may be required, guidelines should be developed and should be made publicly available.

Refund of awards

- 88 The proposed Act should provide that:
- (a) after an award is made, a victim may be required to refund the award in whole or in part if the victim receives any assistance, payment, compensation or damages from any other source in relation to the same criminal act and for the same purpose for which the award has been made
 - (b) in determining whether a refund should be required, the scheme decision maker must have regard to the following factors:
 - (i) the quantum or type of any subsequent assistance, payment, compensation or damages received
 - (ii) any other circumstances that the scheme decision maker considers relevant, including the victim's specific circumstances.
- 89 To assist the scheme decision maker in determining whether a refund should be required, guidelines should be developed and should be made publicly available.

PART FIVE: SUSTAINABILITY AND IMPLEMENTATION

Chapter 17. Improving awareness and accessibility of the proposed victims of crime financial assistance scheme

Engagement and training

- 90 The proposed Act should:
- (a) provide that ongoing community engagement, public awareness and sector training and education activities regarding the proposed scheme are an essential component of the proposed scheme, including the training and education of victim support workers, advocates and legal professionals.
 - (b) provide that the scheme decision maker must:
 - (i) undertake targeted outreach activities regarding the proposed scheme with relevant frontline and community sector organisations including police, victim support organisations, hospitals, community health organisations, culturally and linguistically diverse advocacy organisations and legal services, to improve the numbers of victims accessing state-funded financial assistance
 - (ii) report annually on community engagement, public awareness and sector training and education activities.
- 91 The proposed scheme should be appropriately funded and resourced to enable ongoing community engagement, public awareness and sector training and education activities about the proposed scheme to be conducted.
- 92 Annual reporting on community engagement and public awareness activities undertaken should be part of the proposed scheme's key performance indicators.

Forms and information

- 93 The proposed Act should provide that all forms and other information relevant to the proposed scheme must be in plain language, readily available and accessible in a range of formats.

Chapter 18. Costs and sustainability of the proposed victims of crime financial assistance scheme

Scheme establishment and demand

- 94 A comprehensive demand modelling project should be undertaken to assess current unmet demand under the existing scheme and anticipated demand under the proposed scheme.

Sustainability of the proposed scheme—offender recovery

- 95 The proposed Act should:
- (a) enable a victim to assign to the state their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates, as is currently provided for under section 51 of the *Victims of Crime Assistance Act 1996* (Vic)
 - (b) require any amount equal to the expended amount to be paid into the Consolidated Fund with the balance, if any, to be paid to the assignor, as is currently provided for under section 51 of the *Victims of Crime Assistance Act 1996* (Vic)
 - (c) provide that the scheme decision maker must advise all victims that they may assign to the state their right to recover from any other person, and provide clear information on the process for such recovery
 - (d) notwithstanding a victim's assignment of their right, provide the proposed scheme decision maker with discretion not to recover or continue to recover an amount from an offender because:
 - (i) of the scheme decision maker's assessment of the objective risks to the safety of any person; or
 - (ii) the scheme decision maker determines that the recovery does not have a reasonable prospect of success
 - (e) provide the scheme decision maker with the power to investigate and obtain any information reasonably necessary to assist in determining whether the recovery has a reasonable prospect of success.
- 96 To enable offender contributions to be effectively pursued, where a victim elects for the state to do so:
- (a) the scheme decision maker should be provided with dedicated funding and resourcing to pursue such contributions and this funding should be sufficient not to divert resources from the provision of support to victims under the proposed scheme, and
 - (b) there should be further government consideration of the appropriate agency for pursuing such contributions.

Sustainability of the proposed scheme—'victim levies'

- 97 To assist with scheme sustainability, further consideration should be given by government to the introduction of a 'victim levy' payable by offenders on conviction.

Chapter 19. Monitoring the operation of the proposed Act and scheme for victims of crime financial assistance to ensure best practice

Reporting and publication of data

- 98 The proposed Act should provide that the scheme decision maker must annually publish and make publicly available in readily accessible form information and data relating to all aspects of the scheme, including but not limited to:
- (a) the number and type of applications lodged
 - (b) applicant details, including geographical location, gender, age and whether they are a member of a vulnerable group or groups that experience discrimination and disadvantage
 - (c) application outcomes, including the number and type of awards granted
 - (d) the amount and duration of assistance
 - (e) processing times
 - (f) decision making, particularly in relation to the application of discretionary provisions in the proposed Act
 - (g) offender recovery.

Review of the proposed Act

- 99 The proposed Act should provide for a review of the operation and effectiveness of the Act and the scheme not more than five years after its commencement.

Transitioning to the proposed Act and scheme

- 100 The proposed Act should provide for the following transitional provisions:
- (a) All pending applications before the Victims of Crime Assistance Tribunal at the commencement date of the proposed Act should be finalised under the *Victims of Crime Assistance Act 1996* (Vic).
 - (b) All new applications for financial assistance for victims of crime made on or after the commencement date of the proposed Act should be made under the proposed Act and determined by the proposed scheme.
 - (c) All applications for variations of existing awards made under the *Victims of Crime Assistance Act 1996* (Vic) on or after the commencement date of the proposed Act should be treated as new applications made under the proposed Act.

PART ONE: INTRODUCTION AND CONTEXT

Introduction

- 2** Referral to the Commission
- 2** Scope of reference
- 4** The Commission's process
- 5** The Commission's approach
- 6** Report structure

1. Introduction

Referral to the Commission

First terms of reference

- 1.1 On 22 December 2016, pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), 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* (VOCAA).
- 1.2 The first terms of reference are set out at page viii of this report.
- 1.3 In June 2017 the Commission published a consultation paper on the first terms of reference.¹

Supplementary terms of reference

- 1.4 On 7 July 2017, pursuant to section 5(2)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), the Attorney-General asked the Commission to review and make recommendations on supplementary terms of reference in relation to the operation and effectiveness of the VOCAA and the Victims of Crime Assistance Tribunal (VOCAT) for all victims of crime.
- 1.5 The Attorney-General requested the Commission to provide a single report on both the first and supplementary terms of reference by no later than 27 July 2018.
- 1.6 The supplementary terms of reference are set out at page ix of this report.
- 1.7 In August 2017 the Commission published a supplementary consultation paper on the further terms of reference.²

Scope of reference

- 1.8 The first terms of reference require the Commission to consider how the purpose and objectives of the VOCAA are realised for family violence victims, having regard to the issues raised by Recommendation 106 of the Victorian Royal Commission into Family Violence.
- 1.9 Accordingly, the first terms of reference are part of the Victorian Government response to the recommendations of the Royal Commission into Family Violence.

- 1.10 Fundamentally, the first terms of reference require the Commission to answer the following question: What changes should be made to the VOCAA to better assist victims of family violence rebuild their lives and recover?
- 1.11 The supplementary terms of reference expand the Commission’s inquiry to consider the operation and effectiveness of the VOCAA and VOCAT for all victims, including family violence victims, in achieving the purposes of the VOCAA.
- 1.12 The supplementary terms of reference also require the Commission to consider whether any processes, procedures or requirements under the VOCAA cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model.
- 1.13 Accordingly, while the purpose and rationale for state-funded financial assistance schemes for crime victims is discussed to provide historical context, the Commission does not consider the question of whether or not Victoria should continue to have a state-funded scheme.³ This question is outside the scope of the Commission’s terms of reference. The question centrally within the Commission’s terms of reference is: which is the most effective model?
- 1.14 Also outside the scope of the Commission’s terms of reference is consideration of the role of the Victims Support Agency and the Victims Assistance Program—although both are discussed in Chapter 4 to provide context for the Commission’s review. Notwithstanding this, the Commission considers it important to acknowledge from the outset the significant role the Victims Support Agency and the Victims Assistance Program continue to provide in supporting victims of crime in their recovery journey.
- 1.15 In considering the matters identified in both the first and supplementary terms of reference, and in conducting the review, the Commission is guided by the objectives specified in the supplementary terms of reference—namely, that a state-funded assistance scheme for victims should seek to achieve outcomes for victims that:
- are fair, equitable and timely
 - are consistent and predictable
 - minimise trauma and maximise the therapeutic effect for victims.
- 1.16 In addition, the supplementary terms of reference specify that a state-funded financial assistance scheme must be efficient and sustainable for the state.
- 1.17 In undertaking this review, the Commission is conscious of the importance of keeping the perspectives of victims themselves at the forefront of the reform process. As one victim put clearly in their submission to the Commission:
- I can honestly understand why victims don’t bother to pursue ‘justice’ and why the police, legal fraternity, judiciary and mental health support services actively dissuade entry into the court and tribunals. The entire system is weighed heavily against the complainant. Gatekeepers are met at every step.⁴

3 For discussion on the purpose and rationale of such schemes see, eg, Michael Kirby, ‘Compensation for Victims of Criminal Injuries in Australia’ (Paper presented at the British Institute of International and Comparative Law Conference, Windsor Great Park, United Kingdom, 27 March 1981) 6–7.

4 Submission 60 (BFK).

The Commission's process

The Division

- 1.18 The Chair of the Commission, the Hon. Philip Cummins AM, exercised his powers under section 13(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) to constitute a Division, which he chaired, to oversee the conduct of this reference.
- 1.19 Ms Liana Buchanan, Mr Bruce Gardner PSM, Dr Ian Hardingham QC, and the Hon. Frank Vincent AO QC joined the Chair on the Division for the duration of the reference. Ms Gemma Varley PSM was also part of the Division during the initial research stages and during preparation of the first consultation paper.

First consultation paper

- 1.20 In June 2017, the Commission published the first consultation paper responding to the first terms of reference.⁵ This followed preliminary consultations with representatives of key stakeholders from the courts and judiciary, government departments, family violence advocacy and service providers, legal services and victim support agencies.
- 1.21 The first consultation paper considered the findings of the Royal Commission into Family Violence, matters raised during preliminary consultations and preliminary analysis of relevant case law, academic literature, government reviews and inquiries.
- 1.22 The first consultation paper sought the views of victims, persons affected, professionals, stakeholders and the community on key aspects of the VOCAA and the operation of VOCAT as they relate to victims of family violence. The paper posed 66 questions for consideration and invited written submissions by 28 July 2017. This submission deadline was later extended until 31 October 2017 following receipt of the supplementary terms of reference and publication of the supplementary consultation paper.

Supplementary consultation paper

- 1.23 In August 2017, the Commission published a supplementary consultation paper responding to the supplementary terms of reference.⁶ The supplementary consultation paper was also informed by preliminary consultations with representatives of key stakeholders from the courts and judiciary, government departments, family violence advocacy and service providers, legal services and victim support agencies.
- 1.24 The supplementary consultation paper built on some of the matters raised in the first consultation paper. The paper introduced a number of additional considerations relevant to the broader operation of the VOCAA and VOCAT for all victims of crime as required by the supplementary terms of reference. The supplementary consultation paper also included analysis of relevant case law, academic literature, government reviews and inquiries as related to the broader terms of reference.
- 1.25 The supplementary consultation paper sought the views of victims, persons affected, professionals, stakeholders and the community on key aspects of the VOCAA and the operation of VOCAT. The supplementary consultation paper posed 51 questions for consideration and invited written submissions on both consultation papers by 31 October 2017.

Submissions

- 1.26 A total of 60 written submissions were received in response to both consultation papers (see Appendix A). Those which may be made public are published on the Commission's website.

Consultations

- 1.27 In conducting this reference, the Commission consulted with individuals and organisations with experience of the VOCAT process or whose work intersects with the provision of support to victims of crime.
- 1.28 Two stages of consultations were held. The first consisted of preliminary meetings to assist the Commission in gathering information for the first and supplementary consultation papers.
- 1.29 The second stage consisted of formal consultations with individuals and organisations and commenced following publication of the supplementary consultation paper. Formal consultations were held with victims, including family violence ‘victim survivors’, the courts and judiciary, private and specialist legal practitioners, community legal centres, victim, witness and court support organisations, victims’ advocacy organisations, peak advisory or advocacy organisations for victims of crime, family violence and other diverse communities, and state-funded financial assistance agencies in other Australian jurisdictions and academics. Over 30 formal consultation meetings were held, with the Commission consulting with some stakeholders on more than one occasion (see Appendix B).

The Commission’s approach

Recognising the diversity of victims

- 1.30 In the Commission’s first and supplementary consultation papers, the Commission acknowledged the diversity of victims and how this may affect a victim’s recovery from a criminal act.⁷ Experiences of victimisation can be influenced by a broad range of factors including age, gender, sex, religion, sexual orientation, ethnicity, culture, disability, socio-economic status, geographic location, health, crime types, relationship with the perpetrator and a victim’s past experiences of the justice system.⁸
- 1.31 In reviewing the operation and effectiveness of the VOCAA and VOCAT, the Commission has approached recommendations for reform in a way that recognises victims may have personal characteristics, vulnerabilities and structural influences that impact their experience of victimisation.⁹ The Commission aims to ensure such diversity is represented in the recommendations contained throughout. This includes recognising that a range of intersectional factors may also impact a victim’s recovery from crime.¹⁰ For example, the Commission acknowledges that for victims of family violence, the impacts of violence can often be compounded by various forms of marginalisation.¹¹

Recognising family violence victims

- 1.32 As noted above, the first terms of reference asked the Commission to consider how the purpose and objectives of the VOCAA are realised for family violence victims, having regard to the issues raised by Recommendation 106 of the Victorian Royal Commission into Family Violence (the Royal Commission into Family Violence). The supplementary terms of reference require the Commission to expand its inquiry to consider the operation and effectiveness of the VOCAA and VOCAT for all victims of crime.

7 See, eg, Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 177–8; Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 18–19.

8 See, eg, Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process—Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* Information Paper 2 (2015) 3–5. See generally, Victorian Government, *Designing for Diversity and Intersectionality* <www.vic.gov.au/familyviolence/designing-for-diversity-and-intersectionality.html>.

9 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims’ Commissioner and University of Portsmouth, 2016) 8.

10 ‘Intersectionality’ in this context refers to different parts of a person’s identity resulting in overlapping—or ‘intersectional’—forms of discrimination or disadvantage. See, for example, Victorian Government, *Designing for Diversity and Intersectionality* <www.vic.gov.au/familyviolence/designing-for-diversity-and-intersectionality.html>.

11 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) 12.

- 1.33 Each of the matters specified in the first terms of reference are considered throughout this report contextually, as they arise. The Commission's approach to addressing the first and supplementary terms of reference is outlined below.
- 1.34 To assist readers who have a particular interest, Appendix C provides a summary of how relevant recommendations in this report have considered the unique circumstances of victims of family violence.

Addressing the first and supplementary terms of reference

- 1.35 When considered together, the first and supplementary terms of reference require the Commission to adopt a broad approach and consider the operation and effectiveness of the VOCAA and VOCAT for all victims, including family violence victims.
- 1.36 Fundamentally, the overarching questions posed by both terms of reference are:
- What changes should be made to the VOCAA to better assist victims of crime, including victims of family violence, to rebuild their lives and recover?
 - Are there other models of state-funded financial assistance that would more effectively deliver assistance?
- 1.37 Each of these questions is wide-ranging and substantial. They require the Commission to consider not only legislative barriers that may be encountered by victims under the VOCAA, but any structural or procedural barriers related to the existing model of assistance.
- 1.38 To ensure each of the matters raised in the terms of reference are considered holistically, the Commission has adopted a broad approach to its consideration of reform proposals. Rather than consider each of the matters specified in the terms of reference in isolation, or sequentially following the structure of the terms of reference, the Commission has used a thematic approach which aims to:
- as a fundamental and threshold issue, identify the most effective model of assistance (Chapters 7–10)
 - address legal and technical barriers (Chapters 11–16)
 - address issues of sustainability and implementation (Chapters 17–19).
- 1.39 As a result of this thematic approach, each of the matters specified in the first and supplementary terms of reference are considered throughout the report as they arise. To provide a 'roadmap' for readers, a summary is provided in Appendix D detailing where, and how, each of the matters raised in both the first and supplementary terms of reference has been considered throughout this report.

Report structure

- 1.40 This report is divided into six parts, commencing with this introductory chapter which forms Part One of the report—'Introduction and context'. An overview of other initiatives, reviews and reforms relevant to the Commission's review is provided in Chapter 2.
- 1.41 Part Two—'State-funded financial assistance for victims of crime' comprises Chapters 3–6. It sets out the history and purpose of state-funded financial assistance schemes (Chapter 3), describes Victoria's existing approach under the VOCAA and VOCAT (Chapter 4) notes key issues with the existing scheme as identified to the Commission by stakeholders (Chapter 5) and considers the place of an alleged perpetrator in any state-funded financial assistance scheme (Chapter 6). This part provides the basis for the Commission's consideration in Part Three of the need for a new approach.

- 1.42 Part Three—‘The need for a new model of state-funded financial assistance for victims of crime’ addresses supplementary terms of reference matter 8 which asks the Commission to consider whether there are other models of state-funded financial assistance that would more effectively deliver assistance. It comprises Chapters 7–10 of the report.
- 1.43 Chapter 7 provides an assessment of victims’ needs and the existing scheme. Chapter 8, as required by the supplementary terms of reference, considers what model would more effectively deliver assistance for victims of crime and sets out the Commission’s recommendations for a new Act (proposed Act) and new scheme (proposed scheme). Chapters 9 and 10 set out the Commission’s recommendations for the establishment of a new decision maker and key components of the proposed scheme.
- 1.44 Part Four—‘The proposed Act for victims of crime financial assistance’ comprises Chapters 11–16. Chapter 11 sets out the purpose, objectives and principles of the proposed Act. Chapters 12–16 consider technical and procedural issues including eligibility criteria (Chapter 12), assistance available (Chapter 13), the process for making and application (Chapter 14) and decision making under the proposed Act and scheme (Chapter 15). Chapter 16 considers the interaction of the proposed scheme with other financial assistance schemes and when a refund of an award may be required.
- 1.45 Part Five—‘Sustainability and implementation’ comprises Chapters 17–19. Chapter 17 makes recommendations to improve victims’ awareness and access of the proposed scheme. Chapter 18 discusses the costs and sustainability of the proposed scheme and Chapter 19 outlines monitoring of the proposed scheme to ensure best practice.
- 1.46 Part Six concludes the report and the body of recommendations that have been made by the Commission.

Concurrent reviews and reforms relevant to victims of crime

- 10** Introduction
- 10** Victorian initiatives, reviews and reforms relating to victims of crime
- 16** Reviews and reforms in other jurisdictions

2. Concurrent reviews and reforms relevant to victims of crime

Introduction

- 2.1 This chapter provides an overview of initiatives, reviews and reforms relating to victims of crime in Victoria and other states and territories relevant to the Commission's review of the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) and the Victims of Crime Assistance Tribunal (VOCAT). The discussion in this part is structured in reverse chronological order by report or initiative from the most recent.

Victorian initiatives, reviews and reforms relating to victims of crime

The *Justice Legislation Amendment (Victims) Act 2018* (Vic)

- 2.2 In February 2018, the *Justice Legislation Amendment (Victims) Act 2018* (Vic) was passed to make changes to existing civil and criminal legislation to better support victims of child abuse.¹
- 2.3 Of relevance to this review is the amendment to the VOCAA, abolishing the two year time limit for victims of sexual or physical abuse which occurred when they were under the age of 18 years.² This change implemented a recommendation from the 2013 *Betrayal of Trust* report, which recognised that many victims of childhood abuse are unable to make an application for assistance within two years.³ The *Betrayal of Trust* report is discussed in more detail below.
- 2.4 The *Justice Legislation Amendment (Victims) Act 2018* (Vic) also expanded the definition of 'relevant offence' in the VOCAA to enable victims of child abuse material offences and sexual servitude to apply for VOCAT assistance.⁴
- 2.5 In addition, the *Justice Legislation Amendment (Victims) Act 2018* (Vic) introduced a range of evidentiary and procedural changes aimed at improving the experience of victims of child abuse and holding offenders to account.⁵ These included amending the *Sentencing Act 1991* (Vic) to prevent child sex offenders from using good character evidence to argue for more lenient sentences⁶ and amending the Children's Court publication restrictions in the *Children, Youth and Families Act 2005* (Vic) to allow adult victims to share their stories publicly.⁷

1 Office of the Premier (Vic), 'Making it Fairer for Victims of Crime' (Media Release, 12 December 2017) <www.premier.vic.gov.au/making-it-fairer-for-victims-of-crime/>.

2 *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 37. This amendment is contained in section 29(1A) of the *Victims of Crime Assistance Act 1996* (Vic).

3 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) Recommendation 27.1.

4 *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 22.

5 Office of the Premier (Vic), 'Making it Fairer for Victims of Crime' (Media Release, 12 December 2017) <www.premier.vic.gov.au/making-it-fairer-for-victims-of-crime/>.

6 *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 33.

7 *Ibid* s 24.

- 2.6 The *Justice Legislation Amendment (Victims) Act 2018* (Vic) also amended the *Criminal Procedure Act 2009* (Vic) to allow intermediaries to assist vulnerable victims to give evidence in court and to police.⁸ The introduction of intermediaries implements recommendations made by the Commission in its 2016 report, *The Role of Victims of Crime in the Criminal Trial Process*, which is also discussed further below.⁹

Sentencing Advisory Council—Review of restitution and compensation orders

- 2.7 In June 2017, the Sentencing Advisory Council was asked to provide advice to the Attorney-General about whether restitution and compensation orders made for the benefit of victims under Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic) should become a sentencing option.¹⁰ This review is in response to a recommendation by the Commission in its report *The Role of Victims of Crime in the Criminal Trial Process*.¹¹
- 2.8 In undertaking its review, the Sentencing Advisory Council has been asked to consider whether the purposes of sentencing should include financial reparation for victims, whether there should be a presumption in favour of courts making such orders and whether such orders should be enforced by the state in the form of a fine.¹²
- 2.9 The Sentencing Advisory Council has been asked to report to the Attorney-General by 1 September 2018, two months after the Commission has been asked to report to the Attorney-General.¹³
- 2.10 In March 2018, the Sentencing Advisory Council released an issues and options paper to assist with its consultations.¹⁴ This paper noted that ‘in Victoria victims of crime have a number of different options to seek compensation depending on the circumstances’, including the VOCAA and VOCAT,¹⁵ and stated that ‘for the criminal justice system to adequately and fairly compensate victims, a coherent approach to victim-orientated reforms is required.’¹⁶ The closing date for written submissions was 20 April 2018.

Community Safety Trustee—First progress report (2017)

- 2.11 In June 2017, the Victorian Community Safety Trustee released a progress report on the implementation of the Victorian Government’s *Community Safety Statement 2017*, which identified five priority reform areas aimed at both reducing the harm caused by crime and improving community safety.¹⁷
- 2.12 Of relevance to this review, the progress report raised concerns regarding delays in relation to VOCAT applications.
- 2.13 Currently, on average, it takes around nine months to finalise an application and some matters span more than two years. If the approach is ‘victims first’, then the current process warrants review in the interests of quick resolution for victims.¹⁸

8 Ibid s 25.

9 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) Recommendations 30 and 31.

10 See Sentencing Advisory Council (Vic), *Restitution and Compensation Orders* (2017) <www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders>.

11 See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) xxviii, Recommendation 49.

12 See Sentencing Advisory Council (Vic), *Restitution and Compensation Orders* (2017) <www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders>.

13 Ibid.

14 Sentencing Advisory Council (Vic), *Restitution and Compensation Orders*, Issues and Options Paper (2018).

15 Ibid xv.

16 Ibid.

17 See Community Safety Trustee (Vic), *Community Safety Trustee: First Progress Report—June 2017* (2017) 14.

18 Ibid.

Victorian Law Reform Commission—The Role of Victims of Crime in the Criminal Trial Process (2016)

- 2.14 In October 2014, the Commission was asked to review and report on the role of victims of crime in the criminal trial process, including their role in the decision to prosecute and in the sentencing process and other trial outcomes.¹⁹
- 2.15 In August 2016, the Commission released its report *The Role of Victims of Crime in the Criminal Trial Process*.²⁰ Fifty-one recommendations to improve victim experiences during the criminal trial process were made.²¹
- 2.16 As discussed above, in February 2018, the Commission’s recommendations to introduce intermediaries for child victims and victims with a disability was implemented by the *Justice Legislation Amendment (Victims) Act 2018* (Vic).²²
- 2.17 Of relevance to this review, the Commission made recommendations about:
- Improving the legislative framework and practical operation of restitution and compensation orders against offenders.²³ As outlined above, these matters are currently being considered by the Sentencing Advisory Council.²⁴
 - Restricting access to, and use of, VOCAT records to protect victims of crime during the VOCAT and criminal trial process.²⁵ These recommendations are considered in Chapter 14.
- 2.18 In addition, the Commission identified concerns regarding the accessibility of VOCAT for victims, particularly for victims in regional areas who may be unable to access legal advice and assistance.²⁶ However, an extensive review of VOCAT was beyond the Commission’s terms of reference, which were limited to whether VOCAT had an impact on a victim’s participation in the criminal trial process.²⁷

Victorian Royal Commission into Family Violence (2016) and the Victorian Government response

Victorian Royal Commission into Family Violence

- 2.19 The Victorian Royal Commission into Family Violence was established in February 2015 to ‘inquire into and report on how Victoria’s response to family violence can be improved by providing practical recommendations to stop family violence’.²⁸
- 2.20 On 29 March 2016, the Royal Commission into Family Violence delivered its final report which 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.²⁹

19 Victorian Law Reform Commission, *Terms of Reference* (27 October 2014) Victims of Crime in the Criminal Trial Process <www.lawreform.vic.gov.au/projects/victims-crime-criminal-trial-process/victims-crime-criminal-trial-process-terms-reference>.

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

21 Ibid.

22 *Justice Legislation Amendment (Victims) Act 2018* (Vic) s25. This provision amends the *Criminal Procedure Act 2009* (Vic) to introduce the use of intermediaries for vulnerable victims, as recommended by Recommendations 30 and 31 of the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016).

23 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) xxvii–xxviii, Recommendations 45–9.

24 Sentencing Advisory Council (Vic), *Restitution and Compensation Orders* (2017) <www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders>.

25 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: see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 247.

26 Ibid 238.

27 Ibid 228.

28 Victoria, Royal Commission into Family Violence, *Terms of Reference* (2015) <www.rcfv.com.au/MediaLibraries/RCFamilyViolence/UploadedDocs/Terms-of-Reference.pdf>.

29 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 5.

- 2.21 Of relevance to this review, the Royal Commission into Family Violence found that the cumulative effects of family violence can be made worse by difficulties victims face in navigating the justice and service system, including attempting to gain social and financial independence.³⁰
- 2.22 The Royal Commission into Family Violence made 227 recommendations. These encompassed reforms to:³¹
- 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).
- 2.23 The first terms of reference received by the Commission directly relate to matters raised by Recommendation 106 of the Royal Commission into Family Violence.
- 2.24 Recommendation 106 formed part of the Royal Commission into Family Violence’s recommendations relating to ‘recovery: health and wellbeing’ for victims of family violence,³² alongside recommendations pertaining to counselling services³³ and Medicare.³⁴
- 2.25 Recommendation 106 stated:
- 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.³⁵
- 2.26 The Royal Commission into Family Violence also supported further enquiries into the efficacy of a combined victim support and financial assistance scheme, like that administered in New South Wales.³⁶
- 2.27 These matters, along with other matters specifically addressing issues with the operation of the VOCAA for victims of family violence, were discussed in the Commission’s first consultation paper.³⁷

30 Ibid 65.

31 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.

32 See Chapter 20 in *ibid* 65–87.

33 Ibid 84, Recommendation 104.

34 Ibid, 86, Recommendation 105.

35 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 87.

36 Ibid 86.

37 See generally, Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017).

Victorian Government response—Ending Family Violence: Victoria’s Plan for Change (2016)

- 2.28 In November 2016, the Victorian Government published its response to the Royal Commission into Family Violence—a 10 year plan to end family violence.³⁸ *Ending Family Violence: Victoria’s Plan for Change* outlines how the Victorian Government intended to implement all 227 recommendations of the Royal Commission into Family Violence.³⁹ The plan is focused on four broad outcomes:
- 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.⁴⁰
- 2.29 Of relevance to this review is Outcome 2, as financial assistance for victims of crime is one avenue through which family violence victims may pursue safety and recovery. In *Ending Family Violence: Victoria’s Plan for Change*, the Victorian Government noted the role of VOCAT in achieving financial security for victims of family violence.⁴¹
- 2.30 In support of the plan for change, in July 2017, the Victorian Government released a concept paper, *Support and Safety Hubs: Statewide Concept*, which outlined the intent, scope, key functions and roles of the support and safety hubs.⁴² This initiative related to Recommendation 37 of the Royal Commission into Family Violence, which recommended that the Victorian Government introduce support and safety hubs in each of the state’s 17 Department of Health and Services regions.⁴³
- 2.31 The concept paper noted that the support and safety hubs are intended to provide a single entry point for victims and perpetrators of family violence to access a range of information and support services, including VOCAT.⁴⁴
- 2.32 As at 28 May 2018, support and safety hubs are expected to be established at five initial launch sites in Mallee, Barwon, Bayside Peninsula, Inner Gippsland and North East Melbourne by mid-2018.⁴⁵ The Victorian Government has committed to support and safety hubs operating at all 17 Department of Health and Human Services areas across Victoria by the end of 2021.⁴⁶

Victorian Parliamentary Inquiry into Abuse in Disability Services (2016)

- 2.33 In May 2015, the Family and Community Development Committee of the Parliament of Victoria was asked to conduct an inquiry into abuse in disability services—in particular, why abuse in disability services is not appropriately reported or acted upon, and how it can be prevented.⁴⁷
- 2.34 In May 2016, the Family and Community Development Committee delivered its report, which made 49 recommendations to reform the disability sector in Victoria.⁴⁸

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

39 Ibid ix.

40 Ibid x.

41 Ibid 41.

42 Family Safety Victoria, *Support and Safety Hubs Service Model* (2018) <www.vic.gov.au/system/user_files/Documents/fv/Support_and_Safety_Hubs_Service_Model-1.pdf>.

43 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 55.

44 Family Safety Victoria, *Support and Safety Hubs Service Model* (2018) <www.vic.gov.au/system/user_files/Documents/fv/Support_and_Safety_Hubs_Service_Model-1.pdf>. See, also ‘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, in Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) 40–1.

45 Family Safety Victoria, *Support and Safety Hubs Service Model* (2018) <www.vic.gov.au/system/user_files/Documents/fv/Support_and_Safety_Hubs_Service_Model-1.pdf>.

46 Ibid.

47 Family and Community Development Committee, Parliament of Victoria, *Terms of Reference* (25 April 2016) Inquiry into Abuse in Disability Services <www.parliament.vic.gov.au/fcdc/inquiries/article/1854>.

48 See generally Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services*, Final Report (2016).

- 2.35 Of relevance for this review are the Family and Community Development Committee's findings that people with disability and their families face a number of barriers to reporting violence and abuse to police.⁴⁹ As noted by the Committee, barriers to reporting include a fear of reprisals from service providers, a belief that allegations of abuse will not be taken seriously and a lack of accessible knowledge about how to make a report.⁵⁰ The Committee also identified systemic barriers to reporting, such as a culture of normalisation of abuse within disability services.⁵¹
- 2.36 In addition, the Family and Community Development Committee noted the overlap between the Committee's Inquiry and the Royal Commission into Family Violence, which highlighted the particular experiences of people with disability in relation to family violence.⁵² Accordingly, the Committee recommended that the Victorian Government adopt each of the Royal Commission's recommendations that relate directly to people with disability.⁵³

2013 Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations—*Betrayal of Trust* (2013)

- 2.37 In April 2012, the Family and Community Development Committee of the Victorian Parliament was asked to inquire into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations.⁵⁴
- 2.38 The Committee's final report, *Betrayal of Trust*, was tabled in the Victorian Parliament on 13 November 2013.⁵⁵
- 2.39 Of relevance to this review, the Committee considered VOCAT a viable alternative to civil litigation for victims of criminal child abuse because of its ability to provide an independent acknowledgment of harm, its non-adversarial approach, and the supports it provides for victims.⁵⁶
- 2.40 However, the Committee also heard of limitations to VOCAT's ability to adequately respond to historical child abuse.⁵⁷ Issues raised included the two-year time limit for making an application, the limited compensation available, the lack of ongoing financial support for victims, and the absence of a mechanism for organisations to contribute to awards of financial assistance.⁵⁸
- 2.41 The report made the following recommendations relating to VOCAT:
- That the VOCAA be amended to specify that no time limits apply for applications for assistance by victims of criminal abuse in organisational settings.⁵⁹
 - That the Victorian Government review the functions of VOCAT to consider its capacity to administer a specific scheme for victims of criminal child abuse.⁶⁰
- 2.42 On 8 May 2014, the Victorian Government tabled its response to the report.⁶¹ As part of its response, the Victorian Government announced it would consider options for civil law reform and redress.⁶²

49 Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Service*, Final Report (2016) 4.

50 Ibid 46.

51 Ibid.

52 Ibid 172.

53 Ibid, Recommendation 5.6.

54 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 1, v.

55 Victoria, Parliamentary Debates, Legislative Assembly, 13 November 2013, 3977 (Frank McGuire).

56 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 553–6.

57 Ibid 557.

58 Ibid 557–9.

59 Ibid 557, Recommendation 27.1.

60 Ibid 574, Recommendation 28.1.

61 Victoria, Parliamentary Debates, Legislative Assembly, 8 May 2014, 1589 (Mary Wooldridge, Minister for Community Services).

62 Victorian Government, *Victorian Government Response to the Report of the Family and Community Development Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations 'Betrayal of Trust'* (2014) 2.

- 2.43 In August 2015 a consultation paper, *A Victorian Redress Scheme for Institutional Child Abuse* was published by the Department of Justice and Regulation. Among other things, the consultation paper considered the feasibility of placing a state redress scheme within the administrative bounds of VOCAT, for example by including a new specialised stream for historical child sexual abuse in institutional settings.⁶³
- 2.44 However, in November 2016, the Federal Minister for Social Services, Christian Porter MP, announced that the Australian Government intended to establish a national redress scheme in response to the recommendations of the Commonwealth Royal Commission into Child Sexual Abuse (the Royal Commission).⁶⁴
- 2.45 The Commonwealth Royal Commission into Child Sexual Abuse and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) which would establish the national redress scheme,⁶⁵ are discussed further below.
- 2.46 On 9 March 2018, both the Victorian and New South Wales Governments announced that they would opt-in to the national scheme.⁶⁶ On 19 March 2018, the Australian Capital Territory Government also announced it would join the scheme.⁶⁷ On 30 April 2018, both Queensland and Northern Territory joined the Redress Scheme.⁶⁸ On 22 May 2018 and 28 May 2018, respectively, Tasmania⁶⁹ and South Australia⁷⁰ also announced that they would join the Redress Scheme.
- 2.47 As noted above, the *Justice Legislation Amendment (Victims) Act 2018* (Vic), removed the two-year time limit for VOCAT applications for victims of physical or sexual abuse that occurred when they were under the age of 18 years.⁷¹

Reviews and reforms in other jurisdictions

Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse (2017) and the Australian Government response

- 2.48 The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse was established in January 2013 to inquire into institutional responses to allegations and incidents of child sexual abuse, focusing on systemic issues while being informed by individual cases.⁷² Of relevance to this review was the requirement for the Royal Commission to inquire into redress options for victims of sexual abuse.⁷³

63 Department of Justice and Regulation (Vic), *A Victorian Redress Scheme for Institutional Child Abuse*, Public Consultation Paper (5 August 2015) 34–5.

64 Christian Porter and George Brandis, 'Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse' (Media Release, 4 November 2016) <<https://formerministers.dss.gov.au/17434/commonwealth-redress-scheme-for-survivors-of-institutional-child-sexual-abuse-2/>>.

65 See Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017* (2017) <www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=r6006>.

66 Malcolm Turnbull, Gladys Berejiklian and Daniel Andrews, 'First States Commit to Redress Scheme' (Media Release, 9 March 2018) <www.malcolmturbull.com.au/media/first-states-commit-to-redress-scheme-9-march-2018>.

67 Andrew Barr and Gordon Ramsay, 'ACT to Join National Redress Scheme for Abuse Survivors' (Media Release, 19 March 2018) <www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2018/act-to-join-national-redress-scheme-for-abuse-survivors>. See also Department of Social Services (Cth), *National Redress Scheme for People Who Have Experienced Institutional Child Sexual Abuse* <www.dss.gov.au/families-and-children/programs-services/children/national-redress-scheme-for-people-who-have-experienced-institutional-child-sexual-abuse>.

68 Dan Tehran, 'Queensland and Northern Territory Join Redress Scheme' (Media Release, 30 April 2018) <<https://ministers.dss.gov.au/media-releases/3001>>.

69 Dan Tehran, 'Tasmania Commits to the National Redress Scheme' (Media Release, 22 May 2018) <<https://ministers.dss.gov.au/media-releases/3101>>.

70 Dan Tehran, 'South Australia Joins National Redress Scheme' (Media Release, 28 May 2018) <<https://ministers.dss.gov.au/media-releases/3121>>.

71 *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 37.

72 See the Terms of Reference, as set out in the letters patent, available in Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) vol 1, Appendix A.

73 See paragraph (d) of the Terms of Reference, which states 'what institutions and governments should do to address, or alleviate, the impact of, past and future child sexual abuse and related matters in institutional contexts, including in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services', see ibid.

- 2.49 In 2015 the Royal Commission published its report in relation to redress and civil litigation.⁷⁴ The Royal Commission noted that while the report was an interim one, it contained the Royal Commission's final recommendations in relation to redress for victims.⁷⁵
- 2.50 The Royal Commission considered the use of states and territories' existing victims of crime financial assistance schemes to deliver the services of a national redress scheme. However, the Royal Commission stated that such use should be limited to 'back office' operational support, with the national redress scheme establishing nationally consistent branding, application forms and processes, guidelines and processes for determining payments.⁷⁶
- 2.51 The Royal Commission recommended that 'in order to provide redress under the most effective structure for ensuring justice for survivors, the Australian Government should establish a single national redress scheme.'⁷⁷
- 2.52 In October 2017, in response to the recommendations of the Royal Commission, the Australian Government introduced the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) into the Australian Parliament.⁷⁸
- 2.53 On 30 November 2017, the Bill was referred to the Senate Community Affairs Legislation Committee for inquiry and on 28 March 2018, the Committee handed down its report.⁷⁹
- 2.54 As at 28 May 2018 the Australian Government was considering its response to the report.⁸⁰
- 2.55 The Bill as introduced to the Australian Parliament proposes a scheme that is intended to operate for a period of 10 years and provides three elements of redress to eligible survivors of institutional child sexual abuse:
- 1) a monetary payment of up to \$150,000
 - 2) access to counselling and psychological services
 - 3) a direct personal response from responsible institutions at the request of a survivor.⁸¹
- 2.56 As noted above, the Australian Capital Territory, New South Wales, Northern Territory, South Australian and Tasmanian Governments have all announced their intention to opt-in to the national scheme.
- 2.57 In May 2018, New South Wales was the first state to pass legislation referring certain matters relating to the national redress scheme for institutional child sexual abuse to the Australian Parliament.⁸²

74 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015).

75 Ibid 2.

76 Ibid 317.

77 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 322, Recommendation 26.

78 Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (2017). The Bill was introduced to the House of Representatives on 26 October 2017.

79 Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018).

80 Department of Social Services (Cth), *National Redress Scheme for People Who Have Experienced Institutional Child Sexual Abuse* (2018) <www.dss.gov.au/families-and-children/programs-services/children/national-redress-scheme-for-people-who-have-experienced-institutional-child-sexual-abuse>.

81 Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 3.

82 See *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (NSW).

Australian Government—Early release of superannuation benefits under compassionate and financial hardship grounds and for victims of crime compensation (2017)

- 2.58 On 8 December 2017, the Australian Government announced a Treasury-led review of the rules governing early release of superannuation.⁸³ As part of this review, on 20 December 2017, the Minister for Revenue and Financial Services, the Hon. Kelly O'Dwyer MP, released an issues paper.⁸⁴
- 2.59 The issues paper considered whether state and territory compensation schemes for victims of crime should be able to recover costs from a perpetrator's superannuation.⁸⁵ In addition, the issues paper considered whether victims of crime should be able to access a perpetrator's superannuation under a compensation or restitution order.⁸⁶
- 2.60 Submissions to the issues paper closed on 12 February 2018.⁸⁷
- 2.61 The Treasury-led review was to make recommendations to the Australian Government in March 2018.⁸⁸
- 2.62 In March 2018 the Australian Government was reported in the media as being in the process of drafting legislation to allow victims of crime to access perpetrators' superannuation, with plans for the proposed legislation to be introduced to the Australian Parliament by the end of the year.⁸⁹
- 2.63 On 28 May 2018, the Hon. Kelly O'Dwyer MP released for public consultation two draft proposals on access to superannuation for victims of crime:
- A new claw-back mechanism for 'out of character' superannuation contributions made by perpetrators to shield their assets from use in compensating victims of their crimes.
 - A proposal to allow victims of serious, violent crimes to be able to access a perpetrator's superannuation as compensation, where other assets have been exhausted, subject to appropriate limits and thresholds.⁹⁰
- 2.64 Stakeholders have been invited to comment on the proposals by way of submission by 15 June 2018.⁹¹

Queensland—Review of the *Victims of Crime Assistance Act 2009* (Qld) (2015)

- 2.65 In 2009, and as a consequence of concerns about complexity, cost, and delays for victims in receiving compensation, Queensland changed from a judicial model of assistance to an administratively based scheme through the introduction of the *Victims of Crime Assistance Act 2009* (Qld) (Queensland Act).⁹²
- 2.66 In October 2013 a statutory review of the new scheme was commenced by the Queensland Department of Justice and Attorney-General, and a final report was published in December 2015.⁹³

83 Kelly O'Dwyer, 'Government to Review Rules for Early Release of Superannuation, Including Victims of Crime Compensation' (Media Release, 8 December 2017) <<http://kmo.ministers.treasury.gov.au/media-release/118-2017/>>.

84 The Treasury (Cth), *Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation*, Issues Paper (2017). See also Kelly O'Dwyer, 'Consultation Commences on Early Release of Superannuation including Victims of Crime Compensation' (Media Release, 20 December 2018) <<http://kmo.ministers.treasury.gov.au/media-release/122-2017/>>.

85 The Treasury (Cth), *Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation*, Issues Paper (2017) 23.

86 Ibid 19.

87 Kelly O'Dwyer, 'Consultation Commences on Early Release of Superannuation including Victims of Crime Compensation' (Media Release, 20 December 2017) <<http://kmo.ministers.treasury.gov.au/media-release/122-2017/>>.

88 Kelly O'Dwyer, 'Government to Review Rules for Early Release of Superannuation, including Victims of Crime Compensation' (Media Release, 8 December 2017) <<http://kmo.ministers.treasury.gov.au/media-release/118-2017/>>.

89 Elise Fantin, 'Victims of Crime Could Access the Superannuation of Their Perpetrators under New Proposal', *ABC News* (online), 26 March 2018 <www.abc.net.au/news/20180326/proposalforvictimsofcrimeaccessperpetratorssuperannuation/9587154>.

90 Kelly O'Dwyer, 'New Proposals to Improve Compensation for Victims of Crime' (Media Release, 28 May 2018) <<http://kmo.ministers.treasury.gov.au/media-release/060-2018/>>.

91 Ibid.

92 This occurred following a review of the *Criminal Offence Victims Act 1995* (Qld) and the delivery of services to victims of crime, see Department of Justice and Attorney-General (Qld), *Victims of Crime Review Report* (2008).

93 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 1.

- 2.67 Overall, the review found that the new scheme was operating well in comparison to the previous court-based scheme, providing ‘direct and timely assistance to a wider range of victims’.⁹⁴ However, a number of recommendations were made to build on the existing statutory framework to ‘ensure victims are able to access financial assistance and support when needed and that responses to assist victims are appropriate’.⁹⁵ As a result, the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) was passed in March 2017 to amend the Queensland Act. These amendments came into force in July 2017.
- 2.68 Under the Queensland Act, an ‘act of violence’ now explicitly includes ‘domestic violence’⁹⁶ as defined in Queensland’s *Domestic and Family Violence Protection Act 2012* (Qld),⁹⁷ which includes non-criminal conduct, such as psychological and emotional abuse, economic abuse and behaviour that is threatening, coercive or in any other way dominates a person, causing them to fear for their safety or wellbeing or that of someone else.⁹⁸ This makes Queensland the only jurisdiction to provide financial assistance for non-criminal forms of family violence, consistent with its *Domestic and Family Violence Protection Act 2012* (Qld).
- 2.69 The Queensland Act now also has a broader range of injuries for which victims of sexual offences and victims of family violence can claim. Injuries include a sense of violation, reduced self-worth or perception, lost or reduced physical immunity, lost or reduced physical capacity, increased fear or feelings of insecurity, the adverse effect of others reacting adversely to them, the adverse impact on lawful sexual relations and the adverse impact on feelings.⁹⁹
- 2.70 The Queensland Act previously enabled victims of sexual assault, child victims and victims of an offender who was in a position of power, influence or trust (‘special primary victims’) to make a report to a counsellor, psychologist or doctor in addition to a police officer.¹⁰⁰ This has been extended to victims of family violence who are now also considered special primary victims, meaning that they too can report to this expanded range of professionals.¹⁰¹
- 2.71 In addition, ‘domestic violence service’ has been added to the list of professionals to whom special primary victims can report.¹⁰²
- 2.72 In determining whether the applicant had a reasonable excuse for not assisting the police, the government assessor must now have regard to ‘whether the act of violence involves domestic violence’.¹⁰³
- 2.73 This makes Queensland the only jurisdiction to make domestic violence an explicit consideration in relation to an applicant not having assisted police.
- 2.74 The Queensland Act also aims to simplify the application process for financial assistance by removing the need for applications to include statutory declarations;¹⁰⁴ removing pools of financial assistance to ensure all applications are considered on their own merit;¹⁰⁵ and introducing a Charter of Victims’ Rights to guide how government and non-government agencies respond to victims.¹⁰⁶

94 Ibid 4.

95 Ibid.

96 *Victims of Crime Assistance Act 2009* (Qld) s 25(2).

97 Ibid sch 3.

98 *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

99 *Victims of Crime Assistance Act 2009* (Qld) s 27(1)(f).

100 Ibid s 81.

101 Ibid s 81(2)(a)(iii).

102 Ibid s 81(1)(a)(ii). ‘Domestic violence service’ is defined as ‘an entity that provides services to persons who fear or experience domestic violence’: s 81(2).

103 Ibid s 82(3)(e).

104 Ibid s 52.

105 Ibid s 48.

106 Ibid ss 5–20A.

Australian Capital Territory—Review of the Victims of Crime Financial Assistance Scheme (2013)

- 2.75 In 2013, and in response to concerns about the then court-based scheme of financial assistance for victims of crime, the Australian Capital Territory Justice and Community Safety Directorate released an issues paper which canvassed the possibility of introducing an administrative, rather than a court-based, scheme and potential changes to the criteria for eligibility.¹⁰⁷ In 2014 this was followed by the release for public consultation of a possible new administrative model for providing financial assistance scheme to victims of crime.¹⁰⁸
- 2.76 As a consequence of this review, a new financial assistance scheme was established through the *Victims of Crime (Financial Assistance) Act 2016* (ACT) (ACT Act). This new scheme commenced on 1 July 2016 and abolished the previous court-based system delivered through the Magistrates' Court.
- 2.77 Victim Support ACT, a government body, administers both the financial assistance scheme established under the ACT Act and victim case management and other clinical and non-clinical services provided through the Victims Services Scheme.¹⁰⁹
- 2.78 Clients registered for case management can receive assessment, court support, advocacy and therapeutic services.¹¹⁰ Assessors at Victim Support ACT process applications for financial assistance and the Victims of Crime Commissioner, the head of Victim Support ACT, is the final decision maker.¹¹¹
- 2.79 Victim Support ACT describes the new scheme as reducing barriers for victims of crime by separating the process from the court system and reducing reliance on legal representation.¹¹²

New South Wales—Review of the Victims Compensation Fund (2012)

- 2.80 In 2012, the NSW Department of Attorney-General and Justice published its report *Review of the Victims Compensation Fund*.¹¹³ The independent review by PricewaterhouseCoopers 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.¹¹⁴ This was due to significant delays in the provision of compensation, with an average wait of over two years.¹¹⁵ The system was also described as 'complicated' because of the need to provide expert medical reports and use lawyers to make claims.¹¹⁶
- 2.81 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.¹¹⁷ In particular, the benefits of early provision of funding for assistance with relocation, security upgrades and medical expenses were noted.

107 Justice and Community Safety Directorate (ACT), *The ACT Victims of Crime Financial Assistance Scheme: An issues Paper Prepared by the Justice and Community Safety Directorate* (2013).

108 Justice and Community Safety Directorate (ACT), *The ACT Victims of Crime Financial Assistance Scheme: Proposed Model* (2014).

109 Victim Support (ACT), *The Victim Services Scheme* (2016) <www.victimsupport.act.gov.au/what-we-do/the-victim-services-scheme>.

110 Victim Support (ACT), *Annual Report 2015–16* (2016) 14.

111 Victim Support (ACT), *A New Financial Assistance Scheme for the ACT* (2016) <www.victimsupport.act.gov.au/functions/latest-news/latest-news/a-new-financial-assistance-scheme-for-the-act>.

112 Victim Support (ACT), *Annual Report 2015–16* (2016) 29.

113 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012).

114 Ibid 4.

115 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

116 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.

117 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

- 2.82 In response to the report, the *Victims Rights and Support Act 2013* (NSW) was introduced, which established a new Victims Support Scheme (VSS) and a new Commissioner of Victims Rights. The VSS was 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 on providing with minimal delay a package of practical and financial support to victims of violent crime with a smaller recognition payment.¹¹⁸
- 2.83 The VSS is based on four 'pillars' of support: counselling, immediate needs, financial assistance and recognition payments. The VSS provides the following assistance, delivered through one agency:
- 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 payments—up to \$15,000.¹¹⁹
- 2.84 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.¹²⁰
- 2.85 By way of comparison, the provision of these services through the VSS is equivalent to Victoria's financial assistance scheme being delivered through the Victims Support Agency in the Department of Justice and Regulation rather than through a separate tribunal.
- 2.86 A statutory review of the VSS is currently underway to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.¹²¹ The NSW Department of Justice has invited interested organisations to make submissions on the review. As at 28 May 2018, a final report had not yet been published.

Northern Territory—Review of the Victims of Crime Assistance Act 2007 (NT) (2012)

- 2.87 The *Victims of Crime Assistance Act 2007* (NT) introduced a new administrative scheme for financial assistance for victims of crime, in response to findings that the earlier court-based scheme was inefficient, slow, overly complex and costly. The new scheme adopted a more streamlined administrative case assessment process for financial assistance, to be complemented by the provision of free counselling.¹²²
- 2.88 In December 2012, a statutory review of the operation of the Act was commenced by way of an issues paper.¹²³

118 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.

119 For an overview, see *ibid* 3.

120 *Ibid* 5.

121 See Department of Justice (NSW), *Statutory Review of the Victims Rights and Support Act 2013 (NSW)* <www.justice.nsw.gov.au/justicepolicy/Pages/lpclrld/lpclrld_consultation/review-victims-rights-support-act-2013.aspx>.

122 See Department of the Attorney-General and Justice (NT), *Issues Raised at Consultation for the Review of the Victims of Crime Assistance Act*, Issues Paper (2012) 12.

123 See generally *ibid*.

- 2.89 The issues paper considered similar issues to those considered by the Commission in its first consultation paper. This included the way in which related criminal acts are treated, time limits for applications, notification of alleged perpetrators, perpetrator benefit and recognition of family violence for the purposes of specific provisions.¹²⁴
- 2.90 Amendments were made to the Act in 2013 to increase offender levies.¹²⁵ However, there is no publicly available government response to the issues paper nor evidence of any significant changes to the scheme in response to it.

PART TWO: STATE-FUNDED FINANCIAL ASSISTANCE FOR VICTIMS OF CRIME

The history and purpose of state-funded financial assistance for victims of crime

- 24** Introduction
- 25** Contemporary statutory financial assistance and compensation schemes for victims of crime

3. The history and purpose of state-funded financial assistance for victims of crime

Introduction

- 3.1 The provision of compensation to victims of crime is not new—legal systems as far back as ancient Babylon have provided for payment of restitution to crime victims.¹
- 3.2 In Victoria, the *Crimes Act 1958* (Vic) as originally enacted enabled offenders to be ordered to pay compensation to victims.² However, as discussed in Chapter 4, such schemes depend on an offender having the ability to pay. Where an offender has no financial means, as is often the case, a victim will receive nothing.
- 3.3 In the early 1960s and 1970s, with what Professor Ian Freckelton described as ‘the dawning of awareness of the impact of criminal offences ... upon victims’,³ statute-based state-funded financial assistance schemes for crime victims began to emerge. The first scheme appeared in New Zealand in 1963, followed by Britain, Canada and the United States.⁴
- 3.4 In Australia, the first scheme was introduced in New South Wales in 1967.⁵ Five years later, Victoria’s first scheme was established with the introduction of the *Criminal Injuries Compensation Act 1972* (Vic).
- 3.5 As noted by David Miers, today such schemes are a feature of many common law countries.⁶
- 3.6 Despite the prevalence of such schemes, their justifications are not well defined, or uniform.⁷ Rationales for the establishment of such schemes are varied, and as Matthew Hall notes, include that they are ‘an extension of the welfare state’, redistribute the costs of crime across the community, and increase victim cooperation with the criminal justice system by encouraging the reporting of crime.⁸ State-funded financial assistance schemes can also be explained as a response to the victims’ rights movement and advocacy for the better recognition of victims’ needs.⁹

1 See Robert Francis Harper, *The Code of Hammurabi King of Babylon—About 2250 BC* (University of Chicago Press, 1904) 19 and Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC Information Services, 2001) 12–14.

2 *Crimes Act 1958* (Vic) s 83(1), as repealed by *Crimes (Amendment) Act 1970* (Vic) s 5. This provision is now reflected in Part 4 of the *Sentencing Act 1991* (Vic), which enables victims to apply for a compensation or restitution order against the offender as part of the sentencing process.

3 Ian Freckelton, ‘Compensation for Victims of Crime’ in Hendrik Kaptein and Marijke Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004) 31.

4 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, 174.

5 *Criminal Injuries Compensation Act 1967* (NSW).

6 David Miers, ‘Offender and State Compensation for Victims of Crime: Two Decades of Development and Change’ (2014) 20(1) *International Review of Victimology* 145, 147.

7 Ian Freckelton describes these schemes as having ‘evol[ed] under ... significant “intellectual confusion”’. Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC Information Services, 2001) 53.

8 Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 170. See also Ian Freckelton, *Criminal Injuries Compensation Law: Law, Practice and Policy* (LBC Information Services, 2001) 54–62.

9 David Miers, ‘Offender and State Compensation for Victims of Crime: Two Decades of Development and Change’ (2014) 20(1) *International Review of Victimology* 145, 147. See also Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 171, 174.

- 3.7 Some academics suggest these types of justifications are ‘unconvincing’, concluding that such schemes are often established because of public controversy regarding violent crime and public campaigns demanding state assistance for crime victims.¹⁰
- 3.8 As a consequence, many schemes contain ‘vague statements of their theoretical justification’.¹¹
- 3.9 Nevertheless, as academics have recognised, the emergence of state-funded financial assistance schemes marked a new phase in the provision of support for victims of crime, involving the introduction of specialist bodies and tribunals to assess victim compensation claims.¹²
- 3.10 By the early 1990s, as Freckelton notes, the operational costs of many schemes were beginning to be questioned.¹³ The number of claims lodged and the amounts of compensation paid had grown enormously, raising concerns about long-term sustainability.¹⁴ During this period, the schemes were also described as ‘increasingly legalistic and expensive’ and plagued with technical difficulties and delays.¹⁵
- 3.11 In response to concerns about scheme sustainability, some jurisdictions introduced ‘tariffs’ to quantify the amount payable for injuries, or redefined the types of injury that were compensable.¹⁶ Other jurisdictions tightened scope and compensation levels.¹⁷ The reforms during this period have been described as a ‘backlash against the expenditure involved in state funding of criminal injuries compensation schemes’.¹⁸ In Victoria, this was demonstrated by the introduction of the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) which removed state-funded compensation for ‘pain and suffering’ for victims.
- 3.12 The end of the 1990s saw what Freckelton described as a ‘re-adjustment’ phase.¹⁹ This included, in Victoria, the enactment of the *Victims of Crime Assistance (Amendment) Act 2000* (Vic), which introduced awards of ‘special financial assistance’ for victims of crime ‘who suffer significant adverse effects as a direct result of an act of violence’.²⁰ As discussed in Chapter 4, this amending legislation did not reinstate state-funded compensation for pain and suffering.

Contemporary statutory financial assistance and compensation schemes for victims of crime

- 3.13 As a consequence of the above waves of reform, there is now a ‘remarkably disuniform’ victim compensation landscape across Australia.²¹ While all Australian states and territories have state-funded financial assistance schemes for victims of crime, the way the schemes operate and are administered differs between jurisdictions.²²

10 Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 171.

11 Ibid 174.

12 Ian Freckelton, ‘Compensation for Victims of Crime’ in Hendrik Kaptein and Marijke Malsch (eds) *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004) 42 and 47–50.

13 Ibid 49.

14 Ibid.

15 Ibid 42.

16 See, eg, *Criminal Injuries Compensation Scheme 2012* (UK) Annex E.

17 David Miers, ‘Offender and State Compensation for Victims of Crime: Two Decades of Development and Change’ (2014) 20(1) *International Review of Victimology* 145, 159.

18 Ian Freckelton, ‘Compensation for Victims of Crime’ in Hendrik Kaptein and Marijke Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004) 31.

19 Ibid 42.

20 See the Second Reading Speech for the Victims of Crime Assistance (Amendment) Bill 2000 (Vic), Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 2000, 1911 (Rob Hulls, Attorney-General).

21 Ian Freckelton, ‘Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed’ in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 241.

22 *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 Financial Assistance Scheme 2010* (NT); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (TAS); *Criminal Injuries Compensation Act 2003* (WA).

- 3.14 Many Australian schemes are now beginning to recognise broader notions of ‘violence’ and ‘victimisation’, and to acknowledge different types of crime and their effects. A number of Australian schemes have recently been reformed to recognise that:
- there are forms of violence not previously identified or acknowledged by the community and the justice system that should be recognised by relevant compensation schemes
 - trauma-informed processes and therapeutic outcomes might not be compatible with legal processes
 - impacts on victims of crime are varied, as are victims’ needs.²³
- 3.15 For example, in Queensland, non-criminal family violence behaviours including psychological and emotional abuse, economic abuse and threatening behaviours are now considered an act of violence for the purposes of that state’s victim compensation scheme.²⁴
- 3.16 As discussed in Chapter 2 there has also been a shift away from court- or tribunal-based systems to the provision of case management and therapeutic interventions alongside financial assistance. This is the approach in the Australian Capital Territory, Queensland and New South Wales. This approach recognises that victims’ needs vary and that having victims’ needs assessed by specialist victim support workers as part of the broader provision of victim support may better assist victims than making lump sum payments through a legal process. Victim needs are discussed further in Chapter 7.
- 3.17 In Victoria, and with the exception of amendments in 2000 introducing special financial assistance to primary victims for significant adverse effects, the state-funded statutory financial assistance scheme for victims of crime has not been significantly changed since the introduction of the VOCAA and the establishment of the Victims of Crime Assistance Tribunal in 1996—over 20 years ago.

23 See in particular the schemes established under the *Victims of Crime Assistance Act 2009* (Qld), the *Victims Rights and Support Act 2013* (NSW) and the *Victims of Crime (Financial Assistance) Act 2016* (ACT).

24 See *Victims of Crime Assistance Act 2009* (Qld) s 6(1)(c).

Victoria's existing victims of crime financial assistance scheme

- 28** Introduction
- 28** The Victims of Crime Assistance Act 1996
- 34** Part of Victoria's broader victims' rights and supports framework
- 39** Complementary to other restitution and compensation avenues
- 40** Reviews, inquiries and research relevant to Victoria's existing scheme

4. Victoria's existing victims of crime financial assistance scheme

Introduction

- 4.1 This chapter sets out the current approach to, and the broader context of, state-funded financial assistance for victims of crime in Victoria.
- 4.2 The chapter begins by providing an overview of the *Victims of Crime Assistance Act 1996* (Vic), which establishes the legal framework for the provision of state-funded financial assistance to victims of crime in Victoria.
- 4.3 The chapter then outlines the broader context within which the Act and the Victims of Crime Assistance Tribunal function.

The Victims of Crime Assistance Act 1996

- 4.4 The *Victims of Crime Assistance Act 1996* (Vic) (the Act) was assented to on 17 December 1996 and came into operation on 1 July 1997. The Act repealed the *Criminal Injuries Compensation Act 1983* (Vic) and abolished the Crimes Compensation Tribunal, replacing it with a new tribunal, the Victims of Crime Assistance Tribunal (VOCAT) as the body to determine all applications for financial assistance made under the Act. VOCAT is the key body to which both the supplementary and the first terms of reference relate.

The purpose of the Act

- 4.5 The purpose of the Act is to 'provide assistance to victims of crime',¹ and its objectives 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 crime²
 - 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 crime³
 - allow victims of crime to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources.⁴

1 *Victims of Crime Assistance Act 1996* (Vic) s 1(1).
2 *Ibid* s 1(2)(a).
3 *Ibid* s 1(2)(b).
4 *Ibid* s 1(2)(c).

- 4.6 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.⁵
 - The scheme provided by the Act is intended to complement other services provided by government to victims of crime.⁶
- 4.7 The effect of these provisions is that the Act is intended as an option of last resort. However, as discussed in Chapter 11, for many victims the Act is often the only avenue of financial assistance available. The appropriateness of the purpose and objects provisions of the Act are considered further in Chapter 11.
- 4.8 In introducing the Act to Parliament, the then Attorney-General, the Hon. Jan Wade MP stated in her Second Reading Speech that the policy intent was to establish an integrated model of assistance for victims of crime,⁷ 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'.⁸
- 4.9 The Attorney-General stated that 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.⁹ 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.¹⁰
- 4.10 As noted in Chapter 3, 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.¹¹ To address this omission, the *Victims of Crime Assistance (Amendment) Act 2000* (Vic) later introduced new awards of special financial assistance for primary victims 'who suffer significant adverse effects as a direct result of an act of violence'.¹² While providing for lump-sum payments, this amending legislation did not reinstate compensation for pain and suffering as constituted by previous acts.

5 Ibid s 1(3).

6 Ibid s 1(4).

7 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1024 (Jan Wade, Attorney-General).

8 Ibid 1023.

9 Ibid.

10 Ibid.

11 See, eg, *Criminal Injuries Compensation Act 1983* (Vic) s 18.

12 See Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 2000, 1911 (Rob Hulls, Attorney-General).

Overview of the Act

- 4.11 The Act is structured in five parts:
- Part One sets out the Act's purpose and objectives and defines key terminology. The purpose and objectives are discussed above.
 - Part Two sets out the criteria for a victim's eligibility for assistance under the Act.
 - Part Three establishes VOCAT, details the form and timing for applications, sets out the procedures and powers of the Tribunal, including the ability to determine matters with or without hearing¹³ and to notify any person VOCAT considers to have a legitimate interest, including the alleged offender,¹⁴ and outlines the procedures for the making of awards.
 - Part Four sets out procedures for review, variation and refund of awards.
 - Part Five contains miscellaneous provisions.
- 4.12 Under the Act a person is eligible to apply for financial assistance if they are the primary, secondary or related victim of an act of violence,¹⁵ and that act of violence directly results in their injury or death,¹⁶ or, for primary victims, a significant adverse effect.¹⁷
- 4.13 As discussed in Chapter 12, the Act defines who is a primary, secondary or related victim.¹⁸ It is the victim categories that determine the types and amounts of financial assistance available under the Act.
- 4.14 As also discussed in Chapter 12, the effect of the victim categories and the test for eligibility, including the defined terms, is that not all people who may identify as a victim of crime may be recognised under the Act. This approach contrasts with the more expansive approach adopted in other Victorian legislation, such as the *Victims' Charter Act 2006* (Vic), which defines a victim as a person who has suffered injury or death as a result of a criminal offence, or a family member of a child who has suffered injury or death,¹⁹ and the *Sentencing Act 1991* (Vic), which defines a victim as a person who has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence.²⁰

Establishment of VOCAT

- 4.15 The Act establishes VOCAT as the body to hear and determine applications for financial assistance made by victims of crime.²¹ VOCAT is therefore the key body to which both the supplementary and the first terms of reference relate.
- 4.16 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 and with as much expedition (promptness) as the requirements of the Act and a proper determination of the matter permit.²²

13 See *Victims of Crime Assistance Act 1996* (Vic) ss 33 and 34.

14 Ibid s 34.

15 Ibid s 25(1).

16 Ibid ss 7, 9 and 11.

17 Ibid s 8A.

18 Ibid ss 7, 9 and 11.

19 *Victims' Charter Act 2006* (Vic) s 3(1).

20 *Sentencing Act 1991* (Vic) s 3(1).

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

22 Ibid s 32.

- 4.17 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).²³ Each VOCAT hearing is constituted by a single tribunal member.²⁴
- 4.18 Although located within the Magistrates' Court of Victoria, VOCAT is a separate entity with its own jurisdiction.
- 4.19 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.²⁵
- 4.20 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.²⁶ In 2016–17 judicial registrars heard and determined 21.4 per cent of all VOCAT final awards.²⁷
- 4.21 VOCAT operates in all 51 Magistrates' Court venues across Victoria.²⁸
- 4.22 VOCAT is a tribunal, not a court. It exercises administrative power, not judicial power. Its functions are performed by judicial officers, namely magistrates.
- 4.23 VOCAT hearings are less formal than court hearings²⁹ and VOCAT is not bound by the rules of evidence.³⁰ Nevertheless, VOCAT's procedure is a legal process, bound by the provisions of the Act.³¹
- 4.24 In practice the majority of applications are determined without hearing—that is 'on the papers'.³² In addition, many of the functions of VOCAT are performed by judicial registrars.³³
- 4.25 As discussed in Chapters 5 and 8, the effect of these practices is that VOCAT predominately operates as an administrative system although it is embedded within a tribunal-based system.
- 4.26 Figure 1 over the page outlines the VOCAT process and its relationship with other criminal and civil processes for victims of crime.

23 Ibid s 19(2).

24 Ibid s 21(1).

25 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 14.

26 Ibid 13 and 25.

27 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 28.

28 Ibid 13.

29 VOCAT is not required to conduct itself in a formal manner: *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(a)

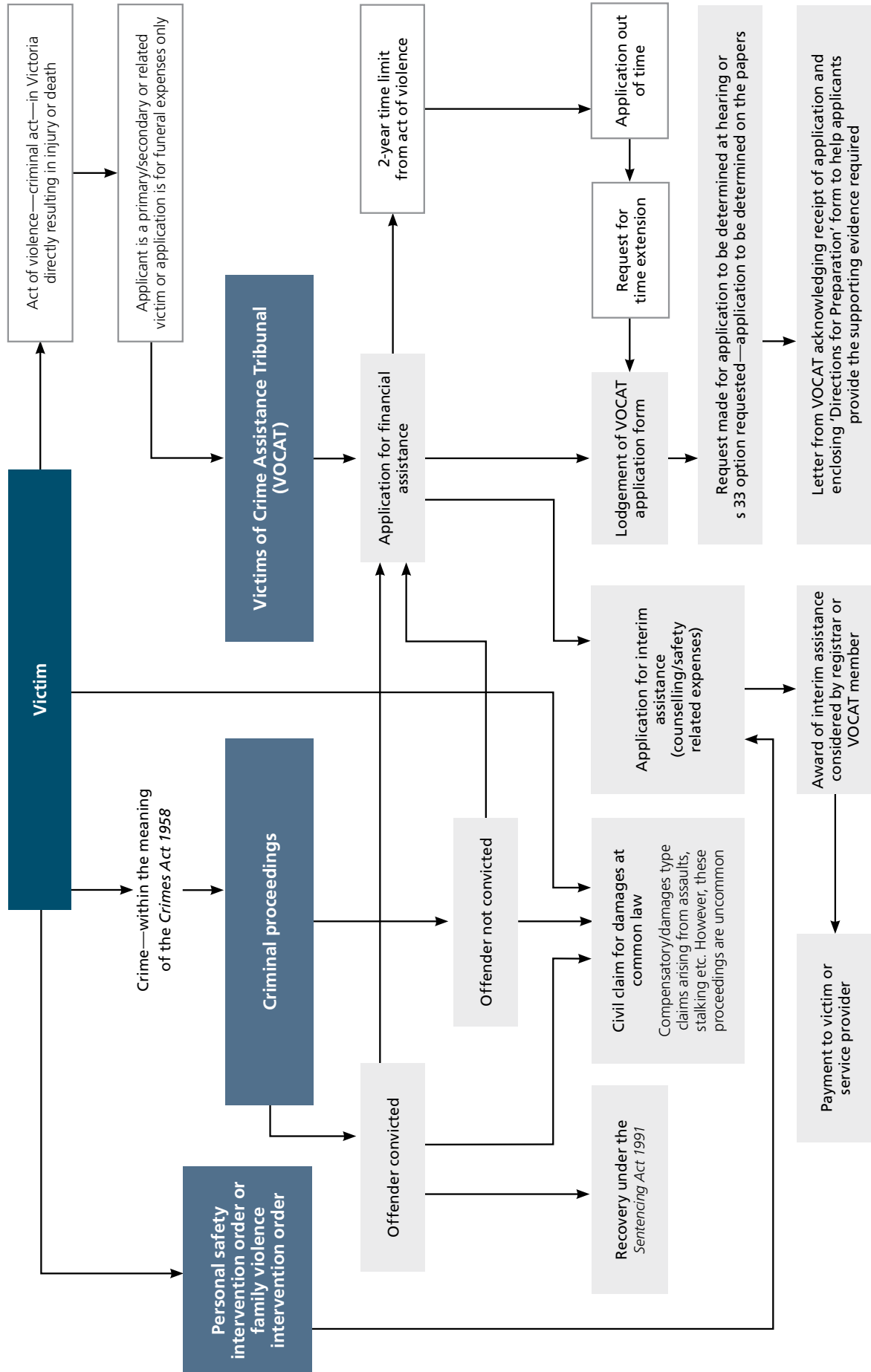
30 Ibid s 38. See also Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 8.

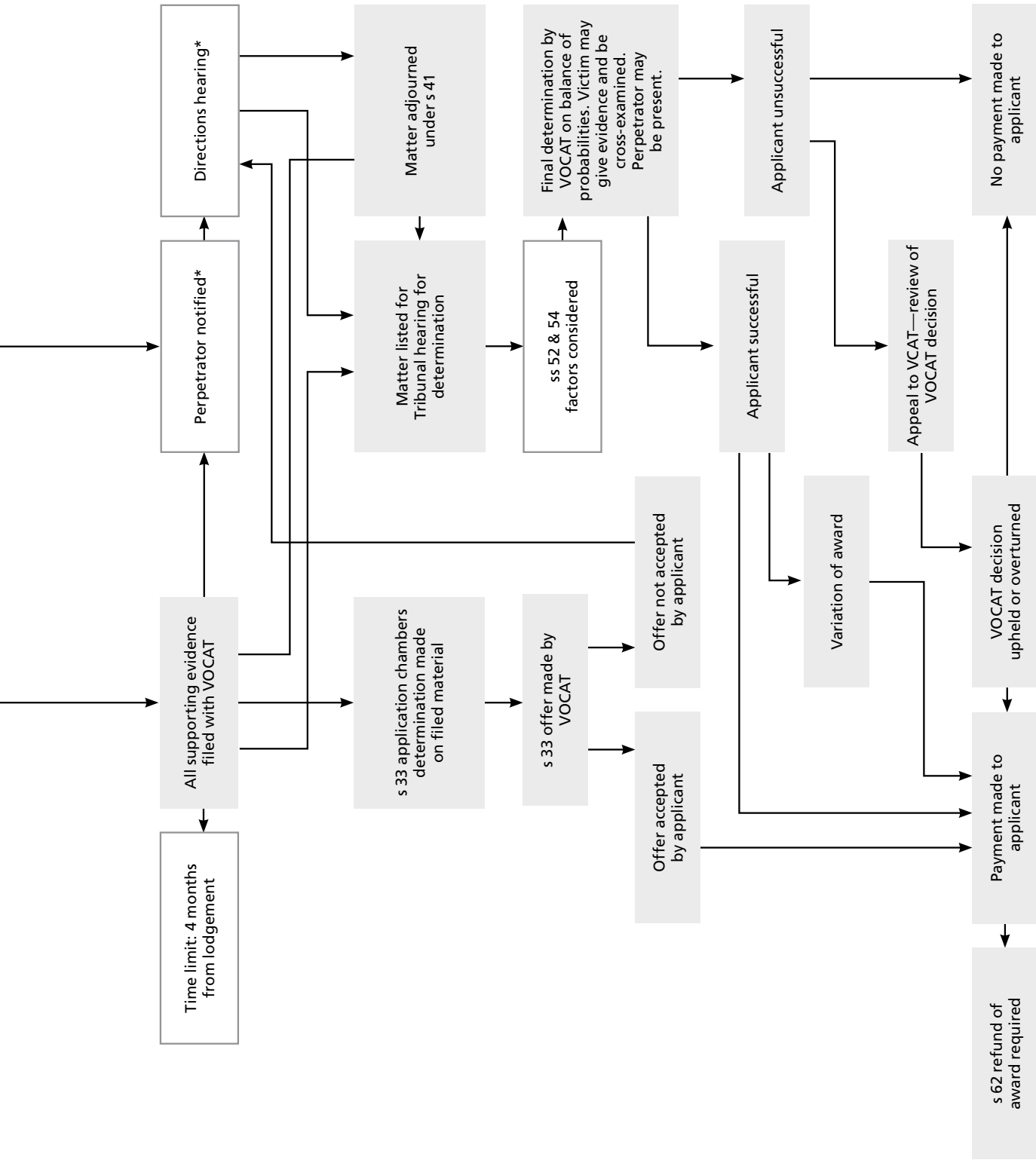
31 VOCAT has the functions, powers and duties conferred on it by the Act: *Victims of Crime Assistance Act 1996* (Vic) s 20. See also Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 63.

32 In 2016–17 applications were determined at hearings in 14% of cases, which means that 86% of cases were determined on the papers: see Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 36.

33 Judicial registrars determine approximately 20% of all VOCAT applications, eg in 2016–17 judicial registrars finalised 1539 applications: Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 37.

Figure 1: The VOCAT process for victims in context





*If required

Demand for VOCAT

- 4.27 Between 2001–02 and 2013–14 there was a 337 per cent increase in VOCAT’s case load,³⁴ and in 2016–17, 7312 applications were made to VOCAT, an increase of 17.5 per cent from 2015–16.³⁵ In addition, in 2016–17, there were 4739 awards of financial assistance—an increase of 13.9 per cent from the previous financial year,³⁶ and what VOCAT has described as ‘one of the biggest growths in the Tribunal’s history’.³⁷
- 4.28 The average amount of financial assistance awarded by VOCAT in 2016–17 was \$7983.³⁸

Role of VOCAT

- 4.29 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’.³⁹
- 4.30 VOCAT has acknowledged it has an important role to play in providing practical and flexible assistance to victims, including in providing ‘an empathetic forum for victims to tell their story and have their experiences of loss and suffering acknowledged by a judicial officer’.⁴⁰
- 4.31 In addition, the importance of its role in ensuring victims are heard is highlighted in the joint submission of VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria, which stated that ‘for some victims, their recovery journey includes having their “day in Court”, to have their experience formally acknowledged and to have their story believed’.⁴¹

Part of Victoria’s broader victims’ rights and supports framework

Victims’ rights

- 4.32 The past decade has seen an increased focus on the needs and rights of victims of crime in Victoria.⁴² This focus has been on both assistance and support needs as well as victims’ rights in the criminal justice system.
- 4.33 As the Commission acknowledged in its 2016 information paper in relation to its review of the role of victims of crime in the criminal trial process:
- the landscape has changed dramatically for victims of crime. The welfare of victims is now a central concern to governments, as reflected in the enactment of victims’ rights charters, victims’ compensation schemes and victim support services.⁴³
- 4.34 These needs and rights are reflected both in legislation and government policy.

34 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.

35 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 32.

36 Ibid.

37 Ibid 14.

38 Ibid 33.

39 Victims of Crime Assistance Tribunal, *Our Role* (2016) <www.vocat.vic.gov.au/about-tribunal/our-role>.

40 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 8. See also Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 17.

41 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

42 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 10.

43 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process—Victims’ Rights and Human Rights: The International and Domestic Landscape*, Information Paper 4 (2016) 22.

- 4.35 The *Victims' Charter Act 2006* (Vic) sets out principles for how Victoria's criminal justice system and victim service agencies should respond to victims of crime.⁴⁴ These principles include the right of victims to information,⁴⁵ respectful treatment⁴⁶ and some participatory rights, such as the right to make a victim impact statement during the sentencing phase of a criminal trial.⁴⁷
- 4.36 The *Victims' Charter Act* reaffirms the right of victims to apply for compensation under the Act and to apply to a court for an order under the *Sentencing Act 1991* (Vic) that the offender pay the victim compensation.⁴⁸
- 4.37 The *Victims of Crime Commissioner Act 2015* (Vic) establishes the Victims of Crime Commissioner and the Victims of Crime Consultative Committee.⁴⁹
- 4.38 The functions of the Victims of Crime Commissioner are to:
- advocate for the recognition, inclusion, participation of, and respect for, victims of crime by government departments and agencies
 - carry out inquiries and report on systemic victim-of-crime matters to the Attorney-General
 - provide the government with advice on improvements to the justice system to meet the needs of victims.⁵⁰
- 4.39 The Victims of Crime Consultative Committee functions as a forum for victims of crime, justice agencies and victim services to discuss improvements to the criminal justice and victim support system and to promote the interests of victims of crime.⁵¹

The broader victim support framework

- 4.40 As noted in the supplementary consultation paper, access to financial assistance under the Act and through VOCAT is only one aspect of a victim's path to recovery.⁵² Victims are unlikely to interact only with VOCAT.
- 4.41 In practice, most victims also engage with the victim and witness support system and/or with broader community or health system supports. This may include government-funded victim and witness services, as well as specialised support services such as family violence or sexual assault services. In some cases, victims may be involved with a number of different government and non-government support agencies. Victims may also use other general support services, such as their local health centre or general practitioner. The figure below shows Victoria's victim and witness support system, including the Victims of Crime Commissioner and the Victims of Crime Consultative Committee discussed earlier above. The figure below shows Victoria's victim support framework.

44 *Victims' Charter Act 2006* (Vic) s 1.

45 *Ibid* ss 7–11.

46 *Ibid* s 6.

47 *Ibid* s 13.

48 *Ibid* s 16.

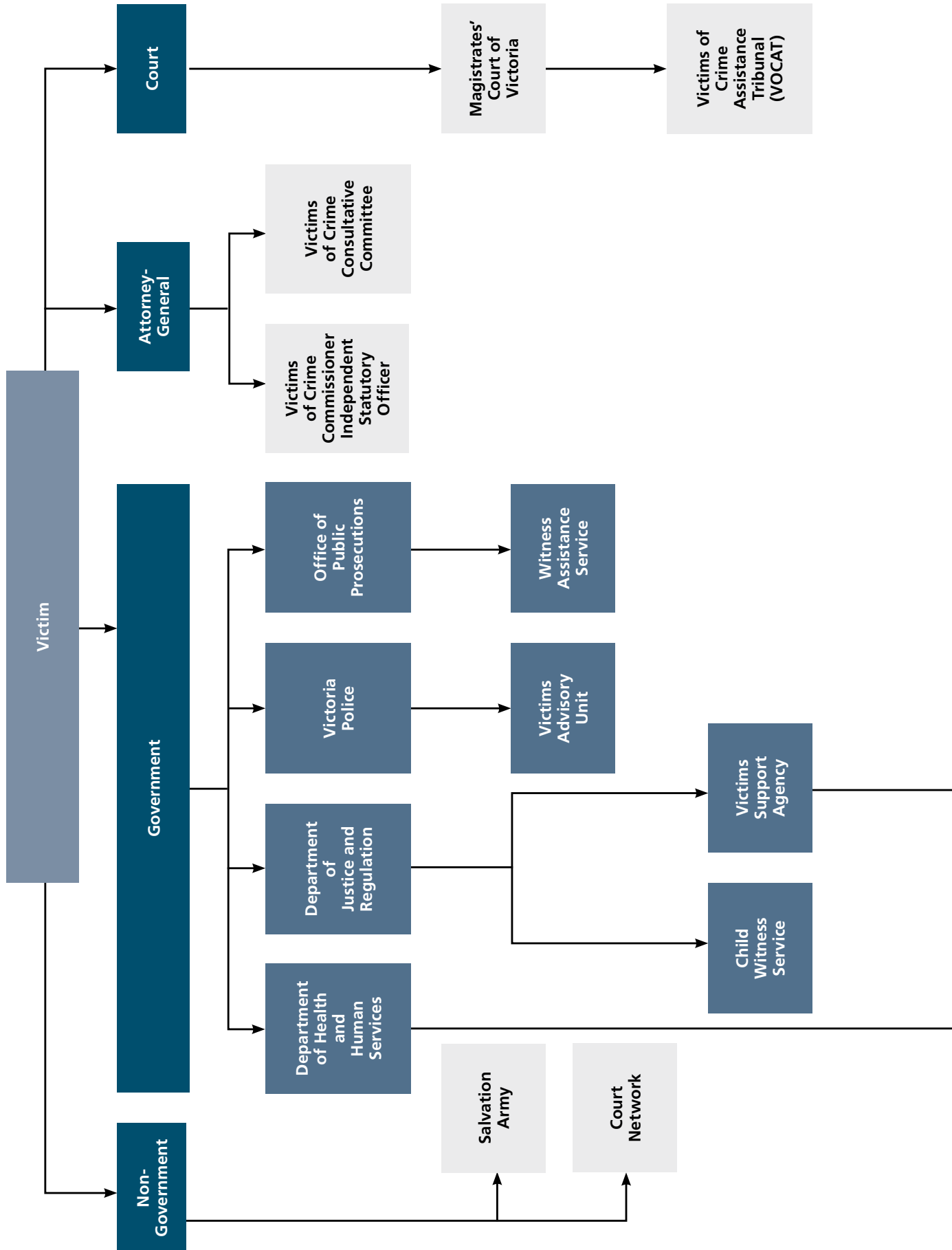
49 *Victims of Crime Commissioner Act 2015* (Vic) s 1.

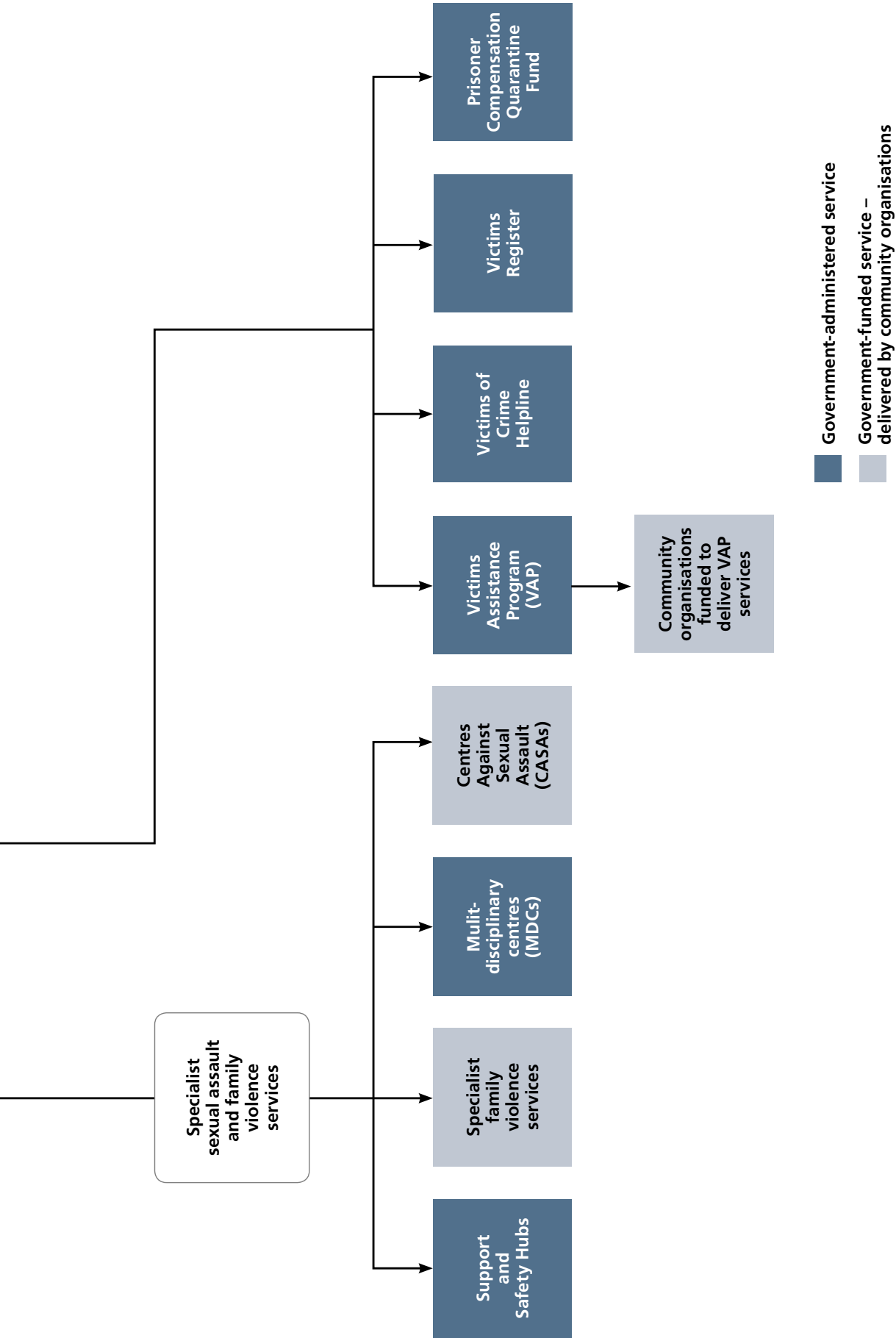
50 *Ibid* s 13(1).

51 *Ibid* s 32.

52 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 11.

Figure 2: Victoria's victim support framework





- 4.42 As evident from Figure 2 above, the current victim and witness service scheme is fragmented, with different services delivered through multiple government and non-government entities. For example, generalist victim and witness support is provided by the Department of Justice and Regulation, while specialist victim responses, such as for family violence and sexual assault, are funded through the Department of Health and Human Services.
- 4.43 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.⁵³
- 4.44 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.
- 4.45 The VSA coordinates delivery of the VAP through contracted community-based organisations which provide victim case management services, including practical support or therapeutic interventions for victims of violent crime. VAPs provide a range of practical support, information and assistance, including assistance with VOCAT applications and victim impact statements for use in sentencing hearings.
- 4.46 Victoria Police's Victims Advisory Unit provides 24-hour assistance to Victoria Police members attending crime scenes. Victim Liaison Officers within the Victims Advisory Unit assess victim needs, provide psychological 'first aid', coordinate crime scene clean-up, provide referrals to support services and organise travel arrangements for family members.⁵⁴ Victim liaison officers do not provide long-term case management services like VAPs.
- 4.47 Witness assistance in Victoria is provided by the Child Witness Service (also part of the Department of Justice and Regulation) and the Office of Public Prosecutions' Witness Assistance Service (WAS). The WAS only provides assistance in prosecutions pursued by the Director of Public Prosecutions.⁵⁵
- 4.48 The non-profit organisation Court Network Victoria provides court support for victims and witnesses as part of a broader volunteer-based model and assists all court users on a non-partisan basis. The Salvation Army also provides some court-based support services and may assist some victims and witnesses as well as other court users.⁵⁶
- 4.49 In addition to the above, more specialised support and assistance exists for specific types of crime. For example, support for victims of family violence is available through Victoria's specialist family violence system.⁵⁷ This includes:
- specialist family violence services (including specialist women's and children's services)
 - police, courts and legal services
 - child protection and family services
 - housing and homelessness services
 - health services (including mental health, drug and alcohol services).⁵⁸

53 Victims Support Agency, Department of Justice and Regulation (Vic), *Victims of Crime* (2017) <www.victimsofcrime.vic.gov.au/>.

54 Victoria Police, *Meeting the Needs of Victims within a Policy Context* (2011) <www.aic.gov.au/media_library/conferences/2011-victim/presentations/green.pdf>.

55 The Witness Assistance Service receives referrals in matters prosecuted by the Director of Public Prosecutions. In specific types of case, referral is mandatory.

56 Magistrates' Court of Victoria, *Salvation Army Court and Prison Services* (2012) <www.magistratescourt.vic.gov.au/court-support-services/support-and-assistance-services>.

57 The family violence 'system' is comprised of a number of separate, yet interconnected, support components. See, eg, Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 19.

58 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 1, 75.

- 4.50 As recommended by the Royal Commission into Family Violence, the Victorian Government through the agency, Family Safety Victoria, has committed to establishing support and safety hubs across Victoria by 2021 to coordinate family violence victims' access to this support.⁵⁹
- 4.51 Linkages between victims, victim and family violence support services and the justice system, including VOCAT, are intended to improve once these hubs are established.⁶⁰ It is not yet clear whether legal assistance will be available through the hubs or how connections to the courts or police will be improved for victims attending the hubs.
- 4.52 Victims of sexual assault can access specialist services through the Victorian Centres Against Sexual Assault (CASAs), funded by the Department of Health and Human Services. There are 15 CASAs across Victoria. They provide:
- 24-hour emergency or crisis care for victims of sexual assault.
 - crisis counselling
 - provision of information and referral to other agencies
 - practical assistance and advocacy
 - coordination of service provision, including police, forensic, child protection and medical personnel.⁶¹
- 4.53 Additional specialised responses are also available through six multi-disciplinary centres across Victoria, which bring together specialised services including police, child protection, nursing and counselling services at the one location.⁶²
- 4.54 Some of these specialist services also provide victims with information about VOCAT.

Complementary to other restitution and compensation avenues

- 4.55 As noted in both the first and the supplementary consultation papers, 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, or
 - apply for state-funded financial assistance under the *Victims of Crime Assistance Act 1996* (Vic).⁶³
- 4.56 Restitution and compensation orders can be made under Part 4 of the *Sentencing Act 1991* (Vic).⁶⁴ 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.⁶⁵ 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).⁶⁶
- 4.57 Victims of crime can also sue the offender for damages in a common law civil action. However, civil action can be a significant financial and procedural burden for victims of

59 Victorian Government, *Family Violence Reform Support and Safety Hubs* (2018) <www.vic.gov.au/familyviolence/support-and-safety-hubs.html>

60 Department of Premier and Cabinet (Vic), *Support and Safety Hubs: Statewide Concept* (2017) 53.

61 Department of Health and Human Services (Vic), *Sexual Assault Support Services* (2010) <www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/sexual-assault/support-services>.

62 Office of the Minister for Families and Children (Vic), 'One-Stop Support Centre for Sexual Assault Victims in Gippsland' (Media Release, 18 February 2016) 1.

63 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 33–4; Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 17. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 131.

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

65 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 130–1.

66 Ibid 132. See also *R v Ross* (2007) 17 VR 80, [19] (Vincent JA, Chernov JA and Whelan AJA agreeing).

- crime, and the Sentencing Act's provisions were intended to be a faster and cheaper alternative to pursuing civil proceedings.⁶⁷
- 4.58 Compensation orders under the Sentencing Act can result in awards much higher than awards by VOCAT,⁶⁸ particularly where an offender has the means to pay, which is a consideration of the court in making orders under that Act.⁶⁹ As the Sentencing Advisory Council has noted, compensation orders for injury are rarely made.⁷⁰ In addition, enforcing such orders often requires significant time and effort, and can be costly to pursue.⁷¹
- 4.59 The Act therefore gives victims an avenue for assistance where they cannot obtain financial assistance from other sources.⁷²
- 4.60 Victoria's family violence service system provides additional state-funded financial assistance for victims of family violence through family violence flexible support packages (FSPs). FSPs enable family violence services to access funds to provide victims with urgent and critical support tailored to their specific needs.⁷³ Flexible support packages can be made up to \$7000, with an average cost of \$3000.⁷⁴ Financial assistance can be sought for safety expenses, housing, medical costs and a broad range of social, economic and community connectedness activities.
- 4.61 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. 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.

Reviews, inquiries and research relevant to Victoria's existing scheme

Women's Legal Service Victoria—Rebuilding Strength Practitioner Survey (2017)

- 4.62 Along with providing assistance to individual victims of family violence with their VOCAT applications, the Women's Legal Service Victoria's *Rebuilding Strength* project⁷⁵ aimed to 'identify systemic issues that women experiencing family violence face in their engagement with VOCAT'.⁷⁶
- 4.63 As part of the project, the Women's Legal Service Victoria surveyed legal practitioners in 2017 to examine the experiences of lawyers and their clients with the VOCAT process. Fifty-eight practitioners responded to the survey, including private solicitors and community legal centre lawyers.⁷⁷

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

68 See Table 1 'Awards made under section 85B of the *Sentencing Act 1991* (Vic) compared to VOCAT awards' in Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 17.

69 *Sentencing Act 1991* (Vic) s 85H.

70 Sentencing Advisory Council (Vic), *Restitution and Compensation Orders: Issues and Options Paper* (2018) 27.

71 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 18.

See also Sentencing Advisory Council (Vic), *Restitution and Compensation Orders: Issues and Options Paper* (2018) Ch 3.

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

73 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.

74 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 1.

75 The Women's Legal Service Victoria (WLSV) *Rebuilding Strength* project connects WLSV clients who have experienced intimate partner violence with pro bono legal representation for their applications to VOCAT. See Women's Legal Service Victoria, *Responding to Legal Need* (2018) <www.womenslegal.org.au/impact_report_2016/what-we-do/responding-to-legal-need/>.

76 Ibid.

77 The Commission was provided with an unpublished copy of preliminary results of the practitioner survey: Women's Legal Service Victoria, *Rebuilding Strength—VOCAT Project: Practitioner Survey Preliminary Results* (2017) (unpublished).

4.64 The preliminary results showed:

- Over 75 per cent of survey participants had filed VOCAT applications outside the two-year time limit.⁷⁸
- Approximately half the survey participants had encountered issues regarding client eligibility for VOCAT, particularly issues relating to family violence not falling within the definition of ‘act of violence’ under the VOCAA.⁷⁹
- Many practitioners had seen multiple incidents of family violence being reduced to a single act of violence for the purposes of the VOCAT application.⁸⁰
- Approximately half the participants had made VOCAT applications for clients who had not made police statements, resulting in a range of issues, including refusal of applications under section 52 of the VOCAA, difficulty providing evidence of eligibility and notification of the alleged offender.⁸¹
- Around 66 per cent of participants had experienced clients retracting police statements, making statements of no complaint or failing to cooperate with criminal investigations or proceedings, resulting in refusal of applications under section 52 of the VOCAA, as well as requiring lawyers to make submissions addressing failure to cooperate with police or prosecution.⁸²
- The majority of practitioners had experienced delay in VOCAT applications, resulting in negative impacts on a client’s psychological recovery and access to services.⁸³
- Approximately three-quarters of participants had experienced potential notification of an alleged offender, including a mix of successful and unsuccessful objections to offender notification.⁸⁴
- Approximately two-thirds of participants considered the quantum of VOCAT awards to be inadequate.⁸⁵

Victorian Law Reform Commission—The Role of Victims of Crime in the Criminal Trial Process (2016)

4.65 As noted in Chapter 2, the Commission’s report *The Role of Victims of Crime in the Criminal Trial Process* made a number of recommendations to improve victim experiences during the criminal trial process. Of relevance to this reference, the Commission made recommendations about restricting access to, and use of, VOCAT records to protect victims of crime during the VOCAT and criminal trial process.⁸⁶ These recommendations are revisited in Chapter 14.

4.66 In addition, the Commission identified concerns regarding the accessibility of VOCAT for victims, particularly victims in regional areas who may be unable to access legal advice and assistance.⁸⁷

4.67 Although an extensive review of VOCAT was beyond the Commission’s terms of reference,⁸⁸ stakeholders told the Commission:

Applying to VOCAT for financial assistance can be a validating and restorative process for many victims, although it can also be difficult or stressful, depending on whether the application is successful and on the attitude of the presiding tribunal member.⁸⁹

78 Ibid 1.
79 Ibid 1–2.
80 Ibid 2.
81 Ibid 3.
82 Ibid 4–5.
83 Ibid 5–6.
84 Ibid 7.
85 Ibid 8.
86 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. See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 247.
87 Ibid 238.
88 Ibid 228.
89 Ibid 244.

Women’s Legal Service Victoria—Report on the Stepping Stones Project (2015)

- 4.68 The report, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* examined the legal and economic problems arising from family violence. The report was based on interviews with 17 women who were part of the Stepping Stones project, a project undertaken by the Women’s Legal Service Victoria providing free legal advice and financial counselling to women experiencing family violence and financial hardship.⁹⁰
- 4.69 Although not focused solely on VOCAT,⁹¹ the report identified particular barriers for victims of family violence in accessing VOCAT:
- the legislation creates significant barriers to victims of family violence obtaining assistance because the law is based on a model of “stranger” violence and fails to recognise the dynamics of family violence.⁹²
- 4.70 The report noted that some women found the VOCAT process to be validating⁹³ and a practical source of financial assistance when no other avenues of assistance are available.⁹⁴
- 4.71 The report also identified the following areas of concern with the current operation of the VOCAA and VOCAT:⁹⁵
- legislative barriers for victims of family violence, specifically sections 29, 34(2) and 52 of the VOCAA, which relate to application time limits; VOCAT giving notice of a hearing to an alleged offender; and requirements to report and cooperate with police and prosecution
 - lack of awareness of VOCAT
 - delay in receiving a VOCAT award.
- 4.72 The report recommended the Department of Justice and Regulation undertake a comprehensive review of VOCAT to examine accessibility for victims of family violence.⁹⁶

Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations—*Betrayal of Trust* (2013)

- 4.73 The report of the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, *Betrayal of Trust*, was discussed in Chapter 2. As already noted, the report considered VOCAT as an alternative to civil litigation in cases of criminal child abuse.⁹⁷
- 4.74 The report noted that ‘very few victims spoke about VOCAT’.⁹⁸ Nonetheless, ‘despite the small amount of evidence received’, the report made the following relevant findings:⁹⁹
- VOCAT provides a viable alternative to civil litigation for victims of criminal child abuse because of its ability to provide an independent acknowledgment of harm by magistrates, giving ‘authority and legitimacy to victims’ claims’, its non-adversarial approach, and the supports provided for victims.¹⁰⁰

90 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, 2015) 15, 17.

91 The report states, ‘Many women simply do not know that VOCA[T] exists. VOCA[T] did not feature prominently in our research interviews with women’: *ibid* 56.

92 *Ibid* 55.

93 *Ibid*.

94 *Ibid* 56.

95 *Ibid*.

96 *Ibid* 57.

97 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 553.

98 *Ibid* 554.

99 *Ibid* 553.

100 *Ibid* 555.

- Limitations of VOCAT include the two-year time limit placed on claims, the limited compensation available and the lack of ongoing financial support for victims which does not accommodate victims who suffer ongoing or permanent injury.¹⁰¹

4.75 The report recommended that:

- the VOCAA be amended to specify that no time limits apply for applications for assistance by victims of criminal abuse in organisational settings¹⁰²
- the Victorian Government review the functions of VOCAT to consider its capacity to administer a specific scheme for victims of criminal child abuse.¹⁰³

4.76 In February 2018 the *Justice Legislation Amendment (Victims) Act 2018* (Vic) was introduced, which removed the two-year time limit for VOCAT applications for victims of physical or sexual abuse that occurred when they were under the age of 18 years.¹⁰⁴

Victims Support Agency, Department of Justice and Regulation—Counselling for Victims of Crime (2011)

4.77 The 2011 report by the Victims Support Agency of the Victorian Department of Justice and Regulation, *Counselling for Victims of Crime*, examined the counselling experiences of 62 applicants to VOCAT.¹⁰⁵ Although this report provided insight into the experiences of a relatively large sample of VOCAT applicants, its focus was limited to a consideration of the process for obtaining counselling through VOCAT, rather than victims' broader experiences.

4.78 Relevantly, the report found that:

- A majority of participants (83 per cent) reported satisfaction with the counselling they received.¹⁰⁶
- There was overall a high level of satisfaction with the process of obtaining VOCAT-funded counselling, although qualitative data 'reflected significant levels of frustration'.¹⁰⁷
- The most common problems associated with obtaining counselling could be 'broadly associated with the need to comply with the requirements of a legal system' and participants' general lack of knowledge and understanding of the VOCAT system.¹⁰⁸
- Many participants experienced problems with finding a lawyer or dealing with their lawyer in relation to their VOCAT application.¹⁰⁹

4.79 Although the focus of the report was participants' experiences of counselling awarded through VOCAT, the report also noted:

Comments about the VOCAT hearing were mixed. While many participants made positive comments about Tribunal Members and felt acknowledged and validated by the hearing ... some participants felt distressed by having to recount details of the crime they experienced. One participant was distressed by the Tribunal member's comments.¹¹⁰

101 Ibid 557.

102 Ibid 553.

103 Ibid 561.

104 *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 37.

105 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011).

106 Ibid 58.

107 Ibid 59.

108 Ibid.

109 Ibid 60.

110 Ibid 59–60.

Whittlesea Community Legal Service—Victims of Crime Assistance Tribunal Capacity Building Project (2011)

- 4.80 The Whittlesea Community Legal Service Victims of Crime Assistance Tribunal Capacity Building Project was undertaken in response to ‘a noted decreased in the total amount of compensation awarded by VOCAT in 2006/2007 at a time when there was a recorded increase in the rate of crimes against the person’.¹¹¹
- 4.81 The research involved consultations with individuals and organisations involved in the VOCAT process, including legal practitioners, workers from the then-Victims Assistance and Counselling Programs (now Victims Assistance Programs), Victoria Police and VOCAT.¹¹²
- 4.82 Although when the project’s discussion paper was published in 2011 it acknowledged that ‘the situation had changed markedly with an increase in both the total number of applications finalised by VOCAT and the total amount of compensation awarded by VOCAT’;¹¹³ a number of recommendations were nevertheless made to address perceived barriers to VOCAT, including:¹¹⁴
- lack of awareness of eligibility for VOCAT
 - difficulty accessing legal representation
 - difficulties associated with obtaining documentation to support an application
 - delays in receiving VOCAT awards
 - the potential for the alleged offender to be notified of the VOCAT hearing.

Hayley Catherine Clark—A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault (2011)

- 4.83 Hayley Catherine Clark’s PhD thesis *A Fair Way to Go* presented findings in relation to Victoria’s criminal justice system—including VOCAT—based on interviews with 22 victims of sexual assault.¹¹⁵
- 4.84 Findings of particular relevance were that:
- for some participants, VOCAT was ‘their primary means of securing justice, for others it was of little significance, and in some instances it resulted in further harm’.¹¹⁶
 - ‘hearings provided more meaning than the (often nominal) monetary award itself’,¹¹⁷ and that ‘focusing on aspects of validation and vindication within the tribunal procedures may provide greater benefit to victim/survivors of sexual assault than the award of money itself’.¹¹⁸
- 4.85 The thesis considered that because the criminal justice system can be detrimental to victims’ wellbeing:
- ‘A greater separation of compensation schemes from the criminal justice system may provide a more encouraging and accessible service for victim/survivors’.¹¹⁹
 - A state-funded financial assistance scheme should provide a greater emphasis on listening to victim/survivors’ personal stories, acknowledging payments as nominal and providing a ‘forum through which victim/survivors can discuss their experience and the impacts the crime/s has had on their lives in their own words’.¹²⁰

111 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 6.

112 Ibid.

113 Ibid.

114 Ibid.

115 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 44.

116 Ibid 110.

117 Ibid 117.

118 Ibid 118.

119 Ibid 119.

120 Ibid 122.

Victims of Crime Assistance Tribunal—Koori VOCAT List Pilot: Review and Recommendations (2010)

- 4.86 In 2006, VOCAT established a pilot 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.¹²¹
- 4.87 A review of the pilot was conducted in 2010 and it found improved processing times since the introduction of the Koori List.¹²² The review also found that the introduction of the Koori List had had a positive impact on Koori applicants' level of engagement with VOCAT and their willingness to continue with their application.¹²³
- 4.88 The review provided insight into stakeholder views on the VOCAA and VOCAT including:
- The VOCAA is very complex and that most Koori applicants would require legal representation.¹²⁴
 - Matters involving childhood sexual assault raise issues of lack of reporting to police and notification of the alleged offender.¹²⁵
 - There are issues relating to delays in obtaining information and records from police.¹²⁶
 - There are often issues of delay for the Koori community—both in relation to reporting a criminal act to police, and making an application to VOCAT.¹²⁷
 - VOCAT information and correspondence was too complex for victims without legal representation.¹²⁸
 - Concerns about the possibility of offender notification, particularly its cultural impact.¹²⁹
 - Concerns about culturally appropriate counsellors and psychologists.¹³⁰
 - The need for additional information and support in relation to VOCAT hearings and increased cultural sensitivity including holding hearings in culturally appropriate and/or neutral venues.¹³¹
 - The positive benefits of having a dedicated registrar managing applications, being a central point of management and communication.¹³²
- 4.89 The review made a number of recommendations aimed at improving the ongoing operation of the Koori List.¹³³

Department of Justice—Reviewing Victims of Crime Compensation: Sentencing Orders and State-Funded Awards (2009)

- 4.90 In 2009 the then-Department of Justice released a discussion paper examining Victorian's schemes for victim compensation, including VOCAT.¹³⁴

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

122 Ibid 17.

123 Ibid.

124 Ibid 22.

125 Ibid.

126 Ibid.

127 Ibid 23.

128 Ibid 24.

129 Ibid 26.

130 Ibid.

131 Ibid 27–28.

132 Ibid 29.

133 Ibid 33–7.

134 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009).

- 4.91 The discussion paper described the VOCAA as ‘complex and difficult for victims to understand’.¹³⁵ Issues noted were:
- the difficulties for victims in finding lawyers who have sufficient expertise to assist with VOCAT applications, particularly in rural and regional areas¹³⁶
 - the ‘potentially traumatic’ processes involved for a victim where an alleged offender is given the opportunity to be heard at a VOCAT hearing¹³⁷
 - the long-term sustainability of VOCAT’s case load in the context of its operation within the organisational structure of the Magistrates’ Court of Victoria¹³⁸
 - delays in victims receiving awards and inconsistent decision making¹³⁹
 - difficulties with the state recovery of assistance awards under the VOCAA.¹⁴⁰
- 4.92 The discussion paper also noted a number of advantages of the VOCAA and VOCAT:¹⁴¹
- the lower burden of proof required to prove that a criminal act occurred
 - the recovery focus of the VOCAA, directing assistance towards counselling, medical expenses and other expenses that assist with recovery
 - the accessibility of VOCAT through the 51 Magistrates’ Court locations
 - the availability of interim awards.
- 4.93 In particular, the discussion paper noted that:
- 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 applicants. However, attending a hearing and giving evidence about the criminal act may further distress others.¹⁴²
- 4.94 The discussion paper also noted that while the VOCAA ‘suggests an assumption that the offender or other state-funded compensation schemes are primarily responsible for compensating victims’, in practice ‘VOCAT is often used as the primary source of assistance’.¹⁴³
- 4.95 The discussion paper also noted increased access to VOCAT for Aboriginal victims of crime as a result of the Koori VOCAT list¹⁴⁴ and an overall growth in demand and the amounts being awarded by VOCAT.¹⁴⁵
- 4.96 The discussion paper outlined a number of options for reform, including whether:
- an administrative model of state-funded financial assistance would be more effective
 - victims should have to prove that they have suffered an injury
 - the award caps should be reviewed
 - VOCAT should be centralised to improve efficiency and consistency
 - the state should seek to recover VOCAT awards from offenders
 - a victim compensation levy should be imposed on offenders to assist with funding victim compensation.¹⁴⁶
- 4.97 A final report of the review was never released.

135 Ibid 18.
136 Ibid 19.
137 Ibid 21.
138 Ibid 23.
139 Ibid 42.
140 Ibid 49.
141 Ibid 42.
142 Ibid 20.
143 Ibid 22.
144 Ibid 19.
145 Ibid 23–4.
146 Ibid 42–50.

Issues with Victoria's existing victims of crime financial assistance scheme

48	Introduction
49	Eligibility for assistance
54	Assistance available to victims
58	Time limits for making an application to VOCAT
60	The making an award under the VOCAA
66	Review, variation and refund of awards
69	Timeliness of awards
74	VOCAT hearings and evidentiary processes
81	Awareness and accessibility

5. Issues with Victoria’s existing victims of crime financial assistance scheme

Introduction

- 5.1 This chapter details stakeholder issues with Victoria’s existing scheme of state-funded financial assistance for victims of crime, as provided for under the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) and through the Victims of Crime Assistance Tribunal (VOCAT) (together the ‘existing scheme’).
- 5.2 Victoria’s existing scheme is unique in that it is the only Australian victims of crime assistance scheme that uses judicial decision makers to determine applications in the first instance,¹ and one of only a few schemes that enables a victim to elect to attend a hearing.² However, as this chapter discusses, stakeholders’ views vary on the benefits of this approach.
- 5.3 In addition, and unlike some other Australian jurisdictions,³ Victoria’s existing scheme enables victims to be supported through the application process by legal practitioners and to seek reimbursement of these costs at the discretion of VOCAT.⁴ The Commission was told that there are significant benefits in victims being able to access legal advice and support,⁵ and in having some of these costs reimbursed.⁶
- 5.4 As this chapter also discusses, there are a significant number of issues with the existing scheme, with the consequence that not all eligible victims may be accessing it.⁷ Even where victims do access the scheme, the Commission was told that the assistance awarded is not always consistent or predictable,⁸ nor is it provided in a timely manner.⁹

1 South Australia also uses judicial decision makers but not in the first instance. If a claim for statutory compensation has not been settled by agreement between the Crown Solicitor and the claimant within 3 months after the application is made or a longer period agreed between the Crown Solicitor and the claimant, the claimant may apply to the court for an order for statutory compensation: *Victims of Crime Act 2001* (SA) s 18(5).

2 In Victoria, hearings may also be held if the Tribunal requires: *Victims of Crime Assistance Act 1996* (Vic) s 33(1). See also Part 6 ‘Determination of Your Application’ of the Victims of Crime Assistance Tribunal, *Application for Assistance Form* (2016), which asks the applicant to nominate whether they would prefer to attend a hearing at the Tribunal or have to have their application determined in their absence. Like Victoria, Tasmania also provides for hearings if the applicant elects or the Commissioner requires: *Victims of Crime Assistance Act 1976* (Tas) ss 7(4) and 7(5). Western Australia is the only other jurisdiction that provides for hearings, but these are only conducted if the assessor requires: *Criminal Injuries Compensation Act 2003* (WA) s 24(1).

3 As discussed in Chapter 10 of this report, the NSW state-funded financial assistance scheme established under the *Victims Rights and Support Act 2013* (NSW) does not provide for the reimbursement of legal costs.

4 *Victims of Crime Assistance Act 1996* (Vic) s 48.

5 Submissions 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 21 (Confidential), 22 (YourLawyer), 30 (CASA Forum), 38 (Ryan Carlisle Thomas Lawyers), 42 (Joint Submission Springvale Monash Legal Service et al), 46 (Victoria Legal Aid); Consultations 7 (Family Violence and Advocacy Organisations), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

6 The issue of legal costs is discussed further in Chapter 10, where it is noted that the removal of the reimbursement of legal costs for applications for state-funded financial assistance under the NSW scheme has been raised by stakeholders as being a barrier, particularly for vulnerable victims.

7 See Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria), which notes that approximately 9% of all victims of crimes against the person apply to VOCAT for financial assistance.

8 See Submissions 5 (Anglicare Victoria Victims Assistance Program), 28 (South Metropolitan Integrated Family Violence Executive), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

9 See Submissions 18 (cohealth), 38 (Ryan Carlisle Thomas Lawyers), 49 (Victims of Crime Commissioner, Victoria); Consultations 4 (Victim, Witness and Court Support), 8 (Victims Representatives—Victims of Crime Consultative Committee), 20 (Academics), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

- 5.5 These issues reflect the matters identified in both the first and supplementary terms of reference and arise in relation to:
- a victim’s eligibility for assistance
 - assistance available to victims
 - time limits for making an application to VOCAT
 - the making of an award under the VOCAA
 - review, variation and refund of awards
 - timeliness of awards
 - VOCAT hearing and evidentiary process
 - awareness and accessibility to VOCAT.
- 5.6 These issues are considered further in the rest of this chapter. The discussion of each issue is preceded by a brief overview of the relevant provisions of the VOCAA.

Eligibility for assistance

- 5.7 The first terms of reference ask the Commission to consider the eligibility test under the VOCAA and whether the test should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury.
- 5.8 In addition, the second, third and fourth matters of the supplementary terms of reference ask the Commission to consider the eligibility test and the definition of ‘act of violence’, as well as whether the VOCAA recognises the appropriate people as victims.

Who is eligible?

- 5.9 A person is eligible for financial assistance under the VOCAA if they are the ‘primary’, ‘secondary’ or ‘related’ victim of an act of violence, and that act of violence directly results in injury, death or, for primary victims, a ‘significant adverse effect’.¹⁰
- 5.10 Different categories of victim are eligible for different kinds of assistance.¹¹ An applicant can only apply to VOCAT for assistance in one capacity, even if the applicant may be eligible under multiple victim categories.¹²
- 5.11 In addition, and for all victim categories, the VOCAA requires there to have been an act of violence. This is defined as a ‘criminal act’ or ‘a series of related criminal acts’ that occurred in Victoria and ‘directly resulted in injury or death to one or more persons’.¹³
- 5.12 The VOCAA defines a criminal act as an act or omission that is a ‘relevant offence’.¹⁴ Relevant offences include assault, injury, threats, sexual offences, stalking, child stealing, kidnapping, conspiracy and attempts of these offences.¹⁵
- 5.13 In a number of cases, the Victorian Civil and Administrative Tribunal (VCAT), which has the power to review decisions of VOCAT, has held that an act of violence must involve an offence against the person and does not include property offences.¹⁶ This means that a person whose house is the subject of the offence of arson, for example, is not eligible for assistance under the VOCAA.¹⁷

10 See *Victims of Crime Assistance Act 1996* (Vic) ss 7, 8A, 9 and 11.

11 Ibid ss 8, 10, 13 and 15.

12 Ibid s 18.

13 Ibid s 3(1).

14 Ibid.

15 Ibid.

16 See *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004) [15]; *Purcell v Victims of Crime Assistance Tribunal* (3 June 2011) [18]; *Matthews v Victims of Crime Assistance Tribunal* [2012] VCAT 1099 (27 July 2012) [18]–[19].

17 See, eg, *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).

- 5.14 The VOCAA also requires the act of violence to directly result in injury—that is, actual physical bodily harm, mental illness or disorder (or exacerbation of these), or pregnancy.¹⁸ ‘Injury’ does not include injury arising from property loss or damage.¹⁹
- 5.15 Primary victims may also claim ‘special financial assistance’ if they have suffered a significant adverse effect, defined as ‘any grief, distress, trauma or injury’ as a direct result of the act of violence.²⁰
- 5.16 The standard of proof for establishing both that an act of violence occurred and that it directly resulted in an injury is on ‘the balance of probabilities’.²¹

Issues identified in the consultation papers

- 5.17 As noted in the first consultation paper, the definitions of act of violence and injury, the causation requirement, and the victim categories create barriers to accessing assistance for victims of family violence.²²
- 5.18 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.²³ Victims of non-criminal forms of family violence, such as economic, emotional and psychological abuse, intimidation, harassment, and certain context-specific harms that occur in a particular culture or tradition are excluded.²⁴ Victims of forms of family violence which are criminal in nature but not offences against the person are also excluded.²⁵
- 5.19 The definition of act of violence contained in the VOCAA is also narrower than the definition of ‘family violence’ in the *Family Violence Protection Act 2008* (Vic), which includes threatening or coercive behaviour, behaviour that in any other way controls or dominates another family member and causes them to fear for their safety or wellbeing or that of another person, and behaviour that causes a child to hear or witness, or otherwise be exposed to family violence.²⁶ As noted by the Royal Commission into Family Violence, the discrepancies between the definition in the VOCAA and the definition in the *Family Violence Protection Act* ‘produce anomalous results in terms of eligibility’.²⁷
- 5.20 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 illness or disorder’, they may be ineligible for assistance.²⁸ 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 diagnosed mental illness or disorder.²⁹
- 5.21 In addition, the exclusion of injury arising from property loss or damage in the VOCAA is a particular concern for victims of family violence.³⁰ This is because in some situations of family violence, the only tangible harm which the victim is able to demonstrate is

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

19 Ibid.

20 Ibid.

21 Ibid s 31.

22 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 46–7.

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

24 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* (2016) vol 4, 78.

25 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* [2011] VCAT 1463 (3 June 2011).

26 *Family Violence Protection Act 2008* (Vic) s 5(1). This point was also noted by the Magistrates’ Court of Victoria and the Children’s Court of Victoria in their submission to the Victorian Royal Commission into Family Violence, see 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.

27 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 78.

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

29 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).

30 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 49.

property damage.³¹ Moreover, the economic harm that can flow from property damage or destruction can affect the independence and security of victims of family violence, as well as contribute to their long-term financial disadvantage.³²

- 5.22 Victims of family violence may 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.³³
- 5.23 The distinction between primary, secondary and related victims can also be problematic for child victims of family violence. As recognised by the Royal Commission into Family Violence children who experience family violence can often suffer severe psychological and developmental trauma and consequences.³⁴ This applies both to child victims who are the direct subject of the violence and those who hear, witness or are otherwise exposed to it.³⁵ However, under the VOCAA, this second group of child victims are not recognised as primary victims. Such child victims are only able to apply for financial assistance as secondary or related victims.³⁶ 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 can receive.³⁷
- 5.24 As noted in the supplementary consultation paper, the eligibility criteria, including the victim categories, the definitions of act of violence and injury, and the causation requirement can create barriers for other victims of crime too.³⁸
- 5.25 The distinction between primary, secondary and related victims may not reflect victims' experiences of violent crime or take account of their needs.³⁹ In addition, these distinctions can operate to exclude people, such as:
- people who assist in the aftermath of an act of violence, unless the assistance is proactive and substantial and occurs at the time of the act of violence, or immediately thereafter⁴⁰
 - family members of a primary victim (other than the parents of a primary victim under the age of 18) who are injured by becoming aware of a non-lethal act of violence⁴¹

31 For an illustration of a situation of family violence in which the only injury to which the victim could point was property damage, see *Purcell v Victims of Crime Assistance Tribunal* [2011] VCAT 1463 (3 June 2011). In that case, VCAT rejected the applicant's claim on the basis that she had only provided evidence of property damage.

32 For a discussion of the economic consequences of family violence, see generally 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).

33 See, eg, *NF v Victims of Crime Assistance Tribunal* [2012] VCAT 1740 (16 November 2012) in which VOCAT refused the applicant's claim for counselling costs on the grounds that the incident in question was only one of many causes of the applicant's difficulties. This decision was set aside by VCAT. See also *CS v Victims of Crime Assistance Tribunal* [2006] VCAT 1061 (9 June 2006), in which both VOCAT and VCAT rejected the victim's application in part because there were a number of other very serious unrelated matters that had had a significant effect on the applicant.

34 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 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).

35 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 106. See also the definition of family violence in section 5(1) of the *Family Violence Protection Act 2008* (Vic), which recognises children seeing, hearing or otherwise being exposed to family violence as a form of 'family violence'.

36 The definition of 'primary victim' in section 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'.

37 This is illustrated by *NF v Victims of Crime Assistance Tribunal* [2012] VCAT 1740 (16 November 2012) in which, despite witnessing his father beat his stepfather to death, the applicant was unable to apply as a primary victim notwithstanding the severe psychological impact of the violence on him.

38 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 39.

39 For example, in *Smith v Victims of Crime Assistance Tribunal* [2003] VCAT 1489 (22 October 2003), a daughter who inadvertently interrupted an assault by her father on her mother was found to be a secondary, rather than primary, victim, on the basis that her injuries had been as a result of witnessing the act of violence.

40 In *Smith v Victims of Crime Assistance Tribunal*, VCAT held that although the applicant had assisted her mother by staying with her after the assault, collecting a flannel and bowl to clean her wounds and putting her brother to bed, the assistance she had rendered was 'no more than offering first aid ... after the event' and did not constitute 'aid' as contemplated by the VOCAA: *ibid* [23].

41 In *Will v Victims of Crime Assistance Tribunal* [2011] VCAT 1739 (13 September 2011), VCAT held that although the applicant had attended on her son as soon as she was informed of the violence and stayed by his bedside for many hours a day for several months while he recovered in hospital, suffering depression and anxiety as a result, the applicant was not a primary victim under the VOCAA and was also not a 'secondary victim' as she was not present at the time of the violence.

- family members of a deceased primary victim who are not ‘close family members’ under the related victim category.⁴²
- 5.26 In addition, because of the definition of ‘spouse’,⁴³ a related victim who is in a relationship involving cohabitation and/or personal or financial commitment and support of a domestic nature,⁴⁴ or who is in a registered relationship under the *Relationships Act 2008* (Vic) must prove they have an ‘intimate personal relationship’ with the primary victim.⁴⁵ This creates an additional hurdle for the domestic partner of a primary victim, which is out-of-step with contemporary values and the way that such relationships are legally construed elsewhere.⁴⁶
- 5.27 The existing definition of ‘close family member’, which is limited to a spouse, parent, guardian, step-parent, child (including by guardianship), step-child, sibling or step-sibling,⁴⁷ may also create a barrier to assistance for Aboriginal and Torres Strait Islander applicants. They may place equal importance on relationships with others, including those within the wider kinship group who might not be a ‘sister’ or ‘brother’ in a biological or legal sense, but who are considered as such by the community.⁴⁸
- 5.28 As noted above in the context of family violence, the narrow definition of an act of violence does not recognise the harm resulting from some forms of non-criminal abuse and/or non-physical criminal offences, including:
- financial abuse and psychological abuse
 - causing a child to hear, witness or be exposed to forms of violence
 - non-contact sexual offences
 - property offences.
- 5.29 Similarly, the narrow definition of injury can also be a barrier to assistance for other victims of crime, not only victims of family violence. In particular, the requirement in the VOCAA to establish a mental illness or disorder, such as a recognised psychiatric or psychological disorder,⁴⁹ means that other psychological, behavioural, interpersonal and social harms may not be recognised.⁵⁰ Further, the requirement for psychiatric assessments to establish such injuries can be a deterrent for some victims.⁵¹ Such assessments are not therapeutic and may cause further distress to a victim.⁵² The need to provide medical and psychological reports can also lead to victims being directed away from frontline and community-based services.⁵³ This can be a particular concern for victims living in rural or remote areas, where there may be few practising psychiatrists or psychologists, and access may be limited.⁵⁴

42 Section 3(1) of the *Victims of Crime Assistance Act 1996* (Vic) defines a ‘close family member’ as 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. In *Reid v Victims of Crime Assistance Tribunal* [2002] VCAT 373 (24 May 2002), VCAT found that the relationship between an aunt and her niece who had been murdered was not an ‘intimate personal relationship’ for the purposes of the VOCAA, and that therefore the aunt was not a ‘related victim’, as they had had infrequent contact in the years preceding the primary victim’s death.

43 Section 3(1) of the *Victims of Crime Assistance Act 1996* (Vic) defines ‘spouse’ as a person to whom the person is married.

44 See *Victims of Crime Assistance Act 1996* (Vic) s 3(1): definition of ‘domestic partner’.

45 They may be able to make an application as a ‘secondary victim’ if they witnessed the act of violence: *Victims of Crime Assistance Act 1996* (Vic) s 10A.

46 Since 2009, de facto couples and married couples have the same property and parenting rights under the *Family Law Act 1976* (Cth).

47 These changes were introduced by *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

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

49 See generally Eleanor Bourke and Colin Bourke, ‘Aboriginal Families in Australia’ in Robyn Hartley (ed) *Families and Cultural Diversity in Australia* (Australian Institute of Family Studies, 1995) <<https://aifs.gov.au/publications/families-and-cultural-diversity-australia/3-aboriginal-families-australia>>.

50 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.

51 However, in *AVA v Victims of Crime Assistance Tribunal* [2010] VCAT 2078 (23 December 2010) VCAT held that the presence of anxiety symptoms without an anxiety disorder still amounted to a mental injury for the purposes of the VOCAA.

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

53 Ibid.

54 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 49.

54 Submission 15 (Merri Health Victims Assistance Program).

- 5.30 There are also significant costs associated with proving injury. Obtaining reports from medical professionals and psychiatrists can be costly for victims and for VOCAT, which reimburses successful applicants. These costs may be considered to be ‘wasting resources’,⁵⁵ given the extensive literature that documents the kinds of harm that victims commonly experience, especially in relation to certain crimes, such as sexual assault.⁵⁶
- 5.31 As already noted, property loss or damage is expressly excluded from the definition of injury and does not constitute a significant adverse effect for the purposes of the VOCAA. This is a particular issue for victims of family violence. However, other victims will also be ineligible for assistance if the only injury or significant adverse effect they suffer is property-related.

Responses

- 5.32 The above concerns regarding the eligibility criteria were also reflected in the written submissions received.
- 5.33 The Magistrates’ Court of Victoria and the VOCAT acknowledged that the eligibility criteria can be a barrier to victims and stated that the victim categories and the definitions of an act of violence and injury are ‘narrow, outdated and fail to take into account distinct victim experiences’.⁵⁷
- 5.34 Many submissions also acknowledged the difficulties that the definition of an act of violence creates for victims of family violence. In particular, the Victim Survivors’ Advisory Council submitted, the existing definition ‘is narrow [and] excludes recourse for many [family violence] survivors’.⁵⁸
- 5.35 Similarly, the Director of Public Prosecutions submitted, ‘a criminal offence committed in the context of family violence is not confined to physical or sexual (violent) offences against the person’.⁵⁹ The Director noted that ‘family violence offences may also include offences not against the person such as fraud and blackmail, criminal damage to property and intimidation and reprisals relating to witnesses’.⁶⁰
- 5.36 In addition, Eastern Metropolitan Regional Family Violence Partnership submitted that ‘not all forms of family violence are currently legislated as acts of crime and this is problematic’.⁶¹
- 5.37 Stakeholders also raised concerns regarding the definition of an act of violence for other victims of crime, particularly victims of stalking and burglary who may not come in direct contact with an offender.⁶²
- 5.38 In relation to the definition of injury, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria, submitted:

Establishing ‘injury’ under the current definition can lead to complexities and delays in some applications, and may result in ineligibility for some victims, despite having suffered harm or distress as a result of an act of violence.⁶³

55 Bree Cook, Fiona David and Anna Grant, *Victims’ Needs, Victims’ Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 67.

56 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, 294.

57 Submission 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal).

58 Submission 8 (Victim Survivors’ Advisory Council). See also submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), noting that approximately half (48.9%) of participants in its practitioner survey encountered issues relating to client eligibility.

59 Submission 3 (Director of Public Prosecutions Victoria).

60 Ibid.

61 Submission 10 (Eastern Metropolitan Regional Family Violence Partnership). See also Submission 1 (Judicial Advisory Group on Family Violence).

62 Submissions 13 (Adviceline Injury Lawyers), 38 (Ryan Carlisle Thomas Lawyers).

63 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

- 5.39 Cohealth submitted that the requirement to prove injury can be ‘cumbersome and re-traumatising’.⁶⁴ Similarly, Inner Melbourne Community Legal submitted:
- The difficulties involved can be so great, that they prevent victims from accessing financial assistance under the scheme at all because they do not have the capacity to undertake all the assessments and attend appointments required for their claim.⁶⁵
- 5.40 It was also submitted that the requirement to prove injury has the potential to create further psychological effects by effectively requiring victims to present as unwell, which ‘could undermine engagement in treatment, in so far as maintaining a positive attitude may be favourable to treatment, but not in one’s financial interests’.⁶⁶
- 5.41 In relation to the causation requirement, Springvale Monash Legal Service submitted that victims of family violence can encounter difficulties in establishing that their injury was a ‘direct result’ of the act of violence, particularly if they are suffering from a mental disorder or illness and there are other contributing factors.⁶⁷ Similarly, knowmore submitted that it can be difficult for victims of institutional child sexual abuse to establish that the injury suffered was a ‘direct result’ of the abuse, as often such victims may experience multiple episodes of violence or other traumatic events across their lives.⁶⁸
- 5.42 In relation to the victim categories, Inner Melbourne Community Legal submitted that the current victim categories are too narrow and do not adequately reflect the experiences of victims and other people impacted by crime.⁶⁹ In this context, Women’s Legal Service Victoria and Domestic Violence Victoria submitted that the victim categories can result in the children of adult family violence survivors having their claims rejected.⁷⁰
- 5.43 Merri Health Victims Assistance Program also submitted that the terms ‘primary victim’, ‘secondary victim’ and ‘related victim’ can ‘imply a hierarchical correlation as to how victims are impacted by a crime’, causing some victims distress about the level of impact they have experienced if they are not identified as a primary victim.⁷¹

Assistance available to victims

- 5.44 The first 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.
- 5.45 In addition, matters four, five and six of the supplementary terms of reference ask the Commission to consider whether:
- the categories of assistance and structure of awards in the VOCAA are appropriate and adequate to account for harm
 - the formula used to quantify special financial assistance in the VOCAA is appropriate
 - whether it is appropriate and fair to award assistance to aid recovery in exceptional circumstances, and
 - whether there are other ways to promote the recovery of victims from the effects of crime.

64 Submission 18 (cohealth).
65 Submission 14 (Inner Melbourne Community Legal).
66 Submission 45 (Daniel Myles et al).
67 Submission 41 (Springvale Monash Legal Service).
68 Submission 43 (knowmore).
69 Submission 14 (Inner Melbourne Community Legal).
70 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
71 Submission 15 (Merri Health Victims Assistance Program).

What assistance is available?

- 5.46 The categories and quantum of awards available to victims of crime under the VOCAA depend on the victim category under which an applicant applies for assistance.
- 5.47 The maximum award for primary victims is \$60,000,⁷² plus \$10,000 of special financial assistance.⁷³ The maximum award for any secondary victim and any one related victim is \$50,000.⁷⁴
- 5.48 The VOCAA limits the maximum amount of financial assistance payable to a pool of related victims to \$100,000.⁷⁵ The related victims' pool can also be reduced by an award for funeral expenses, even if made to someone other than a related victim.⁷⁶

Issues identified in the consultation papers

- 5.49 As noted in the first consultation paper, the main issues facing victims of family violence, including child victims, are the 'related criminal acts' provision,⁷⁷ and the categories of special financial assistance.⁷⁸
- 5.50 In particular, the related criminal acts provision operates to disproportionately reduce the awards received by victims of family violence, including child victims,⁷⁹ as 'domestic violence, almost by definition, will involve repeated acts of abuse by the same offender'.⁸⁰
- 5.51 As recognised by the Royal Commission into Family Violence, the categories of special financial assistance do 'not sufficiently take into account the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence'.⁸¹ 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.⁸²
- 5.52 As noted in the supplementary consultation paper, and similarly to victims of family violence, other crime victims also face issues with respect to the financial assistance available, in particular:
- the quantum (amount) of awards, including the total financial assistance available to an applicant
 - the categories of awards
 - the reduction of awards for related criminal acts.⁸³
- 5.53 In terms of quantum, the maximum award available for primary victims is broadly consistent with the maximum award available for primary victims in other Australian jurisdictions, which ranges from \$30,000 in Tasmania⁸⁴ to \$100,000 in South Australia.⁸⁵ It is also similar to that in Queensland and Western Australia, which both cap the award for primary victims at \$75,000.⁸⁶

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

73 *Ibid* s 8A.

74 *Ibid* ss 10(1) and 13(1).

75 *Ibid* s 12(1).

76 *Ibid*.

77 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 65–6.

78 *Ibid* 66–7.

79 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.

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

81 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 78.

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

83 See Chapter 6 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017).

84 This is the maximum award for a primary victim of a single criminal act in Tasmania: *Victims of Crime Assistance Regulations 2010* (Tas) reg 4(1)(a).

85 This is the maximum award for a primary victim in South Australia: *Victims of Crime Act 2001* (SA) s 20(3)(c).

86 *Victims of Crime Assistance Act 2009* (Qld) s 38(1); *Criminal Injuries Compensation Act 2003* (WA) s 31.

- 5.54 For those victims suffering permanent and serious disability as a result of an act of violence, the maximum amount of financial assistance may be inadequate, particularly where a victim is unable to return to work because of their injuries.⁸⁷
- 5.55 Despite the maximum amounts available, the average award granted by VOCAT is much lower. In the 2016–17 financial year, the average award amount was \$7983, around one-tenth of the total maximum award available.⁸⁸
- 5.56 In addition, the related victims' pool can adversely impact related victims, both in terms of delays, as VOCAT will wait until all related victims have lodged their applications for assistance before considering any related victim application,⁸⁹ and by operating to reduce the quantum of their awards where there are multiple related victims or an award for funeral expenses is also made.
- 5.57 As noted in the supplementary consultation paper, while the categories of award may appear to meet victims' needs, for example, through generous interpretations of 'medical expenses' and 'counselling',⁹⁰ the exclusion of assistance for expenses incurred through loss or damage to property, as well as childcare expenses, can result in some awards being inadequate for victims' needs.⁹¹
- 5.58 In particular, the exclusion of property-related expenses can affect victims of family violence, who may require property-related assistance in order to achieve the independence and security necessary to their recovery, both in the short and longer term.⁹²
- 5.59 The lack of any explicit award for childcare expenses may affect the ability of victims who do not have access to affordable childcare to make practical arrangements for their safety.⁹³ It may also affect their ability to attend medical and counselling appointments to assist in their recovery.⁹⁴
- 5.60 In addition, victims of crimes for which there may be no 'normal' timeframe or pathway for recovery, such as victims of child sexual abuse, may be particularly impacted by the requirement that expenses be 'reasonable'. In this context, expenses, such as for counselling, have been deemed unreasonable because of a lack of demonstrable improvement in an applicant's health.⁹⁵
- 5.61 VOCAT has wide discretion to grant additional financial assistance towards the victim's recovery in exceptional circumstances.⁹⁶ The Commission heard that such awards can be beneficial, allowing victims to access to financial assistance tailored to their specific needs and to claim expenses they would otherwise be unable to access.⁹⁷

87 See, eg, a media report concerning a victim of an assault who was badly injured and has been unable to return to work. The assault victim applied to VOCAT for financial assistance in 2013 and was awarded \$70,000—the maximum available to a primary victim under the VOCAA. Four years later, in 2017, the assault victim describes this money as 'drying up', see William Vallely, 'Damages Do Not Fit the Crime: Victim', *Bendigo Advertiser* (online), 21 July 2017 <www.bendigoadvertiser.com.au/story/4804647/victims-plea-for-justice/>.

88 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 32–3.

89 The VOCAA requires VOCAT to try to hear and determine together all applications made by related victims of any one act of violence: *Victims of Crime Assistance Act 1996* (Vic) s 32(2). On the Application Form, VOCAT states that it waits until all related victims have lodged their applications in order to hear them together: Victims of Crime Assistance Tribunal, *Guide to Completing the Application for Assistance Form* (2016) Section 10.

90 See, eg, *NF v Victims of Crime Assistance Tribunal* [2012] VCAT 1740 (16 November 2012), in which martial arts therapy was found to constitute 'counselling', and *Ractliffe v Victims of Crime Assistance Tribunal* [2015] VCAT 205 (4 March 2015), in which the cost of an occupational therapy assessment provided for the purpose of regaining a driving licence was considered a 'medical expense'.

91 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 81–2.

92 For a discussion of the economic consequences of family violence, see generally 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). See also Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, 2015).

93 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 48.

94 *Ibid.*

95 See, eg, *CS v Victims of Crime Assistance Tribunal* [2006] VCAT 1061 (9 June 2006), in which VCAT held that counselling expenses were not reasonable because, among other things, there was little evidence of improvement in the applicant's mental health.

96 *Victims of Crime Assistance Act 1996* (Vic) ss 8(3), 10A(1) and 13(4).

97 Consultations 7 (Family Violence and Advocacy Organisations), 13 (Regional Consultation—Mildura Legal Professionals).

- 5.62 VOCAT’s broad discretion can result in inconsistency in awards.⁹⁸ VCAT’s interpretation of ‘exceptional circumstances’ as ‘out of the ordinary’ means that only victims who suffer an unusual or uncommon reaction may be eligible for an award for recovery expenses.⁹⁹ This can result in awards for recovery expenses not always being awarded to those who need them the most.¹⁰⁰

Responses

- 5.63 The concerns identified in the consultation papers were reflected in the written submissions received. This is particularly so in relation to the reduction of awards where there are related criminal acts, the requirement for expenses to be reasonable, the discretion afforded to VOCAT in making awards to assist in a victim’s recovery in exceptional circumstances, and the quantum of awards available.
- 5.64 Although the Commission was told that ‘generally, the current categories of assistance are still appropriate for primary victims’,¹⁰¹ the Commission was also told that the structure of the current categories makes the application process ‘inaccessible to most victims without the assistance of legal support with their application’.¹⁰²
- 5.65 The Commission was also told that the ‘related criminal acts’ provisions operate to disproportionately reduce awards of financial assistance made to victims who suffer cumulative harm caused by a pattern of abuse, such as victims of family violence.¹⁰³ As Springvale Monash Legal Service told the Commission, ‘this effectively blames and punishes victims for remaining in abusive situations’.¹⁰⁴
- 5.66 Similarly, the Aboriginal Family Violence Prevention & Legal Service Victoria noted that the effect of the related criminal acts provision was to:
- create an inherent bias within the Act towards once-off, or stranger-based incidents and fail to appropriately recognise the cumulative and serious harm caused by family violence.¹⁰⁵
- 5.67 This issue was also acknowledged by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria in their joint submission.¹⁰⁶
- 5.68 In addition, the written submissions raised concerns about the requirement that expenses be reasonable. While submissions noted that it was appropriate for the VOCAA to require expenses to be reasonable, and to reflect the nature of the crime,¹⁰⁷ it was also submitted that ‘clients experience diverse reactions to crimes, and it is important to ensure assessments of what is “reasonable” take into account an individual’s situation’.¹⁰⁸ As Merri Health Victims Assistance Program submitted, ‘it is difficult to expect that costs for certain expenses be reasonable as this has an inherent expectation that the experiences of victims are comparable/similar’.¹⁰⁹

98 For example, the applicant’s claim for a gym membership was successful in *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011), but was unsuccessful in *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006).

99 See *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651 (14 December 2005) where VCAT held that the victim’s resulting post-traumatic stress disorder, anxiety and depression were ‘depressingly common’ for victims of rape and therefore not ‘unusual, special or out of the ordinary’. In contrast in *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237, the persistence of depression and post-traumatic stress disorder more than 12 years after the assault, along with the continued disfigurement to the nose, was considered by VCAT as ‘circumstances out of the ordinary course’.

100 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 230.

101 Submission 14 (Inner Melbourne Community Legal).

102 Submission 15 (Merri Health Victims Assistance Program).

103 Submission 41 (Springvale Monash Legal Service).

104 Ibid.

105 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

106 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

107 Submission 18 (cohealth).

108 Ibid.

109 Submission 15 (Merri Health Victims Assistance Program).

- 5.69 It was also submitted that the requirement for there to be ‘exceptional circumstances’ is often interpreted by VOCAT without consistency and in a manner at odds with victims’ experience of crime.¹¹⁰ As Schembri & Co Lawyers submitted, ‘Most victims of crime believe that the act of violence in itself constitutes exceptional circumstances as it is not in the ordinary normal course of mainstream life to be a victim of crime’.¹¹¹
- 5.70 Similarly, the Victorian Aboriginal Legal Service submitted:
- By definition, all violence is, or at least should be, exceptional. No-one should be expecting to be the victim of a violent act in any part of their life. That they have suffered such an act is the exception. The inclusion of an additional ‘exceptional circumstances’ category punishes those for whom this kind of violence is potentially more common, therefore victimising those already victimised. This is clearly the case for people who have suffered from domestic and family violence.¹¹²
- 5.71 The problematic nature of the current ‘exceptional circumstances’ awards was also acknowledged by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria:
- The Act does not define or provide examples of what may constitute exceptional circumstances, leaving applicants to try and make their case by leading detailed evidence of psychological injury. Contrary to the purpose of this provision to assist the victim in their recovery, this process may actually serve to pathologise their experience. If an ‘exceptional circumstances’ award is then denied by the Tribunal, the victim’s experience is devalued.¹¹³
- 5.72 In addition, some stakeholders expressed concern about the adequacy of the quantum of awards available. In particular, the Commission was told that ‘the maximum amount of special financial assistance awards had not increased for a long time and that in some cases was grossly inadequate’.¹¹⁴
- 5.73 Similarly, cohealth submitted:
- the amounts of assistance available to those who are severely and profoundly injured during the act of violence are inadequate. While VOCAT is not intended to fully compensate victims for the effects of the crime, a limit of \$70,000 where victims have significant and life changing injuries does little to assist these victims.¹¹⁵
- 5.74 For other stakeholders, the issue of award quantum was not that the total maximum amount available is too low, ‘but rather that the average quantum of awards made is comparatively low’.¹¹⁶ As Inner Melbourne Community Legal submitted, ‘There needs to be better direction as to how the total quantum of award should be calculated, so there is greater consistency and reliability for applicants’.¹¹⁷

Time limits for making an application to VOCAT

- 5.75 The time limit for making an application for assistance was identified by the Royal Commission into Family Violence as a potential barrier for victims of family violence.¹¹⁸ Accordingly, this issue was expressly addressed as part of the Commission’s consideration of the first terms of reference.¹¹⁹

110 Submission 19 (Schembri & Co Lawyers).

111 Ibid.

112 Submission 39 (Victorian Aboriginal Legal Service).

113 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

114 Submission 1 (Judicial Advisory Group on Family Violence).

115 Submission 18 (cohealth).

116 Submission 14 (Inner Melbourne Community Legal).

117 Ibid.

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

119 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 76–81.

- 5.76 In addition, the first and fourth matters in the supplementary terms of reference expressly require the Commission to consider:
- whether the VOCAA can be simplified to make it easier for applicants to understand their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
 - whether the time limits are appropriate and adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime.

Time limits under section 29 of the VOCAA

- 5.77 Under the VOCAA, an application for financial assistance must be made within two years of the act of violence occurring,¹²⁰ except where the application is in relation to an act of violence consisting of physical or sexual abuse which occurred when the applicant was under the age of 18 years, in which case there is no time limit for the making of an application.¹²¹
- 5.78 With the exception of the circumstances noted above, VOCAT must strike out applications made outside this time limit unless 'it considers that, in the particular circumstances, the application ought not to be struck out'.¹²² In making this decision, VOCAT is required to have regard to a number of prescribed factors, including:
- the age of the applicant when the act of violence occurred
 - whether the applicant is intellectually disabled or mentally ill
 - whether the perpetrator of the act of violence was in a position of power, influence or trust in relation to the applicant.¹²³

Issues identified in the consultation papers

- 5.79 As noted in the first consultation paper, the two-year application time limit can be a significant barrier for family violence victims,¹²⁴ because it can take victims of family violence a long time to disclose their experiences of family violence.¹²⁵ The reasons for this are varied and complex.¹²⁶ Accordingly, 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 disproportionately impact such victims' eligibility.¹²⁷
- 5.80 As noted in the supplementary consultation paper, the application time limit can also create barriers for other classes of victim who may take more than two years to identify, disclose and/or report violence and abuse, such victims of child sexual assault, victims of abuse or neglect in care, victims with disability and adult victims of sexual assault.¹²⁸
- 5.81 Regardless of crime type, the time limit for making an application can be a barrier for vulnerable groups or groups that experience discrimination and disadvantage, such as people with disability, members of the LGBTIQ community, Aboriginal and Torres Strait

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

121 *Ibid* s 29(1A).

122 *Ibid* s 29(2).

123 *Ibid* s 29(3).

124 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 78.

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

126 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.

127 *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.

128 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 101.

Recent research by the Royal Commission into Institutional Responses to Child Sexual Abuse found that for victims aged approximately 11 years at the time of alleged sexual abuse, the average time taken to make a complaint to the Catholic Church was 33 years: Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14. See also Family and Community Development Committee, Parliament of Victoria, Inquiry into Abuse in Disability Service, *Final Report* (2016) 59, discussing reasons why victims with disability may face barriers to reporting abuse.

Islander peoples, children and victims from non-English-speaking backgrounds.¹²⁹ As noted by VCAT, this is because of the construction of the provision,¹³⁰ and because of a lack of publicly available information about VOCAT's practices for granting time extensions.

- 5.82 In addition, while VOCAT is allowed to consider certain factors that may account for delayed applications, such as whether the perpetrator was in a position of power, trust or influence over the applicant, or whether the applicant was a child at the time of the occurrence of the act of violence,¹³¹ these factors appear to be interpreted narrowly by the courts.¹³²

Responses

- 5.83 Reflecting the matters discussed in the consultation papers, the written submissions also raised concerns about the application time limit. For example, Merri Health Victims Assistance Program submitted that 'extensions of time are frequently granted by VOCAT but despite this many victims choose not to submit an application due to the mere existence of a time limit'.¹³³
- 5.84 The Commission was told that the two year application time limit 'does not properly take into account the evidence in respect of delayed reporting in sexual crimes'.¹³⁴ The Law Institute of Victoria submitted that 'the current two-year time limit for making a VOCAT application poses a significant barrier for victims of family violence [because] the inherently complex nature of family violence can make it difficult for victims to disclose their experiences within two years of the act of violence occurring'.¹³⁵

The making of an award under the VOCAA

- 5.85 The first terms of reference require the Commission to review the matters giving rise to refusal of an application for financial assistance except in special circumstances.
- 5.86 In addition, the first and fourth matters in the supplementary terms of reference require the Commission to consider:
- whether the VOCAA can be simplified to make it easier for applicants to understand all their potential entitlements, and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
 - whether the structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime.

129 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 102. See also, eg, Angela Dwyer, 'Policing Lesbian, Gay, Bisexual and Transgender Young People: A Gap in the Research Literature' (2011) 22(3) *Current Issues in Criminal Justice* 415, 416, discussing the unwillingness to report to police among LGBTIQ victims of crime; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 145–6, discussing the unwillingness to involve authorities among LGBTIQ victims of family violence, and Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot*, Review and Recommendations (2010) 11, discussing the unwillingness to report to police among Aboriginal and Torres Strait Islander victims of crime.

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

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

132 See, eg, *BFK v Victims of Crime Assistance Tribunal* *ibid*, *FG v Victims of Crime Assistance Tribunal* [2011] VCAT 2449 (1 September 2011) and *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002).

133 Submission 15 (Merri Health Victims Assistance Program).

134 Submission 3 (Director of Public Prosecutions Victoria).

135 Submission 51 (Law Institute of Victoria).

When can an award be made?

- 5.87 An award of financial assistance may be made to a victim of crime where VOCAT is satisfied that:
- an act of violence has occurred
 - the applicant is a victim of that act of violence
 - the applicant is eligible to receive the assistance.¹³⁶
- 5.88 The VOCAA does not require someone to have been charged with or convicted of an offence for an award to be made.¹³⁷
- 5.89 However, there are two circumstances where VOCAT must 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 violence¹³⁸
 - if an earlier application for assistance has been made by the applicant from the same act of violence.¹³⁹
- 5.90 Section 52 of the VOCAA provides two further circumstances where VOCAT must refuse to make an award of assistance, unless there are 'special circumstances'. These are if VOCAT is satisfied that:
- an act of violence was not reported to police within a reasonable time,¹⁴⁰ or
 - 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).¹⁴¹
- 5.91 In determining whether an act of violence was reported to police within a 'reasonable time', the VOCAA provides that VOCAT may 'have regard to any matters that it considers relevant', including:
- the age of the victim at the time of the act of violence
 - whether the victim has an intellectual disability or mental illness
 - 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.¹⁴²
- 5.92 The case law indicates differing interpretations of what is considered a reasonable time for reporting.¹⁴³

136 *Victims of Crime Assistance Act 1996* (Vic) s 50(1). The VOCAA also enables a victim to '... assign to the State their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates': s 51.

137 *Victims of Crime Assistance Act 1996* (Vic) s 50(4).

138 *Ibid* s 52(b).

139 *Ibid* s 52(c).

140 *Ibid* s 52(a)(i).

141 *Ibid* s 52(a)(ii).

142 *Ibid* s 53.

143 In *FG v Victims of Crime Assistance Tribunal* [2011] VCAT 2449 (1 September 2011) and *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002), both cases concerning child sexual abuse, VCAT held that the applicants' significant delay in reporting was not unreasonable. In *FG v Victims of Crime Assistance Tribunal*, 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 of the VOCAA, 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'. Similarly, in *J v Victims of Crime Assistance Tribunal*, a case concerning a 35-year delay in the reporting of an alleged sexual abuse, VCAT noted that the [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.' However, in contrast in *S v Victims of Crime Assistance Tribunal* [2002] VCAT 1257 (7 November 2002), a case concerning a 22-year delay in the reporting of an alleged rape to police, VCAT affirmed the decision of VOCAT to refuse the application on the grounds 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.

- 5.93 Once VOCAT has determined that an act of violence has occurred, that the applicant is a victim eligible for assistance and that there are no circumstances giving rise to mandatory refusal under section 52, section 54 of the VOCAA requires VOCAT to consider a number of further matters before determining whether or not to make an award or the amount of assistance to award. These include:
- the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence¹⁴⁴
 - whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation¹⁴⁵
 - any condition or disposition of the applicant which directly or indirectly contributed to their injury or death¹⁴⁶
 - whether the person by whom the act of violence was committed will benefit directly or indirectly from the award¹⁴⁷
 - any other circumstances that VOCAT considers relevant.¹⁴⁸

Issues identified in the consultation papers

- 5.94 As noted in the first consultation paper, the main issues for victims of family violence concern the requirements to report to police and to assist police and prosecution under the 'contributory conduct' and 'provocation' clauses in section 52, and the perpetrator benefit provisions under section 54.¹⁴⁹
- 5.95 Broadly, these provisions require VOCAT to consider the ways a victim behaves before, during and after a crime. These provisions therefore require VOCAT to make judgments about a victim's character.
- 5.96 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, disadvantage victims of family violence who are less likely to report to police or to cooperate with authorities because of fear, shame or economic dependency.¹⁵⁰
- 5.97 The first consultation paper suggested that the lack of guidance in the VOCAA addressing the unique characteristics of family violence, or directing VOCAT to have regard to these characteristics and dynamics, meant that sections 52, 53 and 54 of the VOCAA are inconsistently interpreted and applied, and that as a consequence, the VOCAA fails to recognise the nature and dynamics of family violence.¹⁵¹
- 5.98 In addition, the first consultation paper suggested that the VOCAA may fail to account for police and broader community attitudes to family violence and the way in which these attitudes might affect reporting rates.¹⁵² As the Royal Commission into Family Violence found, women often commit crimes as a result of experiencing family violence or under duress or coercion from a violent partner.¹⁵³ Data also suggests that women in prison in Victoria experience family violence at much higher rates than women in the rest of the community.¹⁵⁴ Given these findings, the first consultation paper suggested that consideration of a victim's character and behaviour under section 54 of the VOCAA could

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

145 *Ibid* s 54(c).

146 *Ibid* s 54(d).

147 *Ibid* s 54(e).

148 *Ibid* s 54(f).

149 See Chapter 10, Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017).

150 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 105.

See also 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.

151 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 105.

152 *Ibid* 107.

153 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 237–9.

154 *Ibid* 239.

- have a disproportionately adverse impact on victims of family violence, as compared to other victims of crime.¹⁵⁵
- 5.99 In addition, the contributory conduct, provocation and perpetrator benefit provisions can be criticised for the potential for ‘victim blaming’, particularly in the context of family violence where defensive actions by victims can be misconstrued as provocation or ‘contributing to injury’.¹⁵⁶
- 5.100 In relation to perpetrator benefit, the VOCAA provides no guidance about what might be considered as resulting in a benefit to the perpetrator.¹⁵⁷ The first consultation paper referred to the Australian Law Reform Commission’s submission to the Commission’s reference in relation to victims of crime in the criminal trial process, where it was 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.¹⁵⁸ In addition, 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 such an exclusion ‘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’.¹⁵⁹
- 5.101 Echoing the issues raised in the first consultation paper, the main issues raised in the supplementary consultation paper in relation to the making of a VOCAT award also related to the application and operation of sections 52 and 54 of the VOCAA.¹⁶⁰
- 5.102 In relation to the police reporting requirements under section 52 of the VOCAA, victims of crimes such as sexual assault or historical child sexual assault may also be less likely to make a report to police because of fear, shame or economic disadvantage.¹⁶¹
- 5.103 In addition, and as illustrated by the experience in the VOCAT Koori List, some victims may prefer to deal with issues themselves rather than involve police.¹⁶² Similarly, concerns about homophobia and heterosexism may contribute to a reluctance in the LGBTIQ community to report victimisation to police.¹⁶³
- 5.104 For victims with disability, there may also be barriers relating to living environments, physical and financial independence and barriers to reports of violence being believed.¹⁶⁴
- 5.105 In addition, although victims may ultimately make a report to police, the report may be significantly delayed. In particular it may take childhood sexual abuse victims several decades to disclose the abuse.¹⁶⁵
- 5.106 As discussed in both consultation papers, in circumstances where perpetrators of violence exercise power and control over a victim, it is common for victims to report a matter to police, then fail to assist with prosecution by withdrawing the complaint or refusing to give evidence in court.¹⁶⁶ This is particularly the case where the perpetrator and victim

155 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 108.

156 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 8. See also *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) a family violence case in which VCAT held that although the applicant may have provoked the assault, it was nevertheless outweighed by the actions of the perpetrator.

157 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 117–23.

158 Ibid.

159 Ibid.

160 Ibid.

161 Ibid 118. See also Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14.

162 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot*, Review and Recommendations (2010) 11. See also Clear Horizon Consulting, *Evaluation of the Koori Family Violence Police Protocols: Ballarat, Darebin and Mildura* (Victoria Police, 2015) 3.

163 Angela Dwyer, ‘Policing Lesbian, Gay, Bisexual and Transgender Young People: A Gap in the Research Literature’ (2011) 22(3) *Current Issues in Criminal Justice* 415, 416. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 145–6.

164 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/>>. See also Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services*, Final Report (2016) 59.

165 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14.

166 See Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 106, and *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 120.

- are known to each other, for example, in circumstances of family violence and cases of sexual assault. Victims may fear the perpetrator or they may have reconciled after a violent incident. The victim may also be financially reliant on the perpetrator. As already noted, the VOCAA does not provide guidance about whether these factors can be taken into account by VOCAT, and the case law offers differing interpretations of what may constitute reasonable assistance.
- 5.107 In relation to section 54 of the VOCAA, and the requirement for decision makers to consider a victim's character and behaviour 'before, during or after the commission of the act of violence',¹⁶⁷ the supplementary consultation paper noted that these provisions appeared to be a reflection of community expectations that the victim must be an appropriate and 'deserving' recipient of 'sympathy'.¹⁶⁸ In this context the supplementary consultation paper also noted that some academics have suggested these types of provisions require victims to demonstrate they are exhibiting behaviours typically associated with 'responsible citizenship'.¹⁶⁹ This view is also reflected in the case law. In *Hassell v Victims of Crime Assistance Tribunal*,¹⁷⁰ VCAT cites the original decision of VOCAT: 'the Act is designed to assist victims of crime, not persons who become victims because of their involvement in the drug industry'.¹⁷¹
- 5.108 As also reflected in the case law, a victim's criminal history appears to be considered relevant both in the context of whether the past offences were violent,¹⁷² as well as whether their commission could be justified by issues relating to drug and alcohol addiction.¹⁷³ The effect of this is that victims with past criminal records may find it difficult to secure an award or may have their award of assistance reduced.¹⁷⁴
- 5.109 Further complicating such considerations is the known link between victimisation and offending behaviour.¹⁷⁵ This disadvantage may be more pronounced for victims, such as victims of child sexual abuse or child victims of family violence, who may be more likely than the general population to go on to commit criminal offences.¹⁷⁶
- 5.110 As academics have also highlighted, binary oppositions entrenched within the legal system, such as 'innocent' victims and 'wicked' offenders, disadvantage victims who do not fit these strict categories, such as female victims of family violence who 'fight back', have a criminal history, or abuse drugs and alcohol.¹⁷⁷ As David Miers has observed, the differentiation between 'deserving' and 'undeserving' victims is problematic because the reality of criminal victimisation is that many victims have also been offenders.¹⁷⁸

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

168 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 123. See also Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 180.

169 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.

170 [2011] VCAT 2106 (10 November 2011).

171 *Ibid* [29].

172 See, eg, *Nguyen v Victims of Crime Assistance Tribunal* [2001] VCAT 2028 (28 September 2001); *Larson v Victims of Crime Assistance Tribunal* [2012] VCAT 1162 (6 August 2012).

173 See, eg, *Hay v Victims of Crime Assistance Tribunal* [2002] VCAT 45 (15 February 2002); *Rajah v Victims of Crime Assistance Tribunal* [2002] VCAT 1422 (6 December 2002).

174 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 122. See also *RUM v Victims of Crime Assistance Tribunal* [2016] VCAT 367 (10 March 2016); *TNX v Victims of Crime Assistance Tribunal* [2014] VCAT 1234 (15 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.

175 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 122–3. See also 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; Smart Justice, *Better Support for Victims of Crime*, Factsheet (2010); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts* (2017) vol 3, 143–6.

176 James Ogloff et al, *Child Sexual Abuse and Subsequent Offending and Victimisation: A 45 Year Follow-Up Study*, Trends and Issues in Crime and Criminal Justice No 440 (Australian Institute of Criminology, 2012) 5.

177 Julie Stubbs and Jane Wangmann, 'Competing Conceptions of Victims of Domestic Violence Within Legal Processes' in Dean Wilson and Stuart Ross (eds) *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave MacMillan, 2015) 107.

178 David Miers, 'Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) *Legal Studies* 242, 258. See also the discussion of the link between family violence and criminal offending in Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 237–45 and the discussion of the link between sexual abuse and criminal offending in Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts* (2017) vol 3, 143–6.

- 5.111 Accordingly, the operation of section 54 raises concerns that the VOCAA unfairly judges victims' past criminal behaviour, which may itself result from disadvantage and trauma associated with previous victimisation.¹⁷⁹

Responses

- 5.112 Reflecting the matters raised in the consultation papers, the written submissions focused on the mandatory refusal requirements where there had been a failure to report or to cooperate with police and investigatory bodies, as well as the section 54 character and behaviour considerations.
- 5.113 In particular, the Commission was told that the reporting requirement can be particularly difficult for victims of sexual assault and family violence. As Merri Health Victims Assistance Program submitted, 'many sexual assault victims are reluctant to report to the police and at times when they have tried to report, police have refused to take their statement.'¹⁸⁰ Similarly, Victoria Legal Aid submitted 'some victims of family violence and historical abuse are discouraged from making claims under the VOCA Act where acts of violence were not immediately reported to police, and where the victim and perpetrator are known to each other'.¹⁸¹
- 5.114 In addition, Springvale Monash Legal Service submitted that for victims of sexual assault and family violence 'avoiding police can be part of a safety plan to not arouse further abuse from the perpetrator'.¹⁸²
- 5.115 Springvale Monash Legal Service also submitted that the reporting requirement can cause difficulties for other cohorts of victims:
- Past negative experiences and mistrust of police and other authorities also factors into cooperation with the police for example, victims from Aboriginal and Torres Strait Islander communities, LGBTQI communities, and persons from immigrant and refugee backgrounds.¹⁸³
- 5.116 In this context, cohealth submitted that 'there is an onus on victims to be a "perfect" or "ideal" victim, and police interpretation of reasonable assistance can be influenced by their perceptions of victims'.¹⁸⁴ The police reporting and cooperation requirements operate to 'preven[t] victims from seeking VOCAT assistance, with possible financial and emotional impacts on their recovery from the act of violence'.¹⁸⁵
- 5.117 In relation to the character and behaviour considerations, Dr Kate Seear et al submitted: 'While in general there are sound public policy grounds for permitting Tribunal members to retain a broad discretion in regards to eligibility, our research suggests the character test in section 54(a) is overly broad.'¹⁸⁶ In particular:
- in its present form, it is possible, for instance, that a victim of a very serious crime (such as attempted murder, rape or other form of family violence) might be denied victims of crime compensation, including vital financial, social and medical supports, by virtue of having a history of illicit drug use.¹⁸⁷
- 5.118 Similarly, Merri Health Victims Assistance Program submitted that 'irrelevant character and behaviour considerations can sometimes be used by VOCAT to refuse or reduce awards'.¹⁸⁸ Describing this practice as 'unfair', Merri Health Victims Assistance Program

179 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 123.
 180 Submission 15 (Merri Health Victims Assistance Program).
 181 Submission 46 (Victoria Legal Aid) 3.
 182 Submission 41 (Springvale Monash Legal Service).
 183 Ibid.
 184 Submission 18 (cohealth).
 185 Ibid.
 186 Submission 7 (Dr Kate Seear et al).
 187 Ibid.
 188 Submission 15 (Merri Health Victims Assistance Program).

also submitted that 'VOCAT should not require victims to be the 'perfect victim', which has resulted in the system being less supportive of people who are already vulnerable.'¹⁸⁹

- 5.119 The character and behaviour considerations can be particularly problematic for victims of sexual abuse and family violence. Knowmore submitted that for survivor victims of childhood sexual abuse it is:
- unfair and inappropriate to impede or reduce awards ... in light of subsequent character and behaviour considerations, which all too often are underpinned by the offending perpetrated against the applicant.¹⁹⁰
- 5.120 Dr Kate Seer et al submitted that because of the absence of guidelines relating to section 54, Tribunal members may be:
- ... invited to entertain spurious and antiquated arguments about the role of applicants (particularly women) in bringing violence upon themselves. This includes but is not limited to family violence matters; it might extend to sexual assault or sexual abuse cases, or to other scenarios where gendered understandings of responsibility, vulnerability, agency and blame might shape decision making.¹⁹¹
- 5.121 In this regard, Women's Legal Service Victoria and Domestic Violence Victoria submitted that the provisions in section 54 are 'inherently victim-blaming and divorced from social realities'.¹⁹²
- 5.122 In addition, and as the Victorian Aboriginal Legal Service submitted, the effect of the section 54 requirements is to create 'a need for expert legal assistance, and reducing the therapeutic outcomes that can be reached by a victim single-handedly taking ownership of their VOCAT application'.¹⁹³

Review, variation and refund of awards

- 5.123 The review, variation and refund of awards was not a matter expressly referred to in the first terms of reference. However, award variations were raised with the Commission as a concern for family violence victims, as variations are frequently required to pay for additional counselling.¹⁹⁴ Award variations, and also the review and refund of awards was expressly considered as part of the Commission's first consultation paper.¹⁹⁵
- 5.124 The first, fourth and eighth matters in the supplementary terms of reference specifically required the Commission to consider whether:
- the VOCAA can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
 - the time limits and structure and timing of awards are appropriate
 - any processes, procedures or requirements under the VOCA Act cause unnecessary delay to the provision of assistance to victims.
- 5.125 The supplementary consultation paper discussed the process for review of awards, as well as when VOCAT may vary an award or determine that an award needs to be refunded. The Commission sought to understand the extent to which the provisions in the VOCAA relating to review, variation and refund were clear and working as intended, and were still appropriate.¹⁹⁶

189 Ibid.

190 Submission 43 (knowmore).

191 Submission 7 (Dr Kate Seear et al).

192 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

193 Submission 39 (Victorian Aboriginal Legal Service).

194 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 129.

195 See *ibid* Ch 12.

196 See Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 128, Ch 9.

Relevant provisions of the VOCAA

- 5.126 Under the VOCAA, any person whose interests are affected can apply to VCAT for review of a final VOCAT decision.¹⁹⁷ In practice, review applications are usually made by applicants.¹⁹⁸ Reviews commonly relate to matters such as VOCAT refusing to make an award, the amount of an award or VOCAT refusing to vary an award.¹⁹⁹
- 5.127 However, the number of applications for review is relatively few, with only 11 applications being made in the 2015–16 financial year,²⁰⁰ and eight applications the following financial year.²⁰¹
- 5.128 The VOCAA also empowers the Tribunal to vary awards ‘in any manner that the Tribunal thinks fit’.²⁰² VOCAT must have regard to any fresh evidence, any change of circumstances, any other payments received by the applicant and any other relevant factors. VOCAT must not vary an award if the application for variation is made more than six years after the original award, unless the applicant was then under 18 years of age.
- 5.129 In 2015–16, VOCAT varied 986 awards for expenses already incurred and 588 for expenses not yet incurred.²⁰³ In 2016–17 VOCAT varied 1255 awards for expenses already incurred and 708 awards for expenses not yet incurred.²⁰⁴
- 5.130 Finally, the VOCAA also 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.²⁰⁵ Any money not refunded as required may be recovered as a debt due to the state.²⁰⁶ There is limited data on how often refunds are required, as VOCAT’s annual reports do not state how often refunds are required and whether, in practice, the refund provisions are used.²⁰⁷

Issues identified in the consultation papers

- 5.131 As noted in the first consultation paper, the key issue of concern for victims of family violence is the variation process and requirements.²⁰⁸ The variation provisions enable flexibility and can assist family violence victims with their recovery by allowing for additional awards as situations change or new needs emerge.²⁰⁹ The variation process is not always easy for victims of family violence to navigate and can be complicated by the need to repeatedly engage a lawyer to assist with the process.²¹⁰
- 5.132 Similarly, and as noted in the supplementary consultation paper, the variation provisions are the main issue for other victims of crime too, as most variations require additional paperwork to be filed by lawyers and other professionals, increasing delays and limiting flexibility and continuity in provision of services such as counselling.²¹¹ Concerns with the six-year variation window were also noted.²¹²

197 *Victims of Crime Assistance Act 1996* (Vic) s 59(1).

198 See Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017), 158.

199 See, eg, *Ractliffe v Victims of Crime Assistance Tribunal* [2015] VCAT 205 (4 March 2015) relating to a review of VOCAT’s refusal to pay \$405 for an occupational therapy assessment.

200 *Victims of Crime Assistance Tribunal, Annual Report 2015–16* (2016) 61.

201 *Victims of Crime Assistance Tribunal, Annual Report 2016–17* (2017) 61.

202 However, VOCAT is still bound by the provisions of the VOCAA relating to the payment of and amounts of assistance: *Victims of Crime Assistance Act 1996* (Vic) ss 60(1) and (4).

203 *Victims of Crime Assistance Tribunal, Annual Report 2015–16* (2016) 60.

204 *Victims of Crime Assistance Tribunal, Annual Report 2016–17* (2017) 60.

205 *Victims of Crime Assistance Act 1996* (Vic) s 62.

206 *Ibid* s 62(4).

207 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017), 129–30.

See, eg, *Victims of Crime Assistance Tribunal, Annual Report 2016–17* (2017).

208 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 129–30.

209 *Ibid*.

210 *Ibid* 130.

211 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 131–3.

212 *Ibid* 131. The variation window of six years is set out in section 60(2) in the *Victims of Crime Assistance Act 1996* (Vic).

- 5.133 Research by the Victims Support Agency in 2011 found that for some victims the process of seeking the variation is frustrating because it often involves numerous visits to lawyers.²¹³ 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.’²¹⁴
- 5.134 In the final report of the Victorian Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, *Betrayal of Trust*, the limited ability of VOCAT to provide ongoing financial support to victims of child sexual abuse was contrasted with other compensation schemes which, while not designed to cater indefinitely to ongoing costs, cover costs to assist victims to recover from their injury over a longer period of time. In this context, the report noted one victim as stating that these schemes provided a more appropriate ‘safety net’ for victims.²¹⁵

Responses

- 5.135 In response to the consultation papers, the Aboriginal Family Violence Prevention & Legal Service Victoria submitted:
- The capacity to seek a variation of an award and the broad discretion and flexibility within the Act is of great benefit to victims/survivors of family violence.²¹⁶
- ... However, the process for variation—while flexible—remains unnecessarily legalistic, time-consuming and burdensome for victims/survivors, legal representatives and the Tribunal alike.²¹⁷
- 5.136 The Women’s Legal Service Victoria and Domestic Violence Victoria submitted:
- Survivors of family violence regularly require variation of awards and, in the current system, may be unable to complete the necessary variation application documents without legal assistance.²¹⁸
- This issue is compounded by solicitors often being unwilling or unable to assist in the absence of adequate funding. As a result, many clients who rely on victims of crime assistance for access to counselling can face delays in access to counselling when an award is exhausted.²¹⁹
- 5.137 Merri Health Victims Assistance Program submitted that ‘the need to assist victims of crime should not have an expiry date ... Each victim’s recovery is unique and dependent upon their own circumstances.’²²⁰
- 5.138 In relation to the refund provisions, Inner Melbourne Community Legal submitted that:
- While anecdotally we do not have any cases or client experiences with refunds to be able to speak to this issue, our clients quite often indicate that they are concerned about the possibility of having to refund an interim award if their overall application is not successful.²²¹
- 5.139 The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that it is ‘rare for victim/survivors of family violence or sexual assault to be required to refund an award’.²²² However, it was also submitted that:
- The capacity to force a refund from a victim/survivor who reconciles with a perpetrator fails to acknowledge the complex dynamics of family violence and the fact that a victim/

213 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 132.
214 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33.
215 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 558.
216 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
217 Ibid.
218 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
219 Ibid.
220 Submission 15 (Merri Health Victims Assistance Program).
221 Submission 14 (Inner Melbourne Community Legal).
222 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

survivor may reconcile with a perpetrator under duress or threat of further violence, because she was unable to access alternative housing or financial support for herself and/or her children, or for a variety of other complex reasons.²²³

5.140 In relation to the appeal provisions of the VOCAA, the consultation papers noted that there are relatively few appeals of VOCAT decisions.²²⁴ Reasons for this were provided in the written submissions.

5.141 Ryan Carlisle Thomas Lawyers submitted: 'The legal costs involved with pursuing an appeal to VCAT... makes it an unfeasible for option for some applicants.'²²⁵ Another reason, submitted by cohealth, was that:

by the time victims receive a VOCAT award, they have often started to move on, and/or recover from the crime, especially where the crime has been determined to be at the lower end of the spectrum. The time factor is probably the most significant barrier to seeking a review of the award.²²⁶

Timeliness of awards

5.142 The first terms of reference require the Commission to consider procedural matters to expedite the making of an award. Similarly, the first, third and eighth matters in the supplementary terms of reference require the Commission to consider whether:

- the VOCAA can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
- the evidence required to meet eligibility tests can be simplified to avoid unnecessary or disproportionate costs being incurred
- any processes, procedures or requirements cause unnecessary delay to the provision of assistance to victims, having regard to other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model.

5.143 Accordingly, in analysing the timeliness of VOCAT awards, consideration must be given to the VOCAT application requirements the decision making process, and the timeframes for decision making under the VOCAA. These are discussed below.

Requirements of the VOCAA impacting on the timeliness of awards

VOCAT application requirements

5.144 The VOCAA requires that VOCAT applications must commence by filling in a form,²²⁷ accompanied by the requisite documentary evidence.²²⁸

5.145 If the applicant has not reported the act of violence to the police, the application form must also be accompanied by a statutory declaration by the applicant setting out the circumstances and the reasons why the matter was not reported.²²⁹

5.146 Once the application has been received, VOCAT is to write to the applicant or their lawyer acknowledging receipt of the application and to seek further evidence. This can include requests for:

- a report from the applicant's treating doctor if physical injury is claimed
- receipts or invoices for the expenses claimed

223 Ibid.

224 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 128, and *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 129.

225 Submission 38 (Ryan Carlisle Thomas Lawyers).

226 Submission 18 (cohealth).

227 *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(a); *Victims of Crime Assistance Rules 2010* (Vic) r 6.

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

229 Ibid s 26(2); *Victims of Crime Assistance Tribunal, Application for Assistance Form* (2016) 2, 7.

- 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.²³⁰

5.147 Each category of assistance has different supporting documentation requirements. All such documentation must be provided within four months.²³¹

5.148 If an applicant needs more than four months to collect the requisite documentary evidence, they must make a written request to VOCAT outlining what is still outstanding and how much time they require. VOCAT can then extend the deadline for the filing of all material.²³²

The decision making process

5.149 In addition to the documentation and evidentiary requirements, VOCAT has broad investigative powers to:

- authorise a person to make any enquiry or carry out any investigation on behalf of VOCAT that is needed to furnish it with the further information it requires
- order the preparation and submission to VOCAT of a medical report or counselling report
- order an applicant to lodge, within a specified period, an additional statement containing particulars of matters specified in the order or any documents specified in the order.²³³

5.150 The exercise of these powers can impact the timeliness of a determination.

5.151 After receiving documentation from the applicant and other relevant parties, a directions hearing may be held to provide VOCAT with guidance about matters relevant to the application. It is more common to request an applicant's lawyer to attend a directions hearing than the applicant.²³⁴

5.152 VOCAT can also determine an application without conducting a directions hearing or a final hearing. This depends on the preference of the applicant, as well as VOCAT's need for a hearing, for example where VOCAT considers that the matters are complex and require the giving of evidence and oral submissions by lawyers.²³⁵

5.153 In 2016–17, 14 per cent of VOCAT matters were determined at hearings,²³⁶ 'significantly less than the 18.8 [per cent] in the previous year'.²³⁷

5.154 In practice, many straightforward applications are decided without a hearing.²³⁸

230 Victims of Crime Assistance Tribunal, *Application for Assistance Form* (2016) 15.

231 Victims of Crime Assistance Tribunal, *Determining an Application—Supporting Documentation* (2016) <www.vocat.vic.gov.au/determining-application/supporting-documentation>.

232 Ibid.

233 *Victims of Crime Assistance Act 1996* (Vic) s 39(1).

234 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 24.

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

236 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 36.

237 Ibid.

238 Ibid 24.

The timeframe for decision making

- 5.155 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.²³⁹
- 5.156 The VOCAA enables VOCAT to make awards even where there might be related civil or *Sentencing Act 1991* (Vic) matters that have not been finalised.²⁴⁰ This means that VOCAT can still decide an application, even if there is a pending civil trial, or if a court is going to decide a matter concerning compensation or restitution under the Sentencing Act. VOCAT can also adjourn consideration of an application if there is a criminal trial or a civil trial that is related to that act of violence that is likely to be decided within six months.²⁴¹
- 5.157 The effect of these provisions is that, in practice, a VOCAT application is generally adjourned until related matters in the civil and criminal courts have been decided.²⁴²
- 5.158 In addition, and 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.²⁴³

Interim awards

- 5.159 The VOCAA empowers VOCAT to make an interim award of assistance pending the final determination of an application.²⁴⁴
- 5.160 Applicants who need urgent assistance, such as financial assistance for safety-related expenses, can seek an interim award.²⁴⁵ This award can often be paid before VOCAT makes a final decision.
- 5.161 Interim awards form part of the total financial assistance available and must be deducted from any final award.²⁴⁶

Issues identified in the consultation papers

- 5.162 As noted in the first consultation paper, a number of issues have been raised by victims of family violence in relation to the timeliness of awards. These issues relate to:
- The application form. While the form is relatively straightforward and can often be completed without legal assistance, further requests for documentation by VOCAT can make the process difficult to navigate.²⁴⁷ In addition, the fact that the form is tailored towards victims of a 'one-off' act of violence can make it difficult for victims of family violence to complete.²⁴⁸
 - Timeframes for decision making. Although the VOCAA requires VOCAT to act promptly, it also requires decision makers to have regard to matters that can sometimes affect the time taken to finalise an application, including awaiting the outcome of a criminal investigation, trial or inquest. There has also been an increase in the complexity of applications, particularly relating to family violence, which the Commission understands also impacts timeliness.²⁴⁹

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

240 *Ibid* s 32(3).

241 *Ibid* s 41(2).

242 *Victims of Crime Assistance Tribunal, Annual Report 2016–17* (2017) 24.

243 *Ibid*.

244 *Victims of Crime Assistance Act 1996* (Vic) s 56.

245 *Ibid* s 56(1).

246 *Ibid* s 56(4).

247 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 78.

248 *Ibid*.

249 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 117–18. VOCAT has recognised an increase in the complexity of applications as a cause of delay, see *Victims of Crime Assistance Tribunal, Annual Report 2015–16* (2016) 37.

- 5.163 Approximately half of all applications are finalised within nine months.²⁵⁰ As noted in the first consultation paper, the Royal Commission into Family Violence estimated the waiting period for a VOCAT determination for a family violence victim to be roughly between nine and 12 months.²⁵¹
- 5.164 The first consultation paper also noted VOCAT's explanation—that due to the complexity of family violence cases, there are increased delays in the average time taken to complete such applications.²⁵²
- 5.165 Delays in determining VOCAT applications relating to family violence can profoundly impact a victim's ability to leave an abusive relationship and obtain safety.²⁵³ Some of these impacts may now be mitigated for victims of family violence as a consequence of the introduction of Family Violence Flexible Support Packages and other initiatives.
- 5.166 As noted in the supplementary consultation paper, VOCAT frequently requests further information, particularly where the alleged perpetrator has not been charged or convicted, or there is little corroborating evidence.²⁵⁴ VOCAT often also seeks information from Victoria Police to help determine whether a crime occurred. This can include requests for the criminal history of the alleged offender and the victim. VOCAT can also seek information about a victim's injuries through medical records or from Victoria Police.²⁵⁵
- 5.167 Where there are criminal proceedings pending, it is almost always the practice of VOCAT to order an adjournment.²⁵⁶ In fact, applicants are advised when making an application that VOCAT may wait until criminal charges are finalised before determining their matter.²⁵⁷
- 5.168 The effect of these practices is that, for all victims of crime, the decision is frequently delayed. Victims Support Agency research in 2011 found at least two cases of sexual assault victims waiting for around 12 months for a VOCAT award for further counselling. It is unclear whether these victims had attempted to obtain interim awards or knew they were available.²⁵⁸
- 5.169 To improve timeliness VOCAT has implemented a number of initiatives.²⁵⁹ These include the introduction of an online application form and an electronic case management system.²⁶⁰ In addition, the use of judicial registrars is designed to save time by reserving the use of magistrates for more complex matters.
- 5.170 VOCAT has observed an increase in the complexity and number of applications being made, particularly in relation to family violence.²⁶¹ Increased complexity affects timeliness because more information may be required and VOCAT may decide a hearing is necessary. In consequence the number of pending applications has also increased because of 'challenges in keeping pace with the increased number of applications'.²⁶²

250 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 37.

251 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 120. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 81.

252 Ibid 117–18. For VOCAT's discussion of increasing complexity and delays, see Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 37.

253 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 120.

254 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017), 142.

255 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.

256 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017), 142. See also Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 73.

257 Victims of Crime Assistance Tribunal, *Guide to Completing the Application for Assistance Form* (2016) 15.

258 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017), 143 citing Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33.

259 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017), 143.

260 Ibid 143. See also Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.

261 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 37.

262 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 9, cited in Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 143.

- 5.171 Lawyers cite obtaining relevant supporting documentation as one of the principal difficulties of running a VOCAT case and one of the primary reasons for delays and cost increases.²⁶³
- 5.172 The supplementary consultation paper noted that the interim award process was not producing timely responses, in particular for victims of family violence. Some stakeholders stated that where family violence circumstances are urgent, they no longer seek assistance through VOCAT, as delays affect client safety and do not assist with time-sensitive matters such as security or relocation.²⁶⁴
- 5.173 The supplementary consultation paper noted that delays can re-traumatise victims and in some cases, further entrench economic disadvantage.²⁶⁵

Responses

- 5.174 In response to the consultation papers, stakeholders raised concerns regarding the timeliness of determinations—particularly in relation to the VOCAT application process, the supporting documentation and evidentiary requirements, and the decision making process. In addition, a number of submissions commented on the interim award process, noting that this process was subject to delays.
- 5.175 In relation to the application form, the Commission was told that ‘the existing forms are too arduous and complicated’.²⁶⁶
- 5.176 For victims of family violence, the Women’s Legal Service Victoria and Domestic Violence Victoria submitted that the application form itself was ‘an indication of the problematic aspects of the current system’.²⁶⁷ The form requires information that is:
- related to a singular act of violence, thereby not accounting for family violence contexts that typically involve multiple incidents and many different types of violence and abuse occurring over lengthy periods of time.²⁶⁸
- 5.177 Concerns were raised regarding the significant supporting documentation, such as medical or psychological reports, that is often required.
- 5.178 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted:
- The need to assemble documentation is often a source of delays and frequent requests for extensions of time to allow the filing of documents, which adds to VOCAT’s administrative costs.²⁶⁹
- 5.179 Similarly, Springvale Monash Legal Service submitted that obtaining relevant supporting documentation for VOCAT applications was ‘one of the principal difficulties of running a VOCAT case and one of the primary reasons for delays and cost increases’.²⁷⁰
- 5.180 It was also submitted that victims experienced substantial delays in their applications being finalised and in receiving awards,²⁷¹ and that these delays resulted in victims finding the process ‘confusing and, in some cases, distressing’.²⁷²
- 5.181 The impact of these delays was acknowledged by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria, which noted that ‘delays in the final resolution of an application or a variation can lead to significant distress and a sense for victims that they “can’t move on”’.²⁷³

263 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 144. See also Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 40.

264 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 144.
265 Ibid 144–5.

266 Submission 57 (Victims of Crime Assistance League).

267 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

268 Ibid.

269 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

270 Submission 41 (Springvale Monash Legal Service).

271 Submission 37 (safe steps Family Violence Response Centre).

272 Ibid.

273 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

- 5.182 The importance of timely awards for victims of child sexual abuse was noted by knowmore:
- timeliness can be a particularly critical issue for survivors of institutional child sexual abuse, who are often aged, in poor health and suffering from the debilitating impact of complex trauma that can be exacerbated by lengthy delays associated with legal processes.²⁷⁴
- 5.183 VOCAT delays impact not only victims but also the availability of private practitioners willing to provide medical or counselling reports to support a statement of claim, as it can take several months for them to receive payment. As Inner Melbourne Community Legal submitted:
- we can say anecdotally that many practitioners will not undertake any work for clients because of the delays they have experienced previously for payment of their costs.²⁷⁵
- 5.184 Interim awards enable victims' urgent needs to be met and may mitigate the adverse impacts of delays in making a final award. As VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted:
- the ability to make interim awards of assistance ensures that the therapeutic experience for victims is not derailed by delay, and provides for the immediate financial needs of victims.²⁷⁶
- 5.185 Other stakeholders submitted that the interim award application process has its own issues. As Darebin Community Legal Centre submitted:
- although the current framework provides for an interim award process, this process is often significantly time consuming and does not recognise the urgency that family violence safety and support needs require.²⁷⁷
- 5.186 Some victims may be hesitant to apply for an interim award as they may be required to reimburse that award. As Inner Melbourne Community Legal submitted:
- for our clients, the fear of having to reimburse interim awards that may be paid to them if their overall application is rejected can stop them from applying for much needed assistance.²⁷⁸

VOCAT hearings and evidentiary processes

- 5.187 The first 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.
- 5.188 The first consultation paper also considered the importance of VOCAT—beyond monetary benefits for victims of family violence.²⁷⁹ Compensation can be a statement to the community about the unacceptability of family violence and that the process itself can help recognise a victim's experience.²⁸⁰ However, at the time of the introduction of the VOCAA in 1996, there was little community acknowledgment of family violence or its

274 Submission 43 (knowmore).

275 Submission 14 (Inner Melbourne Community Legal).

276 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

277 Submission 24 (Darebin Community Legal Centre).

278 Submission 14 (Inner Melbourne Community Legal).

279 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 140. See also 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.

280 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 140–1. See also Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 43.

harms.²⁸¹ Family violence is therefore not explicitly recognised—in contrast with schemes in other Australian states and territories.²⁸²

- 5.189 In addition, the first, seventh and eighth matters raised in the supplementary terms of reference require the Commission to consider:
- whether the VOCAA can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
 - whether it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of an application to VOCAT or be called to give evidence
 - whether any processes, procedures or requirements cause unnecessary delay to the provision of assistance to victims.

The VOCAT hearing and evidentiary process

- 5.190 VOCAT has the power to determine an application without conducting a hearing where:
- the applicant expressly wishes and consents in writing
 - VOCAT determines a hearing is not required.²⁸³

5.191 In practice, a substantial majority of applications are determined on the papers and without a hearing.²⁸⁴

5.192 Where a hearing is requested by a victim, or required by VOCAT, VOCAT may inform itself in relation to the application in any manner that it thinks fit.²⁸⁵

5.193 The VOCAA provides that VOCAT ‘may give notice of the time and place for the hearing to any other person whom the Tribunal considers to have a legitimate interest’ in the matter.²⁸⁶ This can include the alleged perpetrator.²⁸⁷ Practice directions require VOCAT to first give the applicant an opportunity to be heard on whether this should occur.²⁸⁸

5.194 In addition, the VOCAA, under the heading ‘Who is entitled to appear at hearing’, provides:

The applicant and any other person or body that, in the Tribunal’s opinion, has a substantial interest in a matter is entitled to appear and be heard by the Tribunal on the hearing of the matter.²⁸⁹

5.195 In *AB v Victims of Crime Assistance Tribunal*, Justice McDonald stated:

The Tribunal’s power to make an award of assistance to an applicant is preconditioned upon a finding that the applicant is a victim of a criminal act. Notwithstanding this, the exercise of the Tribunal’s powers is not constrained by the accusatorial system of criminal justice which underpins the trial of a criminal charge.²⁹⁰ The Act does not enshrine the concept of a fair trial of a person alleged to have committed the criminal act which enlivens the Tribunal’s power to award compensation to a victim. So much is plain from ss 33 and 34 of the Act. Under s 33, the Tribunal has power to make an award of compensation without even conducting a hearing. Under s 34(3) the Tribunal has the power to conduct the hearing without providing notice to the person who is alleged

281 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 142.
 282 *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; *Victims of Crime Assistance Act 2009* (Qld) s 25(2).
 283 *Victims of Crime Assistance Act 1996* (Vic) s 33(1).
 284 In the 2016–17 financial year, only 14 per cent of applications were determined at hearings, see Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 36.
 285 *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(b).
 286 *Ibid* s 34(2).
 287 *Ibid* s 34.
 288 See Victims of Crime Assistance Tribunal, *Practice Direction No 4 of 2008—Notification of Alleged Offenders and Third Parties* (11 December 2008), which sets out the procedures and timeframes for the notification process.
 289 *Victims of Crime Assistance Act 1996* (Vic) s 35(1).
 290 See *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 [125] (Crennan J), [171] (Kiefel J).

to have committed an act of violence. A necessary corollary of these powers is that the Tribunal can make a finding that a person has committed a criminal act and proceed to make an award of compensation, without that person being given an opportunity to defend him or herself against such an allegation.²⁹¹

- 5.196 The Judge proceeded, 'plainly ss 33 and 34(3) fall into the category of provisions which are wholly inconsistent with a requirement of procedural fairness';²⁹² this is because 'the Tribunal proceedings bear no comparison with a criminal trial'.²⁹³
- 5.197 Although an alleged perpetrator may appear and be heard by VOCAT where VOCAT so determines, the purpose of a VOCAT hearing is, similarly to an application on the papers, to decide a victim's application for state-funded financial assistance as assessed against the eligibility criteria.
- 5.198 The purpose of a VOCAT hearing is therefore not to decide whether an alleged perpetrator has committed a criminal act or to make an adverse finding of fact against an alleged perpetrator. Instead, the purpose of a VOCAT hearing is to decide whether a person is a victim of a crime, and whether that victim should receive an award to assist them in their recovery from the criminal act. The role of an alleged perpetrator in state-funded financial assistance schemes is considered further in Chapter 6.
- 5.199 On the hearing of a matter, VOCAT is not required to conduct itself in a formal manner.²⁹⁴ VOCAT is also not bound by the rules of evidence, and may inform itself in any manner that it thinks fit.²⁹⁵ However, VOCAT's procedures remain a legal process bound by the provisions of the VOCAA.
- 5.200 The VOCAA requires VOCAT hearings to be open to the public.²⁹⁶ However VOCAT is able to direct alternative arrangements to be made for the giving of evidence by a witness,²⁹⁷ and can direct the whole or part of the hearing to be closed to members of the public.²⁹⁸ VOCAT can also direct that only certain persons, or classes of persons, may be present during the hearing.²⁹⁹
- 5.201 As noted in the supplementary consultation paper, VOCAT records can be subpoenaed and used by the defence in criminal or other proceedings.³⁰⁰

Issues identified in the consultation papers

- 5.202 As noted in the first consultation paper, the main issue for victims of family violence is the alleged perpetrator notification, due to the safety risks that commonly arise in applications involving family violence.³⁰¹
- 5.203 Although VOCAT indicates that perpetrator notification rarely occurs, case analysis indicated that alleged perpetrators are sometimes notified and do participate in proceedings, even in the highly vulnerable contexts of family violence and sexual assault.³⁰²
- 5.204 In addition, the first consultation paper noted concerns of family violence victims about the consistency of decision making.³⁰³ The inconsistency of VOCAT decisions, and the variability in the acknowledgment and validation of victims, significantly shape family

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

292 *Ibid* [25].

293 *Ibid* [26].

294 *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(a).

295 *Ibid* s 38(1)(b).

296 *Ibid* s 42(1).

297 *Ibid* s 37(2).

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

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

300 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 155.

See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 246–7.

301 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 88–9.

See also 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, 60.

302 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 89.

303 *Ibid* 143.

violence victims' experiences of the Tribunal. This 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, as there is a limit to how much a victim can be assured of a 'validating' VOCAT experience.

- 5.205 As noted in the supplementary consultation paper, the main issues for victims of crime more generally relate to:
- perpetrator notification and perpetrators' right to appear
 - evidentiary and procedural protections for victims
 - the therapeutic effect of Tribunal hearings
 - the use of VOCAT documentation in criminal proceedings
 - the transparency and consistency of decision making.³⁰⁴
- 5.206 These concerns reflect and expand on the concerns raised by family violence victims in the context of the first terms of reference and the first consultation paper.
- 5.207 One of the beneficial aspects of Victoria's approach is the use of VOCAT hearings presided over by judicial officers.³⁰⁵ Victoria is one of the few Australian jurisdictions that enables victims to elect to attend a hearing and that uses judicial decision makers.³⁰⁶
- 5.208 Victoria's existing scheme therefore gives victims a unique opportunity to engage with the justice system and be heard and acknowledged.³⁰⁷ For some victims, the hearing of an application by a judicial officer can provide an acknowledgment from the justice system that there has been a crime and that they have suffered harm as a consequence.³⁰⁸ Where an offender has not been prosecuted, victims can feel acknowledged and validated by participating in a VOCAT hearing.³⁰⁹
- 5.209 As VOCAT has noted, the tribunal 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'.³¹⁰
- 5.210 However, some victims may wish not to participate in a VOCAT hearing. As stated by Judith Herman, 'if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law'.³¹¹ Research indicates that some victims can be distressed by having to recount details of the crime during VOCAT hearings³¹² or traumatised by VOCAT members' comments.³¹³
- 5.211 In this context, the perpetrator notification provisions are particularly problematic, raising questions about victim safety and the therapeutic effect of VOCAT hearings, not only for family violence victims, but for other crime victims, such as victims of sexual assault.
- 5.212 Victims of crimes associated with low reporting rates, such as sexual assault,³¹⁴ or victims who may fear or distrust police, are therefore more vulnerable to the perpetrator notification requirements. These are often also the victims more vulnerable to intimidation, threats to their safety or re-traumatisation through contact with an alleged perpetrator.³¹⁵

304 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 157–63.

305 Ibid 154–5.

306 Ibid 154.

307 Ibid.

308 Ibid. See also Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 43.

309 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 155.

310 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 14.

311 Judith Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159, 159.

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

312 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 18; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 38.

313 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 141.

314 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (RMIT University, 2014) 6.

315 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 90.

- 5.213 Even if perpetrator notification occurs rarely, the fact that it exists at all can be a deterrent for some victims, who may elect not to pursue a VOCAT application because of the chance of the perpetrator being notified.³¹⁶
- 5.214 The evidentiary and procedural protections for protected witnesses in criminal proceedings and intervention order matters do not extend to VOCAT hearings. While the VOCAA gives VOCAT the discretion to put in place these types of evidentiary protections, the fact the VOCAA does not require the use of such protections may lead to them to be underused or used inconsistently.³¹⁷
- 5.215 As noted in the supplementary consultation paper, the use of VOCAT materials in other proceedings remains a key issue for victims of crime, in particular victims of family violence.³¹⁸ This issue was also raised by the Commission in its report *Victims of Crime in the Criminal Trial Process*.³¹⁹
- 5.216 The supplementary consultation paper noted concerns about transparency in the VOCAT process.³²⁰ These concerns are not new. In a submission to the then-Victorian Department of Justice’s 2009 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.³²¹ Similarly, research conducted by Whittlesea Community Legal Services found that the lack of written reasons for decisions made it difficult to gather evidence regarding the operation of VOCAT and therefore even more difficult to educate the legal profession about it.³²²
- 5.217 While all hearings conducted by VOCAT are digitally recorded, there is no such process for determinations on the papers. Written decisions are not publicly available—the only decisions available to the public relate to review decisions of the Victorian Civil and Administrative Tribunal. These reviews are rare (only 11 reviews were conducted in 2015–16).
- 5.218 This lack of transparency in the decision making process results in a high degree of uncertainty, as the system relies on the knowledge of support workers or lawyers to advise victims on whether an award made on the papers under section 33 is appropriate, or whether the decision should be reviewed.³²³
- 5.219 Applications are determined on the papers in the majority of VOCAT matters—approximately 86 per cent of all applications in 2016–17.³²⁴ This effectively means that VOCAT is operating predominantly as an administrative system while remaining embedded within a tribunal-based system.
- 5.220 Given this way of operating in practice, when decisions are made by VOCAT ‘on the papers’, there is neither the transparency afforded by the usual open court process, supplemented by the publication of judicial decisions, nor a clear administrative decision making framework as would be the case if the decision making were embedded in government service delivery.³²⁵

316 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 158.
317 Ibid 160.
318 Ibid 162.
319 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 247, Recommendations 50 and 51.
320 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017), 163.
321 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.
322 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 27.
323 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 163.
324 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 36.
325 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 163.

- 5.221 Another area of stakeholder concern is the level of judicial discretion contained within the VOCAA, and in particular that such broad discretion in the VOCAA could be used inappropriately. In this context, stakeholders noted there are inconsistencies in practice, approach and the quantum of awards made by VOCAT members, and considered these inconsistencies tied to the level of discretion granted by the VOCAA.³²⁶

Responses

- 5.222 Reflecting the consultation papers, the written submissions raised concerns regarding the perpetrator notification and right to appear provisions, the lack of evidentiary and procedural protections for vulnerable witnesses, including access to and use of VOCAT records, the effect of the hearing process—and whether it had therapeutic effect—and the consistency of decision making.
- 5.223 In relation to the perpetrator notification provisions and perpetrators' right to appear, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted these are a key concern for many victims, although in practice, alleged perpetrators are notified infrequently, and only rarely choose to participate in a hearing.³²⁷ Similarly, Anglicare Victoria's Victim Assistance Program submitted: 'Victims do not understand the notification process ... Most victims receive the letter and go into panic.'³²⁸ The Office of the Victorian Information Commissioner also submitted that the perpetrator notification provisions 'may deter applicants from making an appearance or pursuing an application for financial assistance'.³²⁹
- 5.224 Victoria Legal Aid submitted that 'notification is more likely for low reported crimes such as sexual assault and family violence',³³⁰ concluding that this was problematic because 'victims of these crimes are particularly vulnerable to re-traumatisation'.³³¹
- 5.225 The Victim Survivors' Advisory Council submitted that for family violence victims:
- Notifying the perpetrator heightens the risk of further injury and damage on the victim survivor. The context of separation is recognised as being the most high-risk time for victim survivors, and notification to the perpetrator of a VOCAT hearing unnecessarily compromises the safety and wellbeing of victim survivors.³³²
- 5.226 It was also submitted that the perpetrator notification provisions potentially create 'another avenue through which perpetrators can manipulate systems to harm and control their victims'.³³³
- 5.227 Victoria Legal Aid submitted that the perpetrator notification provisions 'may compromise the therapeutic potential of a VOCAT hearing'.³³⁴ Inner Melbourne Community Legal submitted:
- The notification provisions are completely at odds with the objectives of the Act, given that it is to provide financial assistance to victims to recover from crimes, and is a form of symbolic expression and recognition, of the community's sympathy and condolences for their experiences.
- Perpetrator notification directly impacts on a victim's willingness to take part in the scheme and acts as a strong deterrent. Our clients have expressed concerns for their safety and have been significantly distressed at the prospect of a perpetrator attending at a hearing which is meant to be focused on their experiences and intended to assist with their recovery.³³⁵

326 Ibid.
 327 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
 328 Submission 5 (Anglicare Victoria Victims Assistance Program).
 329 Submission 20 (Office of the Victorian Information Commissioner).
 330 Submission 46 (Victoria Legal Aid).
 331 Ibid.
 332 Submission 8 (Victim Survivors' Advisory Council).
 333 Submission 28 (South Metropolitan Integrated Family Violence Executive).
 334 Submission 46 (Victoria Legal Aid).
 335 Submission 14 (Inner Melbourne Community Legal).

- 5.228 In contrast Ryan Carlisle Thomas Lawyers submitted that:
- Our democracy and the legal principles of due process and procedural fairness dictate that those accused have a reasonable opportunity to respond to charges levelled against them.³³⁶
- 5.229 Other stakeholders submitted that the removal of the perpetrator notification provisions would not give rise to procedural fairness issues. As Springvale Monash Legal Service submitted:
- [VOCAT's] determinations affect the right of an applicant to receive financial assistance. Its concern is not to determine the criminal liability of an alleged perpetrator.³³⁷
- 5.230 In relation to evidentiary and procedural protections, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted:
- the Act gives VoCAT the discretion to put in place special arrangements, such as hearing evidence via video link or prohibiting in-person cross examination of an applicant.³³⁸
- 5.231 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria also acknowledged that 'the absence of an explicit provision in the Act can lead to this option being underused or used inconsistently'.³³⁹
- 5.232 In addition, stakeholders expressed concern about VOCAT materials being used in other legal proceedings. Schembri & Co Lawyers submitted:
- Quite often victims of family violence suffer from Depression and Anxiety caused by the family violence. This is then used against them in Family Law proceedings in relation to their capacity to adequately care for the children of that relationship.
- Also, defence lawyers for the offender often use the VOCAT material to discredit the victim and argue that the victim made the complaint to police to obtain financial advantage through VOCAT.³⁴⁰
- 5.233 The Director of Public Prosecutions also submitted that there were 'instances where VOCAT materials have been subpoenaed by defence and victims have been cross-examined on their VOCAT application materials'.³⁴¹ It was submitted that on one occasion, this led to the defence securing a re-trial, which resulted in an acquittal due to 'inconsistencies in the complainant's evidence at trial and the VOCAT materials'.³⁴²
- 5.234 In relation to the effect of VOCAT hearings, YourLawyer submitted:
- [the] hearing of a VOCAT application before a Tribunal Member has the potential to be a profoundly positive experience for a victim because it can provide significant therapeutic benefit.³⁴³
- 5.235 In particular, YourLawyer submitted:
- having the ability to make a VOCAT Application, and more particularly the opportunity to be heard at a Hearing, gives the victim legitimacy in addition to providing critical assistance.³⁴⁴
- 5.236 It was also submitted by the Women's Legal Service Victoria and Domestic Violence Victoria that many of their clients report that the VOCAT hearing is 'a healing and validating process for them'.³⁴⁵

336 Submission 38 (Ryan Carlisle Thomas Lawyers).
337 Submission 41 (Springvale Monash Legal Service).
338 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
339 Ibid.
340 Submission 19 (Schembri & Co Lawyers).
341 Submission 3 (Director of Public Prosecutions Victoria).
342 Ibid.
343 Submission 22 (YourLawyer).
344 Ibid.
345 Submission 29 (Women's Legal Service and Domestic Violence Victoria).

5.237 However, this view of VOCAT is not shared by all stakeholders.³⁴⁶ As the Eastern Metropolitan Regional Family Violence Partnership submitted: ‘VOCAT is not a therapeutic process for victims of family violence, including for child victims’,³⁴⁷ concluding that the process is not intended to be so.³⁴⁸ Instead:

additional trauma or even re-victimisation is very possible while going through the VOCAT application process. The current process has no allowance for recognition of extra trauma caused by the process itself.³⁴⁹

5.238 The Victim Survivors’ Advisory Council also concurred with this view, stating:

The current model is not a therapeutic model. Victim survivors [of family violence] are not engaging with appropriately trained individuals with an understanding of family violence. This raises the issue that victim survivors are not heard, their abuse is not acknowledged and that they as victim survivors are not validated.³⁵⁰

5.239 Similarly, knowmore submitted that the VOCAT process can be re-traumatising for victims of child sexual abuse:

while statutory victims’ schemes are relatively informal compared to many other forms of legal proceedings, they still have the potential to re-traumatise survivors ... Not all decision makers have an appropriate understanding of the complexities of institutional child sexual abuse matters and the impacts of such offending on survivors and their capacity to engage effectively with legal processes and with those they perceive as the representatives of authority.³⁵¹

5.240 These issues regarding the effect of the VOCAT hearings and victims’ need to be heard and acknowledged are discussed further in Chapters 7 and 8.

5.241 In relation to the decision making process, the South Metropolitan Integrated Family Violence Executive submitted that ‘the current system ... does not result in predictable and consistent outcomes; and it is often re-traumatising’.³⁵² Similarly, Anglicare Victoria’s Victims Assistance Program submitted that the ‘the outcome for the client relies heavily on the magistrate [who] is hearing the matter.’³⁵³

5.242 Inconsistency in decision making has also been acknowledged by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria, which noted:

There is a risk of inconsistent decision making in relation to awards and interpretation of broad areas of discretion for multiple decision makers with varying levels of VoCAT experience, operating across 51 locations. This can foster unrealistic expectations on the part of victims about likely award outcomes, and the perception that the system is not fair.³⁵⁴

Awareness and accessibility

5.243 Although not a matter referred to in the first terms of reference, family violence victims’ awareness of and access to VOCAT is a key issue.³⁵⁵

5.244 Victims’ awareness and access are specifically identified in the supplementary terms of reference in a number of matters. In particular, the first matter specified in the supplementary terms of reference requires the Commission to consider whether the

346 See, eg, Submissions 8 (Victim Survivors’ Advisory Council), 10 (Eastern Metropolitan Regional Family Violence Partnership), 43 (Knowmore).
 347 Submission 10 (Eastern Metropolitan Regional Family Violence Partnership).
 348 Ibid.
 349 Ibid.
 350 Submission 8 (Victim Survivors’ Advisory Council).
 351 Submission 43 (knowmore).
 352 Submission 28 (South Metropolitan Integrated Family Violence Executive).
 353 Submission 5 (Anglicare Victoria Victims Assistance Program).
 354 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).
 355 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 134.

VOCAA can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support.

Victims' access to VOCAT and awareness of the existing scheme

- 5.245 Victim access to and awareness of VOCAT is not a matter addressed either directly or indirectly in the VOCAA.
- 5.246 In contrast, other state-funded financial assistance schemes expressly provide that it is a function of the scheme coordinator to develop educational and other programs to promote awareness of the needs of victims, and to distribute information about the operation of the state-funded financial assistance scheme and the coordinator's functions to victim service providers and the public generally.³⁵⁶ In New South Wales, the *Victims Rights and Support Act 2013* (NSW) expressly provides that a function of the Commissioner of Victims Rights is to provide information to victims of crime (and members of the immediate family of missing persons) about support services and assistance for victims of crime and such persons, and to assist victims of crime in the exercise of their rights.³⁵⁷

Issues identified in the consultation papers

- 5.247 As noted in the first consultation paper, there are relatively few VOCAT applications made by victims of family violence, compared to the number of reported incidents of family violence in Victoria.³⁵⁸ In this context, the Royal Commission into Family Violence found that victims are often unaware of their eligibility for assistance.³⁵⁹ One woman told the Royal Commission 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.³⁶⁰ Service providers also submitted to the Royal Commission into Family Violence that VOCAT was underused by victims of family violence.³⁶¹
- 5.248 Research indicates that many victims of family violence are simply unaware of the existence of VOCAT.³⁶²
- 5.249 Compounding issues of accessibility, the VOCAA has been described as 'complex and difficult for victims to understand'.³⁶³ A victim's experience of VOCAT is said to be enhanced by victim support and the availability of legal representation.³⁶⁴
- 5.250 Although VOCAT has close links with support agencies,³⁶⁵ these support mechanisms are not integrated with VOCAT and so victims have to access multiple services.³⁶⁶
- 5.251 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.
- 5.252 As noted in the supplementary consultation paper, analysis of Crimes Statistics Agency data suggests approximately nine per cent of all potentially eligible victims of crimes against the person result in applications for financial assistance.³⁶⁷

356 *Victims of Crime Assistance Act 2009* (Qld) s 139(b) and (c).

357 *Victims Rights and Support Act 2013* (NSW) s 10(1)(a).

358 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 135.

359 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 81.

360 *Ibid.*

361 *Ibid.*

362 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.

363 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 18.

364 *Ibid.*

365 See Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 21.

366 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 136.

367 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 167.

- 5.253 Research conducted by the Women’s Legal Service Victoria has found that many victims of family violence are unaware of the existence of VOCAT.³⁶⁸ Similarly, research by Whittlesea Community Legal Service in 2011 also identified a lack of awareness among victims regarding financial assistance available through VOCAT.³⁶⁹ These conclusions are echoed in the research conducted by the Victims Support Agency, which found a general lack of awareness and understanding of VOCAT and the process, even among victims who had been through it.³⁷⁰ Similarly, in an analysis of Australian victim compensation schemes, Betty Chan et al noted that only a small proportion of victims pursue support from a victim compensation scheme. One reason provided was victims’ lack of awareness of the schemes.³⁷¹
- 5.254 Lack of awareness is only one reason victims may not be accessing Victoria’s existing scheme. The documentation requested by VOCAT to support an application, and the form itself, can also be overwhelming for victims.
- 5.255 The VOCAT application form is not ‘victim-friendly’, and is not written in plain language.³⁷² The form does not recognise all victim experiences. As already noted the form is tailored towards victims of a one-off act of violence and uses singular language.
- 5.256 In addition to family violence victims, these features of the form can make it difficult for victims of certain other types of crime to complete the form. Some victims, such as victims of historical child sexual assault or family violence, 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.
- 5.257 As noted in the supplementary consultation paper, concerns with the VOCAT application form were also raised in Victims Support Agency research.³⁷³ A victim of historical childhood sexual assault said the application form was not suitable for sexual assault victims, stating: ‘[The VOCAT form] needs to be very friendly. It was too black and white and it was like everyone fits into the same box, and no one fits into the same box.’³⁷⁴
- 5.258 The VOCAT application form can be contrasted with the form for victim impact statements produced by the Department of Justice and Regulation. While the victim impact statement form is also a legal form, being a statutory declaration submitted to the court during the sentencing phase of a criminal trial, it has been designed by the Victims Support Agency to provide more guidance, information and space for a victim to convey their story in a more sensitive and victim-friendly way.³⁷⁵ Similar ‘victim-friendly’ forms and layouts have also been used by the Office of Public Prosecutions in relation to victim and family member reports under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).³⁷⁶
- 5.259 The effect of the above is that victims are unlikely to navigate the VOCAT system without a lawyer.³⁷⁷
- 5.260 However, access to a lawyer has also been described as a barrier because some victims are not able to access a lawyer. In addition, the Commission was told that some lawyers will not take on VOCAT-related work because the legal costs awarded are too low for the amount of work often required.³⁷⁸ Research by the Victims Support Agency has found

368 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.

369 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 32.

370 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 57–8.

371 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) 17.

372 Ibid 170.

373 Ibid.

374 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33.

375 Victims Support Agency, Department of Justice and Regulation (Vic), *Guide to Victim Impact Statements*, Brochure (2015).

376 Office of Public Prosecutions (Vic), *Victim or Family Member Report Form*, Brochure (2012).

377 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 169.

378 Ibid.

that some victims experienced difficulty securing 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, uncommunicative, difficult to contact, dismissive, insensitive and only interested in money.³⁷⁹

5.261 Accessibility issues have been linked to the legalistic nature of the VOCAT processes:

The most common problems with the process of obtaining counselling through VOCAT can broadly be associated with the need to comply with the requirements of a legal system ... includ[ing] reluctance by some counsellors to engage with the VOCAT process, time-consuming trips to solicitors, difficulty in obtaining documentation and delays in obtaining [VOCAT-funded] counselling once it had been awarded.³⁸⁰

5.262 Some academics have suggested that VOCAT's accessibility is limited because it is part of the justice system rather than the victim support system. Hayley Catherine Clark notes that victims can be discouraged from accessing the justice system because they perceive it as detrimental to their wellbeing. As a result, Clark considers that there should be 'a greater separation of compensation schemes from the criminal justice system ... [to] provide a more encouraging and accessible service for victim/survivors'.³⁸¹

Responses

5.263 Reflecting the matters raised in the consultation papers, the written submissions noted concerns regarding victims' awareness of and access to VOCAT.

5.264 In their joint submission VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria noted the low rate of VOCAT applications³⁸² may be due to:

a general lack of awareness of VoCAT and the financial assistance process in Victoria, or reflect the difficulty for applicants to understand their potential entitlements and quickly and easily access the assistance offered.³⁸³

5.265 The Hume Riverina Community Legal Service submitted that there is very little public knowledge about VOCAT or its eligibility requirements, particularly in rural or regional Victoria.³⁸⁴ The Women's Legal Service Victoria and Domestic Violence Victoria submitted that there was limited awareness of victims of crime assistance and that this was a particular issue for those 'for whom English is a second language, or in newly arrived communities'.³⁸⁵

5.266 Similarly, CASA Forum submitted that lack of awareness of VOCAT is a particular problem 'for people who have high support needs and may not be able to independently get access to information about this process'.³⁸⁶

5.267 The Eastern Community Legal Centre submitted that family violence victims may often be reluctant to engage in VOCAT applications due to:

feeling 'unworthy' of accessing the system and also due to a fear of having to engage in invasive court proceedings. This is especially the case if the victim/survivor has already had experience with any court system.³⁸⁷

379 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 39.

380 Ibid 59.

381 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 119.

382 Based on a comparison between the number of victim reports for crimes against the person in Victoria between April 2016 and March 2017 and the number of applications to VOCAT, the Commission estimates that only around 9% of eligible victims are applying for financial assistance through VOCAT. For further discussion, see Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 167.

383 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

384 Submission 26 (Hume Riverina Community Legal Service).

385 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

386 Submission 30 (CASA Forum).

387 Submission 33 (Eastern Community Legal Centre).

- 5.268 In this context, a victim submitted that ‘the whole [VOCAT] process is wrapped up in the mystique and industry of the Courts and the legal profession’.³⁸⁸ This can result in applicants requiring legal assistance in order to navigate the VOCAT process. As Inner Melbourne Community Legal submitted: ‘legal representation is crucial in complex matters, and it can proportionately affect the quantum of any award thereby getting victims better results’.³⁸⁹
- 5.269 Similarly, Merri Health Victims Assistance Program submitted that ‘the current VOCAT system makes the application of a VOCAT claim inaccessible to most victims without the assistance of legal support with their application’.³⁹⁰
- 5.270 Ryan Carlisle Thomas Lawyers submitted:
- The current VOCAT and State-funded scheme is plainly not easy to navigate without legal representation. One of the major reasons for this is that there are many more criterion to satisfy in VOCAT applications than for WorkCover or TAC claimants.
- For example, WorkCover or TAC claimants merely need to prove at the time of making a claim that they have suffered an injury arising out of in the course of their employment or a transport accident, respectively. Provided these boxes are ticked, the claimant is eligible to receive compensation from their WorkCover insurer or the TAC.
- However, in the case of VOCAT applications, there is a much longer list of criteria applicants are required to ‘tick’ before they can be considered to be eligible. There are many more criteria to satisfy in VOCAT applications than for WorkCover or TAC claimants.³⁹¹
- 5.271 This reliance on legal assistance was described by stakeholders as ‘a barrier to people accessing assistance’. This is because ‘community legal centres have limited resources, and there is limited access to private lawyers with VOCAT experience, especially in rural and regional areas’.³⁹²

388 Submission 27 (Name withheld).
 389 Submission 14 (Inner Melbourne Community Legal).
 390 Submission 15 (Merri Health Victims Assistance Program).
 391 Submission 38 (Ryan Carlisle Thomas Lawyers).
 392 Submission 31 (Victorian Council of Social Service).

The role of an alleged perpetrator in state-funded financial assistance for victims of crime

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6. The role of an alleged perpetrator in state-funded financial assistance for victims of crime

Introduction

- 6.1 This chapter considers the current provisions of the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) that:
- enable VOCAT to give notice of the time and place for a VOCAT hearing to any other person whom the Tribunal considers has ‘a legitimate interest’ in the matter.¹
 - allow ‘any other person or body that, in the Tribunal’s opinion, has a substantial interest’ in the matter to appear and be heard by VOCAT.²
- 6.2 In this chapter, these provisions are referred to as ‘alleged perpetrator notification and appearance’ provisions.³
- 6.3 The alleged perpetrator notification and appearance provisions of the VOCAA were identified in both the first and supplementary terms of reference as specific matters the Commission was asked to consider in its review of the VOCAA. In particular:
- Matter three of the first terms of reference ask 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’.
 - The seventh matter in the supplementary terms of reference ask the Commission to consider whether ‘it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or to be called to give evidence’.
- 6.4 This chapter also relates to the objectives articulated in the supplementary terms of reference that a state-funded financial assistance scheme should seek to achieve outcomes for victims that minimise trauma and maximise therapeutic effect.
- 6.5 Accordingly, this chapter considers:
- current law relating to alleged perpetrator notification and appearance under the VOCAA
 - stakeholder and community views on alleged perpetrator notification and appearance provisions
 - whether alleged perpetrator notification and appearance provisions should form part of state-funded financial assistance.

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

2 *Ibid* s 35(1).

3 The Commission notes that VOCAT uses the term ‘alleged offenders’. See, eg, *Victims of Crime Assistance Tribunal, Practice Direction No 4 of 2008—Notification of Alleged Offenders and Third Parties*, 11 December 2008.

- 6.6 The Commission considers that the question of involvement of an alleged perpetrator—and whether such involvement is necessary as a matter of procedural fairness in a state-funded financial assistance scheme—is a threshold matter that must be considered regardless of the model of state-funded financial assistance. Accordingly, the Commission’s discussion in this chapter precedes and informs the Commission’s consideration of models of assistance in part three of this report.

Current law

- 6.7 Under section 34(2) of the VOCAA, VOCAT ‘may give notice of the time and place for the hearing to any other person whom the Tribunal considers to have a legitimate interest’ in the matter.⁴
- 6.8 Section 35(1) states that ‘any other person or body that, in the Tribunal’s opinion, has a substantial interest in a matter is entitled to appear and be heard by the Tribunal on the hearing of the matter’.⁵
- 6.9 A person or body that has a ‘substantial interest’ and is entitled to appear and be heard by VOCAT becomes a party to the matter.⁶ VOCAT must give a party to the matter a reasonable opportunity to call or give evidence, examine, cross-examine or re-examine witnesses, and make submissions to VOCAT.⁷
- 6.10 The discretion in section 34(2) of the VOCAA—which allows, but does not compel, VOCAT to give notice to those with a legitimate interest—is wide. However the VOCAA does not require VOCAT to give notice in all circumstances. Instead, the VOCAA limits notice to where VOCAT is satisfied that another person has a ‘legitimate interest’ in the matter. The VOCAA does not specify any factors VOCAT may or must consider in determining who might have a ‘legitimate interest’ in a matter.
- 6.11 Similarly to section 34(2) of the VOCAA, section 35(1) also provides VOCAT with discretion to determine whether another person or body has a ‘substantial interest’ in a matter, if so, such persons or bodies are entitled to appear and be heard by the Tribunal at a VOCAT hearing. However, and again similarly to section 34(2) discussed above, the VOCAA is silent on what factors VOCAT may consider in determining whether another person or body has a ‘substantial interest’ in a matter. As a consequence, the VOCAA affords VOCAT with a broad and unfettered discretion to determine who in fact has a ‘substantial interest’.
- 6.12 VOCAT has issued a practice direction in relation to notification of alleged perpetrators and other third parties.⁸ The practice direction provides that where the Tribunal indicates that consideration is being given to notifying the alleged perpetrator, the following procedures are to apply:⁹
- The Tribunal will advise the applicant or their legal representative in writing that notification of the alleged perpetrator is being considered, and 21 days will be allowed for a response.
 - At the conclusion of 21 days, the registrar will refer the matter, including any submissions/objections received, to the Tribunal Member considering the notification to make a decision as to whether the alleged perpetrator will be notified of the application.

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

5 *Ibid* s 35(1).

6 *Ibid* s 35(4).

7 *Ibid* s 38(1)(c).

8 *Victims of Crime Assistance Tribunal, Practice Direction No 4 of 2008—Notification of Alleged Offenders and Third Parties*, 11 December 2008.

9 *Ibid* 1–2.

- If the Tribunal Member determines that the alleged perpetrator is to be notified of the application, the applicant or their legal representative will be advised of this in writing before the alleged perpetrator is notified of the application. The applicant or their legal representative will be allowed 21 days to advise the Tribunal as to whether the application for financial assistance is still to be pursued.
 - If the applicant or their legal representative advises that the applicant wishes to proceed with their application for financial assistance, or no response is received by the Tribunal, the registrar will send notification of the application to the alleged perpetrator by registered mail. The registrar will allow the alleged perpetrator 14 days to advise the Tribunal as to whether they intend to participate in the hearing.
 - If no response is received from the alleged perpetrator, the registrar will refer the application for financial assistance to the Tribunal Member for listing advice. In these circumstances, the registrar is required to advise the applicant or their legal representative that the alleged perpetrator will not be attending the hearing.
 - If the alleged perpetrator elects to be notified of the hearing, the registrar will list the application for a directions hearing and notify the applicant or their legal representative of the time, date and place of the directions hearing.
 - Pursuant to any directions given at the directions hearing, the application will be listed for hearing and both the applicant or their legal representative and the alleged perpetrator will be notified of the time, date and place of the hearing.
- 6.13 VOCAT does not publish data relating to alleged perpetrator notification or appearance. Therefore, it is difficult to determine the percentage of cases where an applicant is notified of VOCAT's intention to notify an alleged perpetrator, or how frequently this may be objected to by an applicant. There is also no statistical data available to the Commission on how often alleged perpetrators attend VOCAT hearings.
- 6.14 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria stated that although perpetrator notification can be a key concern for many victims, in practice alleged perpetrators are notified infrequently, and only rarely choose to participate in a hearing.¹⁰
- 6.15 Case law in relation to alleged perpetrator notification and appearance is also limited. However, the Supreme Court of Victoria has considered the alleged perpetrator notification and appearance provisions. In *A B v Victims of Crime Assistance Tribunal*,¹¹ 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, became a party to the proceeding. The father wished to call his own witnesses, including the applicant's mother. However, VOCAT excused the mother from giving evidence out of concern for the wellbeing of the applicant. In that case, Justice McDonald stated:

The Act does not enshrine the concept of a fair trial of a person alleged to have committed the criminal act which enlivens the Tribunal's power to award compensation to a victim. So much is plain from ss 33 and 34 of the Act. Under s 33, the Tribunal has power to make an award of compensation without even conducting a hearing. Under s 34(3) the Tribunal has the power to conduct the hearing without providing notice to the person who is alleged to have committed an act of violence. A necessary corollary of these powers is that the Tribunal can make a finding that a person has committed a criminal act and proceed to make an award of compensation, without that person being given an opportunity to defend him or herself against such an allegation.¹²

10 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria). Note that this is in contrast with the other stakeholders who submitted that alleged perpetrator notification is a common occurrence. See, eg, Submission 7 (Dr Kate Seear et al).

11 [2015] VSC 245 (5 June 2015).

12 Ibid [24].

6.16 Justice McDonald further stated:

Having regard to the nature of proceedings before the Tribunal, it is inevitable that an applicant could be traumatised by the experience of encountering an alleged perpetrator in Tribunal proceedings. This is expressly acknowledged by the power to conduct a hearing without giving notice to the alleged perpetrator and the power to make alternative arrangements for the giving of evidence by a witness, as set out at para [22] above. These provisions demonstrate that the Act seeks to protect the interests of an applicant. The duty to act fairly — and the parameters of the obligation to provide an alleged perpetrator with a reasonable opportunity to call evidence— must be considered in the context of the statutory scheme. That scheme requires the interests of the applicant to be given due weight vis a vis the right of an alleged perpetrator to be accorded a reasonable opportunity to call evidence.¹³

6.17 Justice McDonald, citing the decision in *Kioa v West*¹⁴ also stated that ‘what is appropriate in terms of procedural fairness will depend on the circumstances of the case, including the nature of the inquiry before the Tribunal’.¹⁵

6.18 In the Supreme Court of Victoria decision in *P v Crimes Compensation Tribunal*,¹⁶ relating to similar alleged perpetrator notification and appearance provisions in the *Criminal Injuries Compensation Act 1983 (Vic)*,¹⁷ VOCAA’s predecessor, the Supreme Court of Victoria stated:

It may well be that in some cases any interest which the alleged offender may have in the determination of the application will be outweighed by a serious risk to an applicant. The notion that an applicant is informed of the decision to notify the alleged offender merely to enable her to withdraw her application is offensive. It contemplates that a person may be put in a position of having to abandon a genuine claim because of fear without the opportunity of being heard on the issue whether, in her circumstances, the notification of the alleged offender is “appropriate”. This result could not have been intended by the legislature nor should it form any part of the Tribunal’s policy.¹⁸

6.19 Accordingly, in *P v Crimes Compensation Tribunal*¹⁹ the Supreme Court of Victoria determined that the Crimes Compensation Tribunal (VOCAT’s predecessor) be prohibited from notifying the alleged perpetrator without giving victims an opportunity to be heard on that matter.

6.20 VOCAT’s current practice direction in relation to notification of alleged perpetrators and other third parties²⁰ requires VOCAT to notify the applicant or their legal representative in writing that notification of the alleged perpetrator is being considered by the Tribunal, allowing for the victim or their legal representative to object to such notification, consistent with the decision in *P v Crimes Compensation Tribunal*.²¹

13 Ibid [27].

14 *Kioa v West* (1985) 159 CLR 550.

15 *AB v Victims of Crime Assistance Tribunal* [2015] VSC 245 [40] citing Justice Mason in *Kioa v West* (1985) 159 CLR 550, in which the court stated that ‘the expression “procedural fairness” more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations’ at [583]–[584].

16 *P v Crimes Compensation Tribunal* [1997] 2 VR 63.

17 Section 7 of the former *Criminal Injuries Compensation Act 1983 (Vic)* provided that ‘Where the Tribunal considers it appropriate, notification of the making of an application shall be given by the Tribunal to any person who, in the opinion of the Tribunal, has or may have an interest in the determination of the application’. Under section 11(b) of the *Criminal Injuries Compensation Act 1983 (Vic)*, ‘any other person who, in the Tribunal’s opinion, has a substantial interest in the proceedings is entitled to appear and be heard by the Tribunal in person, or to be represented by a barrister, a solicitor, or by such other person as the Tribunal considers appropriate’.

18 *P v Crimes Compensation Tribunal* [1997] 2 VR 63, 66.

19 Ibid, 67.

20 Victims of Crime Assistance Tribunal, *Practice Direction No 4 of 2008—Notification of Alleged Offenders and Third Parties*, 11 December 2008.

21 *P v Crimes Compensation Tribunal* [1997] 2 VR 63, 67.

- 6.21 However, both the VOCAA and the VOCAT practice direction are silent on what factors VOCAT considers where a victim objects to alleged perpetrator notification, and in what circumstances an alleged perpetrator may still be notified despite an applicant's objection.²²
- 6.22 VOCAT states in its 2016-17 annual report that:
- In situations where we are asked to decide whether a crime occurred, we may consider it appropriate to ask alleged offenders if they want to be heard. To reduce any possible stress and anxiety where an alleged offender is notified, VOCAT will generally meet the cost of the alleged offender's legal representation and make directions for the hearing to be conducted in a manner which limits contact between the parties, for instance, by having a party give evidence via a video-link.²³
- 6.23 In terms of the effects of alleged perpetrator notification and appearance provisions, the case of *BFK v Victims of Crime Assistance Tribunal*,²⁴ illustrates the way in which perpetrator notification and appearance provisions can operate. Although in this case, the relevant hearing for the purposes of perpetrator appearance was the VCAT rather than VOCAT hearing, it illustrates the nature of such proceedings where an alleged perpetrator might appear.
- 6.24 In *BFK v Victims of Crime Assistance Tribunal*,²⁵ the applicant (BFK) made a claim to VOCAT in relation to an alleged rape by a former boyfriend (YVP). YVP was given 'the opportunity to put his view in this proceeding ... he responded by way of written statement denying the allegation, referring to their consensual sexual relationship'.²⁶ YVP also submitted that he wished to have no further part in the proceeding however, on the victim's request, VCAT issued a witness summons to YVP who attended the hearing, gave evidence, and was cross-examined by BFK's and VOCAT's lawyers.²⁷
- 6.25 *BFK v Victims of Crime Assistance Tribunal*,²⁸ concerned an out of time application under section 29 of the VOCAA. In affirming VOCAT's decision not to allow an out of time application, VCAT referenced YVP's oral evidence at the VCAT hearing, which VCAT determined was 'largely consistent and not weakened during cross-examination'.²⁹

Responses

- 6.26 A significant proportion of stakeholders told the Commission that regardless of the number of alleged perpetrators actually notified about a VOCAT matter—or the even smaller number of alleged perpetrators who might actually attend a VOCAT hearing—the potential for alleged perpetrator notification or appearance can deter victims from applying or proceeding with their VOCAT application.³⁰

22 As discussed below in stakeholder responses, the submission of VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria states: 'In weighing up whether or not an alleged perpetrator should be notified, the Tribunal Member considers a range of factors, including any safety concerns expressed by the applicant. However, the Act provides no guidance whatsoever about the factors to be considered when deciding whether or not to notify an alleged offender': Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria, The Children's Court of Victoria).

23 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 25.

24 [2017] VCAT 289 (15 March 2017).

25 Ibid.

26 Ibid [102].

27 Ibid [105]–[106]. YVP gave evidence at the hearing 'in response to a witness summons issued by VCAT at BFK's request': ibid [20]. The Commission further notes that both BFK and YVP gave evidence via a remote witness facility so they were not required to see each other in person: ibid [21].

28 Ibid.

29 Ibid [136].

30 Submissions 8 (Victim Survivors' Advisory Council), 10 (Eastern Metropolitan Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 17 (Centre for Excellence in Child and Family Welfare), 20 (Office of the Victorian Information Commissioner), 26 (Hume Riverina Community Legal Service), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 31 (Victorian Council of Social Service), 33 (Eastern Community Legal Centre), 37 (safe steps Family Violence Response Centre), 39 (Victorian Aboriginal Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 46 (Victoria Legal Aid); Consultations 2 (Legal Professionals – Private Practice), 3 (Legal Professionals – Community Legal Centres), 4 (Victim, Witness and Court Support), 9 (Domestic Violence Victoria Members), 12 (Regional Consultation – Mildura Victim Support Agencies), 13 (Regional Consultation – Mildura Legal Professionals), 14 (Chief Magistrates' Family Violence Taskforce), 16 (Regional Consultation – Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).

6.27 As stated by Inner Melbourne Community Legal:

It is not just actual notification that causes applicants distress, but the idea that they may be potentially notified. In the case of one of our client's, they experienced loss of sleep, psoriasis, and an increase in anxiety symptoms at the idea of having to face their assailant at a hearing.³¹

6.28 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria also submitted: 'It is apparent that the mere potential for an alleged offender to be notified about an application can deter some victims from submitting an application'³² As also submitted by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria:

[t]he notion that the very person who harmed the applicant might be told about the application, and choose to participate in a hearing, can be an intimidating prospect, particularly for victims of family violence and sexual assault.³³

6.29 Accordingly, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that 'in weighing up whether or not an alleged perpetrator should be notified, the Tribunal Member considers a range of factors, including any safety concerns expressed by the applicant'.³⁴

6.30 Some stakeholders submitted that there was a propensity for the perpetrator notification and appearance provisions to unfairly impact more vulnerable victims³⁵ or victims of specific crimes, like sexual assault or family violence.³⁶ The Commission was told that perpetrator notification is more likely to occur in situations where police have not laid charges, there is an acquittal or the matter is withdrawn by the prosecution.³⁷ Some stakeholders told the Commission that perpetrator notification 'almost always' occurred in these situations, even if submissions are made by legal counsel opposing such notification.³⁸

6.31 Victoria Legal Aid submitted that 'notification is more likely for low reported crimes such as sexual assault and family violence',³⁹ and that 'victims of these crimes are particularly vulnerable to re-traumatisation'.⁴⁰

6.32 Dr Kate Seear et al raised concerns about victims of sexual assault, sexual abuse and/or family violence being subjected to extensive and often gruelling cross-examination by counsel representing the alleged perpetrator, particularly as rules of evidence do not apply under the VOCAA, thereby enabling such cross examination.⁴¹

6.33 The Victim Survivors' Advisory Council submitted that the nature and dynamics of family violence place victims at higher risk as a result of alleged perpetrator notification:

Notifying the perpetrator heightens the risk of further injury and damage on the victim survivor. The context of separation is recognised as being the most high-risk time for victim survivors, and notification to the perpetrator of a VOCAT hearing unnecessarily compromises the safety and wellbeing of victim survivors.⁴²

31 Submission 14 (Inner Melbourne Community Legal).

32 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

33 Ibid.

34 Ibid.

35 Submissions 37 (Safe Steps Family Violence Response Centre), 46 (Victoria Legal Aid), 49 (Victims of Crime Commissioner, Victoria).

36 Submissions 46 (Victoria Legal Aid), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria, The Children's Court of Victoria).

37 Submissions 31 (Victorian Council of Social Service), 33 (Eastern Community Legal Centre), 37 (Safe Steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 46 (Victoria Legal Aid); Consultations 3 (Legal Professionals – Community Legal Centres), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

38 Consultation 3 (Legal Professionals – Community Legal Centres).

39 Submission 46 (Victoria Legal Aid).

40 Ibid.

41 Submission 7 (Dr Kate Seear et al).

42 Submission 8 (Victim Survivors' Advisory Council).

- 6.34 Some stakeholders that alleged perpetrator notification was a further opportunity for family violence perpetrators to exercise control and domination.⁴³
- 6.35 The written submission by safe steps Family Violence Response Centre provided the following first-hand accounts by victims who had experienced perpetrator notification:⁴⁴
- I had an absolutely horrible experience with VOCAT in the mid to late 90's as a result of family violence and abuse issues. It scarred me for quite a long time because they wanted to call the perp to a hearing, and I refused to allow this because I did not feel safe. So the application failed.
- At first they said he would not be informed, then he was informed, then they said he would not be at the hearing, then they tried to bully me into attending the hearing despite the fact I would have to have been cross-examined by his barrister.
- 6.36 The Commission was also told about a matter where the alleged perpetrator had attended the VOCAT hearing and although the magistrate used remote rooms for the giving of evidence, the victim had been highly distressed by the experience.⁴⁵
- 6.37 Anglicare Victoria's Victim Assistance Program also submitted: 'Victims do not understand the notification process ... Most victims receive the letter and go into panic.'⁴⁶
- 6.38 As a result of the significant adverse effects on victims as a result of alleged perpetrator notification and appearance provisions as described above, there was strong stakeholder support for the alleged perpetrator notification and appearance provisions to be abolished entirely.⁴⁷ Other stakeholders suggested the alleged perpetrator notification and appearance provisions be limited, including:
- that there be a legislative presumption against alleged perpetrator notification and appearance⁴⁸ particularly for specific classes of victims, such as victims of family violence and victims of sexual assault⁴⁹
 - that alleged perpetrator notification and appearance only occur where it is required to enable the decision maker to determine whether the criminal act occurred,⁵⁰ where it is necessary to reach a fair decision,⁵¹ is proportionate to the facts,⁵² or where there are substantial doubts about the veracity of an application⁵³
 - that alleged perpetrator notification only occur in 'special circumstances' or only where there are further safeguards in place to protect victims⁵⁴
 - that alleged perpetrator notification only occur 'where no specific safety risks are present'.⁵⁵

43 Submissions 14 (Inner Melbourne Community Legal), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum).

44 Submission 37 (safe steps Family Violence Response Centre).

45 Consultation 13 (Regional Consultation – Mildura Legal Professionals).

46 Submission 5 (Anglicare Victoria Victims Assistance Program).

47 Submissions 7 (Dr Kate Seear et al), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 32 (Australian Psychological Society), 39 (Victorian Aboriginal Legal Service), 41 (Springvale Monash Legal Service), 49 (Victims of Crime Commissioner, Victoria); Consultation 3 (Legal Professionals - Community Legal Centres).

48 Submissions 14 (Inner Melbourne Community Legal), 20 (Office of the Victorian Information Commissioner), 26 (Hume Riverina Community Legal Service), 27 (Name withheld), 38 (Ryan Carlisle Thomas Lawyers), 46 (Victoria Legal Aid); Consultations 3 (Legal Professionals—Community Legal Centres), 13 (Regional Consultation—Mildura Legal Professionals).

49 Submission 26 (Hume Riverina Community Legal Service); Consultation 3 (Legal Professionals—Community Legal Centres).

50 Submissions 14 (Inner Melbourne Community Legal), 18 (cohealth).

51 Submission 46 (Victoria Legal Aid), Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria, The Children's Court of Victoria).

52 Submission 20 (Office of the Victorian Information Commissioner).

53 Submission 41 (Springvale Monash Legal Service).

54 Submission 14 (Inner Melbourne Community Legal).

55 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

6.39 Some stakeholders on the other hand considered it important that alleged perpetrators have the opportunity to defend themselves.⁵⁶ Although some stakeholder considered this ‘right’ should not be an unfettered right. For example, a representative of the Anglicare Victoria Victims Assistance Program stated:

the only time a perpetrator should be notified is if there are no reports to police and not charges. As a perpetrator the[y] should have the right to know of the alleged offence and have the opportunity to defend themselves.

6.40 Ryan Carlisle Thomas Lawyers submitted that:

Our democracy and the legal principles of due process and procedural fairness dictate that those accused have a reasonable opportunity to respond to charges levelled against them.⁵⁷

6.41 Some lawyers told the Commission that there might be some circumstances where it is important to give the alleged perpetrator the opportunity to be heard, especially where there has been no police report or no conviction, in order to test the applicant’s allegations.⁵⁸

6.42 Similarly, some academics consulted by the Commission told the Commission that an alleged perpetrator does have a legitimate interest in the outcome of the application and should therefore be given the opportunity to tell their side of the story.⁵⁹

6.43 However, other stakeholders queried the need to provide alleged perpetrators an opportunity to respond to matters raised in an application for state-funded financial assistance. Some victim support workers consulted suggested alleged perpetrators do not need to ‘defend’ claims related to victims’ assistance.⁶⁰ Springvale Monash Legal Service submitted:

[VOCAT’s] determinations affect the right of an applicant to receive financial assistance. Its concern is not to determine the criminal liability of an alleged perpetrator.⁶¹

6.44 Springvale Monash Legal Service’s submission referenced the decision in *AB v Victims of Crime Assistance Tribunal*,⁶² stating that such judgements demonstrate a ‘victim-centred’ approach which should be followed.⁶³

6.45 Similarly, the Victorian Council of Social Service submitted ‘A VOCAT hearing is not a trial - there is no requirement for ‘both sides’ to be heard and their stories weighed’.⁶⁴

6.46 Some stakeholders also submitted that even if an alleged perpetrator did have an interest in a VOCAT matter, current procedures already enable VOCAT to ‘override’ matters of procedural fairness under section 34 of the VOCAA.⁶⁵ The Victorian Aboriginal Legal Service submitted that this ‘elevates the victim’s interests above those of the alleged perpetrator; elevating the principle of therapeutic justice and state-based assistance over that of procedural fairness’.⁶⁶

56 Submissions 5 (Anglicare Victoria Victims Assistance Program), 38 (Ryan Carlisle Thomas Lawyers); Consultation 15 (Regional Consultation – Ballarat Victim Support Agencies).

57 Submission 38 (Ryan Carlisle Thomas Lawyers).

58 Consultation 16 (Regional Consultation – Ballarat Legal Professionals).

59 Consultation 20 (Academics)

60 Consultations 10 (Regional Consultation – Morwell Victim Support Agencies), 15 (Regional Consultation – Ballarat Victim Support Agencies).

61 Submission 41 (Springvale Monash Legal Service).

62 [2015] VSC 245 (5 June 2015).

63 Submission 41 (Springvale Monash Legal Service) referring to *AB v Victims of Crime Assistance Tribunal* [2015] VSC 245 (5 June 2015).

64 Submission 31 (Victorian Council of Social Service).

65 Submissions 39 (Victorian Aboriginal Legal Service), 41 (Springvale Monash Legal Service).

66 Submission 39 (Victorian Aboriginal Legal Service).

- 6.47 A number of stakeholders submitted alleged perpetrator notification and appearance undermined, or contradicted, the beneficial nature of the VOCAA. Inner Melbourne Community Legal submitted:
- The notification provisions are completely at odds with the objectives of the Act, given that it is to provide financial assistance to victims to recover from crimes.⁶⁷
- Perpetrator notification directly impacts on a victim's willingness to take part in the scheme and acts as a strong deterrent. Our clients have expressed concerns for their safety and have been significantly distressed at the prospect of a perpetrator attending at a hearing which is meant to be focused on their experiences and intended to assist with their recovery.⁶⁸
- 6.48 The Victorian Council of Social Service submitted that:
- VOCA principles include minimising trauma and maximising therapeutic effect. Notifying perpetrators is likely to undermine these goals and risks making the hearing process much less therapeutic.⁶⁹
- 6.49 Victoria Legal Aid also submitted that the perpetrator notification provisions 'may compromise the therapeutic potential of a VOCAT hearing'.⁷⁰
- 6.50 Some stakeholders stated that perpetrator notification results in a more adversarial approach, akin to that of a criminal trial.⁷¹ Dr Kate Seear et al also submitted that alleged perpetrator notification and appearance enables alleged perpetrators to introduce into evidence matters relating to the victim's character and behaviour without rules of evidence applying⁷²:
- As offender notifications appear to be on the increase and are made without sufficient safeguards for victims, alleged offenders have a perverse incentive to raise questions about the character or conduct of the victim (including their past drug use).⁷³
- 6.51 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria supported greater protections to ensure 'that an alleged offender is only notified of a hearing in appropriate circumstances'.⁷⁴

Discussion and the Commission's conclusions

- 6.52 As noted in the introduction to this chapter, the Commission considers that the involvement of an alleged perpetrator—and whether such involvement is necessary as a matter of procedural fairness in a state-funded financial assistance scheme—is a threshold matter that must be considered regardless of the model of state-funded financial assistance.
- 6.53 Accordingly, the Commission must consider whether it remains appropriate for alleged perpetrators to be notified—and in certain circumstances, appear at a hearing for the purposes of a determining a victim's application for assistance—regardless of consideration of the model of assistance, discussed in Chapters 7 and 8, and other technical or procedural reforms considered throughout this report.

67 Submission 14 (Inner Melbourne Community Legal).

68 Ibid.

69 Submission 31 (Victorian Council of Social Service).

70 Submission 46 (Victoria Legal Aid).

71 Consultation 16 (Regional Consultation – Ballarat Legal Professionals).

72 As discussed in Chapter 4, VOCAT is not bound by the rules of evidence: *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(b).

73 Submission 7 (Dr Kate Seear et al). In this submission, Kate Seear et al are referencing the VOCAA's requirement that VOCAT consider the character and behaviour of an applicant in determining whether to make an award, or in determining the amount of an award. The Commission considers relevant character and behaviour considerations under section 52 and 54 of the VOCAA in chapter 15.

74 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

- 6.54 In the Commission's view, there are three main considerations relevant to alleged perpetrator notification and appearance:
- What are the effects of the alleged perpetrator notification provisions on victims of crime?
 - Can the effects of the alleged perpetrator notification provisions be ameliorated through legislative or procedural protections?
 - Notwithstanding any adverse effects for victims of crime, should alleged perpetrators have a right to be notified and heard in relation to a state-funded financial assistance application?
- 6.55 In examining the final matter, the Commission considers that the following must also be considered:
- the policy rationale and framework underpinning the *Victims of Crime Assistance Act 1996* (Vic) when enacted, which included an aim to achieve 'an appropriate balance between the interests of victims and the state and the rights of offenders'.⁷⁵
 - the potential benefits, and interests, for both the state and alleged perpetrators, in having alleged perpetrator notification and appearance provisions.
- 6.56 In the final section of this chapter, the Commission considers that victims should be placed at the centre of state-funded financial assistance and how this relates to alleged perpetrator notification and appearance provisions.

Effects on victim safety and wellbeing

- 6.57 Stakeholder views described above confirm the potential for the VOCAA's alleged perpetrator notification and appearance provisions to cause victims distress and reduce the therapeutic aspects of the financial assistance process. Case studies provided to the Commission in written submissions give voice to victims who have experienced the alleged perpetrator notification and appearance process, demonstrating not only safety, health and wellbeing concerns, but confusion and in some cases, panic about the process.⁷⁶
- 6.58 Stakeholder concerns about alleged perpetrator notification and appearance mirror findings of previous reviews and research.
- 6.59 As noted in the then-Department of Justice discussion paper on state-funded financial assistance: 'some victims find a tribunal hearing distressing or traumatising, particularly in the rare event that the alleged perpetrator is notified and attends'.⁷⁷
- 6.60 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 significant issue for family violence victims⁷⁸ because of its potential to re-traumatise victims.⁷⁹ The Magistrates' Court of Victoria and Children's Court of Victoria also highlighted in its submission to the Royal Commission that alleged perpetrator notification is a concern due to 'the safety risks that commonly arise in applications involving family violence'.⁸⁰

75 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1024 (Jan Wade, Attorney-General).

76 See, eg, Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 37 (safe steps Family Violence Response Centre).

77 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 42.

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

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

80 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.

- 6.61 The Royal Commission noted in its final report that although VOCAT indicates on its website that notification of alleged perpetrators ‘rarely occurs’, the Royal Commission had ‘heard, however, of situations where the tribunal intended to contact the perpetrator and/or invited them to participate in the proceedings. This can re-traumatise victims’.⁸¹
- 6.62 In its 2011 discussion paper in relation to VOCAT, Whittlesea Community Legal Service stated:
- Legal practitioners consulted for this research nominated potential notification of the alleged offender by the Tribunal and the distress this causes to the victim as a barrier to victims accessing compensation from VOCAT.⁸²
- 6.63 Whittlesea Community Legal Service also found that 40 per cent of legal practitioners surveyed for that project had represented a client in a matter where the alleged offender was notified of the hearing, noting that:
- All legal practitioners who had dealt with matters where the offender was notified reported that notification of the offender had a negative impact on the victim and usually caused distress to the victim. In some cases, it was reported that notification of the offender actively discouraged the victim from continuing with the application.⁸³
- 6.64 Women’s Legal Service Victoria’s *Rebuilding Strength—VOCAT Project* found that 77 per cent of surveyed legal practitioners had experienced VOCAT informing them that they intended to notify the alleged perpetrator in a particular case. Sixty-seven per cent of surveyed legal practitioners had also experienced unsuccessful objections to alleged perpetrator notification.⁸⁴ Legal practitioners in that project also cited perpetrator notification as a common consequence of a victim having not reported a matter to police, with one participant stating:
- If [VOCAT] accepts the reasons for failure to report/make a statement/assist the police and it will allow the application to proceed, it will probably want to notify the alleged offender of the application to give [the alleged offender] an opportunity to oppose it.⁸⁵
- 6.65 This finding corresponds with stakeholder concerns outlined above that the alleged perpetrator notification and appearance provisions might adversely impact vulnerable or marginalised victims.
- 6.66 VOCAT’s review of its pilot Koori VOCAT list also noted the differing effects of alleged perpetrator notification depending on an applicant’s cultural context.⁸⁶ It was noted in that report that ‘the interrelatedness of many Koori communities ... [means] that notification to the alleged offender can be perceived as notification to the entire community’.⁸⁷
- 6.67 The Commission is concerned by evidence suggesting that the alleged perpetrator notification and appearance provisions may disadvantage already marginalised or vulnerable victims of crime. This includes victims of crime with low reporting rates, victims who may fear reporting crimes to police, crimes where the alleged perpetrator is known to the victim and victims from culturally diverse communities, including Aboriginal victims of crime for whom the interconnectedness of their community may result in more adverse consequences. In the Commission’s view, there is a high likelihood of further intersectional disadvantage where victims’ circumstances include a number of these factors, such as a victim of sexual assault occurring in the context of family violence.

81 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 80.

82 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 84.

83 Ibid.

84 Women’s Legal Service Victoria, *Rebuilding Strength—VOCAT Project: Practitioner Survey Preliminary Results* (2017) (unpublished) 7.

85 Ibid 4.

86 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot: Review and Recommendations* (2010) 26.

87 Ibid.

- 6.68 In the Commission’s view, stakeholder responses and relevant research outlined above indicate that the alleged perpetrator notification and appearance provisions have profound impacts on victims—in some cases, even preventing victims from applying to VOCAT at all.

Can the effects of alleged perpetrator notification be ameliorated through legislative protections?

- 6.69 Some stakeholders suggested legislative limitations to the alleged perpetrator notification and appearance provisions, and increased safety mechanisms for victims appearing at a VOCAT hearing, might reduce the potential for alleged perpetrator notification and appearance to cause harm to victims.
- 6.70 In the Commission’s view, legislative and procedural protections would undoubtedly assist those who proceed with an application for state-funded financial assistance.
- 6.71 However, the Commission is concerned that even if strengthened safety mechanisms were legislatively enshrined, evidence suggests it is the mere idea, or possibility, of alleged perpetrator notification or appearance that can prevent victims from applying for assistance.
- 6.72 In the Commission’s view, stakeholder submissions and the findings of relevant research and review reports confirm that the current provisions of the VOCAA act as a significant deterrent to prospective applicants to VOCAT. In this context, the Commission is not convinced that procedural or legislative protections will greatly assist victims who are too scared to even proceed with an application because of the chance of perpetrator notification, however slight the actual occurrence of such notification might be.
- 6.73 Given the significant repercussions of these provisions, and the fact it is unlikely that legislative protections can ameliorate their deterrent effect, in the Commission’s view there must be a compelling case for alleged perpetrator notification to be retained. Accordingly, the next part of this chapter considers whether alleged perpetrators should have a right to be notified and heard in relation to an application for state-funded financial assistance, noting the significant impacts of such provisions, and the Commission’s view that legislative protections are unlikely to ameliorate these negative effects.

Should alleged perpetrators have a right to be notified and heard in relation to an application for state-funded financial assistance?

Balancing the interests of victims, the state and the rights of alleged perpetrators

- 6.74 In introducing the *Victims of Crime Assistance Act 1996* (Vic) to Parliament, the then Attorney-General, the Hon. Jan Wade MP stated in her Second Reading Speech that the ‘bill, together with the proposed scheme, will address the needs of victims of violent crimes while at the same time achieving an appropriate balance between the interests of victims and the state and the rights of offenders’.⁸⁸ The Commission notes, however, that there is some ambiguity about how the provisions of the VOCAA achieve such a balance—and precisely which provisions of the VOCAA are intended to do this. The VOCAA contains no express provision clarifying the application of sections 34 and 35 of the VOCAA to alleged perpetrators. VOCAT has issued a Practice Direction in relation to the notification of alleged perpetrators.⁸⁹

- 6.75 As noted in Chapter 4, the past decade has seen an increased focus on the needs and rights of victims of crime in Victoria.⁹⁰ As the Commission acknowledged in its 2016 information paper in relation to its review of the role of victims of crime in the criminal trial process:
- the landscape has changed dramatically for victims of crime. The welfare of victims is now a central concern to governments, as reflected in the enactment of victims' rights charters, victims' compensation schemes and victim support services.⁹¹
- 6.76 These policy changes have resulted from an increased understanding of how criminal justice processes can adversely impact victims of crime and the need to protect victims, as far as practical, from processes that serve to intimidate, distress or otherwise traumatise victims throughout the justice process.
- 6.77 As a result of contemporary understandings of victims' needs and rights, in the Commission's view, if a new state-funded financial assistance Act was introduced today, it would likely 'balance' victim and offender rights much differently than in 1996. For example, the *Victims of Crime Assistance Act 1996* (Vic) predates the *Victims' Charter Act 2006* (Vic) which sets out principles for how Victoria's criminal justice system and victim service agencies should respond to victims of crime⁹² as well as a number of other significant legislative reforms aimed at improving the justice process for victims of crime.
- 6.78 The Commission notes that even in its current form, the VOCAA provisions do not provide alleged perpetrators with an absolute right to be notified or heard. VOCAT has significant discretion to determine whether or not to give notice of a hearing, and whether someone has a 'legitimate interest' in a matter.⁹³ VOCAT also has significant discretion in determining whether someone has a 'substantial interest' in a hearing.⁹⁴ As noted in *AB v Victims of Crime Assistance Tribunal and Ors*,⁹⁵ the VOCAA 'does not enshrine the concept of a fair trial of a person alleged to have committed the criminal act', confirming that an alleged perpetrator does not have an absolute right to defend themselves.⁹⁶
- 6.79 As also noted by a number of stakeholders, and discussed above, the existing provisions of VOCAA therefore elevate victims' safety and wellbeing above notions of procedural fairness for an alleged perpetrator.
- 6.80 Approaches in other jurisdictions demonstrate that alleged perpetrator notification and appearance is not considered an automatic right in the context of similar state-funded financial assistance schemes. There are also differing approaches to perpetrator notification, noting the majority of other Australian jurisdictions have administrative models of assistance without hearings therefore appearance of the offender may not be relevant to all schemes.
- 6.81 In some Australian jurisdictions, notification provisions relate only to whether the scheme is pursuing offender contribution and in these circumstances, only apply where a person has been convicted of an offence relating to the financial assistance determination.⁹⁷ For example, in New South Wales, the Commissioner may make a provisional order for restitution against the person convicted of the relevant offence the subject of the application and must serve notice of the provisional order setting out the terms of the order and include a statement of the grounds on which the order was made.⁹⁸ The NSW Victims Services application form for primary victims states: 'In general the material in our

90 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 10.

91 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Victims' Rights and Human Rights: The International and Domestic Landscape*, Information Paper 4 (2016) 22.

92 *Victims' Charter Act 2006* (Vic) s 1.

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

94 *Ibid* s 35(1).

95 [2015] VSC 245 (5 June 2015).

96 *Ibid* [24].

97 See, eg, *Victims of Crime Assistance Act 2009* (Qld) ss 109–116; *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 71–74; *Victims Rights and Support Act 2013* ss 59–61.

98 *Victims Rights and Support Act 2013* ss 59–61.

possession is not released to other people. However, information may need to be made available to the offender if restitution action is taken to recover the money awarded'.⁹⁹

- 6.82 On the other hand, section 18(4)(c) of the *Victims of Crime Act 2001* (SA) requires a copy of an application for financial assistance to be served on the offender unless the identity of the offender is unknown or the whereabouts of the offender are unknown or cannot be readily obtained.¹⁰⁰ Section 19 (1)(b) of the *Criminal Injuries Compensation Act 2003* (WA) enables (but does not compel) the assessor to give written notice of the application and any amendment to it to an interested person.
- 6.83 Professor Robert Guthrie, an assessor under Western Australia's Criminal Injuries Compensation scheme, observed in 2017 that the Western Australian provisions are directly tied to the provisions in the Western Australian Act that relate to the State's right to seek recovery from convicted offenders. Professor Guthrie observed:
- It is not uncommon for the applicant or his or her representatives to make submissions that the offender not be notified of the application because of the propensity to cause fear or harm or reprisals against the applicant and/or the applicant's family. Where the Assessor chooses not to issue notification to the offender, the assessor will also usually order that the State has not right to recover against the offender. A decision to notify or not therefore requires the Assessor to balance the right to the State to seek recovery against the potential for further harm to be inflicted upon the applicant.¹⁰¹
- 6.84 Various jurisdictions approach alleged perpetrator notification and appearance differently, including amongst jurisdictions with similar administrative models such as Western Australia and New South Wales. This suggests that alleged perpetrator notification and appearance is not considered an automatic right in the context of similar state-funded financial assistance schemes. Accordingly, alleged perpetrator notification must be considered holistically, including in relation to how notification provisions intersect with provisions relating not only to offender recovery, but provisions that prioritise victim safety and wellbeing.

What are the interests for the state in having alleged perpetrator notification and appearance provisions?

- 6.85 There is some evidence to suggest that perpetrator notification and appearance provisions can assist decision makers to determine whether a criminal act has occurred and thus, may go to an applicant's eligibility for state-funded financial assistance. This is particularly the case where a matter has not proceeded through the criminal justice system.
- 6.86 As illustrated in the case of *BFK v Victims of Crime Assistance Tribunal*¹⁰² discussed above (noting the relevant hearing for the purposes of perpetrator appearance was the VCAT hearing), the alleged perpetrator (YVP) was given 'the opportunity to put his view in this proceeding ... he responded by way of written statement denying the allegation, referring to their consensual sexual relationship'.¹⁰³
- 6.87 In that case, YVP attended the VCAT hearing, gave evidence, and was cross-examined by BFK's and VOCAT's lawyers.¹⁰⁴ In affirming VOCAT's decision not to allow an out of time application, VCAT referenced YVP's oral evidence at the VCAT hearing, which VCAT determined was 'largely consistent and not weakened during cross-examination'.¹⁰⁵

99 Victims Services (NSW), *Application: Support for Primary Victims*, Brochure (2017) 2.

100 *Victims of Crime Act 2001* (SA) s 18(4)(c).

101 Robert Guthrie, 'Criminal Injuries Compensation for Victims of Family and Domestic Violence' (Paper Presented at John Curtin Institute of Public Policy Seminar, 19 May 2017) 10.

102 [2017] VCAT 289 (15 March 2017).

103 *Ibid* [102].

104 *Ibid* [105]–[106]. YVP gave evidence at the hearing 'in response to a witness summons issued by VCAT at BFK's request': *ibid* [20]. The Commission further notes that both BFK and YVP gave evidence via a remote witness facility so they were not required to see each other in person: *Ibid* [21].

105 *Ibid* [136].

- 6.88 While such evidence and testimony is undoubtedly helpful during the decision-making process, in the Commission's view, such assistance comes at a cost to the victim. This is because where an alleged perpetrator is notified, and attends a hearing, such hearings may closely resemble criminal trials. As noted by RMIT Centre for Innovative Justice, some victims 'have experienced the VOCAT process as akin to other court processes in which they felt their own behaviour, not the perpetrator's, was on trial; in which their experience has been belittled, disbelieved or dismissed'.¹⁰⁶
- 6.89 In the Commission's view, the assistance provided to a decision maker by having the alleged perpetrator provide evidence (whether by written submission or at a hearing) may undermine the beneficial approach of state-funded financial assistance.
- 6.90 The standard of proof that applies under the VOCAA is 'on the balance of probabilities'.¹⁰⁷ This is a lower standard of proof than 'beyond reasonable doubt', which is used in criminal matters. In the Commission's view, if there is sufficient evidence to determine eligibility, according to the requisite standard of proof, such a finding should be made regardless of whether an alleged perpetrator has been given a right to be heard on the matter.
- 6.91 In the Commission's view, it is vital that state-funded financial assistance continue to provide an alternative pathway for victims whose matter, for whatever reason, cannot proceed through the criminal justice system. It is important that state-funded financial assistance remains separate to the criminal justice system, particularly given there are cases where the criminal standard or proof cannot be met, but there is a genuine need for victim assistance. In the Commission's view, although perpetrator notification and appearance may assist a decision maker to determine eligibility, the Commission considers that state-funded financial assistance processes should not resemble a criminal trial where applicants and alleged offenders are required to give evidence and be cross-examined by legal counsel.

What are the interests of the alleged offender?

- 6.92 The Commission acknowledges some stakeholder concerns that alleged perpetrators may have an 'interest' in a state-funded financial assistance matter.¹⁰⁸ The Commission also notes that many stakeholders also submitted that alleged perpetrators did not have an interest in a state-funded financial assistance process because it has no bearing on any other legal matter.
- 6.93 A finding that the victim is a victim of a crime (and has suffered consequent injury) does not constitute directly or by implication a finding that an alleged perpetrator is guilty of the crime. A finding of guilt is a wholly separate matter. It occurs, if it occurs, in a court of law, not in VOCAT. It is a misconception to assert that a finding of a crime for the purposes of providing a victim with state-funded financial assistance involves a finding of guilt being made against an alleged perpetrator.
- 6.94 Although a finding that the victim is a victim of a crime (and has suffered consequent injury) does not constitute a finding that an alleged perpetrator is guilty of the crime, the Commission accepts that some individuals may wrongfully interpret such a finding as a finding of guilt. This would be a wrongful attribution of guilt as no such finding of guilt has been made by a criminal court. Nonetheless, the Commission accepts that where this occurs, it may have an impact on an alleged perpetrator.
- 6.95 However, any impact caused by a misinterpretation of a process separate to the criminal legal process does not create a legal interest for an alleged perpetrator in relation to an application for the award of state-funded financial assistance to a victim of crime. The Commission considers that given the nature of decisions made in relation to state-funded

106 Submission 47 (Centre for Innovative Justice).

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

108 Submissions 5 (Anglicare Victoria Victims Assistance Program), 38 (Ryan Carlisle Thomas Lawyers); Consultations 15 (Regional Consultation – Ballarat Victim Support Agencies), 16 (Regional Consultation – Ballarat Legal Professionals), 20 (Academics).

financial assistance, whereby there is not a finding of guilt or innocence in relation to an alleged perpetrator, any interest an alleged perpetrator may have in such matters is better categorised as a reputational interest. This is not to say that such reputational interests are insignificant, or that findings in relation to a victim's application for state-funded financial assistance have no impact on alleged perpetrators. In particular, the Commission is mindful that alleged perpetrators are likely to have a keen interest in how information relating to a decision of a state-funded financial assistance scheme might be used, including whether such information might be published. Given the speed and spread of current publication channels, including social media platforms, the Commission appreciates that these are not insignificant concerns. Accordingly, in Chapter 14, the Commission makes recommendations in relation to non-publication provisions that would protect the privacy and identity of an alleged perpetrator the subject of a decision made by the proposed scheme.

- 6.96 In the Commission's view, these recommendations would protect the privacy, confidentiality and identity of an alleged perpetrator and therefore, would be key to mitigating any potential adverse effects as a result of an alleged perpetrator being unable to be heard in relation to a state-funded financial assistance application.
- 6.97 Although, as noted above, some other jurisdictions' state-funded financial assistance schemes have perpetrator notification provisions as a part of an offender recovery process—whereby the relevant state-funded financial assistance scheme seeks to recover from a convicted offender the costs associated with an award—Victoria does not have such a recovery process.¹⁰⁹
- 6.98 As discussed in Chapter 18, Victoria's approach to offender contribution under the VOCAA differs to approaches in other jurisdictions. Section 51(1) of the VOCAA enables a victim to assign to the state their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates. In some other jurisdictions, the state has an express right to recover directly from an offender and to seek enforcement of that debt as a statutory debt against the state. Accordingly, and as also discussed in Chapter 18, perpetrator notification is not required under the VOCAA because of any association with offender recovery.

Placing victims at the centre of state-funded financial assistance

- 6.99 Given stakeholder submissions, and previous research reports discussed above, the Commission agrees with stakeholder concerns that alleged perpetrator notification and appearance provisions are counter-productive to a victim's recovery process. Furthermore, the Commission agrees that such provisions can result in victims electing not to pursue a VOCAT application or withdrawing their application because of the potential for alleged perpetrator notification.
- 6.100 In the Commission's view, the fact that the alleged perpetrator notification and appearance provisions can act as such a severe deterrent to victims applying to the scheme fundamentally contradicts the beneficial nature of a state-funded financial assistance scheme—the primary purpose of which is to assist victims to recover from crime.
- 6.101 In the Commission's view, such provisions prioritise procedural and evidentiary processes over victims' needs and increase the adversarial nature of financial assistance matters. The result of VOCAT determining that a person is entitled to appear and be heard by VOCAT is that such persons become a party to the matter¹¹⁰ and VOCAT must give a party to the matter a reasonable opportunity to call or give evidence, examine, cross-examine or re-examine witnesses and make submissions to VOCAT.¹¹¹ The case of *BFK v Victims of Crime*

109 For the Victorian recovery process, in which the victim assigns his or her rights to the state, see *Victims of Crime Assistance Act 1996* (Vic) s 51.

110 *Victims of Crime Assistance Act 1996* (Vic) s 35(4).

111 *Ibid* s 38(1)(c).

Assistance Tribunal,¹¹² discussed above illustrates the extent to which VOCAT hearings might closely resemble criminal trials, with both applicants and alleged perpetrators being legally represented, called to give evidence and cross examined at hearings before a judicial officer.

- 6.102 As noted in *AB v Victims of Crime Assistance Tribunal*, ‘The duty to act fairly — and the parameters of the obligation to provide an alleged perpetrator with a reasonable opportunity to call evidence— must be considered in the context of the statutory scheme’.¹¹³ The context of this statutory scheme is that it is a scheme established to assist victims of crime to recover from a criminal act. It is not a scheme that makes determinations about the guilt or innocence of an alleged offender.
- 6.103 Given the significant effects on victims, and evidence suggesting such effects are unlikely to be ameliorated by legislative protections, the Commission considers that it is not appropriate for a victims of crime assistance scheme to provide for alleged perpetrator notification or for the opportunity for an alleged perpetrator to be heard in relation to a victim’s application for state-funded financial assistance to assist with their recovery from the criminal act.
- 6.104 The Commission acknowledges that this represents a significant shift from the current VOCAA provisions and the current practice of alleged perpetrators being perceived as individuals who might have a ‘legitimate’ or ‘substantial’ interest in a VOCAT matter or hearing. The Commission also acknowledges that although an alleged perpetrator may not be categorised as having a legal interest in a state-funded financial assistance matter, it does not mean that any decisions made in such a process do not impact on an alleged perpetrator. However, in the Commission’s view, concerns regarding how a state-funded financial assistance matter might impact an alleged perpetrator’s interests can be managed through other protections identified in this report, including recommendations relating to non-publication to protect the privacy and identity of an alleged perpetrator the subject of a decision made by the proposed scheme.
- 6.105 As will be discussed in Chapter 12, a victim’s eligibility for the proposed scheme does not rest on a finding of guilt to the criminal standard of proof about an alleged perpetrator. This is a matter for a criminal court. In the Commission’s view this, combined with non-publication protections, mitigates against the need for an alleged perpetrator to be heard on the matter.
- 6.106 In the Commission’s view, removing perpetrator notification reflects a trauma-informed approach that prioritises victims’ safety and wellbeing.
- 6.107 Regardless of model, or other technical and procedural reforms implemented, the Commission considers this to be a significant step in prioritising victims’ safety and wellbeing needs and placing victims’ needs at the centre of the state-funded financial assistance process.

**PART THREE: THE NEED FOR A NEW MODEL
OF STATE-FUNDED FINANCIAL ASSISTANCE
FOR VICTIMS OF CRIME**

**Assessment of victims'
needs and Victoria's existing
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7. Assessment of victims' needs and Victoria's existing victims of crime financial assistance scheme

Introduction

- 7.1 The supplementary terms of reference ask the Commission to consider the operation and effectiveness of the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) and the Victims of Crime Assistance Tribunal (VOCAT) for all victims, including family violence victims, in achieving the purposes set out in section 1 of the VOCAA.¹
- 7.2 The supplementary terms of reference at matter eight ask the Commission to consider whether any processes, procedures or requirements under the VOCAA cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model.
- 7.3 In the Commission's view, the question of other models raised in the supplementary terms of reference necessitates a consideration of the existing scheme as a whole, not just in relation to matters of delay. To consider whether there is unnecessary delay, consideration must be given to all relevant elements of the VOCAT process. This holistic analysis is confirmed by the supplementary terms of reference, which ask the Commission to consider the operation and effectiveness of the VOCAA and VOCAT for all victims.
- 7.4 Accordingly, the question of whether there are other possible models of state-funded financial assistance that would more effectively deliver assistance was considered in Part Three of the Commission's supplementary consultation paper.² In examining this holistic question, the Commission proposed that victims' needs should be at the centre of any reform proposals. The supplementary consultation paper sought community and stakeholder views on what victims' needs are, and how they should be met through a state-funded financial assistance scheme.³ This chapter begins by considering community and stakeholder views on victims' needs.
- 7.5 This chapter then considers whether a new model is required, having regard to the objectives articulated in the supplementary terms of reference—that a state-funded financial assistance scheme for victims should seek to achieve outcomes for victims that:
- are fair, equitable and timely
 - are consistent and predictable
 - minimise trauma for victims and maximise therapeutic effect for victims
 - that the state-funded financial assistance scheme must be efficient and sustainable for the state

1 'The purpose of this Act is to provide assistance to victims of crime': *Victims of Crime Assistance Act 1996* (Vic) s 1.

2 See, generally, introduction to Part Three in Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 176.

3 Ibid 180.

- 7.6 In addition, at matter one of the supplementary terms of reference, the Commission is asked to consider whether the VOCAA can be simplified to make it easier for victims to understand and not require victims to have legal support in all circumstances.
- 7.7 These objectives can be summarised as comprising the following eight elements:
- fair and equitable
 - timely
 - consistent and predictable
 - maximise therapeutic effect
 - minimise trauma
 - easy to understand
 - do not require legal support in all circumstances
 - efficient and sustainable for the state.

Victims' needs

- 7.8 Victims' needs—including their needs relating to state-funded financial assistance—are inextricably linked with the *impacts* of crime on victims.⁴ Ensuring victims' needs are met is challenging because no two victims of a crime experience the same impacts, and consequently, no two victims have exactly the same needs.⁵
- 7.9 Research has emphasised that the impact of crime on victims is a 'highly individualised experience' and does not necessarily correspond to the "seriousness" of the crime based solely on crime type.⁶ Crime affects different people in different ways and victims' needs are diverse and variable.⁷
- 7.10 Although the impacts of crime may vary depending on a victim's individual characteristics, as well as by crime type, research suggests that an emotional and psychological reaction occurs in most victims.⁸ Other common impacts of crime include physical⁹ and financial impacts.¹⁰ These are often compounded by the need for victims to engage with an unfamiliar criminal justice system.¹¹
- 7.11 Accordingly, victims' varied needs may include:¹²
- emotional, psychological and health needs, such as counselling or psychological assistance
 - information needs, such information on the criminal justice process or broader support system
 - practical support needs, such as a safe house or a safety plan
 - financial needs, such as assistance with medical or dental bills.

4 Ibid 177–8.

5 Victims Support Agency (Vic), *Standards for the Provision of Services to Victims of Crime in Victoria* (2011) 5.

6 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth, 2016) 8.

7 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process—Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences? Information Paper 2* (2015) 4; Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 39.

8 Tamar Dinisman and Ania Moroz, *Understanding Victims of Crime: The Impact of the Crime and Support Needs* (Victim Support, 2017) 4–10; Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 18; Anna Gekoski et al, 'Interviewing Women Bereaved by Homicide: Reports of Secondary Victimization by the Criminal Justice System' (2013) 19(3) *International Review of Victimology* 307, 308.

9 Tamar Dinisman and Ania Moroz, *Understanding Victims of Crime: The Impact of the Crime and Support Needs* (Victim Support, 2017) 10; Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 16.

10 Tamar Dinisman and Ania Moroz, *Understanding Victims of Crime: The Impact of the Crime and Support Needs* (Victim Support, 2017) 8; Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 35.

11 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) xiii; Tamar Dinisman and Ania Moroz, *Understanding Victims of Crime: The Impact of the Crime and Support Needs* (Victim Support, 2017) 11.

12 Tamar Dinisman and Ania Moroz, *Understanding Victims of Crime: The Impact of the Crime and Support Needs* (Victim Support, 2017) 11.

- 7.12 Significantly, victims' needs change over time—some arise immediately following the criminal act, while others are longer term.¹³ This variability in victims' needs requires victims' services to be 'flexible, creative and innovative',¹⁴ providing victims with choice,¹⁵ to ensure the right assistance can be offered to victims at the right time.¹⁶
- 7.13 This need for flexibility is reflected in Victoria's government-funded victim assistance programs¹⁷ and the *Victims' Charter Act 2006* (Vic), which requires support and justice agencies to 'take into account, and be responsive to, the particular needs of persons adversely affected by crime'.¹⁸ VOCAT has also acknowledged the importance of providing practical and flexible assistance to victims in the provision of state-funded financial assistance.¹⁹

Responses

- 7.14 To ensure victims' needs were the starting point for the Commission's consideration of any reform options, the Commission's supplementary consultation paper asked the community and stakeholders what victims' needs are, and how they should be met through a state-funded financial assistance scheme.²⁰

Victims' needs are diverse

- 7.15 Consistent with the research discussed above, stakeholders said that victims of crime are a diverse group, with a range of different needs.²¹ As Schembri & Co Lawyers submitted to the Commission, victims' needs are 'multiple and complex'.²²
- 7.16 The diversity of victims' needs was also confirmed by VOCAT, the Magistrates' Court of Victoria, and the Children's Court of Victoria who submitted:
- The impact of violent crime on a victim, and the path to recovery from the harm suffered is unique to each and every victim. Whether the violent crime was a single event (such as a one-off assault) or a protracted experience (as in many cases of family violence), the impact will not be linear, predictable or fixed over time.²³
- 7.17 Similarly, the Victims of Crime Commissioner submitted that:
- Victims of crime have a variety of needs. Some victims of crime will require significantly more support and assistance than others. However, all victims need to feel as if they matter. They need to feel respected and acknowledged.²⁴
- 7.18 Some academics told the Commission that while the specific needs of individual victims may vary, the needs of victims can generally be categorised as pecuniary and non-pecuniary.²⁵
- 7.19 Pecuniary needs include payment of financial expenses following the criminal act, as well as longer-term practical and health expenses to assist victims in their recovery. Non-pecuniary needs often include recognition of the trauma that they have experienced, an apology, an opportunity to participate in the justice process or to be heard.²⁶

13 Ibid 12.

14 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 49.

15 Ibid.

16 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth, 2016) 10.

17 See, eg, Victims Support Agency, Department of Justice and Regulation (Vic), *Standards for the Provision of Services to Victims of Crime in Victoria* (2011).

18 *Victims' Charter Act 2006* (Vic) s 6(2).

19 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 17.

20 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 180.

21 Submissions 49 (Victims of Crime Commissioner, Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria, Children's Court of Victoria); Consultation 20 (Academics).

22 Submission 19 (Schembri & Co Lawyers).

23 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria, Children's Court of Victoria).

24 Submission 49 (Victims of Crime Commissioner, Victoria).

25 Consultation 20 (Academics).

26 Ibid.

- 7.20 Anglicare Victoria’s Victim Assistance Program submitted that victims’ practical needs might include emergency travel immediately after a crime, medical assistance, food and housing, psychological support and debriefing.²⁷

Flexibility

- 7.21 In both written submissions and during consultations, stakeholders said there is a need for flexibility in Victoria’s victims of crime financial assistance scheme.²⁸ A number of stakeholders told the Commission that there is a need for an individualised approach.²⁹ As safe steps Family Violence Response Centre submitted to the Commission, a ‘more flexible approach acknowledges that not all applicants are alike and that their needs may change over time’.³⁰
- 7.22 Similarly, Domestic Violence Victoria and Women’s Legal Service Victoria submitted that assistance should be flexible and correspond to the lived experience of survivors of family violence.³¹

The need for timely assistance

- 7.23 Timely assistance was also articulated as a key victim need by many stakeholders.³² As the Victims of Crime Commissioner submitted, many victims require urgent assistance immediately following a criminal act.³³
- 7.24 Victim support workers submitted that victims’ immediate needs for financial assistance should be responded to in a timely manner without victims having to consult a lawyer, retell their story or prove psychological injury, which ‘could be assumed for the majority of violent crimes’.³⁴
- 7.25 Early intervention was also highlighted to the Commission as a key need:
 Victims’ practical needs should be met in a timely manner requiring minimal administrative and other hoops to jump through, potentially hastening their recovery. Having a central point through which to apply for assistance, where decisions are made quickly, and are not dependent on magistrates having time in their busy work days to review applications would streamline the process.³⁵
- 7.26 Cohealth submitted that urgent needs often include relocation expenses and financial assistance for loss of earnings.³⁶ The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that victims of family violence often need immediate financial support to leave a violent relationship and establish safety and security measures.³⁷
- 7.27 The importance of timely practical assistance was also raised in relation to counselling, medical, dental and safety expenses.³⁸ As the NSW Commissioner of Victims Rights told the Commission, medical assistance is more effective when provided as quickly as possible.³⁹

27 Submission 5 (Anglicare Victoria Victims Assistance Program).
 28 Submissions 37 (safe steps Family Violence Response Centre), 57 (Victims of Crime Assistance League); Consultations 5 (Victims of Crime Commissioner, Victoria), 20 (Academics), 6 (Victims’ Advocacy Organisations).
 29 Consultations 5 (Victims of Crime Commissioner, Victoria), 12 (Regional Consultation—Mildura Victim Support Agencies).
 30 Submission 37 (safe steps Family Violence Response Centre).
 31 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
 32 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultations 8 (Victims’ Representatives—Victims of Crime Consultative Committee), 20 (Academics), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).
 33 Submission 49 (Victims of Crime Commissioner, Victoria).
 34 Submission 18 (cohealth).
 35 Ibid.
 36 Ibid.
 37 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
 38 Consultation 4 (Victim, Witness and Court Support).
 39 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

Holistic, victim-centred and trauma-informed support

- 7.28 Victim representatives of the Victims of Crime Consultative Committee told the Commission that victims require holistic support— provided through one coordinating body—commencing immediately after a crime occurs encompassing both therapeutic and practical aspects such as counselling, financial assistance and court support.⁴⁰ This view was echoed by victim, witness and court support workers who told the Commission that victims need a ‘central place’ for all their needs to be met, including financial assistance.⁴¹ In this context, the Commission was told that victims’ services in Victoria are fragmented.⁴²
- 7.29 The Victim Survivors’ Advisory Council told the Commission that victims need responses that are victim-centred and do not re-traumatise the victim or cause further psychological damage.⁴³ The Victorian Aboriginal Legal Service emphasised the need for a therapeutic approach which appropriately engages with a victim’s culture and history, including the effects of inter-generational trauma.⁴⁴

Recognition of long-term needs

- 7.30 A number of stakeholders emphasised that victims often have long-term needs that extend beyond the more identifiable needs that may immediately arise following a criminal act. In this context, stakeholders said that the existing scheme does not adequately recognise the longer-term—sometimes lifetime—needs of victims.⁴⁵ VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also emphasised the longer term needs of victims:
- Years after the crime, for example, a change in a victim’s circumstances could trigger the need to resume counselling, or it might take months or years before a victim is ready to seek assistance to re-skill and seek employment as part of their efforts to reclaim or establish their independence.⁴⁶
- 7.31 Taking into account the broader health impacts of victimisation, Daniel Myles et al submitted victims’ longer-term needs may include personal care, case management, cleaning and maintenance services, carer assisted shopping and outings, accessibility aides, home modifications and transport costs associated with injury-related appointments.⁴⁷
- 7.32 Daniel Myles et al also submitted that major trauma patients who are subject to interpersonal violence often experience poorer longer-term recovery outcomes when compared with patients injured in unintentional events, with victims of crime less likely to be pain-free, or to have experienced a full recovery or returned to work compared to other patient groups.⁴⁸ These findings suggest that many victims of crime will continue to require practical and financial assistance months and years after the criminal act.

40 Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

41 Consultation 4 (Victim, Witness and Court Support).

42 Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

43 Submission 8 (Victim Survivors’ Advisory Council).

44 Submission 39 (Victorian Aboriginal Legal Service).

45 Submissions 14 (Inner Melbourne Community Legal), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria); Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

46 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria, Children’s Court of Victoria).

47 Submission 45 (Daniel Myles et al).

48 Ibid.

The need to be heard and acknowledged

- 7.33 Stakeholders submitted that victims often also have non-pecuniary needs, in particular the need for acknowledgment⁴⁹ and validation of their experience as victims of crime.⁵⁰ The RMIT Centre for Innovative Justice, drawing on the work of academic Kathleen Daly, described these broader non-pecuniary needs as ‘justice needs’, which include the need for participation, voice, validation, vindication and offender accountability.⁵¹
- 7.34 Similarly, knowmore, an independent legal service for victims of institutional child sexual abuse, submitted that survivors of institutional child sexual abuse need acknowledgment, but often also have additional justice needs such as a need for system reform and general deterrence.⁵²
- 7.35 Consistent with the view that victims’ needs include non-pecuniary needs, the Commission was told that many victims seek to be heard and acknowledged, whether through the criminal justice system or the state-funded financial assistance scheme.⁵³ Some stakeholders described this as ‘validation’ of the victim’s experience of the crime.⁵⁴ The Commission was told that for many victims of crime, the most important thing is acknowledgment—an apology or expression of sympathy from the state.⁵⁵ In the words of one submission:
- But what I wanted more than the dollars was acknowledgment. I merely wanted a tribunal to listen to my story and say to me, in words like these: We believe you. We acknowledge your pain and your trauma at the hands of an abusive and violent person.⁵⁶
- 7.36 The South Metropolitan Integrated Family Violence Executive submitted:
- A victims of crime assistance scheme is ... vital to providing victims of family violence with the opportunity to be heard and validated, to have their “day in court”, as well as providing for financial compensation. The hearing can be powerfully therapeutic for a victim’s recovery.⁵⁷
- 7.37 The importance of hearings as an opportunity for victims to be acknowledged was emphasised by many stakeholders.⁵⁸ Although many stakeholders said that not all victims may want to attend a hearing, the opportunity for a victim to be heard and acknowledged was often described to the Commission as ‘powerful’,⁵⁹ ‘empowering’⁶⁰ or ‘therapeutic’.⁶¹ The importance of hearings and the opportunity to be heard is discussed further in Chapter 8.

49 Submissions 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore).

50 Submission 5 (Anglicare Victoria Victims Assistance Program).

51 Submission 47 (Centre for Innovative Justice).

52 Submission 43 (knowmore).

53 Consultations 19 (RMIT Centre for Innovative Justice), 20 (Academics).

54 Submission 5 (Anglicare Victoria Victims Assistance Program).

55 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

56 Submission 36 (Name withheld).

57 Submission 28 (South Metropolitan Integrated Family Violence Executive).

58 Submissions 13 (Adviceline Injury Lawyers), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 10 (Regional Consultation—Morwell Victim Support Agencies).

59 Submission 42 (Joint Submission Springvale Monash Legal Service et al); Consultations 8 (Victims’ Representatives—Victims of Crime Consultative Committee), 11 (Regional Consultation—Victoria Legal Aid (Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 14 (Chief Magistrate’s Family Violence Taskforce).

60 Consultations 2 (Legal Professionals—Private Practice), 12 (Regional Consultation—Mildura Victim Support Agencies).

61 Consultations 3 (Legal Professionals—Community Legal Centres), 13 (Regional Consultation—Mildura Legal Professionals).

Stakeholder views on models of assistance

- 7.38 As noted above, the supplementary terms of reference ask the Commission to look beyond reform of technical legal and procedural aspects of the VOCAA and VOCAT, and to consider whether any processes, procedures or requirements under the VOCAA cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model.
- 7.39 To address this broader question, Part Three of the Commission’s supplementary consultation paper considered two options for possible reform to more effectively deliver assistance and better meet the outcomes specified in the supplementary terms of reference.⁶²
- **Reform the existing model:** improve the existing scheme through both legislative and procedural reform, while retaining the existing model in which VOCAT operations are subsidised by the Magistrates’ Court of Victoria and magistrates sit as tribunal members in VOCAT.⁶³
 - **Implement a new model of assistance:** adopt a new model of state-funded financial assistance, such as an administrative or quasi-administrative model.
- 7.40 Noting the above broad options for reform, the Commission asked stakeholders whether:
- judicial decision making remains appropriate and sustainable;
 - financial assistance should be integrated with the existing victim support system through an administrative model; or
 - an alternative decision maker—like an independent Commissioner—would deliver assistance more effectively.

Responses

- 7.41 Approximately half of all written submissions received in response to the Commission’s consultation papers expressed no clear view on the model of assistance, or did not comment at all on this issue.⁶⁴
- 7.42 Among those stakeholders expressing a view on the model of assistance in their written submission, views were almost equally split between those supporting the retention of a judicial model and those supporting a new model of assistance, with slightly more written submissions supporting some form of new model.⁶⁵
- 7.43 There were clear demographic differences between those who supported the retention of a judicial model and those advocating for an administrative model in the written submissions received.
- 7.44 Support for the retention of a judicial model came from VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria, as well as lawyers, with support from some victim assistance and advocacy organisations as well as some academics.⁶⁶

62 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 182, 202.

63 Ibid 182.

64 Submissions 1 (Judicial Advisory Group on Family Violence), 3 (Director of Public Prosecutions Victoria), 4 (Crime Victims Support Association), 9 (Alannah & Madeline Foundation), 10 (Eastern Metropolitan Regional Family Violence Partnership), 11 (Seniors Rights Victoria), 12 (Jesuit Social Services), 14 (Inner Melbourne Community Legal), 16 (Project Respect), 17 (Centre for Excellence in Child and Family Welfare), 20 (Office of the Victorian Information Commissioner), 24 (Darebin Community Legal Centre), 32 (Australian Psychological Society), 33 (Eastern Community Legal Centre), 34 (Dr Cassandra Cross), 35 (Brockway Legal), 36 (Name withheld), 39 (Victorian Aboriginal Legal Service), 41 (Springvale Monash Legal Service), 45 (Daniel Myles et al), 46 (Victoria Legal Aid), 52 (Slavery Links), 54 (Victorian Gay and Lesbian Rights Lobby), 55 (Jacqueline Simpkin), 56 (Sandra Betts), 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

65 Seventeen (17) out of 60 written submissions supported a new model (administrative or ‘hybrid’), with 12 out of 60 written submissions supporting the retention of a judicial model. The remaining written submissions did not comment on the model or did not express a definitive view, with the exclusion of confidential submissions which have not been included in this data. The Commission notes that some written submissions had co-signatories or represented the views of a number of member organisations meaning some single submissions represent the views of more than one individual or organisation.

66 Submissions 7 (Dr Kate Seear et al), 13 (Adviceline Injury Lawyers), 19 (Schembri & Co Lawyers), 22 (YourLawyer), 23 (Johnstone & Reimer Lawyers), 28 (South Metropolitan Integrated Family Violence Executive), 30 (CASA Forum), 38 (Ryan Carlisle Thomas Lawyers), 42 (Joint Submission Springvale Monash Legal Service et al), 43 (knowmore), 47 (Centre for Innovative Justice), 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria).

- 7.45 Support for an administrative model came primarily from victims and some victim assistance or victim advocacy organisations.⁶⁷ Support for an administrative model also came from the Victorian Civil and Administrative Tribunal, the Public Health Association of Australia and the Hume Riverina Community Legal Service.⁶⁸
- 7.46 A number of victims' representatives and victim advocacy or assistance organisations did not comment on the model of assistance, or did not express a definitive or clear view. Of those victim advocacy or assistance organisations that did express a view, most favoured a shift to an administrative model,⁶⁹ while only two such organisations supported the retention of the judicial model.⁷⁰

Support for retaining a judicial model

- 7.47 As already noted above, almost half the written submissions expressing a view on the model of state-funded financial assistance supported the retention of a judicial model. Reasons included that:
- the judicial basis of the existing VOCAT scheme ensures victim participation and redresses the balance of the criminal justice system
 - therapeutic effect is maximised through hearings where there is judicial acknowledgment
 - the complexity of VOCAA necessitates judicial decision making
 - judicial discretion in decision making ensures an individualised approach
 - a victim's right to legal representation is ensured.
- 7.48 These reasons are outlined further below.

Victim participation and redressing the balance of the criminal justice system

- 7.49 Some stakeholders submitted that the judicial basis of the existing VOCAT scheme redresses the balance of the criminal justice system.⁷¹ For example, Johnstone & Reimer Lawyers submitted that a 'move to an administrative model would serve to further disenfranchise victims from the criminal justice system'.⁷²
- 7.50 YourLawyer submitted that being heard during the VOCAT process gives victims 'legitimacy':
- Even in cases where a criminal prosecution of the alleged offender has resulted, oftentimes victims feel that the criminal justice process is focused on the alleged offender and that they, as the victim, are sidelined. Having the ability ... to be heard at a hearing, gives the victim legitimacy.⁷³

67 For ease of categorisation, the Commission uses the terms 'victim assistance' or 'victim advocacy' organisation to include victim-led groups or initiatives, individual victims, as well as organisations who support victims or advocate on their behalf, and includes Submissions 5 (Anglicare Victoria Victims Assistance Program), 6 (Forgetmenot Foundation Inc.), 8 (Victim Survivors' Advisory Council), 15 (Merri Health Victims Assistance Program), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria), 57 (Victims of Crime Assistance League).

68 The following submissions supported an administrative model: Submissions 2 (The Victorian Civil and Administrative Tribunal), 5 (Anglicare Victoria Victims Assistance Program), 6 (Forgetmenot Foundation Inc.), 8 (Victim Survivors' Advisory Council), 15 (Merri Health Victims Assistance Program), 25 (Public Health Association of Australia), 26 (Hume Riverina Community Legal Service), 27 (Name withheld), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria), 57 (Victims of Crime Assistance League).

69 Submissions 5 (Anglicare Victoria Victims Assistance Program), 6 (Forgetmenot Foundation Inc.), 8 (Victim Survivors' Advisory Council), 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria), 57 (Victims of Crime Assistance League).

70 Submissions 28 (South Metropolitan Integrated Family Violence Executive), 30 (CASA Forum).

71 Submissions 23 (Johnstone & Reimer Lawyers), 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

72 Submission 23 (Johnstone & Reimer Lawyers).

73 Submission 22 (YourLawyer).

- 7.51 Complementary to this notion of ‘acknowledgment’ was the concept that judicial models provide a ‘voice’ to victims.⁷⁴ The RMIT Centre for Innovative Justice submitted that VOCAT provides a forum for ‘participation and voice’ and an opportunity for victims to recount their experiences in a meaningful setting.⁷⁵
- 7.52 The Commission was told by some victim representatives of the Victims of Crime Consultative Committee that having judicial decision makers for state-funded financial assistance applications was important as ‘it is the only time during the criminal justice process that the process is about the victim’.⁷⁶

Maximising therapeutic effect through judicial acknowledgment

- 7.53 In both written submissions and in consultations, stakeholders spoke of the therapeutic effect of victims being acknowledged at a hearing by a judicial officer,⁷⁷ particularly where a criminal matter has not progressed.⁷⁸
- 7.54 The Commission was told that it can be very powerful for victims to have a magistrate acknowledge them as a victim.⁷⁹ Indeed, some stakeholders said that for some victims, judicial acknowledgment was often worth more than any fiscal amount.⁸⁰ Some referred to this as a victim’s opportunity to have ‘their day in court’.⁸¹
- 7.55 Stakeholders also submitted that:

Hearings in front of a [compassionate] Magistrate can be of enormous benefit.⁸²

[a]n empathetic Magistrate has the opportunity to provide [victims] with an acknowledgement of the injury they have sustained. Magistrates have been known to say, “I have no doubt that this happened to you and the State will provide you with the following assistance to help you recover.”⁸³

If [victims’] claims were managed administratively and not by a judicial officer, they would miss out on the validation they receive from a Magistrate which can be essential to their recovery.⁸⁴

Quite often the recognition in the form of an official award from the Tribunal carries significant benefits in the form of validation and closure. This is particularly our experience in the context of sexual abuse matters or where the victim has felt disempowered by the criminal process.⁸⁵

- 7.56 The joint submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also noted the importance of victims having the opportunity to be heard:

The [current VOCAT approach] embodies one of the most important components of a therapeutic approach—the option for victims to have a hearing before a Tribunal Member ... for some victims, their recovery journey includes having their ‘day in Court’, to have their experience formally acknowledged and to have their story believed.⁸⁶

74 Submission 47 (Centre for Innovative Justice); Consultation 14 (Chief Magistrate’s Family Violence Taskforce).

75 Submission 47 (Centre for Innovative Justice).

76 Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

77 Submissions 13 (Adviceline Injury Lawyers), 22 (YourLawyer), 23 (Johnstone & Reimer Lawyers), 42 (Joint Submission Springvale Monash Legal Service et al), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 12 (Regional Consultation—Mildura Victim Support Agencies), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

78 Submissions 22 (YourLawyer), 23 (Johnstone & Reimer Lawyers); Consultations 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies).

79 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

80 Submission 51 (Law Institute of Victoria); Consultation 3 (Legal Professionals—Community Legal Centres).

81 Submission 42 (Joint Submission Springvale Monash Legal Service et al); Consultation 13 (Regional Consultation—Mildura Legal Professionals).

82 Submission 13 (Adviceline Injury Lawyers).

83 Submission 30 (CASA Forum).

84 Submission 14 (Inner Melbourne Community Legal Centre).

85 Submission 23 (Johnstone & Reimer Lawyers).

86 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria, and Children’s Court of Victoria).

- 7.57 A number of stakeholders considered Victoria’s court-based scheme to be unique, and the opportunity for hearings to be its strength compared to other schemes:
- the therapeutic value of the VOCAT hearing itself cannot be over-stated. So many of our clients report that the hearing itself is the most beneficial part of the process ... The human acknowledgement and recognition that comes with a hearing can be a powerful and life-changing experience for many survivors.⁸⁷
- 7.58 A number of stakeholders considered that hearings would not be available under an administrative model and for this reason, supported the retention of the current judicial system.⁸⁸

Complexity requires judicial decision making

- 7.59 Johnstone & Reimer Lawyers submitted that the complexity of the scheme necessitates judicial decision making supported by legal representation for applicants.⁸⁹ The Commission was also told by some academics that administrative schemes may ‘trade off’ accuracy for timeliness and cost-effectiveness.⁹⁰
- 7.60 A number of legal professionals and members of the Chief Magistrate’s Family Violence Taskforce told the Commission that the model of assistance is intrinsically linked with the complexity of the VOCAA’s legislative requirements. For example, the Commission was told that if the definition of injury and the need to prove causation were simplified, an administrative scheme might be more appropriate.⁹¹ On the other hand, other stakeholders told the Commission that even ‘simple’ matters have complexities that might not be immediately apparent and would not be suitable for an administrative scheme.⁹²
- 7.61 Other stakeholders told the Commission that judicial oversight was particularly important in matters concerning family violence, where there was an increased risk of misidentification of victims and perpetrators.⁹³ The Commission was told that such matters are complex and require judicial decision making to interrogate issues with a specialised understanding of family violence.⁹⁴

Recognising the individual needs of victims

- 7.62 The Commission was told by a number of stakeholders that an administrative scheme may result in a ‘tick the box’ approach and may fail to consider the individual needs of victims,⁹⁵ particularly in relation to family violence matters, where the Commission was told a more nuanced approach is required.⁹⁶
- 7.63 Stakeholders also told the Commission that under an administrative model there was a risk victims would be just ‘another number’⁹⁷ with decisions being made by ‘faceless bureaucrats’.⁹⁸
- 7.64 The Commission was told that the high level of discretion afforded to magistrates under the existing scheme was conducive to an individualised approach.⁹⁹

87 Submission 42 (Joint Submission Springvale Monash Legal Service et al).
 88 Submissions 22 (YourLawyer), 28 (South Metropolitan Integrated Family Violence Executive), 42 (Joint Submission Springvale Monash Legal Service et al).
 89 Submission 23 (Johnstone & Reimer Lawyers).
 90 Consultation 20 (Academics).
 91 Consultations 2 (Legal Professionals—Private Practice), 14 (Chief Magistrate’s Family Violence Taskforce).
 92 Consultation 2 (Legal Professionals—Private Practice).
 93 Consultation 14 (Chief Magistrate’s Family Violence Taskforce).
 94 Ibid.
 95 Consultations 10 (Regional Consultation—Morwell Victim Support Agencies), 12 (Regional Consultation—Mildura Victim Support Agencies), 14 (Chief Magistrate’s Family Violence Taskforce).
 96 Consultation 14 (Chief Magistrate’s Family Violence Taskforce). However, it should be noted that another participant also warned against simplistic contrasts being made between administrative and judicial models.
 97 Consultation 2 (Legal Professionals—Private Practice).
 98 Consultation 20 (Academics).
 99 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

Right to legal representation

7.65 A number of stakeholders submitted that a victim’s right to legal representation is crucial, and that an administrative model may erode this right.¹⁰⁰ For example Johnstone & Reimer Lawyers submitted:

We are concerned that the introduction of an administrative or quasi-administrative model would jeopardise the ability of a victim to access services and benefits as it would deny victims the right to be guided by legal advice.¹⁰¹

7.66 Some stakeholders submitted that legal practitioners were better equipped than case managers to identify evidentiary or eligibility issues¹⁰² and advocate to ensure victims’ full entitlements are obtained.¹⁰³ Submissions also noted the vulnerability of some victim cohorts and the importance of victims having legal representation due to the VOCAA’s complexity.¹⁰⁴ Dr Kate Seear et al submitted that victims’ rights might be jeopardised without adequate legal advice and representation.¹⁰⁵

7.67 The Commission was also told that an administrative scheme, which removed the need for lawyers, might shift the onus onto victims to navigate the process without support.¹⁰⁶

7.68 It was submitted that if an administrative scheme were to be adopted, the same body may be responsible both for assisting victims with their claim, and for making the financial assistance decision.¹⁰⁷ The joint submission by Springvale Monash Legal Centre et al stated:

We have serious concerns regarding any scheme in which the equivalent of “representation” for victims is provided by the same body responsible for deciding the financial assistance to be provided.¹⁰⁸

7.69 The Commission notes that while neither a judicial or administrative model necessarily includes or excludes legal representation, in some Australian schemes—notably, the administrative scheme in New South Wales—legal costs are not reimbursed.¹⁰⁹ In contrast, the administrative schemes in both the Australian Capital Territory and Queensland reimburse legal costs up to a fixed cap.¹¹⁰

Support for a new model

7.70 As noted above, almost half the written submissions expressing a view on the model of state-funded financial assistance expressed support for a new model, such as an administrative or quasi-administrative model.¹¹¹ The Commission was told that for these stakeholders, a new model would deliver assistance more effectively and better meet victims’ needs. Reasons expressed included that an administrative or quasi-administrative model would:

- reduce the potential for re-traumatisation
- provide a better way for victims to be acknowledged

100 Submissions 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 22 (YourLawyer), 30 (CASA Forum), 38 (Ryan Carlisle Thomas Lawyers), 42 (Joint Submission Springvale Monash Legal Service et al), 46 (Victoria Legal Aid); Consultations 7 (Family Violence and Advocacy Organisations), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

101 Submission 23 (Johnstone & Reimer Lawyers).

102 Submission 14 (Inner Melbourne Community Legal).

103 Submissions 22 (YourLawyer), 19 (Schembri & Co Lawyers).

104 Submission 30 (CASA Forum).

105 Submission 7 (Dr Kate Seear et al).

106 Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

107 Submissions 22 (YourLawyer), 42 (Joint Submission Springvale Monash Legal Service et al).

108 Submission 42 (Joint Submission Springvale Monash Legal Service et al).

109 The New South Wales scheme is currently under legislative review. A number of submissions to the review have raised concerns about the removal of legal costs under the scheme. See, eg, Community Legal Centres NSW, Submission to New South Wales Department of Justice, *Review of the Victims Rights and Support Act*, 29 July 2016, 23.

110 For example, in the Australian Capital Territory, the scheme still reimburses lawyers up to \$1123 for an application and \$2246 for an appeal or review process: *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) r 12. In Queensland, victims may be granted assistance of up to \$500 for legal costs: *Victims of Crime Assistance Act 2009* (Qld) s 38(2).

111 ‘Quasi-administrative’ was referred to in the supplementary terms of reference (although not defined) and referred to in a number of stakeholder submissions but the term ‘quasi-administrative’ was used by different stakeholders to refer to various ‘hybrid’ administrative/judicial schemes, such as administrative decision making coupled with judicial hearings. In that regard, the term ‘quasi-judicial’ meant different things to different stakeholders.

- reduce the need for legal representation
- better integrate victim support, financial assistance and case management
- increase transparency and consistency of decision making
- reduce the burden on the criminal justice system
- provide for more timely decision making.

7.71 These reasons are outlined further below.

Reducing re-traumatisation

7.72 In contrast with submissions and consultations noted earlier, some stakeholders said that the existing judicial model is not therapeutic,¹¹² victim-centred¹¹³ or trauma-informed.¹¹⁴

7.73 Merri Health Victims Assistance Program submitted that although VOCAT hearings can be therapeutic and beneficial for some victims, the VOCAT hearing process can be distressing for other victims:

The hearing process in itself is usually a traumatic, intimidating or distressing event for a victim. A less formal, non-judicial process would be a more effective way.¹¹⁵

7.74 Some stakeholders said that the existing scheme requires victims to continually retell their story in a non-therapeutic environment¹¹⁶ while others told the Commission that having a claim rejected by a judicial officer at a hearing can be very traumatic and damaging,¹¹⁷ as a victims' experience is invalidated.¹¹⁸ This view was also echoed in consultations where the Commission was told that the VOCAT process can be disempowering when not done well.¹¹⁹

7.75 The ACT Victims of Crime Commissioner told the Commission that while there might be some benefit in judicial acknowledgment for victims, this is based on an assumption that the court process can be conducted in a beneficial way. The Commission was told that the court process is inherently rigid and can result in unintended consequences for many victims.¹²⁰

7.76 From the perspective of diverse and intersectional communities, the Commission was told that telling 'their story'—which can be very personal and intimate—can be difficult in a judicial setting, particularly where a victim has previously had a negative experience of the justice system.¹²¹

7.77 The Commission was also told that the existing scheme can be traumatic for victims because of its proximity to, and similarities with, the criminal justice process. For example, some stakeholders said that VOCAT is an adversarial process¹²² and therefore makes some victims 'feel like a criminal',¹²³ 'judged' and that they have to 'justify their emotions'.¹²⁴ In addition, the Commission was told that the VOCAT process, being a court-like process, can be a 'burden' for some victims, particularly where victims are managing multiple court processes in different jurisdictions.¹²⁵ The Commission was also told that some victim

112 Submissions 8 (Victim Survivors' Advisory Council), 31 (Victorian Council of Social Service); Consultation 23 (Community Safety Trustee, Victoria).

113 Submission 8 (Victim Survivors' Advisory Council).

114 Submissions 8 (Victim Survivors' Advisory Council), 20 (Women's Legal Service Victoria and Domestic Violence Victoria); Consultation 20 (Academics).

115 Submission 15 (Merri Health Victims Assistance Program).

116 Submissions 15 (Merri Health Victims Assistance Program), 26 (Hume Riverina Community Legal Service); Consultation 23 (Community Safety Trustee, Victoria).

117 Consultation 9 (Domestic Violence Victoria Members).

118 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

119 Consultation 14 (Chief Magistrate's Family Violence Taskforce).

120 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

121 Consultations 17 (Family Violence Diverse Communities and Intersectionality Working Group), 18 (PartnerSPEAK).

122 Consultations 4 (Victim, Witness and Court Support), 27 (Victim Survivors' Advisory Council).

123 Consultation 5 (Victims of Crime Commissioner, Victoria).

124 Submission 31 (Victorian Council of Social Service).

125 For example, criminal matters, civil matters and family law matters: Consultation 10 (Domestic Violence Victoria Members).

cohorts simply do not pursue an application because it would require them to go through yet another court process.¹²⁶

- 7.78 The Commission was also told of concerns directly related to the conduct of magistrates sitting as VOCAT tribunal members. The Victims of Crime Commissioner told the Commission that their office had received complaints about the conduct of magistrates and their treatment of victims.¹²⁷ The Victims of Crime Commissioner told the Commission that while there can be positive experiences, the potential benefits of a judicial model are outweighed by the negative aspects.¹²⁸
- 7.79 The Commission was also told that some stakeholders could not reconcile what they perceived to be an incompatibility between the role of a magistrate sitting in the Magistrates' Court of Victoria, and their role as a Tribunal member. For example, the Victim Survivors' Advisory Council told the Commission that magistrates are inappropriate financial assistance decision makers because financial assistance decisions require a 'different mindset' and fulfilling dual roles is like asking magistrates to 'wear two different conflicting hats'.¹²⁹ Other stakeholders agreed, suggesting the different roles of magistrates can cause difficulty, particularly in rural and regional areas where a small pool of magistrates means the tribunal member presiding over a VOCAT matter is often aware of an applicant's criminal history.¹³⁰
- 7.80 Some academics consulted by the Commission said that judicial officers may not be the best decision makers because the decision maker needs to be trauma-informed, and this is unlikely to be achieved using magistrates.¹³¹ The Victim Survivors' Advisory Council also told the Commission that financial assistance would be better provided within a restorative justice framework 'without a judicial underpinning'.¹³²
- 7.81 A number of stakeholders said that the adoption of a new administrative or quasi-administrative model would reduce the potential for re-traumatisation,¹³³ limiting victims' exposure to a formal court-like setting and would thereby reduce the likelihood of trauma.¹³⁴

Providing a better way for victim acknowledgment

- 7.82 The Commission was told that there may be better ways for the justice system to acknowledge victims than through hearings for financial assistance. For example, the ACT Victims of Crime Commissioner told the Commission that victims 'don't have to be recognised in a court of law to be recognised'.¹³⁵ Similarly, a participant in the consultation meeting with the Chief Magistrate's Family Violence Taskforce told the Commission that while judicial recognition can be powerful, a transformative justice experience might still be possible without a judicial decision maker.¹³⁶

126 Consultation 18 (PartnerSPEAK). It should be noted, however, that the individuals PartnerSPEAK advocates for (partners of perpetrators of online sexual abuse) would not currently fall within the definition of 'victim' under the VOCAA.

127 Consultation 5 (Victims of Crime Commissioner, Victoria).

128 Ibid.

129 Consultation 27 (Victim Survivors' Advisory Council).

130 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland). Chapter 15 discusses the circumstances in which VOCAT is required to consider an applicant's criminal behaviour under section 45 of the VOCAA.

131 Consultation 20 (Academics).

132 Submission 8 (Victim Survivors' Advisory Council).

133 Submissions 2 (The Victorian Civil and Administrative Tribunal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

134 Submissions 2 (The Victorian Civil and Administrative Tribunal), 15 (Merri Health Victims Assistance Program).

135 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

136 Consultation 14 (Chief Magistrate's Family Violence Taskforce).

- 7.83 Stakeholders said that acknowledgment could come from senior government officials,¹³⁷ an administrator, panel member or commissioner,¹³⁸ provided the acknowledgment comes from someone with standing.¹³⁹ Victoria Legal Aid (Gippsland), for example, told the Commission that for many victims, there would be little difference between a magistrate and another senior figure, such as a commissioner, as they are both authoritative figures.¹⁴⁰ Similarly, other stakeholders told the Commission that it did not matter who provided acknowledgment to victims, so long as it occurred in a meaningful¹⁴¹ and respectful way.¹⁴²
- 7.84 The Victims of Crime Commissioner submitted that victim ‘conferences’ could provide a forum for victims to be acknowledged by a senior government official and provide victims with an opportunity to discuss their experience.¹⁴³ Other stakeholders agreed, suggesting a forum for private, informal hearings on request of a victim.¹⁴⁴
- 7.85 Some representatives of the Victim Survivors’ Advisory Council told the Commission that while ‘symbolic’ hearings would not be part of the criminal process, such a process could still address the imbalance of the criminal justice system.¹⁴⁵
- 7.86 Other stakeholders considered that recognition is not necessarily dependent on hearings. For example, some stakeholders told the Commission of cases where victims had received comprehensive statements of reasons through the New South Wales financial assistance scheme and had felt acknowledged and validated.¹⁴⁶ The NSW Commissioner of Victims Rights also told the Commission that many victims feel validated when receiving the written statement of reasons.¹⁴⁷

Reducing the need for legal representation

- 7.87 Some stakeholders told the Commission during consultations, and in submissions to the Commission, that the existing scheme’s reliance on lawyers is problematic¹⁴⁸ because:
- it results in some lawyers making significant amounts of money—sometimes more than the victim¹⁴⁹
 - community legal centres have limited resources, and there is limited access to private lawyers with VOCAT experience, especially in rural and regional areas¹⁵⁰
 - it can be difficult to access appropriately skilled lawyers, particularly as some lawyers will not take on difficult VOCAT cases, or other lawyers will not take on VOCAT work because of the uncertainty about receiving VOCAT reimbursement¹⁵¹
 - lawyers did not seem to approach VOCAT work in a trauma-informed way.¹⁵²
- 7.88 A number of stakeholders suggested an administrative scheme would help reduce reliance on legal representation.¹⁵³

137 Consultations 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 14 (Chief Magistrate’s Family Violence Taskforce), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW); Submission 49 (Victims of Crime Commissioner, Victoria).

138 Submission 31 (Victorian Council of Social Service).

139 Consultations 12 (Regional Consultation—Mildura Victim Support Agencies), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

140 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

141 Consultation 4 (Victim, Witness and Court Support).

142 Consultation 7 (Family Violence and Advocacy Organisations).

143 Submission 49 (Victims of Crime Commissioner, Victoria).

144 Submission 20 (Women’s Legal Service Victoria and Domestic Violence Victoria).

145 Consultation 27 (Victim Survivors’ Advisory Council).

146 Consultations 3 (Legal Professionals—Community Legal Centres), 10 (Regional Consultation—Morwell Victim Support Agencies).

147 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

148 Submission 31 (Victorian Council of Social Service); Consultations 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 27 (Victim Survivors’ Advisory Council).

149 Consultation 4 (Victim, Witness and Court Support).

150 Submission 31 (Victorian Council of Social Service).

151 Consultation 4 (Victim, Witness and Court Support).

152 Ibid.

153 Submissions 2 (The Victorian Civil and Administrative Tribunal), 5 (Anglicare Victoria Victims Assistance Program), 18 (cohealth), 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria); Consultation 7 (Family Violence and Advocacy Organisations).

Integrating victim support and financial assistance, including case management

- 7.89 Some stakeholders submitted that one of the strengths of administrative schemes is the ability for victims to receive support and case management throughout their application process.¹⁵⁴ This is because in some administrative schemes, like the Australian Capital Territory and Queensland, the scheme case-manages victims' applications throughout the assessment process.¹⁵⁵
- 7.90 The Commission was also told that administrative schemes can place less demanding evidentiary burdens on applicants,¹⁵⁶ with the Victim Survivors' Advisory Council submitting that administrative schemes provide more 'holistic' support to victims.¹⁵⁷
- 7.91 Some stakeholders suggested that state-funded financial assistance to victims of crime may be better provided as part of the existing victim support system because victim support organisations—like community organisations administering the government-funded Victim Assistance Program (VAP)—are already working directly with victims to manage their recovery.¹⁵⁸ This was suggested by some VAPs and Hume Riverina Community Legal Service.¹⁵⁹
- 7.92 Some stakeholders said that an administrative scheme would better streamline the financial assistance process and provide more timely assistance.¹⁶⁰ Anglicare Victoria Victims Assistance Program submitted that an 'administrative model sitting with[in] an agency such as DOJR would ... streamline the process'.¹⁶¹

Increasing transparency and consistency of decision making

- 7.93 A number of stakeholders said that an administrative scheme would improve transparency and consistency in decision making¹⁶² and would, among other things, overcome some of the inconsistencies in judicial decision making.¹⁶³
- 7.94 Some stakeholders told the Commission that inconsistency in VOCAT decision making is a particular issue in rural and regional areas¹⁶⁴ as a result of changing magistrates through the use of the circuit court,¹⁶⁵ and because permanent magistrates and registries can develop their own differing approaches and attitudes.¹⁶⁶

Reducing the burden on the criminal justice system

- 7.95 The Commission was told that using judicial decision makers imposes a further burden on an already stretched criminal justice system.¹⁶⁷ One participant in the Chief Magistrate's Family Violence Taskforce consultation told the Commission that using judicial decision makers increases demand on the courts.¹⁶⁸ The Victims of Crime Commissioner submitted that the VOCAT scheme impinges on an already stretched Magistrates' Court.¹⁶⁹

154 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria).

155 Consultations 1 (Victim Assist Queensland), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

156 Consultation 20 (Academics).

157 Submission 8 (Victim Survivors' Advisory Council). Other stakeholders agreed that holistic support should be provided from the time the crime occurs: Submission 27 (Name withheld); Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

158 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 49 (Victims of Crime Commissioner, Victoria); Consultation 4 (Victim, Witness and Court Support).

159 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 26 (Hume Riverina Community Legal Service).

160 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 26 (Hume Riverina Community Legal Service), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria); Consultations 5 (Victims of Crime Commissioner, Victoria), 7 (Family Violence and Advocacy Organisations), 15 (Regional Consultation—Ballarat Victim Support Agencies), 20 (Academics).

161 Submission 5 (Anglicare Victoria Victims Assistance Program).

162 Submissions 2 (The Victorian Civil and Administrative Tribunal), 5 (Anglicare Victoria Victims Assistance Program), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria); Consultations 15 (Regional Consultation—Ballarat Victim Support Agencies).

163 Submissions 27 (Name withheld), 38 (Ryan Carlisle Thomas Lawyers).

164 Consultations 4 (Victim, Witness and Court Support), 12 (Regional Consultation—Mildura Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).

165 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

166 Consultations 4 (Victim, Witness and Court Support), 16 (Regional Consultation—Ballarat Legal Professionals).

167 Consultation 4 (Victim, Witness and Court Support).

168 Consultation 14 (Chief Magistrate's Family Violence Taskforce).

169 Submission 49 (Victims of Crime Commissioner, Victoria).

- 7.96 The Commission was told that it may be more efficient to take VOCAT out of the Magistrates' Court,¹⁷⁰ with a number of stakeholders submitting that an administrative scheme would free up judicial resources.¹⁷¹ This view was emphasised particularly by stakeholders in rural and regional areas who told the Commission that the workload of rural magistrates means very little time is able to be given to VOCAT matters.¹⁷²

More timely decision making and assistance

- 7.97 A number of stakeholders said that using administrative decision making processes would improve the timeliness of state-funded financial assistance for victims of crime.¹⁷³
- 7.98 In consultations with representatives of the state-funded financial assistance schemes in Queensland, the Australian Capital Territory and New South Wales, the Commission was told that changing to an administrative model had greatly increased efficiency and improved timeliness in their respective jurisdictions.¹⁷⁴

Stakeholder views on essential scheme components

- 7.99 Although there is a divergence of stakeholder views on the preferred model of assistance for reasons outlined above, the Commission notes that there is nevertheless common agreement among many stakeholders on the essential components of any state-funded financial assistance scheme, regardless of whether it is a judicial or administrative model.
- 7.100 In particular, the Commission notes that stakeholders generally agreed that any model of state-funded financial assistance should:
- be trauma-informed and victim-centred¹⁷⁵
 - have specialised and dedicated decision makers¹⁷⁶ or specialised streams, like family violence or sexual assault¹⁷⁷
 - provide victims with the opportunity to be heard¹⁷⁸
 - ensure victims have the right to be legally represented¹⁷⁹
 - provide accessible, flexible and timely assistance.¹⁸⁰

170 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

171 Submissions 2 (The Victorian Civil and Administrative Tribunal), 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria); Consultation 7 (Family Violence and Advocacy Organisations).

172 Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals).

173 Submissions 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 31 (Victorian Council of Social Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria); Consultations 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 15 (Regional Consultation—Ballarat Victim Support Agencies), 20 (Academics).

174 Consultations 1 (Victim Assist Queensland), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW). Improvements in timeliness in New South Wales were also noted in Consultation 5 (Victims of Crime Commissioner, Victoria) and Submission 49 (Victims of Crime Commissioner, Victoria).

175 Submissions 8 (Victim Survivors' Advisory Council), 9 (Alannah & Madeline Foundation), 10 (Eastern Metropolitan Regional Family Violence Partnership), 17 (Centre for Excellence in Child and Family Welfare), 22 (YourLawyer), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 32 (Australian Psychological Society), 37 (safe steps Family Violence Response Centre), 42 (Joint Submission Springvale Monash Legal Service et al), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria).

176 'Dedicated' relates to the decision maker being appointed specifically to do such work and provided sufficient resources to undertake the work. This is in contrast to the existing model where all magistrates are required, as part of their judicial duties, to undertake VOCAT work in addition to their usual Magistrates' Court of Victoria matters.

177 Submissions 14 (Inner Melbourne Community Legal), 17 (Centre for Excellence in Child and Family Welfare), 22 (YourLawyer), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 31 (Victorian Council of Social Service), 33 (Eastern Community Legal Centre), 37 (safe steps Family Violence Response Centre), 42 (Joint Submission Springvale Monash Legal Service et al), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

178 Not all stakeholders thought this opportunity to be heard necessitated a judicial or court 'hearing'. See, eg, Submissions 13 (Adviceline Injury Lawyers), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria). See comments relating to the importance of hearings in Submissions 5 (Anglicare Victoria Victims Assistance Program), 23 (Johnstone & Reimer Lawyers), 28 (South Metropolitan Integrated Family Violence Executive), 42 (Joint Submission Springvale Monash Legal Service et al), 43 (knowmore), 46 (Victoria Legal Aid), 51 (Law Institute of Victoria).

179 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 18 (cohealth), 19 (Schembri & Co Lawyers), 22 (YourLawyer), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 42 (Joint Submission Springvale Monash Legal Service et al), 43 (knowmore), 51 (Law Institute of Victoria). It should be noted that there was also some support for reducing reliance on lawyers, discussed in more detail in Chapter 10.

180 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 51 (Law Institute of Victoria).

Discussion—does Victoria’s existing scheme meet the reference objectives?

- 7.101 As outlined above, the supplementary terms of reference require the Commission to consider the operation and effectiveness of the VOCAA and VOCAT for all victims of crime, including whether any processes, procedures or requirements under the VOCAA cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model.
- 7.102 Before considering other models, this part of the chapter assesses the extent to which the existing scheme is meeting the objectives identified in the supplementary terms of reference. In undertaking this assessment, the Commission has considered stakeholder views, existing research conducted into VOCAT’s operations and victims’ experiences of VOCAT, as well as the experiences and approaches of other jurisdictions for comparison.
- 7.103 The Commission notes that there have been relatively few empirical studies into VOCAT’s operations or effectiveness over the past 20 years. Research has been limited to small research studies with relatively small sample sizes, or limited to discrete areas of VOCAT’s operations, such as the provision of counselling or the operation of the VOCAT Koori List.¹⁸¹ Furthermore, very few of VOCAT’s decisions are publicly available. Accordingly, the Commission mainly relies on review decisions by the Victorian Civil and Administrative Tribunal (VCAT) and the Supreme Court of Victoria.¹⁸²
- 7.104 This lack of empirical evidence in relation to the operation of victims’ compensation schemes is not unique to Victoria. Mulder observes that the granting of public funds to victims of crime has ‘hardly been studied’.¹⁸³ Kunst et al have suggested that research into victims’ satisfaction with state compensation is scarce.¹⁸⁴ In Australia, Genevieve M Grant has observed that while the statutory objectives of various state-funded compensation schemes typically include promoting rehabilitation, there is ‘remarkably little legal scholarship exploring claimant experiences of scheme performance against these aims’.¹⁸⁵ Similarly, Robyn L Holder and Kathleen Daly note that research on victims’ compensation schemes is ‘scant’.¹⁸⁶
- 7.105 While there is little empirical research specifically related to VOCAT’s operations, there is a range of anecdotal evidence illustrating victims’ experiences of VOCAT based on the views expressed to the Commission during consultations and in written submissions, as well as in relevant Victorian case law and research studies.¹⁸⁷ In addition to stakeholder views, the Commission has used a range of quantitative and qualitative datasets to assist in forming its conclusions. These include data provided by VOCAT in its annual

181 See, eg, Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, 2015), in which findings in relation to VOCAT were limited; Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) in which findings primarily focused on the provision of VOCAT-funded counselling; Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011), which was a relatively small research study; Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011), in which discussion of VOCAT was a relatively small component and only related to the experiences of victims of sexual assault; Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot*, Review and Recommendations (2010) which only related to the operation of the pilot Koori List.

182 This lack of publicly available data was also discussed in Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 38, 163–4.

183 J D W E Mulder, *Compensation: The Victim’s Perspective* (Wolf Legal Publishers, 2013) 36.

184 Maarten Kunst et al, ‘Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study’ (2015) 32(19) *Journal of Interpersonal Violence* 1, 3.

185 Genevieve M Grant, ‘Claiming Justice in Injury Law’ (2015) 41(3) *Monash University Law Review* 618, 619.

186 Robyn L Holder and Kathleen Daly, ‘Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors’ (2017) 24(1) *International Review of Victimology* 25, 28.

187 As outlined in Chapter 4, these include Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women’s Legal Service Victoria, 2015); Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011); Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011); Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Best Practice Manual* (Whittlesea Community Connections, 2011); Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011); Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot*, Review and Recommendations (2010).

reports, case law decisions, information provided by those administering schemes in other Australian jurisdictions, and academic and government research on victim experiences of state-funded financial assistance schemes. In using a variety of sources to gather such information, key themes emerge about VOCAT's, and other schemes', operations.

- 7.106 Key themes arising in relation to the operation of VOCAT and other schemes' are considered below against each of the identified reference objectives:
- fair and equitable
 - timely
 - consistent and predictable
 - maximise therapeutic effect
 - minimise trauma
 - easy to understand
 - does not require legal support in all circumstances
 - efficient and sustainable for the state.
- 7.107 The reference objectives provide the Commission with its guiding framework for assessing:
- the operation and effectiveness of the existing scheme
 - whether there are other models of state-funded financial assistance that would more effectively deliver assistance, as required by the supplementary terms of reference.

Maximise therapeutic effect and minimise trauma

- 7.108 As discussed in detail above, consultation and submissions findings suggest that the opportunity to be heard by a judicial officer can have a therapeutic effect for some victims and may be the victim's only opportunity to be acknowledged and heard.¹⁸⁸ As VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted, 'for some victims, their recovery journey includes having their "day in Court", to have their experience formally acknowledged and to have their story believed'.¹⁸⁹
- 7.109 However, the VOCAT process can also be traumatic for some victims.¹⁹⁰ Some stakeholders said the existing scheme is not always therapeutic,¹⁹¹ trauma-informed¹⁹² or victim-centred.¹⁹³
- 7.110 In particular, the Commission was told that the very nature of a court-based model requires victims to defend or 'prove' themselves.¹⁹⁴
- 7.111 Although the Commission was told by some stakeholders that having a judicial officer decide an application for financial assistance can make the process 'extra validating' for victims whose claims are successful, the Commission was told that having judicial decision makers can be 'extra invalidating' for victims whose claims are rejected.¹⁹⁵ This view was also held by some academics consulted by the Commission, who said that when a judicial process does not work, it can be counter-therapeutic for victims.¹⁹⁶

188 Submissions 14 (Inner Melbourne Community Legal), 23 (Johnstone and Reimer Lawyers), 29 Women's Legal Service Victoria and Domestic Violence Victoria), 43 (knowmore).

189 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria, and Children's Court of Victoria).

190 Submissions 14 (Inner Melbourne Community Legal Centre), 15 (Merri Health Victims Assistance Program), 24 (Darebin Community Legal Centre), 31 (Victorian Council of Social Service), 43 (knowmore); Consultations 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 27 (Victim Survivors' Advisory Council).

191 Submissions 8 (Victim Survivors' Advisory Council), 31 (Victorian Council of Social Service); Consultation 23 (Community Safety Trustee, Victoria).

192 Submissions 8 (Victim Survivors' Advisory Council), 20 (Women's Legal Service Victoria and Domestic Violence Victoria); Consultation 20 (Academics).

193 Submission 8 (Victim Survivors' Advisory Council).

194 Consultation 4 (Victim, Witness and Court Support).

195 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

196 Consultation 20 (Academics).

- 7.112 One victim support agency submitted:
- Hearings can be powerful for the victims in having there [sic] opportunity to tell their story and the effect it has had on them. This again relies on the personality of the members holding the hearing. I have experience[d] some good ones and some terrible ones where the victim has walked out feeling worse.¹⁹⁷
- 7.113 The Commission was also told that VOCAT hearings can be adversarial, formal and legalistic.¹⁹⁸ The Victorian Victims of Crime Commissioner told the Commission that while there can be positive experiences of a judicial model, these can be outweighed by the negative aspects.¹⁹⁹
- 7.114 Of particular concern to many stakeholders is section 34(2) of the VOCAA which enables VOCAT to 'give notice of the time and place for the hearing to any other person whom the Tribunal considers to have a legitimate interest' in the matter.²⁰⁰ The effect of this provision is to enable the notification of an alleged perpetrator where VOCAT considers they have a 'legitimate interest' in relation to the matter.²⁰¹ In addition, section 35(1) of the VOCAA also allows 'any other person or body that, in the Tribunal's opinion, has a substantial interest in a matter is entitled to appear and be heard by the Tribunal on the hearing of the matter',²⁰² with the effect that in certain circumstances, an alleged perpetrator will also have a right to appear at a VOCAT hearing.
- 7.115 As noted in Chapters 5 and 6, although perpetrator notification may only occur rarely, the Commission was told that the mere fact that it exists at all can be a deterrent for some victims, who may elect not to pursue a VOCAT application because of the potential of the perpetrator being notified.²⁰³ Some stakeholders suggested that the perpetrator notification provision mirrors the criminal justice system's focus on offender rights over victim rights.²⁰⁴ Others suggested that the provisions 'are completely at odds with the objectives of the Act'.²⁰⁵ In this respect, the Commission was told the perpetrator notification provisions impact the ability for VOCAT to maximise therapeutic effect and minimise trauma. As stated by Inner Melbourne Community Legal:
- It is not just actual notification that causes applicants distress, but the idea that they may be potentially notified. In the case of one of our clients, they experienced loss of sleep, psoriasis, and an increase in anxiety symptoms at the idea of having to face their assailant at a hearing.²⁰⁶
- 7.116 In summary, stakeholder views demonstrate a varied experience of VOCAT's therapeutic effect. The potential for VOCAT to be both therapeutic and counter-therapeutic is also confirmed by research. For example, research by the Victims Support Agency in 2011 suggests victims' experience of VOCAT hearings can be positive,²⁰⁷ but that this is not the case for all victims:

197 Submission 5 (Anglicare Victoria Victims Assistance Program).

198 Consultation 4 (Victim, Witness and Court Support).

199 Consultation 5 (Victims of Crime Commissioner, Victoria).

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

201 A VOCAT practice direction requires VOCAT to first give the applicant an opportunity to be heard on whether perpetrator notification should occur: See *Practice Direction No. 4 of 2008: Notification of Alleged Offenders and Third Parties*.

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

203 Submissions 8 (Victim Survivors' Advisory Council), 10 (Eastern Metropolitan Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 17 (Centre for Excellence in Child and Family Welfare), 20 (Office of the Victorian Information Commissioner), 26 (Hume Riverina Community Legal Service), 28 (South Metropolitan Integrated Family Violence Executive), 31 (Victorian Council of Social Service), 33 (Eastern Community Legal Centre), 39 (Victorian Aboriginal Legal Service), 46 (Victoria Legal Aid), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 2 (Legal Professionals – Private Practice), 3 (Legal Professionals – Community Legal Centres), 4 (Victim, Witness and Court Support), 9 (Domestic Violence Victoria Members), 12 (Regional Consultation – Mildura Victim Support Agencies), 13 (Regional Consultation – Mildura Legal Professionals), 14 (Chief Magistrates' Family Violence Taskforce), 16 (Regional Consultation – Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).

204 Consultation 15 (Regional Consultation – Ballarat Victim Support Agencies)

205 Submission 14 (Inner Melbourne Community Legal).

206 Submission 14 (Inner Melbourne Community Legal).

207 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 36.

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.²⁰⁸

- 7.117 The potentially therapeutic effect of VOCAT may be more complex for some victims than others. For example, VOCAT’s review of the pilot Koori List highlighted that a victim’s experience of the VOCAT process can be impacted by their prior experiences of the justice process:

Koori victims of crime generally have a lot of mistrust about the judicial system, distrust that may extend from their experiences with the police, prisons or as prior offenders ... this distrust extends to legal practitioners as well as to the police and the Tribunal. Participants [to the review] agreed that applicants’ prior experiences of the justice system could affect their perception of the hearing process.²⁰⁹

- 7.118 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also submitted that other factors, beyond the hearing process, may be determinants of a victim’s therapeutic experience:

Significant determinants of a therapeutic experience include a victim’s eligibility and the quantum of awards available to be paid. The consistency of decisions and predictability of outcomes are also key.²¹⁰

- 7.119 Academic research has identified a range of factors as impacting on victim satisfaction. While approval of requests for compensation are positively associated with victim satisfaction, studies suggest the amount of compensation does not necessarily contribute to victims’ satisfaction levels.²¹¹ In particular, Kunst et al found that satisfaction with compensation processes was negatively predicted by the duration of the application process.²¹²

- 7.120 Hayley Catherine Clark observed that some applicants can receive greater gratification from affirmation than from the monetary award itself.²¹³ Similarly, Holder and Daly observed that procedural matters such as the timeliness of an award or interactions with fund staff are more often related to victim satisfaction than the money awarded.²¹⁴

- 7.121 Together, these research findings suggest factors other than monetary amounts—including timeliness and affirmation—may be of primary importance to victims.²¹⁵ This has led Kunst et al to observe:

one might argue that crime victims will be satisfied with the services provided by compensation schemes if they—in their opinion—are respectfully treated and adequately informed ...²¹⁶

208 Ibid 59–60.

209 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 27.

210 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria, and Children’s Court of Victoria).

211 Maarten Kunst et al, ‘Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study’ (2015) 32(19) *Journal of Interpersonal Violence* 1, 10.

212 Ibid 11. This study also highlighted the importance of the treatment by fund workers, information provision and perceptions of fairness.

213 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 117.

214 Robyn L Holder and Kathleen Daly, ‘Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors’ (2017) 24(1) *International Review of Victimology* 25, 30.

215 Ibid; Maarten Kunst et al, ‘Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study’ (2015) 32(19) *Journal of Interpersonal Violence* 1, 10–11; Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 117.

216 Maarten Kunst et al, ‘Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study’ (2015) 32(19) *Journal of Interpersonal Violence* 1, 4.

- 7.122 The Commission notes that although VOCAT is less formal than a court hearing, it is adversarial in nature, requiring the use of legal processes and judicial officers. In addition, and because of the use of judicial officers, court infrastructure and staff, VOCAT is a formal and potentially intimidating process. As Chan et al have observed the ‘adversarial nature of the compensation process for many victim schemes can detract from the well-being of the victim and from the rehabilitative objectives of the scheme’.²¹⁷
- 7.123 Stakeholder views also confirm the potential for the VOCAA’s alleged perpetrator notification and appearance provisions to cause victims’ distress and to reduce the therapeutic aspects of the financial assistance process.
- 7.124 As noted in the then-Department of Justice discussion paper on state-funded financial assistance: ‘some victims find a tribunal hearing distressing or traumatising, particularly in the rare event that the offender is notified and attends’.²¹⁸
- 7.125 This observation is also reflected in case studies provided to the Commission in stakeholder submissions which confirm the counter-therapeutic nature of many VOCAT processes.²¹⁹ Examples include VOCAT asking an 11-year-old to give evidence at a hearing about an alleged sexual assault;²²⁰ VOCAT advising lawyers they would have to take into account the intoxication of their client who was allegedly raped when she was 13 years old under section 54 of the VOCAA;²²¹ a child victim being requested by VOCAT to attend a hearing for the purposes of providing proof of the scarring caused by the act of violence;²²² and instances of victims withdrawing their VOCAT application in family violence matters because VOCAT intended to notify the alleged perpetrator about the application.²²³
- 7.126 The Commission was told of one victim who described VOCAT as so damaging that she considered abandoning her application because she didn’t want to participate in her ‘own abuse’.²²⁴ In particular, the Commission was told ‘VOCAT [has] traumatised me on a completely different level’.²²⁵
- 7.127 As Inner Melbourne Community Legal Centre submitted that applications to VOCAT ‘often [come] at an enormous personal cost, physically and emotionally’.²²⁶
- 7.128 While a number of stakeholders have referred to the powerful nature of judicial acknowledgment as a source of therapeutic effect,²²⁷ as noted above, the current processes can often also cause victims trauma and distress for victims.²²⁸
- 7.129 In the Commission’s view although there is potential for VOCAT to maximise therapeutic effect and minimise trauma, given the divergence of views expressed by stakeholders, this may not be the case for all victims of crime.

Efficient and sustainable for the state

- 7.130 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that the existing scheme is efficient and sustainable as it is heavily subsidised by the Magistrates’ Court, which enables VOCAT to use Magistrates’ Court staff, judicial officers and court infrastructure thereby limiting its overall running costs.²²⁹

217 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) 19.

218 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 42.

219 See, eg, Submissions 14 (Inner Melbourne Community Legal), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

220 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

221 Ibid.

222 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

223 Submission 14 (Inner Melbourne Community Legal).

224 Ibid.

225 Ibid.

226 Ibid.

227 Ibid; Submissions 23 (Johnstone & Reimer Lawyers), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 43 (knowmore).

228 Submissions 14 (Inner Melbourne Community Legal), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

229 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria, and Children’s Court of Victoria).

- 7.131 Stakeholders have also said that using magistrates and court staff for VOCAT purposes burdens an already stretched criminal justice system.²³⁰ A number of stakeholders highlighted the benefits of an administrative scheme as including the freeing up of judicial resources.²³¹
- 7.132 In December 2017 and April 2018, media reports suggested that magistrates were struggling to cope with rising caseloads, with the Chief Magistrate confirming that ‘his colleagues were hearing cases at night and on weekends as the system struggled with the soaring numbers of alleged offenders being held on remand’.²³² It was also reported that ‘some magistrates are overwhelmed by their workloads’.²³³
- 7.133 A number of stakeholders consulted referred to magistrates having heavy case loads and VOCAT being an additional burden on top of their existing Magistrates’ Court work.²³⁴ VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also noted in their submission that the VOCAT workload is one of many daily competing priorities across the Magistrates’ Court and that court appearances must necessarily take precedence over the administration of VOCAT matters.²³⁵
- 7.134 Over the last decade, the jurisdiction of the Magistrates’ Court has been expanded through multiple legislative changes and as a result, the seriousness and the complexity of the matters dealt with have increased significantly.²³⁶ This has included the types of indictable offences that can be tried summarily, all which have had an impact on workload. Many of these changes occurred well after the establishment of VOCAT in 1996.
- 7.135 The Magistrates’ Court Annual Report has described an increased pressure on the court, particularly in its criminal jurisdiction:
- The increasing caseload, the prisoner transport issues, difficulty with obtaining properly accredited interpreters and the increasingly serious matters that now fall within the jurisdiction of the Court have placed very substantial pressures on the Court’s ability to deal with cases efficiently, fairly and effectively.²³⁷
- 7.136 Participants in an evaluation of Victoria Legal Aid’s work in the summary jurisdiction of the Magistrates’ Court described the entire summary jurisdiction as ‘approaching crisis’ and ‘overloaded, under-resourced and overborne’.²³⁸
- 7.137 Increased pressure in the Magistrates’ Court’s daily work impacts on the ability of magistrates to also undertake VOCAT work because VOCAT does not have dedicated magistrates assigned specifically to undertake VOCAT work—VOCAT matters must be incorporated into a magistrate’s existing workload. As noted by the then-Department of Justice in the 2009 discussion paper *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*:
- As [VOCAT] operates within the organisational structure of the Magistrates’ Court of Victoria, the Tribunal’s caseload and resourcing requirements cannot be considered in isolation of the Magistrates’ Court, which has also experienced an increase in caseload.

230 Consultations 4 (Victim, Witness and Court Support), 14 (Chief Magistrate’s Family Violence Taskforce), 16 (Regional Consultation—Ballarat Legal Professionals); Submission 49 (Victims of Crime Commissioner, Victoria).

231 Submissions 2 (The Victorian Civil and Administrative Tribunal), 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria); Consultation 7 (Family Violence and Advocacy Organisations).

232 Noel Towell and Adam Cooper, ‘Courtroom Drama: Magistrates’ Cry for Help as System Approaches “Crisis Point”’ *The Age* (online), 24 November 2017 <www.theage.com.au/victoria/courtroom-drama-magistrates-cry-for-help-as-system-approaches-crisis-point-20171108-gzhpde.html>.

233 Noel Towell and Adam Cooper ‘Struggling Magistrates Cry for Help’ *The Age* (online), 2 April 2018 <www.theage.com.au/national/victoria/struggling-magistrates-cry-for-help-20180401-p4z7bh.html>.

234 Submissions 2 (The Victorian Civil and Administrative Tribunal), 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria); Consultation 7 (Family Violence and Advocacy Organisations).

235 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria, and Children’s Court of Victoria).

236 See generally Law and Justice Foundation of New South Wales, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid’s Summary Crime Program* (2017) 22.

237 Magistrates’ Court of Victoria, *Annual Report 2015–16*, 13.

238 Law and Justice Foundation of New South Wales, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid’s Summary Crime Program* (2017) xvii.

The growth in both jurisdictions must be considered as part of the review of the sustainability of the current model of state-funded assistance awards.²³⁹

- 7.138 While VOCAT has submitted that the subsidisation by the Magistrates' Court increases efficiencies for VOCAT, given the increased pressure in the Magistrates' Court jurisdiction over time, this may ultimately be to the detriment of the Magistrates' Court's operations more broadly and indeed, to the wellbeing of judicial officers and victims.²⁴⁰
- 7.139 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria also raised concerns in their joint submission about the continued subsidisation of VOCAT by the Magistrates' Court in an increasingly constrained fiscal environment for the court.²⁴¹
- 7.140 Accordingly, the Commission considers that, while there may be some efficiencies gained by using the existing infrastructure of the Magistrates' Court, these are offset by the inefficiencies and longer-term impacts on the sustainability of the Magistrates' Court and for the state.

Timely decision making

- 7.141 Many stakeholders told the Commission that the timeliness of VOCAT is a significant problem²⁴² and often prevents victims from receiving financial assistance when they need it most.²⁴³
- 7.142 Stakeholders told the Commission that delays in financial assistance have a significant impact on victims.²⁴⁴ The Commission heard that waiting for long periods of time to receive assistance can cause victims distress²⁴⁵ and may be re-traumatising.²⁴⁶ In this regard, delay experienced in the existing system can itself be a source of re-traumatisation for victims. The Office of the Victims of Crime Commissioner submitted that it receives a large number of complaints in relation to delays in the VOCAT process.²⁴⁷
- 7.143 In its 2015–16 Annual Report, VOCAT raised concerns about its ability to meet demand, concluding that it faces 'challenges in keeping pace with the increased number of applications'.²⁴⁸
- 7.144 Stakeholders and victims gave various timeframes for the finalisation of applications, ranging from between six months to three years.²⁴⁹ Of particular concern to a number of

239 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 23.

240 In 2018, the Magistrates' Court of Victoria established a wellness and wellbeing committee to help magistrates manage the workloads and stresses of the job. See, eg, Belinda Wilson, 'Courts Under Pressure' (2018) 92(1/2) *Law Institute Journal* 6; Noel Towell, Adam Cooper 'Struggling Magistrates Cry for Help' *The Age* (online), 2 April 2018 <www.theage.com.au/national/victoria/struggling-magistrates-cry-for-help-20180401-p4z7bh.html>.

241 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria, and Children's Court of Victoria).

242 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 23 (Johnstone & Reimer Lawyers), 24 (Darebin Community Legal Centre), 27 (Name withheld), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 6 (Victims' Advocacy Organisations), 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 14 (Chief Magistrate's Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies). Some stakeholders told the Commission that they had not experienced significant delays, eg, Consultation 13 (Regional Consultation—Mildura Legal Professionals).

243 Submissions 38 (Ryan Carlisle Thomas Lawyers), 49 (Victims of Crime Commissioner, Victoria); Consultation 7 (Family Violence and Advocacy Organisations).

244 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 23 (Johnstone & Reimer Lawyers), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 15 (Regional Consultation—Ballarat Victim Support Agencies).

245 Submissions 23 (Johnstone & Reimer Lawyers), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria, and Children's Court of Victoria).

246 Submissions 15 (Merri Health Victims Assistance Program), 23 (Johnstone & Reimer Lawyers), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

247 Submission 49 (Victims of Crime Commissioner, Victoria).

248 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 9.

249 Submissions 14 (Inner Melbourne Community Legal), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 43 (knowmore); Consultations 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members).

- stakeholders were delays relating to interim awards.²⁵⁰
- 7.145 Inner Melbourne Community Legal submitted that on average, it takes 6–12 months for an application to be finalised.²⁵¹ Safe steps Family Violence Response Centre provided an example of an applicant waiting 10 months after her daughter had died before receiving an award for counselling, and gave another example of an applicant waiting 17 months for their award.²⁵²
- 7.146 The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that it has experienced delays of more than three years for an application to be finalised.²⁵³ In a consultation meeting with family violence and other advocacy organisations, the Commission was told the average application takes nine months but some applications can take up to two years to finalise.²⁵⁴
- 7.147 In a consultation meeting with members of Domestic Violence Victoria, some participants told the Commission that applications can take between 14 and 15 months.²⁵⁵ The Victim Survivors' Advisory Council told the Commission that variation applications for counselling sessions can take more than six months.²⁵⁶
- 7.148 In addition, in a consultation meeting with legal professionals, the Commission was told that even after an application is finalised, it can take up to 46 weeks, sometimes even more, for the applicant to actually receive payment for a particular medical expense.²⁵⁷
- 7.149 In contrast, some stakeholders have found interim awards a quick and useful way to deal with the delays encountered in relation to final awards.²⁵⁸ This was confirmed by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria in their submission: 'The ability to make interim awards of assistance ensures that the therapeutic experience for victims is not derailed by delay, and provides for the immediate financial needs of victims.'²⁵⁹
- 7.150 While timeliness was raised as a significant concern by many stakeholders, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria warned:
- available metrics regarding average times taken to finalise an application are not a true measure of VoCAT's responsiveness, as they do not reflect the role interim awards play in providing timely assistance to applications. Similarly, the increasing number of pending cases and overall throughput metrics does not directly correlate with VoCAT's efficiency and responsiveness.²⁶⁰
- 7.151 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that consideration should be given to establishing more meaningful metrics to assess VOCAT's timeliness, including recognition of delays driven by factors outside of the Tribunal's control such as the outcome of criminal investigations, trials or inquests or delay in the provision of necessary documentation.²⁶¹
- 7.152 While the Commission notes the importance of data providing a more comprehensive picture of the factors that affect timeliness, it is also important to recognise that producing meaningful data is part of the effective administration of any scheme. The Commission notes that VOCAT does not report on reasons for delay, including whether matters are delayed for beneficial reasons, or as a result of legal or administrative delays.

250 Submissions 23 (Johnstone & Reimer Lawyers), 24 (Darebin Community Legal Centre), 44 (Aboriginal Family Violence Prevention & YLC-391_Youth Gym Promo- July 18 (Facebook Post)), 49 (Victims of Crime Commissioner, Victoria); Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

251 Submission 14 (Inner Melbourne Community Legal).

252 Submission 37 (safe steps Family Violence Response Centre).

253 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

254 Consultation 7 (Family Violence and Advocacy Organisations).

255 Consultation 9 (Domestic Violence Victoria Members).

256 Consultation 27 (Victim Survivors' Advisory Council).

257 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

258 Consultations 7 (Family Violence and Advocacy Organisations), 8 (Victims' Representatives—Victims of Crime Consultative Committee), 23 (Community Safety Trustee, Victoria).

259 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria, and Children's Court of Victoria).

260 Ibid.

261 Ibid.

- 7.153 Timeliness of VOCAT awards has also been raised in a number of relevant reviews and research reports. In June 2017, the Victorian Community Safety Trustee released an interim report on the implementation of the Victorian Government’s Community Safety Statement. In that report, delays in relation to VOCAT applications were noted:
- Currently, on average, it takes around nine months to finalise an application and some matters span more than two years. If the approach is “victims first”, then the current process warrants review in the interests of quick resolution for victims.²⁶²
- 7.154 A number of further reviews and research found similar delays in relation to VOCAT:
- Research conducted by Women’s Legal Service Victoria in 2017 for its Rebuilding Strength project found that a majority of legal practitioners surveyed had experienced delay during the VOCAT process which they considered resulted in negative impacts on client recovery.²⁶³
 - Victims Support Agency research in 2011 found at least two cases of sexual assault victims waiting for around 12 months for a VOCAT award for further counselling.²⁶⁴
 - Research by Whittlesea Community Legal Service in 2011 suggested that the average amount of time taken to resolve a case was 12 months or more.²⁶⁵
 - VOCAT’s review of the pilot Koori List in 2011 found that ‘because [process] does take such a long time ... the Tribunal process holds people back ... they can’t get on with their recovery while their application is still being processed’.²⁶⁶
 - A Discussion Paper in 2009 by the then-Department of Justice stated: ‘a final decision can take a long time, and waiting times are increasing as the number of VOCAT cases increases’.²⁶⁷
- 7.155 By comparison, in other Australian jurisdictions much quicker turnaround times are achieved under other schemes. In New South Wales, the transition from a court-based scheme to an administrative scheme resulted in assistance being provided in just under three months compared to over two years under the former court-based scheme.²⁶⁸
- 7.156 Similarly, under Queensland’s administrative scheme, the Commission was told that typical turn-arounds on applications have been:²⁶⁹
- three weeks for funeral and interim applications
 - three months for primary victims
 - six months for secondary victims.
- 7.157 Research suggests the more quickly victims can receive support and assistance, the better their chances of recovery.²⁷⁰ Conversely, delays can have counter-therapeutic effects on victims.²⁷¹ Moreover, research suggests the timeliness of financial assistance decisions directly correlates to a victim’s overall satisfaction with the financial assistance process.²⁷²

262 Community Safety Trustee (Vic), *Community Safety Trustee: First Progress Report—June 2017* (2017) 14.

263 Women’s Legal Service Victoria, *Rebuilding Strength—VOCAT Project: Practitioner Survey Preliminary Results* (2017) (unpublished) 5–7.

264 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33.

265 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 71.

266 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot*, Review and Recommendations (2010) 32.

267 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 42.

268 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 to Child Sexual Abuse*, 2014, 5.

269 Consultation 1 (Victim Assist Queensland). Queensland transitioned from a court-based scheme to an administrative scheme in 2009.

270 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 48.

271 Bree Cook, Fiona David and Anna Grant, *Victims’ Needs, Victims’ Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 69.

272 Maarten Kunst et al, ‘Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study’ (2015) 32(19) *Journal of Interpersonal Violence* 1, 10–11.

- 7.158 While VOCAT does not consider case ‘throughput’ as directly correlating with scheme responsiveness,²⁷³ many stakeholders and victims consider the timeliness of VOCAT as highly problematic. This experience is confirmed by the research literature²⁷⁴ and is borne out in the experiences of other Australian jurisdictions which have addressed the issue of timeliness through replacement of court-based financial assistance schemes by introducing new models of state-funded financial assistance with an administrative basis.

Fair and equitable/consistent and predictable procedures and decisions

- 7.159 The extent to which the existing scheme is fair and equitable was linked by stakeholders with the extent to which current practices and decisions are consistent and predictable, and the extent to which the current process is transparent.
- 7.160 Inconsistency and lack of transparency in VOCAT’s decision making was raised as an issue by a significant number of stakeholders.²⁷⁵ Stakeholders told the Commission that applicants who have experienced similar crimes and similar injuries do not necessarily receive similar awards of assistance from VOCAT²⁷⁶ and that different outcomes often depend on the personality or attitude of the magistrate.²⁷⁷ In one consultation, a participant described the existing scheme system as a ‘lottery’,²⁷⁸ with inconsistency a particular issue in rural and regional areas.²⁷⁹
- 7.161 Schembri & Co Lawyers submitted that the VOCAA may provide too much discretion which can lead to inconsistency in practice, procedure and final awards.²⁸⁰ The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that the high level of discretion afforded decision makers can sometimes result in Aboriginal clients being subjected to unnecessary questioning or requests for further evidence.²⁸¹
- 7.162 Some victim support agencies suggested to the Commission that inconsistency in approach can impact on a victim’s experience of the process,²⁸² with one agency suggesting that when victims become aware that other victims in similar circumstances received a different award, it can result in some victims feeling ‘less worthy’.²⁸³
- 7.163 Some stakeholders submitted that inconsistency in decision making was the product of judicial discretion²⁸⁴ as well as the lack of oversight in relation to the judiciary.²⁸⁵ However, Ryan Carlisle Thomas Lawyers submitted inconsistencies in judicial-decision are ‘going to happen and cannot be avoided’.²⁸⁶
- 7.164 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that the use of generalist Magistrates’ Court registry staff has meant that specialist VOCAT expertise is difficult to maintain and build on. The submission also noted that the diffused nature of the existing scheme, which operates across 51 locations, reduces

273 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria).
 274 See, eg, Women’s Legal Service Victoria, *Rebuilding Strength—VOCAT Project: Practitioner Survey Preliminary Results* (2017) (unpublished) 5; Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 71; Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33; Community Safety Trustee (Vic), *Community Safety Trustee: First Progress Report—June 2017* (2017) 14.
 275 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 17 (Centre for Excellence in Child and Family Welfare), 19 (Schembri & Co Lawyers), 27 (Name withheld), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore), 49 (Victims of Crime Commissioner, Victoria); Consultations 2 (Legal Professionals—Private Practice), 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals), 14 (Chief Magistrate’s Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).
 276 Submissions 15 (Merri Health Victims Assistance Program), 43 (knowmore).
 277 Consultations 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).
 278 Consultation 19 (RMIT Centre for Innovative Justice).
 279 Consultations 4 (Victim, Witness and Court Support), 12 (Regional Consultation—Mildura Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).
 280 Submission 19 (Schembri & Co Lawyers).
 281 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
 282 Submissions 30 (CASA Forum), 15 (Merri Health Victims Assistance Program).
 283 Submission 15 (Merri Health Victims Assistance Program).
 284 Submission 38 (Ryan Carlisle Thomas Lawyers).
 285 Submission 27 (Name withheld).
 286 Submission 38 (Ryan Carlisle Thomas Lawyers).

- predictability and transparency in decision making, and that a lack of specialist expertise results in difficulties in maintaining oversight of practice.²⁸⁷
- 7.165 For some stakeholders, this propensity for inconsistency does not outweigh the benefits of judicial discretion²⁸⁸ because such discretion enables a flexible approach that accords with the diversity of victim needs.²⁸⁹ In this regard, some stakeholders cautioned against changing to a predictable ‘tick and flick’²⁹⁰ or ‘tick the box’²⁹¹ administrative model which some stakeholders considered cannot offer an individualised approach to victim recovery.
- 7.166 The Commission was told that inconsistency is compounded by the lack of transparency and accountability for decisions due to lack of data collection and reporting—both for individual decisions and as a scheme. A number of concerns were raised about VOCAT not providing comprehensive statements of reasons,²⁹² clearly summarising its reasons for decisions,²⁹³ or advising victims which magistrate made a decision.²⁹⁴
- 7.167 The Victorian Council of Social Service raised concerns that when hearings are not conducted, little information is publicly available about the reasons for decisions.²⁹⁵ Knowmore also submitted that VOCAT should have to publish de-identified reasons for decisions where a matter has been determined on the papers.²⁹⁶
- 7.168 Concerns about transparency and consistency in the VOCAT process are not new. In a submission to the then-Victorian Department of Justice’s 2009 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.²⁹⁷ The then-Department of Justice also acknowledged in its 2009 discussion paper that ‘the decentralized nature of VOCAT across the state contributes to variations in processes and different trends in decision making’.²⁹⁸
- 7.169 Similarly, research conducted by Whittlesea Community Legal Services in 2011 found that the lack of written reasons for decisions made it difficult to gather evidence regarding the operation of VOCAT and therefore even more difficult to educate the legal profession about it.²⁹⁹
- 7.170 While all hearings conducted by VOCAT are digitally recorded, there is no such process for determinations made on the papers even though the majority of applications are determined on the papers and without hearing.³⁰⁰ Written decisions are not publicly available—the only decisions available to the public relate to review decisions of the Victorian Civil and Administrative Tribunal. These reviews are rare (only eight reviews were conducted in 2016–17).³⁰¹

287 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).
288 Submissions 14 (Inner Melbourne Community Legal), 38 (Ryan Carlisle Thomas Lawyers); Consultations 12 (Regional Consultation—Mildura Victim Support Agencies), 14 (Chief Magistrate’s Family Violence Taskforce).
289 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).
290 Consultation 14 (Chief Magistrate’s Family Violence Taskforce).
291 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).
292 Submissions 14 (Inner Melbourne Community Legal), 24 (Darebin Community Legal Centre).
293 Submissions 15 (Merri Health Victims Assistance Program), 26 (Hume Riverina Community Legal Service).
294 Submission 14 (Inner Melbourne Community Legal).
295 Submission 31 (Victorian Council of Social Service).
296 Submission 43 (knowmore).
297 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.
298 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 42.
299 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 27.
300 In the 2016–17 financial year, only 14% of applications were determined at hearings: Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 36.
301 *Ibid* 61.

Easy to understand and does not require legal support

7.171 The Commission was told that the current process is not easy for victims to navigate or understand. While some of the complexity relates to the technical requirements of the VOCAA such as eligibility, proof of injury and causation,³⁰² there are also broader structural issues that result in the current process being complex and difficult for victims to understand.

7.172 For example, stakeholders said that VOCAT was not an easy process for victims to navigate without legal representation.³⁰³ The scheme's reliance on lawyers was viewed by some as a structural barrier to accessibility of the scheme for many victims.³⁰⁴ Some stakeholders suggested it would be 'virtually impossible' to navigate the VOCAT system without a lawyer³⁰⁵ or that 'most victims' would require a lawyer to complete the paperwork.³⁰⁶ Some suggested VOCAT was a 'bureaucratic nightmare' and most victims do not know how to access it.³⁰⁷

7.173 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria agreed that there is a perception—and practical reality for some victims—that the existing scheme is not simple:

Victims may be deterred from seeking financial support because of a perception (and reality for some) that the system is too complex to navigate on their own, and that legal representation is essential. This is particularly the case for victims from Culturally and Linguistically Diverse (CALD) communities, who often face the additional burden of insufficiently accessible information.³⁰⁸

7.174 The legalistic nature of the VOCAT process has been previously identified in research by the Victims Support Agency: 'The most common problems with the process of obtaining counselling through VOCAT can broadly be associated with the need to comply with the requirements of a legal system'.³⁰⁹

7.175 Other stakeholders considered the structure of VOCAT as part of the court system as a practical barrier due to its fragmentation from the rest of the support system.³¹⁰

7.176 Once again, these findings reinforce previous research. For example, Victims Support Agency research has found that many victims want one single point of contact and feel frustrated by the separation of victim support and financial assistance.³¹¹ Research conducted by Elaine Wedlock and Jacki Tapley has found:

One of the fundamental problems regarding crime victims is that there is no one agency taking responsibility for them, instead the journey of the victim involves varying degrees of contact from a range of agencies at differing stages in the process.³¹²

7.177 Additionally, research has found that victims find the process of seeking variation of an award to obtain further counselling complicated by the need for multiple visits to lawyers.³¹³ The complexity of the variation process adds to victims' experience of the VOCAT process, increases delays and affects continuity in services such as counselling.

302 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
 303 Submissions 33 (Eastern Community Legal Centre), 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 5 (Victims of Crime Commissioner, Victoria), 7 (Family Violence and Advocacy Organisations).
 304 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).
 305 Consultation 7 (Family Violence and Advocacy Organisations), 23 (Community Safety Trustee, Victoria).
 306 Submission 18 (cohealth).
 307 Consultation 23 (Community Safety Trustee, Victoria).
 308 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
 309 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 59.
 310 Consultations 8 (Victims Representatives—Victims of Crime Consultative Committee), 20 (Academics).
 311 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 35.
 312 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth, 2016) 25.
 313 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33.

- 7.178 The then-Victorian Department of Justice’s 2009 review of state-funded financial assistance found the VOCAA to be ‘complex and difficult for victims to understand’,³¹⁴ compounded by difficulties finding appropriate legal representation.³¹⁵

Commission’s conclusions and recommendations

- 7.179 This part of the chapter presents the Commission’s conclusions in relation to whether the existing scheme is meeting the eight reference objectives.
- 7.180 Before turning to specific matters relating to the reference objectives, the Commission first acknowledges that, as evidenced throughout this chapter’s discussion, stakeholders expressed varying views on victims’ experiences of the VOCAT process, as did individual victims consulted.
- 7.181 These variations were reflected in the written submissions received, and in the views expressed during consultations, where the Commission was told about positive and negative experiences of VOCAT, particularly in relation to the potentially therapeutic aspects of the existing scheme and victims’ experiences of the judicial hearing process.³¹⁶
- 7.182 These variations are also reflected in relevant research and literature. For example, research by Clark with victims of sexual assault found that for some participants, VOCAT was ‘their primary means of securing justice, for others it was of little significance, and in some instances it resulted in further harm’.³¹⁷ Similarly, research by the Victims Support Agency found ‘mixed’ views among research participants about the VOCAT hearing process:
- Comments about the VOCAT hearing were mixed. While many participants made positive comments about Tribunal Members and felt acknowledged and validated by the hearing ... some participants felt distressed by having to recount details of the crime they experienced. One participant was distressed by the Tribunal member’s comments.³¹⁸
- 7.183 Academic literature suggests that a diversity of experiences in such schemes is ‘predictable’, given matters can vary significantly in their complexity and magnitude, and because people differ in their injuries, circumstances and expectations.³¹⁹
- 7.184 While noting the varied circumstances of individuals, research nonetheless indicates the importance of the overall process being procedurally fair, easy and timely for victims,³²⁰ emphasising that compensation schemes should be designed to minimise stress and delays because stressful processes can have a negative impact on claimants’ health.³²¹ Victim experiences of VOCAT described to the Commission, and in research literature, suggest there are a number of limitations to the existing scheme which could induce stress in victims of crime.

314 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 18.

315 *Ibid* 42.

316 See, eg, Submissions 14 (Inner Melbourne Community Legal), 23 (Johnstone & Reimer Lawyers), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria) and 43 (knowmore) on the potentially therapeutic aspects of the current approach. See also Consultations 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 14 (Inner Melbourne Community Legal), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria) on the potentially distressing components of the current approach.

317 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 110.

318 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 59–60.

319 Genevieve M Grant, ‘Claiming Justice in Injury Law’ (2015) 41(3) *Monash University Law Review* 618, 646.

320 See, eg, Maarten Kunst et al, ‘Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study’ (2015) 32(19) *Journal of Interpersonal Violence* 1, 11.

321 Genevieve M Grant, ‘Claiming Justice in Injury Law’ (2015) 41(3) *Monash University Law Review* 618, 646.

Maximise therapeutic effect and minimise trauma

- 7.185 As outlined above, a number of stakeholders have emphasised the potentially therapeutic effect of a judicial model in which victims are able to be acknowledged at a hearing by a judicial officer,³²² particularly where a criminal matter has not progressed.³²³ However, other stakeholders have said that the existing scheme is not therapeutic,³²⁴ victim-centred³²⁵ or trauma-informed.³²⁶
- 7.186 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria acknowledged the potential for the existing scheme to be therapeutic, while noting some current processes may not always maximise therapeutic effect: 'While many victims who opt for a hearing find it to be a transformative experience, the hearing process could be more trauma-informed.'³²⁷
- 7.187 Although the Commission acknowledges there was a divergence of views in relation to the therapeutic effect of VOCAT, given the significant concerns raised about some victims' experiences of the VOCAT process, the Commission considers that the existing scheme's ability to minimise trauma for all victims is limited.
- 7.188 Of particular concern is the current provisions of the VOCAA relating to alleged perpetrator notification and appearance outlined above. As discussed in Chapter 6, the Commission considers these provisions to be counter-productive to a victims' recovery process, noting widespread stakeholder concern that such provisions often result in victims electing not to pursue a VOCAT application because of the chance of the perpetrator being notified.³²⁸
- 7.189 The Commission has reached this conclusion, notwithstanding the positive experiences of some victims,³²⁹ because of significant concerns of stakeholders that the existing scheme is not therapeutic,³³⁰ victim-centred³³¹ or trauma-informed,³³² and because for some victims, the VOCAT process feels adversarial³³³ and therefore makes them 'feel like a criminal',³³⁴ 'judged' and that they have to 'justify their emotions'.³³⁵ Accordingly, the Commission considers on balance that the existing scheme does not maximise therapeutic effect and minimise trauma for all victims of crime.

322 Submissions 13 (Adviceline Injury Lawyers), 23 (Johnstone & Reimer Lawyers), 42 (Joint Submission Springvale Monash Legal Service et al), 51 (Law Institute of Victoria); Consultations 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 12 (Regional Consultation—Mildura Victim Support Agencies), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

323 Submissions 22 (YourLawyer), 23 (Johnstone & Reimer Lawyers); Consultations 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies).

324 Submissions 8 (Victim Survivors' Advisory Council), 31 (Victorian Council of Social Service); Consultation 23 (Community Safety Trustee, Victoria).

325 Submission 8 (Victim Survivors' Advisory Council).

326 Submissions 8 (Victim Survivors' Advisory Council), 29 (Women's Legal Service Victoria and Domestic Violence Victoria); Consultation 20 (Academics).

327 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

328 Submissions 8 (Victim Survivors' Advisory Council), 10 (Eastern Metropolitan Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 17 (Centre for Excellence in Child and Family Welfare), 20 (Office of the Victorian Information Commissioner), 26 (Hume Riverina Community Legal Service), 28 (South Metropolitan Integrated Family Violence Executive), 31 (Victorian Council of Social Service), 33 (Eastern Community Legal Centre), 39 (Victorian Aboriginal Legal Service), 46 (Victoria Legal Aid), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 2 (Legal Professionals – Private Practice), 3 (Legal Professionals – Community Legal Centres), 4 (Victim, Witness and Court Support), 9 (Domestic Violence Victoria Members), 12 (Regional Consultation – Mildura Victim Support Agencies), 13 (Regional Consultation – Mildura Legal Professionals), 14 (Chief Magistrates' Family Violence Taskforce), 16 (Regional Consultation – Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).

329 See, eg, Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) for examples of positive experiences, and the following submissions also supporting the existing model: Submissions 7 (Dr Kate Seear et al), 13 (Adviceline Injury Lawyers), 19 (Schembri & Co Lawyers), 22 (YourLawyer), 23 (Johnstone & Reimer Lawyers), 28 (South Metropolitan Integrated Family Violence Executive), 38 (Ryan Carlisle Thomas Lawyers), 42 (Joint Submission Springvale Monash Legal Service et al), 47 (Centre for Innovative Justice), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

330 Submissions 8 (Victim Survivors' Advisory Council), 31 (Victorian Council of Social Service); Consultation 24 (Community Safety Trustee).

331 Submission 8 (Victim Survivors' Advisory Council).

332 Submissions 8 (Victim Survivors' Advisory Council), 29 (Women's Legal Service Victoria and Domestic Violence Victoria); Consultation 20 (Academics).

333 Consultations 4 (Victim, Witness and Court Support), 27 (Victim Survivors Advisory Council).

334 Consultation 5 (Victims of Crime Commissioner, Victoria).

335 Submission 31 (Victorian Council of Social Service).

Efficient and sustainable for the state

- 7.190 In relation to efficiency and sustainability for the state, the Commission considers that while there may be some benefits to using the existing Magistrates' Court infrastructure to reduce the operating costs of VOCAT, that having Victoria's busiest court subsidise VOCAT may no longer be the most efficient and sustainable model for delivering state-funded financial assistance because:
- Increasing demand in the Magistrates' Court jurisdiction has led to some magistrates struggling to cope with rising caseloads.³³⁶
 - The VOCAT workload is one of the many daily competing priorities across the Magistrates' Court and, in this context, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria stated that court appearances in the Magistrates' Court jurisdiction must necessarily take precedence over the administration of VOCAT matters.³³⁷
- 7.191 The precarious nature of this subsidised funding and staffing model is best illustrated by the delays experienced by victims, discussed in more detail below. Issues of delay in relation to VOCAT awards are not surprising, given the increased demand on the Magistrates' Court jurisdiction, and the 'dual' responsibilities of magistrates who may need to prioritise court appearances over VOCAT matters. Given these demand challenges and their impact on magistrates' workloads and VOCAT timeliness,³³⁸ the Commission considers that the existing scheme no longer represents the most efficient and sustainable model for state-funded financial assistance.

Timely decision making

- 7.192 The Commission considers that the delays experienced by victims in receiving VOCAT awards—both interim and final—exacerbate some of the more stressful processes of the existing scheme outlined above.
- 7.193 Stakeholders and victims told the Commission about various timeframes for applications to be finalised, ranging from between six months to three years.³³⁹
- 7.194 VOCAT's ability to produce timely outcomes for victims has also been raised in research reports. In June 2017, the Victorian Community Safety Trustee released an interim report noting delays in the receipt of VOCAT awards.³⁴⁰ Previous research reports also raised similar concerns about delays in VOCAT awards, including research conducted by Women's Legal Service Victoria in 2017,³⁴¹ Victims Support Agency research in 2011,³⁴² research by Whittlesea Community Legal Service in 2011,³⁴³ VOCAT research in 2011³⁴⁴ and the then-Department of Justice research in 2009.³⁴⁵

336 Noel Towell and Adam Cooper, 'Courtroom Drama: Magistrates' Cry for Help as System Approaches "Crisis Point"', *The Age* (online), 24 November 2017 <www.theage.com.au/victoria/courtroom-drama-magistrates-cry-for-help-as-system-approaches-crisis-point-20171108-gzhpde.html>; Noel Towell and Adam Cooper 'Struggling Magistrates Cry for Help' *The Age* (online), 2 April 2018 <www.theage.com.au/national/victoria/struggling-magistrates-cry-for-help-20180401-p4z7bh.html>.

337 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

338 The Commission notes that the 2018–19 Victorian Budget has allocated an additional three magistrates to establish a new Bail and Remand Court in the Magistrates' Court and 15 magistrates in the Criminal Division of the Magistrates' Court to respond to demand: Department of Treasury and Finance (Vic), *Victorian Budget 18/19: Getting Things Done*, Service Delivery Budget Paper No. 3 (2017) 112. This increased budget for additional magistrates is discussed in Chapter 8.

339 Submissions 14 (Inner Melbourne Community Legal), 37 (safe steps Family Violence Response Centre), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members).

340 Community Safety Trustee (Vic), *Community Safety Trustee: First Progress Report—June 2017* (2017) 14.

341 Women's Legal Service Victoria, *Rebuilding Strength—VOCAT Project: Practitioner Survey Preliminary Results* (2017) (unpublished) 5–7.

342 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33.

343 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 71.

344 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 32.

345 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 42.

- 7.195 The delays many victims experience in receiving VOCAT awards are particularly significant given research suggests that the more quickly victims can receive support and assistance, the better their chances of recovery.³⁴⁶ Conversely, delays can have counter-therapeutic effects.³⁴⁷
- 7.196 While VOCAT does not consider case ‘throughput’ as directly correlating with scheme responsiveness,³⁴⁸ many stakeholders and victims consider the timeliness of VOCAT awards as having significant impacts on victim outcomes,³⁴⁹ causing distress³⁵⁰ and re-traumatising victims.³⁵¹
- 7.197 Accordingly, given the issues raised during consultations and in written submissions, along with previous research pointing to VOCAT delays outlined above, the Commission considers that the existing scheme is not producing timely responses for all victims of crime.

Fair and equitable/consistent and predictable procedures and decisions

- 7.198 Inconsistency and lack of transparency in VOCAT’s decision making was raised as an issue by a significant number of stakeholders.³⁵²
- 7.199 Some stakeholders submitted that applicants who have experienced similar crimes and similar injuries do not necessarily receive similar awards of assistance from VOCAT³⁵³ and that there can be inconsistency in VOCAT decision making.³⁵⁴
- 7.200 In their written submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that under the existing scheme there:
- is a risk of inconsistent decision making in relation to awards and interpretation of broad areas of discretion for multiple decision makers with varying levels of VoCAT experience, operating across 51 locations. This can foster unrealistic expectations on the part of victims about likely award outcomes, and the perception that the system is not fair.³⁵⁵
- 7.201 The Commission notes that concerns about transparency and fairness in the VOCAT process are not new. Concerns were previously raised in a submission to the then-Victorian Department of Justice’s 2009 review of victim compensation³⁵⁶ and in research by the Whittlesea Community Legal Services.³⁵⁷ The then-Department of Justice also acknowledged in its 2009 discussion paper on the state-funded financial assistance scheme that ‘the decentralized nature of VOCAT across the state contributes to variations in processes and different trends in decision making’.³⁵⁸

346 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 8.

347 Bree Cook, Fiona David and Anna Grant, *Victims’ Needs, Victims’ Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 69.

348 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

349 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 23 (Johnstone & Reimer Lawyers), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 15 (Regional Consultation—Ballarat Victim Support Agencies).

350 Submissions 23 (Johnstone & Reimer Lawyers), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

351 Submissions 15 (Merri Health Victims Assistance Program), 23 (Johnstone & Reimer Lawyers), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

352 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 17 (Centre for Excellence in Child and Family Welfare), 19 (Schembri & Co Lawyers), 27 (Name withheld), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore), 49 (Victims of Crime Commissioner, Victoria); Consultations 2 (Legal Professionals—Private Practice), 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals), 14 (Chief Magistrate’s Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).

353 Submissions 15 (Merri Health Victims Assistance Program), 43 (knowmore).

354 Consultations 4 (Victim, Witness and Court Support), 12 (Regional Consultation—Mildura Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).

355 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

356 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.

357 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 27, which found that the lack of written reasons for decisions made it difficult to gather evidence about the operation of VOCAT and thus even more difficult to educate the legal profession about it.

358 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 42.

7.202 Accordingly, the Commission considers that on balance, the existing scheme may not be fair and equitable for all victims and may be producing inconsistent and unpredictable outcomes which impact some victims' experiences of the VOCAT process.

Process easy to understand and legal representation not required

7.203 Stakeholders said that the existing scheme is not easy for victims to understand and that VOCAT is not an easy process for victims to navigate without legal representation.³⁵⁹ In fact, some stakeholders suggested it would be 'virtually impossible' to navigate the VOCAT system without a lawyer.³⁶⁰

7.204 These stakeholder views are also supported by Victorian research and academic literature, which suggested the process is confusing for victims, particularly without a lawyer.³⁶¹ In its 2009 review of state-funded financial assistance, the then-Victorian Department of Justice also stated that the VOCAA was 'complex and difficult for victims to understand',³⁶² and such complexity was compounded by difficulties experienced by victims in finding appropriate legal representation.³⁶³

7.205 Accordingly, the Commission considers that the existing scheme is neither simple nor easy for victims to understand, and that legal representation is currently required for most, if not all, VOCAT applications, based on stakeholders' views that navigating the system without a lawyer would be difficult, if not 'impossible'.³⁶⁴

The need for a new model

7.206 As noted above, there have been relatively few empirical studies into VOCAT's operations or effectiveness over the past 20 years. The Commission's assessment of the existing scheme has therefore considered stakeholder views, existing research conducted into VOCAT's operations and victims' experiences of VOCAT. The Commission has also considered the experiences and approaches of other jurisdictions as a comparison. In using a variety of data sources, key themes have emerged about VOCAT's operations across written submissions, in consultations and in the available research. These key themes indicated that:

- While some victims may experience therapeutic outcomes, the existing scheme does not maximise therapeutic effect, nor minimise trauma, for all victims of crime because some victims can be distressed and traumatised by the adversarial nature of the VOCAT process, by how hearings may be conducted and by delays experienced in receiving awards.
- Although the existing scheme may produce cost efficiencies through Magistrates' Court subsidisation, in the context of increasing demand in the Magistrates' Court jurisdiction and magistrates' difficulties managing rising caseloads, this may no longer be efficient and sustainable for the state.
- Victims are experiencing significant delays in receiving VOCAT awards, affecting their ability to recover from crime.
- Victims experience inconsistent VOCAT outcomes, resulting in a lack of predictability, suggesting the existing model may not be fair and equitable for all victims, nor consistent and predictable.

359 Submissions 33 (Eastern Community Legal Centre), 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 5 (Victims of Crime Commissioner, Victoria), 7 (Family Violence and Advocacy Organisations).

360 Consultation 7 (Family Violence and Advocacy Organisations), 23 (Community Safety Trustee, Victoria).

361 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33–5.

362 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 18.

363 Ibid 42.

364 Consultations 7 (Family Violence and Advocacy Organisations), 23 (Community Safety Trustee, Victoria).

- The current process under the VOCAA is not simple nor easy to understand and, in this context, most victims would find it difficult, if not impossible to navigate the system without a lawyer.
- 7.207 Accordingly, the Commission considers that on balance, a new model is required if the reference objectives are to be met.
- 7.208 Chapter 8 explores possible models of assistance. This includes a reformed judicial model, as has been proposed by VOCAT, the Magistrates' Court of Victoria and Children's Court of Victoria,³⁶⁵ as well as alternative models of state-funded financial assistance, such as administrative or quasi-administrative models.

Models of state-funded financial assistance for victims of crime

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8. Models of state-funded financial assistance for victims of crime

Introduction

- 8.1 In Chapter 7, the Commission concluded that the existing scheme, as provided for by the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) and the Victims of Crime Assistance Tribunal (VOCAT), does not meet the objectives articulated in the supplementary terms of reference.
- 8.2 Therefore, this chapter considers whether there are other models of state-funded financial assistance, including a reformed judicial model, which may better meet the reference objectives and deliver assistance to victims of crime more effectively.
- 8.3 In response to submissions, and the matters raised in the consultation papers, the Commission considers there are two options for reform:¹
- a reformed judicial model, as proposed by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria in their joint submission.²
 - an administrative model, including options proposed by stakeholders and models in operation in other Australian jurisdictions.
- 8.4 This chapter begins with a discussion of the importance of validation for victims of crime, as a basis for the discussion of models of state-funded financial assistance.
- 8.5 The chapter then provides an overview of the two options for reform followed by an assessment of each option against the reference objectives.
- 8.6 As discussed further below, the Commission acknowledges that the existing scheme can be reformed to better meet victims' needs, and that VOCAT and the Magistrates' Court of Victoria are willing to undertake such reforms. However, in accordance with the supplementary terms of reference, the Commission has been asked to consider which model 'would more effectively deliver assistance'.³ This question therefore requires the Commission to make an assessment of the effectiveness of other possible models and determine which model would be the most effective for both victims and the state, regardless of the extent to which the existing scheme can be improved.
- 8.7 Just as Chapter 7 assessed the existing scheme according to the objectives identified in the supplementary terms of reference, this chapter assesses the two identified reform options according to the same objectives:
- fair and equitable
 - timely

1 These two options for reform were referred to as 'Approach 1: Reforming the Existing Scheme' and 'Approach 2: Is There a Need for a Different Model' in Chapters 14 and 15 of the Commission's supplementary consultation paper: Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 182 and 202.

2 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

3 See Supplementary Terms of Reference matter number eight.

- consistent and predictable
- maximise therapeutic effect
- minimise trauma
- simple and easy to understand
- not requiring legal support in all circumstances
- efficient and sustainable for the state.

The importance of validation

- 8.8 As discussed in Chapter 7, many stakeholders said that victims' needs extend beyond financial, therapeutic or practical support. In particular, stakeholders said that victims often need acknowledgment⁴ and validation of their experience as victims of crime.⁵
- 8.9 This part of the chapter discusses the importance of validation for victims of crime and the importance of victims being acknowledged and heard, including by judicial officers and other non-judicial decision makers.

Validation from judicial officers

- 8.10 For some stakeholders, the validation of victims' experiences is directly tied to such validation being provided by a judicial officer. For example, a significant number of stakeholders said that acknowledgment at a hearing by a judicial officer maximises therapeutic effect,⁶ particularly where a criminal matter has not progressed.⁷ A number of stakeholders noted the powerful nature of judicial validation.⁸ In this context, a number of stakeholders told the Commission that being heard and acknowledged by a judicial officer was 'empowering'⁹ or 'therapeutic'.¹⁰
- 8.11 Some stakeholders submitted that hearings in front of a compassionate Magistrate can be of enormous benefit.¹¹ Some legal professionals told the Commission that judicial recognition of a victim's story was therapeutic¹² and was sometimes worth more than any amount of money.¹³
- 8.12 Similarly, some support workers told the Commission that it can be very powerful for victims to have a magistrate acknowledge them as a victim.¹⁴ CASA Forum submitted:
- An empathetic Magistrate has the opportunity to provide [victims] with an acknowledgement of the injury they have sustained. Magistrates have been known to say "I have no doubt that this happened to you and the State will provide you with the following assistance to help you recover".¹⁵
- 8.13 The importance of judicial acknowledgment was also raised by a victim representative of the Victims of Crime Consultative Committee, who told the Commission about the powerful nature of a magistrate hearing her and saying 'yes' to her financial assistance needs at a VOCAT hearing.¹⁶

4 Submissions 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore).

5 Submission 5 (Anglicare Victoria Victims Assistance Program).

6 Submissions 13 (Adviceline Injury Lawyers), 22 (YourLawyer), 23 (Johnstone & Reimer Lawyers), 42 (Joint Submission Springvale Monash Legal Service et al), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 12 (Regional Consultation—Mildura Victim Support Agencies), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

7 Submissions 22 (YourLawyer), 23 (Johnstone & Reimer Lawyers); Consultations 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies).

8 Submissions 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 23 (Johnstone & Reimer Lawyers), 30 (CASA Forum).

9 Consultations 2 (Legal Professionals—Private Practice), 12 (Regional Consultation—Mildura Victim Support Agencies).

10 Consultations 3 (Legal Professionals—Community Legal Centres), 13 (Regional Consultation—Mildura Legal Professionals).

11 Submission 13 (Adviceline Injury Lawyers).

12 Consultation 3 (Legal Professionals—Community Legal Centres).

13 Ibid.

14 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

15 Submission 30 (CASA Forum).

16 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

- 8.14 The submission by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria also noted the importance of victims having the opportunity to be heard by a judicial officer:

The [current VOCAT approach] embodies one of the most important components of a therapeutic approach—the option for victims to have a hearing before a Tribunal Member ... for some victims, their recovery journey includes having their 'day in Court', to have their experience formally acknowledged and to have their story believed.¹⁷

- 8.15 A representative of the Anglicare Victoria Victims Assistance Program submitted that some victims feel 'listened to' and that they have 'received justice' when the decision is made by a judicial officer.¹⁸
- 8.16 On the other hand, the Commission has also been told by other stakeholders that judicial decision making establishes an adversarial process for victims¹⁹ and, contrary to the above views, can make some victims 'feel like a criminal' and that they must 'prove themselves'.²⁰ For example, one victim support worker submitted that 'the hearing process itself is usually a traumatic, intimidating or distressing event for a victim'.²¹ Some stakeholders told the Commission that acknowledgment could be provided for by other decision makers. This is discussed further below.

Validation from non-judicial decision makers

- 8.17 While many stakeholders told the Commission that validation was best provided through judicial officers as decision makers, other stakeholders said that acknowledgment did not necessarily have to come from a magistrate but could also come from other senior government officials.²²
- 8.18 Some stakeholders said that acknowledgment could come from senior government officials,²³ administrators, panels or commissioners,²⁴ provided it was from a person with standing²⁵ and authority.²⁶ The Commission was told that it did not matter who provided acknowledgment or validation to victims, so long as it occurred in a meaningful and respectful way.²⁷
- 8.19 The Commission was told that if a non-judicial decision maker was used, they would have to have some 'status' or 'power' to acknowledge the crime on behalf of the state.²⁸

17 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

18 Submission 5 (Anglicare Victoria Victims Assistance Program).

19 Consultations 4 (Victim, Witness and Court Support), 27 (Victim Survivors' Advisory Council).

20 Consultation 5 (Victims of Crime Commissioner, Victoria).

21 Submission 15 (Merri Health Victims Assistance Program).

22 Submission 49 (Victims of Crime Commissioner, Victoria); Consultations 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 14 (Chief Magistrate's Family Violence Taskforce), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

23 Submission 49 (Victims of Crime Commissioner, Victoria); Consultations 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 14 (Chief Magistrate's Family Violence Taskforce), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

24 Submission 31 (Victorian Council of Social Service).

25 Consultations 12 (Regional Consultation—Mildura Victim Support Agencies), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

26 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

27 Consultations 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations).

28 Submission 5 (Anglicare Victoria Victims Assistance Program).

Overview of possible models

A reformed judicial model—VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria proposal

- 8.20 Before considering alternative models of state-funded financial assistance, as required by the supplementary terms of reference, the Commission first considers whether the existing scheme can be reformed to meet the identified objectives. This recognises the practical experience of VOCAT, the scheme’s existing structure and infrastructure and VOCAT’s experience in delivering a state-funded financial assistance scheme for over 20 years.
- 8.21 This also acknowledges the views of a number of stakeholders who support the retention of the existing scheme, albeit with some technical, procedural or structural reforms.²⁹
- 8.22 The joint submission prepared by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria provides a detailed vision for a reformed judicial model whose key components are summarised below.³⁰

A ‘quasi-judicial’ model

- 8.23 Key to the joint submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria is the retention of what is described as a ‘quasi-judicial’ or hybrid model. This includes the ability for some decisions to be made quickly through an administrative process, reserving judicial decision making and discretion for more complex cases.³¹
- 8.24 It was submitted to the Commission that this model incorporates both the safeguard of retaining magistrates’ discretion to consider more complex applications and to review decisions, while increasing timeliness for more simple decisions which, as outlined below, would be made by registrars.³²

Three-tiered decision making

- 8.25 In support of the quasi-judicial model, the joint submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria proposes three-tiered decision making, with decisions made as follows:³³
- magistrates determining complex matters or matters where the victim requests a judicial hearing
 - judicial registrars making less complex decisions³⁴
 - assessing registrars processing straightforward applications.
- 8.26 Under this model, it is proposed that magistrates would focus on the most complex applications such as homicides, family violence, sexual assault and applications involving child victims.³⁵

29 See, eg, Submissions 7 (Dr Kate Seear et al), 13 (Adviceline Injury Lawyers), 19 (Schembri & Co Lawyers), 22 (YourLawyer), 23 (Johnstone & Reimer Lawyers), 28 (South Metropolitan Integrated Family Violence Executive), 30 (CASA Forum), 38 (Ryan Carlisle Thomas Lawyers), 42 (Joint Submission Springvale Monash Legal Service et al), 43 (knowmore), 47 (Centre for Innovative Justice), 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria).

30 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

31 Ibid.

32 Ibid.

33 Ibid.

34 Judicial registrars currently determine approximately 21 per cent of VOCAT applications: Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 3.

35 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

- 8.27 It was submitted to the Commission that under this model, delegation powers should be increased to enable judicial registrars to manage all but the most complex of matters, with a third tier of decision makers—assessing registrars—to make simple administrative decisions, retaining the safeguard of magistrates’ discretion to review.³⁶

Specialisation

- 8.28 The joint submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also proposes a specialised model.³⁷ It was proposed to the Commission that such specialisation would provide VOCAT with the capacity to simultaneously improve VOCAT’s therapeutic outcomes and consistency in decision making, as well as yield cost savings and efficiency gains.³⁸
- 8.29 It was also proposed that this specialisation include a smaller pool of dedicated VOCAT magistrates supported by specialised judicial registrars and administrative staff. Further specialisation is also proposed, such as specialisation in family violence to enhance integration with specialist family violence courts.³⁹
- 8.30 The joint submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also noted the VOCAT’s Koori List as a best practice example of a tailored process. It was submitted to the Commission that this specialisation is highly applicable and transferable to VOCAT’s operation more broadly, and would likely also be of benefit to other victim groups.⁴⁰

Centralised ‘hub and spoke’ model

- 8.31 VOCAT currently operates across 51 court locations. The joint submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria proposes that the decentralised structure of VOCAT be transformed to a central registry to form a ‘hub’ to provide a single entry point for managing and triaging VOCAT applications, with ‘spokes’ used in regional areas through local Magistrates’ Courts to enable victims to access local VOCAT support where required.⁴¹
- 8.32 Where a hearing is requested or required, it is proposed that specialist VOCAT magistrates could conduct hearings in person via a circuit court, or remotely from the ‘hub’ through digital and audiovisual online service channels.⁴²

Triaging and case management of applications

- 8.33 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that the ‘hub and spoke’ model would provide for case management of applications to enable improved accessibility, predictability and consistency, and reduce reliance on lawyers to navigate the system.⁴³
- 8.34 Additionally, it was submitted to the Commission that the centralised ‘hub’ would provide infrastructure on which to build stronger referral pathways between VOCAT and other support services for victims who are in contact with the criminal justice system.⁴⁴

36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.
44 Ibid.

Providing pathways to restorative justice

- 8.35 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that a 'hub and spoke' operating model would also provide a platform for future innovations, such as introducing restorative justice options for victims as part of their recovery,⁴⁵ or enabling VOCAT judicial officers' involvement in a panel to hear victims' experiences of the justice system.⁴⁶

Establishing a more robust administrative and regulatory framework

- 8.36 Key to the reform proposal submitted by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria is the establishment of a robust administrative and regulatory framework to support the Tribunal in exercising its functions in relation to making awards for expenses for goods and services.⁴⁷
- 8.37 It was submitted to the Commission that this regulatory framework should consist of a combination of accreditation, research capacity, guidelines and the development of procurement strategies in relation to expenses commonly awarded by the Tribunal.⁴⁸

An administrative model

- 8.38 This part of the chapter provides an overview of possible administrative models.
- 8.39 Administrative models are used in Queensland, the Northern Territory, Tasmania, Western Australia, New South Wales and the Australian Capital Territory.⁴⁹ Taking into account views expressed by stakeholders during consultations, and administrative models in operation in other jurisdictions, the Commission considers there are broadly four administrative models:
- a government victim assistance agency as the decision making body
 - an independent and specialist decision maker (e.g. Commissioner)
 - an expert panel or board as the decision making body
 - a combined administrative/judicial model—a 'hybrid' model.⁵⁰
- 8.40 Each of these models are discussed further below.
- 8.41 These models and their key components, along with the reformed VOCAT proposal, are also summarised in Table 1 over the page.

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid.

49 An overview of the operation of schemes in other jurisdictions can be found at Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 226–35.

50 A hybrid model differs from VOCAT's 'quasi-judicial' model; under a hybrid model stakeholders envisage administrative decisions (decisions made 'on the papers') being made by a government agency or department rather than court staff or magistrates, but with some form of judicial involvement in the process, whether in relation to complex matters or hearings at a victim's request.

Table 1: Possible models of state-funded financial assistance

	JUDICIAL Reformed VOCAT - centralised, specialised 'hub and spoke' model	ADMINISTRATIVE Government-administered within victim support system
Relevant body/ agency	VOCAT	Victims Support Agency (VSA)
Decision maker/s	Magistrates Judicial registrars Assessing registrars Functions, powers and decision making principles enshrined in legislation.	Government case managers or assessors. Functions, powers and decision making principles enshrined in legislation.
Specialisation	Yes – dedicated magistrates and registry staff. Further specialisation possible (i.e. extend Koori VOCAT list model).	Yes – decision making body would be a specialised victim support agency. Further specialisation possible (i.e. capacity to create specialised assessment teams).
Victim recognition/ hearings	'Section 33 letter' and judicial hearings where requested or required.	Letter of acknowledgement and 'Statement of reasons'. Meetings with senior government official possible.
Require lawyers?	Yes – but possibly reduced if legislative and procedural matters are simplified and case management/triaging implemented in 'hub'.	Not reliant on lawyers. Case managers could assist applicants. However, lawyers still funded by scheme.
Decision review mechanisms	Victorian Civil and Administrative Tribunal (VCAT)	Internal review, then to external review (VCAT)
Example of this approach	No other jurisdictions in Australia use a specialised judicial model.	Victim Assist Queensland

ADMINISTRATIVE Independent, dedicated and specialist decision maker	ADMINISTRATIVE Independent, dedicated and specialist panel, board or commission	HYBRID Combined administrative / judicial
A new independent office	A new independent statutory panel, board or commission.	An administrative body and VOCAT
Independent decision maker. Functions, powers and decision making principles enshrined in legislation. Decision maker to have subject matter expertise.	Multidisciplinary panel/board/ commission members. Composition, functions, powers and decision making principles enshrined in legislation. Decision makers to have subject matter expertise.	Various—decision making could be split according to following factors: - assistance type - urgency - complexity - where victim requests judicial hearing.
Yes – specialised and dedicated decision maker and office. Further specialisation possible (i.e. capacity to create specialised assessment teams).	Yes –specialised and dedicated decision makers and office. Further specialisation possible (i.e. capacity to create specialised assessment teams).	Possible—reliant on administrative and judicial components’ structure.
Letter of acknowledgement and ‘Statement of reasons’. Victim conferences with decision maker.	Letter of acknowledgement and ‘Statement of reasons’. Hearings with panel, board or commission member/s where requested or required.	Judicial hearings where requested or required.
Not reliant on lawyers. Case managers could assist applicants. However, lawyers still funded by scheme.	Yes, as not integrated with victim support and possibly perceived as ‘quasi-judicial’ body. Need for lawyers could be reduced if legislative and procedural matters are simplified and case management incorporated into functions of office supporting panel, board or commission.	Yes – to navigate complexity of different decision making and if matter proceeds to judicial hearing.
Internal review, then to external review (VCAT).	VCAT	Dependent on first instance decision maker (administrative or judicial). Possibility to combine internal / external review mechanisms.
Australian Capital Territory	Many jurisdictions in the USA use compensation boards or commissions. Similar approaches in Victoria include the Adult Parole Board.	No Australian scheme has hybrid decision making according to assistance type, urgency, complexity or for victim recognition. South Australia has an administrative scheme, with ‘escalation’ to judicial decision making where first instance administrative decision not accepted by victim.

Government victim assistance agency as decision making body

- 8.42 The first administrative model is for state-funded financial assistance to be embedded within the relevant government-funded victim support agency. This model is used in Queensland where Victim Assist Queensland administers the state-funded financial assistance scheme as part of the Queensland Department of Justice and Attorney.⁵¹
- 8.43 In Victoria, the equivalent government-funded victim support agency is the Victims Support Agency, Department of Justice and Regulation. Like Victim Assist Queensland, Victoria's Victims Support Agency is the gateway to victim support in Victoria and already coordinates a range of services for victims of crime, including the Victims of Crime Helpline, the Victims Assistance Program and the Victims Register.⁵²

Independent and specialist decision maker

- 8.44 The second administrative model is for state-funded financial assistance to be provided through an independent, specialist decision maker. An example of this model is that of the Australian Capital Territory. While it is similar to the administrative model in Queensland, instead of a public servant 'scheme manager', an independent statutory commissioner oversees the scheme.
- 8.45 Victim Support ACT, the government body responsible for delivering the ACT Victims Services Scheme, administers both the financial assistance scheme and victim case management services provided under the Victims Services Scheme.⁵³ Victim Support ACT processes applications for financial assistance and the Victims of Crime Commissioner, the head of Victim Support ACT, is the final decision maker.⁵⁴
- 8.46 In Victoria, this is the equivalent of the Victims of Crime Commissioner overseeing the state-funded financial assistance scheme.⁵⁵

Expert panel or board as decision making body

- 8.47 The third administrative model is an expert panel or board as decision maker, assisted by relevant departmental staff. This is similar to the model in Tasmania where Independent Criminal Injuries Compensation Commissioners are decision makers, supported by Victims Support Services, Department of Justice.⁵⁶
- 8.48 This model is also used in the United States of America where some states use compensation boards or commissions to make victim compensation decisions. For example, the Minnesota Crime Victims Reparations Board has five members appointed by the Commissioner of Public Safety. One Board member must be a physician and at least one member must have been a victim of crime. The Board meets monthly and makes determinations for more complex applications. More straightforward decisions are made by government department staff.⁵⁷
- 8.49 This model could be compared to Victoria's use of the Adult Parole Board.⁵⁸

51 Victim Assist Queensland, Department of Justice and Attorney-General (Qld), *A Guide for Victims of Crime in Queensland* (2017) 9.

52 Victims Support Agency, Department of Justice and Regulation (Vic), *Victims Support Agency* (2017) <www.victimsofcrime.vic.gov.au/>.

53 Victims of Crime Commissioner, ACT Human Rights Commission, *ACT Financial Assistance Scheme* (2016) <www.victimsupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016>.

54 Ibid.

55 The Victorian Victims of Crime Commissioner is appointed pursuant to the *Victims of Crime Commissioner Act 2015* (Vic) s 7.

56 The role of Victims Support Services is to liaise with applicants and keep them informed as to the progress of an application and provide administrative support to the Commissioners. Independent Criminal Injuries Compensation Commissioners decide whether compensation is appropriate and determine the level of financial assistance to be awarded. Commissioners are appointed pursuant to the *Victims of Crime Assistance Act 1976* (Tas) s 2A and must be Australian lawyers of at least five years standing as Australian legal practitioners. See also Department of Justice (Tas), *Financial Assistance* (2014) <www.justice.tas.gov.au/victims/financialassistance>.

57 Minnesota Crime Victims Reparations Board, *Fiscal Year 2017 Annual Report* (2017) 3.

58 The Adult Parole Board consists of members from a diverse range of backgrounds including judicial members and community members. See Adult Parole Board, *Annual Report 2016–17*, (2017) 14.

Hybrid model

- 8.50 The final model, which was proposed in some consultations and written submissions, combines the existing scheme with an administrative model.
- 8.51 A hybrid model differs from what VOCAT consider to be their quasi-judicial model, in that stakeholders envisage that under a hybrid model administrative decisions (decisions made ‘on the papers’) would be made by a government agency or department rather than court staff or magistrates.
- 8.52 Various views were put forward as to how such a model could work, with some stakeholders proposing that decision making could be split between the administrative or judicial stream according to factors such as:⁵⁹
- assistance type (that is, expenses versus lump sum payments)
 - urgency (that is, interim awards versus final awards)
 - complexity
 - if a victim requested a judicial hearing.
- 8.53 There is no Australian precedent for this hybrid model.⁶⁰

Which model would deliver assistance more effectively?

- 8.54 The Commission has assessed each identified possible model—including a reformed VOCAT model—against its ability to meet the eight objectives outlined in the supplementary terms of reference (reference objectives).
- 8.55 The Commission’s analysis of each models’ potential to meet reference objectives is outlined below.

A reformed judicial model

- 8.56 This part of the chapter examines the extent to which the Commission considers a reformed VOCAT model may address some of the concerns that have been identified with Victoria’s existing scheme.
- 8.57 As outlined above, it is clear from the joint submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria that the existing scheme can be reformed to deliver more victim-centred and trauma-informed responses to better support victims in their recovery. Indeed, it is clear from the joint submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria that VOCAT and the courts are willing to embrace such reforms.
- 8.58 In the Commission’s view, these proposed reforms are significant and would provide a much improved model of assistance for victims. However, the supplementary terms of reference require the Commission to consider other models and to determine which model would deliver assistance more effectively to victims of crime.
- 8.59 The Commission recognises the initiatives VOCAT has already implemented to adapt and respond to system pressures, including advocating for a range of legislative reforms to improve system efficiencies and responsiveness to victims of crime, and introducing new initiatives such as the Koori VOCAT list.⁶¹

59 ‘Hybrid’ models were discussed in Submissions 18 (cohealth), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 30 (Victorian Council of Social Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria).

60 An alternative hybrid administrative/judicial model is used in South Australia. An application is made as an administrative process in the first instance to the Crown Solicitor (part of the Attorney-General’s Department). If a claim is not settled by agreement between the Crown Solicitor and the claimant within three months (or a longer period agreed between the Crown Solicitor and the claimant), the claimant may apply to the District Court for compensation. See, eg, Legal Services Commission of South Australia, *Making the Claim* (2016) <www.lawhandbook.sa.gov.au/ch35s02s06.php>.

61 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

8.60 In the Commission's view these initiatives indicate that VOCAT is likely to be able to continue to adapt to the pressures of demand and to adopt new approaches to better meet victims' needs. Consistent with this, and as noted below, the Commission considers that a reformed judicial model as proposed by VOCAT, the Magistrates' Court of Victoria and Children's Court of Victoria in their submission, would likely deliver improved outcomes for victims. However, the Commission considers that a reformed judicial model may not adequately address a number of reference objectives.

Possible improvements under a reformed judicial model

8.61 The Commission considers that the proposal by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria to increase consistency and predictability through the use of specialised magistrates and staff is likely to lead to fairer and more equitable decision making. In addition, the Commission considers the proposal for accreditation and procurement programs for goods and services could increase fairness and equity for individual victims, as well as across the scheme more generally. A robust regulatory framework could support the Tribunal in the making of awards for expenses for goods and services through a combination of accreditation, research capacity, guidelines and the development of procurement strategies⁶² which would likely provide improved accountability in relation to the quality of services provided to vulnerable victims.

8.62 Similarly, the Commission considers that the proposal by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria to centralise decision making and appoint specialist VOCAT magistrates and registry staff is likely to lead to increased consistency and predictability for victims as well as minimise trauma and maximise therapeutic effect. The Commission also considers these initiatives would also likely yield significant efficiencies, service improvements and better outcomes for victims of crime.

Reference objectives a reformed judicial model may not adequately address

8.63 Notwithstanding the potential benefits of a reformed judicial model noted above, the Commission considers the following reference objectives may not be adequately addressed under the proposed reformed judicial model:

- timeliness
- maximise therapeutic effect/minimise trauma
- efficient and sustainable for the state
- simple and easy to understand/reduce the need for legal representation.

8.64 The Commission's conclusions are based on concerns raised by stakeholders in consultations and in written submissions, as well as in relevant research into both the existing scheme and the experience in other jurisdictions.

Timeliness

8.65 As discussed in Chapter 7, timeliness of decision making is a key criticism of the existing scheme. Many stakeholders said that the timeliness of VOCAA awards is a significant problem⁶³ and often prevents victims from receiving financial assistance when they need it most.⁶⁴

62 Ibid.

63 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 23 (Johnstone & Reimer Lawyers), 24 (Darebin Community Legal Centre), 27 (Name withheld), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 14 (Chief Magistrate's Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies).

64 Submissions 38 (Ryan Carlisle Thomas Lawyers), 49 (Victims of Crime Commissioner, Victoria); Consultation 7 (Family Violence and Advocacy Organisations).

- 8.66 Although the proposal of VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria for a central registry with specialised staff and case management may lead to improved timeliness, the Commission has concerns about the ability for a court-based system, relying on the infrastructure and staff of the Magistrates' Court, to provide timely responses. These concerns are based on evidence from other jurisdictions, outlined below, which indicate judicial/court-based models are less likely to produce timely decisions because of resource constraints and the prioritisation of other court business.
- 8.67 In 2012, the NSW Department of Attorney General and Justice published its report *Review of the Victims Compensation Fund*. The independent review 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 significant delays in the provision of compensation, with an average wait of over two years.⁶⁵ During consultations with the NSW Commissioner of Victims Rights, the Commission was told that the administrative scheme, introduced in New South Wales following this review, now determines claims for financial assistance in an average of 26 days.⁶⁶
- 8.68 Similarly, the *Victims of Crime Assistance Act 2007* (NT) was introduced in 2007 to replace an earlier court-based compensation scheme which had been found to be inefficient, slow, overly complex and costly. A review of the scheme in 2007 found that it resulted in a more streamlined administrative case assessment process for financial assistance.⁶⁷
- 8.69 In Queensland, delays (among other issues) also prompted a transition from a court-based scheme to an administrative model. The *Victims of Crime Assistance Act 2009* (Qld) introduced an administratively based scheme by establishing Victim Assist Queensland to administer the financial assistance scheme along with services and support for victims of crime.⁶⁸ In consultations with Victim Assist Queensland, the Commission was told that typical turnarounds on financial assistance applications are:⁶⁹
- three weeks for funeral and interim applications
 - three months for primary victims
 - six months for secondary victims.
- 8.70 A review of the new scheme in Queensland in 2015 found the scheme to be working well in comparison to the previous compensation scheme, providing direct and timely financial assistance to a wider range of victims:
- Based on the above data and results of consultation, the review concluded that the new financial assistance scheme under the VOCA Act is doing what it was intended to do—helping more victims by providing them with financial assistance that will directly help them to recover from the act of violence as soon as possible after the act occurs. Given this conclusion, other models of financial assistance were not considered as a part of the review.⁷⁰
- 8.71 VOCAT has also acknowledged that in the current operating environment, Magistrates' Court appearances necessarily take precedence over VOCAT administration.⁷¹

65 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

66 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW). See also Department of Justice (NSW), *Annual Report 2015–2016* (2016) 24.

67 Department of the Attorney-General and Justice (NT), *Issues Raised at Consultation for the Review of the Victims of Crime Assistance Act*, Issues Paper (2012) 12.

68 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 3.

69 Consultation 1 (Victim Assist Queensland).

70 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 11.

71 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

Maximise therapeutic effect/ minimise trauma

- 8.72 The joint submission by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria states that under their proposed reformed model, specialist magistrates 'would also minimise the risk of hearings re-traumatising a victim'.⁷²
- 8.73 The Commission agrees that specialisation would likely reduce the risk of re-traumatisation. However, the Commission considers that while a risk minimisation approach may be sufficient for other court proceedings—where victims might be required to be a witness and the purpose of the process is not to assist victims, but to prosecute crime—a risk minimisation standard may not be consistent with a beneficial scheme design, the purpose of which is to assist victims to recover from the effects of crime.
- 8.74 The Commission considers that a risk minimisation approach does not place victims at the centre of the process, nor does it demonstrate a trauma-informed approach in which victims' needs are paramount.
- 8.75 The Commission notes that although increased specialisation and case management of applicants may provide the basis for a more trauma-informed response, there is evidence that the adversarial nature of court-based models increases potential for trauma. For example, Cook et al observe that compensation proceedings 'often have the appearance of a trial, with the victim standing in the position of the accused'.⁷³ Chan et al have also observed that the 'adversarial nature of the compensation process for many victim schemes can detract from the well-being of the victim and from the rehabilitative objectives of the scheme'.⁷⁴ In the recent case of *QMX v Victims of Crime Assistance Tribunal*,⁷⁵ VCAT stated:

The woman [victim] was an impressive witness. She gave her evidence carefully ... Much of her evidence concerned extremely distressing and painful events. The woman [victim] often cried and at times sobbed when describing what had occurred including about the harm suffered by her children – to my untrained eye it appeared as if she was reliving the events as she described them.⁷⁶

- 8.76 In the context of VOCAT hearings, the Commission notes that some victims have described their experiences as resembling a 'trial', in that the VOCAT hearing process makes some victims 'feel like a criminal', 'judged' and that they have to 'justify their emotions'.⁷⁷ Other victims have been extensively cross-examined by legal counsel for the alleged perpetrator.⁷⁸ Such processes have the potential to cause significant harm to a victim. For example, a Canadian study into victims' needs found that victims who felt like their credibility was being questioned by the criminal justice system were more likely to suffer symptoms of PTSD and low self-esteem.⁷⁹

Efficient and sustainable for the state

- 8.77 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that the VOCAT model is efficient and sustainable, as it is heavily subsidised by the Magistrates' Court of Victoria and enables VOCAT to use magistrates' court staff, judicial officers and court infrastructure and thereby limit its overall running costs.⁸⁰
- 8.78 However, in the Commission's view the reformed judicial model proposed by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria still raises issues of sustainability and efficiency in the long term.

72 Ibid.
73 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 70.
74 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) 19.
75 [2018] VCAT 614.
76 *QMX v Victims of Crime Assistance Tribunal* [2018] VCAT 614 [35].
77 Submission 31 (Victorian Council of Social Service); Consultation 5 (Victims of Crime Commissioner, Victoria).
78 Submission 7 (Dr Kate Seear et al).
79 Jo-Anne Wemmers and Katie Cyr, *Victims' Needs within the Context of the Criminal Justice System* (University of Montreal, 2006) 100.
80 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

- 8.79 In the Commission’s view, the reformed VOCAT proposal submitted by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria does not sufficiently address how the proposed continuation of VOCAT within the Magistrates’ Court fits with the broader operating environment where ‘the VoCAT workload is one of many daily competing priorities across MCV, and Court appearances necessarily take precedence over the administrative jurisdiction of VoCAT’.⁸¹ In the Commission’s view, while prioritising court appearances may be an operational necessity, it nevertheless conflicts with the evidence-based research indicating that delays in the payment of financial assistance to victims of crime has a counter-therapeutic effect on victims⁸² and therefore creates a potential conflict for magistrates undertaking both Magistrates’ Court and VOCAT work.
- 8.80 In addition, the Commission remains concerned that the VOCAT model establishes an entire decision making framework and structure based on a court-like process—including judicial registrars, registrars, court registries and judicial officers—when the majority of decisions (approximately 85 per cent) are dealt with administratively ‘on the papers’.⁸³ Under the proposed reformed VOCAT model, as submitted by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria, a large percentage of decisions would be made by non-judicial officers. The Commission considers that the overall efficiency of a judicial-based model appears low, given the judicial component of the VOCAT model would only ever serve a small percentage of victims who wish to attend a hearing.
- 8.81 In the Commission’s view the high proportion of administrative decisions indicates victims’ needs might be better met through using more specialised and appropriately trained administrative decision makers, freeing up court resources to undertake matters requiring judicial oversight.
- 8.82 These issues must also be viewed in the context of an increased demand on the magistrates’ court jurisdiction more generally. As noted by the then-Department of Justice in the 2009 discussion paper *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*:
- As [VOCAT] operates within the organisational structure of the Magistrates’ Court of Victoria, the Tribunal’s caseload and resourcing requirements cannot be considered in isolation of the Magistrates’ Court, which has also experienced an increase in caseload. The growth in both jurisdictions must be considered as part of the review of the sustainability of the current model of state-funded assistance awards.⁸⁴
- 8.83 As discussed in Chapter 7, the operating environment of the Magistrates’ Court of Victoria has changed considerably since VOCAT was introduced in 1996. The increased pressure on the court, particularly in its criminal jurisdiction has also been acknowledged by the Magistrates’ Court of Victoria.⁸⁵ A recent evaluation into Victoria Legal Aid’s work in the summary jurisdiction of the Magistrates’ Court of Victoria described the entire summary jurisdiction as ‘approaching crisis’ and ‘overloaded, under-resourced and overborne’.⁸⁶
- 8.84 The Commission notes that the 2018–19 Victorian Budget has allocated an additional three magistrates to establish a new Bail and Remand Court in the Magistrates’ Court, and 15 magistrates in the Criminal Division of the Magistrates’ Court to respond to increases in demand.⁸⁷ Although such initiatives may increase resourcing in the Magistrates’ Court more broadly, a judicial model subsidised by Victoria’s busiest court

81 Ibid.

82 Bree Cook, Fiona David and Anna Grant, *Victims’ Needs, Victims’ Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 69.

83 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 36.

84 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 23.

85 Magistrates’ Court of Victoria, *Annual Report 2015–16* (2016) 13.

86 Law and Justice Foundation of New South Wales, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid’s Summary Crime Program* (2017) xvii.

87 Department of Treasury and Finance (Vic), *Victorian Budget 18/19: Getting Things Done*, Service Delivery Budget Paper No 3 (2017) 112.

may no longer represent the most efficient and sustainable model for the delivery of a state-funded financial assistance scheme.

Simple/easy for victims to understand and reducing need for legal representation

- 8.85 The Commission acknowledges that the proposal in the joint submission by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria to establish a central registry or 'hub', along with introducing case management,⁸⁸ would likely result in the process being simpler and easier for victims to understand. However, the Commission is concerned that the model would still require victims to have legal representation in most cases. While the Commission has not been asked by the supplementary terms of reference to remove a victim's right to legal representation, it has been asked to consider reducing reliance so that victims are not required to engage lawyers to access the scheme in all cases.
- 8.86 In the Commission's view, the proposal by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria⁸⁹ to maintain a quasi-judicial model where hearings could still be requested by judicial officers, increases the complexity for victims navigating the process and increases reliance on legal representation. The Commission considers there may be issues of fairness for victims if they are not legally represented in a quasi-judicial model because such a model may require victims to attend hearings where legal submissions are sought on complex matters like proof of injury and causation. Without a lawyer, this would be a very difficult process for a victim to navigate.

An administrative model

- 8.87 This part examines a range of administrative models of state-funded financial assistance and considers whether such models would deliver assistance to victims of crime more effectively.
- 8.88 This part examines the following administrative models:
- a hybrid model
 - an expert panel, board or Commission
 - a government-administered victims support agency
 - an independent, specialised and dedicated decision maker.

A hybrid model

- 8.89 The Commission considered the potential advantages and disadvantages of a hybrid model, which is essentially a middle ground between a purely administrative and purely judicial model.⁹⁰ A hybrid model incorporates components of the existing judicial model and components of an administrative scheme, such as the option of having a judicial hearing in certain circumstances.
- 8.90 Various views were put forward as to how such a model could work, with some stakeholders proposing decision making could be split between administrative or judicial decision making according to factors such as:⁹¹
- assistance type (that is, expenses versus lump sum payments)
 - urgency (that is, interim awards versus final awards)
 - complexity
 - if a victim requested a judicial hearing.

88 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

89 Ibid.

90 A hybrid model differs from VOCAT's 'quasi-judicial' model; under a hybrid model stakeholders envisage administrative decisions (decisions made 'on the papers') being made by a government agency or department rather than court staff or magistrates.

91 For various options, see submissions 18 (cohealth), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 31 (Victorian Council of Social Service), 44 (Aboriginal Family Violence Prevention and Legal Service), 51 (Law Institute of Victoria).

- 8.91 Given this model's adoption of components of the existing VOCAT model, such as judicial decision making, use of court staff and infrastructure and court listing practices, this option is likely to encounter similar issues as encountered under the reformed judicial model, such as issues with timeliness, minimisation of trauma, and efficiency and sustainability for the state, which have already been outlined above.
- 8.92 In addition, it is likely that a hybrid model would increase the complexity of the system primarily because the point at which a decision would be 'judicial' or 'administrative' is likely to be unclear to most victims, particularly those without legal representation. This means that this model would likely not be simple and easy for victims to understand, nor reduce reliance on legal representation.
- 8.93 Significantly, no other Australian jurisdiction has a hybrid model of this kind.
- 8.94 The Commission considers that a hybrid model would not more effectively deliver assistance to victims of crime, nor meet reference objectives.

Expert panel, board or commission

- 8.95 The Commission has considered the potential advantages and disadvantages of an administrative model using a panel or board.
- 8.96 The Commission considers it likely that this model would see some overall improvements in certain reference objectives, particularly fairness and equity, consistency and predictability and maximise therapeutic effect.
- 8.97 Like a reformed judicial model, this model may also encounter issues with timeliness and minimising trauma.
- 8.98 To the extent that an expert panel, board or commission is quasi-judicial, timeliness is likely to be affected in the same way as under a reformed judicial model.
- 8.99 The quasi-judicial nature of a panel, board or commission may also raise similar concerns about the potential for processes to be more adversarial and is less likely to be simple and easy for a victim to access and navigate without a lawyer. For this reason, the Commission does not consider this model to most effectively meet reference objectives.

Government-administered victim assistance agency and independent, specialist decision maker

- 8.100 The two remaining administrative models are:
- a government-administered victim assistance agency as decision maker
 - an independent, specialist decision maker.
- 8.101 These administrative options are similar in their approach but the key difference is the decision maker. Due to their similarities, the Commission considers them together for ease of comparison.
- 8.102 These models are broadly based on the current models in Queensland, the Australian Capital Territory and New South Wales, jurisdictions which have recently transitioned from a court-based model to an administrative model.⁹²
- 8.103 In all three jurisdictions, the state-funded financial assistance schemes are embedded within the relevant government-administered victim assistance agency, with dedicated case management and assessment teams. Queensland does not have an independent decision maker, using government assessors and a scheme manager to manage the scheme.⁹³ In contrast, the Australian Capital Territory has a Victims of Crime Commissioner as head of the agency administering the financial assistance scheme, along

⁹² In Queensland, a 2008 review recommended a shift to a financial assistance model establishing an administrative agency—Victim Assistance Queensland—to administer the financial assistance scheme. The Australian Capital Territory transitioned from a court-based scheme to an administrative scheme in 2016. New South Wales transitioned to an administrative scheme in 2013.

⁹³ Victim Assist Queensland, Department of Justice and Attorney-General (Qld), *A Guide for Victims of Crime in Queensland* (2017) 9.

with other victim services.⁹⁴ New South Wales also uses a Commissioner of Victims Rights to oversee its scheme, along with other victim services.⁹⁵

- 8.104 The Commission considers that a number of key reference objectives would likely be met by both a government-administered victim assistance agency model and an independent decision maker model.
- 8.105 The Commission considers that both models would meet the following reference objectives:
- **Timely assistance:** In some Australian jurisdictions where administrative schemes have been introduced, there has been a marked increase in timely decision making. For example, in New South Wales, timeframes have decreased from around two years⁹⁶ to an average of 26 days.⁹⁷ In Queensland, decisions are typically made in three weeks for funeral and interim applications, three months for primary victims and six months for secondary victims.⁹⁸
 - **Consistent and predictable processes and outcomes:** A dedicated and specialised administrative scheme would provide for a centralised and specialised decision making process, with dedicated decision makers working in one central location, improving consistency in processes and outcomes. Administrative processes implemented in other Australian schemes have improved the consistency and predictability for victims, for example through decision makers providing comprehensive ‘statements of reasons’ in each matter which outline their reasons for a decision.⁹⁹
 - **Minimise trauma:** Unlike a court-based model, administrative schemes minimise adversarial processes because victims are not required to attend court for hearings. This means victims are not required to give evidence, nor are alleged perpetrators able to attend a hearing. In addition, in some administrative schemes in Australia, multidisciplinary assessors use a ‘beneficial’ case management approach in which assessors treat applicants as ‘clients’, liaising with victims and their support network to discuss a victim’s financial assistance needs to minimise the trauma and administrative burden associated with applying for financial assistance.¹⁰⁰
 - **Simple and easy to understand /reduce reliance on legal representation:** In other Australian jurisdictions where administrative schemes have been introduced, there has been a reduction in the need for victims to engage lawyers to navigate the process.¹⁰¹ Although lawyers can still be used in some jurisdictions, the beneficial case management approach used by assessors reduces reliance on lawyers overall.
 - **Efficient and sustainable for the state:** Given the pressures of increased demand in the Magistrates’ Court of Victoria, particularly in the criminal jurisdiction,¹⁰² an administrative model would likely improve efficiency and sustainability for the state by freeing up court resources, staff and magistrates to undertake Magistrates’ Court of Victoria work.
- 8.106 Although the Commission considers that a number of key reference objectives, as outlined above, would be met by both a government-administered victim assistance agency model, and an independent decision maker model, the Commission considers that using a government-administered victim support agency as the decision making

94 *Victims of Crime Act 1994* (ACT) s 11 and *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 31(1).

95 *Victims Rights and Support Act 2013* (NSW) s 10(1).

96 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

97 Department of Justice (NSW), *Annual Report 2015–16* (2016) 24.

98 Consultation 1 (Victim Assist Queensland).

99 A statement of reasons is a written statement provided to a victim outlining the reasons for the decision, and the factors taken into account by the decision maker in reaching that decision. See detailed discussion in Chapter 10 of how statements of reasons are used in other Australian jurisdictions.

100 Consultations 1 (Victim Assist Queensland), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

101 *Ibid.*

102 Law and Justice Foundation of New South Wales, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid’s Summary Crime Program* (2017) 22.

body may not provide victims with an appropriate forum for victim acknowledgment and participation. Therefore, this model may limit the scheme's ability to maximise therapeutic effect for victims. In addition, there may be perceptions of unfairness due to the lack of independent decision making in the scheme's design. This may impact on actual and perceived fairness and equity.

- 8.107 The Commission also notes that the administrative model using an independent, dedicated and specialised decision maker does meet each of the reference objectives as outlined above. In addition, unlike a scheme delivered by a government victim support agency, the independence of the decision maker would increase fairness and equity as the decision maker's independence and functions would be prescribed in legislation. A further significant advantage of this model is that using an independent, dedicated and specialised decision maker would also enable the decision maker to conduct private hearings to provide victims with a forum to be heard and for acknowledgment by the state.

Discussion

- 8.108 The supplementary terms of reference at matter eight ask the Commission to consider whether any processes, procedures or requirements under the VOCAA cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model.
- 8.109 As noted in the introduction to this chapter, the Commission has approached assessment of these options for reform by asking, in accordance with the supplementary terms of reference, which model 'would more effectively deliver assistance?'¹⁰³
- 8.110 This part of the chapter discusses the challenges with reforming the existing scheme and considers how to best meet the reference objectives.

Challenges with reforming a judicial model

- 8.111 The Commission acknowledges that in their joint submission VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria have proposed significant changes to VOCAT's operations and service delivery model to enable more victim-centred and trauma-informed responses and to better provide assistance to victims of crime.¹⁰⁴
- 8.112 As discussed above, the Commission considers that the existing scheme can be reformed, and that a reformed VOCAT model, alongside relevant technical reforms to the VOCAA, would likely result in improved outcomes for victims against a number of the reference objectives, including increased fairness, equity, consistency and predictability, as well as minimising trauma and maximising therapeutic effect.
- 8.113 While the Commission acknowledges that improvements can be made to the existing scheme, the Commission considers that a judicial model no longer represents the model of state-funded financial assistance that would deliver assistance to victims most effectively or be the most efficient or sustainable model for the state.
- 8.114 For reasons outlined above, the Commission considers a reformed judicial model may not adequately address the following key reference objectives:
- **Timeliness:** Research demonstrates that delays in the payment of financial assistance to victims of crime can have a counter-therapeutic effect on victims.¹⁰⁵ The Commission considers that it may be difficult for the timeliness of awards to be significantly improved under the reformed VOCAT model because in the current

103 See Supplementary Terms of Reference matter number eight.

104 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

105 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 69.

operating environment, Magistrates' Court appearances necessarily take precedence over VOCAT administration.¹⁰⁶ This is contrasted with the experience in other jurisdictions where transitioning from a court-based model to an administrative model has demonstrated increased timeliness in decision making.¹⁰⁷

- **Minimise trauma:** Consultation findings and research into victims' experiences of VOCAT demonstrate that many victims do not experience a therapeutic outcome under a court-based model. As noted above, case studies provided by stakeholders indicate VOCAT can be a source of potential re-traumatisation.¹⁰⁸ The adversarial nature of VOCAT, as described by some stakeholders,¹⁰⁹ can also make some victims 'feel like a criminal', 'judged' and that they have to 'justify their emotions'.¹¹⁰ Inner Melbourne Community Legal submitted that even where they are confident a client would be eligible for a higher award of financial assistance, 'they are willing to walk away with little or nothing at all, knowing that they could not continue with a process that was destructive and ultimately harmful to them'.¹¹¹ The Victim Survivors' Advisory Council submitted that the 'current scheme relies on being an adversarial system rather than adopting a "trauma-informed", "victim-centred" or "human-centred" response'.¹¹² Accordingly, the Commission considers that although there may be therapeutic outcomes for some victims, a reformed judicial model may not adequately address the reference objective of minimising trauma for all victims of crime.
- **Efficiency and sustainability:** Although VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria have submitted that the VOCAT model is efficient and sustainable,¹¹³ the Commission considers that a reformed VOCAT model still raises issues of sustainability and efficiency in the long term. As discussed above, the need for court appearances to take precedence over VOCAT matters ultimately conflicts with the beneficial and timely responses required to meet victims' needs under a state-funded financial assistance scheme. Although such prioritisation may be operationally necessary, it disadvantages victims of crime who often require timely assistance.¹¹⁴ Given the increased pressure on the court, particularly in its criminal jurisdiction,¹¹⁵ the Commission considers that the efficiency and sustainability of a judicial model, subsidised by Victoria's busiest court, is no longer the most efficient and sustainable model for the delivery of a state-funded financial assistance scheme.
- **Simple/easy to understand and reduces reliance on legal representation:** The Commission is concerned that even a reformed judicial model would remain complex for a victim to navigate and would likely increase the need for victims to obtain legal representation in most cases. The Commission acknowledges that the proposal by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria to establish a central registry or 'hub', along with introducing case management,¹¹⁶ may result in the process being simpler and easier for some victims to understand. However, the Commission is concerned that the model would still require victims to have legal representation, raising issues of fairness if victims were not legally represented.

106 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
107 For example, in New South Wales, timeframes have decreased from around two years to an average of 26 days and in Queensland, decisions are typically made in three weeks for funeral and interim applications, three months for primary victims and six months for secondary victims. See Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46 and Department of Justice (NSW), *Annual Report 2015–16* (2016) 24.
108 See, eg, Submissions 14 (Inner Melbourne Community Legal), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
109 Consultations 4 (Victim, Witness and Court Support), 27 (Victim Survivors' Advisory Council).
110 Submission 31 (Victorian Council of Social Service); Consultation 5 (Victims of Crime Commissioner, Victoria).
111 Submission 14 (Inner Melbourne Community Legal).
112 Submission 8 (Victim Survivors' Advisory Council).
113 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
114 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 69.
115 Magistrates' Court of Victoria, *Annual Report 2015–16* (2016) 13.
116 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

- 8.115 Accordingly, and despite recognising the improvements that may be achieved through a reformed judicial model as outlined above, the Commission nevertheless considers that the majority of reference objectives would not be sufficiently met under the proposed reformed judicial model.

Meeting reference objectives—an independent, dedicated and specialised decision maker

- 8.116 Earlier in this chapter the Commission noted that it appeared likely that all key reference objectives could be met by an administrative model using an independent, dedicated and specialised decision maker. This included key objectives of:
- timely
 - consistent and predictable
 - minimise trauma
 - simple and easy to understand
 - reduce reliance on lawyers
 - efficient and sustainable for the state.
- 8.117 The Commission noted that the independence of the decision maker under this model would also likely increase fairness and equity, with centralised decision making, specialisation and dedicated resources improving consistency and predictability for victims and being more conducive to timely decision making, vital to the effectiveness of any scheme and a victim’s recovery.
- 8.118 The Commission also considers that a significant advantage of the independent, dedicated and specialised decision maker model is that it would enable the decision maker to conduct private hearings to provide victims with a forum to be heard and acknowledged by the state. In this regard, this model can incorporate elements of victim validation which stakeholders considered important from the existing scheme.
- 8.119 The Commission considers that the advantages of an independent and dedicated, specialised decision maker model are:
- a victim-centred, trauma-informed process designed with victims’ needs and recovery as paramount
 - A beneficial approach rather than a focus on evidentiary requirements, court processes and adversarial approaches
 - establishing victims’ financial assistance as a specialist field of expertise, with an independent, dedicated, specialist decision maker supported by an independent office of specially trained case managers, specialising in victim recovery and support needs, with further opportunity to establish specialist approaches based on complexity or victims’ needs
 - improved accessibility through better integration with existing government-administered victim support programs, to improve referral pathways and improve the number of victims accessing the scheme
 - in-built, specialist case management reducing reliance on lawyers and assisting victims to meet evidentiary and documentation requirements
 - timely decision making, enabling triaging for immediate financial assistance through dedicated specialist teams and resources, using a case management approach to assess victim needs holistically, allocate urgent supports quickly, and access longer-term supports more easily.

- improved consistency and predictability, with centralised, specialised decision making combined with mandatory training/education requirements and increased accountability and reporting mechanisms, including bringing the provision of financial assistance within the scope of the *Victims' Charter Act 2006* (Vic)¹¹⁷
- efficiency and sustainability for the state, reserving magistrates and other court staff for Magistrates' Court business in a climate of significantly increased demand
- providing a forum to be heard and acknowledged in a victim-centred, trauma-informed environment by someone with standing in the community.

Commission's conclusions and recommendations

- 8.120 The proposed judicial model remains afflicted by a number of significant issues. In contrast, the independent, dedicated and specialist decision maker model has the potential to more effectively deliver assistance to victims as required by the supplementary terms of reference. Significantly, it is designed to meet victims' legitimate needs in accordance with contemporary insights and understanding. It is freed from past concepts of offender involvement,¹¹⁸ which may be appropriate for court processes, but which are not necessary for modern administrative processes for victim assistance.
- 8.121 Accordingly, the Commission considers that the most effective model to deliver Victoria's state-funded financial assistance scheme is through the establishment of an independent and dedicated, specialised decision maker to oversee Victoria's state-funded financial assistance scheme (the proposed model).
- 8.122 The Commission considers that this proposed model would not only provide for administrative efficiencies, but would incorporate similar victim participation and recognition elements as provided for under the existing scheme, primarily through the ability to conduct victim hearings.¹¹⁹ In this context, the Commission considers that the new decision maker's power to conduct hearings is a central component of the Commission's proposed reforms and vision for a model that meets victims' pecuniary and non-pecuniary needs. Victim recognition under the proposed model is discussed in Chapter 10.
- 8.123 The next part of this chapter discusses the proposed model, including how the Commission has incorporated stakeholder views into the proposed new model's design.

The proposed model

- 8.124 The Commission considers that the proposed model provides a unique opportunity to design a purpose-built, victim-centred, trauma-informed model of state-funded financial assistance for crime victims.
- 8.125 In this context, the Commission has the unique opportunity to consider learnings from the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, which used an innovative trauma-informed approach, as well as integrating aspects of Victoria's existing scheme that work well.
- 8.126 The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse has highlighted the advantages of creating a purpose-built, victim-centred model approach from the ground up: 'We had the advantage of creating processes and a culture from scratch, a rare opportunity and not one afforded to most courts or tribunals.'¹²⁰

117 It is anticipated that the independent agency/decision maker would be a 'victims' services agency' for the purposes of the *Victims' Charter Act 2006* (Vic) s 3(1).

118 Offender involvement in VOCAT matters as currently required under the VOCAA is considered further in Chapters 5 and 10.

119 Some administrative models still provide opportunity for hearings before administrative decision makers. For example, in Tasmania, victims may elect to attend a hearing before a Criminal Injuries Compensation Commissioner: *Victims of Crime Assistance Act 1976* (Tas) s 7. The legislative basis for such hearings is similar to the current legislative basis for hearings under the VOCAA, in which such hearings are legislatively prescribed as conducted for the purposes of decision making, rather than for victim acknowledgment or validation. See *Victims of Crime Assistance Act 1976* (Tas) s 7 which refers to the 'Procedure for determining applications for awards'.

120 Carolyn Ford, 'Commission of Care' (2018) 92(1/2) *Law Institute Journal* 20.

- 8.127 In assessing whether the proposed model can incorporate beneficial elements from the existing scheme, the Commission notes that stakeholders supporting the retention of the existing scheme primarily focused on the importance of:
- victims having the right to legal representation
 - victims being given the opportunity to be heard or acknowledged.
- 8.128 The Commission considers it important that victims have a right to legal representation during the financial assistance process, and it is not the Commission's intention that this right be removed. Legal representation is discussed in Chapter 10.
- 8.129 Similarly, the Commission considers it important that victims have the opportunity to be acknowledged and heard. The Commission considers this can be provided for under the proposed model through victim-centred, trauma-informed private hearings. In the Commission's view, such forums will provide victims with an opportunity for validation and acknowledgment by the state, and will ensure victims are given a voice. Victim recognition is also discussed in Chapter 10.

Establishing an independent and dedicated, specialised decision maker

- 8.130 In recognition of the views expressed in written submissions and during consultations, including with victims and their advocates, the Commission considers that:
- a new model of state-funded financial assistance should be introduced to more effectively deliver assistance to victims of crime in Victoria
 - the most effective way for delivering Victoria's state-funded financial assistance scheme is an independent and dedicated decision maker.

Recommendation

- 1** To enable state-funded financial assistance to be more effectively delivered to all victims of crime, a new state-funded financial assistance scheme should be established, led by an independent and dedicated decision maker whose powers and functions are prescribed in legislation.

A new Act

- 8.131 Given the Commission's recommendation that a new model of state-funded financial assistance should be introduced, and that the new scheme should be delivered through the establishment of an independent and dedicated, specialised decision maker, this part of the chapter considers whether there is a need for a new Act to support these significant changes.
- 8.132 While the Commission did not specifically seek stakeholder views on whether the VOCAA should be retained, a number of stakeholders commented that the VOCAA was outdated. For example, the Aboriginal Family Violence Prevention & Legal Service Victoria submitted that the VOCAA was not designed to respond to family violence and 'is in dire need of reform'.¹²¹ Similarly, Domestic Violence Victoria and Women's Legal Service said the Act is no longer 'fit for purpose'.¹²²
- 8.133 Other stakeholders noted that a number of provisions of the VOCAA were outdated and no longer reflected community standards. For example, the Commission was told that the

- inclusion of provocation in section 54 of the VOCAA was outdated¹²³ and 'out of step' with community standards.¹²⁴ Similarly, a number of stakeholders told the Commission that the 'related victim' category does not recognise contemporary notions of family.¹²⁵
- 8.134 Other stakeholders noted the complexity of the VOCAA.¹²⁶
- 8.135 The VOCAA was enacted in 1996. Since that time, there have been significant reforms introduced in Victoria relevant to victims of crime. These include the introduction of the *Family Violence Protection Act 2008* (Vic), the *Victims' Charter Act 2006* (Vic) and the *Victims of Crime Commissioner Act 2015* (Vic). In addition, during this time, community attitudes and values have changed and with them, as recognised by VOCAT, notions about what constitutes a violent crime and also the ways in which a person can be a crime victim.¹²⁷
- 8.136 With the exception of the *Victims of Crime Amendment Act 2000* (Vic) which introduced new lump sum awards of special financial assistance for primary victims who suffer 'significant adverse effects' as a direct result of an act of violence,¹²⁸ the VOCAA has not been significantly altered since its inception.¹²⁹ As a consequence, and as discussed later in this report, the Commission recommends significant reform to the substantive and operational provisions of the VOCAA.
- 8.137 The Magistrates' Court of Victoria and VOCAT have noted that amending the VOCAA is a complex task because modernising, clarifying or streamlining some provisions will affect other sections in the VOCAA, as well as other legislation, and may result in unintended consequences.¹³⁰
- 8.138 The Commission agrees that amending the VOCAA to reflect a new model of state-funded financial assistance would be challenging. It would require redrafting of the VOCAA to make marked departures from its current form. Given the substantive nature of the legislative and procedural reforms recommended by the Commission in this report, as well as the Commission's overarching recommendation for the establishment of a new model for the state-funded financial assistance scheme, the Commission therefore concludes it would be inappropriate and impractical to retain the existing VOCAA.
- 8.139 Accordingly, the Commission considers that the VOCAA should be repealed and replaced with an Act (the 'proposed Act') establishing the new state-funded financial assistance scheme and incorporating the legislative reforms recommended in this report.
- 8.140 In the Commission's view, the proposed new Act would benefit from the use of plain language to address some of the stakeholder concerns outlined above in relation to the VOCAA's complexity. The Commission notes the Victorian Office of the Chief Parliamentary Counsel's *Plain English Policy*, which states that the 'meaning of a law must be clear and legally certain if it is to achieve its purpose'. The Commission also notes that the Office of the Chief Parliamentary Counsel's policy is to use plain language in the drafting of legislation.¹³¹

123 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 3 (Legal Professionals—Community Legal Centres).

124 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

125 Submissions 15 (Merri Health Victims Assistance Program), 31 (Victorian Council of Social Service); Consultation 4 (Victim, Witness and Court Support).

126 See, eg, submission 23 (Johnstone & Reimer Lawyers) submitting that the complexity of the VOCAA requires judicial decision making; Consultation 14 (Chief Magistrate's Family Violence Taskforce) where some members of the Chief Magistrate's Family Violence Taskforce told the Commission that the model of assistance is intrinsically linked with the complexity of the VOCAA's legislative requirements.

127 Victims of Crime Assistance Tribunal, *Annual Report 2014–15* (2015) 23.

128 *Victims of Crime Assistance (Amendment) Act 2000* (Vic) s 1(a).

129 Although as VOCAT and the Magistrates' Court of Victoria acknowledge in Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal), the VOCAA has been amended in 'a piecemeal fashion'.

130 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

131 Office of the Chief Parliamentary Counsel (Vic), *Plain English Policy* (accessed 31 May 2018) <www.legislation.vic.gov.au/domino/web_notes/LDMS/pubhome.nsf/KW/OCPC!OpenDocument&ExpandSection=5,1#_Section5>. The Commission uses the terms 'plain language' and 'plain English' throughout this report. While 'plain language' recognises that information may be provided in languages other than English, and may therefore be more inclusive, 'plain English' is still used by some government departments and stakeholders, so the Commission adopts this terminology where appropriate.

Recommendation

- 2** The *Victims of Crime Assistance Act 1996 (Vic)* should be repealed and replaced with an Act establishing the new state-funded financial assistance scheme and incorporating the legislative reforms recommended in this report.

A new scheme

- 8.141 As discussed above, the Commission considers that the most effective way to deliver Victoria's state-funded financial assistance scheme is through the establishment of an independent and dedicated decision maker to oversee Victoria's state-funded financial assistance scheme (the proposed model).
- 8.142 The proposed model is the Commission's conceptual framework for how to deliver assistance most effectively to victims of crime.
- 8.143 Having determined the most effective model, the Commission has then recommended that a new state-funded financial assistance scheme be established, and that the *VOCCA* be repealed and replaced with an Act establishing the new scheme.
- 8.144 Hereafter in this report, the Commission refers to:
- the 'proposed Act' as the Act to establish the 'proposed scheme'
 - the 'proposed scheme' as the state-funded financial assistance scheme for victims of crime provided for by the 'proposed Act'
 - the 'existing scheme' as the state-funded financial assistance scheme established under the *VOCAA* and administered by the *VOCAA*.

The decision maker in the proposed victims of crime financial assistance scheme

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9. The decision maker in the proposed victims of crime financial assistance scheme

Introduction

- 9.1 In Chapter 8, the Commission recommended that to deliver assistance to victims of crime more effectively, a new state-funded financial assistance scheme (the proposed scheme) should be established, led by an independent, dedicated and specialised decision maker.
- 9.2 Additionally, the Commission recommended that the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) be repealed and replaced with a new Act (the proposed Act) which establishes the proposed new decision maker and scheme and incorporates the legislative reforms recommended in this report.
- 9.3 This chapter makes recommendations relating to the establishment of the proposed scheme decision maker. This includes recommendations relating to:
- the decision maker's appointment, functions and powers, and
 - the composition of the decision maker's office to ensure the decision maker is effectively supported in the exercise of their powers.

An independent, dedicated and specialised decision maker

- 9.4 This section considers the approaches adopted in other Australian states and territories, as well as the existing Victorian context. This part also considers stakeholder views on the functions of the proposed scheme decision maker.

Approaches in other jurisdictions

- 9.5 In the Australian Capital Territory, the Victims of Crime Commissioner manages both the victims' services scheme and the financial assistance scheme.¹ The ACT Victims of Crime Commissioner also has a range of broader victims' advocacy functions.²
- 9.6 Similarly, in New South Wales, the functions of the NSW Commissioner of Victims Rights include determining applications for financial assistance and victim support, in addition to performing a broad range of victims' advocacy functions.³
- 9.7 The Commission has been told by both the ACT Victims of Crime Commissioner and the NSW Commissioner of Victims Rights of the importance of their advocacy functions in enhancing the operation of their jurisdictions' financial assistance schemes by raising awareness of entitlements for victims as well as employing a beneficial approach to financial assistance to best support victims of crime.⁴

1 *Victims of Crime Act 1994* (ACT) s 11 and *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 31(1).

2 See *Victims of Crime Act 1994* (ACT) s 11.

3 *Victims Rights and Support Act 2013* (NSW) s 10(1).

4 Consultations 21 (*Victim Support ACT and the Victims of Crime Commissioner, ACT*), 22 (*Victims Services, NSW and the Commissioner of Victims Rights, NSW*).

The Victorian context

- 9.8 Victoria has a Victims of Crime Commissioner established as an independent office under the *Victims of Crime Commissioner Act 2015* (Vic).
- 9.9 The Victorian Victims of Crime Commissioner is appointed by the Governor-in-Council, on the recommendation of the Attorney-General.⁵ The Commissioner is supported by a small office comprising staff of the Department of Justice and Regulation.⁶
- 9.10 Similarly to the ACT Victims of Crime Commissioner and the NSW Commissioner of Victims Rights, the Victorian Victims of Crime Commissioner has a number of specified functions.⁷ These include advocating for the recognition, inclusion, participation and respect of victims of crime by government departments, bodies responsible for conducting public prosecutions and Victoria Police.⁸
- 9.11 Unlike the Australian Capital Territory and New South Wales, the functions of the Victorian Victims of Crime Commissioner do not include administering a state-funded financial assistance scheme.

Responses

Dedicated and specialised

- 9.12 A number of stakeholders said that only dedicated and specialised decision makers should make financial assistance decisions.⁹ While these views were expressed in the context of the existing scheme, it is evident that many stakeholders consider that decision making in relation to financial assistance should be a specialised area of expertise, regardless of model.
- 9.13 Stakeholders also emphasised the need for the decision maker to undertake appropriate training to ensure their approaches were trauma-informed. For example, the Victorian Council of Social Service submitted that decision makers should receive regular training on family violence, trauma-informed care and working with victims of crime.¹⁰
- 9.14 Victim representatives of the Victims of Crime Consultative Committee also told the Commission that all victim support, including financial assistance, needed to be provided by trained, specialist professionals who recognise and understand trauma.¹¹ Safe steps Family Violence Response Centre emphasised the findings of the Royal Commission into Family violence, that only specially trained professionals should work with victims of family violence.¹² Similarly, the Law Institute of Victoria, in the context of the existing scheme, submitted that all magistrates in the Victims of Crime Assistance Tribunal (VOCAT) jurisdiction should undertake victim training.¹³
- 9.15 In addition, stakeholders emphasised the need for decision makers to undertake mandatory cultural awareness and trauma training, including how to engage with intergenerational trauma.¹⁴

5 *Victims of Crime Commissioner Act 2015* (Vic) s 7(1).

6 Victims of Crime Commissioner (Vic), *Annual Report 2015–2016* (2016) 9.

7 *Victims of Crime Commissioner Act 2015* (Vic) s 13(1).

8 *Ibid* s 13(1)(a).

9 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 49 (Victims of Crime Commissioner, Victoria); Consultations 2 (Legal Professionals—Private Practice), 6 (Victims' Advocacy Organisations), 20 (Academics), 25 (Children's Court of Victoria).

10 Submission 31 (Victorian Council of Social Service). Training of decision makers and staff is also discussed in Chapter 10.

11 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

12 Submission 37 (safe steps Family Violence Response Centre).

13 Submission 51 (Law Institute of Victoria).

14 Submissions 39 (Victorian Aboriginal Legal Services), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

Standing and authority

- 9.16 A number of stakeholders considered it vital that if a non-judicial decision maker was used, the decision maker have the authority and standing in the community to acknowledge victims.¹⁵ For example, some legal professionals said commissioners are authoritative figures¹⁶ and might provide a more trauma-informed response than a magistrate.¹⁷
- 9.17 Similarly, some victims advocates suggested 'government officials',¹⁸ 'administrators' or 'commissioners' would have sufficient standing and authority.¹⁹ Safe steps Family Violence Response Centre specifically recommended the decision maker be Victoria's Victims of Crime Commissioner:
- we recommend a predominantly administrative system that maintains a hearing option for victims conducted by the Victims of Crime Commissioner. That way, victims could elect to have their matter heard in a formal setting if this was important to them.²⁰
- 9.18 A number of stakeholders agreed that acknowledgment could be provided by senior government officials²¹ or a commissioner,²² provided the acknowledgment comes from someone with standing²³ and occurs in a meaningful²⁴ and respectful way.²⁵

Connection with victims' services and improving awareness

- 9.19 The location of the proposed scheme is important, given some stakeholders have suggested victim support in Victoria is 'fragmented'²⁶ and results in inefficiencies because various government agencies or programs overlap.²⁷
- 9.20 Some stakeholders told the Commission that the scheme needs to have appropriate connections with victim support, as more 'holistic' approaches lead to improved outcomes for victims.²⁸
- 9.21 Raising community and support sector awareness of state-funded financial assistance was highlighted as a key function of the respective administrative schemes' decision makers in both New South Wales and the Australian Capital Territory.²⁹
- 9.22 The scheme decision maker in New South Wales—the NSW Commissioner of Victims Rights—told the Commission that part of her role is to advocate on behalf of victims and to raise awareness of the supports available with victim support agencies on the ground. This includes raising awareness with support services that specialise in domestic violence and sexual assault, as well as organisations that work with the LGBTIQ community, the Aboriginal community, multicultural communities and the disability sector.³⁰
- 9.23 Similarly, the ACT Victims of Crime Commissioner told the Commission that community engagement activities have resulted in increased awareness of the scheme, particularly among key support and community agencies following completion of around 120

15 Consultations 12 (Regional Consultation—Mildura Victim Support Agencies), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

16 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

17 Consultation 13 (Regional Consultation—Mildura Legal Professionals).

18 Consultation 6 (Victims' Advocacy Organisations).

19 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 31 (Victorian Council of Social Service).

20 Submission 37 (safe steps Family Violence Response Centre).

21 Submission 49 (Victims of Crime Commissioner, Victoria); Consultations 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 14 (Chief Magistrate's Family Violence Taskforce), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

22 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre).

23 Consultations 12 (Regional Consultation—Mildura Victim Support Agencies), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

24 Consultation 4 (Victim, Witness and Court Support).

25 Consultation 7 (Family Violence and Advocacy Organisations).

26 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

27 Consultation 5 (Victims of Crime Commissioner, Victoria).

28 Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

29 Consultations 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

30 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

community engagement activities, along with associated website and radio promotion activities. The ACT Victims of Crime Commissioner said that the ability to undertake comprehensive community engagement activities was one of the benefits of moving from a court-based model to an administrative model.³¹

Discussion and recommendations

- 9.24 Government services for victims of crime aim to be ‘victim-centred’.³² However, accessing or navigating victim support in Victoria is often not straightforward. In particular, the services and supports available to victims can be fragmented and difficult to navigate for those without the time and resources.
- 9.25 For this reason, the Commission considers that the proposed scheme should not add to the victims’ services and functions already available in Victoria. Instead the Commission considers that the proposed scheme should enhance existing services rather than create additional complexity.
- 9.26 As noted above, views in consultations emphasised the importance of the decision maker being specialised, dedicated and trauma-informed, with sufficient standing and authority in the community to acknowledge victims of crime on behalf of the state.
- 9.27 The models in New South Wales and the Australian Capital Territory also illustrate the benefits of having an independent financial assistance decision maker who also has a broader victims’ advocacy role. In particular, the Commission notes the complementary nature of managing a financial assistance scheme with a beneficial approach, within an agency whose mandate is to provide services to victims, underpinned by legislatively prescribed functions which include advocating for the interests of victims.³³
- 9.28 The Commission also notes the observation in the Department of Justice and Regulation consultation paper, *A Victorian Redress Scheme for Institutional Child Abuse*, that redress decision makers should be both independent and have sufficient expertise and judgement to determine redress claims.³⁴
- 9.29 Given the *Victims of Crime Commissioner Act 2015* (Vic) already establishes an independent statutory officer whose main function is to advocate for victims of crime,³⁵ the Commission considers that it would be appropriate for the proposed scheme to be administered by Victoria’s Victims of Crime Commissioner.
- 9.30 The Commission considers that enabling the Victims of Crime Commissioner to make financial assistance decisions would have the following advantages:
- The Commissioner has standing and authority to provide meaningful acknowledgment to victims of crime.
 - The role of the Victims of Crime Commissioner is already established as an independent statutory appointment dedicated to, and specialising in, victims’ advocacy and support.
 - Enhancing the Commissioner’s existing statutory role complements Victoria’s existing victims’ support framework, and avoids further fragmentation or duplication that would be created by the introduction of a new office or function.
 - The Commissioner’s powers and functions would be expressly provided for under the proposed Act, thereby providing increased transparency in decision making, and providing for appropriate review and complaints mechanisms to improve such

31 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

32 See, eg, Department of Premier and Cabinet (Vic), *Victim-centred Justice* (2016) <www.vic.gov.au/familyviolence/our-10-year-plan/transforming-our-approach/victim-survivors-are-safe-and-supported/victim-centred-justice.html>.

33 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

34 Department of Justice and Regulation (Vic), *A Victorian Redress Scheme for Institutional Child Abuse*, Public Consultation Paper (5 August 2015) 19.

35 Victims of Crime Commissioner (Vic), *The Victims of Crime Commissioner Act 2015* (2017) <www.victimsofcrimecommissioner.vic.gov.au/legislation-and-victims/the-victims-of-crime-commissioner-act-2015>.

transparency, including bringing the provision of financial assistance within the *Victims' Charter Act 2006* (Vic).

- 9.31 The Commission considers that the proposed Act should establish the Victims of Crime Commissioner, appointed pursuant to section 7 of the *Victims of Crime Commissioner Act 2015* (Vic) as the proposed scheme decision maker. This provision could be modelled on the approach in the Australian Capital Territory where the relevant financial assistance Act refers to the Commissioner as the decision maker, and defines the Commissioner with reference to their appointment pursuant to the *Victims of Crime Act 1994* (ACT).³⁶
- 9.32 To ensure greater transparency in the selection and appointment process, and to ensure that the person appointed is a person of appropriate standing and is suitably qualified, the Commission considers that section 7 of the *Victims of Crime Commissioner Act 2015* (Vic) should be amended to provide that the Victims of Crime Commissioner, as the scheme decision maker, be an appointment made by the Governor-in-Council on the recommendation of the Attorney-General, following public advertisement, and must be a person of appropriate standing and suitably qualified.
- 9.33 The Commission notes, for example, that the relevant Tasmanian Act requires that the minister only appoint Australian lawyers of at least five years standing to be Criminal Injuries Compensation Commissioners.³⁷

Recommendations

- 3** The proposed Act should establish the scheme's decision maker as the Victims of Crime Commissioner, appointed pursuant to section 7 of the *Victims of Crime Commissioner Act 2015* (Vic).
- 4** Section 7 of the *Victims of Crime Commissioner Act 2015* (Vic) should be amended to provide that the Victims of Crime Commissioner, as the scheme decision maker, should be appointed following public advertisement, and should be a person of appropriate standing and be suitably qualified.

Functions of the Victims of Crime Commissioner

- 9.34 The Victims of Crime Commissioner has a number of specified functions under the *Victims of Crime Commissioner Act 2015* (Vic). These include:
- to advocate for the recognition, inclusion, participation and respect of victims of crime by government departments, bodies responsible for conducting public prosecutions and Victoria Police
 - to carry out inquiries on systemic victim of crime matters
 - to report to the Attorney-General on any systemic victim of crime matter
 - to provide advice to the Attorney-General and government departments and agencies regarding improvements to the justice system to meet the needs of victims of crime.³⁸
- 9.35 Given the Commission's recommendation above that the scheme's decision maker should be the Victims of Crime Commissioner, the Commission considers it necessary that the legislative functions and powers of the Victims of Crime Commissioner be expanded to include the exercise of the functions and powers necessary to administer the proposed Act and scheme.

36 *Victims of Crime Act 1994* (ACT) s 11 and *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 31(1).
37 *Victims of Crime Assistance Act 1976* (Tas) s 2A.
38 *Victims of Crime Commissioner Act 2015* (Vic) s 13(1).

- 9.36 To ensure that there is clarity and transparency regarding the powers and functions of the decision maker, and to ensure the effective administration of the proposed scheme, the Commission considers that similarly to the approaches taken in the Australian Capital Territory and New South Wales, the scheme decision maker's functions and powers under the proposed Act should be expressly stated as:
- conducting victim conferences and providing recognition statements for the purposes of hearing and acknowledging, on behalf of the state, the impact of the criminal act on a victim
 - administering the scheme for the provision of financial assistance to victims
 - receiving applications for financial assistance
 - deciding applications for financial assistance
 - paying amounts of financial assistance
 - reviewing decisions made by other scheme staff
 - administering the repayment and recovery processes for payments of financial assistance made
 - providing information to victims about the Act and the support services and assistance available to assist recovery from the criminal act
 - publishing guidance materials and resources for victims, support service providers and legal practitioners in relation to the Act
 - conducting education and training, public awareness activities and research in relation to the Act
 - collecting and publishing annual data and information in relation to the operation of the Act.
- 9.37 The Commission considers that these functions and powers should be provided in either the *Victims of Crime Commissioner Act 2015* (Vic), by amendment to section 13, or as a provision of the proposed Act. The rationale for these functions and powers exercisable by the decision maker are discussed further below.
- 9.38 In addition, and to ensure the decision maker's functions and powers are exercised appropriately, the proposed Act should provide that any person in exercising any functions or powers required under the Act must have regard to the purpose and objectives of the Act, its guiding principles, and the *Victims Charter Act 2006* (Vic). The purpose and objectives of the proposed Act and its guiding principles are discussed in Chapter 11.

Recommendations

- 5 The functions and powers of the Victims of Crime Commissioner should be expanded to include the functions and powers necessary to administer the proposed Act and scheme. These functions and powers could either be expressly provided in the *Victims of Crime Commissioner Act 2015* (Vic) by amendment to section 13, or as a provision of the proposed Act.
- 6 The proposed Act should provide that the functions and powers of the scheme decision maker are to:
 - (a) conduct victim conferences for the purposes of hearing and acknowledging, on behalf of the state, the victim and the impact of the criminal act on the victim
 - (b) provide eligible victims with a recognition statement for the purposes of acknowledging, on behalf of the state, the victim and the impact of the criminal act on the victim
 - (c) administer the scheme for the provision of financial assistance to eligible victims
 - (d) receive applications for financial assistance
 - (e) decide applications for financial assistance
 - (f) pay amounts of financial assistance
 - (g) review decisions made by other scheme staff
 - (h) administer the repayment and recovery processes for payments of financial assistance made
 - (i) provide information to victims about the Act and the support services and assistance available to assist recovery from the criminal act
 - (j) publish guidance materials and resources for victims, support service providers and legal practitioners in relation to the Act
 - (k) conduct education and training, public awareness activities and research in relation to the Act
 - (l) collect and publish annual data and information in relation to the operation of the Act.
- 7 The proposed Act should provide that any person in exercising any functions or powers required under the Act must have regard to the purpose and objectives of the Act, its guiding principles, and the *Victims' Charter Act 2006* (Vic).

Resourcing the Office of the Victims of Crime Commissioner

- 9.39 The Office of the Victims of Crime Commissioner is currently resourced by two full-time staff members.³⁹ Using the staffing numbers employed by other Australian jurisdictions with administrative models as a guide, it is clear that additional staff would be required to support the expansion of the office of the Victims of Crime Commissioner to administer the proposed scheme as recommended by the Commission.⁴⁰
- 9.40 In the submission from the Victims of Crime Commissioner to this review, approximate costings were provided in relation to staffing required to implement an administrative scheme in Victoria, although costings did not specifically relate to such staff being part of the Office of the Victims of Crime Commissioner.⁴¹
- 9.41 There were 7312 applications lodged with VOCAT in 2016–17.⁴² In New South Wales, where a similar number of applications were lodged in the 2016–17 financial year, the administrative scheme was overseen by around 22 assessment staff.⁴³ Victim Assist Queensland currently has 12 assessors and three assessment teams processing around 2500 applications a year.⁴⁴ In Western Australia, the Office of Criminal Injuries Compensation has three full-time assessors and 17.2 full-time equivalent administrative employees processing around 3313 claims a year.⁴⁵
- 9.42 Cost implications of the proposed scheme are considered in Chapter 18. However, the Commission considers it vital that the Commissioner be provided with appropriate staffing and funding to administer the proposed Act and scheme. The Commission notes that section 16 of the *Victims of Crime Commissioner Act 2015* (Vic) requires the Secretary of the Department of Justice and Regulation to ensure that the Victims of Crime Commissioner is provided with any employees that are necessary to assist the Commissioner in performing the Commissioner’s functions.
- 9.43 The Commission considers that the Victims of Crime Commissioner should be provided with the staffing and funding necessary to enable the Commissioner to properly perform their functions, including the function of administering the proposed scheme.

Recommendation

- 8** The Victims of Crime Commissioner should be provided with the staffing and funding necessary to properly perform their functions, including the function of administering the new state-funded financial assistance scheme, consistent with section 16 of the *Victims of Crime Commissioner Act 2015* (Vic).

- 9.44 To ensure the Victims of Crime Commissioner can be properly assisted in the exercise of their functions and powers in relation to the proposed Act and scheme, the Commission considers the Commissioner should also be provided with the legislative power to delegate appropriate functions to suitably qualified staff. This will help to ensure the proposed scheme remains efficient and sustainable, and significantly for victims, that assistance is timely. Delegation will also allow for increased specialisation.

39 An Executive Assistant and a Senior Research and Policy Adviser: Victims of Crime Commissioner (Vic), *Organisational Structure* (2018) <www.victimsofcrimecommissioner.vic.gov.au/about-us/organisational-structure-0>.

40 Chapter 18 further discusses costs associated with establishing the proposed scheme, and includes details of staffing in other jurisdictions. Submission 49 (Victims of Crime Commissioner, Victoria).

42 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 4.

43 Submission 49 (Victims of Crime Commissioner, Victoria).

44 Consultation 1 (Victim Assist Queensland).

45 Office of Criminal Injuries Compensation, Department of the Attorney General Western Australia, *Chief Assessor’s Report 2016/17* (2017) 4.

- 9.45 Recommendation 6 above provides that one of the decision maker's functions is to conduct victim conferences. As discussed in Chapter 10, victim conferences are a central component of the proposed scheme and are designed to meet victims' pecuniary and non-pecuniary needs, including providing appropriate victim recognition and acknowledgment. It is important that victim conferences are responsive, timely and trauma-informed. Specialisation is also crucial. The Commission acknowledges it would be difficult for the scheme decision maker alone to conduct all victim conferences and to perform other key functions without appropriate support and assistance.
- 9.46 The Commission therefore considers that the scheme decision maker should be supported by deputy decision makers, who are subject matter specialists, who may be called on as required by the scheme decision maker to perform key functions under delegation, including conducting victim conferences. This would ensure victim conferences can be appropriately prioritised and conducted by specifically skilled decision makers who are subject matter experts in areas such as child sexual abuse, sexual assault, family violence or homicide. This type of approach was also discussed in the Department of Justice and Regulation consultation paper, *A Victorian Redress Scheme for Institutional Child Abuse*, where it was emphasised that a mix of expertise in decision making would be highly beneficial in relation to assessment of redress claims.⁴⁶
- 9.47 Given the significance of victim conferences, the Commission also considers it crucial for decision makers to have appropriate standing and authority. In the Commission's view, the proposed Act should require that deputy decision makers be appointed by the Governor-in-Council, on the recommendation of the Attorney-General, following public advertisement, and are to be persons of appropriate standing and suitably qualified.
- 9.48 The Commission does not envisage that these deputy decision maker positions would be full-time positions. Instead, appropriately qualified decision makers could be appointed on a part-time basis, and be called on to perform key functions when required. This will help to ensure the proposed scheme remains efficient and sustainable.
- 9.49 The Commission considers that the proposed scheme decision maker and deputy decision makers should also be supported by appropriately qualified staff, including case managers and administrative staff. Case management under the proposed scheme is discussed in Chapter 10.

Recommendation

- 9** The proposed Act should provide that the scheme decision maker be supported by:
- (a) deputy decision makers, appointed by the Governor-in-Council on the recommendation of the Attorney-General following public advertisement, who are suitably qualified and are subject matter specialists of appropriate standing
 - (b) appropriately qualified case managers
 - (c) other staff as required for the efficient and effective operation of the Act.

Rural and regional presence

9.50 The existing scheme has a wide geographic spread, with VOCAT operating out of each of the 51 Magistrates' Court locations across Victoria. While this enables better physical access to VOCAT hearings for rural and regional victims, a number of stakeholders raised concerns about the operation of VOCAT in regional areas. In particular, inconsistency in decision making was described as a particular issue in rural and regional areas.⁴⁷ In their written submission, VOCAT, the Magistrates' Court of Victoria and Children's Court of Victoria submitted that under the existing scheme there:

is a risk of inconsistent decision making in relation to awards and interpretation of broad areas of discretion for multiple decision makers with varying levels of VoCAT experience, operating across 51 locations. This can foster unrealistic expectations on the part of victims about likely award outcomes, and the perception that the system is not fair.⁴⁸

9.51 VOCAT, the Magistrates' Court of Victoria and Children's Court of Victoria also submitted that the 'diffused' operating model of the existing scheme created not only administrative inefficiencies, but raised challenges in relation to sufficient specialisation in VOCAT matters and oversight of practice.

9.52 The Commission is mindful that replicating this diffused model may result in similar inefficiencies and inconsistency in decision making.

9.53 In the Commission's view, the expanded office of the Victims of Commissioner should retain a centralised metropolitan office—to provide for centralisation of administrative functions, resources and expertise. However, the Commission is also considers it important the proposed scheme has some rural and regional presence to ensure all victims of crime, regardless of their geographic location, have access to the proposed scheme.

9.54 As discussed in Chapters 10 and 17 the Commission considers there are a range of measures and initiatives that should be implemented to increase access for rural and regional victims of crime. These should include the implementation of co-location or outreach programs in rural and regional areas as well as the decision maker conducting victim conferences⁴⁹ in rural and regional locations. Depending on demand, such rural and regional victim conferences could be conducted at an individual victim's request, in a specific rural or regional location, or on a rotating schedule throughout the year.

Delegation of powers

9.55 To ensure efficient and effective operation of the proposed Act and scheme, the Commission considers that the Act should empower the Victims of Crime Commissioner, as the scheme's decision maker, to delegate any of their functions or powers under the proposed Act, with the exception of the power to conduct victim conferences, to any appropriately qualified member of staff.

9.56 The Commission also considers that the proposed Act should provide that the scheme's decision maker may delegate the power to conduct victim conferences and issue recognition statements⁵⁰ only to deputy decision makers, and not to any other scheme staff. This is in recognition of the importance of victim recognition, and the need for victim conferences to be conducted only by suitably qualified persons of sufficient standing and authority, to ensure they are victim-centred, trauma-informed and viewed with appropriate importance.

47 Consultations 4 (Victim, Witness and Court Support), 12 (Regional Consultation – Mildura Victim Support Agencies), 16 (Regional Consultation – Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice).

48 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

49 The purpose and operation of victim conferences under the proposed Scheme are discussed in Chapter 10.

50 The purpose and operation of both victim conferences and recognition statements under the proposed scheme are discussed in Chapter 10.

Recommendation

- 10** The proposed Act should provide that (other than the power of delegation) the scheme decision maker may delegate:
- (a) the power to conduct victim conferences and to provide recognition statements to deputy decision makers only
 - (b) any other functions or powers under the Act, with the exception of the power to conduct victim conferences and to provide recognition statements, to any appropriately qualified member of staff.

Key components of the proposed victims of crime financial assistance scheme

<u>180</u>	Introduction
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10. Key components of the proposed victims of crime financial assistance scheme

Introduction

- 10.1 In Chapter 8, the Commission recommended that a proposed new state-funded financial assistance scheme (the proposed scheme) be established, led by an independent, dedicated and specialised decision maker. The Commission also recommended that the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) be repealed and replaced with a new Act (the proposed Act) which establishes the proposed scheme.
- 10.2 In Chapter 9, the Commission made recommendations about the new decision maker, including recommendations in relation to the decision maker's appointment, functions and powers, and the composition of the decision maker's office so as to ensure they can be effectively supported in the exercise of their powers.
- 10.3 This chapter makes recommendations in relation to key components of the proposed scheme, including:
- mechanisms for victim recognition, including opportunities to be heard and acknowledged by the decision maker
 - case management of financial assistance applications through the proposed scheme's processes
 - legal representation during the financial assistance process
 - restorative justice pathways under the proposed scheme
 - mechanisms for specialisation within the proposed scheme.

Victim recognition

- 10.4 As noted in Chapter 8, a key rationale for adopting an administrative model with an independent, dedicated and specialised decision maker is the ability to enhance mechanisms for victim acknowledgment and recognition.
- 10.5 Accordingly, this section of the chapter considers:
- current mechanisms under the VOCAA for recognising victims
 - how victim recognition is provided for in other jurisdictions
 - stakeholder and community views on victim recognition.
- 10.6 This section then makes recommendations in relation to how victim recognition should be incorporated into the proposed scheme.

Current mechanisms for victim recognition under the VOCAA

- 10.7 There is only one legislatively enshrined mechanism for victim recognition under the VOCAA, which stems from the VOCAA's second stated objective, which 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.¹
- 10.8 In practice, there are two main mechanisms for victim recognition under the VOCAA:
- through the use of Victims of Crime Assistance Tribunal (VOCAT) hearings
 - through the provision of some financial assistance payments.
- 10.9 These mechanisms are outlined further below.

Hearings

- 10.10 Hearings under the VOCAA are not legislatively established for the purpose of victim recognition. Instead, hearings under the VOCAA are part of VOCAT's decision making process, in that VOCAT decides to conduct a hearing when considered necessary for the purposes of decision making.²
- 10.11 Accordingly, when a hearing is conducted, it is conducted in a similar way to a court hearing, with parties to the proceeding given opportunity to call or give evidence; examine, cross-examine or re-examine witnesses; and make submissions to VOCAT.³
- 10.12 Additionally, 'any other person or body that, in the Tribunal's opinion, has a substantial interest in a matter is entitled to appear and be heard by the Tribunal'.⁴ Those who may have a 'substantial interest' in a VOCAA matter may include the alleged perpetrator who is the subject of the VOCAT application.⁵ These provisions demonstrate that VOCAT hearings are structured not for the purposes of victim recognition, but for the purposes of fact finding and legal submissions. This is particularly so in the context of the provision enabling VOCAT to notify alleged perpetrators as discussed further below.
- 10.13 Since the VOCAA enables victims to request a VOCAT hearing,⁶ some VOCAT hearings can function as a forum for victim recognition. As described in Chapters 7 and 8, the Commission has been told of the powerful nature of some VOCAT hearings as a form of victim recognition and acknowledgment. As VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted:
- for some victims, their recovery journey includes having their "day in Court", to have their experience formally acknowledged and to have their story believed.⁷
- 10.14 While not a legislated purpose under the VOCAA, victim recognition is therefore sometimes achieved through the VOCAT hearing process.

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

2 *Ibid* s 34. As discussed further below, victims can also elect to have a matter heard at a hearing but this is not legislatively prescribed as a forum for victim recognition and as such, the decision making framework underpinning these hearings still applies.

3 *Victims of Crime Assistance Act 1996* (Vic) s 38, although section 38 (1)(a) also states that the Tribunal is not required to conduct itself in a formal manner.

4 *Ibid* s 35(1).

5 VOCAT has issued a practice direction in relation to notification of alleged offenders and other third parties: *Victims of Crime Assistance Tribunal, Practice Direction No 4 of 2008—Notification of Alleged Offenders and Third Parties* (11 December 2008).

6 *Victims of Crime Assistance Act 1996* (Vic) s 33(1). Victims are able to opt-out of hearings at the application stage by ticking a box on the application form. This occurs in approximately 85 per cent of VOCAT matters. In this sense, having a decision made 'on the papers' is considered the default practice, so where a victim wishes to attend a hearing, this is in practical terms considered to be a victim 'requesting' a hearing.

7 Submission 59 (*Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria*).

Financial assistance

- 10.15 There is some evidence to indicate that any payment of financial assistance from a state-funded financial assistance scheme may be perceived by victims as recognition or acknowledgment by the state.⁸
- 10.16 However, under the VOCAA, only certain victims are eligible for payments that are specifically provided as a form of recognition. This stems from the VOCAA's second stated objective, which 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.⁹
- 10.17 Although the VOCAA does not define 'certain victims' for the purposes of this objective, financial assistance as recognition is limited to certain victims in two ways.
- 10.18 First, payments of special financial assistance are only available to primary victims who suffer a significant adverse effect as a direct result of an act of violence.¹⁰ In addition, awards for distress are only available to related victims.¹¹ This narrows the definition of certain victims of crime, to primary victims who suffer a significant adverse effect and to some related victims suffering distress.¹²
- 10.19 The second way in which financial assistance as recognition is limited to certain victims is through case law interpretation of provisions giving rise to refusal or reduction of awards on the basis of the victim's character and behaviour.¹³ An example of this can be seen in *Attard v Victims of Crime Assistance Tribunal*,¹⁴ where the Victorian Civil and Administrative Tribunal noted that it would be contrary to the objects of the VOCAA to grant assistance (to the deceased victim's partner and daughter) because of the victim's contributory conduct leading up to his death and his prior criminal record, stating it would be an 'offence' to the objectives of the VOCAA to make an award of assistance.¹⁵
- 10.20 Similarly, in *RUM v Victims of Crime Assistance Tribunal*¹⁶ the Victorian Civil and Administrative Tribunal considered the applicant's lack of remorse and insight in relation to his prior offending in determining not to award financial assistance because, according to the objectives of the VOCAA, the decision maker must consider 'whether an applicant is an appropriate recipient of a symbolic expression by the state of the community's sympathy'.¹⁷ These decisions demonstrate that financial assistance as recognition is currently limited to those victims who are an 'appropriate' recipient of assistance, or a 'deserving' victim, having regard to their character or behaviour.¹⁸

8 See, eg, Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 120. See also J D W E Mulder, *Compensation: The Victim's Perspective* (Wolf Legal Publishers, 2013) 68, where 83% of victims surveyed after receiving assistance from the Dutch Crime Compensation Fund said that receiving an award acknowledged their victimisation.

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

10 *Ibid* s 8A.

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

12 For further discussion, see Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 186.

13 These broad provisions relate to a victim's character or behaviour 'at any time': *Victims of Crime Assistance Act 1996* (Vic) s 54.

14 [2011] VCAT 2429 (21 December 2011).

15 *Ibid* [24]–[26]. This is further discussed in Chapter 15 in relation to case law interpretation of section 54 of the VOCAA, which relates to VCAT's consideration of an applicant's character, behaviour and conduct.

16 [2016] VCAT 367 (10 March 2016).

17 *Ibid* [18] citing Justice Ginnane in *Meinderts v Victims of Crime Assistance Tribunal* [2011] VCAT 1831 (24 October 2011) [32].

18 For further discussion in relation to 'deserving victims', see David Miers, 'Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) *Legal Studies* 242, 258. This is also discussed in Chapters 10 and 14 in relation to the purpose and objectives of the VOCAA and sections 52 and 54 of the VOCAA.

An overview of victim recognition mechanisms

Victim recognition in other state-funded financial assistance schemes

- 10.21 In a number of other Australian schemes, victim recognition is expressly provided for through lump sum financial payments.
- 10.22 The Australian Capital Territory and the New South Wales schemes specifically provide for victim recognition through ‘recognition payments’, which are similar to the current special financial assistance payments under the VOCAA.
- 10.23 In the Australian Capital Territory recognition payments are made ‘for the trauma experienced ... as a result of an act of violence’.¹⁹
- 10.24 In New South Wales, primary victims of an act of violence are eligible to apply for a recognition payment ‘to acknowledge the trauma suffered’.²⁰
- 10.25 In Queensland, Victim Assist Queensland have described their equivalent lump sum payment as ‘a recognition payment given to primary victims’ although it is called ‘special assistance’.²¹
- 10.26 No administrative schemes in Australia have victim recognition mechanisms which are separate from financial payments (for example, through hearings or written acknowledgment), other than the provision of ‘statements of reasons’. These are written statements provided to a victim outlining the reasons for the decision, and the factors the decision maker took into account in reaching that decision. For example, the *Victims of Crime Assistance Act 2009* (Qld) specifies the circumstances in which a decision maker must provide the applicant with a statement of reasons. These circumstances include, but are not limited to, granting an application or refusing an application.²² Victim Assist Queensland (VAQ) states on its website: ‘Once we have made our final decision we will send you a notice of decision and statement of reasons. These will tell you what we have agreed to help with and why.’ The Commission was told that approximately 200–300 statements of reasons are issued by VAQ each month.²³
- 10.27 In New South Wales, similar legislative provisions to Queensland apply, requiring the decision maker to provide a ‘statement of the reasons’ for approving or dismissing an application.²⁴
- 10.28 The Commission was told by scheme representatives in New South Wales and Queensland that the provision of comprehensive statements of reasons provides victims with a form of acknowledgment because they represent an official state acknowledgment of a victim’s experience of victimisation.²⁵ However, the respective jurisdictions’ legislation does not expressly provide that this is a reason such statements are given to victims.

Private sessions—Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse

- 10.29 The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse provides an example of how victim recognition can be incorporated into an official legal process through carefully managed hearings. These approaches build on other sensitive and flexible approaches adopted for similar inquiries, which aim to support victims of crime to participate in formal hearings, such as the approach used by the Victorian

19 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 28(1).

20 Victims Services, Department of Justice (NSW) *Financial Support* (2017) <www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_financial_support/vs_recognitionpayment.aspx>.

21 Queensland Government, *How We Assess Your Application* (2017) <www.qld.gov.au/law/crime-and-police/victims-and-witnesses-of-crime/financial-assistance/processing-of-your-application>.

22 See, eg, section 90 of the *Victims of Crime Assistance Act 2009* (Qld) which provides that if the decision maker decides to grant assistance, they must provide the applicant with the reasons for the decision, with reference to ‘statement of reasons’.

23 Consultation 1 (Victim Assist Queensland).

24 *Victims Rights and Support Act 2013* (NSW) s 43(4).

25 Consultations 1 (Victim Assist Queensland), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

*Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations.*²⁶

- 10.30 Following the appointment of the Royal Commission, the *Royal Commissions Act 1902* (Cth) was amended to provide for ‘private sessions’, a forum for victims to share their experience in a private, protected and supported environment.²⁷
- 10.31 Private sessions enabled the Royal Commission to hear directly from victims without such sessions being considered a ‘hearing’ of the Royal Commission, nor victims being considered a witness to the Royal Commission.²⁸ This approach enabled flexibility to cater for different needs of those wishing to attend a session, while still providing a forum for victims to share their story with a Commissioner.²⁹
- 10.32 Statements made and documents produced at a private session were not admissible in evidence in any civil or criminal proceedings.³⁰
- 10.33 The Royal Commission emphasised that the private sessions model was designed using trauma-informed principles, engaging in ways that affirmed survivors’ experiences.³¹ Those participating in private sessions were not required to take an oath or affirmation and were not subject to cross-examination, although they were expected to tell the truth. Sessions took place in different settings and included Commission offices, aged care facilities, prisons and hotel rooms.³²
- 10.34 Key to these private sessions was an approach of recognition, acknowledgment and ‘affirmation’. The Commonwealth Royal Commission stated:
- We engaged people in ways that affirmed their experiences and responses while minimising interactions or processes that could increase their trauma³³
- Private sessions did not follow a rigid structure. It was up to each attendee how and to what extent they would detail their experiences. They were provided opportunities to share their experiences, the impact of the abuse and trauma on their lives, and their suggestions for better protecting children in the future.³⁴
- 10.35 Survivors were invited to tell their story in a way that was comfortable to them, with Commissioners there to ‘listen, to bear witness’.³⁵
- 10.36 The Royal Commission established processes based on advice from psychiatrists, psychologists and social workers to ensure survivors felt safe, supported and heard.³⁶ Private sessions have been described as ‘a unique truth telling process unlike any other in the criminal or civil justice systems’,³⁷ with the Royal Commission stating that victims ‘felt that the Australian Government and the people of Australia were finally taking them seriously and that what they had to say about their experiences of child sexual abuse was valued’.³⁸

26 The Inquiry established a holistic process of support for victims to ensure they were given all available support and information necessary to participate in the Inquiry and following their involvement in the Inquiry: Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) Volume 1 of 2, 32.

27 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Private Sessions* (2017) vol 5, 9. See also *Royal Commissions Act 1902* (Cth) s 60B.

28 Ibid 33. See also *Royal Commissions Act 1902* (Cth) s 60C.

29 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Private Sessions* (2017) vol 5, 33.

30 *Royal Commissions Act 1902* (Cth) s 60E.

31 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Private Sessions* (2017) vol 5, 9.

32 Carolyn Ford, ‘Commission of Care’ (2018) 92(1/2) *Law Institute Journal* 20, 20.

33 Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse: *Our Inquiry* (2017) vol 1, 28.

34 Ibid.

35 Carolyn Ford, ‘Commission of Care’ (2018) 92(1/2) *Law Institute Journal* 20, 20.

36 Ibid.

37 Ibid.

38 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Private Sessions* (2017) vol 5, 33.

Apologies to victims

- 10.37 The theme of apologies to victims arose in consultations and in written submissions as a way in which victims can be recognised. It was raised in two distinct ways by stakeholders:
- apologies to individual victims of crime by a magistrate during a VOCAT hearing
 - state apologies to victims of crime, representing an official apology given by a representative of the state for past injustices.³⁹
- 10.38 While these concepts of ‘apology’ differ, both conceptualise the state as providing some kind of apology to victims, as outlined further below.

Apologies to individual victims of crime

- 10.39 Victoria is one of only a few Australian jurisdictions to enable a victim to elect to attend a hearing⁴⁰ and therefore one of the few jurisdictions in which an apology by a judicial officer during a state-funded financial assistance hearing may occur.
- 10.40 While there is no express provision for a Tribunal member to provide an apology to a victim of crime under the VOCAA, it is nonetheless consistent with the flexibility afforded to VOCAT under the VOCAA, which does not require VOCAT to conduct itself in a formal manner, nor comply with rules of evidence.⁴¹
- 10.41 In this regard, VOCAT hearings provide the Tribunal with an opportunity to provide ‘an empathetic forum for victims to tell their story and have their experiences of loss and suffering acknowledged by a judicial officer⁴² and it is within these flexible hearings that the Commission was told that some magistrates apologise to victims.⁴³

State apologies to victims of crime

- 10.42 In a consultation with the Victim Survivors’ Advisory Council,⁴⁴ the question of a state apology⁴⁵ in relation to the former defence of provocation to the crime of murder was raised, noting the defence of provocation was abolished by the *Crimes (Homicide) Act 2005* (Vic).⁴⁶
- 10.43 State apologies—an official apology given by a representative of the state for past injustices—typically occur following commissions of inquiry, in post-conflict environments or following government regimes inflicting human rights abuses.⁴⁷ An Australian example is the Apology to Australia’s Indigenous Peoples by former Prime Minister of Australia, The Hon. Kevin Rudd MP in 2008.⁴⁸ The Prime Minister of Australia, the Hon. Malcolm Turnbull MP, has recently announced his intention to deliver a national apology to survivors of institutional child sexual abuse by the end of 2018.⁴⁹

39 For general discussion of state apologies, see Janna Thompson, ‘Apology, Justice and Respect: A Critical Defence of Political Apology’ (Paper presented at Australian Association for Professional and Applied Ethics 12th Annual Conference, Adelaide, 28–30 September 2005).

40 In Victoria, hearings may also be held if VOCAT requires: *Victims of Crime Assistance Act 1996* (Vic) s 34(1). See also Part 6 of the VOCAT Application for Assistance Form which asks the applicant to nominate whether they would prefer to attend a hearing at the Tribunal or to have their application determined in their absence.

41 *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(a)–(b).

42 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 8.

43 See, eg, submission 28 (South Metropolitan Integrated Family Violence Executive). Apologies to victims during the VOCAT process were also raised in Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 31.

44 Consultation 27 (Victim Survivors’ Advisory Council).

45 Academic literature does not use uniform terminology to refer to state apologies. For example, they may be called ‘public’ apologies, ‘political’ apologies and ‘official public apologies’. Most recently, the Prime Minister of Australia referred to the proposed apology to victims of child sexual abuse as a proposed ‘national apology’: Prime Minister of Australia, Statement on the Royal Commission into Institutional Responses to Child Sexual Abuse (2018) <www.pm.gov.au/media/statement-royal-commission-institutional-responses-child-sexual-abuse>. For general discussion, see International Center for Transitional Justice, *More than Words: Apologies as a Form of Reparation* (2015) 1; Cheryl Regehr and Thomas Gutheil, ‘Apology, Justice, and Trauma Recovery’ (2002) 30 *The Journal of the American Academy of Psychiatry and the Law* 425; Janna Thompson, ‘Apology, Justice and Respect: A Critical Defence of Political Apology’ (Paper presented at Australian Association for Professional and Applied Ethics 12th Annual Conference, Adelaide, 28–30 September 2005) 10.

46 Consultation 27 (Victim Survivors’ Advisory Council).

47 International Center for Transitional Justice, *More than Words: Apologies as a Form of Reparation* (2015) 1; Janna Thompson, ‘Apology, Justice and Respect: A Critical Defence of Political Apology’ (Paper presented at Australian Association for Professional and Applied Ethics 12th Annual Conference, Adelaide, 28–30 September 2005) 1.

48 Australian Government, *Apology to Australia’s Indigenous Peoples* (2008) <www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>.

49 Prime Minister of Australia, *Statement on the Royal Commission into Institutional Responses to Child Sexual Abuse* (2018) <www.pm.gov.au/media/statement-royal-commission-institutional-responses-child-sexual-abuse>.

- 10.44 Cheryl Regehr and Thomas Gutheil have described a state apology as having three main components:
- acknowledgment of the offence
 - a willingness to admit wrongdoing
 - a willingness to state that the act will not be repeated.⁵⁰
- 10.45 Regehr and Gutheil contend that state apologies can be one way of acknowledging the suffering experienced by victims.⁵¹ As stated by the International Center for Transitional Justice, state apologies can be a form of symbolic reparation:
- an apology is a formal, solemn and, in most cases, public acknowledgement that human rights violations were committed in the past, that they caused serious and often irreparable harm to victims, and that the state, group, or individual apologizing is accepting some or all of the responsibility for what happened.⁵²
- 10.46 Janna Thompson notes that an official state apology represents a ‘watershed’ moment requiring preparation, ceremony and subsequent actions following the apology.⁵³ The International Center for Transitional Justice state that apologies act as a ‘symbolic turning point’.⁵⁴
- 10.47 In this context, parallels might be drawn between state apologies and redress schemes, which Kathleen Daly describes as broader than financial assistance: ‘in addition to monetary payments, benefits, and services, redress outcomes may include public apologies, memorialisation, and commemoration’.⁵⁵

Responses

Victim recognition through hearings

- 10.48 Consultation views on victim recognition overwhelmingly focused on the importance of hearings as an opportunity for victim recognition and acknowledgment. A significant number of stakeholders highlighted the need for there to be hearings in some form,⁵⁶ and considered it important that victims be able to opt-in to hearings.⁵⁷
- 10.49 While many stakeholders considered it important for some form of hearing to remain an option for victims, very few spoke specifically about how such hearings should be conducted, or the essential elements of such hearings.
- 10.50 Domestic Violence Victoria submitted that there should be a ‘symbolic’ hearing by a person with authority⁵⁸ while others told the Commission about victim-centred approaches like the private sessions conducted by the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse.⁵⁹
- 10.51 Safe steps Family Violence Response Centre submitted that the Victims of Crime Commissioner should conduct hearings,⁶⁰ while the Victims of Crime Commissioner proposed victim conferences as a forum where victims would have an opportunity to discuss their experience and be acknowledged by a senior government official.⁶¹

50 Cheryl Regehr and Thomas Gutheil, ‘Apology, Justice, and Trauma Recovery’ (2002) 30 *The Journal of the American Academy of Psychiatry and the Law* 425, 425.

51 Ibid 426.

52 International Center for Transitional Justice, *More than Words: Apologies as a Form of Reparation* (2015) 1.

53 Janna Thompson, ‘Apology, Justice and Respect: A Critical Defence of Political Apology’ (Paper presented at Australian Association for Professional and Applied Ethics 12th Annual Conference, Adelaide, 28–30 September 2005) 10.

54 International Center for Transitional Justice, *More than Words: Apologies as a Form of Reparation* (2015) 4.

55 Kathleen Daly, ‘Money for Justice? Money’s Meaning and Purpose as Redress for Historical Institutional Abuse’ in Mark Finnane, Amanda Kaladelfos and Yorick Smaal (eds), *The Sexual Abuse of Children: Recognition and Redress* (Monash University Publishing, 2016) 160, 164.

56 Consultations 2 (Legal Professionals—Private Practice), 6 (Victims’ Advocacy Organisations), 7 (Family Violence and Advocacy Organisations), 10 (Regional Consultation—Morwell Victim Support Agencies), 20 (Academics), 27 (Victim Survivors’ Advisory Council).

57 Submissions 25 (Public Health Association of Australia), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre).

58 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

59 Consultation 27 (Victim Survivors’ Advisory Council).

60 Submission 37 (safe steps Family Violence Response Centre).

61 Submission 49 (Victims of Crime Commissioner, Victoria); Consultation 5 (Victims of Crime Commissioner, Victoria).

- 10.52 The Victim Survivors' Advisory Council told the Commission that a non-judicial hearing—while not part of the criminal process—might still address the imbalance of the criminal justice system for victims.⁶²

Victim safety during hearings

- 10.53 Although noting the importance of hearings as a forum for victim recognition, a number of stakeholders also raised concerns about victim safety during hearings under the existing scheme. While these concerns were raised in relation to the hearing process under the existing scheme, it is important to consider stakeholder concerns about victim safety to ensure the proposed Act does not replicate safety issues experienced under the VOCAA.
- 10.54 As noted above and discussed in Chapter 6, VOCAT can notify any person who may have a 'substantial interest' in the matter, and this person has a right to be heard by the Tribunal.⁶³ This includes the alleged perpetrator.
- 10.55 As also discussed in Chapter 6 a number of stakeholders were concerned about the provisions enabling VOCAT to notify an alleged perpetrator⁶⁴ and there was strong stakeholder support for limitations to perpetrator notification or appearance provisions in the VOCAA, including that:
- the perpetrator notification provision be abolished entirely⁶⁵
 - a legislative presumption against perpetrator notification be introduced,⁶⁶ particularly for specific classes of victims, such as victims of family violence⁶⁷ and victims of sexual assault⁶⁸
 - perpetrator notification only occur where it is required to enable the decision maker to determine whether the criminal act occurred,⁶⁹ where it is necessary to reach a fair decision,⁷⁰ is proportionate to the facts,⁷¹ or where there are substantial doubts about the veracity of an application⁷²
 - perpetrator notification only occur in 'special circumstances' or only if there are further safeguards in place to protect victims.⁷³
- 10.56 The Victorian Information Commissioner submitted that where the privacy of victims cannot be assured, victims may be deterred from lodging an application.⁷⁴
- 10.57 Springvale Monash Legal Service submitted that the VOCAA should be reformed to abolish the provision for an alleged perpetrator to have a substantial interest in a VOCAT matter.⁷⁵ The Commission was told that there seemed to be little rationale for perpetrator notification, given VOCAT is not making a finding of guilt.⁷⁶ In particular, stakeholders told the Commission that under an administrative scheme, where a judicial officer is not

62 Consultation 27 (Victim Survivors' Advisory Council). In this context, the Victim Survivors' Advisory Council is referring to the 'imbalance' of the criminal justice system which generally focuses on the prosecution, acting as the state's representative, and the accused, rather than on victims of crime. See, eg, Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 14–15, 19.

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

64 Submission 20 (Office of the Victorian Information Commissioner); Consultations 6 (Victims' Advocacy Organisations), 12 (Regional Consultation—Mildura Victim Support Agencies), 17 (Family Violence Diverse Communities and Intersectionality Working Group), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

65 Submissions 7 (Dr Kate Seear et al), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 32 (Australian Psychological Society), 39 (Victorian Aboriginal Legal Service), 41 (Springvale Monash Legal Service), 49 (Victims of Crime Commissioner, Victoria); Consultation 3 (Legal Professionals—Community Legal Centres).

66 Submissions 14 (Inner Melbourne Community Legal), 20 (Office of the Victorian Information Commissioner), 26 (Hume Riverina Community Legal Service), 27 (Name withheld), 38 (Ryan Carlisle Thomas Lawyers), 46 (Victoria Legal Aid); Consultations 3 (Legal Professionals—Community Legal Centres), 13 (Regional Consultation—Mildura Legal Professionals).

67 Submission 26 (Hume Riverina Community Legal Service); Consultation 3 (Legal Professionals—Community Legal Centres).

68 Submission 26 (Hume Riverina Community Legal Service); Consultation 3 (Legal Professionals—Community Legal Centres).

69 Submissions 14 (Inner Melbourne Community Legal), 18 (cohealth).

70 Submission 46 (Victoria Legal Aid).

71 Submission 20 (Office of the Victorian Information Commissioner).

72 Submission 41 (Springvale Monash Legal Service).

73 Submission 14 (Inner Melbourne Community Legal).

74 Submission 20 (Office of the Victorian Information Commissioner).

75 Submission 41 (Springvale Monash Legal Service).

76 Consultations 4 (Victim, Witness and Court Support), 10 (Regional Consultation—Morwell Victim Support Agencies).

making a finding against an alleged perpetrator, there may be little rationale for retaining the perpetrator notification provision.⁷⁷

- 10.58 Dr Kate Seear et al raised concerns about victims of sexual assault, sexual abuse and/or family violence being subjected to extensive and often gruelling cross-examination by counsel representing the alleged perpetrator, particularly as rules of evidence do not apply under the VOCAA, thereby enabling such cross examination.⁷⁸

Victim recognition through financial assistance

- 10.59 Stakeholder views on victim recognition provided through financial assistance primarily focused on how:
- the amount of assistance provided as recognition can in fact fail to ‘recognise’ victims when it is perceived as inadequate by a victim
 - financial assistance payments provided as recognition can give rise to moral judgments about ‘deserving’ and ‘undeserving’ victims.
- 10.60 The Commission was told by some academics that victims may view lump sum payments, like special financial assistance under the VOCAA, as a symbolic recognition of the wrong committed and so may not be as concerned by the amount of money provided through such a payment.⁷⁹
- 10.61 This contrasted with the views of other stakeholders. Some submitted that the sums available for special financial assistance ‘are so low that they become an insult’ and that as a consequence, the VOCAA’s objective of ‘recognising’ victims is not met.⁸⁰ A significant number of stakeholders said that the amounts of special financial assistance available under the VOCAA are inadequate.⁸¹ For similar reasons, there was stakeholder concern about recognition payments, like special financial assistance, being divided into categories with different award amounts. The Commission was told that the effect of categories, and their varying awards, is to imply some victims are more deserving than others,⁸² and so this may not adequately recognise the harms suffered by victims.⁸³
- 10.62 Concerns held by other stakeholders were not related to the amount of assistance provided as recognition, but to the way in which such payments can give rise to moral judgments about who is ‘deserving’ of such payments. Some stakeholders expressed concern about providing financial assistance as a symbolic expression of sympathy and condolence as this ‘introduces a set of political and moral considerations about who evokes and “deserves” sympathy’.⁸⁴
- 10.63 Darebin Community Legal Centre submitted that ‘forcing a victim to justify that they are worthy of payment, reinforces stigma and marginalisation and can be re-traumatising’,⁸⁵ while the Aboriginal Family Violence Prevention & Legal Service Victoria submitted that the current operation of financial assistance as recognition only for ‘certain victims’ ‘invite[s] misinformed views about “deserving” and “undeserving” victims’.⁸⁶

77 Consultation 20 (Academics).

78 Submission 7 (Dr Kate Seear et al).

79 Consultation 20 (Academics).

80 Submission 13 (Adviceline Injury Lawyers). See also submission 38 (Ryan Carlisle Thomas Lawyers) who submitted that the quantum does not reflect community values, and Submission 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria) which submitted that ‘the amounts currently awarded are nominal and may fall short of fulfilling the intent of special financial assistance as an expression of the community’s sympathy’.

81 Submissions 1 (Judicial Advisory Group on Family Violence), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 18 (cohealth), 19 (Schembri & Co Lawyers), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 35 (Brockway Legal), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria); Consultations 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals), 16 (Regional Consultation—Ballarat Legal Professionals).

82 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

83 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

84 Submission 7 (Dr Kate Seear et al).

85 Submission 24 (Darebin Community Legal Centre).

86 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

- 10.64 The Commission was also told that the underlying purposes of such financial assistance are inconsistent, and potentially in competition, with the VOCAA's other, more practical, objective—'to assist victims of crime to recover' by providing financial assistance for expenses incurred or reasonably likely to be incurred.⁸⁷ One stakeholder told the Commission that the focus of the scheme should be on victim recovery, not on recognition of harm, and that special financial assistance should therefore be abolished.⁸⁸
- 10.65 These stakeholder views demonstrate that the provision of financial assistance under the VOCAA to recognise certain victims is problematic because the amounts provided as recognition may not correspond with what a victim considers appropriate recognition, and because recognising certain victims necessarily excludes some victims from receiving payments which may create hierarchies of victimhood.

Consultation views on other opportunities for victim recognition

- 10.66 The Commission was told that hearings should not be the only source of victim recognition or acknowledgment. For example, both the Victorian Victims of Crime Commissioner and the ACT Victims of Crime Commissioner told the Commission that victim acknowledgment can be achieved in other ways.⁸⁹ Similarly, the Victorian Community Safety Trustee told the Commission that there are other ways for the justice system to recognise victims, such as through victim impact statements during the criminal trial process.⁹⁰
- 10.67 Other stakeholders submitted that the provision of an official award in and of itself can validate victims:

quite often the recognition in the form of an official award from the Tribunal carries significant benefits in the form of validation and closure. This is particularly our experience in the context of sexual abuse matter or where the victim has felt disempowered by the criminal process.⁹¹

- 10.68 Some of these alternative mechanisms for victim recognition are discussed further below.

Comprehensive statements of reasons

- 10.69 The use of comprehensive statements of reasons in other administrative schemes was raised a number of times by stakeholders as being a source of acknowledgment and validation for victims. The Commission was told of victims who had pursued claims through the New South Wales administrative system and had felt acknowledged through receiving these statements. For example, one legal professional told the Commission that a victim had received a four-page statement of reasons and had felt acknowledged and validated.⁹² Similarly, the NSW Commissioner of Victims Rights also told the Commission that many victims feel validated and believed when receiving the written statement of reasons.⁹³
- 10.70 Victim Assist Queensland told the Commission that a statement of reasons can be a source of validation and acknowledgment for a victim as it signifies that the state acknowledges them as being a victim of crime.⁹⁴
- 10.71 In contrast, some stakeholders said that because VOCAT does not provide a statement which details how they reached their decision, it 'fails to make victims feel that the harm caused to them is acknowledged'.⁹⁵

87 Submission 7 (Dr Kate Seear et al) in relation to section 1(2)(a) of the *Victims of Crime Assistance Act 1996* (Vic).

88 Submission 27 (Name withheld).

89 Consultations 5 (Victims of Crime Commissioner, Victoria), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

90 Consultation 23 (Community Safety Trustee, Victoria).

91 Submission 23 (Johnstone & Reimer Lawyers).

92 Consultations 3 (Legal Professionals—Community Legal Centres), 10 (Regional Consultation—Morwell Victim Support Agencies).

93 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

94 Consultation 1 (Victim Assist Queensland).

95 Submission 24 (Darebin Community Legal Centre).

Apologies to individual victims of crime

- 10.72 The importance of an apology for individual victims of crime, expressed on behalf of the community or the state, was highlighted by a number of stakeholders.⁹⁶ The Commission was told that for many victims of crime, the most important thing is acknowledgment—an apology or expression of sympathy from the state.⁹⁷
- 10.73 Many stakeholders did not consider an apology as being tied to the financial payment under the VOCAA. This is significant because special financial assistance—the provision of a lump sum payment—is currently the primary way in which the existing scheme expresses the state’s ‘sympathy’.⁹⁸
- 10.74 The Law Institute of Victoria submitted:
- In some cases, the opportunity to have their harm formally recognised and receive an apology on behalf of the State of Victoria is more rewarding [for victims] than the monetary award they receive.⁹⁹
- 10.75 Another submission stated:
- I merely wanted a tribunal to listen to my story and say to me, in words like these: We believe you. We acknowledge your pain and your trauma at the hands of an abusive and violent person. We are sorry that this has happened to you.¹⁰⁰
- 10.76 The South Metropolitan Integrated Family Violence Executive submitted: ‘Many Tribunal members verbally acknowledge and recognise the suffering of the victim and, often, apologise on behalf of the State for the crime that occurred.’¹⁰¹

State apologies to victims of crime

- 10.77 In a consultation with the Victim Survivors’ Advisory Council,¹⁰² the question of a state apology in relation to the former defence of provocation to the crime of murder was raised, noting that the defence of provocation was abolished by the *Crimes (Homicide) Act 2005* (Vic). In the Second Reading speech, the then-Attorney-General, the Hon. Rob Hulls MP stated that the defence of provocation:
- condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger. It has no place in a modern, civilised society.¹⁰³
- 10.78 In this context, the Commission was told by the Victim Survivors’ Advisory Council that a state apology should be made for a past law which is now accepted to have been discriminatory against women.¹⁰⁴

96 Submissions 28 (South Metropolitan Integrated Family Violence Executive), 31 (Victorian Council of Social Service), 41 (Springvale Monash Legal Service), 47 (RMIT Centre for Innovative Justice), 51 (Law Institute of Victoria); Consultations 16 (Regional Consultation—Ballarat Legal Professionals), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).
97 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).
98 *Victims of Crime Assistance Act 1996* (Vic) s 1(b). Note that some victims may also be acknowledged at a VOCAT hearing.
99 Submission 51 (Law Institute of Victoria).
100 Submission 36 (Name withheld).
101 Submission 28 (South Metropolitan Integrated Family Violence Executive).
102 Consultation 27 (Victim Survivors’ Advisory Council).
103 Victoria, Parliamentary Debates, Legislative Assembly, 6 October 2005, 1349–53 (Rob Hulls, Attorney-General).
104 Consultation 27 (Victim Survivors’ Advisory Council).

Discussion and recommendations

The need for different types of victim recognition

- 10.79 Research emphasises that financial assistance ‘entails more to victims than just a simple financial deed’.¹⁰⁵ In particular, research by Mulder indicates that for victims, financial assistance may provide acknowledgment and a sense of justice.¹⁰⁶
- 10.80 Although acknowledgment or recognition can be a valued outcome from a victim’s participation in the financial assistance process, as outlined in Chapter 7, victims’ needs vary. While some victims will want to have an interaction with the financial assistance decision maker, others will simply wish to receive practical financial assistance.
- 10.81 This is demonstrated by the varied views on victim recognition expressed by stakeholders during consultations and in written submissions. While hearings can be an important forum for victim recognition, other mechanisms such as written acknowledgment may also be just as important to victims.
- 10.82 The Commission considers it important that the proposed Act provide for different components of victim recognition, including:
- comprehensive written statements of reasons for decisions (all victims)
 - recognition statements (all victims)
 - victim conferences (opt-in).
- 10.83 Providing a letter or statement of acknowledgment or recognition was also raised in VOCAT’s review of the pilot Koori List as a further way to acknowledge victims.¹⁰⁷ Participants in that review suggested that a letter of acknowledgment should accompany any award notification, be signed by a tribunal member and acknowledge that the applicant has suffered.¹⁰⁸
- 10.84 The Commission considers that both the statement of reasons and the recognition statement should be provided to all eligible victims under the proposed scheme as a matter of course. The Commission considers that a victim conference should be available where a victim requests one, but should not be mandatory.¹⁰⁹
- 10.85 Significantly, the Commission considers that victim recognition should no longer be the legislated purpose of the provision of financial assistance payments.
- 10.86 Before outlining how victim recognition mechanisms will work under the proposed scheme, the Commission considers two preliminary matters:
- why it is proposed that financial assistance no longer be provided with a legislatively expressed purpose of ‘recognition’, as is currently the case under the VOCAA
 - individual apologies to victims of crime during the financial assistance process, as well as state apologies to victims of crime.

Reconceiving financial assistance—recovery versus recognition

- 10.87 Although under the VOCAA, some financial assistance payments are provided as a form of victim recognition, the Commission considers that victim recognition should not be the purpose of financial payments under the proposed scheme. The Commission acknowledges that this departs from other Australian schemes, as detailed above, as well as from the VOCAA which provides for financial assistance to:

105 J D W E Mulder, *Compensation: The Victim’s Perspective* (Wolf Legal Publishers, 2013) 3.

106 A survey of recipients receiving assistance from the Dutch Crime Compensation Fund revealed that 83 per cent of victims said that receiving an award acknowledged their victimisation and a further 80 per cent said the award provided them with a sense of justice: J D W E Mulder, *Compensation: The Victim’s Perspective* (Wolf Legal Publishers, 2013) 68.

107 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 32.

108 *Ibid.*

109 As discussed further below, because such hearings would be voluntary, they would not be for the purposes of fact finding or making financial assistance determinations.

certain victims of crime ... 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.¹¹⁰

10.88 While the Commission acknowledges that some victims may feel recognised and acknowledged by payments of financial assistance,¹¹¹ in the Commission's view, recognition for victims under the proposed Act is better provided for in non-pecuniary ways, through comprehensive statements of reasons for decisions, recognition statements and through the introduction of victim conferences.

10.89 The Commission has formed this view for the following three reasons:

- Linking victim recognition to monetary payments can lead to perceptions of inequity because 'the representation in money terms of the victim's pain and suffering ... is a necessarily arbitrary exercise'.¹¹² The Commission was told that amounts of special financial assistance under the VOCAA are so low they only served to 'insult' some victims; that creating categories for provision of lump sum payments to recognise victims can imply that some victims are more deserving of sympathy or recognition than others; and that prescribed categories for lump sum payments may not adequately recognise victims. These issues demonstrate that the provision of financial assistance as an expression of recognition can be fraught, and can result in victims experiencing further distress.¹¹³
- Tying financial payments to recognition and acknowledgment has in the past resulted in moral judgements about who is, or is not, 'deserving' of the state's or community's recognition.¹¹⁴ The Commission was told that providing financial payments to certain victims as recognition, 'introduces a set of political and moral considerations about who evokes and "deserves" sympathy'.¹¹⁵ In particular, the Commission considers that providing a lump sum payment for symbolic recognition of a victim's experience may create an unhelpful hierarchy between victims. This is discussed further in Chapter 11 in relation to the purpose and objectives of the VOCAA and the proposed Act.
- There is evidence that any payment made to a victim under a state-funded financial assistance scheme—whether expressly provided for in legislation as a payment to 'assist', to 'recognise' or 'acknowledge' a victim—may be viewed by the victim as a form of acknowledgment or recognition. For example, Miers' research into the Dutch Crime Compensation Fund found that a high proportion of victims surveyed (83 per cent) considered the financial award helped them feel acknowledged as a victim, even though the Dutch Crime Compensation Fund does not specifically provide for acknowledgment in the making of awards under the relevant financial assistance scheme.¹¹⁶

10.90 As observed by Hayley Catherine Clark:

victim/survivors' narratives suggest that providing greater emphasis on listening to their personal stories and validating the individual, acknowledging the [financial assistance] payment as nominal and emphasising the wrong ... may allow for a better recognition.¹¹⁷

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

111 See, eg, Robyn L Holder and Kathleen Daly, 'Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors' (2017) 24(1) *International Review of Victimology* 25, 39.

112 David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' (2014) 20(1) *International Review of Victimology* 145, 148.

113 See also comments by participants in Holder and Daly's study: 'They gave me a miserable \$10,000 ... You divide \$10,000 by 50 years, you don't get much' and 'The amount granted was not comparable to what I had lived through': Robyn L Holder and Kathleen Daly, 'Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors' (2017) 24(1) *International Review of Victimology* 25, 36.

114 This is further discussed in Chapter 15 in relation to case law interpretation of section 54 of the VOCAA, which relates to VOCAT's consideration of an applicant's character, behaviour and conduct.

115 Submission 7 (Dr Kate Seear et al).

116 J D W E Mulder, *Compensation: The Victim's Perspective* (Wolf Legal Publishers, 2013) 113.

117 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 122.

- 10.91 Accordingly, the Commission considers that the provision of financial assistance, including lump sum payments, should instead be focused on assisting victims in their recovery, and that recognition of victims' experience should be provided in non-pecuniary ways, focusing on acknowledgment and validation.
- 10.92 The provision of financial assistance under the proposed scheme is discussed in Chapter 13, which outlines each component of assistance available under the proposed Act, including the operation of lump sum payments.

Apologies

Apologies to individual victims of crime

- 10.93 As noted above, the importance of magistrates apologising to individual victims of crime during VOCAT hearings was highlighted to the Commission by a number of stakeholders.¹¹⁸ The importance of verbal acknowledgment was also raised in VOCAT's review of the pilot Koori List, in which one legal practitioner said: 'A lot of victims want to hear someone say, on behalf of the State of Victoria, that we are sorry that this happened. It seems to be very important to Koori applications, this verbal acknowledgement.'¹¹⁹
- 10.94 While there is no express provision under the VOCAA enabling a Tribunal member to provide an apology to a victim of crime, this type of victim recognition and acknowledgment is consistent with the flexibility afforded to VOCAT under the VOCAA. In this regard, VOCAT hearings can provide 'an empathetic forum for victims to tell their story and have their experiences of loss and suffering acknowledged by a judicial officer'.¹²⁰
- 10.95 The Commission considers the proposed Act should also provide the scheme decision maker with flexibility in conducting victim conferences, discussed below. Accordingly, the Commission considers that it is not necessary for the proposed Act to legislate for victim apologies. This approach is consistent with the current flexibility afforded to VOCAT under the VOCAA and recognises the varying needs of individual victims. Additionally, this approach recognises that legislating for an apology, similar to the current notions of sympathy under the VOCAA, may raise issues where such provisions are interpreted as giving rise to notions about who deserves an apology. This is discussed in more detail in Chapter 11 in relation to the purpose and objectives of the proposed Act.

Parliamentary state apology to victims of crime

- 10.96 As outlined above, during a consultation with the Victim Survivors' Advisory Council,¹²¹ the question of a parliamentary state apology in relation to the former defence of provocation to the crime of murder was raised, noting that the defence of provocation was abolished by the *Crimes (Homicide) Act 2005* (Vic). In 2005, in the Second Reading speech, the then Attorney-General, the Hon. Rob Hulls MP stated the defence of provocation had 'no place in a modern, civilised society'.¹²²
- 10.97 In the consultation, the Commission was told that a parliamentary state apology should be made for a past law which is now accepted to have been discriminatory against women.
- 10.98 The Commission considers there is merit in government consideration of a parliamentary state apology for past laws which have failed to protect victims, including that of provocation. While state apologies generally relate to past historical injustices on a

118 Submissions 28 (South Metropolitan Integrated Family Violence Executive), 31 (Victorian Council of Social Service), 41 (Springvale Monash Legal Service), 47 (Centre for Innovative Justice), 51 (Law Institute of Victoria); Consultations 16 (Regional Consultation—Ballarat Legal Professionals), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

119 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 31.

120 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 8.

121 Consultation 27 (Victim Survivors' Advisory Council).

122 Victoria, Parliamentary Debates, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General).

broad scale and are made to mark an end-point to a history of wrongdoing,¹²³ there is no reason conceptually to preclude a State apology for a specific past law such as provocation. Such an apology would acknowledge injustice to a grievously afflicted class of victims both deceased and living, in the context of human rights. However, parliamentary state apology, including in relation to provocation, would need to be considered in a wider context, including other statutory reforms such as section 40 of the *Jury Directions Act 2015* (Vic), which abolished the warning to be given to juries required by *Longman v The Queen*¹²⁴ in cases where there has been a delay in complaint. As the matter of a parliamentary state apology involves that wider context, the Commission does not make a specific recommendation on it in this report.

Recognition mechanisms under the proposed Act

Statements of reasons and recognition statements

- 10.99 The use of comprehensive statements of reasons in other administrative schemes were raised a number of times as sources of acknowledgment and validation for victims.¹²⁵ Accordingly, the Commission considers it appropriate that the proposed scheme provide victims with a comprehensive written statement of reasons.
- 10.100 The Commission also notes that not only are such statements a potential source of acknowledgment for victims, but they would also improve the transparency of decision making under the proposed scheme, which is discussed in more detail in Chapter 15.
- 10.101 In addition to written statements of reasons, the Commission considers it appropriate that victims be provided with an additional acknowledgment from the state—a recognition statement—which acknowledges their experience and expresses the state's condolences.
- 10.102 The Commission considers that this should not be an expression of the state's or community's 'sympathy'. As discussed in Chapter 11, the VOCAA's existing objective of expressing the state and community's sympathy has in the past given rise to moral considerations about who evokes and deserves sympathy. Accordingly, the Commission considers it appropriate that the proposed scheme adopt an approach of acknowledgment and recognition, rather than sympathy. This approach is supported by research that indicates many victims simply want an official acknowledgement of their suffering¹²⁶ and that in gaining this acknowledgment, they may then begin to mourn their losses and rebuild their lives.¹²⁷
- 10.103 In the Commission's view, recognition statements should be formulated to provide victims with appropriate acknowledgment and condolence. The Commission considers it important that the recognition statement be personalised and tailored according to each victim's experiences and include the following elements:
- acknowledgment as a victim of crime

123 See Mark Gibney and Erik Roxstrom 'The Status of State Apologies' (2001) 23(4) *Human Rights Quarterly* 911, 914–15; Jeff Corntassel and Cindy Holder 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala and Peru' (2008) 9(4) *Human Rights Review* 465; Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, 1991).

124 (1989) 168 CLR 79. The 'Longman warning' required judges to warn the jury about any perceptible risks of miscarriage of justice that a delay in complaint might cause, and was criticised for its potential to 'perpetuat[e] myths and misconceptions about sexual assault and discriminatory attitudes towards women and children': Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) [28.38]. There have been a range of legislative reforms to the 'Longman warning', including amendments to the *Crimes Act 1958* (Vic) ss 61(1)–(1F), the *Evidence Act 2008* (Vic) s 165B and most recently the *Jury Directions Act 2015* (Vic). Section 40 of the *Jury Directions Act 2015* (Vic) abolished 'any rule of common law under which a trial judge is required or permitted to direct the jury on a disadvantage to the accused in challenging, adducing or giving evidence or conducting his or her case because of delay' which, as explicitly stated at Note 1 of the *Jury Directions Act 2015* (Vic), 'abolishes the rule attributed to *Longman v The Queen* [1989] HCA 60'. The *Jury Directions Act 2015* (Vic), in sections 38–39, now restricts the circumstances in which a judge might direct the jury in relation to 'significant forensic disadvantage' and the provisions have been considered in the recent cases of *Robbins v The Queen* [2017] VSCA 288 and *Mulligan v The Queen* [2017] VSCA 94 (2 May 2017).

125 Consultations 3 (Legal Professionals—Community Legal Centres), 10 (Regional Consultation—Morwell Victim Support Agencies).
126 Janna Thompson, 'Apology, Justice and Respect: A Critical Defence of Political Apology' (Paper presented at Australian Association for Professional and Applied Ethics 12th Annual Conference, Adelaide, 28–30 September 2005) 11; Cheryl Regehr and Thomas Gutheil, 'Apology, Justice, and Trauma Recovery' (2002) 30 *The Journal of the American Academy of Psychiatry and the Law* 425, 426.

127 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 71.

- expression of the state's condolence
- a personalised and tailored acknowledgment of the effects of crime for that victim.

10.104 The Commission also considers it important that the form and content of recognition statements be developed in consultation with victims of crime to ensure each statement provides appropriate recognition to victims.

Recommendations

- 11** The proposed Act should provide that all eligible victims are entitled to receive:
- a comprehensive written statement of reasons for a decision
 - a recognition statement, signed by the scheme decision maker or a deputy decision maker on behalf of the state, which acknowledges the effects of the criminal act on the victim and expresses the state's condolences.
- 12** The form and content of the proposed recognition statement should be developed in consultation with the Victims of Crime Consultative Committee, to ensure the statement provides appropriate recognition to victims.

Victim conferences

- 10.105 As already noted, the Commission considers it important for victims to have the opportunity to be acknowledged and heard. In the Commission's view this opportunity is best created under the proposed scheme through the provision of victim-centred, trauma-informed private hearings. For the purposes of this report, the Commission uses the term 'victim conference' to refer to these hearings.
- 10.106 In the Commission's view, victim conferences should provide victims with an opportunity for validation, acknowledgment by the state, and should ensure victims are given a voice.
- 10.107 As discussed above, the use of private sessions was most recently employed by the Commonwealth Royal Commission into Institutional Response to Child Sexual Abuse. The Commission considers that providing a similar trauma-informed forum for a victim to be heard and acknowledged in a state-funded financial assistance scheme would be a unique innovation not only in Victoria, but in Australia.
- 10.108 The components of the proposed victim conferences are detailed below.

Removing an alleged perpetrator's right to be notified or appear

- 10.109 In the Commission's view victim conferences should be 'opt-in' and at a victim's request. Accordingly, the proposed Act should provide that all victims are entitled to request, and to have, a private victim conference with the scheme decision maker or a deputy decision maker if they are found to be eligible for assistance under the proposed Act.¹²⁸
- 10.110 The Commission considers that the purpose of a victim conference should be to provide a private, respectful forum for victims to be heard, and for the impacts of the criminal act on the victim to be properly acknowledged by the decision maker on behalf of the state, and should not be to determine any application, or the amount of any award.

- 10.111 As victim conferences will be opt-in only, and not for the purposes of determining any application, or the amount of any award, the Commission considers that the perpetrator notification and appearance provisions under the VOCAA should not apply to victim conferences under the proposed Act. As discussed in Chapter 6, alleged perpetrator notification and appearance provisions can significantly impact a victim's safety and wellbeing and these effects are unlikely to be ameliorated through legislative or procedural protections.
- 10.112 As also discussed in Chapter 6, the Commission considers that alleged perpetrators do not have a legal interest in the matter of state-funded financial assistance. This is because such a decision has no bearing on other legal matters. The Commission considers that an alleged perpetrator's interest can be categorised, in the context of state-funded financial assistance, as a reputational interest rather than a legal interest. Accordingly, the Commission proposed in Chapter 6 that perpetrator notification and appearance provisions be removed, and that this reflects a trauma-informed approach that prioritises victims' safety and wellbeing.
- 10.113 The Commission acknowledges the concerns raised by some stakeholders that alleged perpetrators should have the opportunity to 'defend themselves' at a hearing.¹²⁹ The Commission considers these concerns are no longer applicable under the proposed Act because, in contrast to hearings under the VOCAA, victim conferences would not be for the purpose of fact finding or making financial assistance determinations. Instead, under the proposed scheme, victim conferences would be for the purpose of providing victims with a voice and a forum in which to be acknowledged and heard.
- 10.114 To support this approach, and similarly to provisions in *the Royal Commission Act 1902* (Cth) in relation to private sessions,¹³⁰ the Commission considers that the proposed Act should provide that:
- Victims appearing at a victim conference are not providing evidence.
 - Statements made and documents produced at a victim conference are not admissible in evidence in any civil or criminal proceedings, except in the circumstances prescribed in the proposed Act.¹³¹
- 10.115 In the Commission's view, victim conferences should be conducted in a way conducive to victim acknowledgment, safety and recovery. The Commission considers perpetrator involvement in victim conferences would undermine these objectives.

A trauma-informed approach

- 10.116 The Commission notes the trauma-informed approach of the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse in the coordination of private sessions, including their approach to initiating and preparing for private sessions. This included appropriate correspondence with victims to advise them of the process and timeframes, as well as providing clear information about the process, including the booklet *Sharing Your Story: A Guide to Your Private Session*.¹³²
- 10.117 Accordingly, the Commission considers that the proposed Act should specify that victim conferences be conducted in a trauma-informed way which aims to affirm victims' experiences, while minimising interactions or processes that could increase victims' trauma, including in deciding the time, place, structure or format of the conference.

129 Submission 5 (Anglicare Victoria Victims Assistance Program). See also submission 38 (Ryan Carlisle Thomas Lawyers); Consultation 16 (Regional Consultation with Support Agencies—Ballarat).

130 *Royal Commissions Act 1902* (Cth) ss 60C, 60E.

131 The circumstances in which application materials, including any materials relating to a victim conference, may be used, inspected or published are discussed in detail in Chapter 14 of this report.

132 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Private Sessions* (2017) vol 5, 35.

- 10.118 Consistent with the way in which private sessions were conducted by the Royal Commission, the Commission considers that the proposed Act should not be prescriptive about the structure or format of victim conferences, to ensure victims are supported to share their story in a way that responds to their needs.¹³³ This should include consideration of an individual's specific needs, including any cultural needs, special arrangements for victims with a disability, or victims with other special needs or requirements.
- 10.119 As discussed in Chapter 9, the Commission considers that depending on demand for victim conferences, the proposed scheme should provide for such conferences to be held in culturally appropriate and safe spaces in rural and regional locations. These locations should be chosen in such a way that maximises victims' choices and respects their privacy, safety and wellbeing. In this context, the Commission notes research highlighting issues of privacy and safety for victims of family violence having to attend rural and regional courts.¹³⁴ The Commission also notes concerns about the appropriateness of VOCAT hearings taking place in court rooms for Aboriginal victims of crime.¹³⁵
- 10.120 The Commission considers that the proposed scheme should decide the time and place for a victim conference in consultation with a victim or their support worker where relevant, and should consider not only their geographic location but also any other needs or preferences of the victim.
- 10.121 Although the structure and format of victim conferences should be flexible, the Commission considers that victims should be given the opportunity to:
- discuss the impacts of the crime
 - read aloud a Victim Impact Statement or other written statement
 - have a support person/s present
 - be represented by a legal representative
 - request a single victim conference with multiple victims in attendance.

Recommendations

- 13** The proposed Act should provide that all eligible victims are entitled to request, and to have, a private victim conference with the scheme decision maker or a deputy decision maker.
- 14** The proposed Act should provide that:
- (a) the purpose of a victim conference is to provide a respectful forum for victims to be acknowledged and heard, and for the impacts of the criminal act on the victim to be properly acknowledged by the scheme decision maker on behalf of the state, and that the purpose is not to determine any application, or the amount of any award
 - (b) victim conferences must be held in private, and only persons who are authorised by the scheme decision maker may be present during the victim conference
 - (c) victim conferences should be conducted in a trauma-informed way that aims to affirm victims' experiences, while minimising interactions or processes that could increase victims' trauma, including in deciding the time, place, structure or format of the conference

133 Ibid 33.

134 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) 76.

135 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 28.

Recommendations (continued)

- (d) victim conferences should be conducted in a culturally appropriate safe space, with sufficient flexibility for victims to share their story, with victims provided the opportunity to:
- (i) discuss the impacts of the crime
 - (ii) read aloud a Victim Impact Statement or other written statement
 - (iii) have a support person/s present
 - (iv) be represented by a legal representative
 - (v) at victims' request, have a single victim conference with multiple victims in attendance.
- 15** The proposed Act should provide that:
- (a) victims participating in a victim conference are not giving evidence
 - (b) statements made and documents produced at a victim conference are not admissible in evidence in any civil or criminal proceedings, except as expressly provided for in the Act.

Case management

- 10.122 The supplementary terms of reference ask the Commission to consider how to make it easier for victims to understand all their entitlements and quickly and easily access assistance offered by the scheme without necessarily requiring legal support.
- 10.123 As discussed in Chapter 7, the right to legal representation was a key rationale for some stakeholders' support of the existing scheme, while a number of other stakeholders raised concerns about the existing scheme's reliance on legal representation. In this context, a number of stakeholders considered case management as an integral component of any new scheme's design.
- 10.124 Accordingly, this section:
- outlines current case management mechanisms under the VOCAA
 - outlines case management in other jurisdictions
 - discusses consultation views on case management.
- 10.125 This part also makes recommendations in relation to how the proposed scheme should incorporate case management.

Current case management under the VOCAA

- 10.126 While most VOCAT applications are not subject to case management,¹³⁶ and no provision is made for case management under the VOCAA, VOCAT established a specialist Koori List in 2006 which incorporates case management functions.¹³⁷
- 10.127 VOCAT has stated that key to the success of the Koori List is the procedural flexibility and informality available under the VOCAA which has enabled the Tribunal to 'adopt an intensive case-management approach'.¹³⁸ This approach includes:¹³⁹

136 This is acknowledged by the Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria in their joint submission (submission 59), which proposes case management as part of a reformed VOCAT model.

137 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot*, Review and Recommendations (2010) 15–16.

138 Ibid 3.

139 Ibid 15–16.

- all applications being managed centrally by one person
- the registrar developing a relationship with the applicant/applicant's legal representative
- communicating early with applicants/applicant's legal representatives to gain an understanding of the issues involved in the application, communicate the expectations of the Tribunal and anticipate and resolve issues which have the potential to delay applications
- the registrar meeting regularly with Tribunal members determining applications to discuss issues.

10.128 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that the Koori List 'is a best practice example of a tailored process', which includes, among other things, continuity in the management of each application, with the same magistrate managing an application from start to finish.¹⁴⁰

Case management in other jurisdictions

10.129 Case management is a key feature of administrative schemes in other Australian jurisdictions, most notably in Queensland, the Australian Capital Territory and New South Wales.

10.130 The Commission was told that Victim Assist Queensland has three teams of multidisciplinary assessors who use a case management approach. Assessors have both an information gathering role and a decision making role. Victim Assist Queensland told the Commission that key to this process is treating applicants as clients, liaising with victims and their support network, not only to gather evidence for eligibility, but to discuss and understand their financial assistance needs. The Commission was told that a case management approach, where an assessor talks with a victim and acknowledges them during the process, can often be empowering and therapeutic.¹⁴¹

10.131 In the Australian Capital Territory, a similar case management approach is employed. Victim Support ACT employs specialist assessors who consider applications for financial assistance in a 'beneficial manner' and adopt a case management approach. The Commission was told that a case management approach is more responsive to the practical needs of victims, who may often require referrals to other supports, and this assists applications to run more smoothly.¹⁴²

10.132 In New South Wales, because financial assistance is also part of the broader provision of victims' services, a victim support team case manages victims. This team is made up of case coordinators who, along with providing other referrals and practical supports, assist victims to prepare applications for financial assistance. Unlike in Queensland and the Australian Capital Territory, case management is separated from the assessment function—assessors in another team determine applications for financial assistance independently of the case managers.¹⁴³

10.133 A case management approach can promote beneficial outcomes for victims, with Holder and Daly observing in relation to the Queensland scheme that:

It is crucial ... that scheme administrators see their role as more than that of assessors and managers of funds. By working collaboratively with other survivor services and survivors themselves, scheme administrators and the money they provide can become part of a survivor's sensitive process of reconstruction.¹⁴⁴

140 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

141 Consultation 1 (Victim Assist Queensland).

142 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

143 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

144 Robyn L Holder and Kathleen Daly, 'Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors' (2017) 24(1) *International Review of Victimology* 25, 42.

Responses

- 10.134 A number of stakeholders advocated for an administrative model underpinned by a case management approach.¹⁴⁵ Some stakeholders favoured a case management approach, considering the existing scheme's reliance on lawyers to be problematic¹⁴⁶ because:
- Few private lawyers practise in VOCAT matters and community legal centres lack capacity to assist all victims.¹⁴⁷
 - There is a lack of available lawyers in rural and regional areas.¹⁴⁸
 - Some lawyers don't approach the process in a trauma-informed way.¹⁴⁹
- 10.135 For these reasons, some stakeholders considered integration of case management into an administrative scheme's design as crucial to improving accessibility for victims, including removing administrative and evidentiary burdens from victims.¹⁵⁰
- 10.136 The Commission was told in consultations with scheme managers in other Australian jurisdictions that administrative schemes with in-built case management can reduce reliance on lawyers,¹⁵¹ and improve outcomes for victims.¹⁵² The Commission was also told that reducing reliance on lawyers did not mean victims did not have the right to legal representation.¹⁵³
- 10.137 Other stakeholders told the Commission they had concerns about the same agency making both financial assistance determinations and assisting victims with their applications in the absence of independent legal advice.¹⁵⁴

Discussion and recommendations

- 10.138 As will be detailed further in Chapter 17, the Commission has been told that the existing scheme's application and evidentiary requirements are difficult for victims to navigate without support.¹⁵⁵ For example, victims of crime told the Commission that following a serious crime, many victims are simply focused on surviving and may be unable to complete even simple forms.¹⁵⁶
- 10.139 Given the issues raised about the difficulties faced by victims navigating the existing scheme on their own, and about accessing legal representation, the Commission considers that the proposed scheme should incorporate case management. In forming this view, the Commission has considered arrangements in other Australian jurisdictions which indicate that case management can reduce reliance on lawyers¹⁵⁷ as well as improve outcomes for victims.¹⁵⁸
- 10.140 Accordingly, the Commission considers that case management should be provided for under the proposed Act and that case management functions should be part of the proposed expansion of the Office of the Victims of Crime Commissioner, consistent with the recommendation in Chapter 9 that the Victims of Crime Commissioner be supported by appropriately qualified case managers.

145 Submissions 25 (Public Health Association of Australia), 29 (Domestic Violence Victoria and Women's Legal Service Victoria), 37 (safe steps Family Violence Response Centre).

146 Submission 31 (Victorian Council of Social Service); Consultations 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 27 (Victim Survivors' Advisory Council).

147 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 43 (knowmore), 51 (Law Institute of Victoria).

148 Submission 31 (Victorian Council of Social Service).

149 Consultation 4 (Victim, Witness and Court Support).

150 Submissions 18 (cohealth), 27 (Name withheld), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre).

151 Consultation 1 (Victim Assist Queensland).

152 Consultations 1 (Victim Assist Queensland), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

153 Ibid.

154 Submissions 42 (Joint Submission Springvale Monash Legal Service et al), 43 (knowmore).

155 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria); Consultations 6 (Victims' Advocacy Organisations), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 15 (Regional Consultation—Ballarat Victim Support Agencies), 23 (Community Safety Trustee, Victoria).

156 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

157 Consultation 1 (Victim Assist Queensland).

158 Consultations 1 (Victim Assist Queensland), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

- 10.141 While other jurisdictions' approaches differ somewhat in their form and structure, as outlined above, the Commission considers a case management approach vital to the efficient and beneficial operation of the proposed scheme, regardless of whether case managers also make financial assistance determinations—as in the Australian Capital Territory and Queensland—or simply support the decision making of independent assessors in a separate team, as in New South Wales. Either approach should aim to reduce administrative burdens for victims, assess their needs holistically and increase their access to the proposed scheme.
- 10.142 Accordingly, the Commission recommends that the proposed Act specify that case management is an essential component of the proposed scheme, and that case management includes providing assistance to victims, or their representatives, in meeting scheme requirements.

Recommendation

- 16** The proposed Act should provide that case management is an essential component of the scheme, and that case management includes providing assistance to victims, or their representatives, in meeting scheme requirements.

Legal representation

- 10.143 As noted above, the supplementary terms of reference ask the Commission to consider how to make it easier for victims to understand all their entitlements and quickly and easily access assistance offered by the scheme without necessarily requiring legal support.
- 10.144 As discussed in Chapter 7, the right to legal representation was a key rationale for some stakeholders' support of the existing scheme to ensure victims have an independent advocate during the process, while other stakeholders saw reliance on legal representation as a barrier for some victims. In this regard, the Commission must consider how to reduce reliance on legal representation overall, without also affecting a victim's right to independent advice and advocacy.
- 10.145 Accordingly, this part:
- outlines current arrangements for legal representation under the VOCAA
 - outlines legal representation in other jurisdictions
 - discusses consultation views on legal representation.
- 10.146 This part also makes recommendations in relation to how the proposed scheme should incorporate legal representation.

Legal representation under the VOCAA

- 10.147 At VOCAT's discretion, VOCAT may award a legal practitioner the costs of acting for an applicant.¹⁵⁹ Under section 48 of the VOCAA, the costs of, and incidental to, all VOCAT proceedings are 'in the discretion of the Tribunal and it has full power to determine by whom, to whom and to what extent the costs are to be paid'.¹⁶⁰

- 10.148 A legal practitioner acting for an applicant under the VOCAA is not entitled:¹⁶¹
- to recover from the applicant any costs in respect of proceedings before the Tribunal
 - to claim a lien in respect of any such costs on any sum payable as assistance under this Act
 - to deduct any such costs from any such sum—except to the extent to which the costs have been allowed as between the legal practitioner and the client by the Tribunal on the application of the legal practitioner or of the client
 - except as allowed by the Tribunal, to charge for the making of an application to the Tribunal or for appearing on behalf of an applicant.
- 10.149 The Chief Magistrate has issued a guideline to aid VOCAT’s discretion in awarding legal costs.¹⁶² The guideline outlines ranges for preparation and appearance fees, which vary according to factors such as the complexity of the application.
- 10.150 These ranges are outlined in Table 2 below.

Table 2: VOCAT Legal Costs Guideline: Guideline 1 of 2018 (effective 1 January 2018)

	Preparation fees	Appearance fees
Directions Hearing		\$340–\$530
Application of modest complexity	\$885–\$1020	\$730–\$860
Application of greater complexity	\$1020–\$1275	\$860–\$1140
Multiple claims	Principal application: \$875–\$1275. Second and subsequent applications: 30%–50% of the principal application fee	Principal application: \$730–\$1140 Second and subsequent applications: 30%–50% of the principal application fee
Related victim applications	Lead application: \$875–\$1275 Associated applications: 30%–50% of the lead application fee	Lead application: \$730–\$1140 Associated applications: 30%–50% of the lead application fee
Obtaining instructions to review decision of judicial registrar	\$390	

- 10.151 Legal representation significantly impacts the operating expenditure of state-funded financial assistance schemes. For example, in 2016–17, VOCAT awarded \$5,628,709 for legal costs.¹⁶³ In their submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria said that a ‘disproportionate component of the [VOCAT] budget [is] spent on legal expenses as a proportion of award payments’.¹⁶⁴

161 Ibid s 48(4).

162 Victims of Crime Assistance Tribunal, *Cost Guideline (Legal Costs)*, Guideline 1 of 2018 (29 December 2017) <www.vocat.vic.gov.au/vocat-guideline-1-2018-cost-guideline-legal-costs>.

163 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 56.

164 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

Legal representation in other jurisdictions

- 10.152 Some administrative schemes in Australia still reimburse for legal costs, despite case management being provided as part of the scheme.
- 10.153 For example, in the Australian Capital Territory, the scheme reimburses lawyers up to \$1123 for an application and \$2246 for an appeal or review process.¹⁶⁵ In Queensland, victims may be granted assistance of up to \$500 for legal costs.¹⁶⁶
- 10.154 The Commission also notes the experience in New South Wales where the state-funded financial assistance scheme no longer provides reimbursement for legal costs. This has been raised by stakeholders as a barrier, particularly for vulnerable victims, as well as causing issues for lawyers who are still assisting victims with applications to the scheme, but are no longer receiving reimbursement.¹⁶⁷

Responses

- 10.155 There was significant support for any model of state-funded financial assistance to continue to fund legal representation for victims.¹⁶⁸ Additionally, stakeholders submitted that lawyers should be adequately funded to prepare VOCAT cases.¹⁶⁹
- 10.156 Stakeholders said that access to adequately resourced, culturally safe and specialist legal advice and representation was vital, even if the existing scheme was to be simplified or access improved,¹⁷⁰ and that all victims should be able to access high-quality legal advice.¹⁷¹
- 10.157 Springvale Monash Legal Service submitted that legal representation is ‘valuable’ for victims who may be particularly vulnerable.¹⁷² Schembri & Co Lawyers also submitted that it is unreasonable to expect victims experiencing trauma to prepare and manage an application for financial assistance without legal assistance.¹⁷³
- 10.158 Knowmore said that the complex interplay between state-funded financial assistance and other entitlements or schemes, including awards under other redress schemes, necessitates legal representation to ensure survivors are appropriately advised about factors that may affect entitlements under respective schemes.¹⁷⁴
- 10.159 The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that complexity aside, many self-represented victims often become emotionally drained and overwhelmed without an advocate, particularly Aboriginal victims of crime.¹⁷⁵
- 10.160 Some stakeholders considered that legal practitioners were better equipped than case managers to identify evidentiary or eligibility issues¹⁷⁶ and that victims need a lawyer to ensure that their full entitlements are obtained.¹⁷⁷ For example, Dr Kate Seear et al submitted that due to the nature and range of the issues, victims’ rights might be jeopardised without adequate legal advice and representation.¹⁷⁸

165 *Victims of Crime (Financial Assistance) Regulation 2016* (ACT) reg 12.

166 *Victims of Crime Assistance Act 2009* (Qld) s 38(2).

167 The NSW scheme is currently subject to a legislative review. Submissions to this review raised concerns regarding the removal of funded legal representation under the scheme. See, eg, Community Legal Centres NSW, Submission to New South Wales Department of Justice, *Review of the Victims Rights and Support Act*, 29 July 2016, 23. As at 28 May 2018, the review had not been finalised.

168 Submissions 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 41 (Springvale Monash Legal Service), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

169 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

170 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

171 Submission 51 (Law Institute of Victoria).

172 Submission 41 (Springvale Monash Legal Service).

173 Submission 19 (Schembri & Co Lawyers).

174 Submission 43 (knowmore).

175 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

176 Submission 14 (Inner Melbourne Community Legal).

177 Submissions 19 (Schembri & Co Lawyers), 22 (YourLawyer).

178 Submission 7 (Dr Kate Seear et al).

- 10.161 Ryan Carlisle Thomas Lawyers submitted that lawyers assist victims with the application form, explain the process and help victims to navigate the frequent requests for documentary evidence.¹⁷⁹ The Commission was also told that while the VOCAT process can appear easy at first, if an application hits a ‘roadblock’ it can be difficult to overcome this without a lawyer.¹⁸⁰ The Commission was also told that there are certain types of matters where legal assistance is particularly important, such as applications involving historical offences.¹⁸¹
- 10.162 Some stakeholders considered lawyers crucial to victims getting ‘better results’,¹⁸² as well as also being able to assist clients with other legal problems, including intervention orders, child protection, family law, criminal law, fines and *Sentencing Act 1991* (Vic) compensation.¹⁸³

Discussion and recommendations

- 10.163 While the Commission considers that the proposed scheme’s introduction of case management should reduce overall reliance on lawyers, the Commission also agrees with stakeholder concerns that removing the right to legal representation might not best meet all victims’ needs.
- 10.164 In forming this view, the Commission notes the experience in New South Wales where the scheme no longer provides reimbursement for legal costs, but understands lawyers are still assisting victims to access the scheme. This has consequences for vulnerable victims, and in particular, for community legal centres which are still assisting victims.
- 10.165 The Commission agrees that some victims may be particularly vulnerable and require a lawyer to advocate on their behalf. Other victims may already have engaged a lawyer to assist them with other legal processes and it would provide more continuity for them if their lawyer also handled the financial assistance process.
- 10.166 Accordingly, the Commission considers that the proposed Act should:
- expressly state that in applying for assistance, victims have a right to be represented by a legal practitioner
 - provide the scheme decision maker with the discretion to award a legal practitioner the costs of, and incidental to, the making of a victim’s application
 - maintain the current prohibition on legal practitioners directly charging victims for the making of an application¹⁸⁴
 - enable the scheme decision maker to develop publicly available guidelines outlining standard reimbursement costs, similar to the current guidelines published by VOCAT and outlined in Table 2 above, to ensure legal fees represent the reasonable costs of preparing an application, having regard to the assistance provided by case managers under the proposed scheme and the complexity of the application.

179 Submission 38 (Ryan Carlisle Thomas Lawyers).

180 Consultation 3 (Legal Professionals—Community Legal Centres).

181 Ibid.

182 Submissions 14 (Inner Melbourne Community Legal). See also submissions 19 (Schembri & Co Lawyers), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

183 Submissions 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers).

184 *Victims of Crime Assistance Act 1996* (Vic) s 48(4).

10.167 At the same time, the Commission considers that victims without legal representation should not be unfairly disadvantaged. In this regard, the Commission notes other recommendations in this report that aim to address issues of accessibility, including accessibility for victims who do not have a lawyer.¹⁸⁵ The Commission considers these proposals for reform should help to improve access for victims who do not wish, or are unable, to retain a lawyer while at the same time, ensuring victims' right to legal representation is maintained.

Recommendation

17 The proposed Act should provide that:

- (a) in applying for assistance victims have a right to be represented by a legal practitioner
- (b) a legal practitioner is not entitled to recover from the applicant any costs in respect of a victim's application for assistance
- (c) the scheme decision maker may award a legal practitioner the reasonable legal costs of, and incidental to, a victim's application for assistance
- (d) to assist the scheme decision maker in determining awards for legal costs, guidelines should be developed and be publicly available.

Restorative justice

10.168 The supplementary terms of reference ask the Commission to consider how a state-funded financial assistance scheme could maximise therapeutic effects for victims.

10.169 Accordingly, in its supplementary consultation paper, the Commission sought community and stakeholder views on whether restorative justice practices should be a voluntary component of a state-funded financial assistance scheme, or whether a state-funded financial assistance scheme should provide a more direct pathway to restorative justice practices managed elsewhere in the justice system.

10.170 This section:

- outlines the current restorative justice context in Victoria
- considers stakeholder views in relation to restorative justice as a possible component of a state-funded financial assistance scheme
- makes recommendations in relation to restorative justice under the proposed scheme.

185

Recommendations aimed at improving accessibility for victims include the proposed scheme's case management and specialisation components (discussed in this chapter), along with recommendations to improve technical and procedural aspects of the proposed scheme, including simplifying eligibility and available assistance (Chs 12 and 13), application requirements (Ch 14) and reducing complexity in decision making (Chs 15 and 16). In addition, Chapter 17 outlines a range of recommendations aimed at improving broader accessibility of the proposed scheme, including recommendations to assist victims who do not have legal representation.

Restorative justice—the Victorian context

- 10.171 Some academics have noted that a ‘precise definition of restorative justice is elusive’¹⁸⁶ and therefore, that restorative justice may be best understood as an ‘umbrella under which a variety of practices and processes sit’.¹⁸⁷ Restorative justice practices or processes may include:¹⁸⁸
- facilitated meetings between offenders and victims
 - family conferences
 - community circle sentencing.
- 10.172 Restorative justice initiatives focus on fairness, restoration, healing, accountability, responsibility and reparation.¹⁸⁹
- 10.173 Some restorative justice practices are complementary to the criminal justice processes (occurring before, alongside or following traditional justice processes), while others are alternative pathways to justice.¹⁹⁰
- 10.174 In most restorative justice practices or processes, there is typically an encounter between the victim and the offender. However, not all restorative justice practices require this.¹⁹¹
- 10.175 In Victoria, there are a range of restorative justice initiatives available to victims including:
- **Youth justice group conferencing for young offenders:** Youth Justice Group Conferencing facilitates a meeting between the child and other persons including, if they wish, the victim or their representative, and members of the child’s family.¹⁹²
 - **The Neighbourhood Justice Centre:** The Neighbourhood Justice Centre is Australia’s only community justice court and uses a range of therapeutic and problem solving practices.¹⁹³
 - **RMIT Centre for Innovative Justice—pilot restorative justice conferencing program for serious driving offences:** The program ‘supports the person harmed/ the victim to talk with the person responsible for the harm/the offender’ in cases where someone has been seriously injured or died.¹⁹⁴
 - **Department of Justice and Regulation—Family Violence Restorative Justice Service:** As part of the reform agenda arising from the Victorian Royal Commission into Family Violence, the Family Violence Restorative Justice Service will deliver trauma informed restorative justice services to victim survivors of family violence.¹⁹⁵

Responses

- 10.176 Although, as outlined above, restorative justice may be best conceived as an umbrella term that refers to a broad range of practices which attempt to repair the harm caused by crime,¹⁹⁶ a number of stakeholders cautioned against a state-funded financial assistance scheme being ‘too inspired’ by restorative justice, given restorative justice may often

186 Tracey Booth, ‘Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom’ in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences*, (Palgrave MacMillan, 2015) 161, 165.

187 Ibid.

188 Trudy Govier, *Victims and Victimhood* (Broadview Press, 2015) 156.

189 Tracey Booth, ‘Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom’ in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences*, (Palgrave MacMillan, 2015) 161, 165.

190 Theo Gavrielides, ‘The Victims’ Directive and What Victims Want from Restorative Justice’ (2017) 12(1) *Victims and Offenders* 21, 23.

191 For example, the *Children Youth and Families Act 2005* (Vic) enables Youth Justice Group Conferencing for young offenders, the purpose of which ‘is to facilitate a meeting between the child and other persons (including, if they wish to participate, the victim or their representative and members of the child’s family and other persons of significance to the child)’. A meeting between the young person and a victim is not required, and a meeting may focus instead on the young person and their family. See the *Children, Youth and Families Act 2005* (Vic) s 415.

192 Objectives of a Youth Justice Group Conference include increasing the child’s understanding of the effect of their offending on the victim and the community and negotiating an ‘outcome plan’. See *Children, Youth and Families Act 2005* (Vic) s 415.

193 Neighbourhood Justice Centre, *Collaborative Problem Solving* (2018) <www.neighbourhoodjustice.vic.gov.au/knowledge-centre/therapeutic-and-problem-solving-centre/problem-solving-court>.

194 RMIT University, *Restorative Justice Conferencing* (2018) <www.rmit.edu.au/about/our-education/academic-schools/graduate-school-of-business-and-law/research/centre-for-innovative-justice/what-we-do/current-research/restorative-justice-conferencing>.

195 As at 28 May 2018, this service was not yet operational. Information obtained from the Position Description for ‘Convenor, Family Violence Restorative Justice Service’, Department of Justice and Regulation, as advertised February 2018. See Government of Victoria, *Vacancies* (2018) (accessed 15 February 2018) <<https://jobs.careers.vic.gov.au/jobs/VG-DJ1017-DJ1020>>.

196 This was also submitted in submission 47 (Centre for Innovative Justice).

involve the perpetrator.¹⁹⁷ For that reason, some stakeholders said that restorative justice practices should not be tied to the state-funded financial assistance scheme.¹⁹⁸

10.177 On the other hand, some stakeholders considered that VOCAT or the proposed scheme should provide an opportunity for victims to participate in restorative justice practices provided the situation was appropriate.¹⁹⁹

10.178 Safe steps Family Violence Response Centre submitted that applicants should have the option to participate in a restorative justice process provided it was entirely voluntary.²⁰⁰ Similarly, other stakeholders considered that the state-funded financial assistance scheme should provide referrals, or pathways, to restorative justice practices.²⁰¹ For example, Jesuit Social Services submitted:

restorative justice shouldn't be automatically part of the VOCAT process given most victims want financial assistance dealt with quickly. In principle, victims should have access to financial assistance regardless of whether they wish to participate in a restorative justice conference or not.²⁰²

10.179 Some stakeholders warned that restorative justice may not be appropriate for all victim cohorts. Knowmore submitted that there are significant barriers to adopting a restorative justice approach in institutional child sexual abuse matters.²⁰³ Challenges and dangers include the complex power dynamics and seriousness of child sexual abuse matters, as well as both victims' and perpetrators' potential unwillingness to participate in restorative justice processes.²⁰⁴

10.180 Other stakeholders considered an administrative model of state-funded financial assistance, as opposed to a court or tribunal model, as inherently restorative and so already a restorative justice practice in itself. The ACT Victims of Crime Commissioner told the Commission that administratively based schemes are more akin to restorative justice processes because unlike a court, administrative schemes enter into a relationship with an applicant.²⁰⁵ Similarly, Domestic Violence Victoria saw administrative schemes using a symbolic hearing as employing principles of transitional and restorative justice.²⁰⁶ The Victim Survivors' Advisory Council submitted that a new model would better meet the needs of victims if it had a restorative justice framework without a judicial underpinning.²⁰⁷

10.181 RMIT Centre for Innovative Justice submitted that VOCAT could be a 'doorway through which access to restorative justice conferencing is facilitated'.²⁰⁸ At the same time, RMIT Centre for Innovative Justice submitted that it is equally important to make the entire process restorative:

In order to create a victim-centred, restorative experience for victims ... VOCAT needs to undergo a transformation whereby everyone – from counter staff to Magistrates – commits to using restorative principles in every interaction ...²⁰⁹

10.182 The VOCAT, Magistrates' Court of Victoria and the Children's Court of Victoria submission proposed that consideration be given to VOCAT Tribunal members' involvement in a panel that could hear victims' justice system experiences as part of a reformed VOCAT.²¹⁰

197 Consultation 20 (Academics). As noted above, however, not all restorative justice practices require an interaction between the alleged perpetrator and victim.

198 Submission 15 (Merri Health Victims Assistance Program); Consultation 4 (Victim, Witness and Court Support).

199 Consultation 19 (RMIT Centre for Innovative Justice). See also submission 27 (Name withheld).

200 Submission 37 (safe steps Family Violence Response Centre).

201 Submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

202 Submission 12 (Jesuit Social Services).

203 Submission 43 (knowmore).

204 Ibid.

205 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

206 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

207 Submission 8 (Victim Survivors' Advisory Council).

208 Submission 47 (Centre for Innovative Justice).

209 Ibid.

210 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

Discussion and recommendations

- 10.183 Most stakeholders, while supportive of restorative justice more generally, emphasised the need for participation in these programs to be voluntary, supporting an approach where VOCAT or the proposed scheme facilitated referrals to restorative justice programs, rather than such programs being embedded within the scheme.
- 10.184 Noting that research emphasises the need for restorative justice to be, among other things, voluntary, safe, neutral and independent,²¹¹ the Commission considers that the proposed new Act should enable the proposed scheme to facilitate referrals to appropriate restorative justice initiatives or programs, but that these initiatives should not form part of the scheme itself.
- 10.185 The Commission considers that the proposed Act and scheme would necessarily be focused on a beneficial outcome for the victim and would therefore not be appropriately independent for the purposes of conducting a 'neutral' restorative justice program. As there would undoubtedly be some victims who would benefit from the proposed scheme facilitating referrals and providing pathways to restorative justice, the Commission considers that the proposed Act should provide for this.
- 10.186 This would ensure that the above requirements—including that the restorative justice processes be safe, independent and neutral—are met through an appropriate third-party organisation with specific expertise in conducting such practices, while ensuring victims are still advised of these opportunities by the proposed scheme where appropriate.

Recommendation

- 18** The proposed Act should provide that the scheme decision maker may, where requested by a victim, refer the victim to appropriate restorative justice initiatives.

Specialisation

- 10.187 As noted in Chapter 8, a key rationale for adopting an administrative model with an independent and dedicated decision maker was the opportunity for increased specialisation.
- 10.188 Accordingly, this section considers:
- current mechanisms for specialisation under the existing scheme
 - stakeholder and community views on specialisation
 - mechanisms for specialisation under the proposed scheme.

Current mechanisms for specialisation under the VOCAA

- 10.189 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 purpose and objectives of the VOCAA could be achieved for Koori applicants.²¹²
- 10.190 The Koori List does not apply any different legal considerations. All determinations are made within the framework of the VOCAA. However, the list enables VOCAT to be more responsive to the circumstances of Koori victims of crime.²¹³

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Theo Gavrielides, 'The Victims' Directive and What Victims Want from Restorative Justice' (2017) 12(1) *Victims and Offenders* 21, 39.
Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 9.
Ibid 10.

- 10.191 VOCAT has stated that key to the success of the Koori List is the procedural flexibility and informality available under the VOCAA which enables the Tribunal to be responsive to applicants' circumstances.²¹⁴ This may involve sitting at the bar table to hear participants, instead of at the bench, adopting a more informal approach and receiving culturally specific information from community representatives.²¹⁵
- 10.192 The Commission's supplementary consultation paper sought community and stakeholder views on whether a reformed VOCAT could have separate VOCAT streams or lists, following a similar approach to the VOCAT Koori List.

Responses

- 10.193 Specialisation was raised by a number of stakeholders as an important component of any model of state-funded financial assistance. In particular, stakeholders spoke about specialisation in three broad ways:
- State-funded financial assistance decision makers should be dedicated positions, thus ensuring specialisation.
 - State-funded financial assistance decision makers should be appropriately trained to enhance specialisation.
 - The state-funded financial assistance scheme should enable specialisation within the scheme—for example, through specialist lists or streams.
- 10.194 Stakeholders also provided more specific comment on the current operation of the VOCAT Koori List.
- 10.195 Each of these matters relating to specialisation is discussed further below.

Dedicated decision maker

- 10.196 In the context of the existing VOCAT model, a number of stakeholders said that only dedicated and specialised magistrates should preside over VOCAT matters²¹⁶ and that such magistrates should elect to be Tribunal members.²¹⁷
- 10.197 The Children's Court of Victoria told the Commission that a dedicated approach leads to more consistent decision making and can enhance opportunities for victim acknowledgment through more developed and specialised 'court craft'.²¹⁸

Training

- 10.198 To support specialisation, a number of stakeholders highlighted the need for decision makers to be appropriately trained. For example, victim representatives of the Victims of Crime Consultative Committee told the Commission that all victim support, including financial assistance, needed to be provided by trained, specialist professionals who recognise and understand trauma.²¹⁹
- 10.199 The need for trained decision makers was also raised by a number of other stakeholders,²²⁰ including the Victorian Council of Social Service which submitted in relation to the existing model:

214 Ibid 9.

215 Ibid 13–14.

216 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 49 (Victims of Crime Commissioner, Victoria); Consultations 2 (Legal Professionals—Private Practice), 6 (Victims' Advocacy Organisations), 20 (Academics), 25 (Children's Court of Victoria).

217 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 41 (Springvale Monash Legal Service); Consultation 2 (Legal Professionals—Private Practice).

218 Consultation 25 (Children's Court of Victoria).

219 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

220 Submission 31 (Victorian Council of Social Service); Consultation 13 (Regional Consultation—Mildura Legal Professionals).

The quality of interactions with the justice system is crucial in helping people heal and recover, and preventing further traumatisation. The way a VOCAT hearing is conducted can have significant positive or negative effects on a person. VOCAT members should receive regular training on family violence, trauma-informed care and working with victims of crime.²²¹

- 10.200 Similarly, other stakeholders told the Commission that VOCAT members need to be more trauma-informed and as such, need victim training.²²² The Law Institute of Victoria advocated for all magistrates in the VOCAT jurisdiction to undertake victim training.²²³
- 10.201 Safe steps Family Violence Response Centre emphasised the findings of the Royal Commission into Family Violence, submitting that only specially trained professionals should work with victims of family violence.²²⁴
- 10.202 In addition, the Victorian Aboriginal Legal Service submitted that the therapeutic nature of VOCAT needs to be enhanced, particularly with respect to cultural awareness and engaging with Aboriginal victims' culture and history, including how to deal with intergenerational trauma.²²⁵ This view was also held by the Aboriginal Family Violence Prevention & Legal Service Victoria, who advocated for all decision makers and staff to undertake mandatory cultural awareness training, particularly in relation to barriers faced by Aboriginal victims of family violence.²²⁶
- 10.203 While most stakeholders supported training to ensure that decision makers are trauma-informed and understand the complexities of issues such as family violence and sexual assault,²²⁷ some noted that specialised training would also improve the consistency of decision making.²²⁸ In this context, the Commission was told that training of assessors under the NSW scheme includes training in relation not only to victims of crime generally, but also to sexual assault, family violence, trauma-informed practice and therapeutic jurisprudence.²²⁹

Specialist lists

- 10.204 Some stakeholders supported the introduction of specialist lists, similar to the VOCAT Koori List, for particular cohorts of victims, such as family violence or sexual assault.²³⁰ A number of stakeholders told the Commission that consistency in decision making under the existing scheme would be improved through increased specialisation of tribunal members.²³¹
- 10.205 As detailed in Chapter 8, a key element of the proposal by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria for a reformed VOCAT was for a more specialised approach, using the VOCAT Koori List as a best practice example.²³² VOCAT, the Magistrates' Court of Victoria and Children's Court of Victoria submitted that such specialisation would provide VOCAT with the capacity to simultaneously improve VOCAT's therapeutic outcomes and its consistency in decision making, as well as yield cost savings and efficiency gains.²³³

221 Submission 31 (Victorian Council of Social Service).
222 Consultation 4 (Victim, Witness and Court Support).
223 Submission 51 (Law Institute of Victoria).
224 Submission 37 (safe steps Family Violence Response Centre).
225 Submission 39 (Victorian Aboriginal Legal Service).
226 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
227 Submissions 7 (Dr Kate Seear et al), 10 (Eastern Metropolitan Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal).
228 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).
229 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).
230 Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 14 (Chief Magistrate's Family Violence Taskforce), 19 (RMIT Centre for Innovative Justice).
231 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service); Consultations 2 (Legal Professionals—Private Practice), 14 (Chief Magistrate's Family Violence Taskforce), 19 (RMIT Centre for Innovative Justice).
232 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
233 Ibid.

- 10.206 The specialisation envisaged by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria in their joint submission includes a smaller pool of dedicated VOCAT magistrates supported by specialised judicial registrars and administrative staff, with further specialisation within this pool, for example, specialisation in family violence to enhance integration with specialist family violence courts.²³⁴
- 10.207 The joint submission by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria noted VOCAT's Koori List as a best practice example of a tailored process, stating this specialised approach is highly applicable and transferable to VOCAT's operation more broadly and would likely also be of benefit to other victim groups.²³⁵
- 10.208 Stakeholder views in relation to the VOCAT Koori List were mixed. The Victorian Aboriginal Legal Service (VALS) provided a case study example of how the Koori List enables VOCAT members to conduct VOCAT hearings in a culturally sensitive way, for example, by using accessible language, acknowledging the traditional owners of the land and observing Aboriginal and Torres Strait Island customs, such as conducting a smoking ceremony. VALS described how such practices can provide a safe space for Aboriginal people and therefore improve engagement by Aboriginal people with the scheme.²³⁶
- 10.209 VALS also submitted that:
- In our experience, whilst members are aware that they should engage with an Aboriginal victim's culture and history, they may not be aware of how to do this appropriately. Such engagement often takes the form of questions that are at best confusing, and at worst insulting. It can also create an atmosphere of distrust, where the Aboriginal victim does not believe that the Member has their interests at heart.²³⁷
- 10.210 The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that developments like the Koori VOCAT List are positive steps toward breaking down barriers and making VOCAT more accessible for Aboriginal victims of family violence. The Commission was also told that more investment was needed to strengthen initiatives directed towards improving cultural safety and accessibility of the scheme for Aboriginal people.²³⁸ For example, the Aboriginal Family Violence Prevention & Legal Service Victoria submitted that while they strongly support the aims of the Koori VOCAT List and the efforts made by the Tribunal to date, 'in recent years a number of our clients' experiences of the system have not differed markedly from the general administration of the Act'.²³⁹ The Aboriginal Family Violence Prevention & Legal Service Victoria also submitted that Tribunal members often remain seated at the bench and that aside from providing an acknowledgment of country, matters are often 'run in a fashion that resembles normal court proceedings, being quite formal and legalistic and held in what is normally used as a criminal court'.²⁴⁰
- 10.211 Other stakeholders also emphasised the need for proper resourcing, with some legal professionals suggesting the Koori List now has extended delays.²⁴¹ Nonetheless, the Aboriginal Family Violence Prevention & Legal Service Victoria submitted that a well-resourced Koori List, or equivalent Aboriginal-specific stream, should be used under any model.²⁴²
- 10.212 The Victorian Council of Social Service also submitted that the Koori List should be retained, particularly as the list has enabled magistrates to develop specialised expertise and more deeply understand Aboriginal victims' experiences.²⁴³

234 Ibid.
 235 Ibid.
 236 Submission 39 (Victorian Aboriginal Legal Service).
 237 Ibid.
 238 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
 239 Ibid.
 240 Ibid.
 241 Consultation 3 (Legal Professionals—Community Legal Centres).
 242 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
 243 Submission 31 (Victorian Council of Social Service).

Discussion and recommendations

- 10.213 As discussed in Chapters 8 and 9, key to the proposed scheme is the establishment of a new independent, dedicated and specialised decision maker. In recommending that the Victims of Crime Commissioner's powers and functions be expanded to include administering the proposed scheme, the Commission noted in Chapter 9 that the Victims of Crime Commissioner's position is already established as an independent statutory appointment dedicated to, and specialising in, victims' advocacy and support.
- 10.214 Accordingly, the Commission considers that the dedicated nature of the proposed new decision maker should improve specialisation under the proposed scheme. In the Commission's view, there are also two further opportunities to enhance specialisation under the proposed scheme:
- training for the decision maker and support staff
 - establishment of specialised case management/assessment teams.

Training

- 10.215 Many stakeholders noted the importance of appropriate training for state-funded financial assistance decision makers. Stakeholders in particular highlighted the need for training in relation to:
- recognising and understanding trauma²⁴⁴
 - family violence²⁴⁵
 - trauma-informed care²⁴⁶
 - working with victims of crime²⁴⁷
 - cultural awareness and engaging with Aboriginal victims' culture and history, including how to deal with intergenerational trauma.²⁴⁸
- 10.216 The Commission was told that training of assessors under the NSW administrative scheme includes training in relation to victims of crime generally, sexual assault, family violence, trauma-informed practice and therapeutic jurisprudence.²⁴⁹
- 10.217 The recent report of the Senate Community Affairs Legislation Committee in relation to the proposed Commonwealth Redress Scheme also emphasised the importance of training for redress scheme staff to avoid re-traumatisation of victims.²⁵⁰ Areas of training noted in the report included cultural awareness training, disability awareness training and trauma-informed sensitivity training, including training in relation to stress responses and issues of power and control.²⁵¹
- 10.218 The Commission notes that a number of organisations provide training programs for professionals working directly with victims of crime. The Australian Childhood Foundation provides training, workshops and seminars in relation to trauma.²⁵² A number of centres against sexual assault in Victoria also provide training, including training in relation to responding to sexual assault, working with families impacted by sexual assault, the counselling needs of adult survivors of child sexual assault and re-traumatisation.²⁵³ The Domestic Violence Resource Centre delivers specialist family violence training to a range

244 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

245 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre).

246 Submission 31 (Victorian Council of Social Service).

247 Ibid; Submission 51 (Law Institute of Victoria).

248 Submissions 39 (Victorian Aboriginal Legal Services), 44 (Aboriginal Family Violence Prevention & Legal Services Victoria).

249 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

250 Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) 72.

251 Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) 72.

252 Australia Childhood Foundation, *Professional Community* (2017) <<https://professionals.childhood.org.au/workshops-and-seminars>>.

253 See, eg, WestCASA, *Training / Community Education* (2018) <<http://westcasa.org.au/our-services/training-and-community-education/>>.

of community and government organisations.²⁵⁴ The Victorian Aboriginal Community Controlled Health Organisation Inc is a registered training organisation that provides education and training in relation to Aboriginal culture, knowledge and spirituality.²⁵⁵

- 10.219 In the Commission's view, one of the key benefits of transitioning to an administrative model of financial assistance would be the ability for the proposed scheme decision maker to create a culture of specialisation, requiring all scheme staff to undertake mandatory minimum training. Such training, whether provided in-house or through accredited training providers such as those outlined above, would ensure the proposed scheme's staff had the requisite skills to adopt a beneficial approach. All scheme staff should be required to perform their role in a trauma-informed way that aims to affirm victims' experiences, while minimising interactions or processes that could increase victims' trauma.
- 10.220 Accordingly, the Commission considers that such training should, as a minimum, include training in relation to:
- relevant Victorian legislation such as the *Victims' Charter Act 2006 (Vic)*, *Sentencing Act 1991 (Vic)*, *Victims of Crime Commissioner Act 2015 (Vic)* and the proposed new state-funded financial assistance Act
 - victim support and advocacy services provided by government as well as by government-funded or peak community organisations in Victoria
 - victims of crime generally, as well as sexual assault, family violence and trauma-informed practice, as undertaken by assessors in the NSW scheme²⁵⁶
 - working with diverse communities including Aboriginal communities, diverse cultural, linguistic and faith communities, people with a disability, people experiencing mental health issues, older people and those who identify as LGBTIQ.²⁵⁷
- 10.221 In the Commission's view, the proposed scheme should also consider minimum training and education requirements for staff interacting with applicants to the scheme consistent with the legislated functions of scheme staff, and levels of responsibility.
- 10.222 The Commission considers that all scheme staff should be required to undertake appropriate training, as determined by the scheme's decision maker. Such training should underpin a beneficial approach informed by trauma-informed practices so as to affirm victims' experiences and minimise interactions or processes that could increase victims' trauma.

Specialisation

The VOCAT Koori List

- 10.223 The Commission notes that the joint submission by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria highlights VOCAT's Koori List as a best practice example of a tailored process for a particular victim group.²⁵⁸
- 10.224 In 2010, a review of the VOCAT Koori List Pilot noted that the list:
- was originally set-up as a two-year pilot project but, due to its success, will continue as an ongoing part of the Tribunal's operations. The List provides an administrative framework for managing applications by Koori victims of crime; applications are still determined according to the legislative requirements set out in the VOCA Act. What the List does do, however, is direct the Tribunal to promote flexible practices in relation to applications by Koori applicants.²⁵⁹

254 Domestic Violence Resource Centre Victoria, *About Us* (2017) <<https://training.dvrcv.org.au/welcome-dvrcv/>>.

255 Victorian Aboriginal Community Controlled Health Organisation Inc, *Educational Services* (2018) <www.vaccho.org.au/educational/>.

256 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

257 For discussion generally in relation to service provision for diverse communities, see Victorian Government, *Diversity and Intersectionality Framework* (28 April 2017) <www.vic.gov.au/familyviolence/designing-for-diversity-and-intersectionality/diversity-and-intersectionality-framework.html>.

258 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

259 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 3.

- 10.225 As noted above, stakeholder views in relation to VOCAT’s Koori List are mixed. While some stakeholders noted that the Koori List enables VOCAT members to conduct VOCAT hearings in a culturally sensitive way, providing a safe space for Aboriginal people to engage with VOCAT,²⁶⁰ other stakeholders raised concerns about the current operation of the Koori List.
- 10.226 Despite some stakeholder concerns about the current operation of the VOCAT Koori List, in the Commission’s view, a number of the specialist and case management techniques employed in the VOCAT Koori List are complementary to the proposed scheme’s case management approach, including:²⁶¹
- the registrar developing a relationship with the applicant/applicant’s legal representative
 - communicating early with applicants and/or applicant’s legal representatives to gain an understanding of the issues involved in the application, communicate the expectations of the Tribunal and anticipate and resolve issues which have the potential to delay applications
 - the registrar meeting regularly with Tribunal members determining applications to discuss issues.
- 10.227 While some stakeholders raised concerns about the current operation of VOCAT, a number of stakeholders also supported retention of VOCAT’s Koori List—or an equivalent specialist approach—due to it representing a positive step toward breaking down barriers and making VOCAT more accessible.²⁶² A number of stakeholders also highlighted the need for more investment in such specialisation, to strengthen cultural safety and accessibility of the scheme for Aboriginal people. For example, the Aboriginal Family Violence Prevention & Legal Service Victoria submitted that a well-resourced Koori List, or equivalent Aboriginal-specific stream, should be employed under any proposed new scheme.²⁶³ The Victorian Council of Social Service also submitted that the Koori List should be retained, particularly as the list has enabled magistrates to develop specialised expertise and more deeply understand Aboriginal victims’ experiences.²⁶⁴
- 10.228 The Commission recognises the progress made in improving cultural safety for Aboriginal victims of crime, while at the same time noting concerns raised by some stakeholders about the current operation of the VOCAT Koori List. The Commission considers that, consistent with Department of Justice and Regulation’s *Yarrwul Loitjba Yapaneyepuk—Walk the Talk Together: Koori Inclusion Action Plan*, which commits to partnering with the Koori community to inform and shape decision making,²⁶⁵ the proposed scheme should:
- consult with Aboriginal communities about the strengths and weaknesses of the approach under the VOCAT Koori List, including processes and practices that worked well and should be adopted by the proposed scheme
 - following consultation with key stakeholders, establish a specialist approach to managing applications to the proposed scheme by Aboriginal victims of crime, adopting culturally appropriate practices.
- 10.229 Specialist approaches, and the Commission’s recommendations in relation to specialisation under the proposed scheme are discussed further below.

260 Submission 39 (Victorian Aboriginal Legal Service).

261 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 15–16.

262 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

263 Ibid.

264 Submission 31 (Victorian Council of Social Service).

265 Department of Justice and Regulation (Vic), *Yarrwul Loitjba Yapaneyepuk—Walk the Talk Together: Koori Inclusion Action Plan* (2017) 3.

Further specialisation under the proposed scheme

- 10.230 As noted above, and irrespective of model, a number of stakeholders supported the establishment of specialist lists for victims with particular needs, such as family violence or sexual assault victims.²⁶⁶
- 10.231 There is also evidence indicating specialisation can improve outcomes for victims of crime. For example, as noted by the Australian Law Reform Commission, specialisation in relation to family violence can help ensure that victims have contact with staff who understand the nature, features and dynamics of family violence.²⁶⁷
- 10.232 In addition, the Commission notes the Australian Law Reform Commission’s observation that specialisation can improve consistency and efficiency in the interpretation and application of laws as a result of shared understandings and the experience of a smaller number of decision makers:
- Specialists can identify and solve problems more quickly and effectively and can develop and promote best practice that can then be mainstreamed to drive change in the system more generally.²⁶⁸
- 10.233 The Commission is of the view that there is merit to enabling specialisation within the proposed scheme, in both case management and decision making. This is because, under the proposed Act, decision makers will be required to take into account the unique characteristics of particular victims and/or crime types.²⁶⁹
- 10.234 In the Commission’s view, specialisation within the proposed scheme will:
- enable the proposed scheme’s staff and decision makers to apply the proposed Act more efficiently and consistently
 - ensure victims who have contact with the proposed scheme come into contact with staff with a better understanding of the nature, features and dynamics of particular crimes
 - improve the proposed scheme’s ability to better identify and respond to increased vulnerability and intersectional factors, for example the overlapping forms of marginalisation that might occur where a person with a disability experiences family violence.²⁷⁰

Recommendation

- 19** The proposed Act should provide for the establishment of specialised case management and decision making.

²⁶⁶ Submissions 17 (Centre for Excellence in Child and Family Welfare), 38 (Ryan Carlisle Thomas Lawyers); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 14 (Chief Magistrate’s Family Violence Taskforce), 19 (RMIT Centre for Innovative Justice).

²⁶⁷ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report 128 (2017) 71.

²⁶⁸ *Ibid* 72.

²⁶⁹ Chapters 12–14 make recommendations in relation to eligibility, available assistance and making an application under the proposed new scheme, including consideration of particular victims’ characteristics or particular crime types.

²⁷⁰ For a general discussion on diversity and intersectionality, see Victorian Government, *Diversity and Intersectionality Framework* (28 April 2017) <www.vic.gov.au/familyviolence/designing-for-diversity-and-intersectionality/diversity-and-intersectionality-framework.html>.

PART FOUR: THE PROPOSED ACT FOR VICTIMS OF CRIME FINANCIAL ASSISTANCE

The purpose, objectives and principles of the proposed Act for victims of crime financial assistance

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11. The purpose, objectives and principles of the proposed Act for victims of crime financial assistance

Introduction

- 11.1 In Chapter 8, the Commission recommended the establishment of a new, independent, dedicated and specialised decision maker to oversee a new state-funded financial assistance scheme (the proposed scheme).
- 11.2 In Chapter 8, the Commission also recommended that the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) be repealed and replaced with a new state-funded financial assistance Act (the proposed Act).
- 11.3 Having regard to the objectives outlined in the supplementary terms of reference, this chapter considers:
- the existing purpose and objectives of the VOCAA
 - the purpose and objectives of state-funded financial assistance schemes in other jurisdictions
 - stakeholder responses in relation to the purpose and objectives of the VOCAA.
- 11.4 This chapter makes recommendations in relation to the purpose and objectives of the proposed Act, as well as guiding principles to assist the decision maker and others in the administration of the proposed scheme.
- 11.5 The importance of a clearly articulated legislative purpose is founded in common law principles of statutory interpretation and is reflected in section 35 of the *Interpretation of Legislation Act 1984* (Vic), which requires decisions makers, when interpreting legislation, to favour ‘a construction that would promote the purpose or object underlying the Act’.¹
- 11.6 The Hon. Michael Kirby AC CMG has observed that statutory interpretation requires a combined exercise involving analysis of the text, context and purpose (or policy) of the statute in question.²
- 11.7 In relation to victim compensation schemes, Katharina Buck has stated that many such schemes fail to provide a sound theoretical foundation, resulting in moral judgments being made during scheme decision making as a way of overcoming the ‘theoretical vagueness of state compensation’.³
- 11.8 Similarly, Njeri Mathis Rutledge has said that providing a ‘clear mission and rationale’ for state-funded financial assistance is the first step to ensuring that any barriers to access for victims of crime are dismantled.⁴

1 *Interpretation of Legislation Act 1984* (Vic) s 35(a). This is described as the ‘purposive approach’ and is to be contrasted with the ‘literal approach’. See also D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 2006) 25–7.

2 Michael Kirby AC CMG, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35 *Melbourne University Law Review* 113, 116.

3 Katharina Buck, ‘State Compensation to Crime Victims and the Principle of Solidarity: Can Theoretical Analysis Contribute to a Future European Framework?’ (2005) 13(2) *European Journal of Crime, Criminal Law and Criminal Justice* 148, 168.

4 Njeri Mathis Rutledge, ‘Looking a Gift Horse in the Mouth—the Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims’ (2011) 19 *Duke Journal of Gender Law and Policy* 223, 235, speaking more specifically in relation to barriers experienced by domestic violence victims in accessing compensation schemes.

- 11.9 The Commission considers it important that the proposed Act contain a clearly articulated purpose and objectives to guide the scheme decision-maker and others involved in the administration of the Act in making any decision or taking any action under the Act, and to assist the courts when there is a question of statutory interpretation.

The purpose and objectives of the VOCAA

- 11.10 As noted in Chapter 4, the purpose of the VOCAA is to 'provide assistance to victims of crime'.⁵ The objectives of the VOCAA are set out in section 1(2) and are to:
- a) 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
 - b) 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
 - c) allow victims of crime to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources.
- 11.11 In addition, section 1 of the VOCAA states 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.⁶
 - The scheme provided by the Act is intended to complement other services provided by government to victims of crime.⁷
- 11.12 As discussed in Chapter 11, case law demonstrates an intersection between consideration of an applicant's broader character, behaviour and conduct 'at any time', as required under section 54 of the VOCAA, and consideration of whether an applicant is an appropriate recipient of recognition and sympathy according to the objective in section 1(2)(b).⁸ In this context, some applicants have been found not to be appropriate recipients of financial assistance provided by the state as a symbolic expression of the community's sympathy.⁹

The approach in other jurisdictions

Purpose and objectives

- 11.13 The Australian Capital Territory, Queensland, Northern Territory and South Australia all include the concept of victim recovery in the purpose or objectives provisions in their relevant state-funded financial assistance legislation. Most jurisdictions also include a purpose or objective related to supporting, assisting or helping victims.
- 11.14 For example, one of the objects of the *Victims of Crime (Financial Assistance) Act 2016* (ACT) includes 'to assist victims of crime to recover from acts of violence'.¹⁰ The Queensland scheme includes a similar objective 'to help victims of acts of violence to recover'.¹¹

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

6 *Ibid* s 1(3).

7 *Ibid* s 1(4).

8 For example, in *RUM v Victims of Crime Assistance Tribunal* [2016] VCAT 367 (10 March 2016) [18], 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, holding that 'in addition to the factors at section 54 [of the VOCAA], the objectives of the Act "require consideration of whether an applicant is an appropriate recipient of a symbolic expression by the state of the community's sympathy"'.⁹

9 *RUM v Victims of Crime Assistance Tribunal* [2016] VCAT 367 (10 March 2016) [18].

10 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 6(a).

11 *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(a).

- 11.15 The objects of the Northern Territory legislation include ‘to assist the rehabilitation of victims’,¹² while South Australia’s relevant legislation includes an objective ‘to help victims of crime recover from the effects of criminal offending and to advance their welfare in other ways’.¹³
- 11.16 Of the jurisdictions with specific purpose or objective provisions in their relevant legislation, New South Wales is the only one not to include a purpose or objective of recovery.¹⁴ Instead, the object of Part 4 of the New South Wales legislation ‘is to establish a scheme for the provision of support for victims of acts of violence’.¹⁵ As discussed in the Commission’s supplementary consultation paper, this formulation may be considered more inclusive, as it aims to offer assistance to victims whether or not they are able to recover.¹⁶
- 11.17 In regard to paying ‘certain victims’ as a symbolic expression of sympathy, only Victoria and Queensland make such a distinction.¹⁷ Other schemes limit the provision of assistance through eligibility criteria, and the definition of key terms, such as the definition of act of violence.
- 11.18 In relation to whether a state-funded financial assistance scheme is a scheme of last resort, no other Australian jurisdiction with equivalent purpose and objective provisions includes a last resort provision in their purpose or objectives.¹⁸ A number of jurisdictions do, however, have an objective that the state-funded financial assistance scheme complement other services for victims.¹⁹

Guiding principles

- 11.19 No other Australian states or territories have guiding principles in their relevant state-funded financial assistance legislation relating specifically to the administration of their jurisdiction’s state-funded financial assistance scheme.
- 11.20 Some jurisdictions include general principles for the treatment of victims of crime in their relevant Acts, which are similar in scope and nature to the principles contained in Victoria’s *Victims’ Charter Act 2006* (Vic). For example, the *Victims of Crime Act 2001* (SA) contains a number of principles governing the way victims are to be dealt with by public agencies and officials.²⁰ Similarly, Division 2 of the *Victims Rights and Support Act 2013* (NSW) provides for the New South Wales Charter of Victims Rights.
- 11.21 The Australian Law Reform Commission has observed that guiding principles or statements in legislation ‘can perform an important symbolic and educative role in the application and interpretation of the law, as well as for the general community’.²¹ For example, the Preamble of the *Family Violence Protection Act 2008* (Vic) recognises the gendered nature of family violence; the broader community effects of family violence; and the particular dynamics and characteristics of family violence.²² The guiding principles in the *Criminal Procedure Act 2009* (Vic) require courts to have regard to the fact that there is a high incidence of sexual violence within society; sexual offences are significantly under-reported; and that sexual offences often occur in circumstances where there is unlikely to be any physical sign of an offence having occurred.²³

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

13 *Victims of Crime Act 2001* (SA) s 3(c).

14 Neither Tasmania nor Western Australia have applicable purpose or objectives provisions.

15 *Victims Rights and Support Act 2013* (NSW) s 17.

16 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 193.

17 Other schemes limit the provision of assistance through eligibility criteria, such as the definition of ‘act of violence’. See generally Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 195.

18 See *Victims of Crime Assistance Act 2009* (Qld) s 3; *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 6; *Victims Rights and Support Act 2013* (NSW) s 17; *Victims of Crime Assistance Act 2006* (NT) s 3; *Victims of Crime Act 2001* (SA) s 3. Neither Tasmania nor Western Australia have applicable purpose or objectives provisions.

19 See, eg, *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(d); *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 6.

20 See generally *Victims of Crime Act 2001* (SA) pt 2.

21 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks*, Consultation Paper 1, NSWLRC Consultation Paper 9 (2010) 760.

22 *Family Violence Protection Act 2008* (Vic) Preamble.

23 *Criminal Procedure Act 2009* (Vic) s 338.

- 11.22 Such principles provide guidance not only to decision makers, but also speak to community expectations and standards, and provide a picture of the broader policy context underpinning the relevant legislation.

Responses

- 11.23 In its supplementary consultation paper, the Commission considered whether the purpose and objectives provisions of the VOCAA reflected contemporary views in relation to victims.
- 11.24 In particular, the Commission sought stakeholders views on whether:
- the purpose of the VOCAA should be on supporting victims of crime rather than recovery, given not all victims of crime may recover
 - it remained appropriate that one of the objectives of the VOCAA was that only certain victims of crime are entitled to financial assistance as a symbolic expression of the community's sympathy, condolence and recognition
 - it remained appropriate that some awards are a symbolic expression by the state of the community's sympathy and condolence while other awards are not.
- 11.25 In addition to the above matters relating to the VOCAA's purpose and objectives, the Commission sought stakeholders' views in relation to whether the VOCAA should include guiding principles, including a principle of protecting victims from undue trauma, intimidation or distress.

The purpose of the VOCAA—assistance versus recovery

- 11.26 The Commission was told by victim representatives of the Victims of Crime Consultative Committee that the purpose of the VOCAA should be assistance rather than recovery because some victims may never recover from crime.²⁴ Springvale Monash Legal Service submitted that changing the purpose from 'recovery' to 'support' would better reflect the lived experience of victims.²⁵ Similarly, knowmore submitted that the object of the existing scheme should be the provision of support rather than recovery, explaining that this would more accurately reflect the reality that recovery may not be achievable for some survivors of institutional child sexual abuse.²⁶
- 11.27 Other stakeholders viewed assistance as inextricably linked to recovery. For example, cohealth submitted that by changing the purpose of the VOCAA to supporting victims of crime, and providing appropriate and timely support, the scheme would maximise recovery.²⁷ Another stakeholder concurred with this view, submitting that 'to support victims of crime IS in fact to assist their recovery'.²⁸
- 11.28 Ryan Carlisle Thomas Lawyers submitted that there was no clear distinction between assistance and recovery: "Supporting victims" and "assisting their recovery" are one [and] the same to us.²⁹ Accordingly, Ryan Carlisle Thomas Lawyers were of the view that retaining the purpose of the VOCAA as assisting victims' recovery was both clear and appropriate.³⁰

24 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).
 25 Submission 41 (Springvale Monash Legal Service). See also submissions 37 (safe steps Family Violence Response Centre).
 26 Submission 43 (knowmore).
 27 Submission 18 (cohealth).
 28 Submission 27 (Name withheld).
 29 Submission 38 (Ryan Carlisle Thomas Lawyers).
 30 Ibid.

Objectives of the VOCAA

Objective 1(2)(b)—paying ‘certain victims’ financial assistance as a symbolic expression of sympathy

- 11.29 As noted above, the objective in section 1(2)(b) of the VOCAA provides for payment to ‘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’.
- 11.30 The Commission was told by some academics that although the reference to ‘sympathy’ in section 1(2)(b) of the VOCAA may be ‘well-intentioned’, it:
- does not take into account the higher historically and politically specific conditions under which sympathy is experienced and considered legitimate ... By tying [sic] awards of compensation to the articulation and experience of ‘sympathy’ in this way, the Act introduces a set of political and moral considerations about who evokes and ‘deserves’ sympathy.³¹
- 11.31 In particular, Dr Kate Seear et al submitted that by requiring the Victims of Crime Assistance Tribunal (VOCAT) to consider whether certain victims are worthy of state sympathies, the VOCAA politicises suffering and requires moral judgments about ‘appropriate’ or ‘worthy’ victims.³² Accordingly, Seear et al submitted that the VOCAA’s specific emphasis on sympathy in its objectives should be removed.³³
- 11.32 This view was supported by Springvale Monash Legal Service, who submitted that the focus on ‘certain victims of crime’ is underpinned by a philosophy that some victims are innocent or deserving of assistance, while others are not, and that this takes the decision maker’s focus away from assisting victims.³⁴
- 11.33 The RMIT Centre for Innovative Justice also submitted that:
- the ‘certain victims’ who the legislation accepts as eligible for the community’s sympathy are those victims who were most likely to have been functioning members of the community; who experience a single incident of crime; and who are capable of recovering to their previous situation within a relatively short space of time.³⁵
- 11.34 Knowmore also supported removal of the reference to ‘certain victims’ in recognition that many survivors of institutional child sexual abuse will have a history of criminal offending and substance abuse as a result of the offences perpetrated against them and that:
- It is simply unfair to preclude provision of financial assistance to victims because of other conduct which in many cases has its origins, to a significant degree, in the offending perpetrated against the claimant as a vulnerable child.³⁶
- 11.35 Safe steps Family Violence Response Service also supported removal of ‘certain victims’,³⁷ as did Ryan Carlisle Thomas Lawyers who suggested the words be replaced with ‘eligible’.³⁸
- 11.36 A further submission suggested the notion of a symbolic expression by the state is no longer appropriate as ‘the notion itself of a token gift of money is flawed, and should be removed altogether’.³⁹

31 Submission 7 (Dr Kate Seear et al).

32 Ibid.

33 Ibid.

34 Submission 41 (Springvale Monash Legal Service). See also *Attard v Victims of Crime Assistance Tribunal* [2011] VCAT 2429 (21 December 2011) [24]–[26] where VCAT drew reference to the phrase ‘certain victims’ to deny an applicant assistance.

35 Submission 47 (Centre for Innovative Justice).

36 Submission 43 (knowmore).

37 Submission 37 (safe steps Family Violence Response Centre).

38 Submission 38 (Ryan Carlisle Thomas Lawyers).

39 Submission 27 (Name withheld).

Objective 1(2)(c)—scheme of ‘last resort’

- 11.37 Section 1(2)(c) of the VOCAA states that victims of crime are only to have recourse to financial assistance under the Act where compensation for the injury cannot be obtained from the offender or other sources.
- 11.38 Although stakeholder feedback on the operation of this provision was limited, some victim support workers told the Commission that as VOCAT is an option of ‘last resort’, some magistrates have in the past refused to reimburse victim support agencies that have paid for a client’s expenses, like urgent medical or dental expenses through the use of brokerage funds.⁴⁰ The Commission is unable to identify specific case law regarding this matter.
- 11.39 In their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that the intersection of section 1(2)(c) with section 7 of the VOCAA⁴¹ raises issues of sustainability:
- Section 1(2)(c) of the Act provides that one of the Act’s key objectives is to allow victims of crime to have recourse to VoCAT assistance where compensation for their injury cannot be obtained from the offender or other sources. The increasing number of applications being received by the Tribunal from emergency services and other similar workers—particularly those under s 7(1)—has serious implications for the sustainability of VoCAT where other assistance schemes such as WorkSafe are available and may provide more appropriate assistance for such individuals.⁴²
- 11.40 Issues relating to the VOCAA’s intersection with other schemes, as well as stakeholder views in relation to them, are discussed in Chapter 16.

Guiding principles

- 11.41 While the VOCAA does not currently contain guiding principles, there was some stakeholder support for the VOCAA to be amended to include as a guiding principle the protection of victims from undue trauma, intimidation or distress.⁴³
- 11.42 Springvale Monash Legal Service submitted that such a guiding principle should apply to decisions regarding perpetrator notification, whether to allow evidence to be submitted to VOCAT, the manner in which parties give evidence as well as directing Tribunal Members to conduct their determinations in a manner which avoids the risk of victims experiencing trauma, intimidation or distress at any stage.⁴⁴
- 11.43 Safe steps Family Violence Response Centre submitted that a guiding principle should be included in the VOCAA requiring that measures should ‘be taken to limit the trauma, intimidation and distress suffered by victims when giving or hearing evidence’.⁴⁵
- 11.44 On the other hand, the Aboriginal Family Violence & Prevention Legal Service submitted that such procedural protections would be unnecessary if an administrative model was adopted which was victim-centred and trauma informed.⁴⁶

40 Consultations 4 (Victim, Witness and Court Support), 15 (Regional Consultation—Ballarat Victim Support Agencies).

41 Section 7(2) of the VOCAA provides that a person is a primary victim if they are injured or die as a result of trying to arrest someone whom they believe on reasonable grounds has committed an act of violence; or trying to prevent the commission of an act of violence; or trying to aid or rescue someone whom they believe on reasonable grounds is a victim of an act of violence whether or not an act of violence is actually committed.

42 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

43 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 27 (Name withheld), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

44 Submission 41 (Springvale Monash Legal Service).

45 Submission 37 (safe steps Family Violence Response Centre).

46 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

Discussion and recommendations

The proposed Act's purpose

- 11.45 The Commission considers it important that the proposed Act contain a clear articulation of its purpose and objectives to guide both scheme decision makers and the courts.
- 11.46 A number of stakeholders considered that the proposed Act's purpose should not focus on a victim's recovery, but on the provision of assistance. This approach is supported by academic Njeri Mathis Rutledge who concluded that the primary goal of state-funded financial assistance should be to assist crime victims.⁴⁷ Such an approach has been taken in NSW.⁴⁸
- 11.47 The Commission acknowledges that 'managing the effects of crime' and 'recovery' mean different things to different people. Some victims' recovery process may take months, years or continue over their lifetime.⁴⁹ Other victims may never return to their pre-crime state.⁵⁰
- 11.48 Although acknowledging that not all victims will fully recover from crime, the Commission nevertheless considers it is important that all victims be entitled to assistance that supports them in their recovery. This approach is complementary to the existing approach of the Victims Assistance Program in providing assistance to manage the effects of crime.
- 11.49 The Commission therefore considers it important that the purpose of the proposed Act be 'to assist victims in their recovery'. In the Commission's view this approach requires a nexus between the assistance provided and a victim's journey towards recovery, even though, as VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria recognised in their joint submission, each victim's recovery journey will be different.⁵¹
- 11.50 While the proposed purpose provision involves only a slight change in wording from the existing provision of the VOCAA, it recognises that some victims may never recover from crime but that monetary payments to such victims is important for their recovery journey.
- 11.51 It is not the Commission's intention that victims who are not demonstrating signs of recovery be denied assistance on the basis of the purpose of the proposed Act. Rather, it is the Commission's intention that there be a nexus between the assistance provided and a victim's journey towards recovery, notwithstanding any progress made.⁵²

Recommendation

- 20** The proposed Act should provide that the purpose of the Act is to establish a scheme to assist victims in their recovery from a criminal act.

47 Njeri Mathis Rutledge, 'Looking a Gift Horse in the Mouth—the Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims' (2011) 19 *Duke Journal of Gender Law and Policy* 223, 226.

48 *Victims Rights and Support Act 2013* (NSW) s 17.

49 The National Center for Victims of Crime, *The Trauma of Victimization* (2012) <<http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization>>.

50 Department of Justice (Canada), *Working with Victims of Crime: A Manual Applying Research to Clinical Practice* (2015) (accessed 29 May 2018) <<http://canada.justice.gc.ca/eng/rp-pr/cj-jp/victim/res-rech/p6.html>>.

51 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

52 See also the discussion in the Commission's supplementary consultation paper in relation to the provision of counselling where a victim is not demonstrating 'improvement' in relation to the VOCAA's requirement that the assistance be 'reasonable': Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 83.

The proposed Act's objectives

Paying certain victims as a symbolic expression of state sympathy

- 11.52 The Commission agrees with stakeholder concerns about the objective in section 1(2) (b) of the VOCAA—to pay certain victims of crime financial assistance as a symbolic expression by the state of the community's sympathy.
- 11.53 In particular, the Commission considers that:
- the use of the term certain victims is unnecessary and introduces a subjective assessment of whether victims are appropriate recipients of assistance, or are a deserving victim.
 - as observed by Dr Kate Seear et al, although perhaps well intentioned, the use of the word 'sympathy' in the VOCAA gives rise to moral considerations about who evokes and deserves sympathy.⁵³
- 11.54 Seear et al submitted that there 'is clear evidence of VOCAT members reading key provisions of the [VOCAA] through a moral lens, and grappling with questions about sympathy and morality'.⁵⁴
- 11.55 The Commission considers that victims who are eligible for assistance under the proposed Act should be entitled to assistance according to the specified eligibility criteria, rather than through a subjective assessment of whether a victim is worthy of assistance because they are a 'certain victim' as required currently under the VOCAA.
- 11.56 Additionally, the Commission considers that the proposed Act should not include a provision tying financial assistance to 'sympathy' but rather, should reflect victims' need for acknowledgment and recognition⁵⁵ and the need to provide financial assistance to assist a victim in their recovery from a criminal act.

Option of last resort

- 11.57 As noted above, the objective in section 1(2)(c) provides for 'victims of crime to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources'.⁵⁶ This provision is unique in Australian victims of crime assistance legislation and is not replicated in any other state's or territory's purpose or objectives provisions.⁵⁷
- 11.58 While few stakeholders commented on this specific objective in the VOCAA, a number of stakeholders did consider its practical effects, including in terms of:
- the VOCAA's interaction with other schemes in the making of awards
 - the circumstances giving rise to the refund of an award
 - the practicality of victims pursuing other options, such as compensation from an offender.
- 11.59 The Commission considers stakeholder views and makes recommendations in relation to these more specific matters in Chapters 16 and 18. Accordingly, this section of this chapter limits discussion to whether the objective articulated in section 1(2)(c) of the VOCAA remains appropriate and should be included in the proposed Act.

53 Submission 7 (Dr Kate Seear et al).

54 Ibid.

55 Chapter 10 discussed why the proposed scheme should no longer conceptualise financial assistance as being tied to notions of state 'sympathy' and also outlines mechanisms for victim recognition under the proposed scheme.

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

57 See *Victims of Crime Assistance Act 2009* (Qld) s 3(2); *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 6; *Victims Rights and Support Act 2013* (NSW) pt 4 div 1 s 17; *Victims of Crime Assistance Act 2006* (NT) s 3, *Victims of Crime Act 2001* (SA) s 3.

- 11.60 In the Commission's view, the existing objective in section 1(2)(c) of the VOCAA is underpinned by two principles:
- that where practical, offenders should be required to contribute to a victim's recovery⁵⁸
 - that where a victim may have other entitlements, or be eligible for assistance through other financial assistance schemes, such other assistance should be exhausted before victims seek assistance under a state-funded financial assistance scheme where it is more appropriate.⁵⁹
- 11.61 As the Commission's supplementary consultation paper noted, although the objectives of the VOCAA intend the existing scheme to be a financial assistance option of last resort, for many victims it is often the most practical, if not the only, assistance available. This is because most offenders will not have the means to pay a compensation or restitution order made under the *Sentencing Act 1991* (Vic) or to pay compensation arising from a civil claim.⁶⁰ Additionally, an order under the *Sentencing Act 1991* (Vic) is dependent on a criminal conviction first being made, which may not occur until many months or years after a crime has occurred, if at all. As noted by the Department of Justice and Regulation in their 2017 report *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims*, there can be significant delays in criminal cases.⁶¹
- 11.62 The Commission acknowledges that there may be sound policy reasons for expressly providing, as a broad objective, that the scheme be an option of last resort, particularly having regard to scheme sustainability. The Commission nevertheless considers such an objective should not be retained in the proposed Act for the following reasons:
- In practice, state-funded financial assistance has often been the only source of compensation or financial assistance for many victims, rather than being a supplement to other forms of compensation.⁶² As noted above, this is because most offenders will not have the means to pay a compensation or restitution order. Such orders also necessitate the identification and prosecution of an offender, which may not always occur.
 - Requiring a victim to exhaust or pursue other options before pursuing state-funded financial assistance as a last resort is likely to lead to substantially increased delays for victims in accessing much-needed financial assistance. As also noted above, an order under the *Sentencing Act 1991* (Vic) may take many months or years after a crime has occurred to be finalised. As discussed in Chapters 7 and 8, research also shows the importance of early provision of financial assistance to assist victims of crime in their recovery.
 - There are other provisions in the VOCAA which more specifically, and comprehensively, set out the circumstances giving rise to offender contribution, as well as the existing scheme's interaction with other entitlements or financial assistance schemes.⁶³ As a result of these more specific provisions, VCAT has in the past had to

58 This interpretation is supported by the Second Reading Speech to the VOCAA as first enacted which states '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'. This aim is also supported by section 51 of the VOCAA, which enables a victim to assign their rights to recovery from an offender to the state, and section 61 of the VOCAA, which provides that the making of an award of assistance under the VOCAA does not affect a victim's right to recover from any other person. See Victoria, Parliamentary Debates, Legislative Assembly, 31 October 1996, 1024 (Jan Wade, Attorney-General); *Victims of Crime Assistance Act 1996* (Vic) ss 51, 61.

59 This interpretation is supported by the Explanatory Memorandum to the Victims of Crime Assistance (Amendment) Bill 2000 (Vic), where it was noted that the amendments to section 16 of the VOCAA aimed to 'ensure that crimes compensation is a payer of last resort': Explanatory Memorandum, Victims of Crime Assistance (Amendment) Bill 2000 (Vic) 4. In addition, this underlying principle is supported by section 16 of the VOCAA, which requires VCAT to take other entitlements into account when making an award, and section 62, which requires the refund of awards in certain circumstances: *Victims of Crime Assistance Act 1996* (Vic) ss 16, 62.

60 See generally Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 18.

61 Department of Justice and Regulation (Vic) *Proposed Reforms to Criminal Procedure: Reducing Trauma and Delay for Witnesses and Victims*, Discussion Paper (2017) 5.

62 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 22.

63 See *Victims of Crime Assistance Act 1996* (Vic) ss 16 (Other entitlements to be taken into account), 51 (Assignment of rights to the state), 61 (Pursuing other remedies) and 62 (Refund of award).

balance the specificity of such provisions with the broad wording in section 1(2)(c), raising some ambiguity about its application.⁶⁴

- VCAT’s interpretation of the VOCAA provisions relating to the existing scheme’s interaction with other schemes or entitlements does not in fact result in VOCAT being an option of last resort as a literal reading of section 1(2)(c) of the VOCAA might imply. Rather, VCAT has determined that victims can pursue assistance under both the VOCAA and other schemes, provided the assistance or payment provided is for different purposes.⁶⁵

11.63 In the Commission’s view, retaining as an objective of the proposed Act that the proposed scheme be an option of last resort has the potential to:

- misrepresent state-funded financial assistance as an option of last resort, when for many victims, it may be their only option
- lead to confusion for victims of crime, given there may be circumstances where victims of crime are entitled to financial assistance from two separate schemes
- cause substantial delay in the proposed scheme’s decision making, requiring victims to pursue other options and exhaust all other avenues for financial assistance, even where other options may be impractical, complex, traumatic and unreasonably lengthy
- lead to additional complexity in legislative interpretation by having a broad objective that may be unclear in light of more specific provisions about other schemes or entitlements, as is the case under the VOCAA.

11.64 Accordingly, the Commission no longer considers it practical or appropriate that the proposed scheme be an option of last resort. In the Commission’s view, such an objective can be better met by more specific and strengthened provisions in the proposed Act relating to the circumstances where offender recovery or contribution may be pursued, and interaction with other schemes. These matters are discussed further in Chapters 16 and 18.

11.65 As such, the Commission considers that the objective in section 1(2)(c) of the VOCAA should not be replicated in the proposed Act.

Complementary to other government services and not reflective of other available compensation

11.66 As noted in Chapter 9, the Commission considers that the proposed scheme should complement other services provided by government to victims of crime. Core to this approach is the Commission’s recommendation that the fragmentation in victim support be reduced by expanding the functions and powers of the existing office of the Victims of Crime Commissioner to include the administration of the proposed scheme.

11.67 A number of Australian jurisdictions also have an objective that the state-funded financial assistance scheme complement other services for victims.⁶⁶

11.68 Accordingly, the Commission considers it appropriate that one of the objectives of the proposed Act be that the proposed scheme complement other services provided by government to victims of crime, similar to the existing section 1(4) of the VOCAA.

64 See, eg, *Krasauskas v Victims of Crime Assistance Tribunal* [2007] VCAT 1407, in which the VCAT Member stated ‘I accept that the purpose clause in s1 of the Act is worded in a different and perhaps broader way than s16. But, to my mind, the wording of s16 is clear and ought not to be read down in the light of the purpose clause. If Parliament had intended that s16 would operate in a broader way, it could easily have omitted the words ‘loss, expense or matter for which assistance is sought’: at [26].

65 See, eg, *ibid*, in which VCAT held that the applicants were able to access both VOCAT and TAC assistance, despite the objective in section 1(2)(c), because the assistance provided under the schemes was for different purposes. This means that the VOCAA prevents ‘double dipping’, rather than strictly operating as an option of ‘last resort’.

66 See, eg, *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(d); *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 6.

- 11.69 The Commission also considers it appropriate that the proposed Act retain a provision similar to section 1(3) of the VOCAA, which provides that awards of financial assistance to victims of crime are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise. In the Commission's view, such a provision makes clear the financial limitations of state-funded financial assistance.

Recommendation

- 21** The proposed Act should provide that the objectives of the Act are to:
- (a) recognise, on behalf of the state, victims and the impacts of a criminal act on a victim, through the provision of a respectful forum for victims to be heard and to have their experiences properly acknowledged by the state
 - (b) assist victims in their recovery from a criminal act through the provision of financial and other practical assistance
 - (c) complement other services provided by government to victims of crime
 - (d) enable victims to have recourse to financial assistance under the Act, noting such assistance is not intended to reflect the level of compensation that may be available at common law or otherwise.

Guiding principles

- 11.70 As discussed above, there was some stakeholder support for the VOCAA to be amended to include as a guiding principle the protection of victims from undue trauma, intimidation or distress.⁶⁷
- 11.71 While no other jurisdictions have similar provisions or guiding principles in their relevant acts, the Commission notes the use of a Preamble in Victoria's *Family Violence Protection Act 2008* (Vic) and guiding principles in the substantive body of the *Criminal Procedure Act 2009* (Vic).⁶⁸ As discussed above, these statements and principles also provide context for the consideration of the purpose and objectives of the proposed Act.
- 11.72 For example, the Preamble of the *Family Violence Protection Act 2008* (Vic) includes recognition of:⁶⁹
- the need for the justice system to treat victims of family violence with respect
 - the gendered nature of family violence
 - the particular vulnerability of children who are exposed to family violence
 - the broader community effects of family violence
 - the particular dynamics and characteristics of family violence.
- 11.73 The guiding principles in the *Criminal Procedure Act 2009* (Vic) require courts, in any criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, to have regard to the fact that:⁷⁰
- There is a high incidence of sexual violence within society.
 - Sexual offences are significantly under-reported.

67 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 27 (Name withheld), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

68 *Family Violence Protection Act 2008* (Vic) Preamble; *Criminal Procedure Act 2009* (Vic) s 338.

69 For a complete list of factors, see *Family Violence Protection Act 2008* (Vic) Preamble.
70 *Criminal Procedure Act 2009* (Vic) s 338.

- A significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment.
 - Offenders are commonly known to their victims.
 - Sexual offences often occur in circumstances where there is unlikely to be any physical sign of an offence having occurred.
- 11.74 In the Commission's view, the approach in the *Criminal Procedure Act 2009* (Vic), which requires courts to have regard to a number of factors addressing common misconceptions about sexual offences,⁷¹ is preferred over the use of a Preamble as seen in Victoria's *Family Violence Protection Act 2008* (Vic). Although a preamble may assist in statutory interpretation where there is ambiguity in the legislation⁷² The Commission considers it important that the guiding principles form part of the substantive Act.
- 11.75 Accordingly, the Commission considers that the proposed Act should include as a substantive provision guiding principles which are required to be taken into consideration by the scheme decision maker and other scheme staff in administering the proposed Act. The Commission also considers that such guiding principles should not create or confer on any person, any right or entitlement at law.
- 11.76 In the Commission's view, the guiding principles should complement the purpose and objectives of the Act, and should expressly provide that the Act and scheme are intended for the benefit of victims, with victims' wellbeing at their centre.
- 11.77 The Commission considers that, in addition to providing guidance to decision makers, such guiding principles have an important symbolic and educative role for the general community in understanding the approach of the proposed scheme,⁷³ particularly in the context of the proposed scheme's mechanisms for victim recognition, detailed in Chapter 10.

Recommendation

- 22** The proposed Act should provide that in making any decision or taking any action under the Act, regard must be had to the following guiding principles:
- (a) victim benefit—the Act and scheme are intended for the benefit of victims
 - (b) victims should be protected from undue trauma, intimidation or distress
 - (c) victims' needs, safety and wellbeing should be paramount
 - (d) in recognition that victims' needs may vary, the scheme should be flexible in the assistance provided.

71 For a general discussion of myths and misconceptions about sexual offending, see generally Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners* (2017) 4; Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) 82–4.

72 See generally Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23(1) *Melbourne University Law Review* 184.

73 For a general discussion on the educative benefits of guiding principles, see Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks*, Consultation Paper 1, NSWLRC Consultation Paper 9 (2010) 760.

Eligibility for assistance under the proposed Act for victims of crime financial assistance

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12. Eligibility for assistance under the proposed Act for victims of crime financial assistance

Introduction

- 12.1 This chapter considers and makes recommendations about the eligibility criteria an applicant must meet to be granted financial assistance under the proposed Act. In particular, this chapter considers and makes recommendations about:
- who should be recognised as a victim for the purposes of the proposed state-funded financial assistance scheme (the proposed scheme)
 - what tests a victim should be required to meet to be eligible for assistance under the proposed Act.
- 12.2 The recommendations in this chapter aim to ensure that:
- the proposed Act recognises the appropriate people as victims
 - the tests for eligibility and the evidence required to meet them are simple and easy for victims to understand and comply with, without incurring unnecessary or disproportionate costs.
- 12.3 This chapter relates to the first matter in the first terms of reference, which asked the Commission to consider the eligibility test and whether it should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury.
- 12.4 This chapter also relates to the second, third and fourth matters in the supplementary terms of reference, which asked the Commission to consider whether:
- the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) recognises the appropriate people as victims
 - the tests for eligibility for assistance and the evidence required to meet those tests can be simplified to avoid unnecessary or disproportionate costs being incurred
 - the definition of ‘act of violence’ is adequate to account for harm, including harm caused by multiple acts, such as may occur in the context of family violence.
- 12.5 The matter of the proposed scheme being efficient and sustainable for the state, as required by the supplementary terms of reference, is addressed throughout this chapter, and in Chapters 13 and 18.
- 12.6 In its consultation papers, the Commission identified barriers created by the existing eligibility criteria under the VOCAA.¹ In particular, it noted how the victim categories and the definitions of an act of violence and injury make it difficult for some victims to successfully claim assistance.

- 12.7 These concerns were reflected in the views expressed by stakeholders. As the Magistrates' Court of Victoria and the Victims of Crime Assistance Tribunal (VOCAT) stated in their joint submission, the VOCAA's victim categories and definitions of an act of violence and injury are 'narrow, outdated and fail to take into account distinct victim experiences'.²
- 12.8 To address these issues for the purposes of establishing the eligibility criteria for the proposed Act, the Commission first considers the operation and effectiveness of each element of the existing eligibility test under the VOCAA, namely:
- the definition of 'victim'
 - the definition of an 'act of violence'
 - the definition of 'injury'
 - the requirement for the victim to prove that they have suffered injury
 - the requirement that the injury was a direct result of the act of violence.
- 12.9 The Commission then makes recommendations to address the issues identified with the current eligibility test.
- 12.10 As will be discussed, the recommendations in this chapter aim to simplify and clarify the eligibility criteria a victim must meet in order to be granted financial assistance under the proposed Act.

The eligibility test

Current law

- 12.11 A person is eligible for financial assistance under the VOCAA if they are the primary, secondary, or related victim of an act of violence, and that act of violence directly results in their suffering injury, death or, for primary victims, a significant adverse effect.

Responses

- 12.12 As discussed further below, key stakeholder concerns with the current eligibility test include:
- the narrowly defined victim categories under the VOCAA, which can operate to exclude people who are significantly impacted by crime
 - the limited types of offence covered by the existing scheme, including the exclusion of non-criminal family violence and certain serious property offences
 - the narrow definition of injury under the VOCAA, particularly the need for applicants to demonstrate that they suffered a 'mental illness or disorder' in order to make a claim based on psychological harm suffered as a result of the crime
 - the difficulty faced by some applicants in establishing that the act of violence caused their injury.

Discussion and recommendations

- 12.13 The Commission considers that in order for a victim of crime to receive state-funded financial assistance under the proposed Act, victims should continue to be required to satisfy certain eligibility criteria.
- 12.14 In the Commission's view, such criteria are necessary to help ensure that the proposed scheme remains efficient and sustainable for the state and that only those applicants intended to receive assistance do so. As VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted, a state-funded financial assistance scheme 'requires clear eligibility criteria, with an eye to ensuring that the scheme is sustainable in the long term'.³

- 12.15 However, the Commission considers that the proposed eligibility test must also address stakeholder concerns regarding the current eligibility criteria.
- 12.16 To address these concerns, and having regard to the scheme objectives noted in the supplementary terms of reference, the Commission considers that it is necessary to reformulate the eligibility criteria under the proposed Act.
- 12.17 Under the proposed Act, a person should only be eligible for assistance where they:
- are the victim of a ‘criminal act’, and
 - suffer ‘injury’ as a result of that criminal act.
- 12.18 The elements of this proposed new test, and how the Commission’s approach would address stakeholder concerns regarding the current eligibility criteria, are discussed below. Recommendations relating to each element of the proposed eligibility test are also provided.

Recommendation—the eligibility test

- 23** The proposed Act should provide that a person is eligible for financial assistance where the person is a victim of a criminal act and they suffer an injury as a result of that criminal act.

Definition of a victim

- 12.19 This section of the chapter considers whether the existing victim categories under the VOCAA recognise the appropriate people as victims. This section then makes recommendations for reforming these categories to enable the proposed Act to better recognise the appropriate people as victims.

Current law

- 12.20 The assistance an applicant may be entitled to claim under the VOCAA depends on the victim category under which they make their application. An applicant may only apply to VOCAT in one capacity, even if they may be eligible to apply under multiple victim categories.⁴ Each of these existing categories is considered below.

Primary victims

- 12.21 Under the VOCAA, a primary victim is a person who is injured, dies or suffers a ‘significant adverse effect’ as a direct result of an act of violence committed against them.⁵
- 12.22 A primary victim is also a person who is injured or dies 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 The VOCAA provides that the person only has to ‘believe on reasonable grounds’ that someone has committed an act of violence, or that someone is a victim of an act of violence.⁷ Case law establishes that an attempt to prevent an act of violence must be proactive, rather than accidental—for example, inadvertently interrupting an assault is not sufficient.⁸ In addition, case law establishes

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

5 *Ibid* ss 7(1), 8A(1).

6 *Ibid* s 7(2).

7 *Ibid*.

8 *Smith v Victims of Crime Assistance Tribunal* [2003] VCAT 1489 (22 October 2003) [25].

that the aid must be provided at the time of the act of violence.⁹ What constitutes ‘aid’ has also been interpreted narrowly by the Victorian Civil and Administrative Tribunal (VCAT).¹⁰

Secondary victims

- 12.23 Under the VOCAA, a secondary victim is a person who is present at the scene of an act of violence and is injured as a direct result of witnessing that act.¹¹
- 12.24 A secondary victim is also a person who is the parent or guardian of a primary victim who is under 18 at the time of the act of violence, and who is injured as a direct result of subsequently becoming aware of the act of violence committed against their child.¹²
- 12.25 The barriers to accessing assistance that arise from this definition were illustrated by *Will v Victims of Crime Assistance Tribunal*.¹³ In that case, VCAT rejected a mother’s application as a secondary victim because she had not been present at the scene of the act of violence and her son was over 18 at the time.¹⁴
- 12.26 In addition, children and other persons who witness violence are classified as secondary victims, rather than primary victims under the VOCAA. This is illustrated by *NF v Victims of Crime Assistance Tribunal*,¹⁵ where an applicant who witnessed his father beat his stepfather to death when he was eight years old was only able to apply for assistance as a secondary or related victim. This was despite the severe psychological impact the violence had on him.¹⁶ More recently, in *QMX v Victims of Crime Assistance Tribunal*,¹⁷ VCAT held that two children exposed to family violence over a number of years were secondary, not primary, victims and were therefore unable to claim ‘special financial assistance’.¹⁸ This was despite the fact that the alleged offender ‘appeared to have demonstrated a reckless disregard for the children’s wellbeing and in some circumstances there was a risk of consequential injury when he was kicking doors or banging on windows or attempting to force entry’.¹⁹
- 12.27 The VOCAA also provides that a person, including a child, will only be a secondary victim if they were present at the time of the act of violence and witnessed it directly.²⁰ This means that a child, or any other person, who was not present at the scene of the crime, but may have heard or otherwise been exposed to it, will not be eligible for assistance. This particularly affects child victims of family violence, who may be exposed to the violence in ways other than directly witnessing it. For example, a child may overhear threats, be present when police officers attend an incident, provide comfort to the primary victim or help to clean up in the aftermath of the violence.²¹

9 In *Will v Victims of Crime Assistance Tribunal* [2011] VCAT 1739 (13 September 2011) VCAT held at [14] that section 7(2)(c) is ‘designed to cover a person who comes to the aid of someone being attacked or if after the attack they immediately step in and do things to assist the victim ... it does not refer to an act where a mother is sitting beside the bedside of her son’.

10 See, eg, *Smith v Victims of Crime Assistance Tribunal* [2003] VCAT 1489 (22 October 2003) in which VCAT held at [8] that assisting a victim of an act of violence by staying with them, cleaning their wounds and putting a child to bed was ‘no more than offering first aid ... after the event’ and did not constitute aid within the meaning of section 7(2)(c), and at [23] that to consider otherwise would ‘mean any ambulance officer or paramedic giving assistance ... would be entitled as a primary victim’, which was ‘clearly not an intended consequence when the legislative history was considered’.

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

12 *Ibid* s 9(2).

13 [2011] VCAT 1739 (13 September 2011).

14 *Ibid* [18]–[20].

15 [2012] VCAT 1740 (16 November 2012).

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

17 [2018] VCAT 614.

18 *Ibid* [122].

19 *Ibid* [120].

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

21 See *Family Violence Protection Act 2008* (Vic) s 5(1).

Related victims

- 12.28 The VOCAA provides that a related victim is a person who was a close family member or a dependent of, or who had an intimate personal relationship with, a primary victim who died as a direct result of an act of violence.²²
- 12.29 The VOCAA defines close family member as 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.²³ 'Spouse' is defined in the VOCAA as 'a person to whom the person is married'.²⁴
- 12.30 The definition of close family member under the VOCAA does not include other family members, such as the grandparent, cousin, aunt or uncle of a primary victim. Other such family members may be able to make an application under the VOCAA on the basis that they had an 'intimate personal relationship' with the deceased primary victim.²⁵ However, 'intimate personal relationship' is not defined in the VOCAA and has been interpreted narrowly by VCAT.²⁶
- 12.31 The VOCAA defines dependant as an individual who was 'wholly or substantially dependent' on a deceased primary victim's income at the time of their death, or who would have been but for the fact that the primary victim was incapacitated as a result of the injury from which they subsequently died.²⁷ A dependant is also defined in the VOCAA as a child of a deceased primary victim who was born after the primary victim's death and who would have been dependent on the primary victim if they had been born before the primary victim's death.²⁸

Responses

- 12.32 The Commission's first consultation paper asked questions regarding the eligibility criteria and their impact on family violence victims, including children.²⁹
- 12.33 The Commission's supplementary consultation paper asked how the victim categories in the VOCAA affect people applying for financial assistance. It also asked whether the victim categories should be amended, and if so, how.³⁰
- 12.34 Stakeholder views in response to these questions are set out below. There was significant stakeholder support for reforming the existing victim categories to better recognise appropriate people as victims. However, a number of stakeholders noted that any expansion of the victim categories could have cost implications. The Magistrates' Court of Victoria and VOCAT submitted that expanding eligibility, including the victim categories, could cause a significant increase in demand, which may impact on the timeliness of awards and the amounts awarded to victims.³¹

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

23 *Ibid* s 3(1).

24 *Ibid*.

25 *Ibid* s 11(1).

26 See, eg, *Reid v Victims of Crime Assistance Tribunal* [2002] VCAT 373 (24 May 2002) in which VCAT found at [23]–[25] that the aunt of a primary victim who had been murdered did not have an 'intimate personal relationship' with the primary victim, and therefore was not a 'related victim', because they had had infrequent contact in the years preceding the primary victim's death.

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

28 *Ibid*.

29 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) Ch 6, 55, Questions 1–3.

30 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 52, Questions 1–2.

31 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

Primary victims

Children who witness, hear or are otherwise exposed to violence

- 12.35 In response to the consultation papers, stakeholders told the Commission that the existing victim categories should be amended to better recognise children who experience violence by witnessing, hearing or being otherwise exposed to it, in particular to family violence³² and sexual abuse.³³ A number of stakeholders submitted that such child victims should be recognised as primary victims.³⁴ Stakeholders noted that recognising children who witness violence as primary victims would enable these child victims to claim special financial assistance under the VOCAA, thereby providing them with access to greater financial support.³⁵
- 12.36 The Commission was told that such an approach would be consistent with contemporary community understandings of the impact of violence on children, as reflected in state-wide reforms in practice and policy.³⁶

People who prevent a crime or aid or rescue a victim of crime

- 12.37 A number of stakeholders proposed reforming the VOCAA to better recognise people who are injured as a result of preventing an act of violence or assisting a victim in the aftermath of such an act, for example, family members, paramedics and other medical professionals.
- 12.38 Springvale Monash Legal Service submitted that there should not be a requirement for the attempt to prevent, aid or rescue to be proactive, as this excludes from the primary victim category people who accidentally interrupt an act of violence, ‘even if it ultimately prevents the offence or assists the victim’.³⁷
- 12.39 Safe steps Family Violence Response Centre submitted that the primary victim category should be amended to include ‘family members who provide assistance to victims in a manner that does not amount to “aid”’ as currently defined in the VOCAA.³⁸ In addition, safe steps Family Violence Response Centre submitted that the VOCAA should be amended to:
- specify that section 7(2)(c) applies to aid and assistance rendered both at the time of the act of violence and afterwards, as long as there remains a causal connection between the aid and assistance and the act of violence.³⁹
- 12.40 Other stakeholders considered that the existing victim categories should be amended to specifically recognise family members who become the carer for a primary victim.⁴⁰ YourLawyer, for example, submitted that close family members should be able to access financial assistance for:

32 Submissions 8 (Victim Survivors’ Advisory Council), 9 (Alannah & Madeline Foundation), 14 (Inner Melbourne Community Legal), 17 (Centre for Excellence in Child and Family Welfare), 18 (cohealth), 22 (YourLawyer), 25 (Public Health Association of Australia), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 33 (Eastern Community Legal Centre), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 4 (Victim, Witness and Court Support), 6 (Victims’ Advocacy Organisations), 10 (Regional Consultation—Morwell Victim Support Agencies), 14 (Chief Magistrate’s Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies).

33 Submission 43 (knowmore).

34 Submissions 9 (Alannah & Madeline Foundation), 14 (Inner Melbourne Community Legal), 22 (YourLawyer), 25 (Public Health Association of Australia), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 33 (Eastern Community Legal Centre), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 13 (Regional Consultation—Mildura Legal Professionals), 14 (Chief Magistrate’s Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies).

35 Submission 41 (Springvale Monash Legal Service); Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

36 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria); Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

37 Submission 41 (Springvale Monash Legal Service).

38 Submission 37 (safe steps Family Violence Response Centre).

39 Ibid.

40 Submissions 18 (cohealth), 22 (YourLawyer), 28 (South Metropolitan Integrated Family Violence Executive); Consultations 4 (Victim, Witness and Court Support), 15 (Regional Consultation—Ballarat Victim Support Agencies). Note that these proposals were made in relation to the ‘secondary victim’ category, except Submission 22 (YourLawyer), which did not make this recommendation in connection to any specific victim category.

- loss of earnings due to providing aid/care to the primary victim
- travel costs for taking the primary victim to medical and psychological appointments
- costs of medical or psychological treatment incurred on behalf of the primary victim.⁴¹

Secondary victims

Additional family members

- 12.41 Stakeholders told the Commission that the definition of secondary victim under the VOCAA should also be amended to include the following additional family members:
- the children of a primary victim⁴²
 - the spouse⁴³ or partner⁴⁴ of a primary victim
 - the parents or guardians of a primary victim aged over 18 years⁴⁵
 - the siblings of a primary victim⁴⁶
 - other close relatives of a primary victim⁴⁷
 - a person who has a kinship relationship with a primary victim⁴⁸
 - a person who has a 'family-like' relationship with a primary victim.⁴⁹

The partners and children of offenders

- 12.42 PartnerSPEAK told the Commission that the definition of secondary victim should be amended to include the partners and children of online sex offenders.⁵⁰ This is because the partner and children of such offenders often experience similar impacts to other victims of crime.⁵¹
- 12.43 In a consultation with the NSW Commissioner of Victims Rights, the Commission was told that the partners and children of online child sex offenders can access counselling under the NSW victims of crime assistance scheme as secondary victims.⁵²

Related victims

Contemporary families

- 12.44 A number of stakeholders told the Commission that the related victim category under the VOCAA should be amended to better recognise contemporary understandings of family,⁵³ and that the definition of close family member should be amended to include domestic partners.⁵⁴

41 Submission 22 (YourLawyer).

42 Submissions 35 (Brockway Legal), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria). This is the approach in the Northern Territory, where the definition of 'secondary victim' includes the child, step-child or child under guardianship of the primary victim, in addition to the parents, step-parents and guardian of the primary victim: *Victims of Crime Assistance Act 2006* (NT) ss 11(2)(a)–(b).

43 Submission 37 (safe steps Family Violence Response Centre).

44 Submission 49 (Victims of Crime Commissioner, Victoria). See also submission 18 (cohealth), although not specifically in relation to secondary victims.

45 Submission 37 (safe steps Family Violence Response Centre); Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies). Consultation 4 (Victim, Witness and Court Support) also noted difficulties experienced by parents of adult children in accessing assistance.

46 Submission 35 (Brockway Legal).

47 Submissions 35 (Brockway Legal), 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

48 Submissions 25 (Public Health Association of Australia), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

49 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

50 Consultations 9 (Domestic Violence Victoria Members), 18 (PartnerSPEAK).

51 Consultation 9 (Domestic Violence Victoria Members).

52 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW). See also consultation 18 (PartnerSPEAK).

53 Submissions 15 (Merri Health Victims Assistance Program), 31 (Victorian Council of Social Service); Consultations 4 (Victim, Witness and Court Support), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals).

54 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 54 (Victorian Gay and Lesbian Rights Lobby).

- 12.45 Safe steps Family Violence Response Centre noted that including ‘domestic partner’ in the related victim category would help ensure that the VOCAA accords with contemporary social values and that there is no discrimination against non-married or LGBTIQ couples.⁵⁵
- 12.46 The Victorian Gay and Lesbian Rights Lobby submitted that any definition of ‘domestic partner’ in the VOCAA should not include a duration, or living together, requirement and should be inclusive of LGBTIQ people and people in polyamorous relationships.⁵⁶
- 12.47 In addition, safe steps Family Violence Response Centre told the Commission that if domestic partners were added to the definition of close family member, the category of intimate personal relationship should be retained to help ensure that the VOCAA covers other relationships not explicitly included in the definition of close family member.⁵⁷
- 12.48 In their joint submission, Women’s Legal Service Victoria and Domestic Violence Victoria noted the need to improve the VOCAA’s recognition of the chosen families of the LGBTIQ community, and to better align the definitions in the VOCAA with the definition of family member in the *Family Violence Protection Act 2008* (Vic) (FVPA), which includes family-like relationships.⁵⁸
- 12.49 In addition, other stakeholders submitted that the definition of close family member should be amended to recognise children living in the same household as primary victims.⁵⁹

Extended family

- 12.50 A number of stakeholders proposed including additional family members in the definition of close family member, such as grandparents and grandchildren.⁶⁰
- 12.51 The victim representatives of the Victims of Crime Consultative Committee told the Commission that the related victim category does not adequately recognise the adverse effects of murder on cousins, aunts and uncles of the primary victim.⁶¹
- 12.52 However, other stakeholders cautioned that expanding the definition of close family member could result in a significant increase in demand, causing sustainability issues for VOCAT.⁶²

Kinship relationships

- 12.53 The Commission was told that the related victim category can operate to exclude Aboriginal and Torres Strait Islander applicants who may have different conceptions of familial relationships.⁶³ These applicants may place particular importance on relationships with grandparents and other elders, and with members of the wider kinship group who are not a sister or brother in a biological or legal sense, but who are considered as such by their community.⁶⁴
- 12.54 As the Women’s Legal Service Victoria and Domestic Violence Victoria stated: ‘Within Indigenous and other collective cultures in Australia, familial relationships, connectedness and closeness extends beyond the standard family members recognised by European Australian culture.’⁶⁵

55 Submission 37 (safe steps Family Violence Response Centre).

56 Submission 54 (Victorian Gay and Lesbian Rights Lobby).

57 Submission 37 (safe steps Family Violence Response Centre).

58 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria). However, this submission was made in the context of the ‘secondary victim’ category.

59 Submission 15 (Merri Health Victims Assistance Program); Consultation 4 (Victim, Witness and Court Support).

60 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre); Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

61 Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

62 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

63 See Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre).

64 Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals). See generally Eleanor Bourke and Colin Bourke, ‘Aboriginal Families in Australia’ in Robyn Hartley (ed) *Families and Cultural Diversity in Australia* (Australian Institute of Family Studies, 1995) <<https://aifs.gov.au/publications/families-and-cultural-diversity-australia/3-aboriginal-families-australia>>.

65 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria). Note this submission was made in relation to ‘secondary victims’.

- 12.55 A number of submissions proposed that the related victim category should be expanded to include kinship relationships as recognised in Aboriginal and Torres Strait cultures.⁶⁶

Basing the related victim category on other criteria

- 12.56 As an alternative approach, a number of stakeholders told the Commission that the related victim category should not be based on a fixed list of family members.⁶⁷
- 12.57 Instead, they submitted that the related victim category should be based on the substance of the relationship between the applicant and the primary victim to capture close relationships that fall outside the traditional family.⁶⁸ The Commission was told that this approach could also help prevent awards being granted to family members who may be recognised under one of the victim categories, but who do not have a close relationship to the deceased primary victim.⁶⁹
- 12.58 Other stakeholders considered that the related victim category should be based on the impact of the violence on the applicant, rather than on their relationship with the primary victim.⁷⁰

Discussion and recommendations

- 12.59 The Commission acknowledges stakeholder concerns regarding the significant barriers to assistance created by the victim categories in the VOCAA, and the assumptions these categories make about who is most significantly impacted by crime.
- 12.60 In particular, the Commission notes:
- The overall quantum of assistance for which a victim is eligible depends on the victim category under which the application is made. In particular, only primary victims are eligible for a lump sum ‘special financial assistance’ payment.⁷¹ Other victims, even if severely impacted, may be ineligible for this additional payment, including children who witness family violence.
 - The victim categories mean that some people who are significantly impacted by crime may not be eligible for any financial assistance at all—for example, people who do not witness the criminal act against their injured family member but who nevertheless suffer injury as a result of learning about the crime or caring for their injured family member.
 - The distinction between primary, secondary and related victims—and having different amounts of assistance available for each of these categories—creates a hierarchy of victimhood which fails to reflect some victims’ experiences of crime and their recovery needs.
- 12.61 Having regard to stakeholders’ views, the Commission considers that the existing victim categories should not be retained under the proposed Act.
- 12.62 Instead, the Commission considers that the proposed Act should include a single and comprehensive definition of victim to better recognise the people who are most significantly impacted by a criminal act, and remove any hierarchy between them.
- 12.63 This approach would better recognise that many different people may be impacted by a criminal act, and that the severity of those impacts cannot be assumed by creating hierarchical victim categories, both in name and in terms of the amounts of assistance available.

66 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre). Note this proposal was also made in relation to ‘secondary victims’ in Submissions 25 (Public Health Association of Australia) and 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

67 Consultations 4 (Victim, Witness and Court Support), 6 (Victims’ Advocacy Organisations), 9 (Domestic Violence Victoria Members).

68 Consultations 4 (Victim, Witness and Court Support), 6 (Victims’ Advocacy Organisations).

69 Consultation 6 (Victims’ Advocacy Organisations).

70 Consultation 9 (Domestic Violence Victoria Members).

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

- 12.64 While each victim’s specific circumstances—including whether the criminal act was committed against them directly and the nature of their injury—would ultimately determine the amount of assistance awarded under the proposed Act, the Commission considers that abolishing the victim categories would help ensure that restrictions on the amount or type of assistance are not imposed on victims from the outset.
- 12.65 In addition, the Commission considers that abolishing the victim categories would help improve the transparency of the proposed scheme and its accessibility for victims. In particular, adopting a single definition of victim would make it easier for applicants to assess at the outset whether they are eligible for assistance under the proposed Act and reduce reliance on legal representation.
- 12.66 The Commission considers that the proposed Act should define a victim as:
- a) a person against whom a criminal act was committed
 - b) a person who was in a close personal relationship with a person who was injured or died as a result of a criminal act committed against them
 - c) a person who was wholly or substantially dependent on the income of a person who was injured or died as a result of a criminal act, at the time of that person’s injury or death
 - d) a child of a person who was injured or died as a result of a criminal act and who would have been wholly or substantially dependent on the injured or deceased person’s income if the child had been born before the person was injured or died
 - e) a person who witnessed a criminal act
 - f) a person under the age of 18 years who heard or was otherwise exposed to a criminal act
 - g) a person who attempted to assist, aid, or rescue another person against whom they reasonably believed a criminal act was committed, or was going to be committed, either before, during or immediately after the criminal act
 - h) a person who tried to arrest someone whom they believed on reasonable grounds had committed a criminal act,⁷² or
 - i) a person who prevented or tried to prevent the commission of a criminal act.⁷³

Key issues—definition of victim

- 12.67 Drawing on some of the concerns raised by stakeholders, the next section of this chapter considers of the following key elements of the Commission’s proposed definition of victim:
- the proposed definition of the term ‘close personal relationship’
 - how persons who were dependent on a person who died or was injured as a result of a criminal act should be recognised
 - how children exposed to criminal acts should be recognised
 - how people who prevent a crime, or who aid, or rescue a victim of a crime should be recognised
 - whether children and partners of perpetrators of a crime should be recognised
 - the implications of the proposed definition of ‘victim’ for scheme sustainability.

72 This would retain the approach under the VOCAA, which provides that a primary victim includes a person who is injured or dies as a direct result of trying to arrest a perpetrator of an act of violence: *Victims of Crime Assistance Act 1996* (Vic) s 7(2).

73 This would retain the approach under the VOCAA, which provides that a primary victim includes a person who is injured or dies as a direct result of trying to prevent an act of violence: *Victims of Crime Assistance Act 1996* (Vic) s 7(2). However, it would also include a person who unintentionally prevented an act of violence.

Close personal relationship

- 12.68 The Commission acknowledges stakeholder concerns regarding the limited types of relationship that are recognised under the VOCAA's secondary⁷⁴ and related victim categories.⁷⁵
- 12.69 The Commission also notes that this approach is inconsistent with research which demonstrates that criminal acts can have a ripple effect, affecting many people who are close to victims, including their family members, partners and children who may 'experience the effects of trauma ... sometimes with similar symptoms to those of primary victims'.⁷⁶ This may be especially so for the family members of sexual assault victims.⁷⁷
- 12.70 The Commission therefore considers that the proposed Act, in defining victim, should recognise a broader range of relationships than the limited types of relationship currently recognised under the VOCAA.
- 12.71 The Commission considers that the proposed definition of victim should include any person who was in a close personal relationship with a person against whom a criminal act was committed, regardless of whether the person against whom the criminal act was committed was injured or died as a result of the criminal act. The Commission considers that the proposed Act should provide that a close personal relationship includes the following:
- spouse
 - domestic partner, as defined in the FVPA⁷⁸
 - intimate partner
 - parent, guardian or step-parent
 - child (including by guardianship) or step-child
 - sibling or step-sibling
 - someone who regarded a person against whom a criminal act was committed as a family member, and the scheme decision maker considers this to be reasonable, having regard to the circumstances of the relationship, including the factors listed in the FVPA for determining whether a family-like relationship existed.⁷⁹

74 Under the VOCAA, a secondary victim is a person who is present at the scene of an act of violence and is injured as a direct result of witnessing that act. Secondary victims are also persons who are the parent or guardian of a primary victim who is under 18 at the time of the act of violence, and they are injured as a direct result of subsequently becoming aware of the act of violence committed against their child: *Victims of Crime Assistance Act 1996* (Vic) s 9.

75 Under the VOCAA, a related victim is a person who is 'close family member' or dependent of a primary victim, or who had an 'intimate personal relationship' with a primary victim: *Victims of Crime Assistance Act 1996* (Vic) s 11. 'Close family member' is defined as the spouse of the victim; parent, guardian or step-parent of the victim; child, step-child of the victim or a child of whom the victim is the guardian; or a brother, sister, step-brother or step-sister of the victim: *Victims of Crime Assistance Act 1996* (Vic) s 3(1). 'Intimate personal relationship' is not defined.

76 Australian Institute of Family Studies, Australian Government, *'Ripple Effects' of Sexual Assault*, ACSSA Issue No 7 (Australian Centre for the Study of Sexual Assault, 2007) <<https://aifs.gov.au/publications/ripple-effects-sexual-assault/secondary-victims-sexual-assault>>. See also David Riggs and Dean Kilpatrick, 'Family and Friends: Indirect Victimization by Crime' in Arthur Lurigio, Wesley Skogan and Robert Davis (eds), *Victims of Crime: Problems, Policies and Programs* (Sage, 1990) 122; Rob Davis, Bruce Taylor and Sarah Bench, 'Impact of Sexual and Nonsexual Assault on Secondary Victims' (1995) 10(1) *Violence and Victims* 73; Charles Figley and Rolf Kleber, 'Beyond the "Victim": Secondary Traumatic Stress' in Rolf Kleber, Charles Figley and Berthold Gersons (eds), *Beyond Trauma: Cultural and Societal Dynamics* (Plenum Press, 1995) 75.

77 See, eg, Australian Institute of Family Studies, Australian Government, *'Ripple Effects' of Sexual Assault*, ACSSA Issue No 7 (Australian Centre for the Study of Sexual Assault, 2007) <<https://aifs.gov.au/publications/ripple-effects-sexual-assault/secondary-victims-sexual-assault>>; Diane Daane, 'The Ripple Effects: Secondary Sexual Assault Survivors' in Frances Reddington and Betsy Wright Kreisel (eds), *Sexual Assault: The Victims, the Perpetrators and the Criminal Justice System* (Carolina Academic Press, 2005), 131.

78 *Family Violence Protection Act 2008* (Vic) s 9(1) provides that: 'domestic partner' of a person means (a) a person who is in a registered relationship within the meaning of the *Relationships Act 2008* (Vic) with the person; or an adult to whom the person is not married but with whom the person is in a relationship as a couple where one or each of the persons provides personal or financial commitment and support of a domestic nature for the support of the other person. Section 9(2) provides that 'for the purposes of subsection (1)(b), the following is irrelevant—(a) the genders of the persons; (b) whether or not the persons are living under the same roof. Section 9(3) provides that 'for the purposes of subsection (1)(b), a person is not the domestic partner of another person— (a) if the person provides domestic support and personal care to the person—(i) for fee or reward; or (ii) on behalf of another person or an organisation, including a government or non-government agency, a body corporate or a charitable or benevolent organisation; or (b) merely because they are co-tenants'. Section 9(4): 'In deciding whether persons who are not in a registered relationship are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in the *Relationships Act 2008* (Vic) s 35(2) as may be relevant in a particular case.'

79 *Family Violence Protection Act 2008* (Vic) s 8(3). These factors are discussed at [12.87].

12.72 In the Commission's view, such a definition of close personal relationship would clarify the types of relationship that are recognised under the proposed Act. It would include the following types of relationship, as discussed further below, that were identified by stakeholders as being excluded from, or not adequately recognised by, the narrowly defined secondary and related victim categories under the VOCAA:

- Aboriginal and Torres Strait Islander kinship relationships
- LGBTIQ chosen families
- domestic partners
- intimate partners
- other family relationships.

Aboriginal and Torres Strait Islander kinship relationships

12.73 As noted above, the Commission considers that the proposed Act should recognise that a person was in a close personal relationship with a person against whom a criminal act was committed, where that person considered the person against whom the criminal act was committed as a family member, and the scheme decision maker considers this to be reasonable. In making this determination, the scheme decision maker should be required to have regard to the circumstances of the relationship, including the factors listed in section 8(3) of the FVPA.⁸⁰ These factors include 'the cultural recognition of the relationship as being like family in the relevant person's or other person's community'.⁸¹ This would address stakeholder concerns that Aboriginal and Torres Strait Islander kinship relationships are not recognised under the VOCAA.

12.74 This approach would be consistent with the approaches under both the Australian Capital Territory and Queensland victims of crime assistance schemes, which define family member, for the purposes of being a related victim, as including a person who is regarded in Aboriginal or Torres Strait Islander tradition or custom as one of the listed types of family member.⁸²

The LGBTIQ community's chosen families

12.75 To address stakeholder concerns that relationships within the LGBTIQ community are not adequately recognised by the victim categories under the VOCAA, the Commission proposes that the definition of close personal relationship include both domestic partners and intimate partners. These categories of relationship are discussed below.

Domestic partners

12.76 The Commission acknowledges stakeholder views that excluding domestic partners is out of step with contemporary values,⁸³ and is inconsistent with other parts of the VOCAA that recognise domestic partners.⁸⁴

12.77 The Commission also notes that almost all other Australian jurisdictions, with the exception of Queensland and Tasmania, expressly recognise a de facto partner⁸⁵ or a domestic partner⁸⁶ as a related victim for the purposes of their victims of crime assistance legislation.

80 Ibid. These factors are discussed at [12.87].

81 Ibid s 8(3)(d).

82 *Victims of Crime Assistance Act 2009* (Qld) sch 3; *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 15(2)(b)(ii).

83 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 54 (Victorian Gay and Lesbian Rights Lobby).

84 See, eg, *Victims of Crime Assistance Act 1996* (Vic) s10A which concerns additional assistance available to secondary victims, and includes 'domestic partner' alongside 'spouse' in its definition of 'family member'. For the definition of 'domestic partner', see ss 3(1)–(4). See also *Reid v Victims of Crime Assistance Tribunal* [2002] VCAT 373 (24 May 2002) [10], noting this divergence.

85 *Victims of Crime Assistance Act 2006* (NT) s 13(1)(a); *Victims Rights and Support Act 2013* (NSW) s 22(3)(b); *Criminal Injuries Compensation Act 2003* (WA) s 4(1).

86 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 13(b)(i), 14(b)(i) and 17(1)(a); *Victims of Crime Act 2001* (SA) s 17(2)(a).

12.78 Accordingly, the Commission considers that under the proposed Act, the definition of ‘close personal relationship’ should include ‘domestic partners’, as defined in the FVPA.⁸⁷ This approach would address stakeholder concerns that, in addition to dependents, only spouses—that is, the husband or wife—and ‘intimate personal relationships’ are recognised under the VOCAA’s related victim category.

Intimate partners

- 12.79 While the VOCAA currently includes intimate personal relationships in its definition of related victim, this term is not defined.
- 12.80 Having regard to the views expressed by stakeholders, the Commission considers that intimate partners should also be included in the proposed definition of close personal relationship and that this term should be defined in the proposed Act.
- 12.81 In the Commission’s view, expressly including intimate partners, as well as domestic partners, in the proposed definition of close personal relationship would enable relationships that are intimate, but not necessarily domestic to be recognised under the proposed Act, as was proposed by safe steps Family Violence Response Centre.⁸⁸
- 12.82 This proposed approach would also be consistent with the approach adopted in the Australian Capital Territory, which recognises both a domestic partner and an intimate partner for the purposes of its victims of crime assistance scheme.⁸⁹
- 12.83 The Commission considers that the ACT definition of intimate partner should be adopted. This would mean that under the proposed Act, the definition of victim would include someone who was an intimate partner of a person against whom a criminal act was committed, whether or not they were members of the same household.⁹⁰
- 12.84 Similarly to the approach adopted in the Australian Capital Territory, the Commission considers that a decision maker’s determination of whether or not an intimate relationship exists should be based on a number of non-exhaustive factors, including:
- the extent to which each is personally dependent on the other
 - the extent to which each is financially dependent on the other (including any arrangements for financial support)
 - the length of the relationship
 - the frequency of contact between each other
 - if there is, or has been, a sexual relationship
 - the extent to which each is involved in, or knows about, the other’s personal life
 - the degree of mutual commitment to a shared life
 - if the two people share care of or support for children or other dependants.⁹¹

Other family relationships

- 12.85 The Commission also considers that persons who regard themselves as a family member of a person against whom a criminal act was committed should be recognised as having a close personal relationship with that person, where the decision maker considers this to be reasonable.
- 12.86 The Commission notes that the FVPA’s definition of family member includes ‘any other person whom the relevant person regards or regarded as being like a family member’ where it is reasonable to do so ‘having regard to the circumstances of the relationship’,⁹² including the matters specified in section 8(3) of that Act.

87 *Family Violence Protection Act 2008* (Vic) s 9(1). See footnote 87 above for a restatement of the definition in this provision.

88 Submission 37 (safe steps Family Violence Response Centre).

89 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 13(b)(i) and (ii), 14(b)(i) and (ii), and 17(1)(a).

90 *Ibid* ‘Dictionary’; *Family Violence Act 2016* (ACT) s 10.

91 *Family Violence Act 2016* (ACT) s 10(2).

92 *Family Violence Protection Act 2008* (Vic) s 8(3).

- 12.87 Accordingly, and to ensure consistency with the FVPA, the Commission considers that under the proposed Act, the definition of victim should include a person who regards a person against whom a criminal act was committed as a family member, where the decision maker considers this reasonable, having regard to the circumstances of the relationship. In making this determination, the Commission considers that the decision maker should be required to consider a non-exhaustive list of factors. Similarly to section 8(3) of the FVPA, the Commission considers that under the proposed Act, a decision maker should be required to consider:
- the nature of the social and emotional ties between the applicant and the person against whom the criminal act was committed⁹³
 - whether the applicant and the person against whom the criminal act was committed live together or relate together in a home environment⁹⁴
 - the reputation of the relationship as being like family in the community⁹⁵
 - the cultural recognition of the relationship as being like family in the community⁹⁶
 - the duration of the relationship between the applicant and the person against whom the criminal act was committed and the frequency of contact⁹⁷
 - any financial dependence or interdependence between the applicant or the person against whom the criminal act was committed⁹⁸
 - any other form of dependence or interdependence between the applicant and the person against whom the criminal act was committed⁹⁹
 - the provision of any responsibility or care, whether paid or unpaid, between the applicant and the person against whom the criminal act was committed¹⁰⁰
 - the provision of sustenance or support between the applicant and the person against whom the criminal act was committed.¹⁰¹
- 12.88 In the Commission's view, this category of relationship would focus on the substance of a relationship, rather than its form, and would help to ensure that other close relationships are recognised under the proposed Act, even if they do not fall within one of the other categories included in the definition of close personal relationship.
- 12.89 This proposed approach would also address stakeholder concerns that grandparents, aunts, uncles and cousins may be ineligible for assistance under the existing scheme because of VCAT's narrow interpretation of what constitutes an intimate personal relationship under the VOCAA.¹⁰²
- 12.90 However, the Commission considers that expressly recognising such relatives as a separate category or categories under the definition of close personal relationship, without requiring the specific nature of the relationship to be considered and assessed by a decision maker, would compromise the sustainability of the proposed scheme and would place too great an emphasis on blood ties, rather than the substance of those relationships.
- 12.91 Finally, the Commission notes that this category would also enable carers to be recognised as victims under the proposed Act.

93 See *ibid* s 8(3)(a).

94 See *ibid* s 8(3)(b).

95 See *ibid* s 8(3)(c).

96 See *ibid* s 8(3)(d).

97 See *ibid* s 8(3)(e).

98 See *ibid* s 8(3)(f).

99 See *ibid* s 8(3)(g).

100 See *ibid* s 8(3)(h).

101 See *ibid* s 8(3)(i).

102 See submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre); Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee). In one case, an aunt was denied assistance after the murder of her niece despite having at certain times 'carried out the role that would normally have been assumed by the victim's mother': *Reid v Victims of Crime Assistance Tribunal* [2002] VCAT 373 (24 May 2002) [20].

Dependants of persons who died or were injured as a result of a criminal act

- 12.92 Stakeholders did not raise any issues regarding the ability of dependants of deceased primary victims to access assistance under the VOCAA.
- 12.93 The Commission considers that dependants of a person who died as a result of a criminal act should continue to be eligible for assistance and therefore should be included in the definition of victim under the proposed Act.
- 12.94 Similarly to the VOCAA, the Commission also considers that under the proposed Act, a child of a person who died as a result of a criminal act, who would have been dependent on the income of that person if they had been born before that person's death, should continue to be recognised as a victim for the purposes of the proposed Act.
- 12.95 However, in contrast to the VOCAA, the Commission considers that a person who was dependent on the income of another person who was injured as a result of a criminal act should also be eligible for assistance under the proposed Act, where the injury has impacted that other person's ability to earn an income and therefore provide financial support to the dependent person. In the Commission's view, there is no clear rationale for excluding such persons from also accessing assistance under the proposed Act.
- 12.96 The Commission considers that the definition of dependant contained in the VOCAA should be reflected in the definition of victim under the proposed Act, with necessary amendments to reflect the Commission's proposed extension of dependants' eligibility to include the dependant of a person who was injured as a result of a criminal act.¹⁰³
- 12.97 Accordingly, in the Commission's view, the definition of 'victim' in the proposed Act should include:
- an individual who was wholly or substantially dependent on the income of a person who was injured or died as a result of a criminal act, at the time of that person's death or injury
 - a child of a person who was injured or died as a result of a criminal act and who would have been wholly or substantially dependent on the injured or deceased person's income if the child had been born before the person was injured or died.

Children exposed to criminal acts

- 12.98 To address stakeholder concerns that children exposed to family violence may not be considered primary victims under the VOCAA unless they directly witnessed the act of violence, the Commission considers that the definition of victim under the proposed Act should include children who witness, hear or are otherwise exposed to criminal acts, regardless of whether they directly witnessed such acts.
- 12.99 This proposed approach would recognise that being exposed to violence can have far-reaching developmental and psychological impacts for children, particularly in the context of family violence.¹⁰⁴ As the Royal Commission into Family Violence stated, 'children and young people experiencing family violence should be recognised as victims in their own right'.¹⁰⁵
- 12.100 The Commission notes that the impact of children's exposure to family violence is recognised in both Victorian and Commonwealth legislation. Causing a child to hear, witness or be otherwise exposed to family violence constitutes family violence under the

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

104 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 106–12; 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) 1–3; Monica Campo, *Children's Exposure to Domestic and Family Violence: Key Issues and Responses*, CFCA Paper No 36 (Australian Institute of Family Studies, 2015) 6–8.

105 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 142.

FVPA.¹⁰⁶ In addition, causing a child to hear, witness or otherwise be exposed to violence constitutes 'abuse in relation to a child' under the *Family Law Act 1975* (Cth).¹⁰⁷

People who prevent a crime or aid or rescue a victim of crime

- 12.101 To address stakeholder concerns regarding the requirement that an applicant proactively prevent a crime in order to be eligible for assistance as a primary victim,¹⁰⁸ and to help ensure that persons who inadvertently prevent criminal acts are not excluded from accessing assistance, the Commission considers that the definition of victim under the proposed Act should include a person who 'prevents or tries to prevent the commission of a criminal act'.
- 12.102 The Commission's proposed definition of victim would also include 'a person who assists, aids, or rescues another person against whom they reasonably believed a criminal act was committed, or was going to be committed, either before, during or immediately after the criminal act'. This would broadly reflect the VOCAA's definition of primary victim, which includes a person who is injured or dies as a direct result of trying to aid or rescue a victim of an act of violence.¹⁰⁹
- 12.103 The Commission notes that VOCAT's narrow interpretation of aid has operated to exclude family members from accessing assistance in circumstances where they suffer psychological injuries after caring for a primary victim in the aftermath of an act of violence. This issue would be addressed under the proposed Act because family members who care for victims in the aftermath of a crime would be recognised as victims of criminal act in their own right if they have a close personal relationship with the person against whom the criminal act was committed. As such, they would no longer need to establish that they 'aided' the victim in order to qualify for assistance.

Children and partners of perpetrators of crime

- 12.104 Having regard to PartnerSPEAK's submission, the Commission acknowledges the significant impact that online sex offending can have on perpetrators' children and partners, and that apart from the services provided by PartnerSPEAK, there appear to be no dedicated services to support them.¹¹⁰
- 12.105 However, the Commission considers that extending state-funded financial assistance under the proposed Act to close family members of online sex offenders may unfairly exclude other persons from accessing the scheme who may also suffer injury as a result of a family member's criminal offending. For example, the Commission notes research which suggests that where a parent is imprisoned as a result of a criminal act, children may suffer 'a range of psychological impacts including grief and loss, depression and shame'.¹¹¹
- 12.106 In addition, the Commission considers that extending the proposed Act to all persons who suffer injury as a result of a family member's criminal offending would expand the scheme significantly and fundamentally undermine its sustainability for the state.
- 12.107 The Commission was told that the New South Wales scheme has been interpreted to include partners and children of online child sex offenders for the purposes of accessing counselling.¹¹² However, the Commission notes that no Australian victims of crime assistance scheme legislation explicitly extends its assistance to the family members of offenders.

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

107 *Family Law Act 1975* (Cth) ss 4(1), 4AB(3) and (4).

108 Submission 41 (Springvale Monash Legal Service).

109 *Victims of Crime Assistance Act 1996* (Vic) s 7(2).

110 Consultation 18 (PartnerSPEAK).

111 Chris Trotter, Catherine Flynn and Susan Baidawi, 'The Impact of Parental Incarceration on Children's Care: Identifying Good Practice Principles from the Perspective of Imprisoned Primary Carer Parents' (2017) 22(2) *Child & Family Social Work* 952, 953.

112 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW). See also consultation 18 (PartnerSPEAK).

Scheme sustainability

12.108 The Commission acknowledges that the proposed Act's definition of victim extends the proposed scheme to a larger pool of potential victims. However, the Commission considers that the sustainability of the proposed scheme is unlikely to be threatened by this expansion because the broadening of the potential victim pool is likely to be balanced by the following:

- a person who was in a close personal relationship with a person against whom a criminal act was committed must establish that they themselves suffered injury as a result of the criminal act
- the streams of assistance available to a victim and the quantum of such assistance will depend on an assessment by the decision maker of each victim's particular circumstances.

12.109 The issue of scheme sustainability more broadly is discussed in Chapter 18.

Recommendations—definition of victim

24 The proposed Act should define a victim as:

- (a) a person against whom a criminal act was committed
- (b) a person who was in a close personal relationship with a person who was injured or died as a result of the criminal act committed against them
- (c) a person who was wholly or substantially dependent on the income of a person who was injured or died as a result of a criminal act, at the time of that person's injury or death
- (d) a child of a person who was injured or died as a result of a criminal act and who would have been wholly or substantially dependent on the injured or deceased person's income if the child had been born before the person was injured or died
- (e) a person who witnessed a criminal act
- (f) a person under the age of 18 years who heard or was otherwise exposed to a criminal act
- (g) a person who attempted to assist, aid or rescue another person against whom they reasonably believed a criminal act was committed, or was going to be committed, whether the attempt to do so occurred before, during or immediately after the criminal act
- (h) a person who tried to arrest someone whom they believed on reasonable grounds had committed a criminal act, or
- (i) a person who prevented or tried to prevent the commission of a criminal act.

- 25 For the purposes of the proposed definition of victim, the proposed Act should provide that a person ('the relevant person') was in a close personal relationship with a person against whom a criminal act was committed ('the direct victim'), where the relevant person, at the time of the criminal act:
- (a) was married to the direct victim
 - (b) was the domestic partner of the direct victim, as defined in section 9 of the *Family Violence Protection Act 2008* (Vic)
 - (c) was the intimate partner of the direct victim
 - (d) was the parent, guardian or step-parent of the direct victim
 - (e) was the child, including by guardianship, or step-child of the direct victim
 - (f) was the sibling or step-sibling of the direct victim, or
 - (g) regarded the direct victim as a family member, and the scheme decision maker considers it reasonable to have regarded the direct victim as such, having regard to the circumstances of the relationship.
- 26 For the purposes of the definition of close personal relationship, the proposed Act should define an intimate partner as a person who had an intimate relationship with a direct victim at the time of the criminal act, whether they were members of the same household or not, having regard to the circumstances of the relationship.

Defining a criminal act

Current law

- 12.110 For a person to be eligible for assistance under any of the three victim categories, the VOCAA requires that there must have been an act of violence.
- 12.111 The VOCAA defines an act of violence as a 'criminal act' or 'a series of related criminal acts' that occurred in Victoria and 'directly resulted in injury or death to one or more persons'.¹¹³ The VOCAA defines a 'criminal act' as an act or omission that is a 'relevant offence'.¹¹⁴
- 12.112 A 'relevant offence' is defined under the VOCAA as:
- an offence that involves an assault, injury or threat of injury to a person and which is punishable by imprisonment¹¹⁵
 - sexual offences contained in subdivisions 8A, 8B, 8C, 8D, 8E, 8F or 8FA of division 1 of part 1 of the *Crimes Act 1958* (Vic), which include offences of rape, sexual assault, sexual offences against children, incest, sexual offences against persons with a cognitive impairment, child abuse materials offences, offences of sexual servitude, other sexual offences, and the common law offences of rape or assault with intent to rape¹¹⁶
 - the offences of stalking, child stealing and kidnapping¹¹⁷
 - conspiracy, incitement or an attempt to commit any of the offences listed above.¹¹⁸

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

114 *Ibid.*

115 *Ibid.*

116 Sexual offences contained in subdivisions 8D and 8F of division 1 of part 1 of the *Crimes Act 1958* (Vic) were inserted into the VOCAA's definition of 'relevant offence' by the *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 22. This amendment commenced on 5 April 2018.

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

118 *Ibid.*

- 12.113 In addition, the definition of a criminal act includes an act or omission that would have constituted a relevant offence if the perpetrator had not been incapable of criminal responsibility due to their age, mental impairment or the existence of any other defence.¹¹⁹
- 12.114 In a number of cases, VCAT has held that an act of violence must involve an offence against the person and therefore does not include property offences.¹²⁰ For example, in *Lowe v Victims of Crime Assistance Tribunal*¹²¹ and *Matthews v Victims of Crime Assistance Tribunal*,¹²² VCAT held that a victim of an arson attack against their home could not be a victim of an act of violence unless they were under a threat of injury at the time of the fire.
- 12.115 VCAT's finding that an act of violence only includes offences against the person means that certain sexual offences against children—including the offences of grooming and encouraging or facilitating sexual offences against a child—may also be excluded from the definition of act of violence, despite being contained in subdivision 8B of the *Crimes Act 1958* (Vic). This is because of the 'non-violent' nature of such offences. For example, *AVA v Victims of Crime Assistance Tribunal*¹²³ concerned a child whose mother's partner took indecent photographs of her while she was sleeping. VCAT initially refused the application on the basis that an act of violence had not occurred. This is because the applicant 'was clothed when photographed; she was asleep at the time; and there was no evidence or inference of any physical contact whatsoever'.¹²⁴ This decision was set aside on appeal to VCAT, where it was held that the VOCAA covers 'many relevant offences, which do not need to be associated with actual violence'.¹²⁵ However, in this case, VCAT also found that a contact-based sexual offence had taken place. This suggests that some uncertainty may remain in relation to eligibility for victims of non-contact sexual offences against children.¹²⁶
- 12.116 Visual and image-based sexual offences contained in Division 4A of the *Summary Offences Act 1966* (Vic) ('upskirting' offences) are also excluded from the definition of 'act of violence'. These offences include observing and/or visually capturing the genital or anal region and distributing such images.¹²⁷
- 12.117 The definition of act of violence does not include any form of non-criminal violence, such as non-criminal family violence. This is despite the fact that family violence is recognised as a form of violence under the FVPA.¹²⁸

119 Ibid. See, eg, *BVB v Victims of Crime Assistance Tribunal* (2010) 27 VR 425, 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 642 (24 April 2007), 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 the primary victim's claim.

120 See *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004) [15]; *Purcell v Victims of Crime Assistance Tribunal* (3 June 2011) [18]; *Matthews v Victims of Crime Assistance Tribunal* [2012] VCAT 1099 (27 July 2012) [18]–[19].

121 [2004] VCAT 1092 (8 June 2004).

122 [2012] VCAT 1099 (27 July 2012).

123 [2010] VCAT 2078 (23 December 2010).

124 Victims of Crime Assistance Tribunal, cited in *ibid* [29].

125 *Ibid* [34].

126 For further discussion, see Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 58–9.

127 *Summary Offences Act 1966* (Vic) ss 41A, 41B and 41C. These provisions were inserted by the *Summary Offences Amendment (Upskirting) Act 2007* (Vic).

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

Responses

- 12.118 In the first consultation paper, the Commission asked whether the definition of act of violence should be amended to include family violence and if so, how the experience of child family violence victims should be included in the definition.¹²⁹ The Commission also asked whether there should be separate eligibility criteria for victims of family violence.¹³⁰ Regarding eligibility more generally, the Commission asked how the VOCAA should deal with patterns of non-criminal behaviour that result in injury.¹³¹
- 12.119 In both its first and supplementary consultation papers, the Commission also asked whether the definition of ‘act of violence’ should be amended to include other offences, and if so which ones.¹³²
- 12.120 In the second supplementary consultation paper, the Commission asked how the definition of act of violence impacts on people applying for assistance and whether the definition should include non-criminal behaviour more generally, and if so what forms.¹³³
- 12.121 Changing notions of what constitutes an act of violence were reflected in the views expressed by stakeholders. In particular, many stakeholders stated that the definition of an act of violence should be expanded to include a broader range of both criminal and non-criminal conduct, as outlined below.

Expanding the definition to account for family violence

- 12.122 The VOCAA’s definition of an act of violence can create a barrier to accessing assistance for victims of family violence.¹³⁴
- 12.123 The issue of whether the definition of an act of violence should be expanded to better recognise family violence victims was addressed in the majority of consultation meetings and submissions.¹³⁵ Many stakeholders supported expanding the definition to more adequately recognise family violence.¹³⁶ However, stakeholder views diverged as to how this would best be achieved.

129 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017), Ch 6, 55.
 130 Ibid.
 131 Ibid.
 132 Ibid.; Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 61.
 133 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 61.
 134 See, eg, Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
 135 Submissions 1 (Judicial Advisory Group on Family Violence), 3 (Director of Public Prosecutions Victoria), 5 (Anglicare Victoria Victims Assistance Program), 6 (Forgetmenot Foundation Inc.), 8 (Victim Survivors’ Advisory Council), 10 (Eastern Metropolitan Regional Family Violence Partnership), 11 (Seniors Rights Victoria), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 17 (Centre for Excellence in Child and Family Welfare), 18 (cohealth), 19 (Schembri & Co Lawyers), 24 (Darebin Community Legal Centre), 25 (Public Health Association of Australia), 26 (Hume Riverina Community Legal Centre), 27 (Name withheld), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 31 (Victorian Council of Social Service), 32 (Australian Psychological Society), 33 (Eastern Community Legal Centre), 36 (Name withheld), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria), 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 14 (Chief Magistrate’s Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 17 (Family Violence Diverse Communities and Intersectionality Working Group), 18 (PartnerSPEAK), 19 (RMIT Centre for Innovative Justice), 20 (Academics), 23 (Community Safety Trustee, Victoria), 24 (Slavery Links), 25 (Children’s Court of Victoria).
 136 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria) instead supported incorporating an expanded range of non-criminal behaviours in the VOCAA to guide the exercise of discretion, such as in relation to determining awards for special financial assistance.

- 12.124 The most commonly expressed view was that the definition of act of violence should be amended to include non-criminal family violence, including emotional, psychological and financial abuse.¹³⁷ Most of these stakeholders stated that the definition of family violence from the FVPA should be adopted.¹³⁸
- 12.125 However, some stakeholders considered that the FVPA definition should be adopted but also expanded—for example, to include forced marriage¹³⁹ and violence perpetrated by people in a residential facility or in a relationship of dependence.¹⁴⁰
- 12.126 The main reason advanced for expanding the definition of act of violence to include non-criminal family violence was that contemporary understandings of family violence now recognise these forms of abuse, including psychological and financial abuse, and that they can cause as much harm to victims as physical and sexual violence.¹⁴¹ Some stakeholders also noted that there should be consistency between legislative instruments and that it may be inconsistent to recognise family violence as a form of violence under the FVPA but not under the VOCAA.¹⁴²
- 12.127 However, a smaller number of stakeholders expressed concern about expanding the definition of an act of violence to include non-criminal behaviour.¹⁴³ A common concern raised in this context was that such a broadening of the eligibility criteria could result in a significant increase in demand and impact on scheme sustainability.¹⁴⁴
- 12.128 Other concerns were that:
- such an expansion could impact the timeliness of awards¹⁴⁵
 - such an expansion could have the effect of watering down the scheme¹⁴⁶
 - such an expansion could make it easier for perpetrators to make an application for financial assistance¹⁴⁷
 - such an expansion could increase the risk that a perpetrator misappropriates VOCAT assistance through financial abuse¹⁴⁸

137 Submissions 6 (Forgetmenot Foundation Inc.), 8 (Victim Survivors' Advisory Council), 10 (Eastern Metropolitan Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal), 17 (Centre for Excellence in Child and Family Welfare), 18 (cohealth), 19 (Schembri & Co Lawyers), 24 (Darebin Community Legal Centre), 26 (Hume Riverina Community Legal Service), 27 (Name withheld), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 31 (Victorian Council of Social Service), 32 (Australian Psychological Society), 33 (Eastern Community Legal Centre), 36 (Name withheld), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 14 (Chief Magistrate's Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 17 (Family Violence Diverse Communities and Intersectionality Working Group), 18 (PartnerSPEAK), 19 (RMIT Centre for Innovative Justice), 20 (Academics), 23 (Community Safety Trustee, Victoria).

138 *Family Violence Protection Act 2008* (Vic) s 5. See, eg, Submissions 8 (Victim Survivors' Advisory Council), 10 (Eastern Metropolitan Region Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 24 (Darebin Community Legal Centre), 26 (Hume Riverina Community Legal Centre), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 31 (Victorian Council of Social Service), 33 (Eastern Community Legal Centre), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria).

139 Submission 24 (Darebin Community Legal Centre).

140 Submission 37 (safe steps Family Violence Response Centre).

141 See, eg, Submission 30 (CASA Forum).

142 See, eg, Consultations 2 (Legal Professionals—Private Practice), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 14 (Chief Magistrate's Family Violence Taskforce), 20 (Academics).

143 Submissions 1 (Judicial Advisory Group on Family Violence), 5 (Anglicare Victoria Victims Assistance Program), 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultations 2 (Legal Professionals—Private Practice), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 14 (Chief Magistrate's Family Violence Taskforce), 16 (Regional Consultation—Ballarat Legal Professionals), 20 (Academics), 25 (Children's Court of Victoria).

144 Submissions 1 (Judicial Advisory Group on Family Violence), 31 (Victorian Council of Social Service), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

145 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

146 See consultation 2 (Legal Professionals—Private Practice).

147 Submissions 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultation 14 (Chief Magistrate's Family Violence Taskforce).

148 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

- it could be difficult to translate certain forms of family violence, such as psychological abuse, into a lump sum payment¹⁴⁹
 - a line needs to be drawn between violent crime and ‘unpleasant behaviour’.¹⁵⁰
- 12.129 In addition, the Judicial Advisory Group on Family Violence noted in its submission that extending eligibility to non-criminal forms of family violence could ‘create anomalies’. This is because:
- no compensation would be provided for other psychological or financial harms not involving family violence (for example, non-criminal sexual harassment would not create an entitlement to compensation).¹⁵¹
- 12.130 Concerns about inconsistencies arising in the treatment of non-criminal forms of violence were echoed in a consultation meeting with the President of the Children’s Court of Victoria.¹⁵² In addition, in their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria noted that including non-criminal family violence would ‘mark a departure from the Act’s overarching requirement that a criminal offence is established’.¹⁵³
- 12.131 Other stakeholders expressed support for a ‘middle ground’ approach.¹⁵⁴ For example, stakeholders proposed that the definition of an act of violence could be amended to better accommodate family violence but not so far as to include all forms of non-criminal family violence. Stakeholders differed in their suggested approaches, which included:
- extending eligibility only to instances of non-physical family violence that are reported to the police¹⁵⁵
 - amending the definition of act of violence to include a broader range of criminal offences where they occur in the context of family violence, as is the approach taken in the Australian Capital Territory¹⁵⁶—for example, property offences,¹⁵⁷ trespass,¹⁵⁸ fraudulent transactions,¹⁵⁹ arson,¹⁶⁰ and breach of an intervention order¹⁶¹
 - extending eligibility to victims of non-criminal family violence in relation to counselling expenses only, as is the practice in New South Wales.¹⁶²
- 12.132 Some stakeholders also proposed a contextual approach whereby the context of non-criminal family violence surrounding an act of violence could be taken into account in determining an award.¹⁶³ For example, non-criminal behaviour could establish that there was a pattern of abuse rather than a one-off assault, qualifying the applicant for a higher quantum of award.¹⁶⁴
- 12.133 Similarly, in their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria proposed that an uplift category could be inserted into the *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) to enable a victim to receive the highest category of special financial assistance (category A) where there is a ‘history of family violence’.¹⁶⁵ Under this approach, evidence of

149 Consultation 20 (Academics).

150 Ibid.

151 Submission 1 (Judicial Advisory Group on Family Violence).

152 Consultation 25 (Children’s Court of Victoria).

153 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

154 Submission 15 (Merri Health Victims Assistance Program); Consultation 4 (Victim, Witness and Court Support).

155 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

156 Submissions 5 (Anglicare Victoria Victims Assistance Program), 11 (Seniors Rights Victoria), 14 (Inner Melbourne Community Legal).

157 Submissions 3 (Director of Public Prosecutions Victoria), 5 (Anglicare Victoria Victims Assistance Program), 11 (Seniors Rights Victoria), 14 (Inner Melbourne Community Legal).

158 Submission 14 (Inner Melbourne Community Legal).

159 Submission 11 (Seniors Rights Victoria).

160 Submission 5 (Anglicare Victoria Victims Assistance Program).

161 Submissions 5 (Anglicare Victoria Victims Assistance Program), 11 (Seniors Rights Victoria), 14 (Inner Melbourne Community Legal).

162 Submission 1 (Judicial Advisory Group on Family Violence); Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

163 Submission 43 (Knowmore, note discussing child abuse only); Consultation 2 (Legal Professionals—Private Practice). See also submissions 19 (Schembri & Co Lawyers), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

164 Submissions 19 (Schembri & Co Lawyers), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

165 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

family violence, including non-criminal family violence (as defined in the FVPA) could be considered as long as the victim establishes a ‘triggering act of violence’ on the balance of probabilities.¹⁶⁶

Recognising elder abuse and child abuse

- 12.134 A number of stakeholders submitted that the definition of an act of violence under the VOCAA should be broadened to better accommodate elder abuse¹⁶⁷ and child abuse.¹⁶⁸
- 12.135 Seniors Rights Victoria submitted that an extended range of offences should be included in the definition of an act of violence where these occur in the context of elder abuse, including property offences, fraudulent transactions and contraventions of intervention orders.¹⁶⁹
- 12.136 In relation to child abuse, Inner Melbourne Community Legal submitted that the definition of an act of violence should encompass non-criminal forms of child abuse and neglect, such as where the Department of Health and Human Services has intervened on a child’s behalf in the Children’s Court.¹⁷⁰ Inner Melbourne Community Legal also submitted that if the definition of an act of violence were amended to include these forms of child abuse, VOCAT should be able to rely on the findings of any Children’s Court proceeding, as Victoria Police will commonly not charge the parents or carers of a child with a criminal offence.¹⁷¹
- 12.137 Knowmore supported a contextual approach to the recognition of child abuse, in which non-criminal abuse may not be the basis of an application under the scheme but would be taken into account as part of the context surrounding a criminal act of physical or sexual abuse.¹⁷² In particular, knowmore proposed that the VOCAA recognise the concept of ‘connected abuse’, which was introduced in New South Wales in relation to child abuse as a consequence of the *Limitation Amendment (Child Abuse) Act 2016* (NSW). Knowmore submitted that the concept of connected abuse allows other forms of child abuse, such as psychological abuse or minor physical abuse, to also be considered in a civil action where a particular threshold of sexual abuse or serious physical child abuse is established. Knowmore stated that Victoria’s limitations law adopts a similar approach for death or personal injury claims where the claimant suffered psychological abuse or was a minor who suffered physical or sexual abuse.¹⁷³

Sexual offences

- 12.138 Stakeholders also supported including a wider range of sexual offences in the definition of an act of violence.¹⁷⁴ In particular, a number of stakeholders proposed including non-contact sexual offences, such as the grooming and image-based offences contained in the *Summary Offences Act 1996* (Vic).¹⁷⁵
- 12.139 Project Respect submitted that the eligibility criteria should be broadened to also include sexual offences contained in the *Sex Work Act 1994* (Vic).¹⁷⁶

166 Ibid.

167 Submission 11 (Seniors Rights Victoria).

168 Submissions 14 (Inner Melbourne Community Legal), 43 (knowmore).

169 Submission 11 (Seniors Rights Victoria).

170 Submission 14 (Inner Melbourne Community Legal).

171 Ibid.

172 Submission 43 (knowmore).

173 Ibid, citing *Limitation of Actions Act 1958* (Vic) pt IIA, div 5.

174 Submissions 14 (Inner Melbourne Community Legal), 16 (Project Respect), 37 (safe steps Family Violence Response Centre), 43 (knowmore), 52 (Slavery Links); Consultations 3 (Legal Professionals—Community Legal Centres), 15 (Regional Consultation—Ballarat Victim Support Agencies), 18 (PartnerSPEAK).

175 Submissions 14 (Inner Melbourne Community Legal), 16 (Project Respect), 37 (safe steps Family Violence Response Centre), 43 (knowmore), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 3 (Legal Professionals—Community Legal Centres), 18 (PartnerSPEAK).

176 Submission 16 (Project Respect). See *Sex Work Act 1994* (Vic) s 18A(2).

Property offences

- 12.140 A number of stakeholders proposed expanding the definition of an act of violence to include property offences, both in the context of family violence and more generally.¹⁷⁷
- 12.141 Some expressed the view that arson¹⁷⁸ and aggravated burglary¹⁷⁹ should be considered acts of violence. Ryan Carlisle Thomas Lawyers submitted that VOCAT may not consider such offences to be acts of violence unless the victim had contact with the perpetrator.¹⁸⁰ For example, it was submitted that a victim may not be eligible for assistance under the VOCAA where a perpetrator burgles the victim's home while the victim is at home asleep.¹⁸¹
- 12.142 Ryan Carlisle Thomas Lawyers submitted that both arson and aggravated burglary should be included as relevant offences for the purposes of the VOCAA, regardless of any contact by the victim with the offender, because these offences often cause 'distress and, in some cases, significant psychological/psychiatric injuries'.¹⁸² Similarly, Adviceline Injury Lawyers submitted that aggravated burglary should be covered by the scheme where victims are present in the home but not directly injured.¹⁸³
- 12.143 In contrast, other stakeholders told the Commission that any expansion of the eligibility criteria to include property offences should only occur in the context of family violence, with Inner Melbourne Community Legal stating that the scheme may otherwise become unsustainable.¹⁸⁴

Other expansions

- 12.144 A number of submissions proposed that the definition of an act of violence in the VOCAA should be amended to better account for online offences.¹⁸⁵
- 12.145 Slavery Links submitted that the definition of an act of violence should include slavery, as determined by the 'indicia of slavery' enunciated by Chief Justice Gleeson in *R v Wei Tang*.¹⁸⁶
- 12.146 Two submissions proposed including forms of psychological abuse in the definition of an act of violence beyond the context of family violence, elder abuse and child abuse.¹⁸⁷ One stakeholder considered that the definition of an act of violence should be extended to include mental abuse in the workplace and at schools.¹⁸⁸ Another stakeholder submitted that the definition of an act of violence should include subjecting a person to psychological distress that causes them to engage in detrimental activities, including in the context of bullying and supplying them with drugs.¹⁸⁹
- 12.147 More generally, and as an alternative approach, one stakeholder submitted that eligibility could be based on the harm suffered as a result of a crime, and not the crime type or whether it was violent or non-violent.¹⁹⁰

177 Submissions 13 (Adviceline Injury Lawyers), 16 (Project Respect), 38 (Ryan Carlisle Thomas Lawyers); Consultation 7 (Family Violence and Advocacy Organisations). In a number of consultation meetings, stakeholders also noted the difficulties associated with victims of property offences being unable to make an application, but did not explicitly propose broadening the definition to include such victims: see Consultations 4 (Victim, Witness and Court Support), 12 (Regional Consultation—Mildura Victim Support Agencies), 15 (Regional Consultation—Ballarat Victim Support Agencies), 17 (Family Violence Diverse Communities and Intersectionality Working Group), 23 (Community Safety Trustee, Victoria).

178 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultation 7 (Family Violence and Advocacy Organisations). Stakeholders expressed concern about the exclusion of arson during consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

179 Submissions 13 (Adviceline Injury Lawyers), 38 (Ryan Carlisle Thomas Lawyers). Concern was expressed about victims of aggravated burglaries in Submission 18 (cohealth) and Consultations 4 (Victim, Witness and Court Support), 15 (Regional Consultation—Ballarat Victim Support Agencies) and 23 (Community Safety Trustee, Victoria).

180 Submission 38 (Ryan Carlisle Thomas Lawyers).

181 Ibid.

182 Ibid.

183 Submissions 13 (Adviceline Injury Lawyers).

184 Submission 14 (Inner Melbourne Community Legal). See also submission 37 (safe steps Family Violence Response Centre).

185 Submissions 27 (Name withheld), 33 (Eastern Community Legal Centre), 34 (Dr Cassandra Cross).

186 (2008) 237 CLR 1 [28]. See submission 52 (Slavery Links).

187 Submissions 6 (Forgetmenot Foundation Inc.), 27 (Name withheld).

188 Submission 6 (Forgetmenot Foundation Inc.).

189 Submission 27 (Name withheld).

190 Submission 34 (Dr Cassandra Cross).

Discussion and recommendations

Non-criminal acts

- 12.148 The Commission acknowledges that the current definition of act of violence prevents victims of non-criminal forms of violence from accessing assistance under the VOCAA. This includes victims of certain forms of family violence, elder abuse, child abuse and abuse of people with disability.
- 12.149 Elder abuse and child abuse often take the form of non-criminal conduct. The Australian Law Reform Commission's final report, *Elder Abuse—A National Legal Response*, found that although elder abuse can involve physical and sexual abuse, it more commonly takes the form of psychological or emotional abuse, financial abuse and neglect, which may not be criminal.¹⁹¹ As such, victims of elder abuse may not be eligible for assistance under the VOCAA.
- 12.150 Similarly, the 2013 Victorian Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations found that the most common form of child abuse in Australia is emotional abuse.¹⁹²
- 12.151 The Commission also notes that although other forms of violence are criminalised—such as physical assault that occurs in the context of family violence—for cultural reasons, these forms of violence may not always be recognised as crimes, may not be reported and, even where reported, may not result in charges being laid by police.¹⁹³
- 12.152 However, notwithstanding existing cultural issues concerning the recognition of some criminal violence, the Commission acknowledges that excluding non-criminal forms of violence from the proposed Act may be out-of-step with community understandings of violence. Many in the community now view family violence victims, children, older people and people with disability who are subjected to neglect or financial, emotional or psychological abuse as victims of an act of violence.¹⁹⁴ Similarly, many now consider that children who witness, hear or are otherwise exposed to violence should be considered victims of violence in their own right.¹⁹⁵
- 12.153 There is also growing recognition of the harm experienced by victims of non-physical criminal offences, such as non-contact sexual offences, the non-consensual distribution of a naked photograph on the internet and 'grooming', as well as the adverse impact that some property offences can have on a victim's mental health. As VOCAT noted in its *Annual Report 2016–17*, there are 'changing notions about what may constitute a violent crime and the possible ways in which a person can be victimised'.¹⁹⁶
- 12.154 Widespread stakeholder support for expanding the proposed scheme to include non-criminal violence, particularly family violence, is therefore understandable.
- 12.155 In this context, the Commission notes that in Queensland, victims of non-criminal family violence are eligible for financial assistance under the *Victims of Crime Assistance Act 2009* (Qld).¹⁹⁷ The Queensland Act explicitly includes domestic violence within its definition of an act of violence, and includes non-criminal psychological and emotional abuse, economic abuse and behaviour that is threatening, coercive or dominating.¹⁹⁸

191 Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 19.

192 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 1, 127–8.

193 See, eg, discussion about variable responses to family violence by Victoria Police, which was described by Assistant Commissioner Luke Cornelius in 2016 as 'a bit of a lottery': Victoria, *Royal Commission into Family Violence*, Report and Recommendations (2016) vol 3, 8.

194 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 52–5.

195 See, eg, Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 106–12.

196 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 37.

197 See *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 29.

198 *Victims of Crime Assistance Act 2009* (Qld) s 25(2). The Act provides that 'domestic violence' has the same meaning as in the *Domestic and Family Violence Protection Act 2012* (Qld): *Victims of Crime Assistance Act 2009* (Qld), sch 3 (dictionary); *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

- 12.156 The Commission acknowledges the very significant impact that non-criminal forms of violence may have on victims, including family violence victims, and the importance of assisting such victims to recover.
- 12.157 However, notwithstanding the above considerations, including stakeholder views and the approach in Queensland, the Commission considers that the appropriate way to address the exclusion of certain non-criminal forms of violence is to criminalise such conduct to enable its inclusion in the proposed Act, rather than to expand the proposed Act to include non-criminal acts. In the Commission's view, to do otherwise would undermine the fundamental purpose of Victoria's state-funded financial assistance scheme for victims of crime, which is to provide assistance to the victims of acts that are criminal in nature for the purpose of assisting them with their recovery.
- 12.158 Accordingly, the Commission considers that the proposed scheme should reflect the offences in the criminal law and that it is a matter for Parliament to determine what type of conduct constitutes a criminal offence. In the context of family violence, if Victoria amended its *Crimes Act 1958* (Vic) to include crimes comparable to Tasmania's offences of economic and emotional abuse in the context of family violence,¹⁹⁹ these offences could be considered for inclusion in the proposed Act. However, providing assistance to victims of such violence before it is criminalised would, in the Commission's view, undermine the proposed scheme's purpose. In addition, the Commission considers that expanding eligibility to victims of certain types of non-criminal conduct (such as family violence or elder abuse) could unreasonably exclude victims of other types of non-criminal behaviour (such as harassment) which does not occur within a family violence or other recognised context.
- 12.159 The Commission notes that excluding non-criminal forms of violence under the proposed Act would accord with the Australian Law Reform Commission and New South Wales Law Reform Commission's recommendation, in their joint report *Family Violence—A National Legal Response* that only criminal forms of family violence should be included in the definition of an act of violence.²⁰⁰ 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'.²⁰¹
- 12.160 However, the Commission considers that there are other ways that the proposed scheme could acknowledge victims' experience of non-criminal violence—for example, as discussed in Chapter 13, the Commission considers that where a criminal act occurred in the context of a pattern of non-criminal abuse, including in the context of family violence or child abuse, this should be relevant to the amount a victim is eligible to receive under the proposed Act.
- 12.161 Finally, the Commission notes that the term act of violence may be confusing for applicants. As a number of stakeholders noted, family violence is recognised by the community, and in legislation, as a form of violence, yet non-criminal forms of this violence are not considered acts of violence under the VOCAA. The Commission therefore considers that this term should not be used under the proposed Act, despite the fact that the crimes covered by the proposed Act may often be violent acts. In the Commission's view, the proposed Act should instead use the term 'criminal act' to describe those criminal offences that are included in the proposed Act. The Commission considers that

199 *Family Violence Act 2004* (Tas) ss 8–9.

200 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) 1395 (Recommendation 29–5). The Australian Law Reform Commission reiterated this recommendation in its submission to the Victorian Law Reform Commission in relation to the Victims of Crime in the Criminal Trial Process reference: Australian Law Reform Commission, Submission No 1 to the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 18 August 2015, 2. For the Commission's consideration of this recommendation in the first consultation paper, see Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 51–4.

201 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.

the term ‘criminal act’ is easier for applicants to understand and its use would therefore improve scheme accessibility and may reduce reliance on legal representation.

Additional criminal offences

- 12.162 As discussed above, the Commission considers that the proposed Act should continue to cover criminal offences only. The Commission considers that those criminal offences currently contained in the VOCAA should continue to be recognised under the proposed Act.²⁰² However, for the reasons discussed in this part, the Commission considers that the range of criminal offences covered by the existing scheme should be expanded under the proposed Act to include additional offences that are likely to have a significant impact on victims.
- 12.163 The Commission notes one stakeholder’s proposal that the scheme could be expanded to cover any criminal offence, so long as the victim can establish that the offence resulted in the victim suffering harm.²⁰³ The Commission acknowledges that an emphasis on injury, rather than on the type of offence, would avoid any hierarchy between crimes by not presuming that certain crimes, such as crimes against the person, necessarily have a greater impact on victims than other types of crime, such as property or fraud offences.
- 12.164 However, in practice, the Commission considers such an approach may be administratively burdensome, as applicants and the proposed scheme would have to determine whether a particular claim relates to any one of Victoria’s large number of criminal offences. In addition, the Commission considers that such an expansion may threaten the proposed scheme’s sustainability.
- 12.165 In the Commission’s view, the proposed Act should therefore retain the approach under the VOCAA and list those criminal offences that may give rise to an award of assistance.
- 12.166 The Commission’s proposed expanded offences are discussed further below.
- 12.167 The Commission considers that the proposed Act should provide that further offences may be prescribed by regulation. This would enable additional offences to be included in the proposed Act where this is considered appropriate, in line with community expectations or in response to changes to the criminal law.²⁰⁴

Sexual offences

- 12.168 In the Commission’s view, all sexual offences under the common law, *Crimes Act 1958* (Vic) and *Summary Offences Act 1966* (Vic) should be recognised under the proposed Act as criminal acts. The Commission considers that there is no rationale for distinguishing between these crimes for the purposes of the proposed scheme. This is because sexual offences that may be considered less serious for the purposes of the criminal law may nevertheless have a significant impact on a victim.
- 12.169 As outlined above, sexual offences contained in the *Summary Offences Act 1966* (Vic)—observing a person’s genital or anal region,²⁰⁵ taking images of a person’s genital or anal region²⁰⁶ and distributing intimate photographs²⁰⁷ (‘upskirting’ offences)—are currently excluded from the VOCAA, despite the fact that they can have a significant impact on victims.²⁰⁸ For example, research demonstrates that victims of image-based abuse can experience high levels of psychological distress.²⁰⁹

202 These offences are outlined above at [12.112] and include inchoate offences; under the VOCAA, an ‘act of violence’ includes conspiracy, incitement or an attempt to commit a relevant offence: s 3(1). The Commission proposes retaining these inchoate offences under the proposed Act, as they may have a significant impact on victims, particularly in the context of family violence.

203 Submission 34 (Dr Cassandra Cross).

204 The Commission notes that the *Victims of Crime (Financial Assistance) Act 2016* (ACT) contains an equivalent provision at s 7(1)(b)(ii).

205 *Summary Offences Act 1966* (Vic) s 41A.

206 Ibid s 41B.

207 Ibid s 41C.

208 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 57–9.

209 Nicola Henry, Anastasia Powell and Asher Flynn, *Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse*, Summary Report (RMIT University, 2017) 5.

- 12.170 As also outlined above, certain sexual offences against children such as engaging in sexual activity in the presence of a child,²¹⁰ encouraging or facilitating a child to be involved in sexual activity,²¹¹ and the offence of grooming,²¹² may also be excluded from recognition under the existing scheme, despite it now being well recognised that the betrayal and manipulation of trust involved in offences such as grooming can cause significant trauma for victims.²¹³
- 12.171 Many of the sexual offences excluded from the existing scheme have been introduced more recently in recognition of changes in technology which have enabled new forms of sexual abuse. As VOCAT noted in its *Annual Report 2015–16*:
- The area of sexual offending in particular has seen the creation of many new offences in recent years to grapple with advances in technology that have enabled offending to occur in ways not previously contemplated. Yet despite the harms caused to victims of such crimes, many of the new offences would not satisfy the eligibility requirements of the Act.²¹⁴
- 12.172 The Commission considers that the proposed Act should reflect these developments in the criminal law by including these crimes. This would be consistent with the approach in the Australian Capital Territory, where the *Victims of Crime (Financial Assistance) Act 2016* (ACT) includes all sexual offences contained in Part 3 of the *Crimes Act 1900* (ACT).²¹⁵ This includes offences such as ‘intimate observations or capturing visual data’²¹⁶ and using the internet to deprave young people.²¹⁷

Property offences

- 12.173 The Commission acknowledges stakeholder concerns that arson and aggravated burglary may not be covered by the existing scheme in circumstances where the victim did not suffer physical injury or did not come into contact with the perpetrator. The Commission notes that even in the absence of perpetrator contact, these offences often have a significant psychological impact on victims.²¹⁸
- 12.174 These impacts were illustrated in *Lowe v Victims of Crime Assistance Tribunal*, in which both applicants were diagnosed with chronic adjustment disorder with mixed anxiety and depressed mood as a result of an arson attack on their home.²¹⁹
- 12.175 In addition, the Commission notes that victims of property offences may have similar safety-related needs to victims of crimes against the person. For example, victims of multiple break-ins by members of a gang claimed financial assistance from VOCAT for a security door.²²⁰ However, their claim was reportedly unsuccessful because the victims had not been physically attacked.²²¹

210 *Crimes Act 1958* (Vic) ss 49F (for children under 16), 49G (for a child aged 16 or 17 who is under that person’s care, supervision or authority).

211 *Ibid* ss 49S (facilitating a sexual offence against a child), 49K (encouraging a child under 16 to engage in or be involved in sexual activity), 49L (encouraging a child aged 16 or 17 under that person’s care, supervision or authority to engage in or be involved in sexual activity).

212 *Ibid* s 49M.

213 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 467–70.

214 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 15. See also Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 16.

215 *Victims of Crime (Financial Assistance) Act 2016* (ACT) div 1.2.1 pt 1.2 sch 1. However, the Act does not include Part 3A offences which relate to ‘intimate image abuse’.

216 *Crimes Act 1900* (ACT) s 61B.

217 *Ibid* s 66.

218 For example, as part of its 2015 reference on the role of victims of crime in the criminal trial process, the Commission received a submission from Victoria Police noting that victims of property offences tend to suffer the same psychological, emotional and social impacts as victims of crimes against the person: Victoria Police, Submission No 26 to the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 12 October 2015, 31–2.

219 *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004) [6]–[7].

220 See, eg, Megan Bailey, ‘Casey Family Knocked Back for Victims Compensation Because They Weren’t Assaulted in Apex Raid’, *Herald Sun* (online) 7 September 2016 <www.heraldsun.com.au/leader/south-east/casey-family-knocked-back-for-victims-compensation-because-they-werent-assaulted-in-apex-raid/news-story/5afedefc0a5b2e5ea32df385c3c09d23>.

221 *Ibid*.

- 12.176 Stakeholders did not discuss the recently introduced home invasion offences, which involve more than one person trespassing in a home with intent to steal, commit assault or damage the home or property in it, in circumstances where the offenders are armed and/or the victim is home at the time.²²² However, the Commission considers that such offences are likely to have a similar impact on victims as aggravated burglary.
- 12.177 The Commission therefore considers that serious property offences that are likely to have a significant psychological impact on victims—namely, arson,²²³ aggravated burglary,²²⁴ home invasion²²⁵ and aggravated home invasion²²⁶—should be recognised as criminal acts under the proposed Act.
- 12.178 These crimes involve violation of the victim’s home or property in circumstances where the victim either, in the case of arson, suffers damage to their home or property, or, in the case of aggravated burglary and aggravated home invasion, is present when the offence occurs. While it is not necessarily the case that a victim will be present at the time of offending for the purposes of the home invasion offence (as opposed to the aggravated home invasion offence), the Commission considers that invasion of the home by multiple armed offenders, even without the victim being home at the time, is also of sufficient seriousness to warrant inclusion.
- 12.179 The Commission considers that in light of the seriousness of such offences, it should be irrelevant for the purposes of the proposed Act whether the victim came into contact with, or was physically attacked by, the offender.
- 12.180 The Commission previously considered the issue of whether to include property offences in the existing scheme as part of its reference on the role of victims of crime in the criminal trial process.²²⁷ It recommended that property offences should not be included in the scheme due to concerns about scheme sustainability.²²⁸
- 12.181 During that reference, the Commission received a submission that the eligibility criteria in the VOCAA should be expanded to include property offences such as property damage, burglary and online fraud.²²⁹ However, the Commission decided there was no compelling reason for such an expansion.²³⁰ The Commission noted the Magistrates’ Court of Victoria’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’.²³¹ The Commission also 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.²³²
- 12.182 However, the Commission notes that the terms of reference for that reference were much broader in scope than the present terms of reference—which focus specifically on the operation of VOCAT and how Victoria’s victims of crime assistance scheme can better assist victims of crime.

222 *Crimes Act 1958 (Vic) ss 77A, 77B.*

223 *Ibid* s 197(6).

224 *Ibid* s 77.

225 *Ibid* s 77A.

226 *Ibid* s 77B.

227 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 245–6.

228 *Ibid* 246.

229 Dianne Hadden, Submission No 21 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 2015, 11.

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

231 *Ibid* 245.

232 *Ibid*.

- 12.183 In this context, and in light of significant stakeholder submissions on this point,²³³ the Commission now considers that the proposed Act should include certain serious property crimes in recognition of the serious impact such offences have on some victims.
- 12.184 However, the Commission acknowledges that concerns regarding scheme sustainability are still relevant. As such, the Commission considers that only those property offences identified above should be included in the proposed Act, and that property crimes more generally should not be recognised—except in the context of family violence. As discussed below, the Commission considers that victims of certain other property offences— such as damaging property or threats to do so—should be eligible for assistance if the offence was committed in the context of family violence.

Offences that occur in the context of family violence

- 12.185 As discussed above, the Commission considers that the proposed Act should continue to recognise criminal acts only. It follows that victims of non-criminal family violence would not be eligible for assistance under the proposed Act.
- 12.186 However, to better recognise the impacts of family violence and the variety of ways in which it occurs, and to address the barriers faced by such victims in accessing assistance under the existing scheme, the Commission considers that the proposed Act should include a broader range of criminal offences, where those offences occur in the context of family violence, as defined in the FVPA.²³⁴ This proposed approach is modelled on the approach in the Australian Capital Territory. In addition to offences against the person, the *Victims of Crime (Financial Assistance) Act 2016* (ACT) provides for a separate category of family violence offences which can give rise to eligibility for financial assistance.²³⁵ These offences include property offences, such as destroying or damaging property and burglary, driving offences, possession of offensive weapons and contravention of a family violence order.²³⁶ The Explanatory Statement accompanying the ACT Act states that the inclusion of these additional offences is intended to recognise ‘the harmful effects of these domestic violence offences’.²³⁷
- 12.187 Similarly, the Commission considers that the following offences should be included in the proposed Act, where they occur in the context of family violence:
- contravention of a family violence intervention order²³⁸
 - contravention of a family violence intervention order intending to cause harm or fear for safety²³⁹
 - persistent contravention of family violence intervention notices and orders²⁴⁰
 - destroying or damaging property²⁴¹
 - threats to destroy or damage property²⁴²
 - possessing anything with intent to destroy or damage property²⁴³
 - burglary²⁴⁴
 - theft²⁴⁵

233 Submissions 13 (Adviceline Injury Lawyers), 16 (Project Respect), 38 (Ryan Carlisle Thomas Lawyers); Consultation 7 (Family Violence and Advocacy Organisations). In a number of consultation meetings, stakeholders noted the difficulties associated with victims of property offences being unable to make an application, but did not explicitly propose broadening the definition to include such victims: Consultations 4 (Victim, Witness and Court Support), 12 (Regional Consultation—Mildura Victim Support Agencies), 15 (Regional Consultation—Ballarat Victim Support Agencies), 17 (Family Violence Diverse Communities and Intersectionality Working Group), 23 (Community Safety Trustee, Victoria).

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

235 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 9(1)(c), div 1.2.2 pt 1.2 sch 1.

236 *Ibid* div 1.2.2 pt 1.2 sch 1.

237 Explanatory Statement, *Victims of Crime (Financial Assistance) Bill 2016* (ACT), 11.

238 *Family Violence Protection Act 2008* (Vic) s 123.

239 *Ibid* s 123A.

240 *Ibid* s 125A.

241 *Crimes Act 1958* (Vic) s 197.

242 *Ibid* s 198.

243 *Ibid* s 199.

244 *Ibid* s 76.

245 *Ibid* s 74.

- obtaining property by deception²⁴⁶
- obtaining financial advantage by deception²⁴⁷
- blackmail²⁴⁸
- taking or using vehicle without consent of the owner²⁴⁹
- obscene, indecent, threatening language and behaviour in public²⁵⁰

12.188 The Commission considers that including these offences in the proposed Act could also address some of the gaps identified in relation to elder abuse and abuse of people with disabilities. For example, financial abuse experienced by older people and people with disability may be covered where such abuse is perpetrated by a family member and constitutes a relevant offence, such as theft or blackmail.

Additional offences

- 12.189 The Commission acknowledges the concerns raised by Project Respect regarding the exclusion from the existing scheme of certain offences contained in the *Sex Work Act 1994* (Vic). The Commission notes that there may also be other criminal offences relating to specific industries or sectors that are not contained in the *Crimes Act 1958* (Vic) or the *Summary Offences Act 1966* (Vic), which may also have a significant physical and/or psychological impact on victims and which are not covered by the VOCAA. For example, offences relating to public health and occupational health and safety.
- 12.190 The Commission therefore considers that the government should conduct a broader review of criminal offences under Victorian law to determine whether the offences contained in the *Sex Work Act 1994* (Vic) and/or any other offences related to specific sectors or industries should be included in the proposed Act. As noted above, the Commission considers that the proposed Act should also provide that additional offences may be prescribed by regulation.

Recommendations—defining a criminal act

- 27** The proposed Act should define a criminal act as an act or omission that has occurred in the state of Victoria and which would constitute:
- an offence, punishable on conviction by imprisonment, that involved an assault on, or injury or a threat of injury to, a person
 - any sexual offence, including those contained in the *Summary Offences Act 1966* (Vic)
 - an offence of stalking, child stealing or kidnapping under the *Crimes Act 1958* (Vic)
 - an offence of arson, aggravated burglary, home invasion, or aggravated home invasion under the *Crimes Act 1958* (Vic), regardless of whether the victim had contact with the offender at the time of the offence

246 Ibid s 81.
247 Ibid s 82.
248 Ibid s 87.
249 *Summary Offences Act 1966* (Vic) s 38.
250 Ibid s 17.

- (e) any one of the following offences:
- (i) contravention of a family violence intervention order under the *Family Violence Protection Act 2008* (Vic)
 - (ii) contravention of a family violence intervention order intending to cause harm or fear for safety under the *Family Violence Protection Act 2008* (Vic)
 - (iii) persistent contravention of family violence intervention notices and orders under the *Family Violence Protection Act 2008* (Vic)
 - (iv) destroying or damaging property under the *Crimes Act 1958* (Vic)
 - (v) threats to destroy or damage property under the *Crimes Act 1958* (Vic)
 - (vi) possessing anything with intent to destroy or damage property under the *Crimes Act 1958* (Vic)
 - (vii) burglary under the *Crimes Act 1958* (Vic)
 - (viii) theft under the *Crimes Act 1958* (Vic)
 - (ix) obtaining property by deception under the *Crimes Act 1958* (Vic)
 - (x) obtaining financial advantage by deception under the *Crimes Act 1958* (Vic)
 - (xi) blackmail under the *Crimes Act 1958* (Vic)
 - (xii) taking or using a vehicle without consent of the owner under the *Summary Offences Act 1966* (Vic)
 - (xiii) obscene, indecent, threatening language and behaviour in public under the *Summary Offences Act 1966* (Vic)
 - (xiv) intentionally or recklessly causing a bushfire under the *Crimes Act 1958* (Vic)

where that offence occurred in the context of 'family violence' as defined by the *Family Violence Protection Act 2008* (Vic)

- (f) an offence of conspiracy to commit, incitement to commit or attempting to commit any of the above offences
 - (g) any one of the above offences, 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 or any other lawful defence.
- 28** The proposed Act should provide that additional offences may be prescribed by regulation.
- 29** Government should conduct a review to determine whether the offences contained in the *Sex Work Act 1994* (Vic) and any other offences that may have a significant physical and/or psychological impact on the victim should be recognised by the proposed Act.

Defining injury

Current law

- 12.191 The VOCAA provides that for a victim to be eligible for assistance, the act of violence must have directly resulted in their injury or death,²⁵¹ and/or, for primary victims, a significant adverse effect.²⁵²
- 12.192 The VOCAA defines injury as:
- actual physical bodily harm
 - mental illness or disorder or exacerbation of a mental illness or disorder, whether or not flowing from nervous shock
 - pregnancy
 - any combination of these matters arising from an act of violence.²⁵³
- 12.193 The term 'mental illness or disorder' is not defined in the VOCAA and there is a lack of clarity regarding what an applicant must prove to demonstrate this. It appears that VCAT generally understands mental illness or disorder to mean any mental injury that constitutes a recognised psychiatric or psychological disorder.²⁵⁴
- 12.194 However, in some cases, the presence of psychiatric symptoms without a diagnosis of a disorder has been accepted as a mental injury or disorder. For example, in *AVA v Victims of Crime Assistance Tribunal*,²⁵⁵ a child applicant sought financial assistance after her mother's partner took indecent photos of her while she was asleep. VCAT found that the applicant's 'shyness and anxiety problems' did not constitute a mental illness or disorder.²⁵⁶ However, on appeal, VCAT found that the presence of anxiety symptoms without an anxiety disorder still amounted to injury for the purposes of the VOCAA.²⁵⁷
- 12.195 The VOCAA also deems a person to be suffering an injury if VCAT is satisfied on medical or psychological evidence that treatment or counselling is required as a result of trauma associated with an act of violence.²⁵⁸ 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"'.²⁵⁹
- 12.196 The VOCAA provides that injury does not include injury arising from property loss or damage.²⁶⁰

Significant adverse effect

- 12.197 Financial assistance in the form of 'special financial assistance' may also be available under the VOCAA if a victim has suffered a significant adverse effect.²⁶¹ This can occur in two circumstances:
- where a primary victim suffers a significant adverse effect as a direct result of an act of violence.²⁶²

251 *Victims of Crime Assistance Act 1996* (Vic) ss 7, 9 and 11.

252 *Ibid* s 8A.

253 *Ibid* s 3(1).

254 For example, in *RBA v Victims of Crime Assistance Tribunal*, VCAT accepted that the applicant was a 'traumatised person' but found that there was no evidence that she suffered a mental illness or disorder: [2009] VCAT 2225 (26 October 2009) [20].

[2010] VCAT 2078 (23 December 2010).

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

256 *Ibid* [74]–[75].

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

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

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

260 *Ibid* s 8A.

261 *Ibid*.

262 *Ibid*.

- where a primary victim suffers a significant adverse effect as a result of an act of violence, a secondary victim may also be eligible for assistance.²⁶³ However, the secondary victim will also need to establish that they personally suffered an injury as a result of witnessing or learning about the act of violence.²⁶⁴

12.198 Significant adverse effect is defined to include ‘any grief, distress, trauma or injury experienced or suffered by the victim as a direct result of the act of violence’.²⁶⁵ However, as with the definition of injury, it does not include property loss or damage.²⁶⁶

Responses

12.199 In its first consultation paper, the Commission asked whether the definition of injury should be expanded to include non-physical and/or psychological injuries often experienced by victims of family violence and if so, which injuries.²⁶⁷ The Commission also asked whether the definition of injury should be amended to better reflect the cumulative impact of family violence over time, and if so, how this should be done.²⁶⁸

12.200 In its supplementary consultation paper, the Commission asked how the definition of injury impacts on people applying for assistance more generally, whether the definition should be amended to include other forms of harm, and if so what forms.²⁶⁹

12.201 Stakeholders did not raise any issues with the definition of injury in so far as it relates to physical injury, with the exception of Ryan Carlisle Thomas Lawyers, which noted that the VOCAA does not include ‘exacerbation of physical injury’ in its definition of injury.²⁷⁰

12.202 In relation to mental injury, there was significant stakeholder support for broadening the definition of injury to include a wider range of mental harms.²⁷¹ However, as outlined below, stakeholders proposed a diverse range of options for doing so.

Mental injury

12.203 One of the most common proposals by stakeholders was to amend the definition of mental injury to make it less restrictive.²⁷²

263 See interpretation of significant adverse effect and injury: *ibid* s 3(3).

264 *Ibid* s 9.

265 *Ibid* s 3(1).

266 *Ibid*.

267 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) Ch 6, 56.

268 *Ibid*.

269 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 65. Submission 38 (Ryan Carlisle Thomas Lawyers).

270 Submissions 5 (Anglicare Victoria Victims Assistance Program), 8 (Victim Survivors’ Advisory Council), 9 (Alannah & Madeline Foundation), 10 (Eastern Metropolitan Regional Family Violence Partnership), 11 (Seniors Rights Victoria), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 17 (Centre for Excellence in Child and Family Welfare), 18 (cohealth), 19 (Schembri & Co Lawyers), 23 (Johnstone & Reimer Lawyers), 25 (Public Health Association of Victoria), 26 (Hume Riverina Community Legal Service), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 32 (Australian Psychological Society), 35 (Brockway Legal), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria), 51 (Slavery Links); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 5 (Victims of Crime Commissioner, Victoria), 6 (Victims’ Advocacy Organisations), 9 (Domestic Violence Victoria Members), 14 (Chief Magistrates’ Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies), 18 (PartnerSPEAK), 23 (Community Safety Trustee, Victoria). Concern was also expressed about the injury requirement (without explicitly proposing an amendment) in consultation meetings: see consultations 7 (Family Violence and Advocacy Organisations), 8 (Victims Representatives—Victims of Crime Consultative Committee), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 15 (Regional Consultation—Ballarat Victim Support Agencies).

272 Submissions 5 (Anglicare Victoria Victims Assistance Program), 11 (Seniors Rights Victoria), 14 (Inner Melbourne Community Legal), 16 (Project Respect), 17 (Centre for Excellence in Child and Family Welfare), 18 (cohealth), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 32 (Australian Psychological Society), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 9 (Domestic Violence Victoria Members), 12 (Regional Consultation—Mildura Victim Support Agencies).

- 12.204 One of the main reasons advanced for this was to recognise psychological harm that falls short of a recognised ‘mental illness or disorder’ but which nevertheless has a severe impact on victims.²⁷³ Stakeholders also told the Commission that the definition of injury should better reflect the diverse ways that trauma can manifest.²⁷⁴ In particular, stakeholders noted that victims of family violence, child abuse and sexual assault often suffer from emotional and psychological harms that do not constitute a mental illness or disorder.²⁷⁵
- 12.205 For example, PartnerSPEAK told the Commission that the VOCAA should recognise ‘the symptoms of trauma, including memory loss, affected sleeping patterns, suicidal thoughts, inability to work, attention lapses and physical responses to stress, such as loss of vision’.²⁷⁶
- 12.206 Some stakeholders suggested adopting the broader definition of mental injury used in New South Wales, which is ‘psychological or psychiatric harm’.²⁷⁷ Other options put forward by stakeholders for a new definition of mental injury included ‘mental and nervous shock’ or ‘impairment of mental health’.²⁷⁸ Anglicare Victoria Victims Assistance Program submitted that the definition should reflect ‘symptoms of trauma’.²⁷⁹
- 12.207 Stakeholders also expressed concern that establishing mental illness or disorder requires victims to undergo non-therapeutic psychiatric assessments, which can be re-traumatising and can adversely affect recovery.²⁸⁰ Some stakeholders also noted that receiving such a diagnosis can be harmful for some victims, as it can become a ‘permanent label’ for them.²⁸¹
- 12.208 The Commission was told that some victims may find it difficult to establish that they have suffered a mental illness or disorder because they may not want to see a psychologist or psychiatrist to obtain a report. For example, the Aboriginal Family Violence Prevention & Legal Service Victoria submitted that ‘some Aboriginal people may experience western psychiatry as unhelpful and inconsistent with Aboriginal understandings of social and emotional health and wellbeing’.²⁸²
- 12.209 The Aboriginal Family Violence Prevention & Legal Service Victoria also noted that it can be difficult for Aboriginal people in rural and regional areas to obtain a report from culturally competent psychologists and psychiatrists.²⁸³
- 12.210 In addition, the Victim Survivors’ Advisory Council noted that family violence victims may wish to avoid a psychiatric assessment ‘for fear of being diagnosed with a mental illness and/or disorder which may affect family law outcomes and child protection involvement in the cases where children are involved.’²⁸⁴

273 See, eg, Submissions 14 (Inner Melbourne Community Legal), 17 (Centre for Excellence in Child and Family Welfare), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 3 (Legal Professionals—Community Legal Centres), 8 (Victims’ Representatives—Victims of Crime Consultative Committee), 12 (Regional Consultation—Mildura Victim Support Agencies), 18 (PartnerSPEAK). See also Consultation 5 (Victims of Crime Commissioner, Victoria).

274 Submissions 17 (Centre for Excellence in Child and Family Welfare), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations (Legal Professionals—Community Legal Centres), 8 (Victims’ Representatives—Victims of Crime Consultative Committee), 18 (PartnerSPEAK).

275 See, eg, Submissions 17 (Centre for Excellence in Child and Family Welfare), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 32 (Australian Psychological Society), 51 (Law Institute of Victoria).

276 Consultation 18 (PartnerSPEAK).

277 Submissions 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 49 (Victims of Crime Commissioner, Victoria); Consultation 6 (Victims of Crime Commissioner, Victoria).

278 Submission 41 (Springvale Monash Legal Service).

279 Submission 5 (Anglicare Victoria Victims Assistance Program). See also consultation 18 (PartnerSPEAK).

280 Submissions 5 (Anglicare Victoria Victims Assistance Program), 8 (Victim Survivors’ Advisory Council), 16 (Project Respect), 18 (cohealth), 32 (Australian Psychological Society), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service); Consultations (Legal Professionals—Private Practice), 8 (Victims Representatives—Victims of Crime Consultative Committee), 12 (Regional Consultation—Mildura Victim Support Agencies).

281 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies). See also submission 15 (Merri Health Victims Assistance Program); Consultations 4 (Victim, Witness and Court Support), 12 (Regional Consultation—Mildura Victim Support Agencies).

282 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

283 Ibid.

284 Submission 8 (Victim Survivors’ Advisory Council).

- 12.211 The Commission was also told that simplifying and broadening the definition of injury would make documentary evidence requirements easier to satisfy, which in turn would reduce the need for lawyers and judicial decision makers.²⁸⁵

Social, emotional and behavioural harms

- 12.212 A number of submissions proposed expanding the definition of injury in the VOCAA to include a broader range of social, emotional and behavioural harms that victims of crime may suffer.²⁸⁶ Again, stakeholders were concerned that the current definition of injury under the VOCAA does not recognise the range of harms that victims of crime can suffer, especially victims of family violence and sexual assault.²⁸⁷
- 12.213 Proposals ranged from broad recommendations for the VOCAA to recognise ‘behavioural, interpersonal, social and spiritual needs’,²⁸⁸ to the recognition of social isolation, declining health and the denial of ‘access to health and aged care service[s]’,²⁸⁹ to specific recommendations to adopt the approach used in the Queensland and ACT schemes.²⁹⁰ Under both these schemes, an expanded list of injuries for victims of sexual assault and family violence is recognised, 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.²⁹¹
- 12.214 Some submissions stated that an expanded range of social, emotional and behavioural injuries should only apply for particular cohorts of victim—namely, for family violence and sexual assault victims.²⁹² Some submissions also discussed the need to include social, emotional and behavioural harms in relation to children²⁹³ and in the context of elder abuse.²⁹⁴ Other submissions considered that there should be a more general expansion of the definition of injury applicable to all victims.²⁹⁵

Property damage

- 12.215 A number of submissions proposed extending the current definition of injury to include property loss, damage or destruction²⁹⁶ and economic harm.²⁹⁷
- 12.216 One reason advanced for this is that such an expansion would better capture the harms commonly experienced by victims of family violence because the only tangible harm some victims of family violence may be able to demonstrate is property damage.²⁹⁸ In addition, the economic harm that can flow from property damage or destruction can affect the independence and security of victims of family violence, as well as contribute to their long-term financial disadvantage.²⁹⁹

285 Consultation 14 (Chief Magistrate’s Family Violence Taskforce).

286 Submissions 8 (Victim Survivors’ Advisory Council), 9 (Alannah & Madeline Foundation), 10 (Eastern Metropolitan Regional Family Violence Partnership), 11 (Seniors Rights Victoria), 16 (Project Respect), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 43 (knowmore).

287 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 11 (Seniors Rights Victoria), 41 (Springvale Monash Legal Service), 43 (knowmore), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

288 Submissions 9 (Alannah & Madeline Foundation). See also submission 10 (Eastern Metropolitan Regional Family Violence Partnership).

289 Submission 11 (Seniors Rights Victoria).

290 Submissions 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 43 (knowmore). Submission 16 (Project Respect) also proposed a similar list of injuries.

291 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 9(1)(c); *Victims of Crime Assistance Act 2009* (Qld) s 27(f).

292 Submissions 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service). In addition, submission 10 (Eastern Metropolitan Regional Family Violence Partnership) stated that there should be explicit mention in the VOCAA of the harms experienced by family violence victims.

293 Submission 9 (Alannah & Madeline Foundation). Submission 43 (knowmore) discusses sexual offences in the context of child sexual abuse.

294 Submission 11 (Seniors Rights Victoria).

295 Submissions 8 (Victim Survivors’ Advisory Council), 9 (Alannah & Madeline Foundation), 43 (knowmore); Consultations 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 16 (Regional Consultation—Ballarat Victim Support Agencies).

296 Submissions 8 (Victim Survivors’ Advisory Council), 41 (Springvale Monash Legal Service); Consultation 4 (Victim, Witness and Court Support).

297 Submission 35 (Brockway Legal).

298 See, eg, submission 41 (Springvale Monash Legal Service). For an illustration of a situation of family violence in which the only injury to which the victim could point was property damage, see *Purcell v Victims of Crime Assistance Tribunal* [2011] VCAT 1463 (3 June 2011). In that case, VCAT rejected the applicant’s claim on the basis that she had only provided evidence of property damage.

299 For a discussion of the economic consequences of family violence, see generally 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).

- 12.217 However, far fewer submissions supported expanding the definition of injury to include property damage than those which supported amending the definition of an act of violence to include certain property offences.³⁰⁰ In other words, while a substantial number of stakeholders favoured extending eligibility to some victims of property damage, most stakeholders considered that there should still be a requirement for physical or psychological injury.
- 12.218 This viewpoint was articulated in the Victorian Victims of Crime Commissioner's submission, which stated that while the definition of injury should cover psychological or psychiatric harm arising from property damage, it should not extend to property damage itself.³⁰¹

Cumulative harm

- 12.219 Stakeholders told the Commission that the VOCAA's definition of injury does not adequately recognise cumulative harm.³⁰²
- 12.220 In particular, a number of stakeholders told the Commission that the lack of recognition of cumulative harm can make it difficult for some applicants—in particular, victims of family violence—to satisfy the causation requirement.³⁰³ This is because although ongoing abusive behaviour can cause significant cumulative harm, each incident of family violence may not result in a specific, identifiable injury.³⁰⁴ In addition, it was noted that a victim's injury may be the result of a combination of criminal and non-criminal behaviour.³⁰⁵
- 12.221 Accordingly, a number of stakeholders expressed support for the explicit recognition of cumulative harm in the context of family violence in the VOCAA's definition of injury.³⁰⁶

Discussion and recommendations

- 12.222 The Commission acknowledges stakeholder concern that the VOCAA's definition of injury is too narrow and excludes victims who have suffered mental injury but cannot establish that they have a mental illness or disorder. This can disadvantage certain victims, including victims of family violence and sexual abuse, who may suffer a range of other emotional, psychological and behavioural harms as a result of the crime. It can also disadvantage victims who cannot or who do not want to be assessed by a psychologist or psychiatrist or who do not want to receive a diagnosis of a mental illness or disorder.
- 12.223 The Commission therefore considers that the definition of injury in the proposed Act should be expanded so that a victim is not required to demonstrate that they have a mental illness or disorder to be eligible for assistance.
- 12.224 Similarly to the approach adopted in New South Wales, the Commission considers that 'psychological or psychiatric harm' should be sufficient to establish mental injury for the purposes of the proposed Act. The Commission notes that there was broad stakeholder support for this approach and that it accords with the widely recognised psychological impacts of sexual assault and family violence, which may be significant for victims despite not constituting a diagnosed psychological or psychiatric illness or disorder.

300 For example, 24 submissions proposed broadening the definition of 'act of violence' to include non-criminal forms of family, three submissions proposed including property offences in the context of family violence, and three submissions proposed including property offences beyond the family violence context. In contrast, there was support in three submissions and one consultation meeting—submissions 8 (Victim Survivors' Advisory Council), 35 (Brockway Legal) and 41 (Springvale Monash Legal Service); Consultation 4 (Victim, Witness and Court Support)—for recognising property damage as an injury.

301 Submission 49 (Victims of Crime Commissioner, Victoria).

302 See, eg, submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 9 (Domestic Violence Victoria Members).

303 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 23 (Johnstone & Reimer), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers); Consultations 3 (Legal Professionals—Community Legal Centres), 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

304 Consultation 3 (Legal Professionals—Community Legal Centres).

305 Submission 38 (Ryan Carlisle Thomas Lawyers).

306 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 11 (Seniors Rights Victoria), 14 (Inner Melbourne Community Legal), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre); Consultation 9 (Domestic Violence Victoria Members).

- 12.225 The Commission considers that physical harm should continue to constitute injury under the proposed Act. In addition, exacerbation of any pre-existing physical injury should constitute injury for the purposes of the proposed Act. Currently, the definition of injury only recognises the exacerbation of pre-existing mental harm. In the Commission's view, there is no rationale for recognising the exacerbation of pre-existing mental injury but not of physical injury.
- 12.226 The Commission also considers that pregnancy should be removed from the current definition of injury. As discussed in the following section, the Commission considers that victims of sexual offences should not be required to prove injury. As such, it follows that it is unnecessary for pregnancy to be included in the proposed definition of injury, as this will not be relevant for victims of other criminal acts.
- 12.227 The Commission further considers that removing the requirement for victims of sexual assault and family violence to prove injury, as discussed below, would make it unnecessary for the proposed Act to include broader social, emotional and behavioural harms in the definition of injury. The Commission also considers that removing the requirement to prove injury for these victims would address stakeholder concerns regarding the current lack of recognition of cumulative harm in the VOCAA's definition of injury.
- 12.228 In the interests of scheme sustainability, the Commission considers that property damage should not be included in the definition of injury. The Commission agrees with the Victims of Crime Commissioner that while the definition of injury under the proposed Act should cover psychological or psychiatric harm arising from property damage that occurs as a result of a criminal act, it should not extend to property damage in and of itself.³⁰⁷
- 12.229 The Commission acknowledges that the exclusion of property loss or damage as a form of injury has been a particular issue for victims of family violence.³⁰⁸ However, the Commission considers that this issue would be addressed by the Commission's recommendation above that the proposed Act be expanded to cover certain property offences that occur in the context of family violence.

Recommendation—defining injury

- 30** The proposed Act should define injury as:
- (a) physical harm
 - (b) psychological or psychiatric harm
 - (c) exacerbation of any pre-existing physical, psychological or psychiatric harm, or
 - (d) any combination of (a), (b) or (c).

Proof of injury

Current law

- 12.230 To be eligible for assistance under the VOCAA, primary and secondary victims must prove that they suffered an injury or a significant adverse effect as a direct result of the criminal act.³⁰⁹

³⁰⁷ Submission 49 (Victims of Crime Commissioner, Victoria).
³⁰⁸ Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 49.
³⁰⁹ *Victims of Crime Assistance Act 1996* (Vic) ss 7, 9. Related victims need to establish that the act of violence directly caused the death of their close relation as the primary victim: s 11.

12.231 The standard of proof required to establish that an injury occurred is discussed in Chapter 14.

Responses

12.232 In its supplementary consultation paper, the Commission asked whether the requirement to prove injury should be removed for victims of certain crimes and if so, which categories of victim.³¹⁰

12.233 In a number of submissions and consultations, stakeholders proposed removing the requirement to prove injury or creating a presumption of injury for particular cohorts of victims.³¹¹ This is because the harms caused by certain forms of violence are well known and it can be traumatising for these victims to be required to prove injury.³¹² Some stakeholders also considered that removing the requirement to prove injury for certain offences would help address issues of timeliness.³¹³

12.234 However, stakeholders' views varied as to which categories of victim should be exempt from the proof of injury requirement or subject to a presumption of injury. The most common proposals were to remove the requirement to prove injury for victims of child sexual abuse,³¹⁴ sexual assault generally³¹⁵ and/or family violence.³¹⁶ A number of stakeholders submitted that removing the requirement to prove injury for these victims would also avoid some of the difficulties that these victims often experience with the causation requirement.³¹⁷ The causation requirement is discussed in more detail below.

12.235 Stakeholders also proposed that the requirement to prove injury be removed for:

- 'category A offences' under the VOCAA (attempted murder and rape)³¹⁸
- physical assault³¹⁹
- victims of proven offences³²⁰
- all victims of an act of violence.³²¹

12.236 In addition, although the VOCAA does not expressly require related victims to prove the injury they suffered as a result of the primary victim's death, it would appear from stakeholder submissions that, in practice, such victims may be required to prove injury and, according to some stakeholders, this requirement should be removed.³²² For example, Anglicare Victoria Victims Assistance Program submitted that it 'is traumatising for [related] victims to attend a psychologist for diagnosis of injury'.³²³

310 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 65.
311 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 19 (Schembri & Co Lawyers), 26 (Hume Riverina Community Legal Service), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service); Consultations 2 (Legal Professionals—Private Practice), 6 (Victims' Advocacy Organisations), 8 (Victims' Representatives—Victims of Crime Consultative Committee), 16 (Regional Consultation—Ballarat Legal Professionals). Submission 23 (Johnstone & Reimer Lawyers) proposed lowering the threshold for injury.
312 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 19 (Schembri & Co Lawyers), 38 (Ryan Carlisle Thomas Lawyers).
313 Consultation 2 (Legal Professionals—Private Practice).
314 Submissions 18 (PartnerSPEAK), 38 (Ryan Carlisle Thomas Lawyers); Consultation 2 (Legal Professionals—Private Practice).
315 Submissions 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 26 (Hume Riverina Community Legal Service), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers); Consultation 6 (Victims' Advocacy Organisations).
316 Submissions 19 (Schembri & Co Lawyers), 26 (Hume Riverina Community Legal Service), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service).
317 See, eg, submission 37 (safe steps Family Violence Response Centre).
318 Submission 13 (Adviceline Injury Lawyers).
319 Submission 14 (Inner Melbourne Community Legal).
320 Consultation 17 (Ballarat Legal).
321 Submissions 15 (Merri Health Victims Assistance Program), 18 (cohealth), 26 (Hume Riverina Community Legal Service).
322 Submissions 5 (Anglicare Victoria Victims Assistance Program), 38 (Ryan Carlisle Thomas Lawyers); Consultation 8 (Victims Representatives—Victims of Crime Consultative Committee). In consultation 16 (Regional Consultation—Ballarat Legal Professionals), stakeholders queried whether it should be necessary for related victims to prove distress.
323 Submission 5 (Anglicare Victoria Victims Assistance Program).

- 12.237 Most stakeholders who submitted that certain victims should not be required to prove injury considered that this requirement should be removed entirely for these victims.³²⁴ However, other stakeholders considered that there should be a presumption of injury instead.³²⁵ A minority of stakeholders were of the view that the threshold of injury should instead be lowered for certain victims to a significant adverse effect³²⁶ or an adverse effect.³²⁷
- 12.238 In the absence of a requirement to prove injury, some stakeholders proposed that the seriousness of the offence could be considered when determining award amounts. For example, some submissions considered that if the proof of injury requirement were removed for sexual offences or family violence, awards could be determined based on the type of sexual offence³²⁸ or the severity of the family violence.³²⁹
- 12.239 Alternatively, Schembri & Co Lawyers submitted that there could be a baseline award for certain victims, such as family violence victims, which these victims could access without proving injury. However, awards could be increased if evidence of physical or psychological injury is provided.³³⁰

Discussion and recommendations

- 12.240 The Commission acknowledges stakeholder views regarding the significant psychological harm suffered by victims of sexual assault and family violence,³³¹ and the significant barriers that may prevent these victims from accessing support and collecting documentary evidence to prove they have suffered an injury.³³² These barriers include feelings of shame, fear of perpetrator retaliation and historically poor recognition of such violence as criminal. As the Australian and New South Wales Law Reform Commissions noted in their *Final Report Family Violence—A National Legal Response*, only a small percentage of sexual assaults are reported to police.³³³ The Commissions also noted that victims of sexual or physical violence perpetrated by their partners are less likely to report to police than victims who did not know the perpetrator.³³⁴
- 12.241 The Commission also acknowledges the particular vulnerability of children and stakeholder concerns regarding the impact on them of witnessing crimes of family violence and sexual abuse.³³⁵

324 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 19 (Schembri & Co Lawyers), 26 (Hume Riverina Community Legal Service), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service); Consultations 2 (Legal Professionals—Private Practice), 6 (Victims' Advocacy Organisations), 8 (Victims Representatives—Victims of Crime Consultative Committee), 16 (Regional Consultation—Ballarat Legal Professionals).

325 Submissions 18 (cohealth), 19 (Schembri & Co Lawyers), 38 (Ryan Carlisle Thomas Lawyers).

326 Submission 41 (Springvale Monash Legal Service). Consultation 3 (Legal Professionals—Community Legal Centres).

327 Submission 23 (Johnstone & Reimer Lawyers).

328 Submission 19 (Schembri & Co Lawyers).

329 Submission 41 (Springvale Monash Legal Service).

330 Submission 19 (Schembri & Co Lawyers).

331 See, eg, submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program), 19 (Schembri & Co Lawyers), 38 (Ryan Carlisle Thomas Lawyers).

332 See, eg, submissions 5 (Anglicare Victims Assistance Program), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health V Victims Assistance Program), 19 (Schembri & Co Lawyers), 26 (Hume Riverina Community Legal Service), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service); Consultations 2 (Legal Professionals—Private Practice), 6 (Victims' Advocacy Organisations), 8 (Victims' Representatives—Victims of Crime Consultative Committee), 16 (Regional Consultation—Ballarat Legal Professionals).

333 Australian Law Reform Commission and New South Wales Law Reform Commission, *Final Report Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report 128 (2010) Ch 24.

334 Ibid 1100, citing J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) 92, 102.

335 Submissions 8 (Victim Survivors' Advisory Council), 9 (Alannah & Madeline Foundation), 14 (Inner Melbourne Community Legal), 17 (Centre for Excellence in Child and Family Welfare), 18 (cohealth), 22 (YourLawyer), 25 (Public Health Association of Australia), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 33 (Eastern Community Legal Centre), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria); Consultations 4 (Victim, Witness and Court Support), 6 (Victims' Advocacy Organisations), 10 (Regional Consultation—Morwell Victim Support Agencies), 14 (Chief Magistrate'' Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies).

- 12.242 Accordingly, the Commission considers that the following victims should not be required to prove injury for the purposes of the proposed Act:
- victims of a criminal act that would constitute a sexual offence
 - victims of a criminal act that occurred in the context of family violence, as defined by the FVPA
 - victims who witnessed, heard or were otherwise exposed to any of the above criminal acts and were under 18 at the time of the exposure.
- 12.243 In the Commission's view, such victims should be deemed to have suffered injury. However, the Commission considers that the severity of these victims' injuries should be a relevant factor in determining the quantum of the recovery payment awarded. This is discussed in Chapter 13.
- 12.244 As Forster notes in relation to family violence, deeming injury has 'the potential to provide victims of family violence with an easier and less traumatic means of accessing compensation'.³³⁶
- 12.245 The Commission considers that children's particular vulnerability also weighs in favour of removing the requirement to prove injury where they have witnessed or otherwise been exposed to crimes of family violence and sexual abuse. This would help ensure that children who are exposed to family violence are recognised as victims in their own right, as recommended by the Royal Commission into Family Violence.³³⁷
- 12.246 The Commission notes that with respect to sexual offences, its proposed approach is similar to the approach in the Northern Territory. The *Victims of Crime Assistance Regulations 2007* (NT) prescribe 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.³³⁸
- 12.247 Although there may be other types of crime against the person where the victim's injury could be deemed by virtue of the seriousness of the crime, the Commission considers that victims of all other crimes should continue to be required to prove injury. This is because the psychological harm caused by sexual and family violence offences is well established, as are the barriers faced by many victims of these offences in disclosing or reporting these crimes, and therefore in proving injury. In contrast, the basis upon which injury might be deemed for victims of other crimes is less clear.
- 12.248 The Commission also acknowledges stakeholder views that close relations of deceased victims of a criminal act should not be required to prove injury. The Commission notes that the VOCAA does not expressly require proof of injury from such victims. Similarly, under the NSW scheme, immediate family members of a person who died as a result of a criminal act are not required to prove injury.³³⁹ However, in light of the Commission's proposal to significantly expand the types of relationship that may give rise to eligibility under the scheme, the Commission considers that in the interests of scheme sustainability, victims should be required to prove they have suffered an injury where their claim is based on their relationship to a person who died or was injured as a result of a criminal act.
- 12.249 In the Commission's view, removing the requirement to prove injury for some victims would also address some of the difficulties these victims currently experience with satisfying the causation requirement—namely, the requirement that the act of violence directly resulted in the injury. The challenges associated with the existing causation requirement are discussed below.

336 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.

337 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 142.

338 *Victims of Crime Assistance Regulations 2007* (NT) reg 17 and sch 1.

339 *Victims Rights and Support Act 2013* (NSW) s 22(2).

Recommendation—proof of injury

- 31** The proposed Act should provide that an applicant must provide evidence that they have suffered an injury as a result of the criminal act, except where the applicant:
- (a) was the victim of a criminal act that would constitute a sexual offence
 - (b) was the victim of a criminal act that occurred in the context of family violence, as defined by the *Family Violence Protection Act 2008* (Vic), or
 - (c) witnessed, heard or was otherwise exposed to any of the above criminal acts and was under the age of 18 at the time of the exposure.

Causation

Current law

- 12.250 To be eligible for assistance under the VOCAA, an act of violence must ‘directly result’ in the victim’s injury, death or significant adverse effect.³⁴⁰
- 12.251 However, there is a lack of clarity regarding what is required to establish this causal connection. VCAT frequently uses the ‘but for’ test, which requires VCAT to ask: ‘But for the act of violence, would the victim have died, been injured, or suffered the significant adverse effect?’³⁴¹
- 12.252 However, in *JM v Victims of Crime Assistance Tribunal*,³⁴² the VCAT member reserved the question whether the ‘but for’ test is the only applicable test for establishing causation:
- 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.³⁴³

Responses

- 12.253 In its supplementary consultation paper, the Commission asked how the requirement for victims to establish that their injury was the direct result of the act of violence affects victims, and whether this requirement should be amended.³⁴⁴
- 12.254 In response, a number of stakeholders raised concerns about the requirement that a victim’s injury be the direct result of an act of violence.³⁴⁵ In particular, stakeholders told the Commission that the causation requirement can cause difficulties for victims where other factors have also contributed to their injury.³⁴⁶ For example, the applicant in *NF v Victims of Crime Assistance Tribunal*³⁴⁷ sought assistance on the basis that he had 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 causes to which VOCAT pointed

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

341 See, eg, *L v Victims of Crime Assistance Tribunal* [2004] VCAT 1452 (27 July 2004); *JM v Victims of Crime Assistance Tribunal* [2002] VCAT 496 (17 June 2002).

342 [2002] VCAT 496 (17 June 2002).

343 *Ibid* [14].

344 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 68.

345 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victoria Victims Assistance Program), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 16 (Regional Consultation—Ballarat Legal Professionals), 20 (Academics).

346 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

347 [2012] VCAT 1740 (16 November 2012).

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'.³⁴⁸

- 12.255 In addition, stakeholders noted that the causation test under the VOCAA can be difficult to satisfy where an act of violence exacerbates a victim's pre-existing injury.³⁴⁹ Stakeholders told the Commission that this is particularly an issue in relation to psychological injury, despite the fact that the current definition of injury includes 'exacerbation of a mental illness or disorder'.³⁵⁰
- 12.256 One stakeholder told the Commission that the causation requirement can create barriers to accessing assistance where a victim goes on 'to lead a life marred by other psychological torments'.³⁵¹ For example, the Commission was told that victims of historical sexual abuse may later engage in substance abuse.³⁵²
- 12.257 In light of the barriers created for some victims by the causation requirement, in their joint submission, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria proposed 'easing' the causation requirement so that the act of violence need only have contributed to the injury, rather than having been the sole or direct cause of it.³⁵³

Discussion and recommendations

- 12.258 The Commission considers that removing the requirement to prove injury for certain categories of victim would help address certain issues associated with the current causation requirement under the VOCAA, including those difficulties faced by victims of sexual offences in establishing causation.
- 12.259 However, the Commission acknowledges that if the current causation test were retained, some victims who would be required to prove injury under the proposed Act may struggle to satisfy the proposed causation test if they suffered psychological or psychiatric harm and there were multiple contributing factors to that harm.³⁵⁴ The Commission acknowledges the lack of clarity under the VOCAA regarding whether or not the 'but for' test will be applied to determine whether the injury suffered was a direct result of the act of violence.
- 12.260 To address these issues, the Commission considers that under the proposed Act, the word 'directly' should be removed from the causation requirement and that a victim need only establish that they suffered an injury as a result of a criminal act.
- 12.261 In the Commission's view, this approach would represent a return to Victoria's former approach to causation in relation to victims of crime assistance. Both the VOCAA's predecessor—the *Criminal Injuries Compensation Act 1972* (Vic) and the *Criminal Injuries Compensation Act 1983* (Vic)—only required a victim to have suffered the injury as a result of the act of violence, and did not include the word 'direct'.³⁵⁵

348 Ibid [56].

349 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

350 Submissions 14 (Inner Melbourne Community Legal); 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultation 16 (Regional Consultation—Ballarat Legal Professionals). See *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

351 Submission 38 (Ryan Carlisle Thomas Lawyers).

352 Ibid.

353 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

354 For further discussion of this barrier, see Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 5, 65.

355 Both statutes used the phrase 'as a result of': *Criminal Injuries Compensation Act 1972* (Vic) s 3(1) and *Criminal Injuries Compensation Act 1983* (Vic) s 15. For a discussion of the history of the causal test in Victorian legislation for crime victims' financial assistance, see *JM v Victims of Crime Assistance Tribunal* [2002] VCAT 496 (17 June 2002) [10]–[11]. The use of the words 'as a result of' in the *Criminal Injuries Compensation Act 1972* (Vic) led the High Court to decide in *Fagan v Crimes Compensation Tribunal* that Victoria's scheme only required a causal connection between the criminal act and the injury, and that this could be satisfied even if there were other contributing factors. Mason and Wilson JJ stated: 'The fact that other unconnected events may also have had some relationship to the occurrence is not material if the criminal act was a cause, even if not the sole cause': (1982) 150 CLR 666, 673 [17]. In *Savage v Crimes Compensation Tribunal*, the Victorian Court of Appeal subsequently held that this test applied to the *Criminal Injuries Compensation Act 1983* (Vic): [1990] VR 96 [100].

- 12.262 The Commission considers that reverting to the previous formulation of the causation test would lower the causation threshold and make it easier for victims to establish injury where there were multiple contributing factors.
- 12.263 In response to the views expressed by some stakeholders, the Commission also considered the options of including a rebuttable presumption of a causal connection, or deeming a causal connection, for certain criminal acts.³⁵⁶ However, the Commission considers that such an approach is unnecessary in light of the Commission’s proposal that victims of certain crimes— including sexual offences and certain offences occurring in the context of family violence—should not be required to prove injury.

Recommendation—causation

- 32** The proposed Act should provide that where an applicant is required to prove injury, it is sufficient if the applicant can establish that the victim’s injury was a result of the criminal act.

Assistance available under the proposed Act for victims of crime financial assistance

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13. Assistance available under the proposed Act for victims of crime financial assistance

Introduction

- 13.1 This chapter considers the types of assistance that should be available to victims under the proposed Act. In particular, the chapter considers and makes recommendations about:
- the categories of assistance available for victims
 - lump sum payments (currently termed ‘special financial assistance’)
 - the quantum (amount) and duration of assistance provided to victims
 - the circumstances in which awards may be varied
 - ensuring consistency in awards.
- 13.2 The first and supplementary terms of reference asked the Commission to consider the types of assistance that should be available to victims and the quantum of such assistance.
- 13.3 In the first terms of reference, the second matter asked the Commission to make recommendations about the ‘categories and quantum of awards with regard to the cumulative impact of family violence behaviour on victims’.
- 13.4 In addition, the first matter in the supplementary terms of reference asked the Commission to make recommendations about how the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) can be simplified to make it easier for applicants to understand all their potential entitlements.
- 13.5 Regarding the more technical aspects of victims’ entitlements, the fourth, fifth and sixth matters in the supplementary terms of reference asked the Commission to consider whether:
- the categories of assistance and structure and timing of awards are appropriate and adequate to account for the harm arising from crime
 - the basis of the formula used to quantify special financial assistance is the most appropriate way to calculate the amount payable by the state
 - it is appropriate and fair to award assistance to aid recovery in exceptional circumstances and whether there are other ways to promote the recovery of victims.
- 13.6 The recommendations in this chapter propose reforming the category and quantum of award provisions under the VOCAA to create six streams of assistance under the proposed Act. The Commission considers this proposed approach would clarify the types of assistance available, better account for the harm suffered by victims and better assist victims in their recovery journey.

New streams of assistance

Current law

- 13.7 The categories and quantum of awards available to victims of crime depend on the victim category under which an applicant applies for assistance under the VOCAA.

Primary victims

- 13.8 Under the VOCAA, there are the three main categories of award for primary victims:
- 1) expenses actually incurred or reasonably likely to be incurred for:
 - a. reasonable counselling services
 - b. medical expenses as a direct result of the act of violence
 - c. loss of earnings of up to \$20,000 as a direct result of the act of violence
 - d. loss or damage to clothing worn at the time of the act of violence
 - e. safety-related expenses as a direct result of the act of violence.¹
 - 2) in exceptional circumstances, an amount for other expenses actually incurred or reasonably likely to be incurred to assist in the primary victim's recovery² (recovery expenses)
 - 3) special financial assistance, in the form of a lump sum payment, as a symbolic expression by the state of the community's sympathy and condolence for, and in recognition of, significant adverse effects experienced or suffered by a victim as a result of the crime.³
- 13.9 Other than claims made for safety-related expenses and clothing worn at the time of the act of violence, the VOCAA expressly provides that primary victims cannot apply for expenses incurred through loss or damage to property.⁴

Secondary victims

- 13.10 Under the VOCAA, secondary victims may claim assistance for:
- 1) expenses actually incurred or reasonably likely to be incurred for
 - a. reasonable counselling services
 - b. 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 violence⁵
 - 2) in exceptional circumstances, an amount of up to \$20,000 for loss of earnings suffered or reasonably likely to be suffered as a direct result of the act of violence⁶
 - 3) in exceptional circumstances, other expenses actually and reasonably incurred or reasonably likely to be incurred to assist in the secondary victim's recovery (recovery expenses) where:
 - a. the secondary victim was under 18 at the time of the act of violence, the primary victim was their family member,⁷ and the secondary victim was injured by witnessing the act of violence⁸

1 *Victims of Crime Assistance Act 1996* (Vic) s 8(2).

2 *Ibid* s 8(3).

3 *Ibid* ss 1(2)(b), 8A.

4 *Ibid* s 8(4).

5 *Ibid* s 10(2).

6 *Ibid* s 10(3).

7 A 'family member, in relation to a person' is defined in s 10A(3) of the VOCAA 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 VOCAA 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.

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

- b. 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 against their child.⁹

Related victims

- 13.11 Under the VOCAA, related victims may claim assistance for:
- 1) expenses actually incurred or reasonably likely to be incurred for:
 - a. reasonable counselling services
 - b. 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
 - c. distress experienced or reasonably likely to be experienced as a direct result of the death of the primary victim
 - d. 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
 - e. other expenses actually and reasonably incurred or reasonably likely to be incurred as a direct result of the primary victim's death¹⁰
 - 2) in exceptional circumstances, 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 (recovery expenses).¹¹
- 13.12 The VOCAA explicitly excludes applications for expenses incurred by related victims through loss or damage to property.¹²
- 13.13 The VOCAA also limits the total financial assistance available to all the related victims of any one primary victim, to a total maximum cumulative amount of \$100,000. This amount will be reduced by any amount awarded to a person for the funeral expenses of the primary victim (even if that person is not a related victim).¹³ Any one related victim may be awarded a total maximum amount of up to \$50,000.¹⁴

Awards for recovery expenses

- 13.14 As noted above, the VOCAA provides that in exceptional circumstances, a primary victim may be awarded an amount for other expenses actually and reasonably incurred, or reasonably likely to be incurred, to assist in the victim's recovery from the act of violence (recovery expenses).¹⁵ Related victims and some secondary victims are also eligible for recovery expenses in certain circumstances.¹⁶
- 13.15 VCAT has interpreted exceptional circumstances to mean 'unusual, special, out of the ordinary'.¹⁷ Whether or not such circumstances exist involves considering 'all of the circumstances, including the injury and the nature of the offending'.¹⁸

9 Ibid s 10A(2).

10 Ibid s 13(2).

11 Ibid s 13(4).

12 Ibid s 13(3).

13 Ibid s 12(1). The VOCAA also provides that in exceptional circumstances VCAT may award assistance which causes this limit to be exceeded: *ibid* s 12(2).

14 Ibid s 13(1).

15 Ibid s 8(3).

16 Ibid ss 10A, 14(4).

17 See *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002) [90]; *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651 (14 December 2005) [30].

18 *AVA v Victims of Crime Assistance Tribunal* [2010] VCAT 2078 (23 December 2010) [81]–[82]. See also *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651 (14 December 2005) [30].

- 13.16 To make a claim for recovery expenses, the applicant must also demonstrate that the expense will 'go to the heart' of assisting them in their recovery.¹⁹ The therapeutic value of the particular expense is considered,²⁰ as well as whether there is a sufficient connection between the expense and the victim's recovery.²¹
- 13.17 Recovery expenses have been awarded for a diverse range of items and services, including for a gym membership,²² Taekwondo classes,²³ computer training,²⁴ equipment for a beauty therapy course,²⁵ a laptop²⁶ and the removal of tattoos to assist the applicant to obtain employment.²⁷

Special financial assistance

- 13.18 As noted above, the VOCAA provides that in addition to assistance for specific expenses incurred or reasonably likely to be incurred, primary victims may be awarded special financial assistance.²⁸
- 13.19 Special financial assistance is a lump sum award that is made 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'.²⁹
- 13.20 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 the least serious. The minimum and maximum amounts for each category are prescribed in the VOCAA.³⁰ They range from a minimum award of \$130 for category D to a maximum award of \$10,000 for Category A. The award ranges available under each category and the acts of violence that fall within each of them were outlined in detail in the Commission's supplementary consultation paper.³¹
- 13.21 The *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) 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.³² In practice, this is often described as an 'uplift'.

Interim awards

- 13.22 The VOCAA provides that pending the final determination of an application, the Victims of Crime Assistance Tribunal (VOCAT) can make an interim award of assistance in any circumstance that it considers appropriate.³³ In practice, such awards are usually made for urgent assistance. Interim awards are discussed further below.

19 Victims of Crime Assistance Tribunal, *Other Expenses to Assist Recovery* (26 September 2016) <www.vocat.vic.gov.au/assistance-available/financial-assistance-available/other-expenses-assist-recovery>. See also Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 26.

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

21 See, eg, *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006) [29].

22 See, eg, *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) [50].

23 See, eg, *Gatto v Victims of Crime Assistance Tribunal* [2010] VCAT 966 (2 June 2010) [9]. An award was originally made by VOCAT for one year of Taekwondo classes, but no award was made by VCAT for an additional year.

24 See, eg, the original award made by VOCAT in *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006) [6].

25 See, eg, *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) [50].

26 See, eg, the original award made by VOCAT in *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006) [6].

27 *Hay v Victims of Crime Assistance Tribunal* [2002] VCAT 45 (15 February 2002) [27]–[29].

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

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

30 *Ibid* s 8A(5).

31 See Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 74–6.

32 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) regs 7–9.

33 *Victims of Crime Assistance Act 1996* (Vic) s 56.

Responses

- 13.23 In its supplementary consultation paper, the Commission asked whether the current categories of award are still appropriate to meet the needs of victims of crime.³⁴
- 13.24 In response, stakeholders provided views on the operation of some of the existing categories of award and the overall structure of the categories, including whether additional categories should be created. The following sections outline stakeholder views on:
- the structure of the existing award categories
 - the need for new award categories
 - key issues with the recovery expenses category of award
 - key issues with the special financial assistance category of award.
- 13.25 Specific issues regarding the operation of the remaining award categories, including quantum and scope of coverage, are discussed below in separate sections.

Structure of the award categories

- 13.26 A number of stakeholders told the Commission that the existing categories of award should be restructured.³⁵ The Commission was told that the current categories are complicated and applicants often require legal advice to understand what types of assistance they may apply for.³⁶ Many stakeholders submitted that simplifying and clarifying the scheme structure would reduce reliance on lawyers.³⁷
- 13.27 In their joint submission, the Magistrates' Court of Victoria and VOCAT stated that 'a reduced number of simplified categories could help victims understand more easily what kind of assistance they may apply for without the need to seek legal assistance'.³⁸
- 13.28 Women's Legal Service Victoria and Domestic Violence Victoria submitted that the VOCAA should be amended to create one category of award, noting that 'the categories of award are too prescriptive' and that some cohorts of victims, such as victims of family violence, are required to 'retro-fit' their needs and lived experiences to suit the VOCAA.³⁹
- 13.29 Women's Legal Service Victoria and Domestic Violence Victoria also submitted that the scheme should be more flexible and responsive to the lived experiences of victims of family violence.⁴⁰
- 13.30 The Public Health Association of Australia also supported a flexible approach to the award categories.⁴¹ Similarly, in a consultation academics told the Commission that the award categories are too narrow.⁴²
- 13.31 The Victims of Crime Commissioner also submitted that the current categories of award—in particular, special financial assistance and recovery expenses—can result in inconsistent outcomes for different victims.⁴³ The Victims of Crime Commissioner considered that the existing award categories should be restructured to reflect the approach in New South Wales, which provides for four 'pillars' of assistance.⁴⁴

34 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 82.
35 Submissions 14 (Inner Melbourne Community Legal), 25 (Public Health Association of Australia), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria). This was also noted as an option in Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

36 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal). See also Submission 49 (Victims of Crime Commissioner, Victoria).

37 See, eg, submissions 14 (Inner City Melbourne Legal), 49 (Victims of Crime Commissioner, Victoria), 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

38 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

39 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria). It was submitted that this should be in addition to a 'recognition payment'.

40 Ibid.

41 Submission 25 (Public Health Association of Australia).

42 Consultation 20 (Academics).

43 Submission 49 (Victims of Crime Commissioner, Victoria).

44 Ibid.

- counselling
- immediate needs
- financial assistance for economic loss
- recognition payment.⁴⁵

13.32 The Victims of Crime Commissioner submitted that adopting this approach would also help to promote transparency and fairness in awards.⁴⁶

New categories of award

13.33 In addition to concerns about the overall structure of the current award categories, some stakeholders submitted that new award categories should be included in the scheme. Some submissions considered that these new categories should be included as part of a complete restructure of the award categories, while other stakeholders submitted that one or more additional categories could be added to the existing categories.

13.34 Stakeholders proposed the following additional categories of award:

- property loss and damage⁴⁷
- relocation and resettlement expenses⁴⁸
- personal care⁴⁹ and/or therapeutic expenses⁵⁰
- carers' expenses⁵¹
- childcare expenses⁵²
- income assistance, including for victims who were not working at the time of the act of violence⁵³
- education and return to work programs⁵⁴
- financial counselling⁵⁵
- bereavement.⁵⁶

13.35 Each of these suggested new categories is discussed below.

Property loss or damage

13.36 The exclusion of assistance for expenses incurred through loss or damage to property may particularly affect victims of family violence, who may require property-related assistance in order to achieve the independence and security necessary to their recovery, both in the short and longer term.⁵⁷ A number of stakeholders submitted that the VOCAA should be amended to include awards for property loss or damage that occurred as a result of the act of violence.⁵⁸

45 See consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

46 Submission 49 (Victims of Crime Commissioner, Victoria).

47 Submissions 11 (Seniors Rights Victoria), 14 (Inner Melbourne Community Legal), 31 (Victorian Council of Social Service), 37 Submission 37 (safe steps Family Violence Response Centre).

48 Submission 14 (Inner Melbourne Community Legal).

49 Submissions 11 (Seniors Rights Victoria), 45 (Daniel Myles et al).

50 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

51 Submissions 22 (YourLawyer) and 27 (Name withheld).

52 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre).

53 Submission 27 (Name withheld); Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

54 Submission 14 (Inner Melbourne Community Legal).

55 Consultation 8 (Victims Representatives—Victims of Crime Consultative Committee).

56 Submission 27 (Name withheld).

57 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 82.

For a discussion of the economic consequences of family violence, see generally 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). See also Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, 2015).

58 See, eg, submissions 11 (Seniors Rights Victoria), 14 (Inner Melbourne Community Legal), 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre).

- 13.37 Some stakeholders considered that this assistance should be provided only where the property loss or damage occurred in the context of family violence,⁵⁹ sexual assault⁶⁰ and/or elder abuse.⁶¹
- 13.38 Other stakeholders stated that a victim should only be able to claim property loss or damage where the victim has no recourse under any insurance or other schemes.⁶²

Relocation and resettlement expenses

- 13.39 Inner Melbourne Community Legal submitted that there should be two new categories of award for relocation and resettlement costs.⁶³ It explained that relocation costs should include emergency accommodation, moving and storage costs, while resettlement costs should cover the costs of items such as furniture to assist victims to re-establish themselves and their family in a safe environment. Inner Melbourne Community Legal noted that assistance for emergency housing is often provided as a ‘safety-related expense’ but that many victims of family violence also lose access to their furniture and personal effects, which are not covered by the existing scheme.⁶⁴
- 13.40 Other stakeholders also acknowledged the need for financial assistance for housing expenses.⁶⁵

Personal care/therapeutic expenses

- 13.41 Some stakeholders told the Commission that financial assistance should be provided for ongoing personal care needs. For example, Daniel Myles et al submitted that victims may require assistance for:
- in home personal care, case management, cleaning and maintenance services, carer assisted shopping and outings, accessibility aides such as wheelchairs, disability accessible vehicles, home modifications, servicing costs for equipment, and transport costs associated with injury related appointments.⁶⁶
- 13.42 Seniors Rights Victoria also submitted that victims of elder abuse would benefit from financial assistance for transport costs to appointments and programs addressing social isolation, acquiring new disability aids, travel to visit supportive family members and relaxation classes, including hydrotherapy, yoga and meditation.⁶⁷
- 13.43 In their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria considered that a new category of award for therapeutic expenses should be created, to cover expenses such as mobility aids or home renovations to make the victim’s place of residence wheelchair accessible.⁶⁸ It was also submitted that such an award category could include amounts to assist in recovery from loss of self-worth or loss of opportunity for education. However, to help ensure certainty, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria proposed that examples of the kinds of expenses covered by this category could be included in the VOCAA and that such expenses could be capped.⁶⁹

59 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre).

60 Submission 31 (Victorian Council of Social Service).

61 Submission 11 (Seniors Rights Victoria).

62 Submission 14 (Inner Melbourne Community Legal).

63 Ibid.

64 Ibid.

65 See, eg, submissions 9 (Alannah & Madeline Foundation), 19 (Schembri & Co Lawyers), 45 (Daniel Myles et al).

66 Submission 45 (Daniel Myles et al).

67 Submission 11 (Seniors Rights Victoria).

68 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria). This proposal was made in conjunction with a proposal to narrow the definition of ‘exceptional circumstances’ for the purposes of awards for recovery expenses.

69 Ibid.

13.44 In addition, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that such changes would help reduce inconsistency in recovery expenses awards and address costs and delays associated with having to establish exceptional circumstances.⁷⁰

Carers' expenses

- 13.45 The Commission was told that financial assistance should also be available to family members who become carers for primary victims.
- 13.46 YourLawyer told the Commission that close family members of a primary victim should be able to access financial assistance for:
- loss of earnings due to providing care to the primary victim
 - costs of travel for taking the primary victim to medical or psychological appointments
 - costs of medical or psychological treatment for the primary victim incurred by the close family member.⁷¹
- 13.47 Another stakeholder submitted that financial assistance should be available for primary victims who are no longer able to fulfil a carer commitment due to the injury they have suffered as a result of the crime.⁷²

Childcare expenses

13.48 Both safe steps Family Violence Response Centre and the Victorian Council of Social Service submitted that assistance should be provided for childcare expenses incurred as a result of the act of violence.⁷³ Safe steps Family Violence Response Centre stated that such assistance would enable victims to 'plan for their safety and attend medical and counselling appointments'.⁷⁴

Income assistance

- 13.49 Stakeholders told the Commission that awards for loss of earnings unfairly discriminate against those who were not working at the time of the act of violence.⁷⁵ In particular, the Commission was told that this category of award fails to recognise that a victim's future capacity to work can be adversely affected as a consequence of an offence.⁷⁶
- 13.50 One stakeholder proposed that victims of crime who were on a trajectory towards employment—for example, by studying—should be entitled to an award for the same maximum amount as provided for loss of earnings.⁷⁷ This stakeholder noted that victims could, for example, use this financial assistance to fund their remaining education, or other vocational activity, until they have 'regained the standing they would have attained on the trajectory they were on had they not sustained the injury'.⁷⁸ Other stakeholders submitted that the categories of award should reflect something akin to a future potential earnings in a civil claim.⁷⁹
- 13.51 Inner Melbourne Community Legal also submitted that there is currently a lack of income support for victims who do not qualify for Centrelink, for example, due to their visa or residency status.⁸⁰ It noted that this can affect the capacity of some victims of family violence to escape an unsafe environment and achieve financial independence.⁸¹

70 Ibid.

71 Submission 22 (YourLawyer).

72 Submission 27 (Name withheld).

73 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre)—but only for primary victims, as the submission refers to amending section 8 of the VOCAA.

74 Submission 37 (safe steps Family Violence Response Centre).

75 Submission 27 (Name withheld); Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

76 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

77 Submission 27 (Name withheld).

78 Ibid.

79 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

80 Submission 14 (Inner Melbourne Community Legal).

81 Ibid.

- 13.52 To overcome these issues, Inner Melbourne Community Legal proposed creating an award category for income support for victims who are unable to obtain other forms of income support or lose access to existing financial supports.⁸²
- 13.53 Another concern raised about current awards for loss of earnings was the two-year timeframe currently imposed. Ryan Carlisle Thomas Lawyers submitted that although a time limit should apply, the current two-year timeframe 'often does not reflect the time where the loss of earnings occurred'.⁸³ For example, a victim may experience loss of earnings from the date of disclosure of the crime or the date of the criminal trial.⁸⁴
- 13.54 Stakeholders also told the Commission that the maximum quantum of \$20,000 for loss of earnings is inadequate.⁸⁵ Ryan Carlisle Thomas Lawyers stated that this amount over a two-year period is 'far below the minimum wage and often does not even cover 6 months of an applicant's full time wage'.⁸⁶ This, it submitted, 'fall[s] short of community expectations'.⁸⁷ CASA Forum noted that the loss of earnings entitlement has not increased since 1997.⁸⁸

Education and return-to-work programs

- 13.55 Inner Melbourne Community Legal proposed creating a category for 're-education and employment support' to enable victims to re-train and re-enter the workforce.⁸⁹ They stated that although such expenses can usually be claimed as recovery expenses, creating this new category would provide 'better clarity around what [applicants] can generally claim', which 'would assist applicants to understand their entitlements'.⁹⁰
- 13.56 Daniel Myles et al also noted the importance of education opportunities and return-to-work programs.⁹¹ Although these may be provided through the National Disability Insurance Scheme, it was noted that 'victims of crime may have needs that are very specific to the trauma of interpersonal violence' and, as such, may benefit from more tailored support under this scheme.⁹²
- 13.57 As noted above, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria proposed creating a new category of award for therapeutic expenses. They submitted that this category could include amounts for loss of opportunity for education.⁹³

Financial counselling

- 13.58 Representatives of the Victims of Crime Consultative Committee, told the Commission that there should be a category of award for financial counselling.⁹⁴ The Commission heard that the effects of trauma can make it difficult for victims to manage financial matters in the aftermath of a crime. The Commission was also told that some victims never return to work and that financial counselling could assist victims to manage any lump sum payment received as special financial assistance.⁹⁵
- 13.59 However, in a consultation with victim support workers, the Commission heard that providing financial counselling under the VOCAA is a 'paternalistic notion' and that victims of crime would be better served by a trauma-informed model that emphasises

82 Ibid.
83 Submission 38 (Ryan Carlisle Thomas Lawyers).
84 Ibid.
85 Submissions 30 (CASA Forum), 38 (Ryan Carlisle Thomas Lawyers).
86 Submission 38 (Ryan Carlisle Thomas Lawyers).
87 Ibid.
88 Submission 30 (CASA Forum).
89 Submission 14 (Inner Melbourne Community Legal).
90 Ibid.
91 Submission 45 (Daniel Myles et al).
92 Ibid.
93 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
94 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee). See also consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).
95 Ibid.

choices and provides guidance as to effective ways to use financial assistance.⁹⁶ Stakeholders also stated that amounts awarded under the VOCAA are so small as to not warrant financial counselling.⁹⁷

Bereavement

- 13.60 One stakeholder submitted that there should be a new category of award for ‘family member bereavement’.⁹⁸ This would provide family members of a primary victim with limited assistance for counselling and expenses for funeral attendance and meeting family.⁹⁹
- 13.61 In their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria stated that the ‘other expenses’ category of award for related victims could be defined to clarify and narrow its application and to specifically include assistance for funeral-related travel expenses.¹⁰⁰

Recovery expenses

- 13.62 In its supplementary consultation paper, the Commission asked whether it is appropriate to limit awards for recovery expenses to exceptional circumstances.¹⁰¹
- 13.63 Awards for recovery expenses can be beneficial, as they provide victims with financial assistance tailored to their specific recovery needs.¹⁰² The recovery expenses category may also enable victims to claim expenses that they would otherwise be unable to access. For example, the recovery expenses category is sometimes used to cover expenses flowing from financial abuse or property damage.¹⁰³
- 13.64 As outlined in the Commission’s supplementary consultation paper,¹⁰⁴ VOCAT has a very wide discretion in making awards for recovery expenses, both in relation to the applicant’s eligibility for an award under this category and the kinds of expenses covered. This can result in inconsistency in awards for different victims. For example, in some cases an application for financial assistance for a gym membership is successful, whereas in other cases it is not.¹⁰⁵
- 13.65 A significant number of stakeholders told the Commission that the recovery expenses category of award creates difficulties for victims with respect to:¹⁰⁶
- the requirement to establish exceptional circumstances
 - its existence as a separate category of award.
- 13.66 These issues are considered further below.

96 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

97 Ibid.

98 Submission 27 (Name withheld).

99 Ibid.

100 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria). This proposal was made in addition to a proposal to introduce a cap on ‘distress’ payments for related victims. See also *Victims of Crime Assistance Act 1996* (Vic) s 13(2)(e).

101 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 85.

102 Ibid.

103 Ibid.

104 Ibid 84.

105 For example, the applicant’s claim for a gym membership was successful in *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011), but was unsuccessful in *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006).

106 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 19 (Schembri & Co Lawyers), 24 (Darebin Community Legal Centre), 26 (Hume Riverina Community Legal Service), 27 (Name withheld), 28 (South Metropolitan Integrated Family Violence Executive), 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 39 (Victorian Aboriginal Legal Service), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 49 (Victims of Crime Commissioner, Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 5 (Victims of Crime Commissioner, Victoria), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 20 (Academics).

The requirement for exceptional circumstances

- 13.67 Most stakeholder concerns about the recovery expenses category related to the requirement for victims to establish exceptional circumstances.
- 13.68 VCAT has interpreted exceptional circumstances as ‘out of the ordinary’. This means that only victims who suffer an unusual or uncommon reaction to a crime are eligible for an award for recovery expenses. For example, in *RN v Victims of Crime Assistance*,¹⁰⁷ VCAT found that exceptional circumstances did not exist for a rape victim because her resulting post-traumatic stress disorder, anxiety and depression were held to be ‘depressingly common’¹⁰⁸ for victims of rape and therefore not ‘unusual, special or out of the ordinary’.¹⁰⁹
- 13.69 Stakeholders told the Commission that the requirement for exceptional circumstances can unfairly disadvantage victims of more ‘common’ offences, such as family violence and sexual assault, because they are not viewed as exceptional.¹¹⁰ As the Victorian Aboriginal Legal Service stated:
- The inclusion of an additional ‘exceptional circumstances’ category punishes those for whom this kind of violence is potentially more common, therefore victimising those already victimised.¹¹¹
- 13.70 Stakeholders also told the Commission that the need to prove exceptional circumstances can be demeaning, as experiencing any form of violent crime is ‘exceptional’.¹¹² The requirement was also described as being ‘too onerous’,¹¹³ which can contribute to delay in processing applications.¹¹⁴ Moreover, the Commission was told that exceptional circumstances is an overly legalistic notion, which can be difficult for non-lawyers to understand,¹¹⁵ including psychologists preparing reports for applicants.¹¹⁶
- 13.71 VCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also stated that because the VOCAA does not provide examples of what may constitute exceptional circumstances, applicants must provide evidence of psychological injury which may ‘pathologise’ the applicant’s experience and devalue it if the application is unsuccessful.¹¹⁷
- 13.72 As such, a number of stakeholders considered that the requirement to establish exceptional circumstances under the VOCAA should be removed.¹¹⁸ Some stakeholders submitted that instead, this category could be based on whether the expense sought is ‘reasonable’¹¹⁹ and/or whether it would have a therapeutic benefit for the victim.¹²⁰
- 13.73 Another proposal was to provide greater direction as to how exceptional circumstances should be interpreted, through guidelines or inserting a definition in the VOCAA.¹²¹ Springvale Monash Legal Service stated that such a definition should take into account the severity of the act of violence and the extent of the harm suffered.¹²²

107 [2005] VCAT 2651 (14 December 2005).

108 Ibid [35].

109 Ibid [37].

110 Submissions 24 (Darebin Community Legal Centre), 39 (Victorian Aboriginal Legal Service), 41 (Springvale Monash Legal Service), 58 (Judicial Advisory Group on Family Violence Supplementary Submission); Consultations 2 (Legal Professionals—Private Practice), 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

111 Submission 39 (Victorian Aboriginal Legal Service).

112 Consultation 2 (Legal Professionals—Private Practice). See also *ibid*.

113 Consultation 13 (Regional Consultation—Mildura Legal Professionals).

114 Consultation 5 (Victims of Crime Commissioner, Victoria).

115 Consultation 13 (Regional Consultation—Mildura Legal Professionals). See also submission 38 (Ryan Carlisle Thomas Lawyers).

116 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

117 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

118 Submissions 19 (Schembri & Co Lawyers), 24 (Darebin Community Legal Centre), 28 (South Metropolitan Integrated Family Violence Executive) in relation to family violence victims), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 39 (Victorian Aboriginal Legal Service), 58 (Judicial Advisory Group on Family Violence Supplementary Submission) (in relation to family violence victims), 49 (Victims of Crime Commissioner, Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 13 (Regional Consultation—Mildura Legal Professionals), 16 (Regional Consultation—Ballarat Legal Professionals).

119 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultation 2 (Legal Professionals—Private Practice).

120 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultation 13 (Regional Consultation—Mildura Legal Professionals).

121 Submissions 5 (Anglicare Victoria Victims Assistance Program), 26 (Hume Riverina Community Legal Service), 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

122 Submission 41 (Springvale Monash Legal Service).

- 13.74 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that a definition of exceptional circumstances would help increase certainty for applicants and narrow the circumstances in which such awards are made, potentially allowing for the reallocation of funds to lump sum awards for special financial assistance.¹²³
- 13.75 As noted above, VOCAT and the Courts also considered that if the definition of exceptional circumstances under the VOCAA were narrowed, a new category of award could be created for other therapeutic expenses.
- 13.76 Other stakeholders proposed using the term 'special circumstances' rather than exceptional circumstances.¹²⁴ One stakeholder stated that this meaning would be less 'extreme' than exceptional circumstances.¹²⁵
- 13.77 Some stakeholders submitted that exceptional circumstances should automatically apply to certain cohorts of victims, including:
- victims of family violence¹²⁶
 - victims of sexual assault¹²⁷
 - victims of offences where there is a significant power imbalance between the victim and the perpetrator¹²⁸
 - victims who experience severe harm¹²⁹
 - victims of slavery¹³⁰
 - victims of trafficking¹³¹
 - victims who are sex workers.¹³²
- 13.78 Stakeholders also told the Commission that the discretionary nature of whether exceptional circumstances exist results in inconsistent awards.¹³³ Darebin Community Legal Centre proposed the development of a Practice Direction to guide tribunal members about alternative forms of therapy and recovery.¹³⁴
- 13.79 In addition, some stakeholders told the Commission that the decision maker's discretion as to whether or not a certain expense will assist the victim to recover can foster paternalistic attitudes.¹³⁵

Recovery expenses as a separate category of award

- 13.80 There was a divergence in opinion among stakeholders as to the merits of having a separate recovery expenses category of award.
- 13.81 Some stakeholders noted that this category of award enables flexibility and creativity.¹³⁶ For example, the Commission was told that this award can be used to purchase a child a pet, which can be beneficial for their recovery.¹³⁷ The Commission also heard that, for some victims, a recovery expenses award can be more important than an award for

123 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
 124 Submissions 13 (Adviceline Injury Lawyers), 27 (Name withheld).
 125 Submission 27 (Name withheld).
 126 Submission 31 (Victorian Council of Social Service).
 127 Ibid.
 128 Submission 24 (Darebin Community Legal Centre) but the submission's first proposal is to remove the 'recovery expenses' category of award altogether.
 129 Submission 31 (Victorian Council of Social Service).
 130 Submission 52 (Slavery Links).
 131 Submission 16 (Project Respect).
 132 Ibid.
 133 Submissions 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 5 (Victims of Crime Commissioner, Victoria), 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies).
 134 Submission 24 (Darebin Community Legal Centre).
 135 Consultation 3 (Legal Professionals—Community Legal Centres).
 136 Consultations 7 (Family Violence and Advocacy Organisations), 13 (Regional Consultation—Mildura Legal Professionals).
 137 Consultation 13 (Regional Consultation—Mildura Legal Professionals).

special financial assistance because of the extra assistance it provides specifically for a victim's recovery.¹³⁸

13.82 However, other stakeholders expressed concern about the existence of this category of award because of the wide range of items claimed, such as a holiday or a gym membership, which may have an unclear connection to the victim's recovery.¹³⁹ In addition, VOCAT's broad discretion in awarding recovery expenses can lead to inconsistent decision making.¹⁴⁰ Victims may therefore feel the need to seek legal assistance, which increases costs for VOCAT.¹⁴¹

13.83 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that victims may only apply for recovery expenses because of the low awards granted under special financial assistance, which means that in practice, the recovery expenses category effectively duplicates the special financial assistance category:

Arguably, because the amounts of special financial assistance available under the Act have failed to keep pace with community expectations, most VOCAT applicants also apply for 'an exceptional circumstances award'...

[Yet] the purpose of exceptional circumstances awards is not to duplicate special financial assistance.¹⁴²

13.84 Inner Melbourne Community Legal considered that recovery expenses should be abolished to create greater certainty for applicants, in light of the inconsistency in such awards.¹⁴³

Special financial assistance

13.85 In the first consultation paper, the Commission asked whether the maximum award for special financial assistance should be available to all victims of family violence so that the amount they receive is not based on categories of offence but instead on the discretion of VOCAT.¹⁴⁴ The Commission also asked a number of questions about how to ensure that the special financial assistance categories account for the cumulative harm of family violence and, in particular, for child victims of family violence.¹⁴⁵

13.86 In its supplementary consultation paper, the Commission asked:

- whether the maximum and minimum amounts of special financial assistance should be removed and replaced with one amount for each category¹⁴⁶
- whether the amounts of special financial assistance should be increased¹⁴⁷
- whether the special financial assistance formula should be amended to take into account the cumulative harm of a series of related criminal acts¹⁴⁸
- whether the special financial assistance formula should be amended to take into account the experiences of vulnerable victims, including child victims, elderly victims, victims with disability and victims of an act of violence perpetrated by someone in a position of power, trust or authority¹⁴⁹

138 Consultation 2 (Legal Professionals—Private Practice).

139 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

140 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

141 Ibid.

142 Ibid.

143 Submission 14 (Inner Melbourne Community Legal).

144 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) Ch 7, 70.

145 Ibid.

146 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 93.

147 Ibid 94.

148 Ibid 89.

149 Ibid 91.

- who should be eligible for special financial assistance¹⁵⁰
- whether, in addition to financial assistance, there are other ways to promote the recovery of victims of crime.¹⁵¹

13.87 Stakeholder views on these questions are set out below.

Purpose of special financial assistance

13.88 A number of stakeholders suggested that there is a lack of clarity regarding the policy rationale for lump sum payments to victims in the form of special financial assistance.¹⁵²

13.89 Some stakeholders considered that the purpose of special financial assistance awards should be clarified, for example, by renaming the payments ‘recognition payments’ rather than ‘special financial assistance’.¹⁵³ The term ‘recognition payment’ is used in both the ACT and NSW schemes.¹⁵⁴ Stakeholders submitted that this would help clarify for victims the purpose of special financial assistance.¹⁵⁵ As safe steps Family Violence Response Centre noted, the purpose of such financial assistance is not to compensate or assist a victim in their recovery but to provide a ‘symbolic gesture on behalf of the community and the state that recognizes harm caused to victims’.¹⁵⁶

13.90 However, Springvale Monash Legal Service submitted that if special financial assistance were to be renamed a recognition payment, this could have the unintended effect of implying that other ‘regular’ financial assistance payments do not recognise the suffering of other such victims.¹⁵⁷ Accordingly, Springvale Monash Legal Service submitted that it may be more appropriate for special financial assistance to be renamed as one of the following:

- additional recognition payment
- further recognition payment
- extra recognition payment.¹⁵⁸

13.91 Other stakeholders expressed a more fundamental concern about the state providing financial assistance as a symbolic expression of sympathy and condolence. In particular, these stakeholders submitted that special financial assistance ‘introduces a set of political and moral considerations about who evokes and “deserves” sympathy’.¹⁵⁹ In addition, the Commission was told that the underlying purpose of such financial assistance is inconsistent, and potentially in competition, with the VOCAA’s other, more practical, objective—‘to assist victims of crime to recover’ by providing financial assistance.¹⁶⁰ One stakeholder told the Commission that the focus of the scheme should be on victim recovery, not on recognition of harm, and that special financial assistance should therefore be abolished.¹⁶¹

150 Ibid.

151 Ibid 85.

152 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 18 (cohealth), 25 (Public Health Association of Australia), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria), 41 (Springvale Monash Legal Service).

153 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 18 (cohealth), 25 (Public Health Association of Australia), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria).

154 *Victims of Crime (Financial Assistance) Act 2016* (ACT); *Victims Rights and Support Act 2013* (NSW).

155 Submissions 5 (Anglicare Victoria Victims Assistance Program), 18 (cohealth), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service).

156 Submission 37 (safe steps Family Violence Response Centre).

157 Submission 41 (Springvale Monash Legal Service).

158 Ibid.

159 Submission 7 (Dr Kate Seear et al).

160 Ibid; *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(a).

161 Submission 27 (Name withheld).

13.92 However, the Commission also heard that, for many victims, ‘acknowledgment and validation are the most valued outcomes from their participation in the victims of crime assistance scheme’.¹⁶² Stakeholders also submitted that lump sum payments can contribute to victims’ recovery.¹⁶³ The Commission was told that a lump sum payment can be a useful way to ‘tide victims over’ while their affairs are still in disarray in the aftermath of the offence.¹⁶⁴ In addition, lump sum payments can promote victim autonomy. In a consultation with Domestic Violence Victoria, the Commission was told that other than the lump sum payment, victims of family violence are ‘drip fed’ financial assistance under the scheme and are given little agency in how to manage their award.¹⁶⁵

Eligibility for special financial assistance

- 13.93 Some stakeholders told the Commission that eligibility for special financial assistance should be expanded. Proposals included extending eligibility to:
- child victims—either all child victims¹⁶⁶ or to secondary child victims who hear, witness or are otherwise exposed to family violence¹⁶⁷
 - parent secondary victims—either secondary victims who are the parent of a child primary victim¹⁶⁸ or the parents of child victims of sexual abuse¹⁶⁹
 - secondary victims who suffer serious injury¹⁷⁰ or significant harm¹⁷¹
 - applicants who suffer injury due to an act of violence.¹⁷²
- 13.94 In contrast, in a consultation with the President of the Children’s Court of Victoria, the Commission was told that children benefit more from timely, practical assistance than they do from lump sum payments held on trust for them until they are 18.¹⁷³

Special financial assistance categories

- 13.95 The Commission heard that there are issues with the current special financial assistance categories, which determine the quantum range for an award of special financial assistance. In particular, the Commission was told that the categories:
- create inconsistency in awards due to complexity¹⁷⁴
 - are too formulaic¹⁷⁵
 - imply that some victims are more deserving of sympathy than others¹⁷⁶
 - focus too much on the offence, rather than the victim’s experience¹⁷⁷
 - do not adequately recognise the harms suffered by victims of family violence.¹⁷⁸
- 13.96 There was some stakeholder support for removing the award categories for special financial assistance and allowing an award to be made at the discretion of the decision maker, up to a prescribed maximum.¹⁷⁹ For example, Women’s Legal Service Victoria and

162 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
163 Consultation 6 (Victims’ Advocacy Organisations).
164 Ibid.
165 Consultation 9 (Domestic Violence Victoria Members).
166 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership)—all child victims, 44 (Aboriginal Family Violence Prevention & Legal Service Victoria)—but the submission’s first preference is for child victims to be deemed primary victims; in the alternative, submission 44 proposes making special financial assistance available to all secondary and related child victims.
167 Submissions 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 22 (YourLawyer), 41 (Springvale Monash Legal Service)—submission 41 also proposes recognising such child victims as ‘primary victims’.
168 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal).
169 Submission 13 (Adviceline Injury Lawyers).
170 Submission 38 (Ryan Carlisle Thomas Lawyers).
171 Submission 35 (Brockway Legal).
172 Submission 13 (Adviceline Injury Lawyers)—including parents or guardians or immediate family.
173 Consultation 25 (Children’s Court of Victoria).
174 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).
175 Submission 13 (Adviceline Injury Lawyers).
176 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).
177 Submission 15 (Merri Health Victims Assistance Program).
178 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
179 Submissions 1 (Judicial Advisory Group on Family Violence), 13 (Adviceline Injury Lawyers), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria); Consultation 3 (Legal Professionals—Community Legal Centres).

Domestic Violence Victoria proposed such an approach, and that the following safeguards would ensure that the experiences of family violence victims were recognised:

To assist specialist decision-makers with their discretion in determining award amounts, the implementation of the recognition payment could be supported by guidelines, minimum standards for decision making, and education on the immediate and long-term impacts of all forms of family violence.¹⁸⁰

13.97 Other stakeholders submitted that the existing special financial assistance categories should be retained but also emphasised the importance of decision maker discretion when awarding lump sum payments, as this discretion allows a victim's individual circumstances to be considered.¹⁸¹ For example, Ryan Carlisle Thomas Lawyers submitted that:

One of the vital aspects of the judicial decision making currently available is that the decision-makers have the ability to assess and determine the appropriate level of SFA applicable to each and every application and the varying adverse effects they suffer.¹⁸²

13.98 In contrast, a number of stakeholders submitted that, in the absence of guiding factors, the present level of discretion can result in inconsistent outcomes for victims.¹⁸³ Inner City Melbourne Legal stated that there should be greater guidance on how VOCAT should exercise its discretion under the VOCAA, for example, by requiring it to consider the following factors:

- whether the victim is a child, elderly or suffers from disability
- the circumstances of the offence or offences (including severity)
- the nature of the injury.¹⁸⁴

13.99 Other stakeholders submitted that the current level of discretion could be reduced by removing the quantum ranges applicable to each special financial assistance category so that a single amount applies to each category.¹⁸⁵ The Commission was told that the quantum ranges give the decision maker too much discretion, which can result in inconsistent awards.¹⁸⁶

13.100 Some stakeholders supported redirecting the focus of special financial assistance away from the severity of the offence to a consideration of the victim's experience, including a victim's vulnerability, whether the crime occurred in the context of a pattern of abuse and the extent of the victim's injury.¹⁸⁷ For example, Merri Health Victims Assistance Program submitted that 'the current formula focuses on the offence committed ... [but] should acknowledge the victim whom the crime was committed against and their personal circumstances'.¹⁸⁸

13.101 Springvale Monash Legal Service proposed adopting the Australian Capital Territory approach of listing aggravating circumstances, which enable victims to be awarded an increased lump sum payment where such circumstances apply.¹⁸⁹

180 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

181 Submissions 35 (Brockway Legal), 38 (Ryan Carlisle Thomas Lawyers).

182 Submission 38 (Ryan Carlisle Thomas Lawyers).

183 Submission 14 (Inner Melbourne Community Legal); Consultation 5 (Victims of Crime Commissioner, Victoria).

184 Submission 14 (Inner Melbourne Community Legal).

185 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 24 (Darebin Community Legal Centre), 26 (Hume Riverina Community Legal Service), 41 (Springvale Monash Legal Service), 49 (Victims of Crime Commissioner, Victoria). See also submissions 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

186 Submission 14 (Inner Melbourne Community Legal); Consultation 5 (Victims of Crime Commissioner, Victoria). See also submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria), noting that the ranges make it difficult for applicants to predict the award they will receive.

187 Submissions 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 41 (Springvale Monash Legal Service).

188 Submission 15 (Merri Health Victims Assistance Program).

189 Submission 41 (Springvale Monash Legal Service).

Special financial assistance and the recognition of cumulative harm

- 13.102 As outlined in the supplementary consultation paper,¹⁹⁰ the Victorian Royal Commission into Family Violence noted that the special financial assistance categories in the VOCAA do ‘not sufficiently take into account the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence’.¹⁹¹ This is because the relevant categories of special financial assistance are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.¹⁹² As the Commission’s first consultation paper also discussed, victims of family violence often experience violence over long periods of time in the context of a pattern of abuse.¹⁹³
- 13.103 While the maximum award for a category of special financial assistance can be increased where there has been a series of related criminal acts, this can only be done in limited circumstances.¹⁹⁴
- 13.104 Stakeholders confirmed that cumulative harm may not be adequately accounted for in awards for special financial assistance. The Commission was told by a significant number of stakeholders that the categories of special financial assistance need to better recognise cumulative harm as a result of persistent and protracted abuse.¹⁹⁵
- 13.105 The most common submission was that persistent family violence should result in an uplift to Category A (currently the highest category of special financial assistance).¹⁹⁶ VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria outlined this proposal in the following terms:
- In practice, this would involve retaining the related acts provision, but creating a system whereby a Tribunal Member could uplift to special financial assistance category ‘A’, where there is a history of family violence.¹⁹⁷
- 13.106 Some stakeholders submitted that there should be an uplift to Category A for long-term child abuse,¹⁹⁸ long-term sexual abuse,¹⁹⁹ assaults by multiple offenders,²⁰⁰ and any series of related offences.²⁰¹
- 13.107 Another proposal was to create a new category of award which specifically recognises cumulative harm, with the highest quantum of assistance available for this category.²⁰²
- 13.108 In addition, the Commission was told that there should be an increase in the amount awarded under each category where there is a series of offences occurring within that category, as is the approach in the Australian Capital Territory. For example, Springvale Monash Legal Service submitted that a victim should be eligible for at least three times

190 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 87.

191 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 78.

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

193 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 55–7.

194 This was noted by the Victorian Magistrates’ and Children’s Courts in 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.

195 Submissions 1 (Judicial Advisory Group on Family Violence), 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 17 (Centre for Excellence in Child and Family Welfare), 19 (Schembri & Co Lawyers), 24 (Darebin Community Legal Centre), 26 (Hume Riverina Community Legal Service), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 3 (Legal Professionals—Community Legal Centres), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals), 14 (Chief Magistrate’s Family Violence Taskforce), 16 (Regional Consultation—Ballarat Legal Professionals).

196 Submissions 1 (Judicial Advisory Group on Family Violence), 15 (Merri Health Victims Assistance Program) 19 (Schembri & Co Lawyers), 24 (Darebin Community Legal Centre), 26 (Hume Riverina Community Legal Service), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria)—but the submission’s first preference is to abolish the categories altogether, 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

197 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

198 Submission 5 (Anglicare Victoria Victims Assistance Program). See also submission 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal).

199 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program).

200 Submission 5 (Anglicare Victoria Victims Assistance Program).

201 Submissions 13 (Adviceline Injury Lawyers), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 37 (safe steps Family Violence Response Centre).

202 Submission 17 (Centre for Excellence in Child and Family Welfare).

the maximum amount for the applicable category where the victim has experienced a series of related criminal acts falling within that category.²⁰³

Special financial assistance and the recognition of vulnerability

- 13.109 The supplementary consultation paper noted that the limited circumstances in which cumulative harm is recognised when determining awards for special financial assistance may also be a concern for other vulnerable victims who experience repeated violence, including victims of elder abuse, child abuse and abuse of people with disability.²⁰⁴
- 13.110 In response to this, some stakeholders submitted that the special financial assistance categories should be amended to better account for certain victims' vulnerability.²⁰⁵ In particular, the Commission was told that there should be revised uplift provisions for:
- child victims²⁰⁶
 - older victims²⁰⁷
 - victims with a disability²⁰⁸
 - victims where the perpetrator was in a position of power, trust or influence over the victim²⁰⁹
 - victims experiencing financial hardship.²¹⁰
- 13.111 Another proposal was to automatically apply an uplift to category A where the victim was a child; had a disability, acquired brain injury, mental illness or cognitive impairment at the time of the offending; or where the perpetrator was in a position of power, trust or authority.²¹¹
- 13.112 In order to ensure that vulnerability is not only considered in relation to identified vulnerable groups, Springvale Monash Legal Service considered that the *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) could provide for an uplift if the applicant is a 'vulnerable victim' and outline factors to which the decision maker must have regard in determining whether the applicant is a vulnerable victim, including:
- a. The age of the applicant when the act of violence occurred
 - b. Whether the applicant was intellectually disabled within the meaning of the *Disability Act 2006* (Vic) or mentally ill within the meaning of the *Mental Health Act 2014* (Vic), or was in any other way disabled or impaired when the act of violence occurred
 - c. Whether the applicant suffered any financial hardship when the act of violence occurred
 - d. Whether the person who committed, or is alleged to have committed, the act of violence was in a position of power, influence or trust in relation to the applicant
 - e. The nature of the relationship between the applicant and the person who committed, or is alleged to have committed, the act of violence
 - f. All other circumstances that the decision-maker considers relevant.²¹²

203 Submission 41 (Springvale Monash Legal Service).

204 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 87. Submissions 5 (Anglicare), 9 (Alannah & Madeline Foundation), 11 (Springvale Monash Legal Service), 15 (Merri Health Victims Assistance Program), 35 (Brockway Legal), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

205 Submissions 9 (Alannah & Madeline Foundation), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

207 Submissions 9 (Alannah & Madeline Foundation), 11 (Seniors Rights Victoria), 41 (Springvale Monash Legal Service).

208 Submissions 9 (Alannah & Madeline Foundation), 41 (Springvale Monash Legal Service).

209 Submissions 35 (Brockway Legal), 41 (Springvale Monash Legal Service).

210 Submission 41 (Springvale Monash Legal Service).

211 Submission 14 (Inner Melbourne Community Legal). See also submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria) in relation to children.

212 Submission 41 (Springvale Monash Legal Service).

- 13.113 Inner Melbourne Community Legal also submitted that greater guidance is needed regarding how vulnerable victims can access special financial assistance where their financial affairs are administered by a third party, such as the State Trustee.²¹³

The quantum of special financial assistance

- 13.114 A significant number of stakeholders told the Commission that the quantum of special financial assistance is inadequate.²¹⁴ Stakeholders noted that the amounts of special financial assistance have not increased since June 2007²¹⁵ and are very low by contemporary standards.²¹⁶ The Judicial Advisory Group on Family Violence described the amount of special financial assistance available for victims of family violence as ‘grossly inadequate’ in some cases.²¹⁷
- 13.115 The Commission was also told that even the maximum amount of special financial assistance (\$10,000) may only be enough to purchase a car that lasts for a few years, and not nearly enough for victims who need to relocate.²¹⁸
- 13.116 Stakeholders also told the Commission that special financial assistance may not fulfil its intended function of recognising victims of crime, as ‘some amounts are so low that they become an insult’.²¹⁹
- 13.117 Stakeholder views on special financial assistance quantum also accord with findings from the Queensland review of its victims of crime financial assistance scheme, which resulted in amendments to the *Victims of Crime Assistance Act 2009 (Qld)*.²²⁰
- 13.118 Stakeholders held varied views about what the special financial assistance quantum should be. There were proposals to increase the maximum award of special financial assistance to \$20,000²²¹ and \$30,000.²²² Springvale Monash Legal Service submitted that the lowest award of financial assistance should be no less than \$2000.²²³
- 13.119 Stakeholders also submitted that the amounts of special financial assistance should be indexed.²²⁴ Adviceline Injury Lawyers considered indexing the amounts every year and rounding up to the nearest \$100.²²⁵ Ryan Carlisle Thomas Lawyers considered increasing the maximum special financial assistance awards to a ‘base rate’ and thereafter revising them in accordance with increases in the consumer price index.²²⁶
- 13.120 In their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria stated that one way to moderate the costs of increased special financial assistance would be to review ‘the operation of “exceptional circumstances” awards [recovery expenses], and simplifying the requirements of the scheme’.²²⁷

213 Submission 14 (Inner Melbourne Community Legal).

214 Submissions 1 (Judicial Advisory Group on Family Violence), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 18 (cohealth), 19 (Schembri & Co Lawyers), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 35 (Brockway Legal), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals), 16 (Regional Consultation—Ballarat Legal Professionals).

215 Submissions 1 (Judicial Advisory Group on Family Violence), 14 (Inner Melbourne Community Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

216 See, eg, consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

217 Submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

218 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

219 Submission 13 (Adviceline Injury Lawyers). See also submissions 38 (Ryan Carlisle Thomas Lawyers), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

220 See Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009 (2015)* 18 and *Victims of Crime Assistance Act 2009 (Qld)* sch 2 s 2. This amendment was inserted by *Victims of Crime Assistance and Other Legislation Amendment Act 2017 (Qld)* s 95(5).

221 Submission 19 (Schembri & Co Lawyers). Adviceline Injury Lawyers (Submission 13) submitted that it should be at least \$20,000 but recommended \$30,000.

222 Submission 13 (Adviceline Injury Lawyers).

223 Submission 41 (Springvale Monash Legal Service).

224 Submissions 13 (Adviceline Injury Lawyers), 38 (Ryan Carlisle Thomas Lawyers), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

225 Submission 13 (Adviceline Injury Lawyers).

226 Submission 38 (Ryan Carlisle Thomas Lawyers).

227 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

Discussion and recommendations

- 13.121 The Commission acknowledges stakeholder concerns regarding the existing structure of the award categories under the VOCAA.
- 13.122 In particular, the Commission notes stakeholder submissions that the existing categories of award should be restructured.²²⁸
- 13.123 The Commission considers that the current categories of award as provided by the VOCAA should be abolished and replaced with new simplified categories of award. In the Commission's view, this new approach should be modelled on the approach adopted in New South Wales.²²⁹
- 13.124 As noted above, the New South Wales victims of crime financial assistance scheme is based on four pillars of support:
- counselling
 - immediate needs—up to \$5000 to cover urgent expenses, including emergency medical treatment, relocation expenses, crime scene clean-up and safety measures in the home
 - financial assistance for economic loss—up to \$30,000 for out-of-pocket expenses, including loss of earnings,²³⁰ medical and dental expenses and justice-related expenses, such as the costs of having to attend court
 - recognition payments—a lump sum payment of up to \$15,000.²³¹
- 13.125 These distinct pillars of support were designed to target the unique and varying needs of victims of crime.²³² By establishing a separate stream for immediate needs, victims are able to receive urgent financial assistance in a more timely manner.²³³ Moreover, the separation of counselling support from other financial assistance allows victims to access counselling before making an application for financial assistance.²³⁴ The separate counselling pillar also enables victims to access ongoing counselling services—if required—even when a victim has exhausted the maximum quantum available for other forms of financial assistance.²³⁵
- 13.126 The structure of the NSW scheme also promotes victim accessibility through its clarity and simplicity. As the Victorian Victims of Crime Commissioner submitted, the pillar system reduces reliance on lawyers and supports scheme transparency.²³⁶
- 13.127 The Commission considers that adopting a similar approach in Victoria would help make it easier for victims to understand the types of assistance they may be eligible for, and enable a more flexible approach to providing assistance. In the Commission's view, each category of assistance should have a name that clearly indicates its purpose rather than having non-specific categories such as 'special financial assistance'. In naming the categories, the Commission has noted Springvale Monash Legal Service's submission that award categories should be described in ordinary terms to enable applicants to better understand what assistance they are entitled to claim.²³⁷
- 13.128 The Commission considers that improved clarity regarding award entitlements would also help to promote consistency and transparency in awards. In the Commission's view, this new approach would also better assist victims in their recovery journey by helping to

228 Submissions 14 (Inner Melbourne Community Legal), 25 (Public Health Association of Australia), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria). This was also noted as an option in submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

229 See *Victims Rights and Support Act 2013* (NSW).

230 Financial assistance for loss of earnings is capped at \$20,000: *ibid* ss 8(2)(b), 9(a).

231 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 6.

232 *Ibid* 53.

233 *Ibid* 58–9. See also consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

234 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

235 *Ibid*.

236 Submission 49 (Victims of Crime Commissioner, Victoria).

237 Submission 41 (Springvale Monash Legal Service).

ensure victims have better access to the assistance they need to recover from the harm suffered as a result of a criminal act.

New streams of assistance

- 13.129 The Commission considers that under the proposed Act victims should be eligible for assistance under the following six streams of assistance:
- 1) **immediate needs**—to replace interim awards under the existing scheme
 - 2) **funeral expenses**
 - 3) **counselling expenses**
 - 4) **practical assistance**—including assistance for health, housing and safety expenses; financial support; education and return to work; the replacement of lost or damaged clothing worn at the time of the criminal act; and other expenses necessarily incurred to access assistance under the scheme, such as travel and childcare costs.
 - 5) **recovery payments and recovery plans**—a lump sum payment which combines the functions of the recovery expenses and special financial assistance categories under the existing scheme; victims would also have the option of requesting a recovery plan to help manage this payment.
 - 6) **recognition**—a non-pecuniary category of assistance which provides recognition to victims through a recognition statement, victim conference and/or a pathway to restorative justice.
- 13.130 The Commission’s proposed approach is therefore similar to the NSW pillars model.
- 13.131 However, compared to the New South Wales scheme, the Commission’s proposed approach includes additional sub-categories of assistance, such as housing, education and return-to-work expenses. In the Commission’s view, these sub-categories of assistance correspond with the purpose and objectives of the proposed Act, and help clarify the types of assistance available. In addition, and instead of a recognition payment, the Commission considers that for the reasons discussed in Chapter 10, the recognition stream should provide non-pecuniary recognition to victims, with the lump sum recovery payment being focused on addressing victims’ material recovery needs.
- 13.132 The Commission’s proposed approach also accords with the Victims of Crime Commissioner’s submission that establishing a pillar system similar to that in New South Wales, would help to make the Victorian scheme more equitable, just and transparent, as well as reduce reliance on lawyers.²³⁸
- 13.133 In the Commission’s view, the proposed approach also responds directly to stakeholder concerns about the operation of the existing categories of award and the need for certain new categories.
- 13.134 Each stream of assistance is discussed further below. However, before doing so, this section first:
- considers whether the proposed Act should provide financial assistance for property loss or damage
 - explains the Commission’s proposal to abolish the existing recovery expenses and special financial assistance categories of assistance and combine them to create a new stream of assistance, ‘recovery payments and plans’.

The exclusion of property loss or damage

- 13.135 The Commission considers that the proposed Act should continue to provide that victims cannot receive financial assistance for property loss or damage, except in relation to relocation expenses and lost or damaged clothing. In the Commission's view, maintaining this exclusion would help safeguard the scheme's sustainability. As Michael Kirby wrote:
- the practical problems of providing a total form of compensation [that includes victims who suffer property loss or damage] are enormous and would appear to be so expensive as almost certainly to make them unacceptable and to delay unfairly the implementation of a scheme for victims of crimes causing death or bodily injury.²³⁹
- 13.136 The Commission is also of the view that continuing to exclude property loss and damage would help ensure that the scheme does not operate as a disincentive for property insurance.
- 13.137 However, as discussed above in Chapter 12, the Commission considers victims should be eligible for assistance for the psychological harm caused by property damage that occurs in the course of a criminal act.

Reconceiving recovery expenses and special financial assistance

- 13.138 In the Commission's view, the VOCAA's recovery expenses provisions, which limit the award of such expenses to where there are exceptional circumstances, create uncertainty. In particular, the Commission notes stakeholder concerns about the lack of clarity regarding what expenses are covered, inconsistent awards as a result of VOCAT's broad discretion to make such payments, and the narrow interpretation of exceptional circumstances. Taken together, the Commission considers that the practical operation of the provisions is to unfairly and inappropriately limit the award of assistance to aid recovery.
- 13.139 The Commission also acknowledges stakeholder views regarding the operation of the special financial assistance category of assistance. In particular, the Commission notes that providing a lump sum payment for symbolic recognition of a victim's experience may create an unhelpful hierarchy between victims based on whether or not they receive such a payment and the amount. The Commission also acknowledges stakeholder views that eligibility for special financial assistance is too limited and that the quantum of such payments should be increased. Finally, the Commission notes that the quantum ranges which currently apply to special financial assistance payments focus too much on the offence rather than its impact on the victim. At the same time, in the absence of guiding factors, the ranges provide too much discretion to Tribunal members in determining the amount of such payments.
- 13.140 To address the issues identified with the recovery expenses and special financial assistance categories of assistance under the existing scheme, the Commission considers that these two categories should be abolished in their present form and combined to create a new stream of assistance called 'recovery payments and plans', which would be available to all eligible victims under the proposed Act.
- 13.141 In the Commission's view, a recovery payment should be in the form of a lump sum payment. Rather than providing symbolic recognition of a victim's experience, it would be awarded to provide financial assistance for any recovery expenses that do not fit within the other streams of assistance. Recovery payments would therefore cover the types of expense that are currently provided for by the recovery expenses category. In addition to assisting with such expenses, the Commission considers that giving victims' full autonomy in determining their recovery expenses, and allowing them to design their own recovery pathway, would be empowering and may contribute to a victim's recovery.

- 13.142 A 'recovery plan' would allow victims who receive a recovery payment to allocate the payment to particular recovery expenses, and for the payments to be held in trust on their behalf. Except in certain circumstances as outlined below, the Commission considers that having a 'recovery plan' should be optional at the request of the victim.
- 13.143 The Commission's proposed recovery payments and plans stream of assistance—and how it addresses the issues associated with the recovery expenses and special financial assistance categories under the existing scheme—is discussed in detail in the section below, 'Recovery payments and plans'.

Recommendation—new streams of assistance

- 33** The proposed Act should provide that eligible victims may apply for the following streams of assistance:
- (a) immediate needs
 - (b) funeral expenses
 - (c) counselling
 - (d) practical assistance
 - (e) recovery payments and recovery plans—lump sum payments to assist in the victim's recovery
 - (f) recognition:
 - (i) recognition statement
 - (ii) victim conference (at victim's request)
 - (iii) pathway to restorative justice (at victim's request).

Immediate needs

- 13.144 This part discusses, and makes recommendations about, the circumstances in which victims may be granted financial assistance for their urgent and immediate needs, for example, urgent medical expenses or an immediate need for counselling. Currently these types of award are called 'interim awards'.

Current law

- 13.145 Applicants can apply for an interim award of assistance pending the final determination of their application.²⁴⁰
- 13.146 An interim award will be counted towards the total financial assistance available to victims up to the statutory limit of \$60,000 for primary victims and \$50,000 for secondary and related victims.²⁴¹ If an application is dismissed, VOCAT may order the applicant to repay the interim award.²⁴²

240 *Victims of Crime Assistance Act 1996* (Vic) s 56.
241 *Ibid* s 56(4).
242 *Ibid* s 56(3).

- 13.147 Interim awards may be awarded in any circumstances that VOCAT considers appropriate.²⁴³ On its website, VOCAT states that the majority of interim awards are made for counselling and funeral expenses.²⁴⁴ Since 2010, primary victims have also been able to access interim awards for safety-related expenses without needing to demonstrate exceptional circumstances.²⁴⁵
- 13.148 For example, VOCAT's website states that applicants who are attending the Magistrates' Court for the purposes of obtaining an interim intervention order under the *Family Violence Protection Act 2008* (Vic) may be eligible to apply for an interim award for safety-related expenses.²⁴⁶

Responses

- 13.149 In its supplementary consultation paper, the Commission asked whether interim awards are adequate to meet victims' needs, including with respect to quantum and timeliness.²⁴⁷
- 13.150 Most stakeholder concerns regarding interim awards related to timeliness. For example, the Victims of Crime Commissioner told the Commission that 'current evidentiary requirements and waiting times for interim payments ... make it extremely difficult and frustrating for victims to get the support they need, at times when they need it the most'.²⁴⁸
- 13.151 Some stakeholders also expressed concern about the requirement for applicants to reimburse an interim award if their application is ultimately unsuccessful. Inner Melbourne Community Legal stated that fear of having to reimburse an interim award 'can stop [applicants] from applying for much needed assistance'.²⁴⁹ In order to address this issue, as well as the delay in determining an application, Inner Melbourne Community Legal proposed adopting the NSW approach of having a separate 'immediate needs' category of award.²⁵⁰ This approach was also supported by safe steps Family Violence Response Centre.²⁵¹

Discussion and recommendations

- 13.152 As discussed above, the Commission considers that under the proposed Act, the existing categories of award under the VOCAA should be reformulated as six streams of assistance, and that one of these streams be awards for immediate needs.
- 13.153 The Commission acknowledges the benefits of having an immediate needs stream of assistance that victims can access. This category of award should be retained under the proposed Act and should be a separate and distinct category of award.
- 13.154 As is the case under the VOCAA, the Commission is of the view that the decision maker should have discretion to grant an award for immediate needs where the decision maker considers it is appropriate to do so. Stakeholders did not identify any issues with the current exercise of this discretion.
- 13.155 As discussed in the Commission's supplementary consultation paper, the fact that under the VOCAA interim awards are not final, and may be required to be reimbursed later or deducted from awards or varied, can result in uncertainty for applicants and inefficiency for the Tribunal.²⁵² Stakeholders confirmed that the requirement for applicants to

243 Ibid s 56(1).

244 Victims of Crime Assistance Tribunal, *Urgent Financial Assistance* (28 September 2016) <www.vocat.vic.gov.au/assistance-available/urgent-financial-assistance>.

245 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 37. See also Victims of Crime Assistance Tribunal, *Safety-Related Expenses: Victims of Crime Assistance Tribunal*, Information Sheet (2010).

246 Victims of Crime Assistance Tribunal, *Assistance Available—Safety-related Expenses* (2017) <www.vocat.vic.gov.au/assistance-available/financial-assistance-available/safety-related-expenses>.

247 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 86.

248 Submission 49 (Victims of Crime Commissioner, Victoria). See also submission 37 (safe steps Family Violence Response Centre).

249 Submission 14 (Inner Melbourne Community Legal).

250 Ibid.

251 Submission 37 (safe steps Family Violence Response Centre).

252 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 85–6.

reimburse interim awards if unsuccessful may prevent victims from seeking assistance for their immediate needs.²⁵³

- 13.156 To address these concerns, the Commission considers that awards for immediate expenses should be final and that applicants should not be required to refund such awards in the event that their application for other forms of assistance is unsuccessful. However, the Commission notes that applicants seeking an award of financial assistance for immediate needs would still be required to satisfy the eligibility criteria under the proposed Act, as discussed in Chapter 12—for example, they would need to establish that they were the victim of a criminal act and, depending on the type of criminal act, may also need to establish that they suffered an injury as a result of that criminal act.
- 13.157 To help ensure the sustainability of the proposed scheme, the Commission considers that there should be a monetary cap on the amount that can be awarded to a victim for immediate needs. As in New South Wales, the Commission considers that the maximum amount that may be awarded for immediate needs should be prescribed by regulation.²⁵⁴ In New South Wales, this amount is currently \$5000.²⁵⁵ The Commission considers that this quantum cap should also apply under the proposed scheme.
- 13.158 In addition, and to further ensure the sustainability of the proposed scheme, the Commission considers that the scheme decision maker should have discretion to take into account any amount previously awarded to a victim for immediate needs when determining the amount of assistance to award that victim under other streams of assistance.
- 13.159 The Commission also acknowledges stakeholder concerns regarding the timeliness of the determination of interim awards under the existing scheme. The Commission discusses, and makes recommendations about, timeframes for decision making under the proposed Act—including the determination of applications for assistance for immediate needs—in Chapter 15.

Recommendation—immediate needs

- 34** The proposed Act should provide that an award for immediate needs:
- (a) may be made where the scheme decision maker considers it appropriate to do so
 - (b) is final and is not required to be refunded where a victim’s application/s for other streams of assistance is unsuccessful
 - (c) may be taken into account in determining the amount of assistance to award a victim under other streams of assistance, where a victim’s application/s for such other streams is successful.

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Submission 14 (Inner Melbourne Community Legal). See also submission 37 (safe steps Family Violence Response Centre).
Victims Rights and Support Act 2013 (NSW) s 26(1)(b).
Victims Rights and Support Regulation 2013 (NSW) reg 8(1).

Funeral expenses

Current law

- 13.160 Under the VOCAA, related victims can make a claim for assistance for funeral expenses incurred as a direct result of the death of the primary victim.²⁵⁶
- 13.161 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.²⁵⁷
- 13.162 The quantum of awards for funeral expenses is not prescribed by the VOCAA but VOCAT has adopted guidelines to assist VOCAT in determining whether funeral expenses claims are reasonable.²⁵⁸ VOCAT's guidelines outline the types of funeral expense covered and what VOCAT considers to be reasonable amounts for each of these expenses. For example, the guideline states that the reasonable total cost of a burial is \$15,235, which includes cemetery fees, the cost of a coffin or casket and other associated costs.²⁵⁹
- 13.163 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.²⁶⁰

Responses

- 13.164 In the supplementary consultation paper, the Commission asked whether the VOCAA should be amended to reflect the rising cost of funerals and whether funeral expenses should be excluded from the total maximum cumulative amount of assistance available for a pool of related victims.²⁶¹
- 13.165 A number of stakeholders told the Commission that the current maximum amount for funeral expenses is insufficient and does not reflect the rising cost of funerals.²⁶²
- 13.166 One stakeholder submitted that any new quantum for funeral expenses should be indexed and subject to annual review by the Governor-in-Council.²⁶³
- 13.167 Another stakeholder told the Commission that the quantum available for funerals should be flexible and reflect different cultural requirements—for example, more may be awarded where an applicant's culture requires a family member to travel with the body of a victim to be repatriated.²⁶⁴
- 13.168 In a consultation meeting with victim representatives, the Commission also heard that one applicant had encountered difficulties trying to claim assistance for the cost of cremation.²⁶⁵
- 13.169 A number of stakeholders also expressed concern about funeral expenses being included in the related victim pool, as they can deplete the pool.²⁶⁶

Discussion and recommendations

- 13.170 The Commission considers that under the proposed Act, the existing categories of award under VOCAA should be reformulated as six streams of assistance, and that one of these streams should be for 'funeral expenses'.

256 *Victims of Crime Assistance Act 1996* (Vic) s 13(2)(b).

257 *Ibid* s 15.

258 Victims of Crime Assistance Tribunal, *Funeral Expenses*, Guideline 3 of 2016 (1 January 2016) <www.vocat.vic.gov.au/vocat-guideline-3-2016-financial-assistance-funeral-expenses>.

259 *Ibid*.

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

261 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 81.

262 Submissions 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 35 (Brockway Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

263 Submission 27 (Name withheld).

264 Submission 18 (cohealth).

265 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

266 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 18 (cohealth), 27 (Name withheld), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

- 13.171 Stakeholders agreed that the scheme should continue to reimburse those who incur funeral expenses for a person who died as a result of a criminal act.
- 13.172 The Commission considers that under the proposed Act, any person who has incurred, or will incur, funeral expenses for a person who has died as a result of a criminal act should continue to be eligible for financial assistance, regardless of whether they are a victim under the proposed Act.
- 13.173 The Commission acknowledges stakeholder concerns regarding funeral expenses as an expense that reduces the maximum cumulative amount that may be awarded to a victim, and to a pool of related victims.
- 13.174 However, the Commission considers that under the proposed Act, any funeral expenses should not reduce the amount of assistance a victim may otherwise be eligible for, or reduce the amount that any other victim may claim in relation to the same criminal act.²⁶⁷
- 13.175 The Commission also acknowledges stakeholder views that the current amounts listed in the guidelines as indicative of reasonable funeral expenses may be inadequate for some victims. However, to help ensure the sustainability of the proposed scheme, the Commission considers that only reasonable funeral expenses should be covered, and that what constitutes reasonable funeral expenses should be outlined in guidelines. These amounts should be periodically reviewed in line with rising costs and inflation. The requirement for expenses to be reasonable more generally is discussed further below.
- 13.176 However, the Commission also considers that the guidelines should provide that the scheme decision maker may award funeral expenses that exceed the reasonable amounts listed in the guidelines where the scheme decision maker considers it reasonable in the victim's circumstances to do so, including where this is necessary to accommodate cultural requirements, for example, where an applicant's culture requires a family member to travel with the body of a victim to be repatriated.²⁶⁸
- 13.177 In light of the approach of other jurisdictions, and in the interests of sustainability, the Commission considers that a cap should apply to limit the overall maximum amount that may be claimed for funeral expenses. The Commission considers that this amount should be \$15,000, which is broadly consistent with the total maximum available under the current VOCAT guidelines for funeral expenses.²⁶⁹
- 13.178 The Commission acknowledges that some stakeholders expressed the view that amounts available for funeral expenses under the existing scheme are inadequate.²⁷⁰ However, the Commission notes that a total maximum of \$15,000 is already significantly higher than the total maximum amount available for funeral expenses in other jurisdictions. For example, Queensland, the Australian Capital Territory and New South Wales each impose a cap of \$8,000 on funeral expenses.²⁷¹ Recommendations regarding total maximum quantum of assistance are outlined below.

267 This is the approach in New South Wales: see *Victims Rights and Support Act 2013* (NSW). A maximum amount applies for each 'pillar' of assistance, with the effect that an award under one pillar does not reduce the amount available under another. See also submission 49 (Victims of Crime Commissioner, Victoria) where the NSW Scheme is also discussed.

268 Submission 18 (cohealth).

269 The reasonable total cost of a burial is currently considered to be \$15,235, which includes cemetery fees, the cost of a coffin or casket and other associated costs: Victims of Crime Assistance Tribunal, *Funeral Expenses*, Guideline 3 of 2016 (1 January 2016) <www.vocat.vic.gov.au/vocat-guideline-3-2016-financial-assistance-funeral-expenses>.

270 Submissions 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 35 (Brockway Legal). See also Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

271 Queensland Government, *Financial Assistance Available and Who Can Apply* (6 November 2017) <www.qld.gov.au/law/crime-and-police/victims-and-witnesses-of-crime/financial-assistance/victims-categories>; Department of Justice (NSW), *Guide: Financial Support for Family Members of Homicide Victims* (July 2016) <www.victimsservices.justice.nsw.gov.au/Documents/fs_family-members.pdf>; ACT Human Rights Commission, Victims of Crime Commissioner, *Guide to Completing a Financial Assistance Application (Funeral Expenses)* (30 June 2017) <www.victimssupport.act.gov.au/_data/assets/pdf_file/0011/1078931/Funeral-Assistance-GUIDE-TO-COMPLETING-AN-APPLICATION-post-1-July-2017.pdf>.

Recommendations—funeral expenses

- 35** The proposed Act should provide that an award for funeral expenses may be made by the scheme decision maker to any person who has incurred, or will incur, the funeral expenses of a person who has died as a result of a criminal act.
- 36** To assist the scheme decision maker in determining awards for funeral expenses, guidelines should be developed and should be made publicly available.

Counselling

Current law

- 13.179 Under the VOCAA, primary, secondary and related victims are eligible for expenses actually incurred, or reasonably likely to be incurred, for ‘reasonable counselling services’.²⁷² All applications for counselling must be made using the prescribed Application for Counselling form.²⁷³
- 13.180 Where an applicant is seeking counselling for the first time since the act of violence, VOCAT will usually pay for the first five hours of counselling for the purposes of providing ‘psychological first aid’.²⁷⁴
- 13.181 If an applicant is seeking an award of more than five hours of counselling, or has already received five hours of counselling through another scheme (such as the Victims Assistance and Counselling Program), the application must be accompanied by a treatment plan.²⁷⁵ The victim must have authorised the treatment plan, which must then be approved by VOCAT. An award will authorise the applicant to incur counselling expenses for services provided by a particular counsellor in accordance with the treatment plan.
- 13.182 Under the VOCAA, all applications for counselling must be accompanied by a report from the victim’s treating counsellor.²⁷⁶
- 13.183 If the victim seeks additional assistance for counselling expenses beyond what VOCAT initially awarded, an additional report must be provided.²⁷⁷ VOCAT will only make an award for additional counselling expenses where it is satisfied of various factors, including whether there is ‘proper clinical justification’ and whether it is ‘likely to be effective in achieving and maintaining the victim’s recovery’.²⁷⁸
- 13.184 Victims’ and counsellors’ travel expenses for counselling services are not included in a counselling award.²⁷⁹ However, an applicant may make a separate request for such expenses.²⁸⁰
- 13.185 There is no cap on the number of counselling sessions that a victim may be awarded, nor on the overall quantum of a counselling award (although the expenses must be reasonable). However, the applicant’s treatment plan must specify the number of counselling sessions recommended by the counsellor. If VOCAT makes an award for these

272 *Victims of Crime Assistance Act 1996* (Vic) ss 8(2)(a), 10(2)(a), 13(2)(a).

273 Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2014—Awards for Counselling Expenses*, 1 July 2014, 2.

274 *Ibid.*

275 *Ibid.*

276 *Ibid.* 3. The Practice Direction states that ‘the report is the basis for measuring the effectiveness of the treatment provided, and will be relevant in the assessment of any future application or an award for further counselling expenses’: at 2.

277 *Ibid.* 3.

278 *Ibid.* 2.

279 *Ibid.* 4.

280 *Ibid.* See also Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2016—Award of Assistance for Travel Expenses*, 11 December 2015.

sessions, any application for counselling beyond these sessions must be accompanied by an additional report which again outlines a treatment plan and specifies the number of recommended counselling sessions.²⁸¹

- 13.186 The Chief Magistrate has issued a Guideline to aid VOCAT in awarding financial assistance relating to counselling reports and sessions.²⁸²
- 13.187 Under the VOCAA, any amount awarded for counselling expenses is included in the total maximum quantum for which the victim is eligible—\$60,000 for primary victims (in addition to \$10,000 for special financial assistance) and \$50,000 for secondary and related victims.²⁸³

Responses

- 13.188 A number of stakeholders told the Commission that awards for counselling should be treated differently to other expenses, because of the importance of counselling in helping victims recover from trauma. Proposals included:
- providing ongoing counselling without a time limit or maximum number of sessions²⁸⁴
 - having different eligibility criteria for counselling²⁸⁵
 - awarding counselling separately from other types of financial assistance²⁸⁶
 - having another body administer counselling awards.²⁸⁷
- 13.189 The most common submission in relation to counselling awards was that such awards should be ongoing and not limited by time period or number of sessions. Some stakeholders submitted that all victims should be eligible for ongoing counselling,²⁸⁸ while knowmore made this submission in relation to victims of child abuse.²⁸⁹ Many of the stakeholders supporting this view were victim representatives.²⁹⁰
- 13.190 In a consultation with victim representatives, the Commission heard that victims of crime may need ongoing counselling for many years to manage their trauma.²⁹¹ The Commission was also told that decisions about whether to grant financial assistance for additional counselling should not focus on whether the counselling is achieving recovery for the victim, but whether it is assisting the victim.²⁹²
- 13.191 Victim representatives also told the Commission that victims should not be required to fill out additional forms or ‘re-apply’ for counselling, as such requirements can be re-traumatising.²⁹³ Furthermore, it may be important for victims to know that free counselling will always be available and that they will not have to ‘jump through hoops’ to access it.²⁹⁴

281 Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2014—Awards for Counselling Expenses*, 1 July 2014. See attached Form 3 ‘Subsequent Report—Recommendation for Additional Hours of Counselling’ (July 2014) 3.

282 Victims of Crime Assistance Tribunal, *Cost Guideline (Counselling)*, Guideline 2 of 2018 (29 December 2017) <www.vocat.vic.gov.au/index.php/vocat-guideline-2-2018-cost-guideline-counselling>.

283 *Victims of Crime Assistance Act 1996* (Vic) ss 8(1), 8A, 10(1), 13(1).

284 Submissions 4 (Crime Victims Support Association), 6 (Forgetmenot Foundation Inc.), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 43 (knowmore)—child sexual abuse, 57 (Victims of Crime Assistance League); Consultations 8 (Victims Representatives—Victims of Crime Consultative Committee), 18 (PartnerSPEAK)—in relation to partners and children of online sex offenders.

285 Submissions 1 (Judicial Advisory Group on Family Violence), 10 (Eastern Metropolitan Regional Family Violence Partnership); Consultation 18 (PartnerSPEAK).

286 Submission 10 (Eastern Metropolitan Regional Family Violence Partnership). Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria) proposed removing counselling expenses from the related victim pool.

287 Submission 15 (Merri Health Victims Assistance Program).

288 Submissions 4 (Crime Victims Support Association), 6 (Forgetmenot Foundation Inc.), 57 (Victims of Crime Assistance League); Consultations 8 (Victims Representatives—Victims of Crime Consultative Committee), 18 (PartnerSPEAK)—in relation to partners and children of online sex offenders.

289 See, eg, submission 43 (knowmore).

290 Submissions 4 (Crime Victims Support Association), 6 (Forgetmenot Foundation Inc.), 57 (Victims of Crime Assistance League); Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

291 Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

292 Submissions 32 (Australian Psychological Society), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service). See also the discussion in the Commission’s supplementary consultation paper in relation to the provision of counselling where a victim is not demonstrating ‘improvement’ in relation to the VOCAA’s requirement that the assistance be ‘reasonable’: Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 83.

293 Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

294 Ibid.

- 13.192 Knowmore told the Commission that if counselling were ongoing, victims' counselling expenses should be subject to ongoing review.²⁹⁵
- 13.193 The NSW financial assistance scheme for victims of crime provides ongoing counselling in certain circumstances. The NSW Commissioner of Victims Rights may authorise payment for an initial 10 counselling sessions and 'for such further periods of counselling' as the Commissioner considers appropriate, up to a total of 22 sessions.²⁹⁶ In a consultation meeting with the NSW Commissioner of Victims Rights and Victims Services NSW, the Commission was told that applicant victim is able to exceed this amount upon the recommendation of the counsellor.²⁹⁷ The *Victims Rights and Support Regulation 2013* (NSW) provides that this may only occur where the Commissioner is 'satisfied that there are exceptional reasons for doing so'.²⁹⁸ The Commission was told that the highest number of hours granted to an individual was 360 hours.²⁹⁹
- 13.194 Rather than making counselling awards ongoing, some stakeholders proposed simplifying the variation process in relation to counselling. For example, Women's Legal Service Victoria and Domestic Violence Victoria proposed:
- Insert[ing] provisions into the Act that allow applications by survivors of family violence to vary [awards] to be simplified, including giving consideration to contingency award options for additional counselling to avoid delays in accessing counselling for survivors of family violence.³⁰⁰
- 13.195 There was some support for expanding the eligibility requirements in relation to counselling.³⁰¹ For example, some members of the Judicial Advisory Group on Family Violence supported counselling being made available to victims of non-criminal family violence.³⁰² PartnerSPEAK proposed that counselling assistance be made available for the partners and children of online sex offenders, in addition to other forms of assistance.³⁰³ PartnerSPEAK told the Commission that the partners of online sex offenders often suffer post-traumatic stress disorder upon learning about their partner's offending behaviour.³⁰⁴
- 13.196 Broadening the eligibility criteria for counselling to include these groups would be consistent with the approach taken in New South Wales. In a consultation meeting with the NSW Commissioner of Victims Rights, the Commission was told that in New South Wales, the eligibility requirements are easier to satisfy for counselling assistance than for other forms of financial assistance.³⁰⁵ Victims of non-criminal family violence, including financial and psychological abuse, and the partners and children of online sex offenders are able to access counselling support.³⁰⁶ Reports from these counselling sessions can be used to substantiate a claim for other pillars of financial assistance.³⁰⁷ The Commission was told that it may emerge during counselling that a victim is eligible for other forms of assistance.

295 Submission 43 (knowmore).

296 *Victims Rights and Support Regulation 2013* (NSW) regs 5(1), 5(3).

297 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

298 *Victims Rights and Support Regulation 2013* (NSW) reg 5(3).

299 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

300 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

301 Submissions 1 (Judicial Advisory Group on Family Violence), 10 (Eastern Metropolitan Regional Family Violence Partnership); Consultation 18 (PartnerSPEAK).

302 Submission 1 (Judicial Advisory Group on Family Violence).

303 Consultation 18 (PartnerSPEAK).

304 Ibid.

305 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

306 Ibid.

307 Ibid.

13.197 Another proposal was that counselling support should be provided separately to other forms of financial assistance so that it can be delivered in a more timely way.³⁰⁸ As the Eastern Metropolitan Regional Family Violence Partnership explained:

If financial assistance was awarded specifically for counselling before any other kind of category was reviewed for eligibility, the victim could begin therapy and thereby potentially lessen any PTSD symptoms on their path to recovery.³⁰⁹

13.198 Merri Health Victims Assistance Program submitted that financial assistance for counselling for victims of crime should be administered through the Victims Assistance Program rather than VOCAT because this ‘would simplify the process for victims and make this process timelier’ and that ‘the Victims Assistance Program is ideally placed to support victims with counselling’.³¹⁰

Discussion and recommendations

13.199 The Commission acknowledges stakeholder views that awards of financial assistance for counselling are important to victims’ recovery and that currently, various barriers undermine the effectiveness of such awards and their therapeutic purpose. In particular, the Commission notes the significant administrative burden on victims in applying for assistance for counselling expenses, including the need to re-apply after the completion of an approved treatment plan, which can cause delays and interruptions.

13.200 In addition, the Commission notes that under the existing scheme any financial assistance awarded for counselling contributes to the overall maximum quantum to which a victim is eligible. This can reduce the amount of assistance available for other expenses. Awards for other types of assistance can also reduce the quantum for counselling.

13.201 The Commission also acknowledges that the six-year period within which a victim can access assistance under the VOCAA means that long-term counselling is not available. This is despite the fact that trauma and other psychological harm may be re-triggered by various events and milestones, and may re-emerge many years after the crime.

13.202 The Commission considers that all streams of assistance should operate independently of each other, including the counselling stream, so that any amount awarded to a victim for one stream does not reduce the amount of assistance that may be available to the same victim under other streams. This is similar to the approach taken in New South Wales where awards for counselling do not reduce the quantum available for other types of assistance.³¹¹

13.203 Similarly to the approach in New South Wales, the Commission considers that under the proposed Act, victims should be eligible for the reasonable costs of up to 20 counselling sessions, and in exceptional circumstances, for any number of further counselling sessions as may be required, without any time limit or quantum cap. This would mean that a victim could continue to receive financial assistance for counselling on the basis of individual need, regardless of how long ago the criminal act occurred. In practice, the Commission notes that most victims are unlikely to exceed 20 counselling sessions—according to the Victims Support Agency:

The vast majority of VOCAT applicants use less than 10 sessions, with very few using more than 25 sessions.³¹²

308 Submission 10 (Eastern Metropolitan Regional Family Violence Partnership).

309 Ibid.

310 Submission 15 (Merri Health Victims Assistance Program).

311 *Victims Rights and Support Act 2013* (NSW).

312 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 63.

- 13.204 However, in the interests of sustainability, the Commission considers that victims should only be eligible for financial assistance for reasonable counselling costs. Currently, guidelines issued by the Chief Magistrate provide that counselling awards must be paid in accordance with the specified fees. The Commission considers that similar guidelines should be developed to guide decision makers under the proposed scheme. This is discussed further below.
- 13.205 In addition, to help reduce the administrative burden placed on applicants, the Commission considers that victims should be able to make a request for further counselling to the scheme decision maker, who would then determine whether exceptional circumstances exist.
- 13.206 The Commission considers that in determining whether exceptional circumstances exist, the scheme decision maker should be required to consider certain factors identified in publicly available guidelines. These factors should include whether the counselling is assisting, or would assist the victim, and not whether there has been or will be a tangible improvement in their recovery at the time at which the application is made. In the Commission's view, this approach would help improve the transparency of awards and would respond to stakeholder concerns that decisions about whether to grant financial assistance for additional counselling are currently focused on whether the counselling is achieving recovery for the victim, rather than whether it is assisting the victim.³¹³
- 13.207 The Commission considers that the guidelines should also specify, for the purposes of the proposed scheme, the reasonable cost per counselling session and for report writing.
- 13.208 To further reduce the administrative burden for victims, the Commission considers that the scheme decision maker should be empowered under the proposed Act to obtain information from the victim's counsellor for the purposes of determining the application, where the victim so consents.
- 13.209 The power to determine applications for counselling should be delegated to scheme case managers. This approach responds to stakeholder concerns that it can be traumatising for victims to have to prove their need for further counselling after experiencing a traumatic crime, and would also help to streamline the assistance process.
- 13.210 In the Commission's view, this proposed approach would help ensure that all victims are able to access as much counselling as is reasonably necessary to assist in their recovery.
- 13.211 The Commission acknowledges that counselling has been made available to a broader range of persons under the NSW financial assistance scheme for victims of crime, including victims of non-criminal family violence, and that some stakeholders proposed a similar expansion in Victoria.
- 13.212 However, in the Commission's view, such an expansion may threaten the sustainability of the proposed scheme and is inconsistent with its proposed purpose. The Commission therefore considers that counselling assistance should be limited to persons who are victims as defined under the proposed Act.

Recommendations—counselling

- 37** The proposed Act should provide that an award for the reasonable costs of counselling may be made by the scheme decision maker:
- (a) on initial application, for up to 20 counselling sessions
 - (b) in exceptional circumstances, as determined on application, for such further counselling sessions as are required.
- 38** To assist the scheme decision maker in determining awards for counselling, guidelines should be developed and should be made publicly available.

Practical assistance

Current law

13.213 Under the VOCAA, primary victims are currently eligible for the following types of assistance that would fall within the new ‘practical assistance’ category of award:

- medical expenses as a direct result of the act of violence³¹⁴
- loss of earnings of up to \$20,000 as a direct result of the act of violence³¹⁵
- loss or damage to clothing worn at the time of the act of violence³¹⁶
- safety-related expenses as a direct result of the act of violence.³¹⁷

13.214 Under the VOCAA, secondary victims are eligible for 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.³¹⁸ In exceptional circumstances secondary victims may also be eligible for up to \$20,000 for loss of earnings.³¹⁹

13.215 Related victims are eligible for:

- 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 victim³²⁰
- distress experienced or reasonably likely to be experienced as a direct result of the death of the primary victim³²¹
- 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 death³²²
- other expenses actually and reasonably incurred or reasonably likely to be incurred as a direct result of the primary victim’s death.³²³

13.216 In addition, all victims may claim travel expenses necessarily incurred by completing a travel expenses declaration form.³²⁴

314 *Victims of Crime Assistance Act 1996* (Vic) s 8(2)(b).

315 *Ibid* s 8(2)(c).

316 *Ibid* s 8(2)(d).

317 *Ibid* s 8(2)(e).

318 *Ibid* s 10(2).

319 *Ibid* s 10(3).

320 *Ibid* s 13(2)(b).

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

322 *Ibid* s 13(2)(d).

323 *Ibid* s 13(2)(e).

324 *Victims of Crime Assistance Tribunal, Practice Direction No 1 of 2016—Award of Assistance for Travel Expenses*, 11 December 2015, Form 1, ‘Travel Expenses Declaration Form’. The Practice Direction fixes a per kilometre rate at which VOCAT may reimburse expenses incurred by an applicant for travel by car. Claims for other types of travel expenses must be accompanied by an invoice, receipt or ticket for the cost of the travel: at 1.

Responses

- 13.217 The issues raised by stakeholders in relation to the existing categories of award, and stakeholder proposals for new categories of award, are outlined above. In particular, stakeholders expressed concern that under the VOCAA, victims are not expressly entitled to certain types of assistance that may be important for their recovery, including assistance for relocation and resettlement expenses,³²⁵ therapeutic expenses such as mobility aids,³²⁶ childcare expenses incurred to access assistance such as counselling,³²⁷ re-education and return-to-work expenses,³²⁸ and financial counselling.³²⁹
- 13.218 The following section outlines how the Commission's proposed new practical assistance stream would operate, including the scope of coverage of each sub-category, and how it would address the concerns raised by stakeholders in relation to the existing types of assistance available under the VOCAA.

Discussion and recommendations

- 13.219 In the Commission's view, all victims should be eligible to receive financial assistance for practical expenses to address their basic needs which may have been impacted by the crime, including in relation to health, housing, safety and financial security. The practical assistance stream should cover some types of assistance that are currently available under the VOCAA, such as medical expenses, loss of earnings, safety expenses, and loss of or damage to clothing worn by the victim at the time of the criminal act.
- 13.220 The Commission notes that some of the categories of practical assistance under the VOCAA currently meet victims' needs. In particular, the interpretation of 'medical expenses' under the VOCAA has enabled victims to claim for a wide range of therapeutic expenses. In *Ractliffe v Victims of Crime Assistance Tribunal*,³³⁰ the cost of an occupational therapy assessment for the purpose of regaining a driver's licence was considered to be a medical expense.³³¹
- 13.221 However, the Commission also acknowledges stakeholder concerns that other categories of practical assistance under the VOCAA are limited and do not adequately address the needs of some victims. In particular, stakeholders told the Commission that some types of assistance, such as for housing expenses and expenses relating to return-to-work programs, are not expressly available under the VOCAA.³³² This is despite the fact that they may be important in assisting a victim to recover from a criminal act. To address these concerns, the Commission considers that the practical assistance stream should include financial assistance for the following sub-categories of expense:
- health expenses, including medical expenses and therapeutic supports
 - housing expenses, including both relocation and resettlement expenses
 - safety-related expenses
 - financial support, include loss of earnings, dependency payments and financial counselling
 - expenses related to education and returning to work
 - lost or damaged clothing worn at the time of the criminal act
 - other expenses reasonably incurred to access assistance provided under the proposed Act or to attend justice-related appointments for the purpose of making an application under the proposed Act.

325 Submission 14 (Inner Melbourne Community Legal).

326 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

327 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre)—but only for primary victims, as the submission refers to amending section 8 of the VOCAA.

328 Submission 14 (Inner Melbourne Community Legal).

329 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

330 [2015] VCAT 205 (4 March 2015).

331 Ibid [14].

332 See, eg, submissions 14 (Inner Melbourne Community Legal), 45 (Daniel Myles et al).

- 13.222 The type of assistance that the Commission considers should be available within each of these sub-categories is discussed below.
- 13.223 However, as is currently the case under the VOCAA, the Commission considers that practical assistance under the proposed Act should only be available where a decision maker considers such expenses to be reasonable. The requirement for an expense to be reasonable is also discussed below.

Health

- 13.224 The Commission considers that under the health sub-category of the practical assistance stream, victims should be eligible for awards of financial assistance to cover medical expenses, as is the case under the VOCAA. This stream of assistance would cover, for example, medical, dental and pharmaceutical expenses.
- 13.225 In response to stakeholder views that victims' health needs can generate expenses beyond immediate medical expenses, the Commission considers that victims should be able to access financial assistance for personal care expenses related to health needs, including mobility aids, home modifications, and in-home care.
- 13.226 Broadening the type of health expenses that can be claimed would provide holistic support that recognises victims' ongoing and longer-term health needs and any adjustments needed to accommodate them.
- 13.227 The Commission acknowledges the considerable burden placed on family members who assume the role of carer as a result of a criminal act, and some stakeholders suggested that this burden should be recognised and addressed by the proposed scheme.³³³ However, in the interests of scheme sustainability, the Commission considers such assistance should not extend to the carers of victims injured by a criminal act. In addition, the Commission notes that under its proposed expansive definition of victim under the proposed Act, carers who establish that they had a close personal relationship with a person who was injured or died as a result of a criminal act would be eligible to apply for financial assistance under the proposed Act, as a victim in their own right.

Housing

- 13.228 The Commission considers that the housing sub-category of assistance should enable financial assistance to be provided for housing-related expenses, including rental assistance and relocation and resettlement costs.
- 13.229 The Commission acknowledges stakeholder views that after experiencing a criminal act, victims' housing needs often encompass both relocation and resettlement costs. While the Commission was told that VOCAT awards relocation expenses in some circumstances, victims' entitlement to such expenses, and which category they fall under, is unclear. As Inner Melbourne Community Legal submitted, assistance for emergency housing is often provided as a safety-related expense but many victims of family violence also lose access to their furniture and personal effects and need assistance in this regard.³³⁴
- 13.230 The Commission therefore considers that the housing sub-category should include both relocation and resettlement expenses. Relocation expenses should include costs associated with moving and storage,³³⁵ while resettlement expenses should include the costs of items such as furniture to enable victims to re-establish themselves in a new home.³³⁶ The Commission acknowledges that this type of assistance may be particularly important for victims of family violence who may be required to leave their home and may lose access to their furniture and possessions.³³⁷

333 See submission 45 (Daniel Myles et al).
334 Submission 14 (Inner Melbourne Community Legal).
335 Ibid.
336 Ibid.
337 Ibid.

- 13.231 The Commission considers that explicitly stating that victims are eligible for financial assistance for relocation and resettlement as part of the housing sub-category would provide greater clarity to applicants regarding the types of assistance available. This would also promote consistency, as it would help ensure that all applicants who need assistance with housing expenses apply for it, rather than only those who are made aware of this type of assistance through the advice of their legal representative.

Safety

- 13.232 As outlined in the Commission's supplementary consultation paper,³³⁸ the introduction of awards for safety-related expenses in 2010 has been 'generally considered to be a positive step'.³³⁹ The Commission has been told that this category of assistance is viewed as especially useful for victims of family violence,³⁴⁰ who often face ongoing concerns for their safety.
- 13.233 Accordingly, the Commission considers that this sub-category of assistance should be retained and that awards should be able to be made for both short and long-term security expenses, including window or lock repairs and self-defence courses.

Financial support

- 13.234 Similarly to the VOCAA,³⁴¹ the Commission considers that victims should continue to be eligible for financial assistance for loss of earnings if they were working at the time of the criminal act and are unable to work due to injury or their involvement in the criminal trial, and they cannot receive income assistance elsewhere.
- 13.235 However, the Commission considers that the current time limit—which only allows victims to claim loss of earnings within the two years following the offence—should be abolished under the proposed Act. This shift in approach would reflect the fact that a victim's recovery may not be a linear process and that a victim may suffer loss of earnings as a result of the crime beyond this timeframe.
- 13.236 As is the case under the VOCAA, the Commission considers that victims who were dependent on a person who died as a result of a criminal act should be eligible under the financial support stream of assistance for loss of money they would have received from that person, had the criminal act not occurred. This would be consistent with the joint submission received from VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria, which supported retaining dependency payments.³⁴²
- 13.237 However, as discussed in Chapter 12, the Commission is of the view that a person who was dependent on the income of another person who was injured as a result of a criminal act should also be eligible for financial support under the proposed Act, where the injury has impacted on that other person's ability to earn an income and therefore provide financial support to the applicant.
- 13.238 The Commission acknowledges the view expressed by some stakeholders that some victims may find it difficult to manage their finances in the aftermath of a crime, for example, due to the effects of trauma.
- 13.239 The Commission therefore considers that under the proposed Act, victims should be eligible for financial assistance for financial counselling expenses as part of the financial support stream of assistance. This would provide victims with support in managing their financial affairs more broadly. In addition, as discussed below, the Commission considers

338 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 82.

339 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 48.

340 Ibid.

341 *Victims of Crime Assistance Act 1996* (Vic) s 8(2)(c).

342 However, only in relation to children and spouses or de facto partners of a primary victim: submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

that victims who are awarded a lump sum recovery payment under the proposed Act should be able to request a recovery plan to help allocate their lump sum to specific recovery expenses.

- 13.240 The Commission acknowledges stakeholder views that victims who are unemployed at the time of the crime are ineligible for assistance for loss of earnings despite the fact that their future earning potential may have been affected. However, in the interests of scheme sustainability, the Commission considers that financial assistance for loss of earnings should continue to be available only to those who can demonstrate actual loss of earnings. Furthermore, the Commission considers that the 'education and return to work' category of assistance would address this gap, as discussed below.
- 13.241 Currently, the VOCAA imposes a cap of \$20,000 on claims for loss of earnings. The Commission acknowledges that this amount may not cover the full extent of loss of earnings suffered by a victim. However, in the interests of ensuring scheme sustainability, the Commission considers that this cap should be retained in relation to awards for financial support.
- 13.242 The Commission also notes that other publicly funded schemes, such as Centrelink, are likely to provide assistance for victims who were dependent on someone who died or was injured as a result of a criminal act, and for victims who suffer long-term loss of earnings.

Education and return to work

- 13.243 Stakeholders told the Commission that return-to-work programs and re-education opportunities are very important for victims' recovery.³⁴³ This is particularly so for victims who were unemployed or studying at the time of the crime, who have had their future employment trajectory affected, but are ineligible for assistance for loss of earnings. The Commission therefore considers that under the proposed Act, victims should be eligible for assistance to help cover these expenses.
- 13.244 Under the VOCAA, financial assistance is often provided for education and return-to-work expenses. However, Inner Melbourne Community Legal stated that 'better clarity around what they can generally claim would assist applicants to understand their entitlements'.³⁴⁴ In the Commission's view, having a separate sub-category for 'education and return to work' would provide this clarity.
- 13.245 The Commission considers that guidelines should be produced which outline the types and/or amounts of expense that the scheme considers to be 'reasonable'. This is discussed further below.

Lost or damaged clothing

- 13.246 Stakeholders did not identify any issues with the VOCAA provisions that allow for awards to cover the cost of any lost or damaged clothing.
- 13.247 The Commission therefore considers that financial assistance for this type of expense should be retained.

Other expenses

- 13.248 In the Commission's view, a sub-category of 'other expenses' should be included in the practical assistance stream to cover additional expenses that victims reasonably incur:— for example, travel or childcare costs to enable a victim to attend counselling sessions. In addition, this sub-category should cover costs reasonably incurred to attend justice-related appointments where a victim has engaged a legal representative to assist with the application process.

- 13.249 As identified in the supplementary consultation paper,³⁴⁵ the current lack of an award category for childcare expenses may affect the ability of victims who do not have access to affordable childcare to make practical arrangements for their safety.³⁴⁶ This was confirmed by stakeholders. As safe steps Family Violence Response Centre submitted, such awards would enable victims to ‘plan for their safety and attend medical and counselling appointments’.³⁴⁷

Recommendation—practical assistance

- 39** The proposed Act should provide that an award for practical assistance may be made by the scheme decision maker for the following expenses incurred, or reasonably likely to be incurred:
- (a) health-related expenses
 - (b) housing-related expenses, including relocation and resettlement expenses
 - (c) safety-related expenses
 - (d) financial support, including loss of earnings, dependency payments and financial counselling
 - (e) education, re-training and return-to-work expenses
 - (f) expenses for lost or damaged clothing worn at the time of the criminal act
 - (g) other expenses reasonably incurred to access assistance provided under the proposed Act, including travel and childcare expenses, and to attend justice-related appointments.

Recovery payments and plans

- 13.250 The Commission considers that the existing ‘special financial assistance’ and ‘recovery expenses’ categories of award should be consolidated into a new, flexible category called ‘Recovery payments and plans’.
- 13.251 This proposal is intended to address the issues identified by stakeholders with the current recovery expenses and special financial assistance categories.

Discussion and recommendations

- 13.252 Stakeholders told the Commission that awards for recovery expenses create uncertainty for victims because VOCAT is inconsistent in the types of expense that it recognises in this category.
- 13.253 In addition, the Commission was told that the requirement for exceptional circumstances can unfairly disadvantage victims of more ‘common’ offences, such as family violence and sexual assault, because they are not viewed as exceptional.³⁴⁸

³⁴⁵ Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 82.

³⁴⁶ Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 48.

³⁴⁷ Submission 37 (safe steps Family Violence Response Centre).

³⁴⁸ Submissions 24 (Darebin Community Legal Centre), 39 (Victorian Aboriginal Legal Service), 41 (Springvale Monash Legal Service), 58 (Judicial Advisory Group on Family Violence Supplementary Submission); Consultations 2 (Legal Professionals—Private Practice), 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

- 13.254 Stakeholders identified a number of issues with the special financial assistance category. In particular, the Commission was told that providing a lump sum payment for symbolic recognition of a victim's experience may create an unhelpful hierarchy between victims based on whether or not they receive such a payment and the amount.
- 13.255 In addition, stakeholders told the Commission that eligibility for special financial assistance is too limited and the quantum is inadequate. The Commission heard that the award amounts for special financial assistance focus too much on the offence rather than on its impact on the victim and, in the absence of guiding factors, VOCAT members have too much discretion in determining the amount.
- 13.256 This section outlines how the Commission's proposed new 'recovery payments and plans' category would address the issues identified by stakeholders in relation to these categories and better assist victims in their recovery.

Purpose of recovery payments

- 13.257 Under the VOCAA, lump sum payments of special financial assistance may be provided to primary victims as a symbolic expression of the state's sympathy and condolence. The Commission acknowledges that some victims derive benefit from this recognition.
- 13.258 However, as discussed in Chapters 10 and 11, the Commission is of the view that this recognition can and should be provided in non-pecuniary ways, and that financial assistance under the proposed Act should be reserved for expenses to assist in the victim's recovery. Accordingly, the Commission in this section of the chapter considers whether providing a lump sum payment to victims would assist in their recovery.
- 13.259 The Commission was told that lump sum payments can play an important role in a victim's recovery and may complement financial assistance provided for expenses. In particular, lump sum payments can promote victim agency by enabling victims to determine their own recovery pathway to fund certain expenses that may not fall within the other streams of assistance.³⁴⁹
- 13.260 The Commission acknowledges that victims' recovery pathways may not be linear and that victims' needs may not always neatly fall within the scheme's categories of assistance. In particular, a lump sum payment that is not required to be spent in any particular way may fund expenses that may not reflect common understandings of what a victim needs to recover from a traumatic criminal act.
- 13.261 In light of the contribution that a lump sum payment can make to a victim's recovery, the Commission considers that lump sum payments should be retained and re-named 'recovery payments' so that their purpose is clear.
- 13.262 However, in proposing this approach, and linking recovery payments to a victim's recovery rather than a symbolic expression of sympathy or condolence, it is not the Commission's intention that recovery payments should only be awarded to the extent that a victim can identify specific recovery needs. In addition, it is not intended that victims would receive smaller recovery payments under the proposed Act, compared to the amount they may have been awarded for special financial assistance under the existing scheme. The Commission's proposed approach is intended to clarify the purpose of lump sum payments and ensure they better reflect the impact of the criminal act on the victim, rather than to reduce the amount of financial assistance that is awarded to victims.

Eligibility

- 13.263 In the Commission's view, all victims should be eligible for recovery payments. This would avoid any hierarchies of victimhood and presumptions about victim experiences and needs. However, as discussed below, the Commission considers that decision makers should have discretion in determining the amount of a recovery payment, taking into account a victim's specific circumstances, and having regard to a non-exhaustive list of factors in the proposed Act.
- 13.264 The Commission notes that because all victims would be eligible for a recovery payment, this stream of assistance would subsume any payment that related victims may receive under the existing scheme for distress experienced as a result of the death of a primary victim.

Quantum

- 13.265 Because the new recovery payments and plans stream combines two existing categories, the Commission has considered the existing maximum quantum that apply to these two categories and any issues identified by stakeholders.
- 13.266 The maximum amount that may be awarded for special financial assistance is \$10,000. Currently, no maximum quantum applies to recovery expenses— they may be awarded where they are actually and reasonably incurred, or reasonably likely to be incurred by a primary victim. However, these expenses will form part of the overall quantum to which the primary victim is eligible.³⁵⁰
- 13.267 The Commission acknowledges stakeholder views that the maximum amount of \$10,000 currently available under the VOCAA for special financial assistance is inadequate.
- 13.268 The Commission is also of the view that the current maximum amount for special financial assistance is not in line with maximum lump sum payment amounts in some other jurisdictions. While in Queensland, the maximum amount that can be awarded for special assistance is \$10,000, the NSW scheme can award lump sum payments of up to \$15,000³⁵¹ and the ACT scheme up to \$26,250.³⁵²
- 13.269 The Commission therefore considers that under the proposed Act, all victims should be eligible for a maximum amount of \$20,000 as a recovery payment, or \$25,000 for victims of 'related criminal acts'.
- 13.270 Increasing the maximum lump sum payment under the scheme to \$20,000 and extending eligibility to all victims (not just primary victims) raises questions of scheme sustainability. However, the Commission considers that these concerns would be addressed by the fact that recovery payments would combine the special financial assistance and recovery expenses categories. In their joint submission, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria stated that one way to moderate the costs of an increase would be to review 'the operation of "exceptional circumstances" awards [recovery expenses], and simplifying the requirements of the scheme'.³⁵³
- 13.271 The Commission acknowledges stakeholder concerns regarding the current payment categories, which impose quantum ranges for special financial assistance awards based on the type of offence. Stakeholders submitted that these categories are inflexible and place too much emphasis on the offence, rather than its impact on the victim. The Commission therefore considers that under the proposed Act, there should be no such categories imposing quantum ranges for recovery payments.

350 *Victims of Crime Assistance Act 1996* (Vic) s 8(3).

351 *Victims Rights and Support Regulation 2013* (NSW) reg 12(a).

352 *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) reg 8. This is the amount awarded for a sexual offence punishable by imprisonment for 14 years or more, or attempt or conspiracy to commit homicide, and where the victim suffers a very serious injury that is likely to be permanent.

353 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

- 13.272 Instead, decision makers should have broad discretion in determining the amount of a recovery award but should be required to take into account a victim's specific circumstances. In the Commission's view, this would help ensure that any amount awarded as a recovery payment reflects the extent to which the criminal act impacted on the victim. In particular the greater the impact of the crime, the greater the recovery payment should be.
- 13.273 The Commission therefore considers that in determining the amount of a recovery payment, decision makers should be required to have regard to the following non-exhaustive list of factors to be contained in the proposed Act:
- **Whether the criminal act was directly perpetrated against the victim.** A person may be more seriously impacted by a criminal act where the person was the target of the criminal act and/or would be considered to be the victim of the offence for the purposes of criminal law proceedings. However, it is not intended that this factor should be strictly applied. For example, the impact on a child who witnesses family violence may be just as significant as the impact on the person who was the direct target of that violence.
 - **The nature of the victim's injury, including whether the criminal act resulted in the victim suffering a serious injury or serious disease.** The decision maker should consider the seriousness of the injury, its impact on the victim's day-to-day life, whether the injury is temporary or long-term, the likelihood of recovery and the nature of the recovery process.
 - **Whether the criminal act resulted in the death or serious injury of a person with whom the victim was in a close personal relationship.** The victim is likely to have been deeply impacted by the criminal act in these circumstances, particularly if they have taken on a carer's role as a result of it.
 - **Whether the victim was dependent on a person who died or was seriously injured as a result of the criminal act.** A victim is likely to be significantly impacted by the criminal act if it affected the ability of a person to care or provide for the victim.
 - **Whether the victim was particularly vulnerable at the time of the criminal act, including because of the victim's age, or because they had a mental illness, cognitive impairment or disability.** The *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) currently provide for an 'uplift' for a victim who was a child, elderly or impaired at the time of the act of violence in limited circumstances only.³⁵⁴ However, in the Commission's view, being subjected to any offence as a child, an older person or a person with a physical, psychological or cognitive impairment is reason alone for an uplift. Research demonstrates that experiencing violent crime can cause very significant harm to these vulnerable groups.³⁵⁵ This is similar to the approach taken in the Australian Capital Territory, where the age of the victim at the time of the act of violence (if they were under 18 or over 65) and the fact that a victim suffered from impaired physical, psychological or intellectual capacity at the time may be 'circumstances of aggravation'.³⁵⁶

354 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 8(b). See also Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 90.

355 Violent crimes can have a serious impact on older victims, child victims and victims with disability due to such victims often being physically weaker and more emotionally and/or psychologically vulnerable than others: see Etienne G Krugg et al (eds), *World Report on Violence and Health* (World Health Organisation, 2002), especially Chapter 3, 'Child Abuse and Neglect by Parents and Other Caregivers' and Chapter 5, 'Abuse of the Elderly'.

356 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 8(1)(f)(i), (ii).

- **Whether the person who committed the criminal act was in a position of power, influence or trust in relation to the victim.** The impact of a criminal act may be compounded where the victim trusted the offender, or where the offender had power or influence over the victim. For example, the victim may suffer from the loss of the relationship in addition to the injury suffered, or experience a sense of violation as a result of a breach of trust.
- **Whether the criminal act occurred in the context of a pattern of abuse, including a pattern of family violence, as defined in the *Family Violence Protection Act 2008 (Vic)*, or child abuse, as defined in the *Child Wellbeing and Safety Act 2005 (Vic)*.** The Commission acknowledges stakeholder concerns that currently, special financial assistance awards do not adequately recognise cumulative harm.³⁵⁷ This factor would enable non-criminal forms of abuse—including non-criminal family violence—and the cumulative impact of such violence, to effectively operate as an ‘uplift’ on the amount of a recovery payment.
- **Whether there was a series of related criminal acts.** Considering whether a victim suffered multiple related criminal acts and the impact that this may have had on the victim would be a similar approach to that in the Australian Capital Territory, where related criminal acts must be considered in a single application but ‘a series of offences that are related’ may be considered as a ‘circumstance of aggravation’ for the purposes of calculating lump sum payments.³⁵⁸
- **Whether the victim, or the person against whom the criminal act was committed (the direct victim), was involved in any criminal activity that was the primary reason that the criminal act that is the subject of the application was committed.** This factor is intended to potentially reduce the amount of a recovery payment awarded to a victim where the victim’s (or direct victim’s)³⁵⁹ own criminal activity was the main reason that the criminal act was committed against them. This factor is not intended to be applied strictly to prevent vulnerable victims from receiving a recovery payment and is only one of many factors that the decision maker must consider. Nevertheless, the Commission considers that the scheme should not appear to reward applicants whose own criminal conduct has resulted in the act of violence committed against them and that it may be appropriate in certain circumstances to reduce an applicant’s recovery payment in light of an applicant’s own criminal activity. However, the Commission considers that an applicant’s criminal history more broadly, and other matters relating to an applicant’s character or attitude, should not be taken into account in calculating recovery payment amounts. This issue is discussed in Chapter 15.

13.274 This contextual approach was proposed by some stakeholders, including VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria, in relation to family violence.³⁶⁰

357 Submissions 1 (Judicial Advisory Group on Family Violence), 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 16 (Project Respect), 17 (Centre for Excellence in Child and Family Welfare), 19 (Schembri & Co Lawyers), 24 (Darebin Community Legal Centre), 26 (Hume Riverina Community Legal Service), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 3 (Legal Professionals—Community Legal Centres), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals), 14 (Chief Magistrate’s Family Violence Taskforce), 16 (Regional Consultation—Ballarat Legal Professionals).

358 *Victims of Crime (Financial Assistance) Act 2016 (ACT)* s 8(1)(b).

359 The direct victim’s involvement would be considered if the applicant to the proposed scheme was not the person against whom the criminal act was committed.

360 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria). See also submissions 19 (Schrembi & Co Lawyers), 43 (knowmore)—discussing child abuse only; Consultation 2 (Legal Professionals—Private Practice).

- 13.275 These factors may operate as uplift factors, enabling the amount of a recovery payment to be increased depending on, for example, whether the criminal act was committed directly against the victim and the severity of the victim's injury. However, one factor may operate to decrease the amount that would otherwise be awarded—if the victim's own involvement in criminal activity was the primary reason that the criminal act was committed against the victim.
- 13.276 The Commission considers that guidelines should be produced by the scheme to give further guidance to decision makers in determining recovery payment amounts and how the above factors should be applied. This would help ensure consistency in awards, as discussed further below.

Recovery plans as an alternative to a recovery payment

- 13.277 The Commission acknowledges stakeholder views that some victims can find it difficult to manage large sums of money in the aftermath of a criminal act.³⁶¹ The Commission considers that victims who are entitled to a recovery payment should have the option to request that some or all of it be provided to them in accordance with a recovery plan.
- 13.278 Under a recovery plan, the amount that would otherwise be provided to a victim as a lump sum recovery payment (or a portion thereof) would be held in trust and administered by a scheme case manager on behalf of the victim for the purposes of paying for agreed specified expenses to assist in the victim's recovery.
- 13.279 A recovery plan would be designed together with the victim and would enable amounts of money to be designated for specific recovery expenses—for example, a pet, gym membership or education or training course. Such amounts could then be provided directly to the retailer or service provider.
- 13.280 In the Commission's view, the recovery plan should be optional for victims over 18 years of age, that is if the victim so chooses. This is to ensure that the scheme is not paternalistic in its approach towards victims. However, the Commission considers that recovery plans should be mandatory for victims under 18 until they turn 18. In addition, the Commission considers that the scheme decision maker should have the discretion to provide a victim with a recovery plan in circumstances in which the applicant is unable to manage a lump sum payment due to mental illness, cognitive impairment or disability. As discussed in Chapter 15, the scheme decision maker should also have the discretion to provide the victim with a recovery plan where they are satisfied on the balance of probabilities that the alleged perpetrator is likely to benefit from the recovery payment. In such cases it is proposed that the role of the scheme case manager would be to provide oversight to ensure that the payment is used only for expenses that will assist the victim in their recovery.
- 13.281 This approach would be a departure from the existing approach, where lump sum payments for special financial assistance are held on trust for children until they reach 18 years, with the effect that such child victims are unable to access the funds until after they turn 18. However, the Commission's proposed approach would address the concerns expressed by the President of the Children's Court by ensuring child victims of crime receive timely assistance.³⁶² This approach also accords with the joint submission from VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria, that financial assistance for children who witness family violence may be more effective if used in a timely manner to provide 'services focused on a child victim's capacity-building, such as on-going counselling and funding of educational needs'.³⁶³

Recommendations—recovery payments and recovery plans

- 40** The proposed Act should provide that a lump sum recovery payment may be awarded by the scheme decision maker up to a specified maximum amount as determined according to the victim's circumstances, including:
- (a) whether the criminal act was directly perpetrated against the victim
 - (b) the nature of the victim's injury, including whether the criminal act resulted in the victim suffering a serious injury or serious disease
 - (c) whether the criminal act resulted in the death or serious injury of a person with whom the victim was in a close personal relationship
 - (d) whether the victim was dependent on a person who died or was seriously injured as a result of a criminal act
 - (e) whether the victim was particularly vulnerable at the time of the criminal act, including because of the victim's age, or because they had a mental illness, cognitive impairment or disability
 - (f) whether the person who committed, or is alleged to have committed, the criminal act was in a position of power, influence or trust in relation to the victim
 - (g) whether the criminal act occurred in the context of a pattern of abuse, including a pattern of family violence, as defined in the *Family Violence Protection Act 2008* (Vic), or child abuse, as defined in the *Child Wellbeing and Safety Act 2005* (Vic)
 - (h) whether there was a series of related criminal acts
 - (i) whether the victim's, or direct victim's, involvement in any criminal activity was the primary reason that the criminal act that is the subject of the application was committed.
- 41** The proposed Act should provide that the scheme decision maker may, at the request of an applicant, or at the discretion of the scheme decision maker having regard to an applicant's mental illness, cognitive impairment or disability, award a recovery payment in accordance with a recovery plan which:
- (a) details how some or all of the award is to be used to assist the victim's recovery
 - (b) requires the award sum the subject of the plan to be held in trust and administered by a scheme case manager in accordance with the plan for the victim's benefit.
- 42** The proposed Act should provide that a recovery plan is mandatory for victims who are under the age of 18 at the time the award is made.

Recognition

- 13.282 In its supplementary consultation paper, the Commission asked whether, in addition to the financial assistance, there are other ways to promote the recovery of victims from the effect of crime.³⁶⁴
- 13.283 In response, the Commission heard that, for many victims, ‘acknowledgment and validation are the most valued outcomes from their participation in the victims of crime assistance scheme’.³⁶⁵ As discussed in Chapter 10, the Commission considers that the proposed Act should provide a new approach to the recognition of victims. In particular, the Commission considers that ‘recognition’ should be established as a separate stream of assistance.
- 13.284 The Commission is of the view that recognition of victims’ experience can and should be provided in non-pecuniary ways and that financial assistance should be focused on victims’ recovery, rather than on symbolic expressions of sympathy or condolence. As such, no financial assistance would be provided under the proposed ‘recognition’ stream. Instead, this would provide opportunities for victims to be heard and acknowledged, including via a ‘victim conference’ and/or ‘recognition statement’.
- 13.285 Victim conferences, and victim recognition more broadly, are discussed in Chapter 10, where the Commission also makes recommendations relating to the recognition stream of assistance. Victim recognition is also discussed in Chapter 11 in the section on ‘Purpose, objectives and principles of the Act’.

Amounts of assistance

- 13.286 The following section discusses:
- the total maximum amount of financial assistance that victims are eligible for under the VOCAA
 - the requirement under the VOCAA that financial assistance is only awarded for ‘reasonable’ expenses incurred, or reasonably likely to be incurred
 - the reduction of the total maximum amount of financial assistance in circumstances where there are multiple related victims or where the victim experienced multiple criminal acts which VOCAT treats as related criminal acts.
- 13.287 This section then makes recommendations regarding:
- the total maximum amount that may be awarded to a victim under the proposed Act in relation to each proposed stream of assistance
 - the requirement that financial assistance is only awarded for expenses that are reasonable
 - the total amount of financial assistance that multiple related victims may claim under the proposed Act
 - the treatment of multiple criminal acts under the proposed Act where the criminal acts are related and experienced by the same victim.

Current law

- 13.288 Under the VOCAA, the maximum amount of financial assistance available for primary victims is \$70,000 (\$60,000 plus \$10,000 for special financial assistance).³⁶⁶
- 13.289 The maximum award for any secondary victim is \$50,000.³⁶⁷
- 13.290 The maximum award for any one related victim is \$50,000.³⁶⁸ However, the maximum cumulative amount that may be awarded to all the related victims of any one primary victim—that is, the pool of related victims—is \$100,000.³⁶⁹
- 13.291 The maximum cumulative amount that may be awarded to a pool of related victims will also be reduced by an award made for funeral expenses, even if it was made to someone who was not a related victim.³⁷⁰
- 13.292 In exceptional circumstances, however, VOCAT may award assistance to a related victim in excess of the maximum cumulative amount.³⁷¹
- 13.293 Any amount awarded in relation to one type of assistance (for example, medical expenses) will reduce the total amount available for other types of expense (for example, counselling).
- 13.294 Awards of financial assistance for loss of earnings are capped at \$20,000.³⁷²
- 13.295 The VOCAA requires most expenses to be reasonable. This applies to counselling services,³⁷³ medical expenses,³⁷⁴ safety-related expenses,³⁷⁵ other expenses for related victims,³⁷⁶ and recovery expenses.³⁷⁷
- 13.296 The VOCAA provides that the Chief Magistrate may issue guidelines to assist Tribunal members in determining whether an expense is reasonable.³⁷⁸ For example, VOCAT has established guidelines to assist in determining whether funeral expenses are reasonable.³⁷⁹

Related criminal acts

- 13.297 Related criminal acts may be treated as a single act of violence for the purposes of making an award.³⁸⁰ The effect of the related criminal acts provision is to reduce the amount of financial assistance payable to a victim of multiple related crimes.³⁸¹
- 13.298 Criminal acts are considered to be related in the following circumstances:³⁸²
- 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

366 *Victims of Crime Assistance Act 1996* (Vic) ss 8(1), 8A.

367 *Ibid* s 10(1).

368 *Ibid* s 13(1).

369 *Ibid* s 12(1).

370 *Ibid*.

371 *Ibid* s 12(2).

372 *Ibid* s 8(2)(c).

373 *Ibid* ss 8(2)(a), 10(2)(a), 13(2)(a).

374 *Ibid* ss 8(2)(b), 10(2)(b), 13(2)(b).

375 *Ibid* s 8(2)(e).

376 *Ibid* s 13(2)(e).

377 *Ibid* ss 8(3), 10A and 13(4).

378 *Ibid* s 45(1A).

379 Victims of Crime Assistance Tribunal, *Funeral Expenses*, Guideline 3 of 2016 (1 January 2016) <www.vocat.vic.gov.au/vocat-guideline-3-2016-financial-assistance-funeral-expenses>.

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

381 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 9. However, as outlined in the Commission's supplementary consultation paper, there are limited circumstances in which the existence of a series of related criminal acts can increase the amount of special financial assistance available. See Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) Ch 7, 69–70.

382 *Victims of Crime Assistance Act 1996* (Vic) ss 4(1)(a), (b), (c).

- they each contributed to the injury or death for which an application is made, or
- VOCAT considers that they ought to be treated as related criminal acts.

13.299 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’.³⁸³

Responses

Total maximum amounts

- 13.300 In its supplementary consultation paper, the Commission asked whether the maximum amounts of financial assistance available under VOCAA are adequate to meet the needs of victims.³⁸⁴
- 13.301 In consultations, stakeholders told the Commission that the current maximum amounts of financial assistance available to each victim category are inadequate³⁸⁵ and that the maximum amount that may be awarded as special financial assistance is also inadequate.³⁸⁶
- 13.302 In particular, stakeholders stated that the current maximum amount is not sufficient to meet victims’ ongoing medical and care needs.³⁸⁷ Stakeholders also noted that current maximum amounts do not adequately reflect the costs associated with relocation and housing often incurred by victims of family violence.³⁸⁸
- 13.303 In addition, stakeholders submitted that the total maximum amounts have not increased in a very long time and should, at a minimum, be adjusted to reflect inflation.³⁸⁹
- 13.304 Another concern voiced by stakeholders was that the total maximum financial assistance available under the VOCAA is out of step with other schemes. It was noted that the Commonwealth Redress Scheme for Institutional Child Sexual Abuse would provide a maximum of \$150,000, substantially more than the \$70,000 available under the VOCAA for primary victims and this inconsistency between schemes would cause unfairness to victims of non-institutional child abuse.³⁹⁰
- 13.305 Most stakeholders considered that the total maximum award should be increased. However, views varied as to what the total maximum should be. Springvale Monash Legal Service proposed that the total maximum for primary victims should be increased to \$100,000 in order to reflect inflation.³⁹¹ Another stakeholder considered that the quantum should be at least doubled or tripled.³⁹² Other stakeholders stated that the total amount available should be reviewed according to evidence-based research concerning

383 Ibid ss 4(1)(a),(b).

384 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 79.

385 Submissions 1 (Judicial Advisory Group on Family Violence), 4 (Crime Victims Support Association), 6 (Forgetmenot Foundation Inc.), 9 (Alannah & Madeline Foundation), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 19 (Schembri & Co Lawyers), 27 (Name withheld), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 35 (Brockway Legal), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 45 (Daniel Myles et al); Consultations 7 (Family Violence and Advocacy Organisations), 8 (Victims Representatives—Victims of Crime Consultative Committee), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

386 Submissions 1 (Judicial Advisory Group on Family Violence), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 37 (safe steps Family Violence Response Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 35 (Brockway Legal), 58 (Judicial Advisory Group on Family Violence Supplementary Submission); Consultations 8 (Victims Representatives—Victims of Crime Consultative Committee), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals), 16 (Regional Consultation—Ballarat Legal Professionals).

387 Submissions 4 (Crime Victims Support Association), 6 (Forgetmenot Foundation Inc.), 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 45 (Daniel Myles et al).

388 Consultations 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies). See Submission 9 (Alannah & Madeline Foundation) in relation to children.

389 Submissions 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service).

390 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

391 Submission 41 (Springvale Monash Legal Service).

392 Submission 27 (Name withheld).

victims' needs.³⁹³ Ryan Carlisle Thomas Lawyers considered that quantum should be indexed.³⁹⁴

- 13.306 A minority view was that there should be no set maximum award and that financial assistance should be awarded according to victims' needs.³⁹⁵
- 13.307 In contrast, some stakeholders told the Commission that the current maximum is sufficient, but the average award of around \$7000 is too low.³⁹⁶ Inner Melbourne Community Legal submitted that there needs to be better guidance regarding how award quantum is calculated so that there is greater consistency and reliability for applicants.³⁹⁷

Reasonableness requirement

- 13.308 In its supplementary consultation paper, the Commission asked whether it was appropriate for the VOCAA to require that the costs for certain expenses, such as counselling services, be 'reasonable'.³⁹⁸
- 13.309 Stakeholders expressed divergent views in response to this question. A number of stakeholders saw no issue with the requirement.³⁹⁹ However, the Commission was told that there needs to be greater guidance about how 'reasonable' is interpreted by VOCAT.⁴⁰⁰
- 13.310 In particular, some stakeholders considered that a definition of reasonable should be introduced into the VOCAA in relation to expenses.⁴⁰¹ The Commission was told that the definition of reasonable should be 'therapeutic' in nature.⁴⁰² Some stakeholders noted that the definition of reasonable should be focused on assistance rather than recovery,⁴⁰³ and that it should also take into account individual needs.⁴⁰⁴
- 13.311 Other stakeholders proposed that there should be set fees for certain expenses, such as counselling,⁴⁰⁵ and that these should reflect actual costs and be indexed.⁴⁰⁶
- 13.312 In contrast, some stakeholders supported removing the reasonableness requirement entirely.⁴⁰⁷
- 13.313 Other stakeholders submitted that the requirement should only apply to counselling and medical expenses,⁴⁰⁸ or, conversely, that these are the types of expense to which the reasonableness requirement should not apply.⁴⁰⁹
- 13.314 Knowmore submitted that the reasonableness requirement should not apply to counselling expenses for victims of child sexual abuse, noting the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse that counselling services for survivors should be lifelong and accessible on an episodic basis.⁴¹⁰

393 Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).
 394 Submission 38 (Ryan Carlisle Thomas Lawyers).
 395 Consultation 6 (Victims' Advocacy Organisations).
 396 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal).
 397 Submission 14 (Inner Melbourne Community Legal).
 398 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 83.
 399 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 18 (cohealth), 27 (Name withheld), 35 (Brockway Legal).
 400 Submissions 18 (cohealth), 26 (Hume Riverina Community Legal Service), 27 (Name withheld), 32 (Australian Psychological Society), 35 (Brockway Legal), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service).
 401 Submissions 32 (Australian Psychological Society), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service).
 402 Submission 38 (Ryan Carlisle Thomas Lawyers).
 403 Submissions 32 (Australian Psychological Society), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service).
 404 Submission 18 (cohealth).
 405 Submission 5 (Anglicare Victoria Victims Assistance Program).
 406 Submissions 26 (Hume Riverina Community Legal Service), 38 (Ryan Carlisle Thomas Lawyers).
 407 Submissions 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program).
 408 Submission 38 (Ryan Carlisle Thomas Lawyers).
 409 Submission 14 (Inner Melbourne Community Legal).
 410 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 186–93, Recommendation 9, cited in submission 43 (knowmore).

Related victim pool

- 13.315 In its supplementary consultation paper, the Commission asked whether the pool of assistance for related victims should be removed and if not, whether there should be an increase in the maximum cumulative amount of assistance available for a pool of related victims.⁴¹¹
- 13.316 A number of stakeholders told the Commission that the cap on awards for multiple related victims presents difficulties for these victims.⁴¹² This is because it can:
- result in conflict between family members⁴¹³
 - disadvantage large families⁴¹⁴
 - complicate applications and cause delays⁴¹⁵
 - result in inconsistent amounts being awarded to related victims.⁴¹⁶
- 13.317 Some stakeholders considered that the pool of assistance for related victims should be removed.⁴¹⁷ Ryan Carlisle Thomas Lawyers submitted that the VOCAA could ‘subject related victims to a maximum award akin to primary and secondary victims’,⁴¹⁸ with the same maximum award as is currently available to primary victims (\$60,000).⁴¹⁹
- 13.318 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also supported removal of the related victim pool.⁴²⁰ To ensure that the scheme remains sustainable, they proposed narrowing the definition of related victim to include immediate family members only.⁴²¹
- 13.319 An alternative proposal was to adjust the overall maximum amount for related victims according to the number of applicants.⁴²²
- 13.320 One stakeholder stated that a new category of award should be created for related victims called a ‘bereavement award’.⁴²³
- 13.321 Anglicare Victoria Victims Assistance Program submitted that the related victim pool should be maintained, but that funeral expenses should be removed.⁴²⁴
- 13.322 Another proposal was to also remove counselling and medical expenses from the related victim cap.⁴²⁵ Ryan Carlisle Thomas Lawyers stated that such expenses should be viewed separately to distress payments, as they are to special financial assistance in the case of primary victims.⁴²⁶

411 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 82.
412 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 27 (Name withheld), 31 (Victorian Council of Social Service), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 6 (Victims’ Advocacy Organisations), 8 (Victims Representatives—Victims of Crime Consultative Committee), 13 (Regional Consultation—Mildura Legal Professionals).

413 Submissions 15 (Merri Health Victims Assistance Program), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultation 13 (Regional Consultation—Mildura Legal Professionals).

414 Submissions 13 (Adviceline Injury Lawyers), 38 (Ryan Carlisle Thomas Lawyers), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultation 8 (Victims Representatives—Victims of Crime Consultative Committee).

415 Submissions 14 (Inner Melbourne Community Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

416 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

417 See, eg, Submissions 27 (Name withheld), 31 (Victorian Council of Social Service), 38 (Ryan Carlisle Thomas Lawyers), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultation 8 (Victims Representatives—Victims of Crime Consultative Committee).

418 Submission 38 (Ryan Carlisle Thomas Lawyers). See also Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

419 Submission 38 (Ryan Carlisle Thomas Lawyers).

420 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

421 Ibid.

422 Submission 13 (Adviceline Injury Lawyers).

423 Submission 27 (Name withheld).

424 Submission 5 (Anglicare Victoria Victims Assistance Program).

425 Submissions 38 (Ryan Carlisle Thomas Lawyers). See also 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

426 Submission 38 (Ryan Carlisle Thomas Lawyers).

Related criminal acts

- 13.323 In its first consultation paper, the Commission asked a number of questions about whether the related criminal acts provision should be amended to better address the experiences of family violence victims, including the cumulative impact of such violence.⁴²⁷
- 13.324 In its supplementary consultation paper, the Commission asked whether:
- the definition of ‘related criminal acts’ should be amended to reflect the cumulative harm of long-term abuse
 - victims should be given an opportunity to object if claims are to be treated as related
 - there should be a higher maximum for awards of financial assistance for victims of a series of related criminal acts.⁴²⁸
- 13.325 In response to the consultation papers, stakeholders confirmed that the related criminal acts provision can unfairly reduce the amount of assistance available to a victim under the existing scheme and trivialise the experience of victims of protracted abuse.⁴²⁹ This is because the related criminal acts provision can operate to reduce the amount of financial assistance that victims of multiple criminal acts might otherwise be eligible for if they were able to make multiple applications under the scheme in relation to each of those criminal acts.⁴³⁰ Victims of family violence are particularly affected by the related criminal acts provision because ‘domestic violence, almost by definition, will involve repeated acts of abuse by the same offender’.⁴³¹
- 13.326 As the Magistrates’ Court of Victoria and the Children’s Court of Victoria jointly submitted to the Royal Commission into Family Violence, 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.⁴³²
- 13.327 In addition, Merri Health Victims Assistance Program noted that the related criminal acts provision fails to reflect victims’ needs, as victims of long-term abuse can require substantially more support than victims who experience an isolated incident of violence.⁴³³
- 13.328 Where family violence victims make multiple applications for assistance, this creates a burden for both the victim and for VOCAT, and causes delays.⁴³⁴ While there is no data in VOCAT’s 2016–17 annual report about how often the related criminal acts provision is used, and the extent to which it affects the timeliness of awards, this issue was highlighted in the joint submission of VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria.⁴³⁵
- 13.329 A number of stakeholders considered that applicants should be able to object to VOCAT treating multiple acts of violence as related.⁴³⁶ However, Ryan Carlisle Thomas Lawyers stated that the VOCAA would not need to be amended to enable applicants to object, as VOCAT currently has a discretion to treat acts of violence as related, thereby providing applicants with an opportunity to object.⁴³⁷

427 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 6, 77.
 428 Ibid 96.
 429 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 33 (Eastern Community Legal Centre), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals).
 430 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 65.
 431 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 9.
 432 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.
 433 Submission 15 (Merri Health Victims Assistance Program).
 434 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).
 435 Ibid.
 436 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 35 (Brockway Legal), 41 (Springvale Monash Legal Service).
 437 Submission 38 (Ryan Carlisle Thomas Lawyers).

- 13.330 Another common proposal was to increase the quantum of awards for victims of related criminal acts.⁴³⁸ Some stakeholders submitted that the quantum of awards should only be increased in relation to special financial assistance.⁴³⁹ Other stakeholders proposed increasing the overall maximum amount available for victims of related criminal acts, as is done in Tasmania.⁴⁴⁰ Some stakeholders stated that this could be done by increasing the award by a percentage.⁴⁴¹
- 13.331 In addition, there was one proposal to increase the overall maximum award in the VOCAA and to give the decision maker greater discretion to provide higher awards where there has been a series of related criminal acts.⁴⁴²
- 13.332 Some stakeholders submitted that the definition of related criminal acts should be amended to recognise cumulative harm.⁴⁴³ One stakeholder submitted that the definition of related criminal acts in the VOCAA should start with: 'Having regard to the cumulative harm of long term abuse...'.⁴⁴⁴ Inner Melbourne Community Legal proposed adopting a similar approach to the approach in the Australian Capital Territory, which does not require related acts to be treated as one act of violence unless to do otherwise would result in the victim receiving a disproportionate award, or for another reason prescribed in the regulations.⁴⁴⁵
- 13.333 Some stakeholders also considered explicitly excluding family violence from the related criminal acts provision.⁴⁴⁶

Discussion and recommendations

- 13.334 The Commission acknowledges stakeholder concerns that the current maximum amounts available under the VOCAA are inadequate for victim needs,⁴⁴⁷ and out of step with comparable schemes.⁴⁴⁸ In response to submissions and consultations, the Commission considers that the maximum quantum of assistance available under the proposed Act should be increased. The proposed quantum is broadly consistent with those in other jurisdictions, as discussed below.
- 13.335 The Commission also considers that the amounts of financial assistance available under the proposed Act should be indexed, so that the amounts continue to increase in line with inflation. This would rectify an issue identified with the VOCAA, which does not provide for the indexing of award amounts, and would respond to concerns raised by a number of stakeholders.⁴⁴⁹
- 13.336 The Commission also considers that the quantum should be prescribed by the proposed Act, rather than by regulation. In light of significant stakeholder concern regarding the inadequacy of the maximum amounts under the VOCAA, this approach would ensure that the maximum amounts available under the proposed scheme can only be reduced

438 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 33 (Eastern Community Legal Centre), 35 (Brockway Legal), 41 (Springvale Monash Legal Service).

439 See, eg, submissions 19 (Schembri & Co Lawyers), 33 (Eastern Community Legal Centre), 35 (Brockway Legal), 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

440 Submissions 5 (Anglicare Victoria Victims Assistance Program), 13 (Adviceline Injury Lawyers), 35 (Brockway Legal).

441 Submissions 13 (Adviceline Injury Lawyers), 35 (Brockway Legal).

442 Submission 27 (Name withheld).

443 Submissions 5 (Anglicare Victoria Victims Assistance Program), 9 (Alannah & Madeline Foundation), 17 (Centre for Excellence in Child and Family Welfare).

444 Submission 27 (Name withheld).

445 Submission 14 (Inner Melbourne Community Legal).

446 Submissions 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

447 Submissions 1 (Judicial Advisory Group on Family Violence), 4 (Crime Victims Support Association), 6 (Forgetmenot Foundation Inc.), 9 (Alannah & Madeline Foundation), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 19 (Schembri & Co Lawyers), 27 (Name withheld), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 35 (Brockway Legal), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 45 (Daniel Myles et al); Consultations 7 (Family Violence and Advocacy Organisations), 8 (Victims Representatives—Victims of Crime Consultative Committee), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

448 See consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

449 See, eg, submissions 13 (Adviceline Injury Lawyers), 26 (Hume Riverina Community Legal Service), 27 (Name withheld), 38 (Ryan Carlisle Thomas Lawyers), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

by an amending enactment of parliament. However, to enable the amounts to be easily increased in response to changing victim needs and any rising costs associated with certain forms of assistance, the Commission considers that it should be possible for higher maximum amounts to be prescribed by regulation.

Total maximum amounts

- 13.337 The Commission considers that an increase in the total maximum quantum is appropriate, given that the quantum under the VOCAA have not increased in many years and have not been adjusted to reflect inflation.⁴⁵⁰
- 13.338 The Commission notes that the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that a total maximum of \$200,000 be available for any one victim under its proposed Commonwealth Redress Scheme, with an average payment of \$65,000.⁴⁵¹ This is significantly higher than the total maximum amounts under the VOCAA.
- 13.339 The Commission's proposed quantum for each stream of assistance are discussed below.

Immediate needs

- 13.340 As noted above, the Commission considers that all victims should be eligible for a maximum amount of \$5000 for the immediate needs stream of assistance, which would include emergency housing, urgent safety expenses and urgent medical expenses.
- 13.341 Any amounts awarded for immediate needs would not automatically count towards the victim's total maximum quantum of assistance—as discussed above, the scheme decision maker would have discretion to take into account any amount awarded for immediate needs when determining the amount to award a victim under other streams of assistance.
- 13.342 The Commission notes that the proposed inclusion of a maximum cap of \$5000 for awards for immediate assistance represents a shift in approach from the VOCAA, which treats interim awards as an advance on the maximum award of assistance that can be awarded to a particular victim.
- 13.343 Under the Commission's proposed approach, awards of financial assistance for immediate needs would be under a separate stream and would be final.
- 13.344 A maximum amount of \$5000 for immediate needs would be consistent with the approach in New South Wales, where final awards can be granted to primary victims for immediate needs up to a maximum of \$5000 to 'cover expenses for treatment or other measures that need to be taken urgently, as a direct result of that act of violence, to secure the victim's safety, health or wellbeing'.⁴⁵²

Funeral expenses

- 13.345 The Commission considers that victims should be eligible for a maximum amount of \$15,000 for reasonable funeral expenses, to be determined in accordance with guidelines produced under the proposed Act.

450 Submissions 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service). The Commission also notes that its proposed total maximum quantum broadly accords with the submission received from Springvale Monash Legal Service, which stated that the total maximum quantum should be increased to \$100,000: submission 41 (Springvale Monash Legal Service).

451 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 22. In October 2017, the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) was introduced into the Commonwealth Parliament to implement the Commonwealth's response to Royal Commission's recommendations. The Bill includes a payment of up to \$150,000 to survivors, rather than the Royal Commission's recommended \$200,000: Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) cl 18. In November 2017, the Senate referred the Bill to the Senate Community Affairs Legislation Committee for inquiry and report. The Committee delivered its report in March 2018: Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018). The Victorian National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Vic), if passed, would refer powers to the Commonwealth to ensure that Victorian state institutions participate in the scheme.

452 *Victims Rights and Support Act 2013* (NSW) s 26(1)(b).

- 13.346 This amount is broadly consistent with the maximum available under the existing VOCAT guidelines.⁴⁵³ Although some stakeholders submitted that the amounts available for funeral expenses under the existing scheme are inadequate,⁴⁵⁴ the existing maximum of \$15,000 is already significantly higher than the maximum amount available for funeral expenses in other jurisdictions.
- 13.347 The Commission considers that any amount awarded for funeral expenses should not reduce a victim's maximum quantum for other streams of assistance, nor should it affect the amount of assistance that another victim can claim in relation to the same criminal act.

Counselling

- 13.348 In the Commission's view, victims should be eligible for an initial 20 counselling sessions, with an option to access additional counselling sessions in exceptional circumstances, without a limit on the total number of sessions or the time period. This would be consistent with the approach under the NSW scheme.
- 13.349 What constitutes reasonable counselling expenses and exceptional circumstances should be outlined in guidelines produced under the proposed Act, is discussed further below.

Practical assistance

- 13.350 In the Commission's view, victims should be eligible for a maximum amount of \$80,000 for the practical assistance stream, with a cap of \$20,000 for the financial support sub-category.
- 13.351 This would mean that the amount available under proposed Act for practical assistance would be higher than the amounts available for comparable expenses in other states.
- Under the NSW scheme, victims may be awarded up to \$30,000 for 'economic loss' (in addition to counselling expenses, \$5000 for immediate needs and up to \$10,000 for a 'recognition payment')⁴⁵⁵
 - Under the ACT scheme, victims are eligible for up to \$30,000 for loss of earnings, in addition to up to \$10,000 for immediate needs and up to \$26,250 for a 'recognition payment'.⁴⁵⁶
 - Under the South Australian scheme, victims are eligible for assistance of up to \$100,000, which encompasses all types of assistance.⁴⁵⁷
- 13.352 The Commission considers that its proposed maximum amount for practical assistance is appropriate in light of stakeholders' concern that the current total amounts are inadequate to address victims' needs, particularly ongoing medical and care needs,⁴⁵⁸ and the costs associated with relocation and housing often incurred by victims of family violence.⁴⁵⁹ The current quantum may also be inadequate to meet the practical needs of victims suffering permanent and serious disability as a result of a criminal act.⁴⁶⁰

453 The reasonable total cost of a burial is currently considered to be \$15,235, which includes cemetery fees, the cost of a coffin or casket and other associated costs: Victims of Crime Assistance Tribunal, *Funeral Expenses*, Guideline 3 of 2016 (1 January 2016) <www.vocat.vic.gov.au/vocat-guideline-3-2016-financial-assistance-funeral-expenses>.

454 Submissions 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 35 (Brockway Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

455 *Victims Rights and Support Act 2013* (NSW).

456 *Victims of Crime (Financial Assistance) Act 2016* (ACT).

457 This is the maximum award for a primary victim in South Australia: *Victims of Crime Act 2001* (SA) s 20(3)(c).

458 Submissions 4 (Crime Victims Support Association), 6 (Forgetmenot Foundation Inc.), 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 45 (Daniel Myles et al).

459 Consultations 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies). See Submission 9 (Alannah & Madeline Foundation) in relation to children.

460 See, eg, a media report concerning a victim of an assault who was badly injured and has been unable to return to work. The assault victim made an application for financial assistance to VOCAT in 2013 and was awarded \$70,000, the maximum amount available to a primary victim under the VOCAA. Four years later, in 2017, the assault victim described this money as 'drying up': William Vallely, 'Damages Do Not Fit the Crime: Victim', *Bendigo Advertiser* (online), 21 July 2017 <www.bendigoadvertiser.com.au/story/4804647/victims-plea-for-justice/>.

Recovery payment

- 13.353 The Commission acknowledges stakeholder views that the current maximum amount of \$10,000 available to primary victims as special financial assistance is inadequate.⁴⁶¹ Under the proposed Act, this amount should be doubled so that victims are eligible for a maximum amount of \$20,000 for a recovery payment, or \$25,000 for a victim of related criminal acts.
- 13.354 This amount is broadly consistent with the approach in the Australian Capital Territory, where victims are eligible for a ‘recognition payment’ of up to \$26,250.⁴⁶² However, the Commission’s proposed quantum is higher than in other states. The maximum amount that victims may receive as a ‘recovery payment’ under the NSW scheme, or as ‘special financial assistance’ under the Queensland scheme, is \$10,000.⁴⁶³
- 13.355 Having regard to scheme sustainability, the Commission considers that under the proposed Act, not all victims would receive the maximum amount available as a recovery payment. Under the proposed Act, in determining the amount to award a victim as a recovery payment, the decision maker would be required to consider the victim’s specific circumstances, including a number of factors, such as the nature of the victim’s injury.

Recommendation—amounts of assistance

- 43** The proposed Act should provide that the maximum amounts that can be awarded by the scheme decision maker should be prescribed as follows, and should be subject to indexation:
- (a) the following maximum amounts:
 - (i) \$5000 for immediate assistance
 - (ii) \$15,000 for funeral expenses
 - (iii) \$80,000 for practical assistance, with a cap of \$20,000 for financial support
 - (iv) \$20,000 for a recovery payment, or \$25,000 for applicants who were the victim of two or more related criminal acts, or
 - (b) any such higher maximum amounts for any items in paragraph (a) as may be prescribed by regulation.

Reasonableness requirement

- 13.356 As required by the supplementary terms of reference, the proposed Act must ensure that state funds are spent appropriately and that the scheme is financially sustainable. The Commission considers that retaining a requirement that assistance may only be provided for reasonable expenses would help ensure the scheme’s sustainability by limiting the amount that may be awarded for any particular expense.
- 13.357 The Commission also considers that it is important that, as far as possible, victims in the same position receive the same amounts of assistance for the same types of expense. Imposing a reasonableness requirement on expenses covered by the proposed Act would

461 Submissions 1 (Judicial Advisory Group on Family Violence), 13 (Adviceline Injury Lawyers), 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 37 (safe steps Family Violence Response Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 35 (Brockway Legal); Consultations 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 13 (Regional Consultation—Mildura Legal Professionals), 16 (Regional Consultation—Ballarat Legal Professionals).

462 *Victims of Crime (Financial Assistance) Act 2016* (ACT).

463 *Victims Rights and Support Act 2013* (NSW); *Victims of Crime Assistance Act 2009* (Qld).

help to achieve this and is consistent with other compensation schemes in both Victoria and other jurisdictions.⁴⁶⁴

- 13.358 Under the proposed Act, it should continue to be the case that awards can only be made for reasonable expenses incurred, or reasonably likely to be incurred.
- 13.359 The Commission acknowledges stakeholder submissions that greater clarity is needed regarding what constitutes 'reasonable' under the VOCAA.⁴⁶⁵ To address this guidelines should be produced which outline what types of expense are considered reasonable for the purposes of the proposed Act and/or the reasonable costs for such expenses, where such costs and types of expense are likely to be similar across victims. This issue is discussed further below.

Recommendations

- 44** In making any award for expenses, the proposed Act should provide that the scheme decision maker must be satisfied that the expenses incurred, or reasonably likely to be incurred, are reasonable.
- 45** To assist the scheme decision maker in determining whether an expense is reasonable, guidelines should be developed and should be made publicly available.

Abolishing the related victim pool

- 13.360 In Chapter 12, the Commission proposed that the existing victim categories in the VOCAA be abolished and that the proposed Act instead include a single, expansive definition of victim.
- 13.361 This approach would mean that under the proposed Act, any victim would be eligible for the maximum amount of financial assistance available, regardless of whether there are applications from multiple victims relating to the same criminal act. This means that the related victim pools would not exist under the proposed Act.
- 13.362 In the Commission's view, all victims should be entitled to receive the amount of assistance necessary to aid their recovery, subject to the prescribed maximum amounts. Limiting assistance through related victim pools is not a victim-centred approach and can result in some victims receiving less assistance than they may need and would otherwise be entitled to if they were not a related victim under the VOCAA.
- 13.363 The Commission notes that the Queensland Department of Justice and Attorney-General also recommended abolishing victim pools in its review of the *Victims of Crime Assistance Act 2009* (Qld).⁴⁶⁶ Queensland has since introduced an amendment removing the pools of assistance from its scheme.⁴⁶⁷
- 13.364 There are no pools of assistance for related victims in either the NSW or ACT schemes, both of which have similar victim categories to Victoria's existing categories.⁴⁶⁸
- 13.365 The Commission also considers that abolishing victim pools would help to address the issue of the complex application process for related victims under the VOCAA, and the resultant delays in awards.

464 See, eg, *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 26(1)–(2), 53; *Victims Rights and Support Act 2013* (NSW) ss 47(2)–(3).

465 Submissions 18 (cohealth), 26 (Hume Riverina Community Legal Service), 27 (Name withheld), 32 (Australian Psychological Society), 35 (Brockway Legal), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service).

466 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 16 (Recommendation 4).

467 See *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 38.

468 *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) reg 5; *Victims Rights and Support Regulation 2013* (NSW) reg 10.

Recommendation

- 46** The proposed Act should not include any collective cap on assistance for multiple victims whose claims relate to the same criminal act.

Related criminal acts

- 13.366 The Commission acknowledges stakeholder concerns that the current related criminal acts provision can disproportionately disadvantage those victims who experience multiple acts of violence committed by a single offender, particularly victims of family violence. The related criminal acts provision can unfairly affect victims of other forms of long-term abuse, such as child abuse, elder abuse and abuse of people with disability. These forms of abuse are also often perpetrated by the same offender and in the same location.⁴⁶⁹ As such, they are likely to be treated as related.
- 13.367 However, these concerns need to be balanced with the need to ensure the sustainability of the proposed scheme and to reduce the administrative burden on victims and the scheme decision maker.
- 13.368 In the Commission's view, the related criminal acts provision has an important function in limiting the circumstances in which an individual victim is eligible for assistance where there is more than one related criminal act. This protects the sustainability of the scheme and helps ensure that the state is able to provide assistance to other victims.
- 13.369 The Commission considers that under the proposed Act, the concept of related criminal acts should be retained, with the effect that where the applicant was the victim of related criminal acts, as is currently defined in the *Victims of Crime Assistance Act 1996* (Vic), the scheme decision maker must treat the related criminal acts as a single act of violence for the purposes of making an award of assistance.⁴⁷⁰
- 13.370 The Commission acknowledges the concerns expressed by some stakeholders regarding the operation of the related criminal acts provision under the VOCAA, and considers that these would be addressed by the following aspects of the proposed Act:
- Victims of multiple acts of violence may be entitled to a larger recovery payment because recovery payments under the proposed Act would be determined based on the victim's specific circumstances, including whether the criminal act occurred in the context of a pattern of abuse involving child abuse or family violence. This would address the issue that the related criminal acts provision disadvantages victims of these types of crime.
 - The decision maker would be required to consider whether the alleged offender was in a position of power, influence or trust in relation to the victim and whether the victim was particularly vulnerable at the time of the criminal act, including because of the victim's age, or because they had a mental illness, cognitive impairment or disability. These factors may also enable acknowledgment of the experiences of victims of family violence and other forms of protracted abuse by a single perpetrator.
 - Victims of related criminal acts would be eligible for a higher maximum recovery payment under the proposed Act—\$25,000 instead of \$20,000, as outlined above. This would also address stakeholder concern that the current scheme fails to

469 See, eg, Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 20, for the context in which elder abuse usually occurs. See also Australian Institute of Health and Welfare, *Child Protection Australia 2015–16*, Child Welfare Series No 66 (2017) for data relating to child abuse occurring within the home.

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

acknowledge the experience of victims of multiple criminal acts who can only make a single application for assistance because those criminal acts are related.

- 13.371 As is currently the case, the Commission considers that the scheme decision maker should have the discretion not to treat two or more criminal acts as related criminal acts.
- 13.372 In the interests of transparency, and consistency, the Commission considers that guidelines should be developed and made publicly available, specifying the circumstances in which two or more criminal acts should be treated as related criminal acts.

Recommendations—related criminal acts

- 47** The proposed Act should:
- (a) provide that where an applicant is the victim of ‘related criminal acts’ the scheme decision maker must treat the related criminal acts as a single criminal act for the purposes making any award of assistance
 - (b) include a definition of the term ‘related criminal acts’ modelled on the definition in section 4 of the *Victims of Crime Assistance Act 1996* (Vic).
- 48** To assist the scheme decision maker in determining whether two or more criminal acts are related criminal acts, guidelines should be developed and should be made publicly available.

Form of payment

Current law

- 13.373 VOCAT has discretion to make all or part of an award payable to the applicant or to any other person for the applicant’s benefit.⁴⁷¹
- 13.374 In addition, the award may be paid as a lump sum, in instalments, or as a combination of both.⁴⁷²
- 13.375 The VOCAT website states: ‘Amounts awarded to an applicant for expenses not yet incurred are only payable on the submission of an invoice or receipt relating to the particular expense.’⁴⁷³

Responses

- 13.376 Most stakeholders did not identify any issues with the VOCAA’s form of payment provisions. However, in consultation’s, legal professionals told the Commission that it can be difficult for some victims to pay for expenses upfront and then have to wait for VOCAT to reimburse them.⁴⁷⁴ The Commission was told that some victims have to wait a considerable amount of time before they are reimbursed for medical expenses, sometimes 46 weeks or more.⁴⁷⁵ As such, one participant submitted that where victims produce a quote for an expense for which financial assistance is then awarded, the victim should not be required to provide a receipt in order to receive that financial assistance.⁴⁷⁶

471 Ibid s 55(1)(a).

472 Ibid s 55(1)(b).

473 Victims of Crime Assistance Tribunal, *Determining an Application—Supporting Documentation* (2016) <www.vocat.vic.gov.au/determining-application/supporting-documentation>.

474 Consultation 13 (Regional Consultation—Mildura Legal Professionals).

475 Ibid.

476 Ibid.

Discussion and recommendations

- 13.377 As most stakeholders did not express concern with the current form of payment provisions, the Commission considers that these provisions should be retained under the proposed Act.
- 13.378 As discussed in Chapter 10, case managers under the proposed scheme would work closely with victims throughout the application process. The form of payment provisions would enable decision makers to make an award for assistance payable directly to the victim, or directly to goods or services providers where the victim requests this from their case manager, or where the decision maker considers it otherwise appropriate. The provisions would also enable an award to be paid as a lump sum, in instalments, or partly as a lump sum and partly in instalments.
- 13.379 The Commission considers that these provisions could be used to address the concern expressed by some stakeholders that it may be difficult for some victims to pay for expenses upfront.

Recommendation—payment of awards

- 49** The proposed Act should provide that the scheme decision maker has the discretion to make all or part of any award:
- (a) payable to the applicant or to any other person for the applicant's benefit
 - (b) as a lump sum payment, a payment by instalments, or a payment partly as a lump sum and partly in instalments.

Variation of awards

Current law

- 13.380 Under the VOCAA, victims may apply to have their award varied within the six years after the award was made.⁴⁷⁷ VOCAT has broad discretion to vary awards 'in any manner that the Tribunal thinks fit'.⁴⁷⁸ VOCAT may vary the terms of an award or increase or decrease the amount.⁴⁷⁹
- 13.381 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.⁴⁸⁰
- 13.382 VOCAT must not vary an award if the application for variation is made more than six years after the original award, unless the applicant was under 18 when the award was made.⁴⁸¹ Where this is the case, the applicant may apply for a variation up until age 24.⁴⁸²

477 *Victims of Crime Assistance Act 1996* (Vic) s 60.

478 *Ibid.* However, VOCAT is still bound by the provisions of the Act relating to the payment and amounts of assistance: *ibid* s 60(4).

479 *Ibid* s 60(1).

480 *Ibid* s 60(3).

481 *Ibid* s 60(2).

482 *Ibid.*

Responses

- 13.383 The supplementary consultation paper identified two key issues regarding variations of awards:
- **The variation process.** Most variations require additional paperwork to be filed via lawyers and other professionals, increasing delay and limiting flexibility and continuity in provision of services such as counselling.
 - **The variation window.** VOCAT 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 18.⁴⁸³
- 13.384 In its supplementary consultation paper, the Commission asked whether the six-year period for variation of an award should be extended to account for victims' long-term needs.⁴⁸⁴ If so, the Commission asked what the time limit should be and whether this should apply to specific crimes or types of award only.
- 13.385 The Commission also asked how the variation process impacts on victims and whether there is a need to make the process more accessible and timely.⁴⁸⁵

Variation process

- 13.386 Some stakeholders spoke positively about the variation process. Legal professionals told the Commission that the variation process works 'quite well'.⁴⁸⁶ They stated that the variation process is sufficiently straightforward that some victims applying for variations do not require legal assistance, as psychologists are able to submit documentation direct to VOCAT.⁴⁸⁷ However, another submission stated that this is not the case, but that treating professionals should be able to make requests for further treatment directly to VOCAT, as is the case for the WorkCover and Transport Accident Commission (TAC) schemes.⁴⁸⁸
- 13.387 Other stakeholders considered the variation process inefficient and inconsistent. The Commission was told about a matter where a victim was granted an award for dental expenses and then went overseas for three years before having the dental work done.⁴⁸⁹ When the victim returned, the dentist specified in the award was no longer practising. The victim therefore sought a variation from VOCAT to enable him to obtain treatment from another dentist. A registrar refused the variation on the basis that the victim should have had the dental treatment earlier. This decision was overturned on appeal but legal costs were refused because VOCAT held that the applicant could have obtained the variation without legal assistance, even though the variation was initially denied.⁴⁹⁰
- 13.388 Other stakeholders submitted that the variation process is administratively burdensome, with victims having to provide fresh evidence and subsequent reports, which result in delays and increased costs for the victim and the scheme.⁴⁹¹ The Aboriginal Family Violence Prevention & Legal Service Victoria told the Commission that the process is 'unnecessarily legalistic, time-consuming and burdensome'.⁴⁹² The Commission was also told the variation process is 'more churn and burn and waste of time/resources/money'.⁴⁹³

483 Ibid s 60(2).

484 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 9, 132.

485 Ibid 133.

486 Consultation 2 (Legal Professionals—Private Practice). See also consultation 16 (Regional Consultation—Ballarat Legal Professionals).

487 Consultation 2 (Legal Professionals—Private Practice).

488 Submission 38 (Ryan Carlisle Thomas Lawyers).

489 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

490 Ibid.

491 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal).

492 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

493 Submission 27 (Name withheld).

- 13.389 Ryan Carlisle Thomas Lawyers submitted that some victims are discouraged from applying for variations because of the administrative burden.⁴⁹⁴ The Commission was told that the variation process may be traumatic for some victims,⁴⁹⁵ with one victim likening it to having to ‘beg’ for additional counselling, and having to go through yet ‘another process’.⁴⁹⁶
- 13.390 Inner Melbourne Community Legal submitted that where victims are seeking additional counselling or medical expenses, a form completed by a GP should be sufficient.⁴⁹⁷
- 13.391 It was also submitted that the variation process is unclear and that victims are not aware of the six-year time limit.⁴⁹⁸ In particular, the Commission was told that there is confusion about whether the six-year variation period commences from the date of the crime or from the date that the award is made.⁴⁹⁹
- 13.392 The Commission was told that applications for variations should be determined more quickly and that the decision making time is inconsistent between courts.⁵⁰⁰ In particular, the magistrate who originally heard the application may want to consider any variations sought in relation to that application, which can cause delays in processing the variation request.⁵⁰¹
- 13.393 Delays in determining variation applications frequently occur where the variation involves assistance for counselling. One stakeholder therefore proposed that decisions regarding counselling assistance, including variation applications, should be determined administratively rather than judicially.⁵⁰²

Variation window

- 13.394 A significant number of stakeholders considered the six-year variation window to be too narrow.⁵⁰³ Hume Riverina Community Legal Service stated that the variation window is an ‘arbitrary’ limit.⁵⁰⁴
- 13.395 The Commission was told that this time period does not recognise the potentially lifelong effects of crime. Victims’ representatives told the Commission that the full extent of grief for the loss of a loved one may not be realised until at least five years after their death.⁵⁰⁵
- 13.396 The Commission heard that the effects of family violence may extend over a number of years.⁵⁰⁶ One stakeholder noted that unforeseen expenses related to family violence often emerge in the longer term, especially for child victims of family violence.⁵⁰⁷ Similarly, another stakeholder noted that where the victim is a child, it is not always obvious what the child’s future needs will be.⁵⁰⁸ VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria proposed expanding the factors that VOCAT must consider when determining out-of-time applications to include ‘specific regard for the presence of family violence, sexual assault or child abuse’.⁵⁰⁹

494 Submission 38 (Ryan Carlisle Thomas Lawyers).

495 Submission 43 (knowmore).

496 Submission 37 (safe steps Family Violence Response Centre).

497 Submission 14 (Inner Melbourne Community Legal).

498 Consultation 13 (Regional Consultation—Mildura Legal Professionals).

499 Submission 5 (Anglicare Victoria Victims Assistance Program).

500 Ibid.

501 Ibid; Consultation 14 (Regional Consultation with Legal Professionals—Mildura).

502 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

503 Submissions 5 (Anglicare Victoria Victims Assistance Program), 6 (Forgetmenot Foundation Inc.), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 58 (Judicial Advisory Group on Family Violence Supplementary Submission); Consultations 2 (Legal Professionals—Private Practice), 8 (Victims’ Representatives—Victims of Crime Consultative Committee), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies).

504 Submission 26 (Hume Riverina Community Legal Service).

505 Consultation 8 (Victims Representatives—Victims of Crime Consultative Committee). See also submission 26 (Hume Riverina Community Legal Service).

506 See, eg, submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

507 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

508 Submission 18 (cohealth).

509 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

- 13.397 The Commission was told that the six-year time limit does not adequately account for the complexity of medical and dental injuries, which may take longer than six years to treat or to stabilise sufficiently to determine the extent to which treatment will be needed.⁵¹⁰
- 13.398 Some stakeholders told the Commission that there should be no time limit on victims' access to counselling and that victims should not be required to continue to fill out forms or re-apply or vary awards for counselling, as such requirements can be re-traumatising.⁵¹¹
- 13.399 The Commission was told that lawyers will sometimes seek an interim award while determining the client's longer-term needs. This is because once a final award has been granted, 'the clock starts ticking' for variations.⁵¹²

Discussion and recommendations

The benefits of a variation process or a process to enable additional awards of assistance

- 13.400 As identified in the supplementary consultation paper, there are benefits to having a procedure to vary awards after they are made.⁵¹³ Variations have given VOCAT the flexibility to provide additional awards as victims' situations change or new needs emerge. Variations also acknowledge that a victim's journey is not always predictable. This was confirmed by consultations and submissions, which identified issues with the variation process and time limit but not with variations themselves.
- 13.401 As with the existing scheme, the Commission considers that there are benefits associated with imposing a time limit within which such applications for further assistance may be made. A time limit contributes to certainty and sustainability, as it provides an indication of the extent to which additional funds may be needed for such additional awards of assistance at any point in time.
- 13.402 The Commission is also of the view that victims' longer-term needs—for example, where a victim is permanently unable to work—are likely to be met through other support or welfare systems, such as the public health and social security systems. This may reduce the need for a victims of crime scheme to provide ongoing assistance beyond a particular timeframe.
- 13.403 The proposed Act should provide a mechanism which enables victims who have already received an award of assistance to apply for further assistance related to the criminal act the subject of their initial application, without needing to re-establish their eligibility. However, given the administrative nature of the proposed scheme, the Commission considers the variation process should be reconceived as a right for eligible victims, where they have already received an award of assistance, to be able to apply for further assistance related to the criminal act the subject of their initial application, without needing to re-establish their eligibility.
- 13.404 In addition, having regard to the views expressed by stakeholders, the Commission considers that different time limits and processes should apply under the proposed Act. These proposals are discussed below.

510 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

511 Consultations 8 (Victims Representatives—Victims of Crime Consultative Committee), 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

512 Consultation 13 (Regional Consultation—Mildura Legal Professionals).

513 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) Ch 9, 131.

Increasing the application time limit for awards of additional assistance

- 13.405 The Commission notes that there is little precedent for increasing the time limit beyond six years, given that the time limits which apply under victims of crime assistance schemes in other Australian jurisdictions vary between three and seven years.⁵¹⁴ However, the Commission acknowledges stakeholder concerns that the current six-year window does not adequately take into account the potential long-term effects of crime on victims.
- 13.406 The Commission notes that the *Betrayal of Trust report* stated that VOCAT's inability to provide ongoing financial support to victims is a significant limitation of the scheme.⁵¹⁵ The Committee acknowledged that although comparable compensation schemes—such as those of the Transport Accident Commission and the Department of Veterans' Affairs—are not designed to cater indefinitely for ongoing costs, they do assist victims to recover from their injury over a longer period of time than six years.⁵¹⁶ For example, one victim told the inquiry that assistance from Veterans' Affairs provides a more appropriate 'safety net' for victims.⁵¹⁷
- 13.407 The Commission considers that the application window for further assistance should be extended from the current six-year time limit to a period of 10 years from the grant of an initial award under the proposed Act—or, for child victims, 10 years from the date that the victim turns 18. As submitted by the Judicial Advisory Group on Family Violence, the Commission considers that extending the time limit for only certain types of crime would be unfair, 'as variation may be necessary to meet the needs of any crime victim'.⁵¹⁸
- 13.408 In addition, to reflect the potentially lifelong effects of crime, it should be possible to extend the window beyond 10 years in exceptional circumstances.
- 13.409 However, to ensure scheme sustainability, the Commission considers that it should only be possible to obtain further assistance beyond the 10-year period for health-related expenses where the injury suffered as a result of the criminal act has either persisted beyond, or developed after, that 10-year period.⁵¹⁹
- 13.410 To ensure transparency and consistency, the Commission considers that guidelines to assist the scheme decision maker should be developed and made publicly available, outlining the circumstances in which exceptional circumstances are likely to be found to extend the 10-year application window.⁵²⁰
- 13.411 As outlined in the section above on 'Counselling', the Commission considers that victims should be eligible for the reasonable costs of up to 20 counselling sessions and, in exceptional circumstances, for any number of further counselling sessions as are required, without any time limit or maximum quantum applying. The Commission therefore notes that under the proposed Act, no time limit would apply for the counselling stream of assistance.

514 A seven-year time limit applies in New South Wales, the Australian Capital Territory, Queensland and the Northern Territory. See *Victims Rights and Support Act 2013* (NSW) s 40(6); *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 49(2); *Victims of Crime Assistance Act 2009* (Qld) s 101(3); *Victims of Crime Assistance Act 2006* (NT) s 46(1). See also Submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

515 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 558.

516 Ibid.

517 Ibid.

518 Submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

519 The Judicial Advisory Group on Family Violence supported this approach: see submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

520 An alternative approach would be to include a definition of 'exceptional circumstances' and examples of when such circumstances are likely to arise. See, eg, *Victims of Crime Assistance Act 2009* (Qld) s 28 which provides a definition of 'exceptional circumstances' and examples of when such circumstances are likely to arise for the purposes of 'special assistance' payments.

Applications for further assistance process

- 13.412 The Commission acknowledges stakeholder concerns that the current variation process can be administratively burdensome for victims and often requires legal assistance.
- 13.413 To reduce the administrative burden, the Commission considers that eligible victims should be able to make an application for further assistance at any time during the 10-year period following their initial award of assistance—or, for child victims, up until 10 years from the date they turned 18—and that they should be able to do so by written request to the scheme decision maker. In practice, the Commission considers that the power to grant further assistance should be delegated to scheme case managers.

Awareness of time period

- 13.414 In response to stakeholder concern that there is a lack of awareness under the existing scheme about when the variation period commences and when it expires, the Commission considers that the scheme decision maker should be required to notify victims in writing that their 10-year time period for any further applications for assistance is due to expire one year prior to that expiration date.

Recommendations—additional awards of assistance

- 50** The proposed Act should provide that where a victim has received an award of financial assistance, they may apply to the scheme decision maker:
- (a) for additional awards of assistance, without the need to re-establish eligibility:
 - (i) for adult victims, for a 10-year period following the date of their initial award of assistance, or
 - (ii) for victims who were under the age of 18 at the time of their initial award of assistance, for a 10-year period from the date that victim turns 18, and
 - (b) after the end of the applicable time period, for awards of assistance for additional health-related expenses, without the need to re-establish eligibility, where:
 - (i) the expenses relate to an injury suffered as a result of the criminal act that persists beyond the end of the 10-year period, or
 - (ii) the injury does not develop until after the end of the 10-year period.
- 51** The proposed Act should provide that in making an award for additional health-related expenses outside the applicable time period, the scheme decision maker must be satisfied that there are exceptional circumstances justifying the making of the award.
- 52** The proposed Act should provide that where a victim has received an award of financial assistance, they must be notified in writing that the applicable time period is due to expire, one year prior to that expiration date.
- 53** To assist the scheme decision maker in determining an application for additional health-related expenses lodged outside the applicable time period, including in determining whether there may be exceptional circumstances, guidelines should be developed and made publicly available.

Consistency in awards

Current law

- 13.415 The VOCAA provides that the Chief Magistrate may issue guidelines for VOCAT to take into account when determining whether an expense is reasonable. For example, such guidelines have been produced for the purposes of determining reasonable legal costs⁵²¹ and funeral expenses.⁵²²

Discussion

- 13.416 In the Commission's view, developing guidelines to aid the scheme decision maker in determining award amounts, and making them publicly available, would promote consistency in awards. Such guidelines can also improve transparency, by making it clear to applicants on what basis awards are determined and amounts likely to be awarded. As stated in the joint submission received from VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria, guidelines may improve consistency and predictability in a number of areas of broad discretion, including what goods and services are 'reasonable and specific to recovery' and reasonable amounts for these goods and services.⁵²³
- 13.417 Consistency in awards, and lack of transparency about how award amounts are determined, were consistent concerns for stakeholders. The Commission therefore considers that under the proposed Act guidelines should be produced to guide the scheme decision maker in determining both award amounts and as to what constitutes a reasonable expense.
- 13.418 As outlined in the recommendations above, and as a minimum, the Commission considers that to assist the scheme decision maker, guidelines should be developed and made publicly available in relation to:
- **immediate needs**—the circumstances in which the scheme is likely to grant an award for immediate assistance
 - **funeral expenses**—types and amount of expenses considered to be reasonable
 - **counselling expenses**—reasonable cost per session and for report writing and the circumstances in which exceptional circumstances are likely to apply to enable an award of counselling to be made beyond the initial 20 sessions
 - **housing expenses**—types and amounts of relocation and resettlement expenses that are considered to be reasonable
 - **safety expenses**—types and amounts of expenses that are considered to be reasonable
 - **financial support**—how loss of earnings and dependency payments are calculated, and number of financial counselling sessions and cost per session considered to be reasonable
 - **education and return to work**—types and amounts of expenses that are considered to be reasonable
 - **other expenses**—types and amounts of expenses that are considered to be reasonable

521 See Victims of Crime Assistance Tribunal, *Cost Guideline (Legal Costs)*, Guideline 1 of 2018 (29 December 2017) <www.vocat.vic.gov.au/vocat-guideline-1-2018-cost-guideline-legal-costs>.

522 Victims of Crime Assistance Tribunal, *Funeral Expenses*, Guideline 3 of 2016 (1 January 2016) <www.vocat.vic.gov.au/vocat-guideline-3-2016-financial-assistance-funeral-expenses>.

523 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

- **recovery payments**—how the factors that the decision maker is required to consider in determining recovery payment awards should be applied in practice. For example, the guidelines could indicate the average recovery payment should fall in the middle of the maximum amount of \$20,000 (or \$25,000 for victims of related criminal acts) and identify which factors are intended to increase or decrease the payment amount.
- **recovery plans**—the form of such plans and the process for developing and varying them
- **related criminal acts**—the circumstances in which two or more criminal acts should be treated as related criminal acts, to assist a scheme decision maker in exercising their discretion under the related criminal acts provision
- **additional awards of assistance**—the circumstances in which exceptional circumstances are likely to apply to enable additional awards to be made beyond the applicable 10-year time period.

13.419 The Commission notes that as other expenses, such as medical expenses, may vary widely depending on the nature of a victim's injury, it may not be possible to produce cost guidelines for such expenses.

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14. Making an application under the proposed Act for victims of crime financial assistance

Introduction

- 14.1 This chapter considers and makes recommendations about the processes and procedures for making an application under the proposed Act, including:
- how to apply for assistance
 - the burden of proof that the decision maker will apply when considering applications—for example, when deciding whether a criminal act occurred
 - the documentary evidence that must be provided in support of an application
 - the inspection and publication of scheme application materials and the use of such materials in other legal proceedings
 - application time limits.
- 14.2 The recommendations in this chapter seek to ensure that the processes and procedures for making an application under the proposed Act are fair and equitable, consistent and predictable, and enable the timely determination of applications.
- 14.3 This chapter relates to issues raised in the first, second, third and fourth matters of the supplementary terms of reference, which asked the Commission to consider whether:
- the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) can be simplified to make it easier for applicants to understand their entitlements
 - the VOCAA recognises the appropriate people as victims
 - evidence required to meet eligibility tests under the VOCAA can be simplified
 - application time limits under the VOCAA are appropriate.

How to make an application

- 14.4 This section of the chapter considers the current VOCAA requirements for commencing an application and makes recommendations for how this process can be simplified and made more accessible under the proposed scheme.
- 14.5 These recommendations seek to help meet the objectives of the scheme, as outlined in the supplementary terms of reference. In particular, they seek to ensure that the scheme is fair and equitable, by making the application process accessible. By simplifying the process, these recommendations also seek to establish a scheme that is efficient and sustainable for the state.

Current law

- 14.6 Under the VOCAA, applications for assistance must be commenced by way of a written application in the prescribed form and must be accompanied by any documentary evidence required.¹
- 14.7 If an 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 why the applicant did not report it.²
- 14.8 The VOCAA specifies the information an application must set out.³ This is reflected in the Victims of Crime Assistance Tribunal (VOCAT) application form, which comprises 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 disability
 - 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 of the act of violence on the applicant, including any physical and psychological effects, and 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 determined 'on the papers' or whether 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, and 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 the applicant is claiming funeral expenses only.
 - 9) if the act of violence resulted in a death, the applicant must provide 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.⁴

¹ *Victims of Crime Assistance Act 1996* (Vic) ss 26(1)(a)–(b); *Victims of Crime Assistance Rules 2010* (Vic) r 6.

² *Victims of Crime Assistance Act 1996* (Vic) s 26(2); Victims of Crime Assistance Tribunal, *Application for Assistance Form* (2016) 2, 7.

³ *Victims of Crime Assistance Act 1996* (Vic) s 27(1).

⁴ The *Justice Legislation Further Amendment Act 2016* (Vic) amended the VOCAA, removing the previous requirement for an applicant to verify their application form by way of statutory declaration. This change was intended to make it easier for applicants and legal practitioners to file an application electronically.

- 14.9 An application and the supporting documentation must be lodged either in hard copy or online via the VOCAT website.⁵ Hard-copy applications must be lodged with or posted to the VOCAT venue closest to the applicant's place of residence.⁶ If an applicant applies online, the application will automatically be lodged with the correct venue.⁷
- 14.10 There is no fee for filing an application for assistance, whether it is done online or in hard copy.⁸
- 14.11 There is a separate application form for applications for interim assistance.⁹ This form requires the applicant to outline the assistance sought and why an interim award is appropriate.
- 14.12 The VOCAA provides that applicants may withdraw an application at any time prior to the hearing or determination of the application.¹⁰ They must do so in writing to VOCAT.¹¹ VOCAT must then make an order striking out the application.¹²

Responses

- 14.13 In response to the consultation papers, Women's Legal Service Victoria and Domestic Violence Victoria submitted that the 'current form used for applying to VOCAT itself is an indication of the problematic aspects of the current system'.¹³
- 14.14 The Commission was told that the current application form is difficult for victims to complete on their own, and that the form does not account for diverse victim experiences, particularly for victims of family violence.¹⁴
- 14.15 As the Women's Legal Service Victoria and Domestic Violence Victoria submitted, completing the application form often necessitates legal advice, because it is not self-evident which victim category an applicant falls into, and how this may affect their entitlements.¹⁵
- 14.16 The Aboriginal Family Violence Prevention & Legal Service Victoria also submitted that because family violence 'typically involves a pattern of conduct over a prolonged period of time', the requirement to describe a single incident of violence 'can create misperceptions about what can or cannot be the subject of a claim' and can deter some applicants from making an application.¹⁶
- 14.17 To address these issues, and to better reflect the lived experiences of family violence victims, the Women's Legal Service Victoria and Domestic Violence Victoria submitted that the application form should be amended to enable victims to:
- list multiple family violence incidents or, where abuse is ongoing, list a range of dates over which the violence occurred
 - list one or multiple perpetrators to reflect the nature of family violence in extended family settings

5 Victims of Crime Assistance Tribunal, *Lodging an Application* (18 April 2018) <www.vocat.vic.gov.au/index.php/how-apply/lodging-application>. For the online application form, see Victims of Crime Assistance Tribunal, *Application for Assistance* (31 May 2016) <www.vocat.vic.gov.au/application-assistance>.

6 *Victims of Crime Assistance Rules 2010* (Vic) r 7(1)(b)(i). If there are multiple applicants in respect of one act of violence, the application must be lodged at the venue closest to where the act of violence was committed: r 7(1)(b)(ii). If the Chief Magistrate nominates a venue, then the application should be lodged at that venue: r 7(1)(a). A hard-copy application must be lodged with the Registrar at the Melbourne Magistrates' 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: r 7(2).

7 Victims of Crime Assistance Tribunal, *Where to Apply* (12 April 2018) <www.vocat.vic.gov.au/how-apply/where-apply>.

8 Victims of Crime Assistance Tribunal, *Lodging an Application* (18 April 2018) <www.vocat.vic.gov.au/index.php/how-apply/lodging-application>.

9 Victims of Crime Assistance Tribunal, *Application for Interim Assistance* (2016) <www.vocat.vic.gov.au/application-interim-award>.

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

11 *Ibid.*

12 *Ibid* s 29A(2).

13 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

14 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

15 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria). See also submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

16 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

- outline any cumulative harm suffered, as opposed to harm resulting from any one incident
 - outline any harm suffered by their children or other family members.¹⁷
- 14.18 In addition, Women’s Legal Service Victoria and Domestic Violence Victoria submitted that the application form should clarify the circumstances in which any assistance received from other sources will impact on the claim, so that victims know that they will not necessarily be disadvantaged as a result of receiving other forms of assistance.¹⁸
- 14.19 Hume Riverina Community Legal Service expressed concern about the requirement that interstate applicants and applicants of Aboriginal and Torres Strait Islander origin must file their application with VOCAT’s Principal Registry in Melbourne. It was submitted that this requirement ‘places an unnecessary burden’ on such victims and ‘may result in them having to travel from Albury/Wodonga to Melbourne for hearings or to have their matter finalised’.¹⁹ It was proposed that ‘there should be discretion for interstate and Koori applicants to file in the Registry closest to their residential address’.²⁰
- 14.20 More generally, the Commission was told that the application form and information provided to applicants should be ‘overhauled’ to improve accessibility, including by translating the form into languages other than English.²¹ The accessibility of the current application form, and accessibility issues more generally are discussed in Chapter 17.

Discussion and recommendations

- 14.21 The Commission considers that applications for state-funded financial assistance under the proposed Act should continue to be required to be made in writing, in the specified form, and to be supported by documentary evidence.
- 14.22 However, to address stakeholder concerns regarding the current form’s complexity and its failure to reflect victims’ lived experiences, particularly the experiences of family violence victims, the Commission considers that changes to the application form are required.
- 14.23 As VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria stated in their joint submission, ‘Simplifying the administrative processes involved in lodging and progressing VOCAT applications is an important part of improving the scheme’s accessibility.’²²
- 14.24 The Commission considers that the proposed Act should provide that a victim may apply for any stream of assistance, within the application time limits, by completing the prescribed application form, and that multiple streams of assistance may be applied for at the same time using the same form.
- 14.25 There should be a single application form for all streams of assistance, including immediate needs, in contrast to the current application process, where there is a separate application form for applications for interim assistance.
- 14.26 Such an approach would help simplify and streamline the application process, making it more accessible for applicants, who would not need to determine which form they need to complete.
- 14.27 In addition, the application form should enable applicants to list multiple criminal acts committed by the same perpetrator. The form should also enable applicants to indicate whether the criminal act or acts took place in the context of a broader pattern of abuse and to indicate the time period over which it took place.

17 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

18 Ibid.

19 Submission 26 (Hume Riverina Community Legal Service). See VOCAT, *How to Apply—Where to Apply* (2018) (12 April 2018) <www.vocat.vic.gov.au/how-apply/where-apply>.

20 Submission 26 (Hume Riverina Community Legal Service).

21 Submissions 14 (Inner Melbourne Community Legal). See also submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

22 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

- 14.28 These changes would help make the form more accessible for victims who do not experience a criminal act as an isolated, one-off event.
- 14.29 To assist the decision maker in determining an application and to reduce the administrative burden on victims, the Commission considers that similarly to section 39 of the VOCAA, the proposed Act should enable the scheme decision maker, with the applicant's consent, to obtain any information, evidence or documentation it considers necessary to determine an application. Similarly to section 26(1)(c) of the VOCAA, the proposed Act should require that the application form contain an authorisation to this effect.
- 14.30 The Commission also acknowledges the views of some stakeholders that it may be unclear to victims why the current VOCAT form requires them to provide details of any assistance they have applied for under other schemes.²³ It was submitted that some victims may assume they will be disadvantaged by having applied to other schemes.²⁴
- 14.31 In Chapter 11, the Commission concluded that the proposed scheme should no longer be a scheme of 'last resort'. Instead, the Commission considered that the broad aims of such an objective would be better met by more specific and strengthened provisions in the proposed Act relating to:
- circumstances where offender recovery or contribution may be pursued
 - interaction with other schemes or entitlements.
- 14.32 In support of these proposed provisions, the Commission considers that applicants should continue to be required to provide details of any assistance they have applied for, or for which they may be eligible under any other scheme. However, the Commission considers that the application form should include an explanation of why victims are required to provide this information, expressly stating:
- the circumstances in which an award of financial assistance, or eligibility for an award of financial assistance, under another scheme may reduce the amount of financial assistance a victim would otherwise be eligible for under the proposed Act
 - the circumstances in which victims may be required to refund an award under the proposed Act.
- 14.33 The overlap between the proposed scheme and other schemes, and the circumstances giving rise to refunds, are discussed in Chapter 16.
- 14.34 The Commission notes the concern expressed by Hume Riverina Community Legal Service regarding the requirement that certain applicants must file their application with VOCAT's Principal Registry in Melbourne.²⁵ As discussed in Chapter 17, the Commission considers that the proposed scheme should undertake more specific and targeted outreach activities with relevant frontline and community sector organisations. This should include co-locating scheme staff at these locations on a part time basis to assist victims with submitting applications or paperwork to increase the overall accessibility of the proposed scheme.
- 14.35 As is currently the case, the Commission considers that a victim should continue to be able to withdraw an application made under the proposed Act at any time, by giving written notice to the scheme decision maker.

23 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).
24 Ibid.
25 Submission 26 (Hume Riverina Community Legal Service).

Recommendations—how to make an application

- 54** The proposed Act should provide that an application for assistance must be made in writing in the specified form, supported by the required documentary evidence.
- 55** The proposed Act should provide that a victim may apply for any stream of assistance within the application time limits by completing the specified application form, and that multiple streams of assistance may be applied for using the same form.
- 56** The proposed Act should provide that the scheme decision maker may obtain, with the applicant's consent, any information, evidence or documentation the scheme decision maker considers necessary to determine an application.
- 57** The proposed Act should provide that the application form:
- (a) contain an authorisation for the scheme decision maker to obtain any information, evidence or documentation necessary to enable the determination of an application
 - (b) enable applicants to:
 - (i) list multiple criminal acts by the same perpetrator
 - (ii) indicate that the criminal act/s occurred in the context of a pattern of abuse and list a range of dates over which such abuse occurred
 - (c) require applicants to provide details of any assistance they have applied for, or may be eligible for, under any other scheme, and state the circumstances in which:
 - (i) an award of financial assistance, or eligibility for an award of financial assistance, under another scheme may reduce the amount of financial assistance a victim would otherwise be eligible for under the proposed Act
 - (ii) an award of financial assistance under the proposed scheme may be required to be refunded.
- 58** The proposed Act should provide that a victim may withdraw an application made under the proposed Act at any time, by giving written notice to the scheme decision maker.

Standard of proof

- 14.36 In this section, the Commission considers the standard of proof that applies under the VOCAA and makes recommendations about the standard of proof to be applied by the scheme decision maker when making a determination under the proposed Act. This includes any questions of fact that must be decided in considering an application for assistance, for example, whether a criminal act occurred and whether the injury the applicant suffered was a result of that criminal act.
- 14.37 The 'standard of proof' is the degree of certainty required to prove something at law. The standard of proof differs in different legal proceedings.

- 14.38 As discussed below, the standard of proof that applies under the VOCAA is ‘on the balance of probabilities’.²⁶ This is the standard of proof that generally applies in civil proceedings and is often described as ‘more likely than not’ or ‘more probable than not’. It requires that an alleged fact be more probable than not in order to be accepted by the decision maker as true. This is a lower standard of proof than ‘beyond reasonable doubt’, which is used in criminal matters.

Current law

- 14.39 As noted above, the standard of proof that applies to any question of fact that VOCAT must decide in relation to an application for state-funded financial assistance under the VOCAA is ‘on the balance of probabilities’.²⁷

- 14.40 In determining whether this standard has been met in applications made under the VOCAA, VCAT has frequently applied the test set out in *Briginshaw v Briginshaw* (the Briginshaw test).²⁸ In that case, Justice Dixon stated:

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.²⁹

- 14.41 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.³⁰ In the context of the VOCAA, in which VOCAT must find whether or not a criminal act occurred, the allegation will almost always be of a serious nature.

- 14.42 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.³¹ In particular, VCAT has pointed to the VOCAA’s stated purpose of recognising the effect of an act of violence on victims of crime and expressing the community’s sympathy and condolence.³² This casts doubt on the extent to which the Briginshaw test will be applied for the purposes of determining an application made under the VOCAA.

Responses

- 14.43 In response to the consultation papers, the Commission was not told of any concerns with the existing standard of proof or that it is unfairly applied.³³

Discussion and recommendations

- 14.44 The Commission notes that both the Victorian Government and the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse have stated that a lower standard of proof may be appropriate for redress schemes for child abuse. The Victorian Government, in a discussion paper considering options to implement a state redress scheme for institutional child abuse, stated that a modified standard of proof

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

27 *Ibid.*

28 (1938) 60 CLR 336. For VCAT’s application of this test to the Act, 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].

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

30 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 17, 171. See also *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [16].

31 See, eg, *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].

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

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

might be more appropriate to meet the needs of child abuse victims, given the challenges in meeting the ‘balance of probabilities’ standard of proof.³⁴

- 14.45 In addition, in its final report, the Royal Commission into Institutional Responses to Child Sexual Abuse stated that ‘the standard of proof for a redress scheme should be lower than the common law standard of proof’.³⁵ It therefore recommended that ‘reasonable likelihood’ should be the standard of proof adopted for its recommended redress scheme for persons sexually abused as a child in an institutional context.³⁶
- 14.46 However, the Commission did not receive any submissions indicating that the current standard of proof that applies under the VOCAA creates any particular barriers for victims or is unfairly applied. The Commission notes that most other state-funded victims of crime assistance schemes in Australia use ‘on the balance of probabilities’ as the standard of proof.³⁷ Accordingly, the Commission considers that the proposed Act should continue to provide that in deciding any matter under the proposed Act, the standard of proof should continue to be ‘on the balance of probabilities’.
- 14.47 In addition, the Commission considers that the absence of criminal proceedings against an alleged offender, or the acquittal of an alleged offender, should not be taken to indicate that, on the balance of probabilities, the criminal act did not occur for the purposes of the proposed Act, or to otherwise cast doubt on an applicant’s claim.
- 14.48 Accordingly, the Commission considers that the proposed Act should expressly provide that the scheme decision maker may determine, for the purposes of the proposed Act that a criminal act occurred, regardless of the existence, status or outcome of any other legal proceedings.

Recommendation—standard of proof

- 59** In determining an application for financial assistance, the proposed Act should provide that the scheme decision maker:
- (a) must be satisfied on the balance of probabilities about the existence of any relevant matter
 - (b) may determine that a criminal act occurred regardless of the existence, status or outcome of any other legal proceedings, including where those other proceedings are pending or where the alleged offender has been acquitted in criminal proceedings relating to the alleged criminal act.

Documentary evidence requirements

- 14.49 This section considers the documentary evidence requirements for applications under the VOCAA and makes recommendations for how these requirements can be simplified and made more accessible for applicants under the proposed Act.
- 14.50 These recommendations are intended to ensure that the proposed scheme operates fairly and is equitable and is efficient and sustainable for the state.

34 Department of Justice and Regulation (Vic), *A Victorian Redress Scheme for Institutional Child Abuse*, Public Consultation Paper (5 August 2015) 18, 34.

35 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 375.

36 Ibid 376.

37 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 43; *Victims Rights and Support Act 2013* (NSW) s 39(2)(a); *Victims of Crime Assistance Act 2009* (Qld) ss 78–80, 82, 85; *Victims of Crime Assistance Act 1976* (Tas) s 5(2); *Victims of Crime Act 2001* (SA) s 22; *Criminal Injuries Compensation Act 2003* (WA) s 3. However, the SA scheme requires the offence to have been admitted or proved ‘beyond reasonable doubt’ in proceedings before a court, or admitted in statutory proceedings related to the offence, or that the offence can be reasonably inferred from any admissions made in such proceedings, with limited exceptions: *Victims of Crime Act 2001* (SA) ss 22(2)–(3), 27. The WA scheme requires the offender to have been convicted or acquitted of the offence, with some limited exceptions: *Criminal Injuries Compensation Act 2003* (WA) ss 12–17.

Current law

- 14.51 The VOCAA requires that applications for assistance be accompanied by ‘any documentary evidence (such as medical certificates or statements of earnings) indicated in the form as being required to accompany the application’.³⁸ The application form includes a *Guide to Completing the Application for Assistance Form* which outlines these documentary evidence requirements.³⁹
- 14.52 VOCAT’s website provides additional information about the supporting documentation that should be filed in relation to each category of assistance claimed.⁴⁰ This is outlined at Table 3 below.

Table 3: Documentation to be filed with VOCAT in support of application⁴¹

Assistance claimed	Documents to be filed in support of claim
Special financial assistance	Application should include evidence that the applicant has experienced or is suffering a significant adverse effect (eg medical/psychological report) (evidence may be given at a hearing).
Counselling expenses	Application should include a: <ul style="list-style-type: none"> • completed Application for Counselling form⁴² • relevant Counsellor’s Report and a Counselling and Report Fee Invoice.⁴³
Medical expenses	Application should include a report from a medical practitioner/dentist linking the treatment provided/proposed to the injury sustained by the applicant (the report should detail the proposed treatment plan), receipts, invoices or quotes substantiating the expense claimed (may also include ambulance expenses).
Safety-related expenses (primary victims only)	Application should include receipts, invoices or quotes substantiating the safety-related expense(s) claimed (eg an invoice from home security company, locksmith etc).
Other expenses to assist recovery	Application should include receipts, invoices or quotes substantiating the other expenses claimed (eg an invoice from the home security company, locksmith etc, or a quote if the expense has not yet been incurred).
Clothing worn at time of act of violence	Application should include: <ul style="list-style-type: none"> • invoices, receipts or quotes for the cost of replacing the clothing • a statutory declaration detailing the cost of the clothing lost or damaged (value of replacement clothing must be equivalent to the value of damaged clothes).

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

39 Victims of Crime Assistance Tribunal, *Guide to Completing the Application for Assistance Form* (2016) 5.

40 Victims of Crime Assistance Tribunal, *Medical Expenses* (26 September 2016) <www.vocat.vic.gov.au/assistance-available/financial-assistance-available/medical-expenses>.

41 Table information source: Victims of Crime Assistance Tribunal, *Determining an Application— Supporting Documentation* (2016) <www.vocat.vic.gov.au/determining-application/supporting-documentation>.

42 Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2014, Awards for Counselling Expenses*, 1 July 2014, Form 4.

43 *Ibid*, Forms 1–3.

Assistance claimed	Documents to be filed in support of claim
Loss of earnings	<p>Application should include:</p> <ul style="list-style-type: none"> • a completed Loss of Earnings Claim form • advice in writing detailing number of days/weeks absent from work, reason for period of absence, and gross loss of earnings (including how gross loss was calculated) • medical report/certificate linking the applicant's total or partial incapacity to work to their injury • documentation verifying WorkCover payments, Transport Accident Commission payments, Social Security payments, any other payments (if any) received by the applicant for their injury • if applicant is self-employed, tax returns for the three financial years before the act of violence occurred and the financial years for the loss of earnings claim period.
Funeral expenses	<p>Application should include a receipt, invoice or quote from the funeral service substantiating the expense claimed.</p>
Distress	<p>Application should include:</p> <ul style="list-style-type: none"> • evidence of the applicant's relationship to the deceased primary victim • evidence that the applicant has suffered grief, distress or trauma as a direct result of the deceased primary victim's death (evidence may be given at a hearing).
Dependency claims	<p>Application should include (related victims only):</p> <ul style="list-style-type: none"> • a completed Dependency Claim form • details of gross pre-death earnings of the deceased (including how earnings were calculated) • documentation verifying WorkCover payments, Transport Accident Commission payments, Social Security payments, any other payments (if any) received by the applicant/deceased's estate • tax returns of the applicant/deceased for the three financial years before the death of the primary victim and the financial years for the dependency claim period • details of the assets and liabilities of the applicant and the estate of the deceased • details of the financial contributions made by the deceased primary victim to the applicant for the three financial years immediately before the death of the primary victim • verification of the relationship between the applicant and the deceased (eg spouse, child).
Solicitor's costs	<p>Applicant must complete the 'Amounts Payable to Solicitor' section of Statement of Claim form.</p>
Solicitor's disbursements	<p>Application should include receipts and invoices for solicitor's disbursements claimed.</p>

- 14.53 Part 4 of the application form asks the applicant whether the act of violence has been reported to police and if so, to provide specified details. If the applicant has not reported the act of violence to the police, the form requires that in accordance with section 26(2) of the VOCAA, the application be accompanied by a statutory declaration setting out the circumstances of the act of violence and the reasons the applicant failed to report it.⁴⁴
- 14.54 The application must contain an authorisation for VOCAT to obtain any other evidence or document that it requires to determine the application—for example, public hospital records or police reports.⁴⁵ VOCAT also has powers under the VOCAA to obtain evidence, investigate and obtain information.⁴⁶
- 14.55 Once an application is received, VOCAT writes to the applicant or their lawyer to acknowledge receipt of the application and it may seek further evidence from the applicant, including:
- 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.⁴⁷
- 14.56 VOCAT asks the applicant to file all additional documentation in support of the application and a completed Statement of Claim form within four months of receiving VOCAT’s acknowledgment letter.⁴⁸ The applicant must notify VOCAT in writing within this time that the application is ready to proceed or the application may be struck out.⁴⁹
- 14.57 However, Whittlesea Community Legal Service, in its 2011 Discussion Paper stated that four months may not be long enough for applicants to compile and lodge all supporting evidence.⁵⁰ In particular, in the case of medical and counselling expenses, ‘it may be difficult for an applicant to get appointments with medical practitioners or psychologists/ psychiatrists who can provide appropriate supporting documentation to the Tribunal’ within this timeframe.⁵¹
- 14.58 If the applicant needs more than four months, they must make a written request to VOCAT outlining what material is still outstanding and how much time the applicant requires to obtain it. VOCAT can then extend the period within which all material must be filed.⁵²
- 14.59 As noted in the supplementary consultation paper, the Commission was informed that VOCAT frequently requests further documentation, particularly where the alleged perpetrator has not been charged or convicted, or there is little corroborating evidence.⁵³ The Commission was told that VOCAT often 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.⁵⁴ It also seeks information about a victim’s injuries via medical records or from Victoria Police.⁵⁵

44 *Victims of Crime Assistance Act 1996* (Vic) s 26(2).

45 *Ibid* s 26(1)(c).

46 *Ibid* ss 37, 39, 40.

47 Victims of Crime Assistance Tribunal, *Application for Assistance Form* (2016) 15.

48 Victims of Crime Assistance Tribunal, *Determining an Application—Supporting Documentation* (2016) <www.vocat.vic.gov.au/determining-application/supporting-documentation>.

49 *Ibid*.

50 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 76.

51 *Ibid*.

52 Victims of Crime Assistance Tribunal, *Determining an Application—Supporting Documentation* (2016) <www.vocat.vic.gov.au/determining-application/supporting-documentation>.

53 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017), 140.

54 *Ibid*.

55 *Ibid*; Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.

Responses

- 14.60 Echoing the concerns raised by Whittlesea Community Legal Service noted above, Springvale Monash Legal Service submitted that obtaining relevant supporting documentation is one of the main difficulties of running a VOCAT matter, and one of the primary reasons for delay and costs.⁵⁶
- 14.61 In addition, stakeholders expressed concern about the following aspects of the current documentary evidence requirements:
- evidence required to establish mental illness or disorder for the purposes of proving injury under the VOCAA
 - types of evidence accepted
 - inconsistent application of evidentiary requirements
 - administrative burden for applicants.
- 14.62 Each of these is discussed in turn below.

Evidence required to establish mental illness or disorder

- 14.63 Under the VOCAA, ‘injury’ is defined as including ‘actual physical bodily harm’ and ‘mental illness or disorder’. Stakeholders told the Commission that the evidentiary requirements for establishing that an applicant has suffered a mental illness or disorder can be difficult to satisfy for some applicants for the following reasons:
- not all psychologists are trained in victims of crime work, and the process of obtaining a psychological report therefore has the potential to re-traumatise victims, particularly since the purpose of the assessment is not therapeutic support⁵⁷
 - even where a report is provided by a psychologist or counsellor who is already treating the applicant, obtaining a psychological report can disrupt the therapeutic relationship between the psychologist and the applicant⁵⁸
 - in regional areas, there may be a lack of psychologists and counsellors able to provide such reports⁵⁹
 - it can be difficult for Aboriginal people in rural and regional areas to obtain a report from culturally competent psychologists and psychiatrists⁶⁰
 - some psychologists and counsellors may be reluctant to write reports due to uncertainty as to whether they will get paid by VOCAT, particularly if the application is unsuccessful or an applicant withdraws it before it is determined.⁶¹
- 14.64 The Commission also heard during consultations with victim representatives that the documentary evidence requirements are a further example of the criminal justice system requiring victims to constantly ‘prove themselves’.⁶²
- 14.65 The Commission was told that VOCAT’s reliance on psychological reports to establish injury can be very costly for applicants⁶³ and for the scheme as a whole.⁶⁴ The time taken to obtain such reports can also lead to delays in the application process.⁶⁵

56 Submission 41 (Springvale Monash Legal Service). See also submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

57 Submissions 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultation 9 (Victims’ Representatives—Victims of Crime Consultative Committee).

58 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

59 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

60 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

61 Ibid.

62 Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

63 Submission 37 (safe steps Family Violence Response Centre); Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

64 Submissions 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

65 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

- 14.66 Springvale Monash Legal Service submitted that VOCAT's reliance on psychological reports increases the scheme's vulnerability to fraudulent claims by external parties.⁶⁶

Types of evidence accepted

- 14.67 A significant number of stakeholders expressed concern about the narrow types of evidence that VOCAT will accept as proof of physical injury or mental illness or disorder.⁶⁷ These stakeholders told the Commission that applicants should be able to use a broader range of documentary evidence to support their applications, including reports from a range of health, therapeutic and support services. Anglicare Victoria Victims Assistance Program stated that a document similar to a Victim Impact Statement could be used to support applications and enable victims to express the impact of the crime without requiring professional reports.⁶⁸
- 14.68 Inner Melbourne Community Legal submitted that broadening the types of evidence accepted by the scheme could address some barriers to assistance experienced by victims who did not seek medical or professional assistance following the crime, other than, for example, by disclosing the crime to a support service, such as a family violence service.⁶⁹
- 14.69 One submission stated that VOCAT places too much reliance on police reports as the 'only source' of information about a crime, when consideration of a wider range of information might enable a better assessment of the context in which the offending occurred.⁷⁰ The Commission was also told that 'VOCAT does not seem to be set up to consider a wide range of objective sources when it comes to the subtle effects of domestic violence'.⁷¹

Inconsistent application of evidentiary requirements

- 14.70 The Commission was told that the documentary evidence requirements for establishing mental illness or disorder are inconsistently applied, with different magistrates accepting different types of documentation. As noted above, stakeholders expressed concern about the narrow types of documentary evidence that VOCAT accepts for the purposes of establishing mental illness or disorder. In consultations, stakeholders told the Commission that some magistrates will accept counselling reports, while others require victims to obtain a report from a psychologist.⁷²

Administrative burden

- 14.71 The Commission was told that gathering the necessary documentation to establish injury is administratively burdensome for applicants.⁷³ The Commission was given examples of victims being directed by their lawyer to obtain specific reports or documents to support their VOCAT application.⁷⁴ In this context, the Commission was told that any state-funded financial assistance scheme should minimise the need for victims to chase reports and paperwork in this manner.⁷⁵
- 14.72 To address the administrative burden for applicants, victims of crime representatives told the Commission that the onus should not be on applicants to gather the requisite documentary evidence to support a VOCAT application.⁷⁶

66 Submission 41 (Springvale Monash Legal Service).
67 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 8 (Victims' Representatives—Victims of Crime Consultative Committee), 9 (Domestic Violence Victoria Members), 12 (Regional Consultation—Mildura Victim Support Agencies), 15 (Regional Consultation—Ballarat Victim Support Agencies).

68 Submission 5 (Anglicare Victoria Victims Assistance Program).

69 Submission 14 (Inner Melbourne Community Legal).

70 Submission 36 (Name withheld).

71 Ibid.

72 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

73 Submission 14 (Inner Melbourne Community Legal); Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

74 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

75 Ibid.

76 Ibid.

- 14.73 The Commission was told that there is a lack of understanding by applicants about the supporting materials required by VOCAT and that failing to provide the correct documents can adversely affect a victim's claim.⁷⁷
- 14.74 In their joint submission, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria stated that a case management approach could alleviate the administrative burden placed on applicants—under such an approach, 'the evidence needed to support a particular application could be identified and discussed with a victim at the outset [which] could alleviate the need to engage legal representation'.⁷⁸

Discussion and recommendations

- 14.75 The Commission notes stakeholder views that the current documentary evidence requirements can be difficult for some applicants to satisfy.⁷⁹ In particular, the Commission notes that the administrative burden of collecting the necessary documentation can be onerous for applicants, and that the types of evidence accepted by VOCAT as proof of injury are narrow. While some stakeholders submitted that VOCAT can be flexible in accepting broader types of evidence, the Commission was told that this does not occur consistently, raising issues of fairness and transparency.⁸⁰ Applicants without legal representation may also be unaware that documentary evidence requirements are not always strictly applied, with the effect that such applicants may be disadvantaged when making their application.
- 14.76 The Commission notes that current documentary evidence requirements can operate to delay the determination of applications, disadvantage applicants or even deter some victims from applying for assistance in the first place.
- 14.77 However, the Commission also notes that, as with any public scheme providing financial benefits, the decision maker must have sufficient information to determine applications and to ensure that only those applicants who meet the eligibility requirements are awarded assistance.
- 14.78 In the Commission's view, ensuring that the evidentiary burden is not too onerous for applicants, while also ensuring that decision makers have sufficient information to determine applicants' eligibility for assistance, are key considerations in formulating the documentary evidence requirements under the proposed Act.
- 14.79 To clarify the purpose for which documentary evidence is required, the Commission considers that there should be three categories of documentary evidence required:
- 1) evidence required to establish that the applicant was the victim of a criminal act; this could include documentary evidence of a close personal relationship
 - 2) evidence required to establish that the applicant suffered an injury as a result of the criminal act
 - 3) evidence required to establish expenses incurred or reasonably likely to be incurred by the applicant.
- 14.80 Each of these categories of evidence is discussed further below.
- 14.81 Due to the inconsistent application of the existing documentary evidence requirements and the significant barriers they create for some victims, the Commission considers that the documentary requirements that apply under the proposed scheme should be listed in the proposed Act, and not prescribed by regulation. In the Commission's view, this would help to ensure that the proposed scheme is accessible and transparent by making it easier for victims to identify the documentary evidence requirements that apply. In addition, due

77 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

78 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

79 See, eg, submissions 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service); Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

80 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

to the significant impact that documentary evidence requirements can have on scheme accessibility, the Commission considers that such requirements should not be narrowed without parliamentary scrutiny.

Documentary evidence to establish a criminal act

- 14.82 Except for the provision of a statutory declaration as noted above, neither the VOCAA, nor the *VOCAT Guide to Completing the Application for Assistance Form* specify any documentation that is required to be submitted by the applicant as evidence that the applicant was the victim of a criminal act.
- 14.83 In acknowledgement of the fact that some victims may never report a criminal act to the police, the Commission considers that under the proposed Act, an applicant should be able to provide a broader range of documentary evidence to establish that they were the victim of a criminal act. This would be consistent with the approach in some other jurisdictions. For example, in New South Wales, applicants seeking a recognition payment or assistance for economic loss are required to provide a police report or a 'report from a government agency, such as DOCS or NSW Housing' to establish that the applicant was the victim of a criminal act.⁸¹ In the Australian Capital Territory, the application form for primary victims requires the victim to specify whether the act of violence was reported to a doctor, psychologist, social worker or counsellor, or to a government agency or to a non-government agency, such as a domestic violence service or rape crisis centre.⁸²
- 14.84 To ensure transparency and clarity of requirements, for both decision makers and applicants, the Commission considers that these documentary evidence requirements should be specified in the proposed Act.
- 14.85 In the Commission's view, the proposed Act should provide that an applicant must provide at least one of the following in support of their application to establish that they were the victim of a criminal act:
- record of conviction of the perpetrator
 - if the criminal act was reported to the police, details of that report, including the date of the report and officer and police station at which the report was made
 - a Family Violence Intervention Order, Family Violence Safety Notice or Personal Safety Intervention Order
 - a medical report, including a report from the applicant's general practitioner
 - a report from a psychologist
 - a report from a counsellor
 - a report from a social worker
 - a report from a government department or agency, such as the Department of Health and Human Services
 - a report from a family violence service
 - a report from a non-government agency, such as an agency administering the Victims Assistance Program, as determined by the decision maker.
- 14.86 So that victims are not prevented from applying for assistance in circumstances where they have not previously reported the criminal act to any person and are therefore unable to satisfy the above proposed requirements, the Commission considers that as an alternative, the applicant should be able to provide a statutory declaration outlining the details of the criminal act and the reasons why the applicant has been unable to provide the prescribed documentary evidence.

81 Department of Justice (NSW), *Recognition Payments* (4 May 2018) <www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_financial_support/vs_recognitionpayment.aspx>.

82 Victims of Crime Commissioner, ACT Human Rights Commission, *ACT Financial Assistance Scheme, Primary Victim Application Form* (accessed 31 May 2018) <www.victimssupport.act.gov.au/___data/assets/pdf_file/0009/1078938/Primary-Victim-application-form.pdf>.

Documentary evidence to establish an injury

- 14.87 As noted above, stakeholders submitted that, in practice, VOCAT sometimes accepts documentary evidence outside the types of documentation it formally prescribes.⁸³ The Commission considers that such inconsistent practices raise issues of transparency and fairness.
- 14.88 In addition, the Commission notes stakeholder views that the types of documentary evidence accepted by VOCAT for the purpose of proving injury, particularly mental illness or disorder, are too narrow and can be difficult to satisfy for some victims who do not seek medical assistance in the aftermath of a crime and/or who cannot or do not wish to see a psychologist or psychiatrist to prove that they have a mental illness or disorder.⁸⁴ The Commission also notes concerns raised by some stakeholders that in certain circumstances, undergoing a psychological assessment for non-therapeutic purposes can be re-traumatising for victims.⁸⁵
- 14.89 The Commission considers that the proposed Act should specify the types of evidence required to establish that an applicant has suffered injury as a result of the criminal act. This approach would help ensure greater transparency regarding the evidentiary requirements and ensure fairness, as all applicants would be aware of the evidentiary requirements and these requirements would be applied consistently. This would address the current gap, as reported by stakeholders, between the formal evidentiary requirements and those that apply in practice.
- 14.90 In addition, the Commission considers that the evidentiary requirements for proof of injury should be broadened to enable a wider range of documentation to be submitted to prove injury—which the Commission proposes be defined as ‘physical harm’ or ‘psychological or psychiatric harm’, or exacerbation of one or either of these. Again, this proposed approach would be similar to the approach taken in other jurisdictions. In the Australian Capital Territory, the application form requires applicants to provide details of ‘any person or agency who saw or treated your injury’.⁸⁶ In New South Wales, applicants seeking a recognition payment or assistance for economic loss must provide ‘a medical, dental or counselling report verifying that [the applicant has] been injured (physical or psychological)’.⁸⁷
- 14.91 The Commission notes that most of the barriers associated with the documentary evidence requirements, as identified by stakeholders, relate to the evidentiary requirements for proving mental illness or disorder. However, as submitted by Inner Melbourne Community Legal, the Commission notes that victims who suffer physical harm—including victims of family violence—may not seek medical assistance in the immediate aftermath of a crime and may therefore be unable to prove their physical injury.⁸⁸ Such victims may therefore be ineligible for assistance unless they can demonstrate that they have suffered a mental illness or disorder.⁸⁹ The Commission therefore considers that its proposed broadening of the types of documentary evidence that can be provided to establish injury should also apply for the purposes of establishing physical injury.
- 14.92 Accordingly, the Commission considers that similarly to New South Wales and the Australian Capital Territory, the proposed Act should allow victims to provide a broader range of documentation to support their claim. The Commission considers that the

83 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

84 Submission 14 (Inner Melbourne Community Legal).

85 Submissions 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service); Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

86 Victims of Crime Commissioner, ACT Human Rights Commission, *ACT Financial Assistance Scheme, Primary Victim Application Form* (accessed 31 May 2018) <www.victimssupport.act.gov.au/_data/assets/pdf_file/0009/1078938/Primary-Victim-application-form.pdf>.

87 Department of Justice (NSW), *Recognition Payments* (4 May 2018) <www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_financial_support/vs_recognitionpayment.aspx>.

88 Submission 14 (Inner Melbourne Community Legal).

89 Ibid.

proposed Act should provide that applicants must provide at least one of the following to establish that they suffered injury as a result of a criminal act:

- a medical report, including from the applicant's general practitioner
- hospital records
- a report from a psychologist or psychiatrist
- a report from a counsellor
- a report from a social worker
- a report from a family violence service
- a report from a government agency
- a report from an alternative non-government agency as determined by the decision maker.

14.93 The Commission notes that in some cases there may be overlap between the documentary evidence requirements for establishing that the applicant was the victim of a criminal act, and the documentary evidence requirements for establishing that the applicant suffered injury as a result of that criminal act.

Documentary evidence to establish expenses

14.94 The Commission considers that, as with existing requirements under the VOCAA,⁹⁰ applicants should continue to be required to provide receipts, invoices, quotes, or other relevant documentary evidence (such as evidence of loss of earnings) to substantiate any assistance claimed under the immediate needs, funeral expenses, counselling and practical support streams of assistance, including expenses incurred or reasonably likely to be incurred.

Close personal relationship

14.95 In Chapter 13, the Commission concluded that people who were in a close personal relationship with a person who was injured or died as a result of a criminal act should be included in the definition of victim under the proposed Act. The Commission also considers that 'close personal relationship' should be broadly defined to address stakeholder concerns that the VOCAA does not adequately reflect the diversity of relationships that exist in the community.

14.96 The Commission acknowledges stakeholder concerns that it may be distressing for a person to have to prove their relationship for the purposes of accessing assistance.⁹¹ However, to ensure the sustainability of the proposed scheme in light of the Commission's proposed broadening of the eligibility criteria, the Commission considers that victims who had a close personal relationship with a person who died or was injured as a result of a criminal act committed against them should be required to provide evidence of that relationship in support of their application. This would be similar to the current requirement under the VOCAA that related victims must provide evidence of their relationship with the deceased victim when making an application for assistance for 'distress'.⁹²

Reducing the administrative burden

14.97 To address the administrative burden associated with collecting the documentary evidence necessary to support an application, the proposed Act should provide that, at a victim's request, and within the limits of available resources, one of the functions of a scheme case manager should be to assist victims, so as far as is reasonably practicable, to collect

90 See *Victims of Crime Assistance Act 1996* (Vic) ss 26, 55(2).

91 Submission 15 (Merri Health Victims Assistance Program).

92 Victims of Crime Assistance Tribunal, *Determining an Application—Supporting Documentation* (2016) <www.vocat.vic.gov.au/determining-application/supporting-documentation>.

supporting documentary evidence and complete the application forms. The Commission considers that the proposed Act should empower the scheme decision maker, including case managers, with the victim's consent, to request documentary evidence and to obtain any other necessary and relevant information for the purposes of determining an application made under the proposed Act.

- 14.98 As stated in the joint submission received from VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria, a case management approach, where evidentiary requirements are identified and discussed with the victim at the outset of an application, could also reduce reliance on legal advice.⁹³

Recommendations—documentary evidence requirements

Evidence required to establish a criminal act

- 60** To assist the scheme decision maker in determining whether the applicant was the victim of a criminal act, the proposed Act should provide that an applicant must provide at least one of the following in support of their application:
- (a) a record of the conviction of the perpetrator
 - (b) a police report
 - (c) a Family Violence Intervention Order, Family Violence Safety Notice or Personal Safety Intervention Order
 - (d) a medical report
 - (e) a report from a psychologist
 - (f) a report from a counsellor
 - (g) a report from a social worker
 - (h) a report from a government department or agency
 - (i) a report from a family violence service
 - (j) a report from a non-government agency, as determined by the scheme decision maker.
- 61** The proposed Act should provide that where an applicant is unable to provide any of the required documentary evidence, the applicant must provide a statutory declaration stating the reasons why the documentary evidence has been unable to be provided.

Recommendations—documentary evidence requirements (continued)

Evidence required to establish injury

- 62 To assist the scheme decision maker in establishing that the applicant has suffered injury as a result of the criminal act, the proposed Act should provide that an applicant must provide at least one of the following in support of their application:
- (a) a medical report, including from the applicant’s general practitioner
 - (b) hospital records
 - (c) a report from a psychologist or psychiatrist
 - (d) a report from a counsellor
 - (e) a report from a social worker
 - (f) a report from a family violence service
 - (g) a report from a government agency
 - (h) a report from a non-government agency, as determined by the scheme decision maker.

Evidence required to establish a close personal relationship

- 63 The proposed Act should provide that an applicant who had a close personal relationship with a person who died or was injured as a result of a criminal act must provide evidence of that relationship in support of their application.

Evidence required to establish expenses

- 64 The proposed Act should provide that an applicant must provide a written quotation, invoice, receipt, or other relevant documentary evidence in support of any claim for expenses already incurred or reasonably likely to be incurred for immediate needs, funeral expenses, counselling, and practical support.

Reducing the burden on victims—assisting victims to meet their documentary evidence requirements

- 65 The proposed Act should provide that at a victim’s request, and so far as is reasonably practicable within the limits of available resources, scheme case managers must assist victims with the collection of documentary evidence and/or the completion of the relevant application forms.

Use of materials in other proceedings and inspection and publication of materials

14.99 This part considers the circumstances in which documents and materials produced for the purposes of a VOCAT application can be inspected, published or used in other legal proceedings, and makes recommendations about the inspection, publication and use of documents and materials produced for the purposes of the proposed Act and scheme.

Current law

Use of materials in other proceedings

14.100 Under the VOCAA, evidence of anything said in a VOCAT hearing, or any document prepared solely for the purpose of an application under the VOCAA, is not admissible in any civil or criminal proceeding in a court or a tribunal or in any other legal proceeding within the meaning of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) except in:

- a proceeding before VOCAT itself, or in a proceeding arising out of a VOCAT proceeding
- a proceeding for an offence against the VOCAA
- a proceeding for fraud or perjury offences against the *Crimes Act 1958* (Vic)
- with the consent of the person to whom the words or document principally refers or relates.⁹⁴

14.101 Materials relating to a VOCAT matter may also be admissible in another proceeding if a party to that proceeding requests that they be ruled admissible, and the court or tribunal considers that it is in the interests of justice to do so.⁹⁵

14.102 As the Commission's report *The Role of Victims of Crime in the Criminal Trial Process* noted, it is possible for VOCAT records to be subpoenaed and used by the defence in criminal hearings to demonstrate inconsistencies in a victim's evidence and to challenge the credibility of a victim.⁹⁶ The Commission was informed that VOCAT records are regularly subpoenaed for this purpose.⁹⁷

14.103 In that report, the Commission recommended that applications, supporting documentation and documents provided to or prepared for, or on behalf of, VOCAT at any time in connection with an application for financial assistance under the VOCAA should be inadmissible as evidence in any criminal legal proceedings except:⁹⁸

- in criminal proceedings in which the applicant is the accused
- in or arising out of proceedings before VOCAT
- with the applicant's consent.

14.104 The Commission also recommended that a person should not be required by subpoena or any other procedure to produce any application or document that would be inadmissible following the implementation of the above recommendation.⁹⁹

94 *Victims of Crime Assistance Act 1996* (Vic) s 65(1).

95 *Ibid* s 65(2).

96 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 246. Once VOCAT receives a subpoena, victims may or may not be notified that their records have been requested: Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2015—Access to Files*, 1 April 2015, 4.

97 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 247. VOCAT has published a Practice Direction which provides information about serving a subpoena on VOCAT and how VOCAT responds to subpoenas: Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2015—Access to Files*, 1 April 2015, 3–4.

98 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 247.

99 *Ibid* (Recommendation 51).

- 14.105 The Commission’s rationale, confirmed through consultations at the time, was that medical, psychological, psychiatric and counselling records provided to VOCAT are prepared for a specific purpose—determining an applicant’s eligibility under the VOCAA. The Commission concluded that it is not appropriate for such materials to then be used for the purposes of criminal proceedings without the victim’s consent.¹⁰⁰
- 14.106 The Commission stated:
- Victims are entitled to apply for assistance from VOCAT to help them with their recovery. They should not be discouraged from doing so because of fear that an offender will seek to access or use their VOCAT records in criminal proceedings.¹⁰¹
- 14.107 As at 28 May 2018, these recommendations are yet to be implemented and therefore remain relevant considerations in the Commission’s current examination of Victoria’s victims of crime assistance scheme.

Inspection of documents

- 14.108 Section 42A of the VOCAA allows for the inspection of documents filed in a VOCAT proceeding in certain circumstances. The VOCAA provides that the applicant in the proceeding and, on payment of any prescribed fee, any other person, may inspect and obtain a copy of any document filed in a VOCAT proceeding.¹⁰²
- 14.109 However, as an exception to the above, the VOCAA provides that:
- a person may not inspect or obtain a copy of a document which VOCAT has ordered remain confidential,¹⁰³ and
 - a person, not being the applicant in the proceeding, may not, without the leave of VOCAT, inspect or obtain a copy of a document which in the opinion of a registrar of VOCAT ought to remain confidential.¹⁰⁴
- 14.110 VOCAT has published a Practice Direction which specifies the procedure to be followed when a request is made under the VOCAA to inspect or obtain a copy of a document filed in a VOCAT proceeding, including ‘classified’ documents, such as medical or counselling reports.¹⁰⁵
- 14.111 However, the inspection of documents provisions in the VOCAA do not prevent documents filed in a VOCAT proceeding from being subpoenaed, even if VOCAT considers the documents to be confidential.¹⁰⁶ If VOCAT receives a subpoena to access documents that it considers should not be inspected under section 42A, it will provide the documents to the issuing court in a sealed envelope, noting its objection to their inspection or release without leave of the court.¹⁰⁷ The court hearing the matter may then order that the documents be inspected or released, notwithstanding VOCAT’s objection.¹⁰⁸

100 Ibid 247.

101 Ibid.

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

103 Ibid s 42A(2)(a).

104 Ibid s 42A(2)(b).

105 Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2015—Access to Files*, 1 April 2015. The Practice Direction states that ‘Parties, non-parties (including media representatives), persons with a substantial interest or alleged offenders may request access to information and/or documents contained on a file’: at 1.

106 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 247.

107 Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2015—Access to Files*, 1 April 2015.

108 Ibid. The Commission notes that it is for the court to determine whether proceedings should be conducted in closed court for the purposes of determining whether to admit such evidence.

Publication of materials

- 14.112 The VOCAA provides that, except in accordance with an order from VOCAT, a person must not publish material produced as part of an application to VOCAT.¹⁰⁹ This includes evidence given at a hearing,¹¹⁰ the content of specified documents¹¹¹ and any information likely to lead to the identification of a party or another person at a VOCAT hearing.¹¹²
- 14.113 It is an offence to publish any material without an order by VOCAT allowing the publication.¹¹³ VOCAT may only grant the order if it believes that it is in the public interest to do so.¹¹⁴

Responses

Use of materials in other proceedings

- 14.114 In the Commission's supplementary consultation paper, stakeholders were asked whether VOCAT application materials should be admissible as evidence in criminal or family law proceedings.¹¹⁵
- 14.115 Stakeholders confirmed that such materials are sometimes used in other legal proceedings and that this is problematic for some victims.¹¹⁶
- 14.116 As knowmore submitted to the Commission, VOCAT application materials can contain sensitive personal information detailing the victim's abuse (including childhood sexual abuse) and resultant psychological injury.¹¹⁷ If such materials are subpoenaed for use in other proceedings, this information may then be disclosed in those proceedings and used against the victim to discredit them—for example, by arguing that the victim made the complaint to police in order to obtain financial advantage via a VOCAT application.¹¹⁸
- 14.117 A number of stakeholders also told the Commission that it is the practice of some defence lawyers to subpoena VOCAT application materials pre-trial.¹¹⁹ The Director of Public Prosecutions (DPP) also submitted that victims have been cross-examined on their VOCAT application materials.¹²⁰ In one case, the DPP stated that VOCAT application materials were used by the defence to secure a re-trial which resulted in an acquittal because of inconsistencies between the victim's evidence at trial and their VOCAT application materials.¹²¹
- 14.118 Knowmore submitted that the use of VOCAT application materials in family law proceedings is also an issue for some victims.¹²² In particular, knowmore stated that psychiatric reports produced for the purposes of a VOCAT application have been used against its clients in family law proceedings.¹²³

109 *Victims of Crime Assistance Act 1996* (Vic) ss 43(1), 43(3).

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

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

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

113 The penalty is 100 penalty units or imprisonment for two years for a natural person and 500 penalty units for a body corporate: *ibid* s 43(3).

114 *Victims of Crime Assistance Act 1996* (Vic) s 43(1).

115 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 163.

116 Submission 43 (knowmore). See also submissions 3 (Director of Public Prosecutions Victoria), 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

117 Submission 43 (knowmore). See also submissions 3 (Director of Public Prosecutions Victoria), 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

118 Submission 43 (knowmore). See also Submissions 3 (Director of Public Prosecutions Victoria), 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

119 Submissions 3 (Director of Public Prosecutions Victoria), 5 (Anglicare Victoria Victims Assistance Program); Consultation 13 (Regional Consultation—Mildura Legal Professionals).

120 Submission 3 (Director of Public Prosecutions Victoria).

121 *Ibid*.

122 Submission 43 (knowmore).

123 *Ibid*.

- 14.119 Given how VOCAT application materials can be used by alleged offenders in other legal proceedings, many stakeholders expressed the view that materials produced for the purposes of a VOCAT application should be inadmissible in other proceedings, including criminal or family law proceedings.¹²⁴
- 14.120 For example, Women’s Legal Service Victoria and Domestic Violence Victoria submitted that access to and use of records related to VOCAT applications should be restricted and protected from subpoena due to the sensitive nature of the information,¹²⁵ and to ensure victims are not re-traumatised by having this information made available to the alleged perpetrator.¹²⁶
- 14.121 Stakeholders also expressed the view that because VOCAT records directly relate to a victim’s recovery, they should be deemed to have been provided for a ‘therapeutic’ purpose.¹²⁷ Any access to or use of these records without the applicant’s consent would conflict with this purpose.¹²⁸
- 14.122 In their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria noted that VOCAT application materials may have limited probative value in other proceedings, but that it is difficult for VOCAT members to assess this, as they do not have access to the other proceedings.¹²⁹ The submission therefore questioned whether the ability to subpoena VOCAT application materials should be retained.¹³⁰
- 14.123 However, other stakeholders submitted that victims should be able to consent to VOCAT application materials being used in other proceedings where this might benefit them, such as for a plea in mitigation or as evidence of their victimisation in an application for revocation or discharge of infringements.¹³¹
- 14.124 Some stakeholders stated that VOCAT materials should continue to be admissible, but that the interests of justice test in section 65 of VOCAA should be amended to better protect victims by limiting access to such materials in certain circumstances.¹³²

Inspection of documents

- 14.125 Knowmore submitted that in addition to VOCAT application materials being inadmissible in other legal proceedings, such materials should also not be shared with other schemes, such as the Transport Accident Commission (TAC) or WorkCover.¹³³ These materials can also be used against victims in the context of applications for compensation under these schemes—for example, knowmore submitted that it assisted a client whose institutional records relating to the sexual abuse she suffered in state care were used against her in TAC proceedings as evidence that her pain and suffering was the result of pre-existing trauma from this abuse.¹³⁴
- 14.126 Knowmore’s submission did not state the mechanism by which VOCAT application materials are shared with other schemes, but it may be that the inspection provisions contained in the VOCAA are the basis on which VOCAT documents are accessed by other schemes.

124 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 19 (Schembri & Co Lawyers), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore), 49 (Victims of Crime Commissioner, Victoria); Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals).

125 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

126 Submission 15 (Merri Health Victims Assistance Program).

127 Submission 15 (Merri Health Victims Assistance Program). See also submission 14 (Inner Melbourne Community Legal).

128 Submissions 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program).

129 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

130 Ibid.

131 Submission 41 (Springvale Monash Legal Service); Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

132 Submissions 27 (Name withheld), 41 (Springvale Monash Legal Service).

133 Submission 43 (knowmore).

134 Ibid.

- 14.127 Inner Melbourne Community Legal stated that ‘access and use of VOCAT records should be restricted’ because such records ‘pertain directly to [a] victim’s recovery’ and the release of the documents without the victim’s consent would run contrary to this.¹³⁵

Publication of materials

- 14.128 In their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria noted that there is lack of clarity regarding the publication provisions in the VOCAA.¹³⁶ It was submitted that some judicial officers in higher jurisdictions had interpreted the existing publication prohibition as requiring VOCAT members to make an order under section 43(3) of the VOCAA every time VOCAT material is subpoenaed to that higher court, on the basis that the release of such materials to a party by a prothonotary or registrar is an act of publication, even where an order was made by the judge under rule 42A(10) of the *Supreme Court (General Civil Procedure) Rules 2015*.¹³⁷
- 14.129 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria questioned whether it should be possible to subpoena VOCAT application materials for the purposes of other legal proceedings. However, if the current provisions are retained, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that the meaning of ‘published’ in section 43 of the VOCAA should be clarified.¹³⁸

Discussion and recommendations

Use of VOCAT application materials in other proceedings

- 14.130 The Commission notes widespread stakeholder concern regarding the use of VOCAT application materials in other legal proceedings without the victim’s consent.¹³⁹ In particular, the Commission notes the concern that alleged perpetrators may access VOCAT application materials to discredit victims in criminal and family law proceedings.¹⁴⁰ This can result in victims being subjected to cross-examination about their VOCAT application during a criminal trial.¹⁴¹ Stakeholders also expressed concern that the use of VOCAT application materials in other proceedings may result in personal and sensitive information about the crime being used for non-therapeutic and unintended purposes.¹⁴²
- 14.131 In the Commission’s view, the current use of VOCAT application materials in such ways conflicts with the beneficial intent of a victims of crime assistance scheme and the objectives of the VOCAA, which include assisting victims recover from crime.¹⁴³ It may be re-traumatising for a victim if an alleged perpetrator obtains information about the impact of the crime on the victim, including any physical and/or psychological injuries, and then uses that information against the victim. This may also undermine the benefit of any assistance provided under the scheme.
- 14.132 The Commission reiterates the recommendation from its report *The Role of Victims of Crime in the Criminal Trial Process* that applications, supporting documentation and documents provided to, or prepared for or on behalf of VOCAT in connection with an

135 Submission 14 (Inner Melbourne Community Legal).

136 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

137 Ibid. In its 2016–17 Annual Report, VOCAT states that VOCAT’s Coordinating Committee reviewed VOCAT’s Practice Direction regarding access to VOCAT materials ‘in light of Associate Justice Lansdowne’s decision requiring the Tribunal to make an order to allow publication of material for every subpoena and the impact that this would likely have on the Tribunal’s workload’: Victims of Crime Assistance Tribunal, *Annual Report 2016–17 (2017)* 43. However, the Annual Report does not provide details of the outcome of this review.

138 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

139 Submission 43 (knowmore). See also submissions 3 (Director of Public Prosecutions Victoria), 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 19 (Schembri & Co Lawyers), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 49 (Victims of Crime Commissioner, Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals).

140 Submission 43 (knowmore). See also submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

141 Submission 3 (Director of Public Prosecutions Victoria).

142 Submission 43 (knowmore). See also submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

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

application for financial assistance under VOCAA should be inadmissible as evidence in any criminal legal proceedings except:¹⁴⁴

- in criminal proceedings in which the applicant is the accused
- in or arising out of proceedings before VOCAT (for the purposes of the proposed Act, this exception would be ‘in or arising out of proceedings relating to the application to which the applicant is a party’)
- with the applicant’s consent.

14.133 The Commission also reiterates the recommendation in *The Role of Victims of Crime in the Criminal Trial Process* that a person should not be required by subpoena or any other procedure to produce any application or document that would be inadmissible following the implementation of the above recommendation.¹⁴⁵

14.134 The Commission acknowledges stakeholder submissions that it may also be harmful to victims if their materials produced for the purposes of applying to a victims of crime assistance scheme are used in other types of proceedings, including family law proceedings. The Commission therefore considers that the above recommendation should be extended, so that materials produced for the purposes of an application under the proposed Act are inadmissible in any other legal proceedings, except with the applicant’s consent.

14.135 It should continue to be possible to subpoena scheme application materials where such materials are admissible in legal proceedings following the implementation of the above recommendations—for example, in criminal proceedings in which the applicant is the accused.

14.136 The Commission notes that its proposed approach would be similar to the approach in New South Wales. The *Victims Rights and Support Act 2013* (NSW) provides that an application for assistance, any supporting documents, and any documents provided or prepared in connection with an application are not admissible as evidence in any other criminal or civil proceeding, except where the applicant is an accused person in criminal proceedings or in proceedings before the Tribunal to determine any issue relating to the application.¹⁴⁶ In addition, a person cannot be compelled to produce an inadmissible document.¹⁴⁷

Inspection of materials

14.137 The Commission notes that VOCAT’s 2016–17 Annual Report does not provide any information regarding the extent to which the inspection of materials provisions under the VOCAA are used.

14.138 However, the Commission acknowledges the concern expressed by knowmore that under the existing scheme, victims’ VOCAT application materials may be shared with other schemes and used against victims in the context of applications for compensation under these other schemes.¹⁴⁸ The Commission also notes Inner Melbourne Community Legal’s submission that access to scheme materials should generally be restricted due to the sensitive and personal information they contain.¹⁴⁹

14.139 As outlined above, the Commission considers that materials produced for the purpose of an application under the proposed Act should be inadmissible in any other legal proceedings, with some exceptions.

144 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) (Recommendations 50 and 51).

145 Ibid (Recommendation 51).

146 *Victims Rights and Support Act 2013* (NSW) s 113. See also *Victims of Crime Assistance Act* (NT) s 64.

147 *Victims Rights and Support Act 2013* (NSW) s 113(3).

148 Submission 43 (knowmore).

149 Submission 14 (Inner Melbourne Community Legal).

- 14.140 The Commission considers that a similar rationale applies to the inspection of VOCAT application materials by persons other than the victim. The Commission therefore considers that under the proposed Act, application materials should only be able to be inspected:
- by the applicant
 - by other persons with the applicant's consent, or
 - under a subpoena in the limited circumstances specified in Recommendation 66 below.
- 14.141 The Commission notes, however, that further consideration may need to be given to requests for scheme materials by other Victorian or Commonwealth agencies in circumstances where the victim does not consent to the release of the materials but the agency is empowered to access this information under legislation and/or as a result of information-sharing arrangements.

Publication of materials

- 14.142 In response to the consultation papers, the Commission received limited stakeholder submissions regarding the operation of the VOCAA publication provisions. As noted above, an exception to this was the issue raised in the joint submission from VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria, which noted a lack of legislative clarity regarding the word 'publish' in the VOCAA and the effect of this for the release of materials in response to a subpoena.¹⁵⁰
- 14.143 The Commission notes that VOCAT's 2016–17 Annual Report does not provide any information regarding the extent to which the publication provisions under the VOCAA are used.
- 14.144 However, the Commission considers it important that the proposed Act continue to restrict the publication of materials to protect the identity and privacy of applicants, alleged perpetrators and any other participants in an application under the proposed Act.
- 14.145 Under the proposed scheme, decision makers would not be concerned with attributing guilt to alleged perpetrators. Instead, decision makers would be required to determine whether an applicant is a victim of a criminal act, and whether as a result of that criminal act, they suffered an injury. In addition, the Commission has proposed that victim conferences should not be for the purposes of fact finding or making financial assistance determinations. Nevertheless, the Commission notes that a determination under the proposed Act, and an acknowledgment of the victim's experience through a victim conference or in a statement of acknowledgment, could raise concerns that an alleged perpetrator has not been given the right of reply. This is notwithstanding that such an acknowledgment or award of assistance under the proposed Act would not be a determination of criminal guilt, and would be solely for the benefit of the victim.
- 14.146 In this context, the Commission notes the ease with which private information can be made public through social media and the potential for a victim to use a determination under the proposed Act as the basis for making information public about an alleged perpetrator, which may have the effect of alleging guilt.
- 14.147 Similarly, the Commission notes that should an alleged perpetrator become aware of a victim's application to the scheme, this information could also be made public and disseminated, thus causing fear, harm or distress to a victim.
- 14.148 In order to protect the privacy of any individuals the subject of an application or determination, including victims and alleged perpetrators, the Commission considers that the proposed Act should prohibit the publication of information in any form or medium that would identify any individuals the subject of an application.

- 14.149 In this context, the Commission notes the concept of ‘open justice’, which recognises ‘the crucial importance of public disclosure of what is happening in our legal processes’,¹⁵¹ in particular, that ‘those who have been charged with offences must be seen to have been subjected to a fair process according to law’.¹⁵² The Commission also notes that open justice is ‘a constitutional hallmark of the exercise of judicial power’.¹⁵³
- 14.150 However, the Commission considers that the proposed prohibition, and the proposed inspection of materials provision discussed above, do not infringe the principles of open justice. Under the proposed Act, the decision maker would not be making a finding of criminal guilt in relation to an alleged perpetrator. Instead, under the proposed Act, the functions and powers of the decision maker are limited to a determination of the question of whether a person is a victim of a criminal act, and whether as a result of that criminal act they suffered an injury. As such, the question of whether an alleged perpetrator has been afforded procedural fairness is not relevant. Furthermore, under the proposed Act, the decision maker would not be a judicial officer and would not exercise judicial power.
- 14.151 The Commission notes that publication prohibitions also apply in Tasmania and Western Australia. Tasmania’s *Victims of Crime Assistance Act 1976* (Tas) contains a publication prohibition in relation to hearings conducted under that Act.¹⁵⁴ The Act provides that proceedings are to be conducted in private and a person must not publish, or allow to be published, a report of proceedings.¹⁵⁵ In Western Australia an assessor may, if satisfied that it is in the interests of justice, prohibit publication of an application to the scheme, proceedings in relation to such an application, any decision, award or order made by an assessor and any reasons provided.¹⁵⁶ In particular, an assessor may prohibit publication where this is likely to lead members of the public to identify a victim, a close relative of a deceased victim or an alleged offender.¹⁵⁷
- 14.152 Notwithstanding the above, and for the purposes of scheme reporting, the Commission considers that the proposed Act should provide that the publication prohibition does not apply to the publication of de-identified data. This would include data on scheme expenditure.
- 14.153 In addition, the Commission considers that the proposed Act should provide that the proposed publication prohibition does not prevent a victim from speaking to the media or publishing concerns about the proposed scheme’s process, provided that the victim, or any other individual the subject of an application, including an alleged perpetrator, is not identified.
- 14.154 In addition, and to address an ambiguity in the VOCAA regarding the release of materials in response to a subpoena, as identified in the joint submission from VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria,¹⁵⁸ the Commission considers that the proposed Act should clarify that the publication prohibition does not apply to the release of scheme materials in accordance with a subpoena. However, the Commission notes that scheme materials could only be released in response to a subpoena where they would not be inadmissible as a result of the Commission’s recommendations above.

151 Frank Vincent AO QC, *Open Courts Act Review* (September 2017) 14.

152 Ibid.

153 Ibid.

154 *Victims of Crime Assistance Act 1976* (Tas) s 8.

155 Ibid ss 8(1)–(2).

156 *Criminal Injuries Compensation Act 2003* (WA) s 64(2).

157 Ibid s 64(3).

158 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

Recommendations—use of application materials

Use of application materials in other proceedings

- 66** The proposed Act should provide that an application for assistance, any supporting documents, and any documents provided or prepared in connection with an application under the proposed Act are not admissible as evidence in any other legal proceedings, except:
- (a) in criminal proceedings in which the applicant is the accused
 - (b) in or arising out of proceedings relating to the application to which the applicant is a party, or
 - (c) with the applicant's consent.
- 67** The proposed Act should provide that a person is not required by subpoena, or any other procedure, to produce any application or other document that would be inadmissible following the implementation of Recommendation 66.

Inspection of application materials

- 68** Except in accordance with Recommendation 66, the proposed Act should provide that an application for assistance, any supporting documents, and any documents provided or prepared in connection with an application under the proposed Act may only be accessed by the applicant or, with the applicant's consent, by another person.

Publication of application materials

- 69** The proposed Act should provide that a person must not publish, or cause to be published, any details or documentation related to, or produced for, the purposes of:
- (a) an application to the scheme that would be likely to lead to the identification of any individual the subject of an application, including applicants and alleged offenders
 - (b) a determination of the scheme that would be likely to lead to the identification of any individual the subject of an application, including applicants and alleged offenders
 - (c) any proceeding conducted by the scheme, including a victim conference, that would be likely to lead to the identification of any individuals the subject of an application, including applicants and alleged offenders.

Recommendations—use of application materials

Publication of application materials (continued)

- 70 The proposed Act should provide that the publication prohibition does not apply to:
- (a) the publication of de-identified data for the purpose of scheme reporting
 - (b) media or other public reports about the scheme which appropriately de-identifies individuals
 - (c) any information that would not lead to the identification of any individuals the subject of an application
 - (d) the release of any application for assistance, any supporting documents, and any documents provided or prepared in connection with an application under the proposed Act by a court or tribunal in accordance with a subpoena, where such materials are not inadmissible as a result of Recommendation 66.

Time limits for making an application

14.155 This part outlines the current law with respect to the time limits that apply for the making of an application under the VOCAA. It also considers stakeholder views regarding the existing application time limits and makes recommendations for the application time limits to be applied under the proposed Act.

Current law

- 14.156 Under the VOCAA, an application for financial assistance must be made within two years of the act of violence.¹⁵⁹ VOCAT must strike out applications made outside this time limit ‘unless it considers that, in the particular circumstances, the application ought not to be struck out’.¹⁶⁰ As discussed below, the VOCAA specifies the matters VOCAT must have regard to in determining whether to further hear and determine an application made out of time. As is also discussed below, there are exceptions to the time limit that apply to child victims of physical and sexual abuse.¹⁶¹
- 14.157 The VOCAA provides that VOCAT must not decide to hear an out-of-time application only because the applicant was unaware of the scheme or the time limit.¹⁶² This means that a victim’s lack of knowledge of the scheme, or the time limit, can be a barrier to accessing the scheme.
- 14.158 Where an applicant wishes to lodge an application outside the two-year time limit, they must apply for leave from VOCAT using the ‘application for extension of time’ form.¹⁶³
- 14.159 The form requires the applicant to set out their reasons for not lodging the application within the time limit and to attach supporting documentation.¹⁶⁴ The applicant can state whether they want the time extension to be decided without appearing before VOCAT.¹⁶⁵

159 *Victims of Crime Assistance Act 1996* (Vic) s 29(1). For applications by related victims or a person who has incurred funeral expenses, the application must be made within two years after the death of the primary victim.

160 *Victims of Crime Assistance Act 1996* (Vic) s 29(2).

161 *Ibid* s 29(1A).

162 *Ibid* s 29(4).

163 Victims of Crime Assistance Tribunal, *Practice Direction No 2 of 2016—Extension of Time for Lodgement* (30 April 2016) <www.vocat.vic.gov.au/practice-direction-2-2016-extension-time-lodgement>.

164 Victims of Crime Assistance Tribunal, *Application for Extension of Time Form* (2016) <www.vocat.vic.gov.au/application-extension-time-form>.

165 *Ibid*.

Considering the particular circumstances of the case

14.160 In deciding whether to hear an out-of-time application, VOCAT must have regard to:¹⁶⁶

- the applicant’s age when the act of violence occurred
- whether the applicant is intellectually disabled¹⁶⁷ or mentally ill¹⁶⁸
- 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’s capacity to make a fair decision
- whether the applicant was a child at the time of the act of violence and they made the application for assistance within a reasonable time after turning 18
- all other circumstances that VOCAT considers relevant.

14.161 VOCAT has used its discretion to consider ‘all other circumstances’¹⁶⁹ to consider factors such as the prospect of success of the substantive case.¹⁷⁰ VOCAT may also consider circumstances such as:

- whether the applicant can show an acceptable explanation for the delay
- whether it would be fair and equitable to extend the time limit
- whether VOCAT has been prejudiced by the delay
- whether the delay might result in ‘unsettling’ other people
- considerations of fairness to affected individuals.¹⁷¹

Child victims of physical and sexual abuse

14.162 Different application time limits now apply to child victims of physical and sexual abuse. The *Justice Legislation Amendment (Victims) Act 2018* was enacted in February 2018 and creates a new section 29(1A) of the VOCAA.¹⁷² This new section provides that an application may be made at any time where a victim was under 18 at the time that the act of violence was committed against them and the act of violence consisted of physical or sexual abuse.¹⁷³

14.163 This amendment to the VOCAA will address the issue identified in the Commission’s supplementary consultation paper of child victims being unable to make out-of-time applications. This issue was illustrated in *S v Victims of Crime Assistance Tribunal*,¹⁷⁴ where an alleged rape took place when the applicant was 17. VCAT upheld VOCAT’s decision to strike out the application for being out of time because the alleged perpetrator had not been in a position of power, influence or trust over the applicant and there was no psychiatric evidence linking the trauma of the rape to the applicant’s delay in making the application.¹⁷⁵

14.164 While this amendment to the VOCAA is a positive development in removing barriers to assistance currently experienced by some classes of child victim, the Commission considers that for other child—and adult—victims, the two-year time limit may still operate as a

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

167 ‘Intellectually disabled’ within the meaning of the *Disability Act 2006* (Vic).

168 ‘Mentally ill’ within the meaning of the *Mental Health Act 2014* (Vic).

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

170 See, eg, *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).

171 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [11]. This decision was upheld on appeal to the Supreme Court: *BFK v VOCAT* [2017] VSC 736.

172 *Victims of Crime Assistance Act 1996* (Vic) s 29(1A), inserted by the *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 37. This amendment commenced on 5 April 2018.

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

174 [2002] VCAT 1257 (7 November 2002).

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

disproportionately difficult barrier to overcome, including for family violence victims,¹⁷⁶ victims of abuse or neglect in care, and adult victims of sexual assault.¹⁷⁷ This is because the discretionary factors that VOCAT must consider in determining whether to allow an out-of-time application to be heard have been interpreted narrowly.¹⁷⁸

14.165 For example, in *BFK v Victims of Crime Assistance Tribunal*,¹⁷⁹ VCAT affirmed VOCAT's decision to strike out an application for being out of time because the 18-year-old applicant's alleged perpetrator boyfriend had not been in a position of power, influence or trust over her, as he was not significantly older and VCAT considered he was 'troubled' rather than 'calculating and controlling'.¹⁸⁰

14.166 VCAT also found in that case that the 23-year delay between the alleged act of violence and the application denied VOCAT the opportunity to make a fair decision:

This delay raises questions as to the accuracy of memories of events long past, particularly in the context of conflicting evidence and all potential corroborating evidence being no longer available.¹⁸¹

14.167 In addition, regardless of crime type, the application time limit can present a particular barrier to accessing assistance for more vulnerable groups of the community, including those with disability, members of the LGBTIQ community, Aboriginal and Torres Strait Islander applicants, children and those from non-English-speaking backgrounds.¹⁸² As discussed further in Chapter 15, as a result of discrimination, lack of cultural safety and accessibility issues more generally, these victims may not feel comfortable reporting the crime to the police or to authorities more generally, which may also delay them in making an application to VOCAT.

14.168 Finally, the mere existence of the time limit, and the words used in the VOCAA to describe it, can operate as a barrier for some victims, who may not be aware that out of time applications may be allowed and/or in what circumstances.¹⁸³ In *BFK v Victims of Crime Assistance Tribunal*,¹⁸⁴ VCAT noted that section 29 of the VOCAA is 'couched in strong terms', providing that VOCAT 'must strike out' an application made out of time. VCAT contrasted this 'strong' language to the more flexible and neutral language employed in other provisions of the VOCAA, such as where the word 'may' is used.¹⁸⁵

Responses

14.169 In the Commission's consultation papers, community and stakeholder views were sought on whether:

- the two-year application time limit is still appropriate
- the time limit should be removed for some crime types, victim cohorts or certain types of assistance
- the decision maker should have to consider additional factors when determining whether or not to accept an out-of-time application

176 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 78–9.
177 Recent research by the Royal Commission into Institutional Responses to Child Sexual Abuse found that for victims aged approximately 11 years at the time of alleged sexual abuse, the average time taken to make a complaint to the Catholic Church was 33 years: Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14. See also Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services*, Final Report (2016) 59, discussing reasons why victims with disability may face barriers to reporting abuse.

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

179 Ibid.

180 Ibid [117]. This decision was upheld on appeal to the Supreme Court: *BFK v VOCAT* [2017] VSC 736.

181 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [121].

182 See, eg, Angela Dwyer, 'Policing Lesbian, Gay, Bisexual and Transgender Young People: A Gap in the Research Literature' (2011) 22(3) *Current Issues in Criminal Justice* 415, 416, discussing the unwillingness to report to police among LGBTIQ victims of crime. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 145–6, discussing the unwillingness to involve authorities among LGBTIQ victims of family violence. See also Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 11, discussing the unwillingness to report to police among Aboriginal and Torres Strait Islander victims of crime.

183 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 79.

184 [2017] VCAT 289 (15 March 2017).

185 Ibid [12].

- the decision maker should be required to publish data and reasons for decisions relating to out-of-time applications.¹⁸⁶

14.170 In response, stakeholders told the Commission that VOCAT frequently grants extensions for applications made outside the two-year time limit,¹⁸⁷ particularly for childhood sexual abuse matters.¹⁸⁸ This was confirmed by the joint submission received from VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria.¹⁸⁹ However, many stakeholders and members of the community expressed concern that the current time limit nevertheless presents difficulties for victims for the following reasons:

- a two-year time limit is too short and not evidence-based
- the time limit disproportionately impacts particular cohorts of victims
- the decision maker should be required to consider additional factors when deciding whether to grant an out-of-time application
- there is a lack of clarity regarding when out-of-time applications will be allowed, which results in inconsistent decisions.

14.171 Each of these concerns is discussed in turn below.

Two-year time limit too short and not evidence-based

14.172 A number of stakeholders expressed the view that the two-year time limit is too short.¹⁹⁰

14.173 This is because victims' lives are often 'complex and chaotic' in the period following an offence and victims may be unable to manage a 'bureaucratic' process within a two-year timeframe.¹⁹¹ Similarly, Ryan Carlisle Thomas Lawyers submitted that victims may be busy trying to 'get their lives "back on track"' in the aftermath of a crime.¹⁹²

14.174 Stakeholders also told the Commission that trying to meet the two-year time limit can re-traumatise victims¹⁹³ and place undue stress on them when they are dealing with grief and trauma at 'a time of heightened vulnerability'.¹⁹⁴ The RMIT Centre for Innovative Justice told the Commission that being told by a lawyer that the application is 'out of time' can cause stress and worry for the victim, regardless of whether VOCAT is likely to accept an out-of-time application.¹⁹⁵

14.175 Stakeholders also noted that the two-year time limit may not reflect victims' experience of trauma. Some victims, particularly family violence victims, may take time to deal with the psychological consequences of violence and to be able even to name or identify what has happened to them.¹⁹⁶ Springvale Monash Legal Service also submitted that for some victims of childhood sexual abuse, disclosing the abuse is a 'process' rather than an 'event'.¹⁹⁷ The Judicial Advisory Group on Family Violence stated that family violence victims 'may not tell anyone about the violence for many years before they leave the relationship'.¹⁹⁸

186 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 104–5.
 187 Submissions 15 (Merri Health Victims Assistance Program), 49 (Victims of Crime Commissioner, Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals), 19 (RMIT Centre for Innovative Justice).
 188 Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 7 (Family Violence and Advocacy Organisations), 12 (Regional Consultation—Mildura Victim Support Agencies).
 189 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
 190 Submissions 3 (Director of Public Prosecutions Victoria), 8 (Victim Survivors' Advisory Council), 27 (Name withheld), 30 (CASA Forum), 38 (Ryan Carlisle Thomas Lawyers), 54 (Victorian Gay and Lesbian Rights Lobby), 58 (Judicial Advisory Group on Family Violence Supplementary Submission); Consultations 3 (Legal Professionals—Community Legal Centres), 10 (Regional Consultation—Morwell Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals).
 191 Submission 15 (Merri Health Victims Assistance Program). See also consultation 4 (Victim, Witness and Court Support).
 192 Submission 38 (Ryan Carlisle Thomas Lawyers).
 193 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).
 194 Submission 8 (Victim Survivors' Advisory Council).
 195 Consultation 19 (RMIT Centre for Innovative Justice).
 196 Submission 8 (Victim Survivors' Advisory Council); Consultation 9 (Domestic Violence Victoria Members). See also submissions 58 (Judicial Advisory Group on Family Violence Supplementary Submission), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
 197 Submission 41 (Springvale Monash Legal Service). See also submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).
 198 Submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

- 14.176 Echoing these concerns, victim representatives told the Commission that some victims may take up to 15 years to realise they are experiencing post-traumatic stress disorder from a crime and that they therefore need financial assistance.¹⁹⁹
- 14.177 The Commission was told that the two-year time limit is ‘arbitrary’ and that any time limit imposed by the scheme should be evidence-based.²⁰⁰ In addition, the current time limit is inconsistent with the time limits prescribed in the *Limitation of Actions Act 1958 (Vic)*.²⁰¹
- 14.178 Some stakeholders supported increasing the time limit to three years to be consistent with other Australian victims of crime assistance schemes, and compensation schemes more generally.²⁰² Others stated that an increased time limit should be based on the evidence regarding known timeframes for reporting crimes, but did not specify what those time limits should be.²⁰³
- 14.179 The Director of Public Prosecutions submitted that the time limit should take into account the time it takes to finalise criminal matters.²⁰⁴ A number of legal professionals told the Commission that the two-year time limit could start running from the end of the criminal trial, instead of from the date of the act of violence.²⁰⁵
- 14.180 Another approach is that the time limit could be increased for particular victim cohorts only, including:
- child victims²⁰⁶
 - childhood sexual assault victims²⁰⁷
 - rape and sexual assault victims²⁰⁸
 - family violence victims.²⁰⁹
- 14.181 Other stakeholders stated that the time limit should be removed completely for certain victim cohorts, including:
- victims under 18 at the time of the act of violence (regardless of crime type),²¹⁰ or victims of child abuse²¹¹ or child sexual abuse²¹²
 - victims of sexual offences²¹³
 - victims of family violence.²¹⁴

199 Consultation 6 (Victims’ Advocacy Organisations).

200 Consultations 4 (Victim, Witness and Court Support). See also Submissions 3 (Director of Public Prosecutions Victoria), 15 (Merri Health Victims Assistance Program), 30 (CASA Forum); Consultations 10 (Regional Consultation—Morwell Victim Support Agencies), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

201 Submissions 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore).

202 Submissions 13 (Adviceline Injury Lawyers), 38 (Ryan Carlisle Thomas Lawyers), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultation 3 (Legal Professionals—Community Legal Centres).

203 Submission 3 (Director of Public Prosecutions Victoria); Consultations 4 (Victim, Witness and Court Support), 10 (Regional Consultation—Morwell Victim Support Agencies).

204 Submission 3 (Director of Public Prosecutions Victoria).

205 Submission 35 (Brockway Legal)—the submission proposed that the time limit could commence from either the date of the act of violence or the date when any related criminal proceedings end, whichever is later; Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

206 Submissions 35 (Brockway Legal), 49 (Victims of Crime Commissioner, Victoria).

207 Submission 5 (Anglicare Victoria Victims Assistance Program).

208 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal).

209 Submissions 5 (Anglicare Victoria Victims Assistance Program), 10 (Eastern Metropolitan Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria).

210 Submissions 8 (Victim Survivors’ Advisory Council), 9 (Alannah & Madeline Foundation), 14 (Inner Melbourne Community Legal), 17 (Centre for Excellence in Child and Family Welfare), 18 (cohealth), 41 (Springvale Monash Legal Service); Consultation 3 (Legal Professionals—Community Legal Centres).

211 Submissions 15 (Merri Health Victims Assistance Program), 26 (Hume Riverina Community Legal Service).

212 Submissions 15 (Merri Health Victims Assistance Program), 19 (Schembri & Co Lawyers), 26 (Hume Riverina Community Legal Service), 30 (CASA Forum), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore); Consultation 3 (Legal Professionals—Community Legal Centres).

213 Submissions 15 (Merri Health Victims Assistance Program), 19 (Schembri & Co Lawyers), 26 (Hume Riverina Community Legal Service), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 15 (Regional Consultation—Ballarat Victim Support Agencies).

214 Submissions 15 (Merri Health Victims Assistance Program), 19 (Schembri & Co Lawyers), 26 (Hume Riverina Community Legal Service), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 32 (Australian Psychological Society), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

- 14.182 In their joint submission, the Magistrates' Court of Victoria and VOCAT stated that the time limit could be removed for particular offences, but the submission did not specify which offences.²¹⁵
- 14.183 In contrast, other stakeholders expressed concern that having different time limits for different categories of victim might inadvertently result in a stricter application of the time limits, in contrast to the current flexible approach, where out-of-time applications are often allowed.²¹⁶
- 14.184 Safe steps Family Violence Response Centre proposed removing the time limits for all victims claiming assistance for counselling or other victim support or referral services.²¹⁷
- 14.185 There was also stakeholder support for removing all time limits (regardless of crime or victim type),²¹⁸ with Anglicare Victoria Victims Assistance Program questioning the need for a time limit, particularly given VOCAT frequently grants out-of-time applications.²¹⁹
- 14.186 Some stakeholders expressed concern that the mere existence of a time limit may create barriers.²²⁰ Victims may not be aware that out-of-time applications may be accepted and/or in which circumstances, or they may not want the added administrative burden of having to pursue an out-of-time application in addition to the application for assistance.
- 14.187 For example, the Commission was told that there is nothing in the guidance materials to indicate VOCAT's willingness to grant extensions, which means that applicants may not be aware that an out-of-time application may be successful unless they have a legal representative assisting them.²²¹
- 14.188 Other stakeholders told the Commission that some victims hear about the two-year time limit and simply assume they are ineligible.²²² This raises issues of fairness and accessibility, as only those applicants with access to legal advice may make out-of-time applications.

Difficulties for particular victim cohorts

- 14.189 There was widespread concern among stakeholders that the two-year time limit creates a particularly onerous barrier for particular groups of victims.
- 14.190 Springvale Monash Legal Service told the Commission that the time limit is particularly difficult to meet for those victim cohorts who typically take more than two years to identify, disclose and report violence and abuse.²²³
- 14.191 This includes family violence victims, who may take a long time to recognise their experiences as violence, regain stability and address the psychological consequences of the abuse they have suffered.²²⁴ Domestic Violence Victoria told the Commission that some victims may not access support services until 10 years after family violence has occurred.²²⁵
- 14.192 The Commission was told that during the two years following the violence, family violence victims are often dealing with other urgent matters, such as keeping their children safe and re-establishing their lives.²²⁶ The Victim Survivors' Advisory Council, Women's Legal Service Victoria and Domestic Violence Victoria emphasised that family violence victims

215 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).
 216 Submission 51 (Law Institute of Victoria); Consultation 3 (Legal Professionals—Community Legal Centres).
 217 Submission 37 (safe steps Family Violence Response Centre).
 218 Submissions 8 (Victim Survivors' Advisory Council), 9 (Alannah & Madeline Foundation), 10 (Eastern Metropolitan Regional Family Violence Partnership); Consultation 13 (Regional Consultation—Mildura Legal Professionals).
 219 Submission 5 (Anglicare Victoria Victims Assistance Program).
 220 Submissions 8 (Merri Health Victims Assistance Program), 41 (Springvale Monash Legal Service); Consultations 4 (Victim, Witness and Court Support), 17 (Family Violence Diverse Communities and Intersectionality Working Group), 19 (RMIT Centre for Innovative Justice).
 221 Consultation 7 (Family Violence and Advocacy Organisations).
 222 Consultation 19 (RMIT Centre for Innovative Justice). See also submission 18 (cohealth).
 223 Submission 41 (Springvale Monash Legal Service).
 224 Submissions 14 (Inner Melbourne Community Legal), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 41 (Springvale Monash Legal Service), 51 (Law Institute of Victoria); Consultations 10 (Domestic Violence Victoria Members), 12 (Regional Consultation—Mildura Victim Support Agencies).
 225 Consultation 9 (Domestic Violence Victoria Members).
 226 Consultation 10 (Regional Consultation—Morwell Victim Support Agencies). See also submission 17 (Centre for Excellence in Child and Family Welfare).

are often dealing with multiple other legal processes which can take a long time to resolve.²²⁷ The two-year time limit therefore 'does not account for [the] cumulative effect [and] multiple events' often associated with family violence.²²⁸

- 14.193 Women's Legal Service Victoria and Domestic Violence Victoria submitted that some victims of family violence fear reprisal from perpetrators, distrust authorities and the legal system and have had other experiences of systemic discrimination. All this compounds their experiences of violence and the justice system and impacts their ability to apply within the two years.²²⁹ Women's Legal Service Victoria and Domestic Violence Victoria submitted that in response to a practitioner survey conducted in 2017, 75 per cent of respondents stated that they had submitted applications for family violence victims outside the two-year time limit.²³⁰
- 14.194 The Commission was referred to research indicating that the majority of victims who experience rape and sexual offences delay disclosing and/or reporting the crime, which the two-year time limit on applications fails to reflect.²³¹
- 14.195 While VOCAT has discretion to allow applications to be made out of time, stakeholders submitted that the factors VOCAT must have regard to in section 29(3) of the VOCAA, are too limited for family violence and sexual assault victims.²³² Springvale Monash Legal Service submitted that the factors do not 'adequately compensate for the unique nature of family violence and/or sexual assault and the disproportionate impact this time-limit for making an application has on victims of family violence'.²³³
- 14.196 The Victorian Gay and Lesbian Rights Lobby submitted that VOCAT should be required to consider the sexual orientation, gender identity or intersex status of the victim when considering whether to strike out an out-of-time application.²³⁴
- 14.197 Stakeholders highlighted the disproportionate impact that the time limit has on child victims. As evidenced by the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, some victims of childhood sexual assault may not disclose abuse until decades later.²³⁵ The CASA Forum submitted that the Royal Commission has the largest body of information available on these issues in Australia and that it found that the time from offence to disclosure is on average 22 years.²³⁶ The CASA Forum submitted that there 'is no logic to having a two year limit if the 22 years [to disclose abuse] is an accepted figure'.²³⁷
- 14.198 In relation to child victims, stakeholders also submitted that the time limit disadvantages those who:
- may not be capable of understanding the abuse²³⁸
 - may not have the skills to communicate abuse²³⁹
 - are subjected to the power and control of a perpetrator who prevents reporting²⁴⁰

227 Submissions 8 (Victim Survivors' Advisory Council), 29 (Women's Legal Service Victoria and Domestic Violence Victoria); Consultation 9 (Domestic Violence Victoria Members). See also submission 14 (Inner Melbourne Community Legal).

228 Consultation 10 (Domestic Violence Victoria Members).

229 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

230 Ibid.

231 Submissions 3 (Director of Public Prosecutions Victoria), 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

232 Submissions 51 (Law Institute of Victoria), 41 (Springvale Monash Legal Service).

233 Submission 41 (Springvale Monash Legal Service).

234 Submission 54 (Victorian Gay and Lesbian Rights Lobby).

235 Submissions 18 (cohealth), 30 (CASA Forum), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore).

236 Submission 30 (CASA Forum)

237 Ibid.

238 Submission 17 (Centre for Excellence in Child and Family Welfare).

239 Ibid.

240 Ibid.

- do not have the means or capacity to make an application without the assistance of an adult but do not have a parent, carer or guardian able to make the application on their behalf—such as children in out-of-home care²⁴¹
- may not identify the violence and abuse of their childhood until later in life.²⁴²

14.199 As noted above, the VOCAA has recently been amended to remove the time limit for child victims of physical and sexual abuse, which addresses some of the issues identified by stakeholders in relation to the impact of the time limit on child victims.

Factors considered by decision maker in accepting an out-of-time application

14.200 To better reflect the reasons for delayed applications to VOCAT, stakeholders supported amending the VOCAA to require VOCAT to consider additional factors when determining whether to accept an out-of-time application.²⁴³ Proposed factors included:

- whether the applicant has experienced family violence²⁴⁴
- the nature of the relationship between the applicant and alleged offender, including whether they are a family member or in an intimate personal relationship²⁴⁵
- whether the applicant has experienced homelessness²⁴⁶
- whether the applicant has a diagnosed medical condition which affected their ability to make an application²⁴⁷
- whether the applicant knew about the scheme or the time limit and if not, whether the applicant would have made an application within the prescribed time limit if they had been aware²⁴⁸
- when the applicant became aware of the scheme and their entitlement to apply²⁴⁹
- the applicant's recovery period from serious injury²⁵⁰
- the length of time taken for criminal proceedings to finalise²⁵¹ and whether any related legal proceedings have been finalised²⁵²
- the nature and effect of the act of violence,²⁵³ including whether it involved sexual assault or child abuse²⁵⁴
- the applicant's sexual orientation, gender identity or intersex status and whether this affected the delay in disclosure of abuse.²⁵⁵

14.201 Other stakeholders submitted that specific criteria should be developed for some victim groups, such as children²⁵⁶ or other victims with 'vulnerabilities'.²⁵⁷

14.202 Other proposals included providing VOCAT with discretion to hear any out of time application, with wide discretion to consider any relevant circumstances.²⁵⁸

241 Submission 14 (Inner Melbourne Community Legal).
 242 Submissions 8 (Victim Survivors' Advisory Council), 9 (Alannah & Madeline Foundation), 41 (Springvale Monash Legal Service) and 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
 243 The Commission notes that some of these proposed factors already fall within the factors under s 29(3) of the VOCAA.
 244 Submissions 1 (Judicial Advisory Group on Family Violence), 10 (Eastern Metropolitan Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal), 19 (Schembri & Co Lawyers), 22 (YourLawyer), 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultation 2 (Legal Professionals—Private Practice).
 245 Submission 14 (Inner Melbourne Community Legal).
 246 Ibid.
 247 Submissions 14 (Inner Melbourne Community Legal), 18 (cohealth).
 248 Submission 38 (Ryan Carlisle Thomas Lawyers).
 249 Submission 14 (Inner Melbourne Community Legal).
 250 Submission 18 (cohealth).
 251 Submission 19 (Schembri & Co Lawyers).
 252 Submission 22 (YourLawyer).
 253 Submission 35 (Brockway Legal).
 254 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).
 255 Submission 54 (Victorian Gay and Lesbian Rights Lobby).
 256 Submission 9 (Alannah & Madeline Foundation).
 257 Submission 15 (Merri Health Victims Assistance Program).
 258 Submissions 38 (Ryan Carlisle Thomas Lawyers), 49 (Victims of Crime Commissioner, Victoria).

- 14.203 Springvale Monash Legal Service considered that VOCAA should include guidelines stating that, a decision maker should err on the side of granting an extension, unless VOCAT would be unable to make a fair decision as a result of the delay.²⁵⁹
- 14.204 In contrast, other stakeholders submitted that the current factors are already sufficiently broad, appropriately applied and cover the circumstances of most victims.²⁶⁰

Lack of clarity and consistency

- 14.205 A number of stakeholders expressed the view that there needs to be 'greater certainty about when an application may be heard out of time' as well as greater transparency regarding section 29 decisions.²⁶¹
- 14.206 In particular, concerns were raised that the weight given to legislative factors in section 29(3) of the VOCAA is unclear. The Commission was told that although this section provides a broad range of circumstances that VOCAT must have regard to in determining an out-of-time application, the VOCAA does not provide any overall 'yardstick' for when applications should be granted—for example, whether they should only be granted in very exceptional circumstances.²⁶²
- 14.207 This lack of clarity can result in different outcomes for similar applications.²⁶³ For example, Springvale Monash Legal Service submitted that:
- Combined with a lack of access to written decisions, the varying approaches of Tribunal members can result in a lack of transparency and uncertainty. This raises concerns about the current scheme's consistency and predictability for victims.²⁶⁴
- 14.208 Legal professionals also told the Commission that the VOCAA is unclear as to when the two-year time limit starts running for victims of an act of violence that was committed when they were under the age of 18.²⁶⁵
- 14.209 Stakeholders also submitted that the VOCAA is unclear as to when the two-year time limit begins for abuse that spans a period longer than two years—in particular, whether the time limit commences when the abuse started or after it ceased (if it has ceased).²⁶⁶

Discussion and recommendations

Retaining an application time limit

- 14.210 Most stakeholders did not propose that application time limits should be abolished entirely. Rather, most stakeholders expressed concern that the current two-year timeframe is too short,—particularly for child victims and victims of family violence and sexual assault. In addition, stakeholders submitted that the circumstances in which out of time applications may be granted do not adequately account for victims' experiences.
- 14.211 There are benefits to having an application time limit. A time limit may help promote scheme sustainability by providing some certainty regarding current and future liabilities. In addition, time limits may increase the likelihood that there will be sufficient evidence available for a decision maker to determine on the balance of probabilities that a criminal act has occurred and that an applicant has suffered an injury as a result of it. As such, where applicants are able to comply with the time limit, they may be more likely to be successful.

259 Submission 41 (Springvale Monash Legal Service).

260 Submissions 5 (Anglicare Victoria Victims Assistance Program). See also submission 13 (Adviceline Injury Lawyers).

261 Submissions 14 (Inner Melbourne Community Legal). See also submissions 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service).

262 Submission 41 (Springvale Monash Legal Service).

263 Ibid.

264 Ibid.

265 Consultation 3 (Legal Professionals—Community Legal Centres).

266 Submissions 38 (Ryan Carlisle Thomas Lawyers), 51 (Law Institute of Victoria).

- 14.212 An application time limit may also encourage some victims to seek assistance earlier, which in turn may facilitate the earlier provision of practical and therapeutic support. Stakeholders told the Commission that earlier provision of support better assists victims in their recovery from crime.²⁶⁷
- 14.213 The Commission therefore considers that the proposed Act should continue to prescribe an application time limit. However, to address the concerns identified by stakeholders, the Commission considers that the time limit provisions should be reformed to:
- increase the application time limit that generally applies
 - further increase the application time limit for certain victims
 - abolish the application time limit for a broader range of child victims
 - abolish the application time limit for applications for counselling
 - expand the factors that the decision maker must have regard to when determining whether to accept an out of time application, to reflect diverse victim experiences
 - improve consistency and transparency in the determination of out-of-time applications.
- 14.214 Each of these proposed reforms is discussed below.

Increasing the application time limit generally

- 14.215 The Commission notes the significant stakeholder concern that the current two-year application time limit is not appropriate, notwithstanding VOCAT's practice of frequently allowing out-of-time applications to be lodged.²⁶⁸ In particular, the Commission notes that the existing application time limit is 'arbitrary' and inconsistent with victims' recovery needs, particularly victims of family violence and sexual assault.²⁶⁹
- 14.216 The Commission also notes that victims of crime assistance schemes in most other Australian jurisdictions have a three-year application time limit, with a further increased time limit for some victim cohorts, such as victims of family violence and sexual assault.²⁷⁰
- 14.217 Similarly to these other jurisdictions, the Commission considers that under the proposed Act, a general application time limit of three years should apply from the date of the criminal act, or for child victims, three years from the date on which the victim turns 18. This would bring the proposed Act into line with other Australian jurisdictions. The Commission also notes that a number of stakeholders proposed extending the time limit to three years.²⁷¹
- 14.218 In relation to child victims, the Commission considers that the current approach under the VOCAA, which provides that the time period applies from the date on which a child victim turns 18, should be preserved. The effect of this would be that under the proposed Act, the application timeframe for a child victim would not expire until three years after the date on which the victim becomes an adult. However, as is the case under the existing scheme, this would not prevent an application for a child victim being made by a child's parent or legal guardian before the child turns 18.

267 See, eg, submission 18 (cohealth); Consultations 4 (Victim, Witness and Court Support), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

268 Submissions 3 (Director of Public Prosecutions Victoria), 8 (Victim Survivors' Advisory Council), 27 (Name withheld), 30 (CASA Forum), 38 (Ryan Carlisle Thomas Lawyers); Consultations 3 (Legal Professionals—Community Legal Centres), 10 (Regional Consultation—Morwell Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals).

269 Consultation 4 (Victim, Witness and Court Support). See also submissions 3 (Director of Public Prosecutions Victoria), 15 (Merri Health Victims Assistance Program), 30 (CASA Forum); Consultations 10 (Regional Consultation—Morwell Victim Support Agencies), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

270 A three-year time limit applies in the Australian Capital Territory, Queensland, South Australia, Tasmania and Western Australia. In New South Wales, a general time limit of two years applies, with exceptions for certain victims, including a 10-year time limit for victims of domestic violence, child abuse or sexual assault and no time limit for a child victim of a sexual offence. In the Northern Territory, a two-year general time limit also applies with an extension being possible in certain circumstances, including where the injury or death occurred as a result of sexual assault, domestic violence or child abuse.

271 Submissions 13 (Adviceline Injury Lawyers), 38 (Ryan Carlisle Thomas Lawyers); Consultation 3 (Legal Professionals—Community Legal Centres).

- 14.219 In addition, the Commission considers that specific exceptions to the application time limit should apply to child victims to preserve—and further extend—the exceptions for child victims of physical or sexual abuse introduced earlier this year, as outlined above.
- 14.220 The Commission also considers that exceptions to the general application time limits should apply where:
- the criminal act was a sexual offence, or occurred in the context of family violence—the time limit for bringing an application should be increased in these circumstances to 10 years
 - the assistance sought is for counselling—there should be no application time limit in these circumstances.
- 14.221 Each of these exceptions is discussed further below.

Increasing the time limit for certain victims

- 14.222 The Commission notes the widespread stakeholder concern that the two-year application time limit has a disproportionate impact on child victims and victims of sexual assault and family violence.²⁷² These victim cohorts may take much longer to recognise the violence and/or its effects on them, and/or to disclose or report it.
- 14.223 The Commission therefore considers that a 10-year application time limit should apply to adult victims of a criminal act that constitutes a sexual offence, or that occurred in the context of family violence. This proposed approach would be consistent with the approach taken in New South Wales, where the application time limit is 10 years for victims of domestic violence, child abuse or sexual assault.²⁷³ The Judicial Advisory Group on Family Violence submitted that this time limit would be appropriate for victims of sexual assault and/or family violence.²⁷⁴
- 14.224 The Commission considers that separate exceptions should continue to apply to child victims. Recent amendments to the VOCAA mean that currently, no time limit applies to child victims of acts of violence that consist of physical or sexual abuse, in contrast with the approach in New South Wales
- 14.225 This exception should be retained under the proposed Act. However, the Commission considers that this exception should be broadened so that no application time limit applies for child victims of a criminal act that occurs in the context of ‘child abuse’ as defined by the *Child Wellbeing and Safety Act 2005* (Vic).²⁷⁵ This definition includes both physical and sexual abuse—as is currently recognised by the VOCAA exception—but also includes a broader range of acts including grooming, serious emotional or psychological harm and serious neglect. The Commission considers that broadening the exception in this way is appropriate given the special vulnerability of child victims which arises in a wider range of circumstances than an offence consisting of physical or sexual abuse.
- 14.226 The current exception to the application time limit for child victims should be expanded to apply to child victims of family violence, including where the child was exposed to family violence but the violence was not committed against them directly. This reflects the well-documented impact of exposure to family violence on children and that the effect of such violence may not manifest or be recognised until much later in the child’s life.²⁷⁶

272 Submissions 14 (Inner Melbourne Community Legal), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 41 (Springvale Monash Legal Service), 51 (Law Institute of Victoria); Consultations 9 (Domestic Violence Victoria Members), 12 (Regional Consultation—Mildura Victim Support Agencies).

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

274 Submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission). The submission stated that no time limit should apply for institutional abuse.

275 The *Child Wellbeing and Safety Act 2005* (Vic) s 3(1) defines ‘child abuse’ as including a) any act committed against a child involving a sexual offence, or an offence under section 49M(1) (grooming for sexual conduct with a child under the age of 16 of the *Crimes Act 1958* (Vic); and b) the infliction on a child of physical violence, or serious emotional, or psychological, harm; and c) the serious neglect of a child.

276 See submissions 8 (Victim Survivors’ Advisory Council), 9 (Alannah & Madeline Foundation), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

- 14.227 The Commission considers that no application time limit should apply for child victims of a criminal act in the context of family violence, as defined by the *Family Violence Protection Act 2008* (Vic), or for child victims who witnessed or were otherwise exposed to a criminal act that occurred in the context of family violence.
- 14.228 This proposed approach would also be consistent with, although broader than, the approach in New South Wales, where no application time limit applies to child victims of a sexual offence. In the Commission's view, this broader approach is appropriate. It preserves the existing time limit exceptions for child victims that currently apply in Victoria, while also recognising the significant impact of family violence on children and that, as with childhood sexual and physical abuse, there may be a significant delay in recognising and disclosing this violence.

No time limit for counselling

- 14.229 In addition to the exceptions to the application time limit proposed above in relation to certain victims, the Commission has considered stakeholder submissions that different time limits should apply depending on the type of assistance claimed. In particular, the Commission notes safe steps Family Violence Response Centre's proposal that time limits be removed for all victims claiming assistance for counselling.²⁷⁷
- 14.230 The Commission notes that not all victims have a linear recovery pathway, and that for some victims, the impacts of crime may manifest many years later.²⁷⁸ Application time limits may prevent some of these victims from accessing assistance under the VOCAA and this may continue to be the case for some victims under the proposed Act, even though increased time limits might apply.
- 14.231 While the Commission considers that time limits are necessary, a victim of a criminal act should not be completely barred from accessing support under the proposed Act on the basis of time limits alone. The Commission considers that no application time limit should apply to counselling. Victims should be eligible to apply for counselling at any time after the criminal act. This proposed approach would ensure that a victim of a criminal act is able to access therapeutic support even if time limits prevent the victim from accessing other forms of financial assistance.

Expanding the factors relevant to allowing an out-of-time application

- 14.232 The Commission considers that decision maker discretion to determine out-of-time applications appropriately balances the need for certainty that time limits provide, with the need to acknowledge the barriers that some victims face in making timely applications. The Commission therefore considers that decision maker discretion to allow an out of time application should be retained under the proposed Act. However, in response to concerns expressed by stakeholders, the Commission considers that the list of factors the scheme decision maker must consider when determining whether to allow an out-of-time application should be expanded under the proposed Act.
- 14.233 In determining whether to allow an application made out of time, the Commission considers that the proposed Act should require the decision maker to consider the following factors:
- a) the applicant's age at the time of the criminal act, including whether they were a child at the time that the criminal act occurred
 - b) whether the applicant is intellectually disabled within the meaning of the *Disability Act 2006* (Vic) or mentally ill within the meaning of the *Mental Health Act 2014* (Vic)

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Submission 37 (safe steps Family Violence Response Centre).
Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria); Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

- c) whether the alleged offender was in a position of power, influence or trust in relation to the applicant
 - d) the physical or psychological effect of the criminal act on the applicant
 - e) whether the applicant has or had a medical or psychological condition which affected their ability to make an application
 - f) the nature, dynamics and circumstances of the criminal act, including whether it occurred in the context of a pattern of abuse, including family violence
 - g) whether the applicant has experienced homelessness
 - h) the length of time taken for any related legal proceedings to finalise
 - i) whether the delay in making the application threatens the capacity of the decision maker to make a fair decision
 - j) any other circumstances that the decision maker considers relevant.
- 14.234 Factors (a)–(d) and (i)–(j) above are matters that VOCAT is currently required under the VOCAA to have regard to.
- 14.235 Factors (e) to (h) are new additional factors that the Commission considers should also be included under the proposed Act. These additional factors respond to stakeholder views that the current factors do not adequately reflect diverse victim experiences and would help to ensure that the decision maker considers all relevant reasons why an applicant may not have been able to comply with the time limit.
- 14.236 In particular, the Commission agrees with the submission from Inner Melbourne Community Legal which stated that the decision maker should be required to consider whether the applicant has or had a medical or psychological condition that affected their ability to make an application, regardless of whether this was linked to the criminal act itself.²⁷⁹ In the Commission’s view, such a condition may have just as much impact on an applicant’s ability to make a timely application as would injury arising from the crime itself.
- 14.237 In addition, the Commission considers that in determining an out-of-time application, decision makers should be required to consider the nature, dynamics and circumstances of the criminal act, including whether it occurred in the context of a pattern of abuse, including family violence. In the Commission’s view, the consideration of such a factor would enable recognition of the particular barriers faced by victims of family violence, and other victims of patterns of abuse, in disclosing the violence committed against them. For example, such victims may have feared perpetrator reprisals if they had made an application earlier, or been fearful of the psychological impact that the disclosure and subsequent report may have had on other members of the victim’s family.
- 14.238 The Commission considers that where victims of family violence seek assistance beyond the 10-year time limit, decision makers should be required to consider the impact of family violence in preventing the victim from making the claim within the 10-year time limit.
- 14.239 The Commission agrees with Inner Melbourne Community Legal that homelessness should be a factor that the decision maker is required to consider.²⁸⁰ The Commission notes that homeless persons are more likely than other members of the community to be victims of crime.²⁸¹ In addition, victims of crime who are homeless face significant barriers to lodging an application, including access to necessary resources. In the Commission’s view, a victim’s housing situation, whether or not it is affected by the crime itself, should not operate as a bar to accessing assistance.

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See submission 14 (Inner Melbourne Community Legal). See also submission 18 (cohealth).
Submission 14 (Inner Melbourne Community Legal).
Australian Institute of Criminology, Australian Government, *Homeless People: Their Risk of Victimisation*, AICrime Reduction Matters No 66 (2008) <<https://aic.gov.au/publications/crm/crm066>>.

- 14.240 The Commission notes that where there are related legal proceedings, the Office of Public Prosecutions does not encourage victims to pursue a VOCAT application until criminal proceedings are finalised,²⁸² notwithstanding that the VOCAA does not prohibit victims from applying for assistance during such proceedings, nor does it prohibit VOCAT from hearing such applications.²⁸³ The Commission is of the view that in considering an out-of-time application, the decision maker should be required to consider the length of time taken for any related legal proceedings to finalise, as this may have affected the timing of the application.
- 14.241 So that victims are not deterred from making applications outside any applicable time limit where they may be eligible to do so, the Commission considers that the proposed Act should provide that the following information be developed and made publicly available in plain language, Easy English, and other accessible formats:
- what time limits apply to what groups of victims
 - when those time limits commence
 - the circumstances in which the scheme may accept an out-of-time application
 - the process for making an out-of-time application.

Increasing transparency and consistency in decision -making

- 14.242 In the Commission's supplementary consultation paper, the Commission noted that it is difficult to determine the circumstances in which out-of-time applications are struck out by VOCAT under section 29 of the VOCAA.²⁸⁴
- 14.243 Data published by VOCAT states that in 2016–17, 2096 of 7209 applications lodged (29.1 per cent) were either withdrawn or struck out.²⁸⁵ However, this data does not distinguish between those applications that are withdrawn and those that are struck out on the basis that they were submitted out-of-time. It is therefore difficult to determine how many applications are struck out under section 29 and the circumstances in which VOCAT considers that an extension should not be granted.
- 14.244 Stakeholders told the Commission that this lack of transparency can result in different outcomes for applicants with similar circumstances.²⁸⁶
- 14.245 The Commission considers that the proposed Act should require the decision maker to provide written reasons to the applicant for not accepting an application made out of time.
- 14.246 The proposed Act should require the proposed scheme to publish annual data on out-of-time applications which are refused, and applications for assistance which are made within the applicable time limit, but are refused for other reasons.²⁸⁷ To promote transparency, predictability and consistency of decision making, the Commission considers that this data should include the reasons for refusal.²⁸⁸ It should also include the type of alleged offence and the type of assistance claimed.
- 14.247 The Commission also notes stakeholder concern that the existence of time limits may be off-putting for applicants, who may be unaware that they may be allowed to make an out-of-time application or unsure whether they would be eligible for one.²⁸⁹

282 Submission 3 (Director of Public Prosecutions Victoria).

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

284 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 103.

285 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 36.

286 Submissions 41 (Springvale Monash Legal Service), 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

287 See submission 58 (Judicial Advisory Group on Family Violence Supplementary Submission).

288 See *ibid.*

289 Submissions 15 (Merri Health Victims Assistance Program), 41 (Springvale Monash Legal Service); Consultations 4 (Victim, Witness and Court Support), 17 (Family Violence Diverse Communities and Intersectionality Working Group), 19 (RMIT Centre for Innovative Justice).

Recommendations—application time limits

Time limits for the making of an application

- 71** The proposed Act should provide that:
- (a) the time limit for making an application for immediate assistance, funeral expenses, practical assistance and/or a recovery payment is three years after the date the criminal act occurred, except where:
 - (i) the applicant was under the age of 18 when the criminal act occurred—in which case the time limit for making an application is three years from the day that the victim turns 18
 - (ii) the applicant is an adult victim of a criminal act which occurred in the context of family violence, as defined in the *Family Violence Protection Act 2008* (Vic), or constitutes a sexual offence—in which case the time limit for making an application is 10 years after the date the criminal act occurred
 - (iii) the applicant was under the age of 18 when the criminal act occurred and the criminal act occurred in the context of child abuse, as defined in the *Child Wellbeing and Safety Act 2005* (Vic), or family violence, as defined in the *Family Violence Protection Act 2008* (Vic)—in which case there is no time limit for making an application.
 - (b) there is no time limit for making an application for an award of assistance for counselling.
- 72** The proposed Act should provide that where there are related criminal acts, the application time limit commences from the date of the last criminal act.

Considering applications made out of time

- 73** The proposed Act should provide that the scheme decision maker has the discretion to accept applications made out of time and that in considering such late applications must have regard to:
- (a) the applicant's age at the time of the criminal act, including whether they were a child at the time that the criminal act occurred
 - (b) whether the applicant is intellectually disabled within the meaning of the *Disability Act 2006* (Vic) or mentally ill within the meaning of the *Mental Health Act 2014* (Vic)
 - (c) whether the alleged offender was in a position of power, influence or trust in relation to the applicant
 - (d) the physical or psychological effect of the criminal act on the applicant
 - (e) whether the applicant has or had a medical or psychological condition which affected their ability to make an application
 - (f) the nature, dynamics and circumstances of the criminal act, including whether it occurred in the context of a pattern of abuse, including family violence
 - (g) whether the applicant has experienced homelessness
 - (h) the length of time taken for any related legal proceedings to finalise
 - (i) whether the delay in making the application threatens the capacity of the scheme decision maker to make a fair decision
 - (j) any other circumstances that the scheme decision maker considers relevant.
- 74** To ensure victims are not deterred from making an application outside the application time limit, the proposed Act should provide that information about time limits, including the circumstances in which out-of-time applications may be accepted and the process for making such an application, should be developed and made publicly available.

Increasing transparency and consistency of decision making

- 75** To promote transparency, predictability and consistency of decision making, the proposed Act should provide that the scheme decision maker must:
- (a) provide written reasons to the applicant for not accepting an application made out of time
 - (b) publish annual data on out-of-time applications that are refused, and applications for assistance that are refused for other reasons, including the categories and reasons for refusal.

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15. Decision making under the proposed Act for victims of crime financial assistance

Introduction

- 15.1 This chapter considers and makes recommendations about the processes for decision making under the proposed Act, including:
- applicant reporting requirements, including requirements to report a matter to police or other professionals
 - consideration of an applicant's character, conduct or behaviour in determining whether to make an award, or in determining the amount of an award
 - the timeliness and transparency of decision making under the proposed Act.
- 15.2 The recommendations in this chapter aim to ensure that under the proposed Act:
- the scheme decision maker has discretion to consider appropriate factors in the making of awards, while minimising barriers to assistance for victims of crime in accordance with the purpose of the proposed Act¹
 - there is clarity for both victims and the scheme decision maker regarding timeframes for decision making
 - there is transparency in decision making.
- 15.3 This chapter relates to issues raised in the first, second, third, fourth and eighth matters of the supplementary terms of reference, which ask the Commission to consider whether:
- the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) can be simplified to make it easier for applications to understand their potential entitlements
 - the VOCAA recognises the appropriate people as victims
 - the tests for eligibility and the evidence required to meet tests can be simplified
 - the VOCAA's definitions account for circumstances, like family violence, that might result in a delay in reporting a crime
 - there are any processes, procedures or requirements under the VOCAA that cause unnecessary delay in the provision of assistance to victims of crime.

Factors to be considered by the scheme decision maker when determining an application

- 15.4 This part of the chapter considers factors to be considered by the scheme decision maker under the proposed state-funded financial assistance scheme (the proposed scheme) when making an award under the proposed Act.
- 15.5 The Commission's first and supplementary consultation papers identified concerns about sections 52 and 54 of the VOCAA which relate to the current factors the Victims of Crime Assistance Tribunal (VOCAT) is required to consider when determining an application.
- 15.6 This part of the chapter outlines the current law, and views of the community and stakeholders on the current provisions, and makes recommendations in relation to the factors that should be considered in determining an application under the proposed Act.

Current law

- 15.7 VOCAT may award financial assistance to a victim of crime where it is satisfied that an act of violence has occurred, that the applicant is a victim of that act of violence, and that the applicant is eligible to receive the assistance.²
- 15.8 However, even if VOCAT determines that a victim is eligible for an award, sections 52 and 54 require VOCAT to consider a number of other factors relating to a victim's character and behaviour before, during and after a crime, which may result in the refusal, or reduction, of an award.³
- 15.9 These considerations are broad and may be unrelated to the criminal act the subject of the application. The current application of sections 52 and 54 is outlined further below.

Mandatory refusal of an award under section 52 of the VOCAA

- 15.10 Under section 52 there are two circumstances where VOCAT must refuse to make an award of assistance:⁴
- 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.
- 15.11 These provisions were not raised as problematic in either the first or supplementary consultation papers, in literature, case law, in written submissions or during consultation meetings. Accordingly, this part of the report focuses on two further circumstances where VOCAT must refuse to make an award of assistance, unless there are special circumstances. These are if VOCAT is satisfied that:⁵
- an act of violence was not reported to police within a reasonable time
 - 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).

2 *Victims of Crime Assistance Act 1996* (Vic) s 50(1). The VOCAA does not require someone to have been charged with or convicted of an offence for an award to be made: ss 50(1), (4).

3 To support consideration of such factors, the VOCAA provides that an application must contain an authorisation for VOCAT to obtain any other evidence or any other document it considers that it requires in order to enable it to determine the application—for example, public hospital records or police reports: *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(c). In addition, VOCAT has broad investigative powers and broad powers to obtain information, including requiring other government departments or services to provide VOCAT with 'any information or ... documents relevant to the application': *Victims of Crime Assistance Act 1996* (Vic) ss 39–40. Information on the VOCAT website states that 'Practitioners are advised to seek instructions regarding reporting and character and behaviour prior to lodging the application for assistance': Victims of Crime Assistance Tribunal, *Information to Provide to the Tribunal* (2017) <www.vocat.vic.gov.au/information-provide-tribunal>.

4 *Ibid* ss 52(b)–(c).

5 *Ibid* s 52(a).

Act of violence not reported to police within a reasonable time

- 15.12 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' including:⁶
- 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)
 - 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.
- 15.13 The case law varies in its interpretation of what constitutes a reasonable time for reporting, as well as what might result in special circumstances mitigating an unreasonable delay.
- 15.14 In *J v Victims of Crime Assistance Tribunal*,⁷ the Victorian Civil and Administrative Tribunal (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 making this finding, VCAT considered the way sexual assault was viewed at the time of the offences and the power dynamics in the family relationship.⁸
- 15.15 In *S v Victims of Crime Assistance Tribunal*,⁹ VCAT determined the applicant had not reported the alleged rape to police within a reasonable time despite the victim's admission that she did not report to police at the time (22 years earlier, when she was 17 years old) because she did not know what to do, was frightened and ashamed, felt dirty and was scared of the perpetrators.¹⁰
- 15.16 Where VOCAT determines that a report was not made to police within a reasonable time, section 52 enables VOCAT to consider any special circumstances that may have brought about that delay. The phrase 'special circumstances' is not defined in the VOCAA. However, VCAT has found that for the purposes of section 52, special circumstances must be something out of the ordinary.¹¹
- 15.17 Case law raises some uncertainty about what might constitute special circumstances. For example, in cases of child sexual abuse, a victim's age at the time of the offence has previously been interpreted as constituting special circumstances mitigating an unreasonable delay in reporting to police.¹² However, for some other types of crime, the factors that may give rise to a finding of special circumstances are less clear. In *TUN v Victims of Crime Assistance Tribunal*,¹³ VOCAT refused an application for assistance 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. While VCAT did ultimately overturn VOCAT's decision, and found that special circumstances did exist, VCAT also distinguished the applicant's experience from 'others faced with domestic violence'. VCAT only held that special circumstances existed in that case because of the criminal profile of the applicant's former partner, who was a member of a motorcycle gang with seven convictions for manslaughter.

6 Ibid s 53

7 [2002] VCAT 532 (24 July 2002).

8 Ibid [61].

9 [2002] VCAT 1257 (7 November 2002).

10 Ibid [10].

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

12 See, eg, *CS v Victims of Crime Assistance Tribunal* [2006] VCAT 1061 (9 June 2006).

13 [2009] VCAT 1599 (10 August 2009).

- 15.18 The requirement that something be out of the ordinary¹⁴ for it to constitute special circumstances can create barriers in particular for victims of family violence and sexual assault—because although such acts may be common, they often have unique dynamics and characteristics that create additional barriers to reporting.¹⁵
- 15.19 Further complicating considerations under section 52(a)(i) are circumstances that raise questions of whether the act of violence was in fact reported to police at all, for example where police may have been told about an incident or attended the scene but no official police record was made.¹⁶ Case law indicates that ‘what constitutes a report to police must depend on the circumstance of each particular case’,¹⁷ which raises some uncertainty.

Failure to provide reasonable assistance to an investigatory or prosecutorial body

- 15.20 Except where there are special circumstances, the failure to provide reasonable assistance to an investigatory or prosecutorial body requires VOCAT to refuse an application for financial assistance.¹⁸
- 15.21 However, unlike the ‘failure to report’ provisions, the VOCAA does not provide any further guidance about what VOCAT should have regard to in considering whether there are special circumstances.
- 15.22 In addition, under section 52(a)(ii), there are no prescribed positive actions a victim must perform to satisfy ‘reasonable assistance’, such as providing a witness statement or participating in a criminal trial. However, guidance in the VOCAT application form suggests a victim must do more than call police:

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.¹⁹

- 15.23 Case law in relation to what constitutes ‘reasonable assistance’ varies.
- 15.24 In *Rajah v Victims of Crime Assistance Tribunal*,²⁰ VCAT found the existence of special circumstances to mitigate what might otherwise be viewed as failure to assist the police—not providing a written statement to police. In that case, the applicant was a victim of sexual and physical abuse by her mother’s former de facto partner and the circumstances of the offending and the vulnerability of the victim were accepted as giving rise to special circumstances.²¹
- 15.25 In *Nichol v Victims of Crime Assistance Tribunal*,²² the applicant assisted police in the initial stages of their investigation but the day before a court hearing she withdrew the complaint. 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 VOCAA. Accordingly, VCAT refused the application, finding the applicant had ‘pulled the rug out from under the police at the last minute’.²³

14 See, eg, *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840 (30 April 2000) [23].

15 See, eg, *TUN v Victims of Crime Assistance Tribunal* [2009] VCAT 1599 (10 August 2009) [10], where VOCAT submitted that the circumstances of family violence did not constitute special circumstances because they ‘were nothing out of the ordinary or special; it was common for such victims to fear reprisals’. In making this submission, counsel for VOCAT was referencing VCAT’s decision in *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840 (30 April 2000) [23], in which it had held that for the purposes of section 52 of the VOCAA, what must be demonstrated for ‘special circumstances’ is for something to be ‘out of the ordinary’.

16 See, eg, *Haddara v Victims of Crime Assistance Tribunal* [2010] VCAT 1133 (29 June 2010) where several attempts were made to report a matter direct to police. This can be contrasted with *Sanders v Victims of Crime Assistance Tribunal* [2003] VCAT 396 (3 March 2003) where VCAT determined on appeal that providing details orally to police at the scene of an alleged assault was sufficient to constitute a report to police.

17 *Sanders v Victims of Crime Assistance Tribunal* [2003] VCAT 396 (3 March 2003) [42].

18 *Victims of Crime Assistance Act 1996* (Vic) s 52(a)(ii).

19 Victims of Crime Assistance Tribunal, *Guide to Completing the Application for Assistance Form* (2016) 10.

20 [2002] VCAT 1422 (6 December 2002).

21 *Ibid* [21].

22 [2000] VCAT 840 (30 April 2000).

23 *Ibid* [21].

- 15.26 In *Gray v Victims of Crimes Assistance Tribunal*,²⁴ the 16-year-old applicant had been stabbed at a train station. VOCAT denied his application for failure to cooperate with police because he had refused to give police a statement immediately after the stabbing, although he did give a statement months later. VCAT overturned VOCAT's decision on the basis the applicant had provided reasonable, although delayed, assistance.

Additional factors VOCAT must consider under s 54 of the VOCAA

- 15.27 Once VOCAT has determined that an act of violence has occurred, that the applicant is a victim eligible for assistance, and that there are no circumstances giving rise to mandatory refusal under section 52, section 54 of the VOCAA requires VOCAT to consider a number of additional matters before determining whether or not to make an award, or in determining the amount of the award. These include, relevantly:
- (a) the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence²⁵
 - ...
 - (c) whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation²⁶
 - (d) any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death²⁷
 - (e) whether the person by whom the act of violence was committed will benefit directly or indirectly from the award²⁸
 - (f) any other circumstances that it considers relevant.²⁹
- 15.28 Current law in relation to these provisions is discussed below.

Character, behaviour and attitude of applicant

- 15.29 Section 54(a) of the VOCAA which requires VOCAT to have regard to the character, behaviour and attitude of an applicant 'at any time' is broad. The VOCAA explicitly provides for consideration of past criminal activity³⁰ but section 54(a) is much broader, given it enables VOCAT to consider the character, behaviour or attitude of the victim 'at any time'.³¹
- 15.30 Analysis of case law shows that in practice section 54 has been used to scrutinise a VOCAT applicant's past criminal activity³² as well as an applicant's drug and alcohol use.³³ In the case of drug and alcohol use, VOCAT's consideration of these factors is significant. The VOCAA does not make consideration of drug and alcohol use mandatory, however, such considerations fall within the broad consideration of an applicant's character and behaviour 'at any time'.³⁴

24 [2014] VCAT 1002 (12 August 2014).

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

26 *Ibid* s 54(c).

27 *Ibid* s 54(d).

28 *Ibid* s 54(e).

29 *Ibid* s 54(f).

30 *Ibid* s 54(a).

31 *Ibid*. For related victims, VOCAT must have regard 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: *ibid* s 54(b).

32 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 (15 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); *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523 (5 April 2018) [80].

33 See, eg, 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.

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

- 15.31 These considerations intersect with VOCAT's consideration of one of the objectives of the VOCAA—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'.³⁵
- 15.32 Together, the section 54 considerations and the objective in section 1(2)(b) of the VOCAA can result in consideration of who is 'deserving' of recognition and sympathy.³⁶
- 15.33 For example, in *RUM v Victims of Crime Assistance Tribunal*,³⁷ VCAT considered the fact that the applicant was a serious sex offender, lacking in remorse and insight in relation to his offending. VCAT determined not to award financial assistance, because the objectives of the VOCAA 'require consideration of whether an applicant is an appropriate recipient of a symbolic expression by the state of the community's sympathy'.³⁸
- 15.34 A similar rationale can be seen in *White v Victims of Crime Assistance Tribunal*,³⁹ where VCAT upheld VOCAT's decision not to award special financial assistance because of the applicant's past criminal history, indicating such an award would 'offend the conscience of the people of Victoria'.⁴⁰
- 15.35 Similarly, in *TNX v Victims of Crime Assistance Tribunal*,⁴¹ VCAT considered the applicant's prior convictions for causing serious injuries, his failure to render assistance at the time of the offences and the limited remorse shown by him in relation to his offending behaviour. Taking into account all those circumstances, VCAT determined it was appropriate to reduce the amount of special financial assistance.⁴²
- 15.36 In *Nguyen v Victims of Crime Assistance Tribunal*,⁴³ VCAT determined that despite the applicant's criminal history, it was appropriate to make a 'modest' award for medical expenses and clothing replacement, given the applicant's prior offences did not involve violence and the application was only for expenses incurred.
- 15.37 More recently in *CZG v Victims of Crime Assistance Tribunal*,⁴⁴ VCAT considered the applicant's past criminal offending, as well as contributory conduct under section 54, determining that:
- While many in the community would no doubt feel compassion for him, as I do, the applicant is not an appropriate recipient of an award of assistance ... His own violent criminal conduct combined with his direct contribution to the events leading up to the act of violence have disqualified him.⁴⁵
- 15.38 In *CZG v Victims of Crime Assistance Tribunal*,⁴⁶ VCAT considered 'factors which may lead to a decision in favour of [an] applicant despite a serious criminal history', suggesting demonstration of attempted rehabilitation and bravery⁴⁷ may lead to a decision in favour of an applicant.⁴⁸

35 Ibid s 1(2)(b).

36 The intersection between section 54 considerations and the objective in section 1(2)(b) of the VOCAA was also discussed in Chapter 11.

37 [2016] VCAT 367 (10 March 2016).

38 Ibid [18].

39 [2010] VCAT 455 (19 April 2010).

40 Ibid [18]. However, VCAT did determine it would be appropriate to provide assistance for medical expenses: ibid [15] and [18].

41 [2014] VCAT 1234 (15 September 2014).

42 Ibid [22].

43 [2001] VCAT 2028 (28 September 2001).

44 [2018] VCAT 523 (5 April 2018).

45 Ibid [80].

46 Ibid.

47 Ibid at [26], VCAT discussed the decision in *White v Victims of Crime Assistance Tribunal* [2010] VCAT 455 (19 April 2010), where the applicant, who had an extensive criminal history, had attempted to rescue another man who was being assaulted.

48 *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523 (5 April 2018) [27]. At [27], VCAT considered the seriousness of injuries caused by a criminal act might also lead to a decision in favour of the applicant despite a serious criminal history.

Whether the applicant provoked the commission of the act of violence and any condition or disposition of the applicant

- 15.39 In determining whether to award financial assistance or how much to award, section 54 of the VOCAA requires VOCAT to consider:
- ‘whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation’⁴⁹
 - ‘any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death’.⁵⁰
- 15.40 Together, these are sometimes referred to as ‘contributory conduct’ or ‘provocation’ clauses.⁵¹ Some commentary suggests these provisions relate to ‘the extent to which the applicant was the author of their misfortune’.⁵² This interpretation is evident in the recent case of *CZG v Victims of Crime Assistance Tribunal*,⁵³ where VCAT determined that the applicant ‘had a direct involvement in the sequence of events that led to the act of violence’ and ‘escalated the conflict by making a threat to kill his former girlfriend, and making a threat to kill her acquaintance’.⁵⁴
- 15.41 As with consideration of an applicant’s character, behaviour and attitude, case law also demonstrates an intersection between consideration of provocation and the VOCAA objective regarding paying certain victims of crime 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’.⁵⁵
- 15.42 In *Fallon v Victims of Crime Assistance Tribunal*,⁵⁶ VCAT affirmed VOCAT’s decision to deny the applicant assistance due to ‘inflammatory words’ uttered by the victim which were found to have ‘set in motion the chain of events’.⁵⁷ Given the victim’s ‘provocative’ actions, VCAT determined that the incident did not ‘give rise to circumstances where there should be any expression, symbolic or otherwise, by “the State of the community’s sympathy and condolence”’.⁵⁸
- 15.43 In *Mendez v Victims of Crime Assistance Tribunal*,⁵⁹ which involved family violence, both VOCAT and VCAT determined the applicant had provoked the assault, although VCAT ultimately determined the applicant’s provocation was outweighed by the actions of the perpetrator which resulted in a charge for intentionally cause serious injury.⁶⁰

Perpetrator benefit

- 15.44 In determining whether to make an award or the amount of an award, VOCAT must also consider whether the alleged perpetrator will benefit directly or indirectly from the award.⁶¹
- 15.45 The VOCAA provides no guidance about what might be considered a direct or indirect benefit to a perpetrator, and the Commission has found no case law in relation to this matter. However, as discussed in the Commission’s first consultation paper, some concerns have been raised in academic literature that the perpetrator benefit provision

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

50 *Ibid* s 54(d).

51 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. ‘Provocation’ under the VOCAA is distinguished from the defence of provocation that was available in homicide matters prior to 2005 in Victoria. The defence of provocation was abolished by the *Crimes (Homicide) Act 2005* (Vic) and is no longer an available defence to homicide: Thomson Reuters Westlaw, *Criminal Law, Investigation and Procedure Victoria* (at 7 August 2017) [GPOCL.4000].

52 Thomson Reuters Westlaw, *Criminal Law, Investigation and Procedure Victoria* (at 7 August 2017) [VCAA.54.20].

53 [2018] VCAT 523 (5 April 2018).

54 *Ibid* [58], [60].

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

56 [2009] VCAT 414 (12 March 2009).

57 *Ibid* [19].

58 *Ibid*.

59 [2011] VCAT 1237 (8 July 2011).

60 *Ibid* [53].

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

unfairly prejudices some classes of victim, particularly victims of family violence who may have an ongoing relationship with the perpetrator.⁶²

Responses

Requirement to report to police

- 15.46 Some stakeholders told the Commission that the requirement to report to police is a ‘troubling obligation’ as it sends a message to victims of crime that the state will only assist victims if they ‘work’ for the state, perpetuating notions of ‘deserving’ and undeserving victims.⁶³ The Victorian Council of Social Service also submitted that such provisions place an ‘unreasonable burden’ on victims of family violence or sexual assault.⁶⁴
- 15.47 A number of specific practical and structural barriers to reporting were also raised by stakeholders, including concerns relating to:
- misunderstandings about what amounts to a report to police, as well as barriers to getting the police to take an official report⁶⁵
 - the dynamics of certain crimes, such as family violence and sexual assault, affecting victims’ ability to report to police⁶⁶
 - vulnerabilities of diverse communities, creating barriers to reporting to police⁶⁷
 - challenges for some victims in relation to reporting to police within ‘reasonable time’⁶⁸
 - safety and wellbeing concerns for victims as a result of reporting to police.⁶⁹
- 15.48 From a practical perspective, some stakeholders said that the definition of reporting to police is unclear⁷⁰ and that misunderstandings can arise where a victim may have called 000, or police have attended an incident, but no official report or statement is made.⁷¹ The Commission was also told that where a Family Violence Intervention Order (FVIO) is issued, but no report is made to police, victims may mistakenly consider the FVIO to be a police report.⁷²
- 15.49 Some stakeholders said that victims can face barriers in getting police to take a formal statement. The Commission was told by some legal professionals that victims can be advised by police there is nothing the police can do about a complaint, or that the relevant police officer is not available to take the report.⁷³ Inner Melbourne Community Legal submitted that appointments with police are sometimes cancelled⁷⁴ and lawyers and victim support workers said that in some cases, police have simply refused to take statements,⁷⁵ particularly in relation to historical family violence matters.⁷⁶

62 For further discussion, see Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 109.

63 Consultation 20 (Academics).

64 Submission 31 (Victorian Council of Social Service).

65 Submissions 15 (Merri Health Victims Assistance Program), 24 (Darebin Community Legal Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 38 (Ryan Carlisle Lawyers); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support).

66 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 24 (Darebin Community Legal Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service).

67 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 39 (Victorian Aboriginal Legal Service), 44 (Aboriginal Family Violence Prevention Legal Service Victoria); Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 19 (RMIT Centre for Innovative Justice).

68 Submissions 3 (Director of Public Prosecutions Victoria), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 37 (safe steps Family Violence Response Centre); Consultation 4 (Victim, Witness and Court Support).

69 Submissions 14 (Inner Melbourne Community Legal), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore).

70 Consultation 2 (Legal Professionals—Private Practice). See also submission 37 (safe steps Family Violence Response Centre).

71 Submission 24 (Darebin Community Legal Centre); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres).

72 Consultation 3 (Legal Professionals—Community Legal Centres).

73 Ibid.

74 Submission 14 (Inner Melbourne Community Legal).

75 Submissions 15 (Merri Health Victims Assistance Program), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 38 (Ryan Carlisle Thomas Lawyers); Consultation 4 (Victim, Witness and Court Support).

76 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

- 15.50 Some stakeholders said that there are specific barriers to reporting to police for particular victims, whether because of a particular crime type or because of a victim’s individual circumstances or vulnerabilities. A number of concerns were raised in relation to family violence victims because the dynamics of family violence often mean victims will not make a report to police⁷⁷ for a range of reasons, including:
- shame and stigma⁷⁸
 - fear of the perpetrator,⁷⁹ including fears for their own safety or the safety of their children⁸⁰
 - concern they will not be believed⁸¹
 - previous history/trauma relating to police interactions,⁸² fear of police or authority,⁸³ and concerns about being pursued as an offender about unrelated criminal matters⁸⁴
 - because they do not want a prosecution pursued⁸⁵
 - because they do not recognise the family violence as violence⁸⁶
 - cultural barriers⁸⁷
 - wanting to keep the family together.⁸⁸
- 15.51 Some stakeholders said that victims who are less likely to report to police are often the most vulnerable members of our community.⁸⁹ The Commission was told that intersectional factors, combined with the dynamics of family violence, may prevent victims from marginalised communities engaging with police.⁹⁰ Such factors act as particular barriers for:
- Aboriginal and/or Torres Strait Islander women⁹¹
 - women from culturally and linguistically diverse backgrounds⁹²
 - women working in the sex industry⁹³
 - women with disabilities⁹⁴
 - people from LGBTIQ communities⁹⁵
 - women living in rural or remote areas.⁹⁶
- 15.52 Stakeholders submitted that Aboriginal women in particular may not report family violence to police because of:
- the history of police interaction with Aboriginal people since colonisation⁹⁷

77 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 24 (Darebin Community Legal Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 41 (Springvale Monash Legal Service).

78 Submission 31 (Victorian Council of Social Service).

79 Submission 24 (Darebin Community Legal Centre).

80 Submission 31 (Victorian Council of Social Service); Consultation 7 (Family Violence and Advocacy Organisations).

81 Submission 31 (Victorian Council of Social Service).

82 Submission 24 (Darebin Community Legal Centre).

83 Submission 10 (Eastern Metropolitan Regional Family Violence Partnership).

84 Submission 39 (Victorian Aboriginal Legal Service); Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 19 (RMIT Centre for Innovative Justice).

85 Submissions 15 (Merri Health Victims Assistance Program), 51 (Law Institute of Victoria); Consultations 4 (Victim, Witness and Court Support), 15 (Regional Consultation—Ballarat Victim Support Agencies).

86 Submission 31 (Victorian Council of Social Service).

87 Submission 24 (Darebin Community Legal Centre).

88 Submission 31 (Victorian Council of Social Service).

89 Submission 15 (Merri Health Victims Assistance Program); Consultation 4 (Victim, Witness and Court Support).

90 Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 19 (RMIT Centre for Innovative Justice).

91 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 39 (Victorian Aboriginal Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies).

92 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid; Consultation 13 (Regional Consultation—Mildura Legal Professionals).

97 Submission 39 (Victorian Aboriginal Legal Service).

- discriminatory police responses to Aboriginal women, including police disbelieving Aboriginal women, minimising or trivialising their experiences or labelling family violence as reciprocal⁹⁸
 - concerns about child protection becoming involved, given the over-representation of Aboriginal children in out-of-home care.⁹⁹
- 15.53 In addition, knowmore submitted to the Commission that survivors of institutional child sexual abuse are often unwilling to report to police because of a lack of trust of police, negative interactions with police or authorities, shame, guilt, fear of not being believed, as well as fear of reprisals from the perpetrator.¹⁰⁰
- 15.54 Some stakeholders submitted to the Commission that not reporting to police may be part of a victim's safety plan¹⁰¹ or may be an active choice by victims to prioritise their wellbeing and recovery.¹⁰² In this context, knowmore submitted that it can be counter-productive and potentially re-traumatising to compel survivors to report to police.¹⁰³
- 15.55 Compounding general barriers to reporting to police is the requirement that reporting be within reasonable time.¹⁰⁴ This was raised as particularly problematic because stakeholders submitted that such a requirement does not adequately reflect the reality of many crimes, particularly that:
- evidence suggests victims of sexual offences will often delay reporting¹⁰⁵
 - historical child sexual assault will often be disclosed by adult survivors decades after the abuse occurred, and often after the offender is deceased¹⁰⁶
 - some victims of family violence may take a long time to recognise family violence as a crime¹⁰⁷ or regain stability in their life to deal with the psychological consequences of family violence¹⁰⁸
 - some victims delay reporting a crime to police until they feel they would be ready to commence the prosecution process, which may take some time.¹⁰⁹
- 15.56 In addition, safe steps Family Violence Response Centre submitted that there are different interpretations of what is considered a reasonable time for the purposes of reporting under section 52, resulting in significant uncertainty for applicants.¹¹⁰
- 15.57 Although stakeholders raised extensive issues in relation to the police reporting requirement, as summarised above, a small number of stakeholders considered the requirement to report to police to be beneficial, as it may assist the state in holding perpetrators to account, and because a police report may assist a victim to meet evidentiary requirements.¹¹¹

98 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

99 Ibid.

100 Submission 43 (knowmore).

101 Submission 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

102 Submission 43 (knowmore).

103 Ibid.

104 *Victims of Crime Assistance Act 1996* (Vic) s 52(a)(i).

105 Submissions 3 (Director of Public Prosecutions Victoria), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 37 (safe steps Family Violence Response Centre); Consultation 4 (Victim, Witness and Court Support).

106 Submission 43 (knowmore).

107 Consultation 9 (Domestic Violence Victoria Members).

108 Ibid.

109 Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

110 Submission 37 (safe steps Family Violence Response Centre).

111 Submissions 13 (Adviceline Injury Lawyers), 41 (Springvale Monash Legal Service); Consultation 7 (Family Violence and Advocacy Organisations).

Requirement to cooperate with police and prosecution

- 15.58 In written submissions and during consultations, stakeholders said that the requirement for victims to cooperate with police and prosecution is difficult to comply with because:
- victims may be too scared to proceed with making a formal statement or having charges pressed,¹¹² with some victims fearing the repercussions of cooperation with police or prosecution¹¹³
 - victims may be unwilling to face the perpetrator, relive traumatic experiences and be cross-examined about intensely personal and painful experiences during the criminal justice process¹¹⁴
 - victims may be unwilling to participate in the criminal justice process more broadly because their motivation for making initial contact with police was to stop the violence and seek safety, rather than for prosecution purposes¹¹⁵
 - the alleged offender may be a work colleague or a public figure, and victims may fear that proceeding with charges might attract unwanted attention¹¹⁶
 - some victims may decide that they can no longer participate in an investigatory or prosecution process¹¹⁷ because it might inflame past trauma or be incompatible with recovery.¹¹⁸
- 15.59 Some stakeholders said that the requirement to cooperate with police disproportionately affects victims of family violence.¹¹⁹ A lack of cooperation with police is a common occurrence in family violence matters due to the nature and dynamics of family violence.¹²⁰ Women’s Legal Service Victoria and Domestic Violence Victoria submitted that some family violence victims are requested by police to sign statements of ‘no complaint’ which can then be interpreted by VOCAT as not providing reasonable assistance.¹²¹ The RMIT Centre for Innovative Justice told the Commission that VOCAT will often seek submissions from legal counsel seeking reasons why a client has not cooperated with police.¹²²
- 15.60 The Commission was told that a requirement to report to police relies on police willingness to engage with victims, including victims who police might view as ‘difficult’, such as victims with cognitive impairments, acquired brain injuries or those with a criminal history.¹²³ Some stakeholders submitted that the requirement to cooperate with police can prevent victims from seeking assistance and can create an onus on victims to be the ‘perfect’ or ‘ideal’ victim.¹²⁴
- 15.61 The Aboriginal Family Violence Prevention & Legal Service Victoria was concerned by what they viewed as increasing evidentiary burdens to fulfil police cooperation requirements. It submitted that where once VOCAT would have accepted a police statement as sufficient proof of cooperation with police, Tribunal members are increasingly asking parties to present further evidence, such as Victim Impact Statements.¹²⁵

112 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

113 Submissions 18 (cohealth), 26 (Hume Riverina Community Legal Service).

114 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

115 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

116 Submissions 14 (Inner Melbourne Community Legal), 38 (Ryan Carlisle Thomas Lawyers).

117 Submission 14 (Inner Melbourne Community Legal).

118 Submission 41 (Springvale Monash Legal Service).

119 Submission 51 (Law Institute of Victoria); Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

120 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

121 Ibid.

122 Consultation 19 (RMIT Centre for Innovative Justice).

123 Ibid.

124 Submission 18 (cohealth).

125 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria). Victim Impact Statements are voluntary statements made by victims to explain the effects of crime on them which can be submitted to the court during the sentencing phase of a criminal trial as per the *Sentencing Act 1991* (Vic) s 8K.

Special circumstances mitigating failure to report or provide reasonable assistance

- 15.62 Although section 52 of the VOCAA provides an exception to mandatory refusal where VOCAT considers that there are special circumstances resulting in either a failure to report to police within reasonable time, or a failure to provide reasonable assistance to police or the prosecution, stakeholders raised concerns about an exception based on special circumstances.
- 15.63 Stakeholders suggested an exception based on special circumstances is problematic because:
- it is not defined in the VOCAA,¹²⁶ so there is little guidance as to the types of matter that may mitigate a failure to report or cooperate¹²⁷
 - it may not adequately account for the experiences of diverse communities, for example, the effects of historical police contact with the Aboriginal community or particular cultural or community pressures and expectations¹²⁸
 - it places the onus on victims to prove they are an exception or to explain why their particular experience with violence is different and special,¹²⁹ which may be difficult with common criminal acts, like family violence.¹³⁰
- 15.64 Some stakeholders submitted that the hurdle of proving special circumstances is substantial for some applicants.¹³¹ Darebin Community Legal Centre submitted that where applicants struggle to prove special circumstances, VOCAT will often request a hearing and begin the offender notification process, and at this stage victims will often instruct their lawyer to withdraw their VOCAT application altogether.¹³²

Section 54 character and behaviour considerations

- 15.65 A number of stakeholders were concerned that section 54 unfairly affects victims of crime,¹³³ with section 54 provisions broadly described by stakeholders as:
- a barrier for family violence victims¹³⁴
 - ‘blocking justice’ for people who deserve financial assistance¹³⁵
 - perpetuating victim blaming by the justice system¹³⁶
 - punishing people with criminal histories twice¹³⁷
 - requiring victims to be the ‘perfect victim’,¹³⁸ putting victims ‘on trial’¹³⁹ and deeming some victims as ‘lesser’ or ‘less deserving’ than other victims¹⁴⁰
 - relying on a binary notion of victim/offender, inconsistent with reality¹⁴¹

126 Submissions 38 (Ryan Carlisle Thomas Lawyers), 39 (Victorian Aboriginal Legal Service), 41 (Springvale Monash Legal Service).

127 Submissions 38 (Ryan Carlisle Thomas Lawyers), 39 (Victorian Aboriginal Legal Service).

128 Submission 39 (Victorian Aboriginal Legal Service).

129 Ibid.

130 Ibid.

131 Submissions 24 (Darebin Community Legal Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

132 Submission 24 (Darebin Community Legal Centre).

133 Submission 30 (CASA Forum); Consultations 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies), 17 (Family Violence Diverse Communities and Intersectionality Working Group), 19 (RMIT Centre for Innovative Justice). Consultation 3 (Legal Professionals—Community Legal Centres).

134 Ibid.

135 Submissions 24 (Darebin Community Legal Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 41 (Springvale Monash Legal Service); Consultations 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 9 (Domestic Violence Victoria Members), 13 (Regional Consultation—Mildura Legal Professionals).

137 Submissions 7 (Dr Kate Seear et al), 46 (Victoria Legal Aid); Consultation 3 (Legal Professionals—Community Legal Centres).

138 Submissions 15 (Merri Health Victims Assistance Program). See also Submissions 24 (Darebin Community Legal Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria); Consultations 4 (Victim, Witness and Court Support), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

139 Consultation 9 (Domestic Violence Victoria Members).

140 Submissions 7 (Dr Kate Seear et al), 24 (Darebin Community Legal Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 46 (Victoria Legal Aid); Consultations 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

141 Submissions 24 (Darebin Community Legal Centre), 46 (Victoria Legal Aid); Consultation 17 (Family Violence Diverse Communities and Intersectionality Working Group).

- ‘too subjective’,¹⁴² giving rise to the potential for bias and unfairness¹⁴³ and discriminatory and abusive conduct by decision makers.¹⁴⁴
- 15.66 The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that ‘denying payment on character grounds and forcing a victim to justify that they are worthy of payment, reinforces stigma and marginalisation and can be re-traumatising’.¹⁴⁵
- 15.67 Stakeholders also submitted that the nature of section 54(a) was ‘unreasonably broad’,¹⁴⁶ and as a consequence:
- imposes ‘perfect victim’ standards¹⁴⁷
 - requires victims to ‘act “rationally”, leave abusive relationships, report violence, and not fight back or have substance abuse issues’¹⁴⁸
 - invites misinformed views about ‘deserving’ and ‘undeserving’ victims.¹⁴⁹
- 15.68 The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that the section 54 provisions can re-traumatise victims who can feel that they have to ‘prove they are not “to blame” for the violence they have experienced’.¹⁵⁰
- 15.69 Some stakeholders submitted that section 54 perpetuates structural inequalities which cause people who experience particular marginalisations, such as poverty and disability, to have contact with the criminal justice system,¹⁵¹ and therefore creates barriers for the most vulnerable members of the community and those most in need of assistance.¹⁵²
- 15.70 Some stakeholders said that section 54 fails to recognise who the majority of victims are, instead requiring a neat dichotomy of ‘victims’ and ‘perpetrators’,¹⁵³ ‘divorced from social realities’.¹⁵⁴
- 15.71 Other concerns related to a perceived lack of transparency and consistency in decision making under section 54 because of the broad nature of the provisions. Stakeholders said there can be a big disparity in approaches between different magistrates,¹⁵⁵ so it can be difficult to predict the Tribunal’s approach.¹⁵⁶
- 15.72 The Commission was also told that discussing section 54 requirements with victims is the ‘antithesis of therapeutic’ as it communicates to victims that they are not worthy of assistance.¹⁵⁷
- 15.73 In contrast, some stakeholders told the Commission that section 54 provides Tribunal members appropriate discretion¹⁵⁸ to deeply examine complex situations and weigh appropriate matters,¹⁵⁹ particularly where victims have themselves cost the state significant money as a result of their past offending behaviour.¹⁶⁰ Some academics told the Commission that there might be a community expectation that some victims should not be entitled to assistance in some circumstances.¹⁶¹

142 Submission 27 (Name withheld). See also submission 15 (Merri Health Victims Assistance Program); Consultation 7 (Family Violence and Advocacy Organisations).

143 Submission 15 (Merri Health Victims Assistance Program); Consultation 4 (Victim, Witness and Court Support).

144 Consultation 19 (RMIT Centre for Innovative Justice).

145 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

146 Submission 7 (Dr Kate Seear et al). See also submission 41 (Springvale Monash Legal Service).

147 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

148 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

149 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

150 Submissions 24 (Darebin Community Legal Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

151 Submission 24 (Darebin Community Legal Centre).

152 Consultation 19 (RMIT Centre for Innovative Justice).

153 Ibid.

154 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

155 Submissions 5 (Anglicare Victoria Victims Assistance Program), 15 (Merri Health Victims Assistance Program); Consultation 4 (Victim, Witness and Court Support).

156 Submission 46 (Victoria Legal Aid).

157 Consultation 19 (RMIT Centre for Innovative Justice).

158 Consultation 2 (Legal Professionals—Private Practice).

159 Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

160 Ibid.

161 Consultation 20 (Academics).

15.74 Beyond the general concerns expressed about section 54 provisions, some stakeholders raised concerns about some of the more specific considerations provided for under section 54, including:

- past criminal activity
- drug and alcohol use
- provocation or contributory conduct
- perpetrator benefit.

15.75 Stakeholder views in relation to these matters are outlined below.

Consideration of past criminal activity

15.76 Stakeholders expressed significant concern about the current requirement to consider an applicant's past criminal activity¹⁶² suggesting such considerations:

- are 'unreasonable' and 'discriminatory'¹⁶³
- are 'a moral judgement'¹⁶⁴
- result in unfair judgment of victims¹⁶⁵ and re-victimise individuals¹⁶⁶
- ignore the connection between past victimisation and criminal offending¹⁶⁷
- ignore the connection between criminal activity and disadvantage experienced by a victim, such as poverty¹⁶⁸ or homelessness¹⁶⁹ or growing up witnessing violence¹⁷⁰
- further disadvantage people from low socio-economic backgrounds,¹⁷¹ and marginalised victims who are more likely to have had intersections with the criminal justice system.¹⁷²

15.77 Some stakeholders were particularly concerned about historical criminal convictions being used by VOCAT to deny victims assistance,¹⁷³ including historical matters not relevant to the act of violence.¹⁷⁴ Some stakeholders had experienced VOCAT seeking submissions on shoplifting convictions from 25 years¹⁷⁵ and 17 years before.¹⁷⁶ In this context, the Commission was told that 'victims are victims', regardless of their past criminal history.¹⁷⁷

15.78 Some stakeholders also said that the section 54 provisions under the VOCAA disproportionately impact:

- female victims of crime, because many female victims of family violence have criminal histories relating to their experiences of family violence¹⁷⁸

162 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

163 Consultation 7 (Family Violence and Advocacy Organisations).

164 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

165 Consultations 9 (Domestic Violence Victoria Members), 13 (Regional Consultation—Mildura Legal Professionals).

166 Submission 39 (Victorian Aboriginal Legal Service); Consultation 5 (Victim, Witness and Court Support).

167 Submissions 14 (Inner Melbourne Community Legal), 24 (Darebin Community Legal Centre), 31 (Victorian Council of Social Service), 38 (Ryan Carlisle Thomas Lawyers), 39 (Victorian Aboriginal Legal Service), 43 (knowmore), 46 (Victoria Legal Aid); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 15 (Regional Consultation—Ballarat Victim Support Agencies), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

168 Submission 31 (Victorian Council of Social Service); Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

169 Consultations 7 (Family Violence and Advocacy Organisations), 19 (RMIT Centre for Innovative Justice).

170 Submission 38 (Ryan Carlisle Thomas Lawyers).

171 Submission 31 (Victorian Council of Social Service).

172 Submission 26 (Hume Riverina Community Legal Service); Consultation 19 (RMIT Centre for Innovative Justice).

173 Submission 38 (Ryan Carlisle Thomas Lawyers).

174 Submission 39 (Victorian Aboriginal Legal Service).

175 Ibid.

176 Consultation 4 (Victim, Witness and Court Support).

177 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

178 Submissions 24 (Darebin Community Legal Centre), 39 (Victorian Aboriginal Legal Service).

- Aboriginal victims/survivors,¹⁷⁹ because Aboriginal people face more discrimination across the justice system.¹⁸⁰
- 15.79 Academics consulted by the Commission said that the proposal to limit redress under the Commonwealth redress scheme for victims of institutional child sexual abuse who have served a prison sentence of five years or more is inappropriate.¹⁸¹ Similarly, knowmore submitted that its clients often have pathways to criminal offending beginning with childhood abuse leading to trauma, followed by a lifetime of institutional involvement and criminal offending.¹⁸²
- 15.80 Notwithstanding the above concerns, other stakeholders told the Commission that consideration of an applicant’s criminal activity may appropriately limit some people from receiving a VOCAT award.¹⁸³ For example, some stakeholders submitted that those involved in ‘habitual criminal behaviour’ should not benefit from a crime.¹⁸⁴ Cohealth submitted that consideration of criminal offending might be appropriate in some circumstances, but that the VOCAA should be amended to provide greater guidance as to how the discretion should be exercised.¹⁸⁵
- 15.81 A number of stakeholders said that criminal offending should only be considered if it is connected to the act of violence that forms the basis of their application,¹⁸⁶ similar to the approaches taken in the Australian Capital Territory¹⁸⁷ and Queensland.¹⁸⁸ However, Dr Kate Seear et al and Springvale Monash Legal Service submitted that these considerations should be safeguarded through ensuring the scheme decision maker considers whether the act of violence which is the subject of the application was proportionate to the victim’s own criminal activity, and disallowing consideration of a victim’s use of drugs and alcohol.¹⁸⁹

Consideration of drug and alcohol use

- 15.82 There was significant concern expressed about VOCAT’s current consideration of a victim’s drug and alcohol use. Reasons provided by stakeholders include that such a consideration:
- is counter-therapeutic for victims of crime¹⁹⁰
 - is inappropriate because addiction is a health problem¹⁹¹ and magistrates are not health experts¹⁹²
 - ignores the connection between drug and alcohol use and victimisation,¹⁹³ including that child sexual abuse or exposure to family violence can often lead to drug and alcohol abuse¹⁹⁴
 - is inappropriate because the VOCAA does not require a nexus between the act of violence and the victim’s drug or alcohol use, so such considerations are irrelevant to the criminal act the subject of the application¹⁹⁵
 - can result in the state failing to assist those most in need.¹⁹⁶

179 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 17 (Family Violence Diverse Communities and Intersectionality Working Group).

180 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

181 Consultation 20 (Academics).

182 Submission 43 (knowmore).

183 Consultations 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals).

184 Submission 18 (cohealth).

185 Submission 14 (Inner Melbourne Community Legal).

186 Submissions 7 (Dr Kate Seear et al), 18 (cohealth), 31 (Victorian Council of Social Service), 41 (Springvale Monash Legal Service), 46 (Victoria Legal Aid); Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

187 Submission 39 (Victorian Aboriginal Legal Service).

188 Submissions 7 (Dr Kate Seear et al), 41 (Springvale Monash Legal Service).

189 Ibid.

190 Consultation 20 (Academics).

191 Submission 31 (Victorian Council of Social Service).

192 Submission 7 (Dr Kate Seear et al).

193 Submission 31 (Victorian Council of Social Service).

194 Consultation 19 (RMIT Centre for Innovative Justice).

195 Submission 7 (Dr Kate Seear et al).

196 Ibid.

- 15.83 Some stakeholders queried how a past drug addiction could diminish a victim's right to financial assistance when it does not change the impact that the crime has on a victim.¹⁹⁷
- 15.84 Dr Kate Seear et al submitted that academic research demonstrates significant inconsistency and variability in VOCAT approaches to an applicant's past history of drug and alcohol use. Seear et al submitted that the Tribunal's reasoning is problematic, as Tribunal members generally rely on 'explaining' or 'excusing' drug use, even though evidence suggests people use drugs or alcohol for a range of reasons.¹⁹⁸

Consideration of provocation or contributory conduct

- 15.85 Some stakeholders said that the inclusion of provocation in section 54 was outdated¹⁹⁹ and out of step with community standards.²⁰⁰ Springvale Monash Legal Service submitted that such provisions feed into 'victim-blaming'.²⁰¹ This view was shared by the Aboriginal Family Violence Prevention & Legal Service Victoria who were particularly concerned about the applicability of provocation in family violence and sexual assault matters where such considerations might amount to 'victim blaming'.²⁰²
- 15.86 Merri Health Victims Assistance Program raised concerns about provocation no longer being available as a defence in criminal law and its inclusion in the VOCAA therefore appearing contradictory.²⁰³
- 15.87 Concerns were raised about the extent to which the provisions which require VOCAT to take into account the 'condition or disposition' of the victim, require it to take into account the influence of drugs and alcohol at the time of the criminal act.²⁰⁴ Some stakeholders said there had been instances where VOCAT had raised queries in relation to clients' intoxication at the time of the criminal act, including in cases of alleged sexual assault.²⁰⁵
- 15.88 Other stakeholders were concerned that the 'contributory conduct' provision in section 54 of the VOCAA does not adequately consider the psychological impact of family violence and sexual abuse, such as the effect of grooming,²⁰⁶ and that in some cases, victims' actions might be perceived as provocation or contributory conduct without appropriate contextual information.²⁰⁷ Springvale Monash Legal Service submitted that victims may sometimes respond to a perpetrator's threats through defensive or protective behaviours.²⁰⁸ Other stakeholders submitted that the provocation and contributory conduct provisions feed into a victim blaming narrative.²⁰⁹ Dr Kate Seear et al said this has particular applicability to family violence and sexual assault cases where 'gendered understandings of responsibility, vulnerability, agency and blame might shape decision making'.²¹⁰

Consideration of perpetrator benefit

- 15.89 A number of stakeholders submitted that consideration of perpetrator benefit under section 54 unfairly discriminates against family violence victims because:
- it fails to account for the complex dynamics of family violence, as well as the importance of financial stability for women's decisions to stay or leave violent

197 Consultation 7 (Family Violence and Advocacy Organisations).
 198 Submission 7 (Dr Kate Seear et al).
 199 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 3 (Legal Professionals—Community Legal Centres).
 200 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).
 201 Submission 41 (Springvale Monash Legal Service).
 202 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
 203 Submission 15 (Merri Health Victims Assistance Program).
 204 Submission 14 (Inner Melbourne Community Legal).
 205 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 3 (Legal Professionals—Community Legal Centres).
 206 Consultation 7 (Family Violence and Advocacy Organisations).
 207 Submission 41 (Springvale Monash Legal Service).
 208 Ibid.
 209 Submissions 7 (Dr Kate Seear et al), 29 (Women's Legal Service Victoria and Domestic Violence Victoria).
 210 Submission 7 (Dr Kate Seear et al).

relationships²¹¹

- family violence is different to one-off crimes, in that the perpetrator and victim often have an ongoing relationship and their lives may remain ‘enmeshed’ through familial responsibilities²¹² or because of other complex reasons including family obligations, childcare and parenting arrangements, common places of worship or work, property ownership and family law orders²¹³
- refusing awards might deny women the opportunity to obtain the money needed to safely exit a violent relationship²¹⁴ or assist a victim during the process of leaving a violent relationship.²¹⁵

15.90 For this reason, Aboriginal Family Violence Prevention & Legal Service Victoria submitted that consideration as to whether the perpetrator may directly or indirectly benefit from an award is not relevant to whether the victim has in fact suffered from family violence and is in need of assistance.²¹⁶

15.91 Women’s Legal Service Victoria and Domestic Violence Victoria submitted that it is the state’s responsibility to ‘hold perpetrators accountable’ and that as such, victims should not be excluded, blamed, disadvantaged or penalised where they continue to ‘manage complex relational circumstances’ with a perpetrator.²¹⁷

15.92 However, some support workers told the Commission that the perpetrator benefit provision in the VOCAA may still be appropriate since the provision of Family Violence Flexible Support Packages is also based on a requirement that a victim must have left (or be in the process of leaving) a perpetrator of family violence.²¹⁸

Discussion and recommendations

15.93 As detailed above, the practical effect of both sections 52 and 54 is that VOCAT must consider a victim’s character, attitude and behaviour before, during and after a crime. Because section 52 and 54 considerations often intersect and overlap, the Commission’s recommendations are outlined together at the end of this part.

15.94 However, before detailing the Commission’s recommendations for the proposed Act and scheme, the next part of the report discusses each relevant factor under the existing VOCAA to determine whether it should be included in the proposed Act.

Requirement to report to police within reasonable time and provide reasonable assistance to police and prosecution

15.95 As noted above, stakeholders have raised significant concerns about requirements to report to police and provide reasonable assistance to police and prosecution under section 52 of the VOCAA.²¹⁹ Few stakeholders advocated for the retention of section 52 reporting and cooperation requirements in their current form, with only a small number suggesting such requirements may assist the state to hold perpetrators to account or assist a decision maker in determining whether the criminal act occurred.²²⁰

211 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
212 Submissions 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
213 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
214 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 41 (Springvale Monash Legal Service).
215 Submission 30 (CASA Forum).
216 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
217 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).
218 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).
219 Submissions 3 (Director of Public Prosecutions Victoria), 10 (Eastern Metropolitan Regional Family Violence Partnership), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 24 (Darebin Community Legal Centre), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 39 (Victorian Aboriginal Legal Service), 41 (Springvale Monash Legal Service), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 12 (Regional Consultation—Mildura Victim Support Agencies), 19 (RMIT Centre for Innovative Justice).
220 Submissions 13 (Adviceline Injury Lawyers), 41 (Springvale Monash Legal Service); Consultation 7 (Family Violence and Advocacy Organisations).

- 15.96 A number of the concerns raised by stakeholders in relation to police reporting requirements are confirmed by academic literature, including barriers to reporting for:
- victims of family violence who are less likely to report to police as a result of fear, shame or economic disadvantage²²¹
 - victims of sexual assault or historical child sexual assault who, like family violence victims, may also be less likely to report the crime, or delay reporting as a result of confusion, shock, guilt or fear²²²
 - Aboriginal victims of crime, who may have a general distrust of authorities²²³
 - members of the LGBTIQ community, who may be less likely to report to police because of actual or perceived discrimination and harassment²²⁴
 - victims with disability, who may experience physical or structural barriers to reporting, as well as cultural barriers relating to being believed when making a report.²²⁵
- 15.97 In addition there is limited evidence to suggest the reporting requirements in state-funded financial assistance schemes results in increased rates of reporting to police.²²⁶
- 15.98 In this context, the Commission notes that other Australian jurisdictions have addressed concerns about police reporting requirements by introducing alternative reporting mechanisms in their relevant schemes. For example, in the Australian Capital Territory, New South Wales and Queensland, special classes of victim may make a report to other professionals like their doctor or social worker.²²⁷ These alternative reporting mechanisms recognise the barriers faced by many victims in making a report to police.
- 15.99 As submitted by Eastern Metropolitan Regional Family Violence Partnership, a trauma-informed approach ‘means the trauma is addressed, not exacerbated or magnified by asking [victims] to make statement after statement’.²²⁸
- 15.100 Taking into account the range of concerns expressed by stakeholders about the operation of section 52 provisions, as outlined above, and given such concerns are also reflected in academic literature, the Commission is of the view that the current section 52 requirements are not consistent with the purpose of the proposed Act—to assist victims of crime in their recovery.²²⁹
- 15.101 The Commission considers that the current police reporting requirements may have a negative effect on some victims’ recovery by placing them at risk of further harm or violence from the perpetrator,²³⁰ or exposing them to police or prosecution processes that may conflict with their welfare and recovery.²³¹ Accordingly, the Commission considers that under the proposed Act, a report to police should be recognised as one of the documentary evidence options that can be provided by an applicant to establish eligibility for the proposed scheme, rather than a mandatory requirement. The documentary evidence requirements of the proposed Act are discussed in Chapter 14.

221 This was discussed in detail in Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 105.

222 See, eg, Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14, relating to delayed reporting in historical child sexual abuse; Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating and Evidence-based Resource for Police and Legal Practitioners* (2017) 4, relating to reasons why victims of sexual offences often delay reporting a crime to police.

223 Australian Institute of Criminology, *Non-disclosure of Violence in Australian Indigenous Communities*, Trends and Issues in Crime and Criminal Justice No 405 (2011) 6; Clear Horizon Consulting, *Evaluation of the Koori Family Violence Police Protocols: Ballarat, Darebin and Mildura* (Victoria Police, 2015) 3.

224 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 145–6; Angela Dwyer, ‘Policing Lesbian, Gay, Bisexual and Transgender Young People: A Gap in the Research Literature’ (2011) 22(3) *Current Issues in Criminal Justice* 415, 416.

225 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/>>; Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services*, Final Report (2016) 59.

226 See, eg, Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 119.

227 *Victims Rights and Support Act 2013* (NSW) s 44(c); *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 31(3)–(4); *Victims of Crime Assistance Act 2009* (Qld) ss 81(1)(a)(ii), (2).

228 Submission 10 (Eastern Metropolitan Regional Family Violence Partnership).

229 See Chapter 11 for the purpose and objectives of the proposed Act and scheme.

230 Submissions 14 (Inner Melbourne Community Legal), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

231 Submissions 38 (Ryan Carlisle Thomas Lawyers), 43 (knowmore).

- 15.102 The Commission also considers that, by extension, the requirement to assist police and prosecution should no longer apply either, and should not be included in the proposed Act. In the Commission's view, it would be impractical to require a victim to provide reasonable assistance to police and prosecution, without at the same time requiring victims to make a report to police regarding the relevant criminal act. Accordingly, the Commission considers that the current requirement to assist police should not be replicated in the proposed Act.

Broad consideration of character and behaviour 'at any time'

- 15.103 As described above, there was significant stakeholder concern with the existing scheme's broad consideration of an applicant's character and behaviour 'at any time', with section 54 described by many stakeholders as a 'barrier',²³² perpetuating victim blaming,²³³ punishing people with criminal histories 'twice',²³⁴ requiring victims to be the 'perfect victim',²³⁵ putting victims 'on trial',²³⁶ and deeming some victims as 'underserving'.²³⁷
- 15.104 These concerns have also been raised in academic literature. Kate Seear and Suzanne Fraser have highlighted issues with the VOCAA's consideration of character and behaviour, and the broad discretion within such a consideration:

section 54 offers no guidance to what might be a relevant consideration, what weight should be given to relevant considerations in deciding whether or not to make an award, and how those considerations impact on decisions about the kind or size of an award to make ... [decision makers] have considerable scope for determining what is both 'relevant' and 'problematic'.²³⁸

- 15.105 Julie Stubbs and Jane Wangmann have observed that binary oppositions entrenched within the legal system, such as those perpetuated by the broad nature of section 54 considerations, lead to perceptions of 'innocent' victims and 'wicked' offenders which can disadvantage victims who do not fit these strict categories, such as female victims of family violence who 'fight back', have a criminal history, or abuse drugs and alcohol.²³⁹ Similarly, Geneviève Parent has observed that the 'innocent' victim stereotype in victim compensation schemes does not correspond with the reality of most victims and may impede or prevent the victim's rehabilitation process.²⁴⁰
- 15.106 David Miers has observed that the:
- differentiation between deserving and undeserving victims to the [United Kingdom] Scheme's legitimacy cannot be overstated. Its defining purpose has always been to compensate the innocent victim, a notion which, though politically powerful is both conceptually and factually problematic, and controversial in its application²⁴¹
- 15.107 At the same time, the Commission acknowledges that some stakeholders thought some section 54 considerations enable VOCAT to examine complex situations and weigh appropriate matters,²⁴² particularly where victims have themselves cost the state

232 Consultation 3 (Legal Professionals—Community Legal Centres).

233 Submissions 24 (Darebin Community Legal Centre), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 41 (Springvale Monash Legal Service); Consultations 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 9 (Domestic Violence Victoria members), 13 (Regional Consultation—Mildura Legal Professionals).

234 Submissions 7 (Dr Kate Seear et al), 46 (Victoria Legal Aid); Consultation 3 (Legal Professionals—Community Legal Centres).

235 Submissions 15 (Merri Health Victims Assistance Program), 24 (Darebin Community Legal Centre), 29 (Women's Legal Service Victoria and Domestic Violence Victoria); Consultations 4 (Victim, Witness and Court Support), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

236 Consultation 9 (Domestic Violence Victoria members).

237 Submissions 7 (Dr Kate Seear et al), 24 (Darebin Community Legal Centre), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 46 (Victoria Legal Aid); Consultations 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

238 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, 830.

239 Julie Stubbs and Jane Wangmann, 'Competing Conceptions of Victims of Domestic Violence Within Legal Processes' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave MacMillan, 2015) 107.

240 Geneviève Parent, 'When Crime Pays: The Politics of Crime, Law, and Victim Compensation in Quebec' (Paper presented at the Canadian Political Science Association Conference, Toronto, 1–3 June 2006) 8.

241 David Miers, 'Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) *Legal Studies* 242, 248.

242 Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

significant money as a result of their past offending.²⁴³ The Commission was told that there might be a community expectation that some victims should not be entitled to assistance in some circumstances.²⁴⁴

- 15.108 However, the Commission notes that other Australian jurisdictions have much narrower provisions providing for consideration of a victim's character and behaviour, limiting such factors to behaviours relevant to the current act of violence.²⁴⁵
- 15.109 In the Commission's view, the broad consideration of an applicant's character, behaviour and attitude 'at any time' can unfairly prejudice vulnerable, disadvantaged and diverse victims who may fall short of the notion of the 'perfect victim'.²⁴⁶
- 15.110 The broad consideration of an applicant's character, behaviour and attitude is consistent with the current objectives of the VOCAA—which include an objective of only acknowledging certain victims. However, as discussed in Chapter 11, the Commission has recommended that the proposed Act not include an objective provision recognising certain victims because such an objective can give rise to moral judgments about deserving and undeserving victims inconsistent with the purpose of the proposed Act—to assist victims in their recovery.²⁴⁷
- 15.111 Accordingly, the Commission considers that it is no longer appropriate, or consistent with the purpose and objectives of the proposed Act, for the scheme decision maker to have regard to the broad character and behaviour of the applicant 'at any time' in making a financial assistance determination and that such a provision should not be included in the proposed Act.

Consideration of criminal behaviour

- 15.112 As stated at above, stakeholders raised significant concerns about the requirement under the VOCAA to consider an applicant's past criminal behaviour, suggesting consideration of an applicant's past criminal behaviour was 'unreasonable' and 'discriminatory',²⁴⁸ re-victimises individuals,²⁴⁹ ignores the connection between past victimisation and criminal offending,²⁵⁰ and further disadvantages people from low socio-economic backgrounds²⁵¹ and marginalised victims who are more likely to have had interaction with the criminal justice system.²⁵²
- 15.113 At the same time, a small number of stakeholders told the Commission that consideration of an applicant's criminal activity appropriately limits some people from receiving an award.²⁵³ For example, cohealth suggested those involved in 'habitual criminal behaviour' should not benefit from a crime, but assistance should be provided for victims where previous criminal behaviour is unrelated to the current crime.²⁵⁴

243 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

244 Consultation 20 (Academics).

245 See, eg, *Victims Rights and Support Act 2013* (NSW) s 44(1); *Victims of Crime Assistance Act 2009* (Qld) s 80(1); *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 45, 47; *Criminal Injuries Compensation Act 2003* (WA) s 41(a).

246 Academics have observed that although the underlying philosophy of victim compensation schemes has always relied on a differentiation between 'deserving' and 'undeserving' victims, this philosophy becomes problematic because it is confounded by the reality of criminal victimisation—the fact that many victims have also been offenders. See, eg, David Miers, 'Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) *Legal Studies* 242, 258.

247 As stated by Njeri Mathis Rutledge, the goal of a state-funded financial assistance scheme should be victim assistance and accordingly, any requirements that 'do not advance the primary goal of victim assistance should be dismantled': Njeri Mathis Rutledge, 'Looking a Gift Horse in the Mouth—the Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims' (2011) 19 *Duke Journal of Gender Law and Policy* 223, 226.

248 Consultation 7 (Family Violence and Advocacy Organisations).

249 Submission 39 (Victorian Aboriginal Legal Service); Consultation 4 (Victim, Witness and Court Support).

250 Submissions 14 (Inner Melbourne Community Legal), 24 (Darebin Community Legal Centre), 31 (Victorian Council of Social Service), 38 (Ryan Carlisle Thomas Lawyers), 39 (Victorian Aboriginal Legal Service), 43 (knowmore), 46 (Victoria Legal Aid); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 15 (Regional Consultation—Ballarat Victim Support Agencies), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

251 Submission 31 (Victorian Council of Social Service).

252 Submission 26 (Hume Riverina Community Legal Service); Consultation 19 (RMIT Centre for Innovative Justice).

253 Consultations 13 (Regional Consultation—Mildura Legal Professionals), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals).

254 Submission 18 (cohealth).

- 15.114 Victoria's consideration of an applicant's criminal behaviour is much broader than in other jurisdictions. Other jurisdictions limit considerations to:²⁵⁵
- whether the victim's involvement in criminal activity (past or present) was the 'only reason' or the 'main reason' the act of violence was committed²⁵⁶
 - whether the applicant was involved in a serious crime when the act of violence occurred, and the serious crime was the main reason that the act of violence occurred²⁵⁷
- 15.115 Therefore, unlike the broad consideration of any criminal behaviour under the VOCAA, other jurisdictions require a nexus between criminal behaviour and the act of violence the subject of the application—either temporally (the applicant was committing an offence at the time) or causally (the applicant's past criminal behaviour was connected in some way to the act of violence the subject of the application).
- 15.116 In contrast, the proposed Commonwealth Redress Scheme for Institutional Child Sexual Abuse may exclude applicants convicted of serious crimes, including sexual offences, drug offences, fraud or murder, that have resulted in a prison sentence of five years or more.²⁵⁸ Like the current provisions of the VOCAA, such a proposal is much broader than other state-funded financial assistance schemes as it does not require a nexus between the criminal behaviour and the act of violence the subject of the application.
- 15.117 However, the Senate Community Affairs Legislation Committee stated in its report that nearly all written submissions and witnesses to their enquiry said that survivors should not be excluded from the redress scheme due to criminal offending.²⁵⁹ For example, the Alliance for Forgotten Australians submitted to the Senate Inquiry that such an exclusion punishes victims 'three times':
- firstly through the institutional practices which took away their childhoods; secondly through the grief, loss and trauma which has affected their entire lives; and thirdly through ineligibility for redress and justice. Sadly, this third punishment appears to be an expedient, cynical and traumatic outcome for survivors and what remains of their families.²⁶⁰
- 15.118 Other victims' groups also submitted the exclusion was inappropriate, given the link between victimisation, trauma and criminal activity.²⁶¹ The Senate Community Affairs Legislation Committee also stated in its report that 'no other Commonwealth compensation scheme or financial relief payment for other survivor or victim cohorts ... holds any eligibility restriction on access based on criminal conviction or similar character grounds'.²⁶²
- 15.119 On the other hand, the Commonwealth Department of Social Services submitted to the Senate Inquiry that the exclusion of victims with a history of serious criminal convictions was based on consultation with state and territory ministers who:

255 Some jurisdictions have behaviour considerations beyond criminal behaviour, including whether behaviour directly or indirectly contributed to the injury or death sustained by a victim (*Victims Rights and Support Act 2013* (NSW) s 44) or whether an applicant's behaviour contributed to their injury or death (*Criminal Injuries Compensation Act 2003* (WA) s 41(a)).

256 *Victims of Crime Assistance Act 2009* (Qld) s 80(1).

257 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 45, 47.

258 While not reflected in the Bill, the intention of the Commonwealth Government to exclude some victims of crime from the proposed redress scheme as a result of past criminal convictions was addressed in Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) 38.

259 Ibid 40.

260 Alliance for Forgotten Australians, Submission No 2 to Senate Community Affairs Legislation Committee, *Inquiry into the Commonwealth Redress Scheme*, 16 January 2018, 4.

261 Knowmore, Submission No 31 to Senate Community Affairs Legislation Committee, *Inquiry into the Commonwealth Redress Scheme*, 2 February 2018, 8.

262 Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) 38.

were of the strong view that excluding some people based on serious criminal offences is necessary to ensure the Scheme is not using taxpayer money to pay redress to those whose actions may not meet prevailing community standards.²⁶³

- 15.120 Recent media reports suggest that the Commonwealth Government may reconsider its plan to exclude sexual abuse survivors with serious criminal histories from accessing the national redress scheme.²⁶⁴
- 15.121 In the Commission's view, broad consideration of an applicant's past criminal activity raises issues of unfairness for victims of crime, particularly given the connection between past victimisation and future offending highlighted not only by stakeholders but in academic literature.²⁶⁵
- 15.122 In the Commission's view, in order to be taken into account in the making of an award, a victim's criminal behaviour should be either temporally or causally connected in some way to the act of violence the subject of the application. This approach would be consistent with the approach in other jurisdictions outlined above. Accordingly, the Commission considers that under the proposed Act, the decision maker should be able to consider:
- whether the applicant was committing an offence at the time of the criminal act that is the subject of the application, which was the primary reason the criminal act that is the subject of the application was committed
 - whether the applicant's previous involvement in criminal activity was the primary reason the criminal act that is the subject of the application was committed.
- 15.123 The effect of this is that an applicant's criminal behaviour will only be relevant where there is a nexus between the current or past criminal behaviour and the criminal act the subject of the application.
- 15.124 In the Commission's view, this approach appropriately balances stakeholder concerns that:
- victims not be unfairly denied access to assistance where an applicant's past criminal behaviour has no relationship to the current act of violence
 - there are some behaviours that the community reasonably expects ought to affect an applicant's eligibility under the proposed scheme, such as an applicant committing an offence at the time the act of violence occurred that contributed in some way to the act of violence.
- 15.125 The Commission acknowledges that under this proposal, some victims of crime with past criminal histories may be eligible for financial assistance. This may be considered undesirable in some circumstances, particularly where an individual's past criminal activity 'may not meet prevailing community standards'.²⁶⁶
- 15.126 However, the Commission considers that a beneficial, victim-centred scheme necessarily places victims' needs at the centre and that a victim's past (unrelated) criminal behaviour does not negate a victim's current assistance needs.

263 Department of Social Services (Cth), Submission No 27 to Senate Community Affairs Legislation Committee, *Inquiry into the Commonwealth Redress Scheme*, 6 February 2018, 4.

264 Media reports in February 2018 suggested that the Commonwealth Government 'will reconsider its plan to bar sexual abuse survivors with serious criminal histories from accessing the national redress scheme amid mounting pressure from legal and mental health experts'. See, eg, Amy McNeillage, 'Coalition to Rethink Plan to Bar Criminals from Child Sexual Abuse Redress Scheme' *The Guardian* (online), 19 February 2018 <www.theguardian.com/australia-news/2018/feb/19/coalition-to-rethink-plan-to-bar-criminals-from-child-sex-abuse-redress-scheme>. As at 28 May 2018, the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (Cth) had not yet been passed.

265 See, eg, James Ogloff et al, *Child Sexual Abuse and Subsequent Offending and Victimisation: A 45 Year Follow-Up Study*, Trends and Issues in Crime and Criminal Justice No 440 (Australian Institute of Criminology, 2012) 5; Karin Derkley, *Spiral of Circumstances Sends Women to Prison* (8 March 2018) <www.liv.asn.au/Staying-Informed/LIJ/LIJ/March-2018/Spiral-of-circumstances-sends-women-to--prison>.

266 See, eg, Department of Social Services (Cth), Submission No 27 to Senate Community Affairs Legislation Committee, *Inquiry into the Commonwealth Redress Scheme*, 6 February 2018, 4.

- 15.127 In particular, the Commission notes stakeholder concerns that denying victims financial assistance based on past criminal activity ignores the established link between past victimisation and criminal offending.²⁶⁷ This approach also has the potential to further disadvantage marginalised victims who are more likely to have had intersections with the criminal justice system.²⁶⁸
- 15.128 The Commission has also considered the recent report of the Senate Community Affairs Legislation Committee in relation to the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth). Nearly all written submissions and witnesses to the enquiry said that survivors should not be excluded from the redress scheme due to criminal offending.²⁶⁹ The Senate Committee also noted that ‘no other Commonwealth compensation scheme or financial relief payment for other survivor or victim cohort ... holds any eligibility restriction on access based on criminal conviction or similar character grounds’.²⁷⁰
- 15.129 In the Commission’s view, the proposal that an applicant’s criminal behaviour be either temporally or causally connected in some way to the act of violence the subject of the application appropriately balances stakeholder concerns that victims not be unfairly denied assistance to help them recover from a criminal act, while also ensuring related criminal behaviour is a relevant consideration.
- 15.130 Consistent with this beneficial approach, the Commission is of the view that consideration of criminal behaviour should only apply to the provision of lump sum recovery payments rather than to the provision of immediate assistance, funeral expenses, counselling or practical assistance. In the Commission’s view, this approach ensures victims receive necessary practical supports to assist in their recovery from crime, while at the same time accepting that some financial assistance—like lump sum payments—may not be appropriate for ‘those [applicants] whose actions may not meet prevailing community standards’.²⁷¹
- 15.131 This approach of limiting such a consideration to lump sum payments reflects the current approach of VOCAT in some cases of making awards for practical expenses, but not awards of special financial assistance where section 54 matters arise.²⁷²

Consideration of drug and alcohol use

- 15.132 The VOCAA does not specifically provide for consideration of drug and alcohol use but such considerations fall within the broad consideration of an applicant’s character and behaviour ‘at any time’.²⁷³ Research by Kate Seear and Suzanne Fraser in 2014 also confirmed that victims of crime who use drugs and/or alcohol face considerable obstacles in accessing VOCAT awards.²⁷⁴
- 15.133 As noted above, stakeholders said that consideration of drug and alcohol use was problematic because such considerations can lack any causal connection with the act of violence the subject of the application,²⁷⁵ some victims’ drug and alcohol use is directly

267 Submissions 14 (Inner Melbourne Community Legal), 24 (Darebin Community Legal Centre), 31 (Victorian Council of Social Service), 38 (Ryan Carlisle Thomas Lawyers), 39 (Victorian Aboriginal Legal Service), 43 (knowmore), 46 (Victoria Legal Aid); Consultations 2 (Legal Professionals – Private Practice), 3 (Legal Professionals – Community Legal Centres), 4 (Victim, Witness and Court Support), 11 (Regional Consultation – Victoria Legal Aid – Gippsland), 15 (Regional Consultation – Ballarat Victim Support Agencies), 19 (RMIT Centre for Innovative Justice), 20 (Academics).

268 Submission 26 (Hume Riverina Community Legal Service); Consultation 19 (RMIT Centre for Innovative Justice).

269 Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) 40.

270 Ibid 38.

271 Department of Social Services (Cth), Submission No 27 to Senate Community Affairs Legislation Committee, *Inquiry into the Commonwealth Redress Scheme*, 6 February 2018, 4.

272 See, eg, *Nguyen v Victims of Crime Assistance Tribunal* [2001] VCAT 2028 (28 September 2001) [29]–[30] where VOCAT made a ‘modest’ award for medical expenses and clothing replacement.

273 *Victims of Crime Assistance Act 1996* (Vic) s 54(a). See also 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, 829.

274 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.

275 Submission 7 (Dr Kate Seear et al).

related to their previous experiences of victimisation,²⁷⁶ and because such considerations can be counter-therapeutic for victims of crime,²⁷⁷ resulting in the state failing to assist those most in need.²⁷⁸

15.134 For example, Dr Kate Seear et al submitted that where victims use drugs and alcohol in the aftermath of crime a paradox emerges—victims may want support in relation to their drug and alcohol use, but this may become ‘the very thing that prohibits them from obtaining compensation’.²⁷⁹

15.135 Dr Kate Seear et al also submitted that:

It is a popular misconception that experts are in agreement about issues pertaining to use, effects, harms, intoxication, addiction and alcoholism or that relevant mechanisms are straightforward. Indeed, key concepts around all of these are complex and contested.²⁸⁰

15.136 In the Commission’s view, consideration of an applicant’s drug and alcohol use is problematic because:

- some victims may use drugs and alcohol to cope with the effects of victimisation,²⁸¹ although drug and alcohol health experts do not necessarily agree on the causes and effects of drug and alcohol use, nor its intersection with trauma²⁸²
- a victim’s drug and alcohol use does not diminish their need for financial assistance as a result of victimisation—and may in fact increase their financial assistance needs²⁸³
- consideration of an applicant’s drug and alcohol use may further entrench inequality and stigma.²⁸⁴

15.137 The VOCAA does not specifically require VOCAT to consider a victim’s drug and alcohol use. As the Commission has recommended that the proposed Act not include a broad consideration of character and behaviour, a victim’s drug and alcohol use is unlikely to arise under the proposed Act as a relevant consideration in the same way it has under the VOCAA.

15.138 However, in allowing the proposed scheme decision maker to consider a victim’s criminal behaviour, whether past or present, where there is a nexus between that criminal behaviour and the criminal act the subject of the application, consideration of a victim’s use of drugs and alcohol may arise in some circumstances. This may arise where such activity constitutes a criminal offence and is temporally or causally connected to the criminal act.

15.139 In the Commission’s view, consideration of a victim’s use of drugs and alcohol, even where this use may constitute a criminal offence, should not be relevant to consideration of whether the victim requires financial assistance to assist them in their recovery from a criminal act. As will be discussed further below in relation to ‘contributory conduct’ provisions under the VOCAA, the Commission is concerned that consideration of a victim’s drug and alcohol use at the time of the act of violence may perpetuate ‘victim blaming’. In reaching this conclusion, the Commission has considered the recent decision in Western Australia where a victim of an alleged sexual assault was denied compensation because she had taken illicit drugs—and was therefore committing a criminal offence—at the time she was sexually assaulted.²⁸⁵ Such concerns were also raised by Dr Kate Seear

276 Submission 31 (Victorian Council of Social Service).

277 Consultation 20 (Academics).

278 Submission 7 (Dr Kate Seear et al).

279 Ibid.

280 Ibid.

281 See, eg, 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; Smart Justice, *Better Support for Victims of Crime*, Factsheet (2010).

282 Submission 7 (Dr Kate Seear et al).

283 Consultation 7 (Family Violence and Advocacy Organisations).

284 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, 827.

285 *Re Her Honour Judge Schoombee; Ex Parte Attorney General for Western Australia* [2011] WASC 23 (18 November 2010) [55].

et al, who submitted that if section 54 considerations were amended to reflect other jurisdictions' 'temporal and causal' approaches, such an approach should also explicitly exclude consideration of criminal activity relating to a victim's use of alcohol or other drugs.²⁸⁶

- 15.140 The Commission is of the view that consideration of a victim's use of drugs or alcohol would contradict the beneficial approach of the proposed scheme, and its purpose to assist victims in their recovery.²⁸⁷ As such, the Commission recommends that the proposed Act explicitly exclude consideration of criminal behaviour that relates to drug and alcohol use.

Consideration of provocation and contributory conduct

- 15.141 As noted above, stakeholders expressed significant concerns with the VOCAA provisions relating to 'provocation' and 'contributory conduct', suggesting such provisions are out of step with community expectations, particularly where such considerations might perpetuate victim blaming in family violence and sexual assault matters.²⁸⁸
- 15.142 Other stakeholders suggested the contributory conduct provision in section 54 of the Act does not adequately consider the psychological impact of sexual abuse, such as the effect of grooming.²⁸⁹ Springvale Monash Legal Service also submitted that in cases of family violence, victims' actions may be perceived as a contributory factor when not viewed in the broader context of the cycle of violence.²⁹⁰
- 15.143 Similar concerns have been raised in academic research. Linda Jurevic observed in relation to the equivalent Western Australian Act that:
- by looking for contributory conduct in the victim, the Act creates defences to otherwise actionable conduct. The offender would not be able to assert a defence in criminal law, or allege contribution in tort law for his victim's behaviour. Second, the Act ignores the social and psychological context in which domestic violence takes place. The Act's attempt to award compensation only for the "truly deserving", and for those who are deemed not to be the "author of their own misfortune" is used to blame women for remaining in an abusive relationship or not seeking the assistance of the legal system when leaving it.²⁹¹
- 15.144 In the Commission's view, the retention of a legislative provision incorporating provocation, given the defence of provocation was abolished under Victorian criminal law in 2005,²⁹² is out of step with community standards and may perpetuate victim blaming.
- 15.145 In addition, the Commission considers that retention of a legislative provision incorporating contributory conduct may perpetuate victim blaming, including where a victim has consumed drugs and alcohol. As observed by David Miers, many incidents of violence crime are prefaced or accompanied by the excessive consumption of alcohol or the use of illicit drugs.²⁹³ In this context, Miers notes the negative publicity received when the United Kingdom scheme rejected a compensation application on the grounds that it was unclear whether, by virtue of the applicant's intoxication, sexual intercourse had been consensual.²⁹⁴

286 Submission 7 (Dr Kate Seear et al).

287 The purpose and objectives of the proposed Act and scheme are outlined in Chapter 11.

288 Submissions 41 (Springvale Monash Legal Service, 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 3 (Legal Professionals—Community Legal Centres), 11 (Regional Consultation—Victoria Legal Aid—Gippsland). The potential for victim blaming is evident in *Mendez v Victims of Crime Assistance Tribunal* where both VOCAT and VCAT found the victim had 'provoked' the assault by her boyfriend, even though VCAT subsequently found that the actions of her boyfriend 'outweighed' her provocation due his subsequent violence towards her: *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) [53].

289 Consultation 7 (Family Violence and Advocacy Organisations).

290 Submission 41 (Springvale Monash Legal Service).

291 Linda Jurevic, 'Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western Australian Criminal Injuries Compensation Act' (1996) 3(2) *Murdoch University Electronic Journal of Law*.

292 The defence of provocation was abolished in Victoria by the *Crimes (Homicide) Act 2005* (Vic) and is no longer an available defence to homicide. See, eg, Thomson Reuters Westlaw, *Criminal Law, Investigation and Procedure Victoria* (at 7 August 2017) [GPOCL.4000].

293 David Miers, 'Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) *Legal Studies* 242, 265.

294 *Ibid.*

- 15.146 Accordingly, and as outlined above, the Commission is of the view that consideration of a victim's use of drugs or alcohol would contradict the beneficial approach of the proposed Act, and its purpose of assisting victims in their recovery.²⁹⁵ The Commission recommends that the proposed Act explicitly exclude consideration of criminal behaviour that relates to drug and alcohol use.
- 15.147 The Commission also considers that a victim's 'contributory conduct', including any 'provocation' or 'disposition', should no longer be relevant to a decision maker's determination of whether a victim should be entitled to financial assistance to assist in their recovery from a criminal act.
- 15.148 The exception to this would be where such behaviour is a criminal offence committed at the time of the criminal act, which was the primary reason the criminal act that is the subject of the application was committed. In such circumstances, this would be relevant criminal behaviour because, as discussed above, it would constitute a criminal offence with a nexus with the act of violence the subject of the application.²⁹⁶

Consideration of perpetrator benefit

- 15.149 As noted earlier, a number of stakeholders have also raised concerns about consideration of perpetrator benefit under section 54, suggesting it unfairly discriminates against family violence victims.
- 15.150 In 2010, the Australian Law Reform Commission recommended that perpetrator benefit provisions should be repealed in state-funded financial assistance schemes because such provisions 'discriminate against victims of family violence who remain in relationships with the offender'.²⁹⁷
- 15.151 Some other Australian jurisdictions do not have perpetrator benefit provisions, but instead only consider whether an applicant may have colluded with an alleged offender.²⁹⁸
- 15.152 However, Western Australia retains a similar provision to the perpetrator benefit provision in the VOCAA, enabling the decision maker to refuse to make an award if the assessor is of the opinion that the alleged offender is likely to benefit or gain advantage from the award.²⁹⁹
- 15.153 Professor Robert Guthrie, an assessor under Western Australia's Criminal Injuries Compensation scheme, observed in 2017 that perpetrator benefit matters rarely arise in Western Australia.³⁰⁰ However, Guthrie also noted that in the rare cases where such matters do arise, the matter may be discontinued, rather than refused (to allow the applicant to revive the application at a later stage); in some cases, assessors have paid the award to the Public Trustee with a direction that it not be used for the benefit of the offender.³⁰¹
- 15.154 The Commission agrees with stakeholder concerns that the perpetrator benefit provisions may unfairly prejudice some classes of victim, particularly victims of family violence who have an ongoing relationship with the perpetrator.³⁰² The Commission does not consider it consistent with the beneficial approach of the proposed scheme to impose barriers to financial assistance where a victim is still in relationship with a perpetrator, but may wish to access financial assistance to deal with the effects of the crime, or to escape violence.

295 The purpose and objectives of the proposed Act and scheme are outlined in Chapter 11.

296 For example, a threat to kill by the applicant would constitute a relevant criminal offence that may have a nexus with the act of violence.

297 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010) 941.

298 See, eg, *Victims' Rights and Support Act 2013* (NSW) s 44(1)(d).

299 *Criminal Injuries Compensation Act 2003* (WA) s 36.

300 Robert Guthrie, 'Criminal Injuries Compensation for Victims of Family and Domestic Violence' (Paper Presented at John Curtin Institute of Public Policy Seminar, 19 May 2017) 5–6.

301 *Ibid.*

302 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 30 (CASA Forum), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

Accordingly, the Commission recommends there be no limitations to the provision of immediate assistance, funeral expenses, counselling or practical assistance for reasons of perpetrator benefit.

- 15.155 However, in the case of recovery payments, which are provided in a lump sum, the Commission considers that the potential for an alleged perpetrator, particularly in cases of family violence or elder abuse, to perpetrate financial abuse on a victim may be more likely, because the financial assistance is not for goods or services, but is provided in a lump sum.
- 15.156 Inner Melbourne Community Legal submitted that a perpetrator may use financial assistance awarded as a way to perpetrate further economic abuse, as well as exert control, suggesting that the decision maker should be able to put controls in place for accessing awards in such cases.³⁰³ Women’s Legal Service Victoria and Domestic Violence Victoria submitted that rather than denying a victim assistance as a result of perpetrator benefit, safeguards should be put in place that prioritise a victim’s right to access financial assistance, while managing any potential adverse outcomes in a way that is safe and relevant to a victim’s circumstances.³⁰⁴
- 15.157 The Australian Law Reform Commission suggested in 2010 that although perpetrator benefit provisions should be repealed, relevant jurisdictions should consider mechanisms ‘to ensure that offenders cannot access victims’ compensation awards’.³⁰⁵
- 15.158 Accordingly, the Commission considers that while perpetrator benefit should not be a factor in deciding whether or not to award a recovery payment, the Commission considers that the scheme decision maker should have discretion to require a recovery plan to be put in place in circumstances where the decision maker believes on the balance of probabilities that the perpetrator may benefit from the award. Following consultation with the victim, the recovery plan should outline how some or all of the payment will be used to assist in the victim’s recovery, and money should be held in trust and administered by a scheme case manager consistent with the plan.³⁰⁶

Factors to be considered in determining an application under the proposed Act

- 15.159 Having regard to the matters discussed above, the Commission considers that, in determining an application for state-funded financial assistance under the proposed Act:
- there should be no mandatory requirement for a victim to make a report to police or assist with police or the prosecution—instead, a police report may be used by an applicant to assist them to meet evidentiary requirements
 - the decision maker should no longer have regard to the broad character and behaviour of the applicant ‘at any time’ in making a financial assistance determination
 - the decision maker should limit consideration of an applicant’s current or past criminal behaviour to activities with a nexus to the criminal act that is the subject of the application, and only in relation to the provision of a recovery (lump sum) payment
 - the decision maker should not have a broad power to take into account an applicant’s drug and alcohol use, and the Act should explicitly exclude consideration of criminal behaviour (where relevant) that relates to drug and alcohol use

303 Submission 14 (Inner Melbourne Community Legal).

304 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

305 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010) 941.

306 As discussed in Chapter 13, the decision maker under the proposed scheme will also retain a general discretion to make any payments to any other person for the benefit of the applicant wholly as a lump sum, partly as a lump sum, partly by instalments or wholly by instalments, as is currently the case under section 55 of the VOCAA.

- an applicant's 'contributory conduct', including any 'provocation' or 'disposition', should no longer be relevant unless such behaviour constitutes a criminal offence with a nexus between the criminal act the subject of the application, and then, only in relation to the provision of a recovery (lump sum) payment
- the perpetrator benefit provision should not apply in relation to all practical supports under the proposed scheme, but a decision maker should have discretion to consider whether or not to require a recovery plan in relation to recovery (lump sum) payments where the assessor determines on the balance of probabilities that a perpetrator might benefit from a recovery payment.

- 15.160 In addition, to ensure the proposed scheme's sustainability and to protect the scheme from fraudulent claims, the Commission recommends that in determining an application, the proposed Act should require a decision maker to refuse any application where satisfied on the balance of probabilities that:
- the applicant has committed the criminal act the subject of the application or has voluntarily and freely participated in, assisted in or encouraged the commission of, the criminal act that is the subject of the application
 - the application is made in collusion with the person who committed or is alleged to have committed the criminal act, or
 - an earlier application has been made in relation to the same criminal act, whether or not the earlier application has been determined.
- 15.161 In this regard, the proposed Act would replicate the current provisions in sections 52(b)–(c) of the VOCAA which enable VOCAT to 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 or if an earlier application for assistance has been made by the victim from the same act of violence.³⁰⁷ The Commission notes that these provisions were not raised as problematic in either the first or supplementary consultation papers, in literature, case law or by stakeholders in written submissions or during consultation meetings. Accordingly, the Commission recommends they be retained.
- 15.162 However, in the Commission's view, the proposed Act should also include a further provision enabling the proposed decision maker to refuse any application where the decision maker is satisfied on the balance of probabilities that the applicant has committed the criminal act that is the subject of the application or has voluntarily and freely participated in, assisted in or encouraged the commission of the criminal act that is the subject of the application. This extends the current provisions in sections 52(b)–(c) of the VOCAA to ensure that any involvement of an applicant in the criminal act that goes beyond 'collusion' is also captured under the proposed Act to ensure the proposed scheme's sustainability, and to protect the scheme from fraudulent claims.

Recommendations—factors to be considered in determining an application

- 76** The proposed Act should provide that the scheme decision maker must refuse any application where satisfied on the balance of probabilities:
- (a) the applicant has committed the criminal act the subject of the application
 - (b) the applicant voluntarily and freely participated in, assisted in or encouraged the commission of the criminal act the subject of the application
 - (c) the application is made in collusion with the person who committed or is alleged to have committed the criminal act, or
 - (d) an earlier application has been made in relation to the same criminal act, whether or not the earlier application has been determined.
- 77** The proposed Act should provide that the scheme decision maker, in determining whether or not to make a recovery payment, or the amount of the recovery payment, must have regard to:
- (a) whether the applicant, or the direct victim if the applicant is not the direct victim, was committing an offence at the time of the criminal act the subject of the application, and that offence was the primary reason the criminal act the subject of the application was committed
 - (b) whether previous involvement in criminal activity by the applicant, or the direct victim if the applicant is not the direct victim, was the primary reason the criminal act the subject of the application was committed.
- 78** The proposed Act should provide that for the purposes of determining whether or not to make a recovery payment, or the amount of the recovery payment, the scheme decision maker must not have regard to criminal activity related to drug and alcohol consumption.
- 79** The proposed Act should provide that where the scheme decision maker is satisfied on the balance of probabilities that an alleged perpetrator is likely to benefit from the making of a recovery payment, the scheme decision maker may determine that a recovery payment be subject to a recovery plan, with monies held in trust and administered by a scheme case manager in accordance with the recovery plan.

Timeliness of decision making

- 15.163 This part of the chapter reviews, and makes recommendations in relation to, the timeliness of decision making.
- 15.164 The Commission's first and supplementary consultation papers identified a number of issues in relation to the timeliness of awards, including:
- the timeframes for decision making
 - VOCAT application requirements, including documentary evidence requirements and VOCAT's requests for further information, which affect the timeliness of awards
 - VOCAT's practice of adjourning the finalisation of a matter until related criminal proceedings have finalised.
- 15.165 Accordingly, this part of the chapter outlines the current law in relation to the timeliness of decision making, community and stakeholder views, and makes recommendations in relation to the timeliness of decision making under the proposed scheme.

Current law

- 15.166 VOCAT must act expeditiously to determine applications. Under the VOCAA, VOCAT has a duty to act fairly, according to the substantial merits of the case and as promptly as the requirements of the VOCAA and a proper determination of the matter permit.³⁰⁸
- 15.167 However, VOCAT must also have regard to matters that can affect the time it takes to finalise an application, including:³⁰⁹
- awaiting the outcome of a criminal investigation, trial or inquest
 - the need for further enquiries to be made by VOCAT
 - the need to notify the alleged offender about the application and give them reasonable time to respond
 - waiting for an injury to stabilise so that an accurate prognosis can be provided to VOCAT
 - identifying and communicating with all related victims of a deceased primary victim to advise them of their right to apply for financial assistance.
- 15.168 Section 32 of the VOCAA 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, meaning VOCAT can still decide an application, even if there is a pending civil trial, or if a court is going to decide a matter concerning compensation or restitution under the Sentencing Act.
- 15.169 However, under section 41 of the VOCAA, VOCAT can adjourn consideration of an application if there is a criminal trial or a civil trial that is related to that act of violence that is likely to be decided within six months.³¹⁰
- 15.170 The effect of sections 32 and 41 of the VOCAA is that in practice, a VOCAT application can be adjourned until other related court matters have been decided.
- 15.171 At the same time, section 56 of the VOCAA empowers VOCAT to make an interim award of assistance pending the final determination of an application. Applicants who need urgent assistance, such as financial assistance for safety-related expenses, can seek an interim award.³¹¹

308 Ibid s 32(1).
 309 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.
 310 *Victims of Crime Assistance Act 1996* (Vic) s 41(2).
 311 Ibid s 56(1).

Responses

- 15.172 Many stakeholders said that the timeliness of VOCAT is a significant issue³¹² and often prevents victims from receiving financial assistance when they need it most.³¹³ The Victorian Victims of Crime Commissioner submitted that he receives a large number of complaints in relation to delays in the VOCAT process.³¹⁴
- 15.173 Stakeholders and victims gave various timeframes for the finalisation of applications, ranging from six months to three years.³¹⁵ Of particular concern to a number of stakeholders were delays relating to interim awards.³¹⁶
- 15.174 Stakeholders submitted that delays in financial assistance can have a significant impact on victims, causing distress,³¹⁷ re-traumatising victims³¹⁸ and hampering recovery.³¹⁹
- 15.175 Stakeholders said that timely assistance is especially important for victims of family violence³²⁰ who may urgently need assistance to relocate³²¹ and implement safety mechanisms.³²² Knowmore submitted that timely assistance is particularly important for adult victims of child sexual abuse who are often aged, in poor health and suffering the debilitating impact of complex trauma that can be exacerbated by lengthy delays.³²³
- 15.176 Ryan Carlisle Thomas Lawyers submitted that sections 32 and 41 of the VOCAA appeared ‘at odds with one another’:

Section 32 requires the VOCAT to act fairly, according to the substantial merits of the case and with as much expedition as the requirements of the Act and proper determination of the matter permit. Conversely, section 41 gives the VOCAT significant discretion to adjourn the matter.³²⁴

- 15.177 While timeliness was raised as a significant concern by many stakeholders, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also submitted that:
- available metrics regarding average times taken to finalise an application are not a true measure of VoCAT’s responsiveness, as they do not reflect the role interim awards play in providing timely assistance to applications. Similarly, the increasing number of pending cases and overall throughput metrics does not directly correlate with VoCAT’s efficiency and responsiveness.³²⁵

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- 312 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 15 (Merri Health Victims Assistance Program), 18 (cohealth), 23 (Johnstone & Reimer Lawyers), 24 (Darebin Community Legal Centre), 27 (Name withheld), 28 (South Metropolitan Integrated Family Violence Executive), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 37 (safe steps Family Violence Response Centre), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 43 (knowmore), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 6 (Victims’ Advocacy Organisations), 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 14 (Chief Magistrate’s Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies), 25 (Children’s Court of Victoria).
- 313 Submissions 38 (Ryan Carlisle Thomas Lawyers), 49 (Victims of Crime Commissioner, Victoria); Consultation 7 (Family Violence and Advocacy Organisations).
- 314 Submission 49 (Victims of Crime Commissioner, Victoria).
- 315 Submissions 14 (Inner Melbourne Community Legal), 37 (safe steps Family Violence Response Centre), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 7 (Family Violence and Advocacy Organisations), 9 (Domestic Violence Victoria Members).
- 316 Submissions 23 (Johnstone & Reimer Lawyers), 24 (Darebin Community Legal Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria); Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).
- 317 Submissions 23 (Johnstone & Reimer Lawyers), 37 (safe steps Family Violence Response Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria).
- 318 Submissions 15 (Merri Health Victims Assistance Program), 23 (Johnstone and Reimer Lawyers), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).
- 319 Submissions 5 (Anglicare Victoria Victims Assistance Program), 18 (cohealth); Consultation 4 (Victim, Witness and Court Support).
- 320 Submissions 17 (Centre for Excellence in Child & Family Welfare), 41 (Springvale Monash Legal Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria); Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).
- 321 Submissions 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria).
- 322 Submissions 41 (Springvale Monash Legal Service), 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria); Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).
- 323 Submission 43 (knowmore).
- 324 Submission 38 (Ryan Carlisle Thomas Lawyers).
- 325 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria).

- 15.178 Stakeholders generally agreed that one of the most common causes of delay in relation to awards under the VOCAA is VOCAT’s practice of waiting until the finalisation of the criminal trial before determining an application.³²⁶
- 15.179 Stakeholders had differing opinions about the usefulness of this practice. Some stakeholders submitted that waiting for the outcome of the criminal trial reduces the complexity of applications,³²⁷ as VOCAT does not need to assure itself that a crime has occurred if there has been a successful prosecution.³²⁸ Other stakeholders told the Commission that waiting for the outcome of a criminal trial prevents the applicant being cross-examined during the criminal trial about their VOCAT application.³²⁹
- 15.180 In contrast, other stakeholders said that the practice of awaiting the outcome of the criminal trial is contrary to the purpose and objectives of the VOCAA.³³⁰ As the Victims of Crime Commissioner submitted:

Under the current scheme, a victim can make an application regardless of whether criminal charges are filed and with a lower evidentiary burden in place. Why then, should victims in matters where a person has been charged with the offence, be required to await the determination of guilt before receiving a final payment?³³¹

- 15.181 Stakeholders also said that the following factors caused delays in the VOCAT process:

- documentary evidence requirements³³²
- the failure of police to respond quickly to information requests³³³
- poor preparation by lawyers³³⁴
- the vulnerability of the applicant, which can lead to delay in completing forms and arranging supporting evidence³³⁵
- the complexity of a particular matter³³⁶ and managing legal proceedings more generally.³³⁷

- 15.182 To manage issues related to timeliness of decision making, a number of stakeholders supported amending sections 32 and 41 of the VOCAA to clarify the need for speedy determinations³³⁸ or the development of a practice direction to provide guidance to VOCAT in relation to the need to expedite awards.³³⁹ Some stakeholders, however, did not consider that a practice direction providing further guidance to VOCAT would improve timeliness.³⁴⁰ Some stakeholders submitted that there should be specified time limits in which decision makers must determine an application.³⁴¹ For example, Darebin Community Legal Centre submitted that:

326 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 23 (Johnstone & Reimer Lawyers), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 7 (Family Violence and Advocacy Organisations), 8 (Victims Representatives—Victims of Crime Consultative Committee), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 15 (Regional Consultation—Ballarat Victim Support Agencies).

327 Submission 30 (CASA Forum).

328 Consultation 2 (Legal Professionals—Private Practice).

329 Consultations 2 (Legal Professionals—Private Practice), 15 (Regional Consultation—Ballarat Victim Support Agencies).

330 Submissions 38 (Ryan Carlisle Thomas Lawyers), 49 (Victims of Crime Commissioner); Consultations 3 (Legal Professionals—Community Legal Centres), 7 (Family Violence and Advocacy Organisations).

331 Submission 49 (Victims of Crime Commissioner, Victoria).

332 Submissions 14 (Inner Melbourne Community Legal), 24 (Darebin Community Legal Centre), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria); Consultations 6 (Victims’ Advocacy Organisations), 19 (RMIT Centre for Innovative Justice).

333 Submission 14 (Inner Melbourne Community Legal); Consultations 16 (Regional Consultation—Ballarat Legal Professionals), 23 (Community Safety Trustee, Victoria).

334 Consultation 14 (Chief Magistrates’ Family Violence Taskforce).

335 Consultation 3 (Legal Professionals—Community Legal Centres).

336 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate’s Court of Victoria and Children’s Court of Victoria). In Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), it was noted that family violence applications are often complex. In Consultation 13 (Regional Consultation—Mildura Legal Professionals), the Commission was told that a rise in complex injuries and diverse medical treatments now also contribute to delays.

337 Submissions 27 (Name withheld), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria).

338 Submissions 14 (Inner Melbourne Community Legal), 51 (Law Institute of Victoria).

339 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 35 (Brockway Legal), 38 (Ryan Carlisle Thomas Lawyers).

340 Submissions 14 (Inner Melbourne Community Legal), 18 (cohealth), 27 (Name withheld).

341 Submissions 24 (Darebin Community Legal Centre), 49 (Victims of Crime Commissioner, Victoria).

The current framework contains a limited timeframe for victims to apply and prepare their VOCAT applications, however is entirely silent on the time frame in which VOCAT is required to make a finding regarding an application.³⁴²

- 15.183 Other stakeholders submitted that more structural changes were required to improve timeliness, including:
- having specialist VOCAT magistrates³⁴³ or specialist streams³⁴⁴
 - triaging applications³⁴⁵
 - co-location of victim services³⁴⁶ or integration with victim services³⁴⁷
 - increased staff³⁴⁸ and resources.³⁴⁹
- 15.184 Some stakeholders submitted that amending the VOCAA would make little difference to the timeliness of awards without more resources³⁵⁰ or changing the model of assistance.³⁵¹ A number of stakeholders said using administrative processes would greatly improve the timeliness of state-funded financial assistance for victims of crime.³⁵²
- 15.185 The Commission was also told about poor communication from VOCAT where months might pass without an applicant receiving any correspondence.³⁵³ The Crime Victims Support Association submitted that phone calls to VOCAT by victims often go unanswered, causing victims more stress.³⁵⁴ The Victims of Crime Assistance League submitted that the 'existing system is devoid of communication. Parties are left in the dark for many months receiving no communication.'³⁵⁵

Discussion and recommendations

- 15.186 Research suggests the more quickly victims can receive timely support and assistance, the better their chances of recovery.³⁵⁶ Conversely, delays can have counter-therapeutic effects on victims.³⁵⁷ For example, Geneviève Parent has observed in relation to the equivalent state-funded financial assistance scheme in Quebec, Canada that delays in awards bring 'more stress to an already very difficult situation for crime victims' and that battling with expenses on top of delays imposed by bureaucratic obstacles is difficult for victims.³⁵⁸ Research suggests the timeliness of financial assistance decisions enhances a victim's overall satisfaction with the financial assistance process.³⁵⁹

342 Submission 24 (Darebin Community Legal Centre).
343 Submissions 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria); Consultation 14 (Chief Magistrate's Family Violence Taskforce).
344 Submissions 5 (Anglicare Victoria Victims Assistance Program), 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria).
345 Submissions 5 (Anglicare Victoria Victims Assistance Program), 51 (Law Institute of Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria).
346 Submission 5 (Anglicare Victoria Victims Assistance Program); Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).
347 Consultations 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies).
348 Submissions 6 (Forgetmenot Foundation Inc.), 14 (Inner Melbourne Community Legal), 51 (Law Institute of Victoria), 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal), 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria); Consultation 14 (Chief Magistrates' Family Violence Taskforce).
349 Submission 14 (Inner Melbourne Community Legal).
350 Ibid.
351 Submission 27 (Name withheld).
352 Submissions 15 (Merri Health Victims Assistance Program), 27 (Name withheld), 31 (Victorian Council of Social Service), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 49 (Victims of Crime Commissioner, Victoria); Consultations 7 (Family Violence and Advocacy Organisations), 11 (Regional Consultation—Victoria Legal Aid—Gippsland), 15 (Regional Consultation—Ballarat Victim Support Agencies), 20 (Academics).
353 Submissions 4 (Crime Victims Support Association), 57 (Victims of Crime Assistance League); Consultation 6 (Victims' Advocacy Organisations).
354 Submission 4 (Crime Victims Support Association).
355 Submission 57 (Victims of Crime Assistance League).
356 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46–8.
357 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 69.
358 Geneviève Parent, 'When Crime Pays: The Politics of Crime, Law, and Victim Compensation in Quebec' (Paper presented at the Canadian Political Science Association Conference, Toronto, 1–3 June 2006) 10.
359 Maarten Kunst et al, 'Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study' (2015) 32(19) *Journal of Interpersonal Violence* 1, 10–11.

- 15.187 In other Australian jurisdictions where administrative schemes have been introduced, there has been a marked increase in timely decision making. For example, in New South Wales, timeframes have decreased from around two years³⁶⁰ to an average of 26 days.³⁶¹ In Queensland, decisions are typically made in three weeks for funeral and interim applications, three months for primary victims and six months for secondary victims.³⁶²
- 15.188 The Commission noted in Chapter 8 that the transition to an administrative model would likely to lead to improvements in overall timeliness of decision making.³⁶³ However, in the Commission's view, additional safeguards should be incorporated into the proposed scheme's design to ensure timeliness remains a key feature of the effective delivery of state-funded financial assistance to victims of crime.
- 15.189 The Commission notes the observation above by Darebin Community Legal Centre that VOCAT currently imposes time limits on victims' submission of documentary evidence to support a claim, but VOCAT itself is not expressly required to determine applications within specified timeframes.³⁶⁴ In the Commission's view, time limits prescribed in the proposed Act should promote timeliness of decision making and should operate for the benefit of applicants, not just the decision making body as is currently the case.
- 15.190 Therefore, beyond the structural changes under the proposed scheme outlined in Chapters 9 and 10, the Commission considers that further safeguards be included in the proposed Act as follows:
- that the scheme decision maker should be required to act expeditiously in the determination of applications, reflecting the current provision in section 32 of the VOCAA³⁶⁵
 - that, in support of the requirement proposed above that the scheme decision maker be required to act expeditiously, regulations provide for time limits within which determinations for immediate assistance, funeral expenses, counselling and practical assistance should be made.
- 15.191 The Commission notes that the Tasmanian scheme also prescribes timeframes within which applications must be determined.³⁶⁶
- 15.192 The Commission considers that time limits should be provided for in regulations so that they can be amended in accordance with best practice, while being flexible to changes in demand for the proposed scheme over time.
- 15.193 The Commission considers that the time limits included in the regulations should be developed in accordance with best practice, including average timeframes for decision making in other administrative schemes in Australia. These timeframes should also recognise the time-sensitive nature of immediate assistance, funeral expenses, counselling and practical assistance, including the need to maintain continuity in service provision for supports such as counselling.
- 15.194 The Commission does not consider that there should be a prescribed timeframe for the determination of recovery (lump sum) payments. Although the scheme decision maker will still be required to act expeditiously, in line with the general requirement under the proposed Act, in the Commission's view, a prescribed timeframe for the determination of a recovery payment would be impractical due to the range of factors that must be taken into account before determining recovery payments, as outlined in detail in Chapter 13.

360 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

361 Department of Justice (NSW), *Annual Report 2015–2016* (2016) 24.

362 Consultation 1 (Victim Assist Queensland).

363 See discussion in Chapter 8 regarding improved timeliness of decision making in administrative schemes in Australia.

364 VOCAT requests that the applicant file all additional documentation in support of their application and a completed Statement of Claim form within four months of receiving VOCAT's acknowledgment letter: Victims of Crime Assistance Tribunal, *Determining an Application—Supporting Documentation* (2016) <www.vocat.vic.gov.au/determining-application/supporting-documentation>.

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

366 In Tasmania, an application for an award is to be determined within three years of the date of the application: *Victims of Crime Assistance Act 1976* (Tas) s 7(1)(a).

- 15.195 Although legislative timeframes should improve predictability and consistency for victims, the Commission also considers that communication with victims during the decision making process is as important as timely decision making. The Commission notes stakeholder concerns about poor communication from VOCAT, including concerns about lack of contact from VOCAT³⁶⁷ and phone calls to VOCAT going unanswered.³⁶⁸
- 15.196 To provide further clarity and certainty to victims, the Commission considers that where an application for assistance is unable to be determined within the time period prescribed in the regulations, the decision maker must:
- provide the applicant with written reasons for the failure to make a decision within the prescribed time limit, and provide the applicant with information on the expected determination time frame, or
 - if the decision maker considers further information in relation to the application is necessary, the decision maker must request in writing that the applicant, or another person, provide specified further information in relation to the application, and
 - report annually on the proportion of decisions determined according to the prescribed timeframes.
- 15.197 Given stakeholder concerns that VOCAT frequently delays matters pending the outcome of a criminal trial,³⁶⁹ the Commission also considers that the proposed Act should provide that the scheme decision maker is not to be permitted to delay an application pending the outcome of any other legal proceeding.
- 15.198 The Commission notes that the scheme decision maker should still be able to refuse an application where an applicant is unable to meet the requirements of the proposed scheme, as discussed in Chapter 14. However, the Commission considers that it should not be a practice of the proposed scheme to wait for the outcome of a criminal investigation, trial or inquest before providing assistance to a victim, provided the evidentiary requirements can be met.

367 Submissions 4 (Crime Victims Support Association), 57 (Victims of Crime Assistance League); Consultation 6 (Victims' Advocacy Organisations).

368 Submission 4 (Crime Victims Support Association).

369 Submissions 5 (Anglicare Victoria Victims Assistance Program), 14 (Inner Melbourne Community Legal), 23 (Johnstone & Reimer Lawyers), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 43 (knowmore), 49 (Victims of Crime Commissioner, Victoria), 51 (Law Institute of Victoria), 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 7 (Family Violence and Advocacy Organisations), 8 (Victims' Representatives—Victims of Crime Consultative Committee), 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

Recommendation—timeliness of decision making

- 80** To help ensure timely decision making, the proposed Act should:
- (a) provide that the scheme decision maker must act expeditiously in the determination of applications
 - (b) prescribe specific time limits within which determinations for immediate assistance, funeral expenses, counselling and practical assistance should be made, reflecting:
 - (i) the urgent nature of requests for immediate assistance and funeral expenses
 - (ii) the need to maintain continuity in service provision for victims in relation to counselling
 - (iii) best practice, benchmarked against the average time taken to determine financial assistance applications in other schemes
 - (c) provide that where an application for assistance is unable to be determined within the relevant prescribed time period, the scheme decision maker must:
 - (i) provide the applicant with written reasons for the failure to make a decision within the prescribed time limit
 - (ii) provide the applicant with information on the expected determination timeframe
 - (iii) if the scheme decision maker considers further identified information in relation to the application is necessary, request the applicant, or another person, in writing, to provide the specified further information in relation to the application
 - (d) provide that the scheme decision maker is not permitted to delay the determination of an application pending the outcome of any other legal proceeding.

Transparency of decision making

15.199 This part of the chapter reviews, and makes recommendations in relation to, the transparency of decision making. This part relates to the transparency of decision making in individual cases, rather than matters relating to transparency of the proposed scheme's operations. Broader data collection and publication in relation to the proposed scheme are discussed in detail in Chapter 19.

Current law

Written reasons for decisions

15.200 Under section 33 of the VOCAA, VOCAT may determine an application without conducting a hearing in the following circumstances:³⁷⁰

- if the applicant has stated in the application a wish for the Tribunal to make a determination without conducting a hearing
- the applicant consents in writing
- the application relates to an interim award.

15.201 If making a decision under section 33 of the VOCAA, VOCAT must notify the applicant of its decision, including details of:³⁷¹

- the amount of assistance
- the purpose for which the assistance is awarded
- any conditions to which the award is subject
- the person or persons to whom assistance is payable
- any other order made by the Tribunal.

Review of decisions

15.202 Any person whose 'interests are affected' can apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of a final VOCAT decision.³⁷² Reviews may relate to:³⁷³

- 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 varying an award
- a decision that a person is required to make a refund to VOCAT
- the amount VOCAT determines must be refunded.

15.203 An application for review must be made within 28 days after the final decision is made.³⁷⁴

15.204 A person may not apply for review of a final decision if the final decision was made by a judicial registrar as a delegate of the Tribunal.³⁷⁵ Instead, a review of a delegated Tribunal member decision is to be conducted as a hearing 'de novo'—that is, heard at a new hearing as though the first decision had not been made.³⁷⁶

370 *Victims of Crime Assistance Act 1996* (Vic) s 33(1).
371 *Ibid* s 33(2).
372 *Ibid* s 59(1).
373 *Ibid* ss 59(1)(a)–(e).
374 *Ibid* s 59(2).
375 *Ibid* s 59(1A).
376 *Ibid* s 59A(2).

- 15.205 In practice, those ‘affected’ by VOCAT decisions for the purposes of section 59 of the VOCAA are usually applicants, so reviews usually relate to matters like VOCAT refusing to make an award, the amount of an award or VOCAT refusing to vary an award.³⁷⁷
- 15.206 There are relatively few reviews, with only eight applications for review of a VOCAT decision made to VCAT in the 2016–17 financial year.³⁷⁸
- 15.207 *Practice Direction No 1 of 2017—Response to Applications for Review of Decisions* outlines the procedure to be followed by VOCAT upon receipt of a Notice of Review to VCAT which primarily relates to internal processes to be followed by VOCAT staff.³⁷⁹

Responses

Transparency of decision making

- 15.208 Safe steps Family Violence Response Centre submitted that there is a lack of publicly available data in relation to decisions made by VOCAT.³⁸⁰ Moreover, the Victorian Council of Social Service submitted that applicants are often not given reasons for a decision if it is made ‘on the papers’ under section 33 of the VOCAA.³⁸¹
- 15.209 Knowmore submitted that the lack of transparency in VOCAT’s decision making can have a severe impact on victims of abuse who can be triggered and re-traumatised by the lack of clarity surrounding the process.³⁸²
- 15.210 A number of stakeholders said that VOCAT should provide written reasons for its decisions, either at the request of the applicant³⁸³ or as a matter of course³⁸⁴ and that these reasons should be sufficiently specific.³⁸⁵
- 15.211 In particular, stakeholders said that comprehensive reasons for decisions should be provided when decisions are made ‘on the papers’³⁸⁶ and in these circumstances, it should be clear who the decision maker is.³⁸⁷
- 15.212 Moreover, some stakeholders stated that adequately de-identified written reasons should be published in order to improve transparency of the VOCAT process.³⁸⁸

Accessibility of review of decisions

- 15.213 The Commission was told in submissions and during consultations, that the current review mechanism whereby all decisions (except those by a judicial registrar) are appealed to VCAT is a barrier for victims.³⁸⁹

377 See, eg, *Ractliffe v Victims of Crime Assistance Tribunal* [2015] VCAT 205 (4 March 2015) relating to a review of VOCAT’s refusal to pay \$405 for an occupational therapy assessment.

378 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 61. Of these applications for review to VCAT, two resulted in the original order set aside and a new order made on review; one order was varied on review; two orders were affirmed on review; one application for assistance was remitted to VCAT for determination; and two applications for review were struck out, withdrawn or abandoned.

379 Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2017—Response to Applications for Review of Decisions*, 18 May 2017, 2.

380 Submission 37 (safe steps Family Violence Response Centre).

381 Submission 31 (Victorian Council of Social Service).

382 Submission 43 (knowmore).

383 Submission 14 (Inner Melbourne Community Legal).

384 Submissions 31 (Victorian Council of Social Service), 41 (Springvale Monash Legal Service), 43 (knowmore).

385 Submission 19 (Schembri & Co Lawyers).

386 Submission 14 (Inner Melbourne Community Legal). See also submission 43 (knowmore).

387 Submission 14 (Inner Melbourne Community Legal).

388 Submissions 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 43 (knowmore).

389 Submissions 5 (Anglicare Victoria Victims Assistance Program), 38 (Ryan Carlisle Thomas Lawyers); Consultations 3 (Legal Professionals—Community Legal Centres), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals).

- 15.214 Stakeholders said the current review process is a barrier because:
- of the 28-day review window³⁹⁰
 - victims are often unwilling to seek a review of a VOCAT decision due to the cost of going to VCAT,³⁹¹ including VCAT application fees,³⁹² and the costs of hiring a lawyer³⁹³
 - victims are reluctant to expend more time and energy on another legal process³⁹⁴
 - VCAT is a ‘costs jurisdiction’, and there is a perception that VCAT can be ‘unsympathetic’ in relation to VOCAT matters³⁹⁵
 - there are few options to appeal unsatisfactory interim decisions.³⁹⁶
- 15.215 It was suggested that the review process is ‘subject to the strength of the client to fight’³⁹⁷ and it is ‘unfair’ to place the responsibility on victims to ‘fix’ poor decision making by pursuing an appeal to VCAT.³⁹⁸
- 15.216 VCAT submitted, however, that VCAT’s processes are informal and that many litigants do not have legal representation.³⁹⁹ VCAT also submitted that litigants can apply for VCAT fees to be waived, reduced or postponed.⁴⁰⁰
- 15.217 One submission observed that while the current review mechanisms under the VOCAA allow victims to review decisions ‘of law’, there is no complaints mechanism to review VOCAT processes or procedures such as delayed decision making.⁴⁰¹

Discussion and recommendations

Reasons for decisions

- 15.218 Stakeholders raised concerns about the lack of publicly available data in relation to decisions made by VOCAT⁴⁰² and the lack of transparency for applicants when decisions are made ‘on the papers’ under section 33 of the VOCAA.⁴⁰³ A number of stakeholders said that VOCAT should provide written reasons for its decisions, either at the request of the applicant⁴⁰⁴ or as a matter of course⁴⁰⁵ and that these reasons should be sufficiently specific.⁴⁰⁶
- 15.219 The Commission notes that concerns about transparency and fairness in the VOCAT process are not new. In a submission to the then-Victorian Department of Justice’s 2009 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.⁴⁰⁷ The then-Department of Justice also acknowledged in its discussion paper that ‘the decentralized nature of VOCAT across the state contributes to variations in processes and different trends in decision making’.⁴⁰⁸

390 Submission 5 (Anglicare Victoria Victims Assistance Program).
391 Consultations 2 (Legal Professionals—Private Practice), 4 (Victim, Witness and Court Support).
392 Submission 38 (Ryan Carlisle Thomas Lawyers).
393 Submission 5 (Anglicare Victoria Victims Assistance Program).
394 Consultations 3 (Legal Professionals—Community Legal Centres), 14 (Chief Magistrate’s Family Violence Taskforce), 15 (Regional Consultation—Ballarat Victim Support Agencies).
395 Consultation 3 (Legal Professionals—Community Legal Centres).
396 Ibid.
397 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).
398 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).
399 Submission 2 (Victorian Civil and Administrative Tribunal).
400 Ibid.
401 Submission 27 (Name withheld).
402 Submission 37 (safe steps Family Violence Response Centre).
403 Submission 31 (Victorian Council of Social Service).
404 Submission 14 (Inner Melbourne Community Legal).
405 Submissions 31 (Victorian Council of Social Service), 41 (Springvale Monash Legal Service), 43 (knowmore).
406 Submission 19 (Schembri & Co Lawyers).
407 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.
408 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 42.

- 15.220 Similarly, Whittlesea Community Legal Service research found that the lack of written reasons for decisions made it difficult to gather evidence regarding the operation of VOCAT and therefore even more difficult to educate the legal profession about it.⁴⁰⁹
- 15.221 As discussed in Chapter 8, a key rationale for recommending that the proposed scheme be overseen by an independent and dedicated decision maker is to improve the transparency and consistency of decision making. Transparency of decision making is a vital component of effective administrative decision making.⁴¹⁰ In the context of state-funded financial assistance schemes, the importance of providing applicants with written reasons for all decisions is twofold:
- Providing written reasons enables victims to understand what the decision is, why a decision has been made, and what their rights of review or appeal are.
 - Evidence from other jurisdictions in Australia suggests written reasons for decisions can be a source of recognition and validation for a victim, representing the state's acknowledgment of their experience and the harms caused by the criminal act.⁴¹¹
- 15.222 Furthermore, Geneviève Parent has observed that poor information about state-funded financial assistance can aggravate and complicate victims' post-victimisation experiences.⁴¹²
- 15.223 Accordingly, the Commission considers that the proposed Act should require the scheme decision maker to provide written reasons for:
- decisions to accept or reject applications for immediate assistance, counselling, practical assistance and recovery payments
 - any factors taken into account in determining the amount of the recovery (lump sum) payment⁴¹³
 - reducing an award of assistance on the grounds that an applicant has received any other assistance, payment, compensation or damages from any other source in relation to the same criminal act, or requiring a refund if an award.
- 15.224 In the Commission's view, the provision of written reasons should assist victims to understand their rights and entitlements and improve transparency in the proposed scheme's decision making, as well as being a potential source of recognition and validation for a victim, representing the state's acknowledgment of their experience and the harms caused by the criminal act.

409 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 27.

410 Law Institute of Victoria, *A User's Guide to Administrative Decision-making* (2013) 7–8.

411 In Chapter 10, Statements of Reasons were discussed in relation to their potentially therapeutic effect.

412 Geneviève Parent, 'When Crime Pays: The Politics of Crime, Law, and Victim Compensation in Quebec' (Paper presented at the Canadian Political Science Association Conference, Toronto, 1–3 June 2006) 11.

413 Factors required to be considered by the proposed scheme decision maker are outlined in Chapter 13.

Recommendation—written reasons for decisions

- 81** The proposed Act should provide that the scheme decision maker must provide written reasons for decisions, in plain language, in relation to:
- (a) accepting an application for immediate assistance, counselling, practical assistance or a recovery payment
 - (b) rejecting an application for immediate assistance, counselling, practical assistance or a recovery payment
 - (c) the factors taken into account in determining the amount of a recovery payment
 - (d) reducing an award of assistance on the grounds that a victim has received any other assistance, payment, compensation or damages from any other source in relation to the same criminal act, or
 - (e) requiring a refund of an award.

Review of decisions

- 15.225 During consultations and in written submissions, stakeholders said that the current review mechanism can be a barrier for victims.⁴¹⁴ These concerns appear to be reflected in the VCAT review figures—in 2016–17, only eight applications for review were made to VCAT.⁴¹⁵
- 15.226 In some other Australian jurisdictions, reviews proceed by way of an internal review first, followed by an external review.⁴¹⁶ Data from other Australian schemes seems to demonstrate that internal review avenues provide victims with improved access to having decisions reviewed. For example, the Commission was told that in Queensland, reviews are sought in around two per cent of matters, equating to around 50 internal reviews each year.⁴¹⁷ Higher review rates are also seen in New South Wales, where 378 applicants applied for an internal review of their decision in 2016–17. This is compared to the much smaller number of external reviews to VCAT (eight) in 2016–17.⁴¹⁸
- 15.227 In the Commission’s view, an internal review mechanism in the first instance would provide victims with a more accessible and less legalistic review process. The Commission considers that the proposed Act should enable an applicant to request an internal review of a decision by a more senior decision maker in the first instance, followed by the right to request an external review to VCAT.
- 15.228 In addition, and to ensure victims are aware of their review rights, the proposed Act should require the scheme decision maker to accompany all written reasons for decisions with information on avenues for review and timeframes for review.

414 Submissions 5 (Anglicare Victoria Victims Assistance Program), 38 (Ryan Carlisle Thomas Lawyers); Consultations 3 (Legal Professionals—Community Legal Centres), 15 (Regional Consultation—Ballarat Victim Support Agencies), 16 (Regional Consultation—Ballarat Legal Professionals).

415 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 61. Of these applications for review to VCAT, two resulted in the original order set aside and a new order made on review; one order was varied on review; two orders were affirmed on review; one application for assistance was remitted to VCAT for determination; and two applications for review were struck out, withdrawn or abandoned.

416 In Queensland, an applicant may apply to the Queensland Civil and Administrative Tribunal for a review of the internal review decision: *Victims of Crime Assistance Act 2009* (Qld) s 125(2). In New South Wales, an applicant may apply to the Administrative Decisions Tribunal for a review of a decision made by the Commissioner following an internal review: *Victims Rights and Support Act 2013* (NSW) s 51(1).

417 This figure is approximate, based on the percentage figure provided to the Commission during Consultation 1 (Victim Assist Queensland).
418 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 61.

- 15.229 Only one submission raised concerns about the 28-day review window.⁴¹⁹ In this context, the Commission notes review provisions in other Australian jurisdictions which also provide 28 days in which a victim may request a review of a decision.⁴²⁰ Accordingly, the Commission considers that the proposed Act should provide that victims have 28 days to seek an internal review of a decision, and 28 days after the determination of an internal review, to seek an external review to VCAT.

Recommendations—review of decisions

- 82** The proposed Act should enable, at the request of an applicant:
- (a) internal review of a decision by a more senior scheme decision maker
 - (b) following completion of the internal review process, an external review of the decision to the Victorian Civil and Administrative Tribunal.
- 83** The proposed Act should provide that the scheme decision maker must accompany all written reasons for decisions with information on the right of review and timeframes for review.
- 84** The proposed Act should provide that applicants have:
- (a) 28 days to seek an internal review of a decision
 - (b) 28 days after an internal review of decision to seek an external review to the Victorian Civil and Administrative Tribunal.

Complaints process

- 15.230 One stakeholder submitted that while current VOCAA review mechanisms allow victims to review decisions ‘of law’, there is no mechanism to review VOCAT processes, procedures or the conduct of decision makers.⁴²¹
- 15.231 The operation of VOCAT currently comes under *The Magistrates’ Court Complaints Policy* which sets out the process for complaints about court services, staff or facilities.⁴²² In addition, complaints about the conduct or capacity of a Victorian judicial officer, including a magistrate sitting as a VOCAT Member, can be made to the Judicial Commission of Victoria.⁴²³
- 15.232 However, as the Commission has recommended the establishment of a new scheme, led by an independent decision maker, the Commission considers that the proposed Act should provide for a complaints process, separate to a victim’s right to seek a review of a determination.
- 15.233 The Commission considers that the proposed Act should require the scheme decision maker to establish a complaints process consistent with section 19 of the *Victims’ Charter Act 2006* (Vic), which states that if a person adversely affected by crime informs a victim services agency that they believe that the agency has not upheld the Charter principles, the agency should inform the person about the processes available for making a complaint.

419 Submission 5 (Anglicare Victoria Victims Assistance Program).

420 *Victims Rights and Support Act 2013* (NSW) s 49(2); *Victims of Crime (Financial Assistance Act) 2016* (ACT) s 92(2); *Victims of Crime Assistance Act 2009* (Qld) s 124(2)(a).

421 Submission 27 (Name withheld).

422 Victims of Crime Assistance Tribunal, *Complaints* (2017) <www.vocat.vic.gov.au/contact-us/complaints>.

423 Ibid.

Recommendation—complaints process

- 85** The proposed Act should provide that the scheme decision maker must establish a complaints process relating to the administration of the proposed scheme, including the conduct of any scheme staff. This complaints process should be separate and distinct to a victim’s right to review or appeal a decision and should be consistent with the principles governing responses to victims of crime under the *Victims’ Charter Act 2006* (Vic).

Interaction with other schemes and refund of awards

434 Introduction

434 Interaction with other compensation and financial assistance schemes

448 Refund of awards

16. Interaction with other schemes and refund of awards

Introduction

- 16.1 This chapter considers and makes recommendations in relation to the interaction of the proposed state-funded financial assistance scheme (proposed scheme) with other compensation and assistance schemes, and the circumstances which may give rise to the refund of awards.
- 16.2 This chapter relates to the following matters specified in the supplementary terms of reference:
- whether the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) can be simplified to make it easier for applicants to understand all their potential entitlements
 - whether the VOCAA recognises the appropriate people as victims
 - whether any processes, procedures or requirements under the VOCAA cause unnecessary delay in the provision of assistance to victims of crime.
- 16.3 This chapter also relates to the objective outlined in the supplementary terms of reference that the state-funded financial assistance scheme be efficient and sustainable for the state.

Interaction with other compensation and financial assistance schemes

Current law

Sections 1(2)(c) and 16 of the VOCAA

- 16.4 As noted in Chapter 11, section 1(2)(c) of the VOCAA provides that one of the objectives of the Act is to allow victims recourse to financial assistance 'where compensation for the injury cannot be obtained from the offender or other sources'.¹
- 16.5 This provision operates in conjunction with section 16 of the VOCAA, which requires other entitlements to be taken into account by the Victims of Crime Assistance Tribunal (VOCAT) in determining the amount (if any) to be awarded to an applicant.²

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

2 *Ibid* s 16. It also works in conjunction with section 62 of the VOCAA which requires the victim to refund their VOCAT award if they later receive any damages, compensation, assistance or payments not taken into account under section 16, but which VOCAT would have taken into account had the assistance been received before the making of the VOCAT award. Refunds are discussed later in this chapter.

- 16.6 Section 16 of the VOCAA specifically requires that in determining the amount (if any) to be awarded to an applicant, VOCAT:
- must take into account, and reduce the amount by the total amount of, any damages that the applicant has recovered at common law for the loss, expense or other matter for which assistance is sought from the Tribunal³
 - must take into account, and reduce the amount by the total amount of, any compensation, assistance or payment of any other kind that the applicant has received for the loss, expense or other matter for which assistance is sought from the Tribunal⁴
 - must take into account, and reduce the amount by any amount of, financial assistance that the applicant has been awarded or is eligible to be awarded under section 12 of the *Transport (Compliance and Miscellaneous) Act 1983* in relation to the incident to which the application relates⁵
 - may take into account, and reduce the amount by the total amount of:
 - any compensation, assistance or payments of any kind under any scheme, whether statutory or non-statutory, including that managed by the Transport Accident Commission (TAC) and the Victorian WorkCover Authority (WorkCover) and that established by the *Police Assistance Compensation Act 1968* and any predecessor of any such schemes⁶
 - any payments under any insurance policy (including life and health insurance) or superannuation scheme⁷
 - that the applicant has not received but is entitled to receive, or would be entitled to receive, if they applied for it or them, for the loss, expense or other matter for which assistance is sought from the Tribunal.⁸
- 16.7 In the case of special financial assistance, section 16 of the VOCAA also provides that VOCAT must not take into account any payments under any insurance policy (including life and health insurance) or superannuation scheme that the applicant has received, or has not received but is entitled to receive, or would be entitled to receive if they applied for them, for the loss, expense or other matter for which assistance is sought from the Tribunal.⁹
- 16.8 The Explanatory Memorandum to the Victims of Crime Assistance (Amendment) Bill 2000 (Vic) notes that the amendments to section 16 of the VOCAA were to 'ensure that crimes compensation is a payer of last resort'.¹⁰
- 16.9 The Explanatory Memorandum also confirms that the intention of section 16 is that VOCAT:
- must offset any compensation or common law damages actually received by the applicant against any award made under the VOCAA
 - may, but is not required to, reduce a VOCAT award to take into account the amount that an applicant is eligible to receive under other schemes, such as those administered by WorkCover or TAC or under any insurance policy or superannuation scheme
 - must not reduce any award of special financial assistance on account of the applicant's superannuation or insurance entitlements, but awards may still be reduced by any amount received for pain and suffering from statutory schemes such as those administered by WorkCover and TAC.¹¹

3 *Victims of Crime Assistance Act 1996* (Vic) s 16(a)(i).

4 *Ibid* s 16(a)(ii).

5 *Ibid* s 16(ac).

6 *Ibid* s 16(b)(i).

7 *Ibid* s 16(b)(ii).

8 *Ibid* s 16(b).

9 *Ibid* s 16(ab).

10 Explanatory Memorandum, Victims of Crime Assistance (Amendment) Bill 2000 (Vic) 4.

11 *Ibid*.

- 16.10 To support VOCAT’s consideration of other entitlements or payments, the VOCAA provides that an application must contain an authorisation for VOCAT to obtain any other evidence or any other document it considers that it needs in order to determine the application¹²—for example, public hospital records or police reports. In addition, VOCAT has broad investigative powers,¹³ and broad powers to obtain information, including requiring other government departments or services to provide VOCAT with ‘any information or ... documents relevant to the application’.¹⁴
- 16.11 In *Krasauskas v Victims of Crime Assistance Tribunal*¹⁵ the Victorian Civil and Administrative Tribunal (VCAT) confirmed¹⁶ that section 16 requires VOCAT to ‘first look at the award which it would otherwise make, and then reduce that possible award by the amounts mentioned in [section] 16’.¹⁷ This approach confirms that VOCAT can only reduce amounts which are received or receivable ‘for the loss, expense or other matter’ for which assistance is sought from VOCAT, noting that section 16 does not have a broader application:
- on its proper interpretation, s16 can only be used to reduce a possible award by a payment or benefit from another source “for the loss, expense or matter” for which application is made to VOCAT. “Loss, expense or other matter” is not referring to some general or global set of non-specific matters. It is a reference to the matters which may make up an award according to s13(2).¹⁸
- 16.12 VCAT observed that this interpretation may appear to be more specific than the more general objective in section 1(2)(c) of the VOCAA, but noted that such an approach still prevents ‘double counting’:
- One must ask: which of these matters are the subject of application for assistance? My interpretation will still prevent “double counting”, where a benefit or payment from another source relates to the same loss, expense or matter for which assistance is sought from VOCAT. I accept that the purpose clause in s1 of the Act is worded in a different and perhaps broader way than s16. But, to my mind, the wording of s16 is clear and ought not to be read down in the light of the purpose clause. If Parliament had intended that s16 would operate in a broader way, it could easily have omitted the words “loss, expense or matter for which assistance is sought”.¹⁹
- 16.13 When applied to the circumstances of the applicants in *Krasauskas v Victims of Crime Assistance Tribunal*,²⁰ VCAT compared the purpose of the provisions enabling financial assistance for distress under the VOCAA with the relevant provisions of the *Transport Accident Act 1986* (Vic) and determined that:
- the nature of the s57 and s58 benefits [of the *Transport Accident Act 1986* (Vic)] is to provide money to assist in the economic support of those who were economically dependent on the person killed in the transport accident. They are not benefits in respect of distress experienced by the family of the person who died.²¹
- 16.14 Accordingly, VCAT determined that the applicants were not barred from seeking assistance under the VOCAA for distress, simply because they were entitled to different types of TAC benefits unrelated to distress.²²

12 *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(c).

13 *Ibid* s 39.

14 *Ibid* s 40(1)(b).

15 [2007] VCAT 1407 (6 August 2007).

16 In confirming this approach, VCAT accepted the reasoning in *Vaughan v Victims of Crime Assistance Tribunal* [2005] VCAT 1758 (26 August 2005).

17 *Krasauskas v Victims of Crime Assistance Tribunal* [2007] VCAT 1407 (6 August 2007) [24].

18 *Ibid* [26].

19 *Ibid*.

20 [2007] VCAT 1407 (6 August 2007).

21 *Ibid* [30].

22 Deputy President McKenzie therefore determined that the claims were not manifestly hopeless and the respondent’s (VOCAT’s) application to dismiss the proceedings was itself dismissed: *ibid* Order 1.

- 16.15 In contrast, in *Eades v Victims of Crime Assistance Tribunal*,²³ VCAT determined that payments under section 92 of the *Accident Compensation Act 1985* (Vic) relating to compensation for the death of a worker, were:
- intended at least to some degree to provide a solatium that is compensation to a near relative for the distress suffered as a result of the death of the deceased ... Hence, the lump sum paid under the [Accident Compensation Act] should be brought to account for the purposes of applying s16 of the VOCA Act.²⁴
- 16.16 These cases demonstrate that, under the VOCAA, VOCAT must interrogate the specific nature of the other payments or benefits under different schemes to determine whether they relate to the same loss, expense or other matter for which assistance is sought from VOCAT.

Section 7(2) of the VOCAA

- 16.17 Despite the above sections of the VOCAA, which seek to limit VOCAT to an option of 'last resort', section 7(2) of the VOCAA nonetheless describes primary victims as those who are injured or die:²⁵
- trying to arrest someone whom they believe on reasonable grounds has committed an act of violence
 - trying to prevent the commission of an act of violence
 - trying to aid or rescue someone whom they believe on reasonable rounds is a victim of an act of violence.
- 16.18 Given many of those who try to arrest an alleged perpetrator, prevent an act of violence or aid or rescue a victim of an act of violence are often 'first responders', such as paramedics or police officers attending incidents in the course of their employment, section 7 of the VOCAA appears to provide scope for the VOCAA to assist such workers, notwithstanding the existence of statutory workplace injury schemes in Victoria.²⁶ The VOCAA does not distinguish between those responding as members of the public, and those responding in the course of their employment.
- 16.19 In *Smith v Victims of Crime Assistance Tribunal*²⁷ counsel for the respondent (VOCAT) submitted that a broad interpretation of 'aid' under the VOCAA, such as giving first aid following an incident, is inappropriate as it 'would mean any ambulance officer or para medic [sic] giving assistance, would be entitled as a primary victim, clearly not an intended consequence when the legislative history was considered'.²⁸
- 16.20 While this case did not relate to the provision of aid by a first responder, counsel for the respondent (VOCAT) submitted that the applicant's assistance 'was no more than offering first aid. It was assistance given after the event'.²⁹ VCAT agreed with this interpretation, suggesting that 'aid' for the purposes of section 7(2)(c) discounts assistance provided 'after the event'³⁰ and as such, could be interpreted as not enabling first responders, like paramedics or police, who provide assistance after an event, to apply for assistance under the VOCAA as primary victims.

23 [2008] VCAT 448 (26 February 2008).

24 Ibid [32].

25 *Victims of Crime Assistance Act 1996* (Vic) s 7(2).

26 As discussed later in this chapter, this interpretation of the VOCAA was also raised in submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

27 [2003] VCAT 1489 (22 October 2003).

28 Ibid [23].

29 Ibid.

30 Ibid [27].

- 16.21 However, the decision in *Will v Victims of Crime Assistance Tribunal*³¹ raises some ambiguity about this interpretation of section 7 of the VOCAA. In that case, VCAT said:
- Section 7(c) is designed to cover a person who comes to the aid of someone being attacked or if after the attack they immediately step in and do things to assist the victim, that is the sort of aid that Section 7(c) is looking at.³²
- 16.22 Accordingly, while VCAT suggests in *Will v Victims of Crime Assistance Tribunal* that those who immediately step in *after* an incident to assist victims would be captured by section 7, potentially bringing section 7(2)(c) within the scope of first responders, VCAT also stated in the same case:
- I agree with what Ms Crafti [counsel for VOCAT] has said that if one was to give the wide interpretation [of section 7] that has been suggested by Mr McKenna [counsel for the applicant] it would lead to perverse results. That is, it would lead to results where persons such as paramedics and doctors who suffered some psychological injury as a result of having to treat a patient would be able to claim pursuant to the Act, that is not the case.³³
- 16.23 The decision in *Will v Victims of Crime Assistance Tribunal*³⁴ seems to accept that ‘aid’ can be provided after the event. In contrast, the decision in *Smith v Victims of Crime Assistance Tribunal*,³⁵ distinguishes assistance provided after the event with assistance provided by paramedics and doctors.
- 16.24 In its supplementary consultation paper, the Commission noted that any distinction between aid rendered to a victim at the time of an act of violence and assistance provided afterwards may be problematic given the intended purpose of section 7(2)(c) of the VOCAA, which appears to represent an aim to elevate people who are not direct victims of an act of violence to the status of primary victims in order to reward the behaviour of ‘good Samaritans’.³⁶ For example, Markus Dirk Dubber describes such provisions in crime victim compensation schemes as ‘an effort to encourage citizens to assist one another in times of need’.³⁷ In this context, the Commission suggested in the supplementary consultation paper that any distinction between aid rendered to a victim at the time of an act of violence and assistance provided afterwards may be undesirable.³⁸

Independent Broad-Based Anti-Corruption Commission review of police applications to VOCAT (2013)

- 16.25 In 2013, the Independent Broad-Based Anti-Corruption Commission (IBAC) reviewed an investigation of the former Office of Police Integrity (OPI) regarding applications to VOCAT by Victoria Police officers.
- 16.26 The IBAC review confirmed a practice within sections of Victoria Police of applying to VOCAT for injuries incurred in the course of their duties, which IBAC stated ‘may be inappropriate and which may conflict with other processes such as WorkSafe compensation’.³⁹
- 16.27 Publicly available information in relation to this IBAC review states that IBAC recommended Victoria Police consider relevant policy to ensure applications by police for VOCAT assistance are subject to independent review, and also recommended that the entitlements of police injured in the course of duty be clearly outlined by Victoria Police.⁴⁰

31 [2011] VCAT 1739 (13 September 2011).

32 Ibid [14].

33 Ibid [17].

34 [2011] VCAT 1739 (13 September 2011).

35 [2003] VCAT 1489 (22 October 2003) [27].

36 Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims’ Rights* (New York University Press, 2002) 308.

37 Ibid.

38 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 48.

39 Independent Broad-Based Anti-Corruption Commission, *Special Report Following IBAC’s First Year of Being Fully Operational* (2014) 15. The review also raised concerns about alleged improper involvement of police in referring victims to select solicitors in relation to their VOCAT applications.

40 Ibid.

The IBAC report also states that issues relating to police applications to VOCAT were referred to both Victoria Police and the Secretary of the then-Department of Justice.⁴¹

- 16.28 There is no other publicly available information suggesting these matters were progressed further, either by Victoria Police or through legislative amendment.

Overview of other compensation, financial assistance or redress schemes

- 16.29 As outlined above, under section 16 of the VOCAA, VOCAT must take into account any compensation, assistance or payment of any other kind that the applicant has received for the loss, expense or other matter for which assistance is sought from the Tribunal. In addition, section 16 requires VOCAT to consider, in certain circumstances, other assistance that an applicant may be eligible to be awarded, or be entitled to receive, even where the applicant has not been awarded or received such payment.
- 16.30 Outlined below are some of the relevant schemes, and assistance available under such schemes, that may interact with VOCAT awards.⁴²

WorkSafe

- 16.31 Victoria's WorkCover Authority, known as WorkSafe Victoria,⁴³ has a number of statutory functions which include:⁴⁴
- providing benefits to injured workers and helping them return to work
 - enforcing Victoria's occupational health and safety and accident compensation laws
 - managing the Victorian workers compensation scheme.
- 16.32 WorkSafe Victoria provides a range of benefits to injured workers, including:⁴⁵
- weekly payments
 - medical and allied health treatment
 - ambulance transport
 - hospital treatment
 - personal and household help
 - impairment lump sums
 - common law damages.
- 16.33 WorkSafe Victoria also provides a range of income support, lump sum compensation and reimbursement of expenses to dependents of workers who die as a result of a work-related injury.⁴⁶
- 16.34 As WorkSafe Victoria may initiate criminal prosecution proceedings under relevant legislation,⁴⁷ some victims may be entitled to benefits from both WorkSafe Victoria and VOCAT.

The Transport Accident Commission (TAC)

- 16.35 The TAC was established under the *Transport Accident Act 1986* (Vic), with its key functions being paying for treatment and support services for people injured in transport accidents, promoting road safety in Victoria and improving the state's trauma system.⁴⁸

41 Ibid.

42 This is not an exhaustive list. There are a number of state, territory and Commonwealth schemes that might intersect with supports available under VOCAT or the proposed Scheme.

43 WorkSafe Victoria, *Enforcement Group: Victims and Persons Adversely Affected by Crime Policy* (2017) 2.

44 WorkSafe Victoria, *Annual Report 2017* (2017) 2.

45 Ibid 3.

46 Ibid 3.

47 WorkSafe Victoria, *Enforcement Group: Victims and Persons Adversely Affected by Crime Policy* (2017) 2.

48 Transport Accident Commission, *2016/17 Annual Report* (2017) 8.

- 16.36 The TAC covers transport accidents directly caused by the driving of a car, motorcycle, bus, train or tram.⁴⁹ The scheme operates on a no-fault basis, which means that anyone injured in a transport accident within Victoria (or interstate if in a Victorian-registered vehicle) is eligible to receive support services, irrespective of who caused the crash.⁵⁰ The TAC funds medical treatment for transport accident-related injuries for as long as it is necessary, including ambulance services, surgery and medical visits, medicines, therapies and nursing visits. Depending on the seriousness of the injury, TAC support may extend to income support, rehabilitation and disability services, return-to-work programs, attendant care, allowances for parents to visit dependent children in hospital, travel costs to and from medical appointments and equipment or aids, such as wheelchairs.⁵¹
- 16.37 As some transport accidents also involve criminal offences, such as culpable driving causing death or dangerous driving causing death or serious injury,⁵² some victims of crime may be entitled to benefits or assistance from both TAC and VOCAT.

The proposed Commonwealth Redress Scheme for Institutional Child Sexual Abuse

- 16.38 In October 2017, the Commonwealth Government introduced the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (Cth).
- 16.39 The proposed Commonwealth Redress Scheme for Institutional Child Sexual Abuse (the proposed Commonwealth redress scheme) is intended to operate for a period of 10 years from 1 July 2018, providing three elements of redress to eligible survivors of institutional child sexual abuse:
- 1) a monetary payment of up to \$150,000
 - 2) access to counselling and psychological services
 - 3) a direct personal response from responsible institutions at the request of a survivor.⁵³
- 16.40 Both Bills were referred to the Senate's Community Affairs Legislation Committee and the Committee's report on both Bills was released in March 2018. In its report, the Community Affairs Legislation Committee recommended that both Bills be passed, and made a number of further recommendations in relation to the proposed redress scheme.⁵⁴
- 16.41 As at 28 May 2018, all state and territory governments, with the exception of Western Australia, have committed to join the proposed scheme.⁵⁵ Subject to the passage of legislation, people who were sexually abused as children while in the care of relevant government or non-government institutions can apply for the redress scheme as of 1 July 2018.⁵⁶
- 16.42 The Department of Social Services' (DSS) (Commonwealth) submission to the Senate Community Affairs Legislation Committee Inquiry submitted that when working out the amount of a redress payment, the proposed Commonwealth redress scheme will deduct

49 Ibid.

50 Ibid.

51 Ibid.

52 *Crimes Act 1958* (Vic) ss 318–19.

53 Explanatory Memorandum, Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth) 3.

54 Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) xii–xii.

55 Subject to the passage of legislation, the Victorian Government will refer powers to the Commonwealth to ensure that Victorian state institutions participate in the proposed Commonwealth redress scheme: National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Vic) cl 1(2). A number of non-government institutions have also committed to join the proposed scheme, including the Catholic Church, Anglican Church, the Salvation Army, the YMCA and Scouts Australia: Department of Social Services (Cth), *National Redress Scheme for People Who Have Experienced Institutional Child Sexual Abuse* (5 June 2018) <www.dss.gov.au/national-redress-scheme-for-people-who-have-experienced-institutional-child-sexual-abuse>.

56 As at 28 May 2018, this would include victims of child sexual abuse relating to Commonwealth, state and territory government organisations (with the exception of Western Australia), as well as the Catholic Church, Anglican Church, the Salvation Army, the YMCA and Scouts Australia: Department of Social Services (Cth), *National Redress Scheme for People Who Have Experienced Institutional Child Sexual Abuse* (5 June 2018) <www.dss.gov.au/national-redress-scheme-for-people-who-have-experienced-institutional-child-sexual-abuse>.

relevant prior payments made to a survivor from responsible institutions where such payments were made 'in recognition of the harm caused by the abuse'.⁵⁷

16.43 The DSS submitted that the proposed Commonwealth redress scheme will not deduct payments provided to victims to access counselling and psychological services or routine payments for treatment, or other expenses like medical or dental bills. The DSS also submitted that the proposed Commonwealth redress scheme will not take into account one-off payments for specific purposes that are not related to recognition of harm.⁵⁸

16.44 As the proposed Commonwealth redress scheme is not yet implemented, it is not clear how the proposed scheme will interact with state-based financial assistance for crime victims. However, the Commission notes that the proposed Commonwealth redress scheme may interact with the VOCAA in two ways:

- Victims who have already received VOCAT awards may have such awards taken into consideration by the proposed redress scheme.⁵⁹
- Victims who receive awards from the proposed redress scheme may have such awards taken into account by VOCAT, in accordance with section 16 of the VOCAA.

16.45 However, the Commission notes that many victims of child sexual abuse have not obtained financial assistance under the VOCAA because of issues relating to application time limits, difficulties fulfilling requirements to report matters to police, and complex transitional provisions under the VOCAA which impact applications relating to offences occurring prior to 2000.⁶⁰

Family Violence Flexible Support Packages

16.46 Victoria's family violence service system currently provides additional state-funded financial assistance for victims of family violence through family violence flexible support packages (FSPs). FSPs enable family violence services to access funds to provide victims with urgent and critical support tailored to their specific needs.⁶¹ Flexible support packages can be for up to \$7000, with an average cost of \$3000.⁶²

16.47 Financial assistance can be sought for safety expenses, housing, medical costs and a broad range of social, economic and community connectedness activities. Support available through Family Violence Flexible Support Packages may cross over with support available through VOCAT, for example, safety expenses or medical costs.

The National Disability Insurance Scheme

16.48 The National Disability Insurance Scheme (NDIS) provides people with a permanent and significant disability with 'reasonable and necessary supports they need to live an ordinary life'.⁶³

16.49 Victims of crime who, as a result of a criminal act, sustain a permanent and significant disability may be eligible for supports from both a state-funded financial assistance scheme and the NDIS.

57 Department of Social Services (Cth), Submission No 27 to Senate Community Affairs Legislation Committee, *Inquiry into the Commonwealth Redress Scheme*, 6 February 2018, 7.

58 Department of Social Services (Cth), Submission No 27 to Senate Community Affairs Legislation Committee, *Inquiry into the Commonwealth Redress Scheme*, 6 February 2018, 7.

59 Noting that the proposed redress scheme may only take into account other payments received if they have been made to a survivor from responsible institutions 'in recognition of the harm caused by the abuse'. This seems to distinguish payments already made to 'victim/survivors' from institutions, as opposed to payments made by other state-based compensation schemes. See Department of Social Services (Cth), Submission No 27 to Senate Community Affairs Legislation Committee, *Inquiry into the Commonwealth Redress Scheme*, 6 February 2018, 7.

60 See *Victims of Crime Assistance Act 1996* (Vic) s 77(1). These issues are also discussed in Submission 43 (knowmore).

61 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.

62 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 1.

63 National Disability Insurance Scheme, *About the NDIS* (accessed 31 May 2018) <<https://www.ndis.gov.au/about-us/what-ndis.html>>.

- 16.50 Where compensation or support is provided by other schemes, like a victim support or financial assistance scheme, NDIS participants would be required to provide the NDIS with information about compensation or supports that the NDIS covers, like personal care, to enable the National Disability Insurance Agency ‘to calculate the effect the compensation has on those supports’.⁶⁴

Responses

- 16.51 In their joint submission, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria stated that section 7(2) of the VOCAA:
- makes it clear that a police officer or other first responder will be considered a primary victim of an act of violence if they are injured or die trying to arrest someone, attempting to prevent the commission of an act of violence, or trying to aid a victim of an act of violence.⁶⁵
- 16.52 The submission from VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria stated that there had been a recent increase in the number of applications received from emergency services and other first responder workers who have been injured in the course of their duties.⁶⁶
- 16.53 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also stated that section 16 of the VOCAA, which requires that any award made by the Tribunal be reduced to take into account any amounts of compensation or other forms of assistance received (or that may be received), creates additional complexity and results in delays:
- the complex interaction between VoCAT and other schemes that may provide overlapping services, in conjunction with the Tribunal’s legislative requirement to provide financial assistance as a last resort, can lead to delays in the finalisation of applications.⁶⁷
- 16.54 In addition, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that the intersection of the VOCAA objective in section 1(2)(c) with section 7 and section 16 raises issues of sustainability for VOCAT:
- Section 1(2)(c) of the Act provides that one of the Act’s key objectives is to allow victims of crime to have recourse to VoCAT assistance where compensation for their injury cannot be obtained from the offender or other sources. The increasing number of applications being received by the Tribunal from emergency services and other similar workers—particularly those under s 7(1)—has serious implications for the sustainability of VoCAT where other assistance schemes such as WorkSafe are available and may provide more appropriate assistance for such individuals.⁶⁸
- 16.55 Accordingly, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that navigating section 16 and section 7(2) of the VOCAA ‘can be a source of ambiguity for police officers, emergency services and similar applicants’.⁶⁹
- 16.56 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also submitted that ‘it is crucial that the role of government in supporting vulnerable children, via, for example, the Department of Health and Human Services (DHHS) is not displaced as the first point of assistance’.⁷⁰

64 National Disability Insurance Agency, *NDIS Participants with Compensation* (2016) 1.
65 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).
66 *Ibid.*
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*
70 *Ibid.*

- 16.57 In their submission VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria stated:
- All of these concerns suggest that the provision of VOCAT assistance to emergency services and other workers injured in the course of their duties is in need of review. In particular, consideration should be given to whether Parliament intends for such workers injured in the course of their employment to be entitled to special financial assistance. Consideration may also be given to whether VoCAT is a suitable avenue for such workers to receive financial assistance, and whether other assistance schemes such as WorkSafe could function more effectively as the exclusive avenue of assistance available in these circumstances.⁷¹
- 16.58 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria also submitted that 'it is crucial that the role of government in supporting vulnerable children, via, for example, the Department of Health and Human Services (DHHS) is not displaced as the first point of assistance'.⁷²
- 16.59 Ryan Carlisle Thomas Lawyers raised some concerns with what they viewed as VOCAT's practice of 'pre-empting' an applicant's entitlement to damages or other forms of compensation such as WorkCover entitlements, submitting that VOCAT should be liable to pay the applicant until such time that an applicant is successful under another scheme.⁷³
- 16.60 Anglicare Victoria Victims Assistance Program submitted that VOCAT does not finalise awards until entitlements under TAC and WorkCover are exhausted.⁷⁴
- 16.61 Due to the complexity of the intersection of other entitlements, Johnstone & Reimer Lawyers noted the importance of legal representation for applicants, given some victims have multiple potential sources of entitlement, including TAC, WorkCover and superannuation.⁷⁵
- 16.62 In a consultation with Victim Assist Queensland (VAQ), the Commission was told that while the Queensland scheme operates as a scheme of 'last resort', VAQ had experienced difficulties with the intersection between victims of crime assistance and motor vehicle matters.⁷⁶ The Commission was also told that recent amendments to the Queensland Act now require applicants to make a claim through a compulsory third-party insurer prior to accessing assistance through VAQ.⁷⁷
- 16.63 A number of stakeholders also raised concerns about the intersection between VOCAT and other compensation or assistance schemes in the context of whether victims should be required to refund awards. Refunds, including how refunds should apply under the proposed scheme, are discussed separately below.

Discussion and recommendations

- 16.64 As submitted by VOCAT, the Magistrates' Court of Victoria and Children's Court of Victoria, there are issues of ambiguity and complexity in relation to VOCAT's consideration of other assistance or payments.⁷⁸
- 16.65 The Commission has considered how other Australian jurisdictions address the matter of assistance or payments already made to a victim, as well as those an applicant may be entitled to, or may receive in the future.

71 Ibid.

72 Ibid.

73 Submission 38 (Ryan Carlisle Thomas Lawyers).

74 Submission 5 (Anglicare Victoria Victims Assistance Program).

75 Submission 23 (Johnstone & Reimer Lawyers).

76 Consultation 1 (Victim Assist Queensland).

77 Ibid.

78 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

- 16.66 In Queensland, the government assessor must reduce the amount of assistance that would otherwise be payable to the applicant by an amount equivalent to the ‘relevant payment’ which includes payments an applicant has received, or will receive.⁷⁹ However, this provision does not apply where the government assessor is satisfied that the purpose for which the relevant payment was or will be made does not include compensating the applicant for expenses in relation to which the applicant is eligible for assistance.⁸⁰ In the Queensland Act, the following example is provided at section 86 illustrating how the intersection of two relevant schemes might apply in practice:
- Example—An applicant is eligible for assistance for counselling expenses mentioned in section 39(a), 42(a), 45(a), 46(a) or 49(a). A relevant payment is received by the applicant under the [National Injury Insurance Scheme Queensland] Act for the applicant’s treatment, care and support within the meaning of that Act. The purpose of the relevant payment does not include compensating the applicant for counselling expenses.⁸¹
- 16.67 In support of the Queensland provisions, the Queensland Act enables the scheme administrators to obtain information about ‘relevant payments’ from other agencies.⁸²
- 16.68 In the Australian Capital Territory, the Victims of Crime Commissioner must:
- consider the extent to which services are available to the applicant under both the victims services scheme, and other services, in deciding the amount of financial assistance in relation to immediate need payments and economic loss payments⁸³
 - reduce the amount of financial assistance ‘equal to the associated payment’ if the applicant has ‘received an associated payment covering the same harm or loss as the financial assistance is intended to cover’.⁸⁴
- 16.69 In New South Wales, in determining the amount of financial support to be given or the recognition payment to be made to a person, the Commissioner of Victims Rights must have regard to any amount that has been paid or that the person is entitled to be paid ‘by way of damages in civil proceedings’ or ‘under any other Act or law’ or ‘under any insurance or other agreement or arrangement’ in respect of the act of violence to which the application for financial support or a recognition payment relates.⁸⁵ In support of this provision, the Commissioner is required to postpone the determination of an application until an applicant’s entitlements have been determined in relation to workers compensation, or death and disability payments under the *Police Act 1990* (NSW).⁸⁶
- 16.70 In the Commission’s view, the proposed state-funded financial assistance scheme Act (proposed Act) should provide clarity in relation to factors to be considered by the scheme decision maker where an applicant:
- has already received financial assistance or a relevant payment from another source relating to the same criminal act
 - has not received financial assistance or a relevant payment from another source relating to the same criminal act, but may be entitled to or eligible for such assistance or payments
 - may be required to refund an award.
- 16.71 These matters are discussed below, with the exception of refund of awards, which is considered later in this chapter.

79 *Victims of Crime Assistance Act 2009* (Qld) s 86(2). ‘Relevant payment’ is not defined in the Act.

80 *Ibid* s 86(2A).

81 *Ibid*.

82 Including the insurance commissioner under the *Motor Accident Insurance Act 1994*, the police commissioner under the *Police Service Administration Act 1990*, the Workers’ Compensation Chief Executive Officer under the Workers’ Compensation Act, and the Chief Executive Officer of the National Injury Insurance Agency Queensland: *Victims of Crime Assistance Act 2009* (Qld) s 77.

83 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 46(2).

84 *Ibid* s 47(1)(a).

85 *Victims Rights and Support Act 2013* (NSW) s 44(4).

86 *Ibid* ss 44(5)–(6).

Where an applicant has already received financial assistance or relevant payment from another source

- 16.72 As noted above, VCAT has interpreted section 16 of the VOCAA as allowing victims to obtain payments under the VOCAA, even when they have received payments from another scheme, if the payments received under another scheme are not ‘for the loss, expense or other matter’ for which assistance is sought under the VOCAA.⁸⁷ In other words, a victim may receive two payments, or two types of assistance, from the VOCAA and another scheme, if they are for different purposes.⁸⁸
- 16.73 In the Commission’s view, it is appropriate for a victim to be eligible for different financial assistance under different schemes, provided it does not amount to the victim receiving assistance for the same purpose. The Commission considers such an approach acknowledges that victims may be navigating complex legal frameworks that intersect, while it also ensures sustainability and efficiency for the state by making sure victims do not receive assistance for the same purpose from two separate schemes. As noted by VCAT, such an approach does not equate to ‘double counting’,⁸⁹ because the assistance is provided for different purposes.

Where an applicant may be entitled to other assistance or payments not yet received

- 16.74 As outlined above, in addition to considering any payments that a victim has already received, section 16 of the VOCAA enables VOCAT to consider assistance or payments that a victim has not received, but ‘is eligible to be awarded’⁹⁰ or is ‘entitled to receive’ or ‘would be entitled to receive if he or she applied’.⁹¹ As outlined above, these provisions are similar to provisions in other Australian jurisdictions.
- 16.75 Having regard to the current provisions in the VOCAA, and those in other jurisdictions, the Commission considers that it is appropriate to provide the scheme decision maker with discretion to reduce the amount of assistance provided to a victim where they may be entitled to other assistance or payments. This approach is also consistent with the Explanatory Memorandum to the Victims of Crime Assistance (Amendment) Bill in 2000, which stated that the intention of section 16 is that VOCAT can, but is not required to, reduce a VOCAT award to take into account the amount that an applicant is eligible to receive under other schemes.⁹²

Providing clarity in the proposed Act

- 16.76 The Commission agrees with the observation of VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria that navigating the provisions in the VOCAA regarding the intersection of the VOCAA and other schemes ‘can be a source of ambiguity’.⁹³
- 16.77 In the Commission’s view, the VOCAA does not provide sufficient clarity regarding the intersection between the VOCAA and other sources of payment or assistance—whether payments already received, or likely to be received by an applicant from other sources in the future.

87 *Krasauskas v Victims of Crime Assistance Tribunal* [2007] VCAT 1407 (6 August 2007).

88 For example, related victims may be entitled to payments for ‘distress’ under the VOCAA in addition to payments provided under other schemes because payments for ‘distress’ might not be covered by other schemes. See, eg, *Krasauskas v Victims of Crime Assistance Tribunal* [2007] VCAT 1407 (6 August 2007) [30], where the applicants were entitled to financial assistance for distress under the VOCAA, even though they were also entitled to payments under the *Transport Accident Act 1986* (Vic) for ‘economic support’, as the payments were for different purposes.

89 *Krasauskas v Victims of Crime Assistance Tribunal* [2007] VCAT 1407 (6 August 2007) [26].

90 *Victims of Crime Assistance Act 1996* (Vic) s 16(ac).

91 *Ibid* s 16(b).

92 Explanatory Memorandum, *Victims of Crime Assistance (Amendment) Bill 2000* (Vic) 4.

93 Submission 59 (*Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria*).

- 16.78 Accordingly, the Commission considers that the proposed Act should:
- clarify that victims may be entitled to financial assistance under the proposed scheme, notwithstanding any entitlements they may be eligible for, or may have received, for a different purpose than the entitlements the victim may be eligible for, or may have received, under another scheme
 - require the scheme decision maker, at the time of making an award, to reduce the amount of assistance provided to a victim equivalent to any assistance, payment, compensation or damages that the victim has received, for the same purpose as a payment under the proposed Act
 - provide the scheme decision maker with discretion to reduce the amount of assistance provided to a victim, equivalent to any assistance, payment, compensation or damages that the scheme decision maker believes on the balance of probabilities that the victim will receive from any other source in relation to the same criminal act, and for the same purpose as a payment under the proposed Act.
- 16.79 In the Commission's view, this approach:
- reduces ambiguity and uncertainty by acknowledging some victims will be entitled to different payments from different schemes and that it is appropriate for this to occur in some circumstances, as is currently the case under the VOCAA
 - reduces complexity and uncertainty, by requiring the scheme decision maker, at the time of making an award, to reduce the amount of an award if payment has or may be received from any other source for the same purpose as a payment under the proposed Act. Such discretion should also reduce the need for victims to refund awards, which is discussed further below.
 - encourages timely decision making by enabling the scheme decision maker to consider future payments where they believe such payments will be received by a victim, without requiring a victim to exhaust such opportunities prior to an award being made⁹⁴
 - promotes sustainability of the proposed scheme, while also encouraging a beneficial approach for victims, by requiring awards to be reduced when a victim has already received other payments but giving the scheme decision maker discretion not to reduce awards where other payments have not been received. This approach acknowledges such payments may ultimately never be received by a victim and that state-funded financial assistance is often the most practical route for a victim.
- 16.80 The Commission also considers that guidelines should be developed and made publicly available regarding the scheme's intersection with other compensation, redress, insurance or financial assistance schemes in the interests of providing consistent and transparent advice to potential applicants. Such guidelines should also reflect any relevant case law interpretation of the proposed Act. In the Commission's view, such guidelines should provide clarity for prospective applicants in relation to consideration of payments already made, or likely to be made, by another scheme, as well as the circumstances in which a refund of award might be required, which is discussed in detail in the next part of this chapter.
- 16.81 The Commission also notes the use of an example in Queensland's relevant Act, which sets out how the intersection of two relevant schemes might apply in practice.⁹⁵ While this is a matter for legislative drafting, the Commission considers such an example provides a useful illustration of the intersection of relevant schemes and state-funded financial assistance and in this context, assists the scheme decision maker in determining an application where it intersects with another scheme.

94 This is in contrast with the approach in New South Wales where the decision maker is required to postpone the determination of an application until an applicant's entitlements have been determined in relation to workers compensation or death and disability payments under the *Police Act 1990* (NSW): *Victims Rights and Support Act 2013* (NSW) ss 44(5)–(6).

95 *Victims of Crime Assistance Act 2009* (Qld) s 86(2A).

- 16.82 VOCAT currently has broad investigative powers,⁹⁶ and broad powers to obtain information, including requiring other government departments or services to provide VOCAT with information or documents relevant to the application.⁹⁷ In support of the equivalent Queensland provisions, the Queensland Act also enables the scheme administrators to seek information about relevant payments relating to motor accidents, work-related injuries and other insurance schemes.⁹⁸
- 16.83 In the Commission's view, the proposed scheme should continue to have appropriate powers to investigate and obtain information to assist in determining, at the time of making an award, whether to reduce the amount of assistance provided to a victim, equivalent to any assistance, payment, compensation or damages that the victim has received from any other source.

Recommendations—interaction with other compensation and financial assistance schemes

86 The proposed Act should:

- (a) provide that a victim may be entitled to financial assistance under the proposed Act, notwithstanding any assistance, payment, compensation or damages they may be eligible for or may have received from any other source, where the award made under the proposed Act is for a different purpose than the other entitlement or payment
- (b) provide that the scheme decision maker, at the time of making an award, must reduce the amount of assistance, equivalent to any assistance, payment, compensation or damages that the victim has received from any other source in relation to the same criminal act, if that payment was for the same purpose as the award under the proposed Act
- (c) provide the scheme decision maker with discretion to reduce the amount of assistance provided to a victim, equivalent to any assistance, payment, compensation or damages that the scheme decision maker considers on the balance of probabilities that the victim will receive from any other source in relation to the same criminal act, and for the same purpose as an award under the proposed Act
- (d) provide the scheme decision maker with the power to investigate and obtain information to assist in determining, at the time of making an award, whether to reduce the amount of assistance provided to a victim, equivalent to any assistance, payment, compensation or damages that the victim has received from any other source.

87 To assist the scheme decision maker in determining an application where a victim may be eligible for or may have received assistance, payment, compensation or damages from another source, including the circumstances in which an award may be reduced, or a refund of part or all of an award may be required, guidelines should be developed and should be made publicly available.

96 *Victims of Crime Assistance Act 1996* (Vic) s 39.
 97 *Ibid* s 40.
 98 *Victims of Crime Assistance Act 2009* (Qld) s 77.

Refund of awards

Current law

- 16.84 As outlined above, under section 16 of the VOCAA there are a number of circumstances where VOCAT must take into account other compensation, assistance or payments received by an applicant and reduce the VOCAT award amount accordingly.⁹⁹
- 16.85 In addition to considering any payments that a victim has already received, section 16 of the VOCAA currently enables VOCAT to consider assistance or payments that a victim has not received, but 'is eligible to be awarded'¹⁰⁰ or is 'entitled to receive' or 'would be entitled to receive if he or she applied'.¹⁰¹
- 16.86 If the victim later receives any damages, compensation, assistance or payments not taken into account under section 16 of the VOCAA, but which VOCAT would have taken into account had the assistance been received before the making of the VOCAT award, then the victim must refund:
- the amount of the assistance paid to them under the VOCAA, if it is equal to or less than the amount of the damages, compensation, assistance or other payments subsequently received
 - the amount of damages, compensation, assistance or other payments subsequently received, if the amount of the assistance paid to them under the VOCAA is greater.¹⁰²
- 16.87 However, VOCAT retains some discretion as to whether a refund is required if the subsequent assistance was received from a person other than the alleged offender. In those circumstances, the victim only needs to refund the award, or part of it, if VOCAT specifically requires this.¹⁰³ However, the VOCAA does not specify the circumstances in which VOCAT is likely to require this.
- 16.88 In the Commission's supplementary consultation paper, the Commission noted that limited data is available on how often refunds are required by VOCAT and whether, in practice, such provisions are being used.¹⁰⁴

Responses

- 16.89 Some stakeholders submitted that VOCAT rarely requires a refund of an award.¹⁰⁵ Ryan Carlisle Thomas lawyers submitted that VOCAT instead seeks to pre-empt whether a VOCAT award will overlap with assistance provided under another scheme, and reduce the award accordingly at the time it is granted.¹⁰⁶
- 16.90 Nevertheless, some stakeholders were concerned about the circumstances in which VOCAT might intersect with other assistance, requiring victims to refund the VOCAT award. For example, knowmore submitted that where other assistance is provided and a VOCAT refund required, this could make victims feel that they had participated in a lengthy and potentially traumatic process for no net practical gain.¹⁰⁷ Knowmore also submitted that the intersection between state-funded financial assistance and the proposed Commonwealth redress scheme for institutional child sexual assault needs to be clearly communicated to victims so that they fully understand their entitlements and obligations if assistance is received from multiple sources.¹⁰⁸

99 *Victims of Crime Assistance Act 1996* (Vic) ss 16(a), (ac). There are a further set of circumstances where VOCAT may take into account other monies received and reduce an award, but is not required to: *Victims of Crime Assistance Act 1996* (Vic) s 16(b).

100 *Ibid* s 16(ac).

101 *Ibid* s 16(b).

102 *Ibid* s 62(1).

103 *Ibid* s 62(2).

104 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 130.

105 Submissions 5 (Anglicare Victoria Victims Assistance Program), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

106 Submission 38 (Ryan Carlisle Thomas Lawyers). The Commission notes that this approach is consistent with section 16 of the VOCAA.

107 Submission 43 (knowmore).

108 *Ibid*.

- 16.91 Inner Melbourne Community Legal also submitted that despite the fact that VOCAT rarely pursues refunds, some victims are nonetheless concerned about the possibility of having to refund an award, particularly interim awards in the event that a final award is not made.¹⁰⁹
- 16.92 To address these concerns, some stakeholders suggested that awards should never have to be refunded given the amounts awarded by VOCAT are relatively small and, in the case of special financial assistance, are a ‘symbolic expression’ of the state’s sympathy.¹¹⁰ Cohealth also submitted that the symbolic nature of special financial assistance means that such payments are made for a different purpose than payments made under other schemes.¹¹¹ Ryan Carlisle Thomas Lawyers submitted that a refund should only be required when another entity provides the same kind of assistance as that which was awarded by VOCAT.¹¹²
- 16.93 Some stakeholders suggested that the refund provisions should be retained, but that certain victim cohorts should not have to refund awards, such as victims of family violence and sexual assault.¹¹³ In particular, Women’s Legal Service Victoria, Domestic Violence Victoria and Aboriginal Family Violence Prevention & Legal Service Victoria submitted that in the case of family violence, refunds should not be required where this would increase the risk of harm by the perpetrator or would exacerbate the effects of family violence.¹¹⁴
- 16.94 Other stakeholders suggested that refunds should only be pursued in cases of fraud or serious misrepresentation¹¹⁵ or where a victim has the means to refund the award.¹¹⁶
- 16.95 One submission supported the broader application of refund provisions, submitting that victims should have to refund awards where they had ‘double-dipped’ and received the same support through other mechanisms.¹¹⁷

Discussion and recommendations

- 16.96 As stated in the Commission’s supplementary consultation paper, there is limited data available on the circumstances in which VOCAT requires awards to be refunded and how often it does so.¹¹⁸ VOCAT’s annual report does not include this information or state whether the refund provisions are used.
- 16.97 While this may suggest that the provisions are used rarely, if at all, the Commission notes stakeholder feedback that the very existence of the refund provisions, even in the absence of enforcement, is a source of concern for applicants. This is because applicants may not be aware of how VOCAT entitlements intersect with entitlements available under other schemes and whether there is a risk that they will receive a VOCAT award and then be required to refund it, or a part of it, at a later date.
- 16.98 The Commission therefore considers that the key issue associated with the refund provisions is the lack of clarity about when they may be invoked, rather than the existence of the provisions themselves. Accordingly, the Commission considers that the proposed Act should continue to provide that applicants may be required to refund awards where damages, compensation, assistance or other payments of any kind are obtained from other sources in relation to the same criminal act and for the same purpose for which the VOCAA award has been made. This is consistent with the recommendation above relating to the circumstances in which the scheme decision maker may consider other entitlements or awards at the time of making an award.

109 Submission 14 (Inner Melbourne Community Legal).

110 Submission 18 (cohealth).

111 Ibid.

112 Submission 38 (Ryan Carlisle Thomas Lawyers).

113 Submission 14 (Inner Melbourne Community Legal).

114 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

115 Submissions 35 (Brockway Legal), 49 (Victims of Crime Commissioner, Victoria).

116 Submission 14 (Inner Melbourne Community Legal).

117 Submission 27 (Name withheld).

118 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 130.

16.99 However, the Commission acknowledges that the lack of clarity regarding the application of the refund provisions is currently a source of concern for victims and may even prevent them from applying to the proposed scheme.¹¹⁹ To improve clarity regarding the operation of the refund provisions, the Commission considers that rather than refunds being mandatory where financial assistance is obtained from the offender, and at VOCAT's discretion in other circumstances, all refunds should be at the discretion of the decision maker supported by publicly available guidelines. In the Commission's view, the decision maker should determine whether a refund is required by considering the specific circumstances of the matter, including:

- **The quantum of the subsequent assistance received.** For example, where a substantial amount of assistance is obtained later from another source, for example through the Prisoner Compensation Quarantine Fund,¹²⁰ the decision maker may consider that it is in the interests of the proposed scheme's sustainability to require a refund from the victim.
- **The type of subsequent assistance received.** For example, whether the subsequent payment is in the form of a lump sum payment or financial assistance for goods and services that have already been provided to the victim. It may cause hardship to a victim, for example, to require them to refund an award for counselling services that have already been provided and paid for, even if the victim is subsequently awarded assistance for counselling under another scheme.
- **Any other circumstances the decision maker considers relevant.** For example, the decision maker might consider the victim's specific circumstances, including whether a refund is likely to cause undue hardship to the victim.

16.100 In the Commission's view, the need for refunds in the interests of scheme sustainability must also be balanced against the administrative and financial burdens that refunds may place on victims, and the efficiency of such provisions for the proposed scheme itself. Allowing the scheme decision maker discretion in such circumstances acknowledges that requiring victims to refund awards after a payment has already been made may cause financial stress, particularly where services have already been provided and paid for, or recovery payments already spent.

16.101 To improve awareness about the likelihood of a victim having to refund an award, the Commission considers that the proposed scheme should produce publicly available guidelines on the circumstances in which a victim may be required to refund the award and the factors the scheme decision maker will consider in determining whether a refund is required.

119 Submissions 14 (Inner Melbourne Community Legal), 43 (knowmore).

120 The Prisoner Compensation Quarantine Fund (PCQF) quarantines any compensation a convicted offender receives if they are injured in prison and successfully sue the prison. If the prisoner is paid \$10,000 or more in compensation, the money will be held in the PCQF for at least 12 months. The prisoner cannot access the money during this time, enabling a victim to make a compensation claim against the prisoner. The Victims Support Agency manages the PCQF. See State Government of Victoria, *Compensation from the Offender (2017)* Victims of Crime <www.victimsofcrime.vic.gov.au/going-to-court/compensation-from-the-offender>.

Recommendations—refund of awards

- 88** The proposed Act should provide that:
- (a) after an award is made, a victim may be required to refund the award in whole or in part if the victim receives any assistance, payment, compensation or damages from any other source in relation to the same criminal act and for the same purpose for which the award has been made
 - (b) in determining whether a refund should be required, the scheme decision maker must have regard to the following factors:
 - (i) the quantum or type of any subsequent assistance, payment, compensation or damages received
 - (ii) any other circumstances that the scheme decision maker considers relevant, including the victim's specific circumstances.
- 89** To assist the scheme decision maker in determining whether a refund should be required, guidelines should be developed and should be made publicly available.

PART FIVE: SUSTAINABILITY AND IMPLEMENTATION

Improving awareness and accessibility of the proposed victims of crime financial assistance scheme

- 454 Introduction
- 455 The number of victims accessing VOCAT
- 456 Responses
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17. Improving awareness and accessibility of the proposed victims of crime financial assistance scheme

Introduction

- 17.1 This chapter reviews, and makes recommendations in relation to, improving awareness and accessibility of the proposed new state-funded financial assistance scheme (the proposed scheme).
- 17.2 This chapter relates to issues raised in the first matter specified in the supplementary terms of reference which ask the Commission to consider whether the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) can be simplified to make it easier for applicants to understand all their potential entitlements, and easily access the assistance offered by the scheme without necessarily requiring legal support.
- 17.3 In Chapter 8, the Commission recommends that the VOCAA be repealed and replaced with an Act (the proposed Act) establishing the proposed scheme and incorporating the legislative reforms recommended in this report. In making this recommendation, the Commission noted the importance of plain language in legislative drafting, and suggested the use of plain language in the drafting of the proposed Act would address some stakeholder concerns with the complexity of the VOCAA.¹
- 17.4 This chapter addresses matters of awareness and accessibility beyond provisions of the proposed Act. Recommendations in this chapter aim to ensure the establishment of the proposed Act and scheme is supported with:
- community engagement and awareness activities to improve the general awareness and understanding of entitlements under the proposed Act
 - sector training and education to improve referrals to the proposed scheme, and to enable victims to be better informed and supported throughout the process by support workers and legal practitioners
 - a new suite of forms and information to improve accessibility of the proposed scheme for a broader range of victims.
- 17.5 In particular, this chapter considers the importance of plain language, and other accessible legal information, which is critical to access to justice.² As stated by the Commission in its report *Plain English and the Law*:

It is a matter of social justice that the legal professional communicates effectively with the community, as it is fundamentally important that everyone affected by the law should be able to understand it.³

1 In Chapter 8, the Commission notes that the Victorian Office of the Chief Parliamentary Counsel's *Plain English Policy* requires the office to, among other things, use plain language in the drafting of legislation: Office of the Chief Parliamentary Counsel (Vic), *Plain English Policy* (accessed 31 May 2018) <www.legislation.vic.gov.au/domino/web_notes/LDMS/pubhome.nsf/KW/OCPC!OpenDocument&ExpandSection=5,1#_Section5>.

2 See generally Department of Justice and Regulation (Vic), *Access to Justice Review: Volume 1 Report and Recommendations* (Victorian Government, 2016) 131.

3 Victorian Law Reform Commission, *Plain English and the Law* (2017) vii.

- 17.6 Before turning to consider stakeholder views in relation to awareness and accessibility of the Victims of Crime Assistance Tribunal (VOCAT), to provide context for discussing broader awareness and accessibility matters, this chapter begins by considering the number of victims accessing VOCAT as outlined in the Commission's first and supplementary consultation papers.

The number of victims accessing VOCAT

- 17.7 Based on statistical analysis of family violence and VOCAT data, the Commission's first consultation paper noted that the small number of family violence-related VOCAT applications recorded for 2015–16 (388) appeared disproportionate to the number of family violence incidents recorded that same year (78,628).⁴
- 17.8 Similarly, in the Commission's supplementary consultation paper, an comparison of Victoria's Crime Statistics Agency's data on victim reports⁵ with the number of VOCAT applications, suggested that approximately nine per cent of all potentially eligible victims are making applications to VOCAT.⁶
- 17.9 Accordingly, in relation to both family violence victims, and victims of crimes against the person, the Commission noted that the small number of VOCAT applications was disproportionate to the number of victim reports and recorded incidents of family violence, which suggested that there may be a high level of unmet need.⁷
- 17.10 In this context, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria agreed in their submission that there was significant unmet demand under the existing scheme:
- Approximately 9 per cent of all victims of crimes against the person apply to VoCAT for financial assistance. This low figure may be due to a general lack of awareness of VoCAT and the financial assistance process in Victoria, or reflect the difficulty for applicants to understand their potential entitlements and quickly and easily access the assistance offered by the scheme, without legal support.⁸
- 17.11 However, as acknowledged in the Commission's supplementary consultation paper, the seemingly low rate of victims accessing VOCAT is not unique to the Victorian state-funded financial assistance scheme.
- 17.12 Awareness of state-funded financial assistance schemes appears to be low in many Australian and international jurisdictions. For example, in an analysis of Australian victim compensation schemes, Betty Chan et al observed that only a small proportion of victims access financial assistance schemes in Australia.⁹ Similar findings have been found internationally, including in the United Kingdom and the United States of America.¹⁰ A 2008 study in the United States of America suggested up to 95 per cent of eligible victims do not apply for state-funded financial assistance.¹¹

4 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 135.

5 The Commission used the number of 'victim reports' rather than recorded offences, as such reports represent the potential number of individual victims who may be eligible for VOCAT rather than the number of recorded crimes for that period, noting that one 'incident' might result in multiple recorded offences but only have one victim.

6 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 166–7.

7 Ibid 167.

8 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

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) 17.

10 Independent Inquiry into Child Sexual Abuse (United Kingdom), *Criminal Compensation Issues Paper: A Summary of the Themes Raised by Respondents* (2017) 4; Jennifer Alvidrez et al, 'Reduction of State Victim Compensation Disparities in Disadvantaged Crime Victims through Active Outreach and Assistance: A Randomized Trial' (2008) 98(5) *American Journal of Public Health* 882, 882; Maarten Kunst et al, 'Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study' (2015) 32(19) *Journal of Interpersonal Violence* 1, 2.

11 Jennifer Alvidrez et al, 'Reduction of State Victim Compensation Disparities in Disadvantaged Crime Victims through Active Outreach and Assistance: A Randomized Trial' (2008) 98(5) *American Journal of Public Health* 882, 882.

Responses

Victims' awareness of VOCAT

- 17.13 There was agreement among most stakeholders in both the written submissions and during consultations that awareness of VOCAT or entitlements under the Act was low among victims.¹²
- 17.14 The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that:
- One of the key non-legislative barriers for victims/survivors is awareness. Many victims/survivors of family violence are not aware of the Act, their legal rights or entitlements. This is particularly so for Aboriginal victims/survivors many of whom face a number of barriers, including lower levels of formal education and limited knowledge of legal rights and options and the legal system more broadly.¹³
- 17.15 Other stakeholders told the Commission that if 90 per cent of eligible victims are not accessing VOCAT, then the system needs to be more accessible and responsive.¹⁴
- 17.16 Victims' representatives of the Victims of Crime Consultative Committee told the Commission that the onus should not be on victims to seek out information about state-funded financial assistance, find relevant services or make appointments on their own.¹⁵
- 17.17 A variety of views were expressed by stakeholders, and victims themselves, about when and how victims might learn about VOCAT. Some victims told the Commission that they found out about VOCAT a long time after the crime occurred, and only then 'by chance'.¹⁶ Similarly, Hume Riverina Community Legal Service and CASA Forum submitted that it was common for victims to find out about VOCAT after the two-year time limit for an application had expired.¹⁷ Some victim support workers described awareness of VOCAT among victims as 'mixed',¹⁸ 'varied'¹⁹ or 'hit and miss'.²⁰ Other stakeholders suggested victims simply 'learn along the way' during the criminal justice process.²¹
- 17.18 Ryan Carlisle Thomas Lawyers submitted that awareness of VOCAT was 'crime dependent'.²² Some stakeholders said that awareness of VOCAT is more problematic for certain victim cohorts, including:
- family violence victims²³ and sexual assault²⁴ victims
 - victims experiencing disadvantage,²⁵ including homelessness²⁶
 - victims with capacity²⁷ or mental health issues²⁸

12 Submissions 6 (Forgetmenot Foundation Inc), 10 (Eastern Metropolitan Regional Family Violence Partnership), 15 (Merri Health Victims Assistance Program), 26 (Hume Riverina Community Legal Service), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 8 (Victims Representatives—Victims of Crime Consultative Committee), 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation with Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals), 16 (Regional Consultation—Ballarat Legal Professionals), 25 (Children's Court of Victoria).

13 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

14 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

15 Consultation 8 (Victims' Representatives—Victims of Crime Consultative Committee).

16 Ibid.

17 Submissions 26 (Hume Riverina Community Legal Service), 30 (CASA Forum).

18 Consultation 9 (Domestic Violence Victoria Members).

19 Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

20 Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

21 Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

22 Submission 38 (Ryan Carlisle Thomas Lawyers).

23 Submission 30 (CASA Forum); Consultations 3 (Legal Professionals—Community Legal Centres), 9 (Domestic Violence Victoria Members), 13 (Regional Consultation—Mildura Legal Professionals).

24 Submission 30 (CASA Forum).

25 Consultation 7 (Family Violence and Advocacy Organisations).

26 Consultation 3 (Legal Professionals—Community Legal Centres).

27 Submission 30 (CASA Forum); Consultations 7 (Family Violence and Advocacy Organisations).

28 Consultation 3 (Legal Professionals—Community Legal Centres).

- victims from non-English speaking backgrounds²⁹ and diverse communities³⁰
 - victims of institutional child abuse³¹ or historical offences perpetrated when a victim was a child.³²
- 17.19 The Commission was also told that a victim’s awareness of VOCAT is often reliant on service system connections.³³ For example, the Commission was told that victims linked in with the Victims Assistance Program (VAP) often had good awareness of VOCAT since all VAP clients are advised of VOCAT eligibility.³⁴ On the other hand, other stakeholders told the Commission that awareness and understanding of VOCAT is low even among support agencies and police.³⁵
- 17.20 Despite the overall agreement among many stakeholders that awareness of VOCAT was low, stakeholders nonetheless identified a range of referral points to VOCAT for victims, including:
- police³⁶
 - community agencies/support organisations³⁷
 - family violence services³⁸
 - victim support agencies³⁹
 - lawyers⁴⁰
 - courts⁴¹
 - health professionals.⁴²
- 17.21 A number of stakeholders considered Victoria Police to be a vital source of information and referral to VOCAT.⁴³ While a number of stakeholders suggested there were varying levels of police referral of victims to VOCAT,⁴⁴ others suggested referrals by police were improving.⁴⁵ In particular, stakeholders identified specialist police units like Sexual Offences and Child Abuse Investigation Teams (SOCITs) as significantly improving awareness of VOCAT amongst victims.⁴⁶
- 17.22 Other stakeholders said the existing scheme relies on victims, particularly family violence victims, identifying themselves as a victim of crime⁴⁷ and reporting a crime to police, which does not always occur.⁴⁸

29 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria); Consultations 3 (Legal Professionals—Community Legal Centres).

30 Submissions 36 (Name withheld), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 17 (Family Violence Diverse Communities and Intersectionality Working Group).

31 Consultation 3 (Legal Professionals—Community Legal Centres).

32 Consultation 13 (Regional Consultation—Mildura Legal Professionals).

33 Ibid.

34 Consultations 10 (Regional Consultation—Morwell Victim Support Agencies), 15 (Regional Consultation—Ballarat Victim Support Agencies), 23 (Community Safety Trustee, Victoria).

35 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

36 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 18 (cohealth), 38 (Ryan Carlisle Thomas Lawyers); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 10 (Regional Consultation—Morwell Victim Support Agencies).

37 Consultations 2 (Legal Professionals – Private Practice), 7 (Family Violence and Advocacy Organisations), 10 (Regional Consultation – Morwell Victim Support Agencies).

38 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultation 2 (Legal Professionals—Private Practice).

39 Submissions 18 (cohealth), 38 (Ryan Carlisle Thomas Lawyers); Consultations 2 (Legal Professionals—Private Practice), 10 (Regional Consultation—Morwell Victim Support Agencies).

40 Consultations 3 (Legal Professionals – Community Legal Centres), 7 (Family Violence and Advocacy Organisations), 10 (Regional Consultation – Morwell Victim Support Agencies).

41 Submissions 38 (Ryan Carlisle Thomas Lawyers), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 3 (Legal Professionals—Community Legal Centres), 10 (Regional Consultation—Morwell Victim Support Agencies).

42 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

43 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies).

44 Submissions 6 (Forgetmenot Foundation Inc), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 9 (Domestic Violence Victoria Members), 10 (Regional Consultation—Morwell Victim Support Agencies).

45 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultation 2 (Legal Professionals—Private Practice).

46 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 12 (Regional Consultation—Mildura Victim Support Agencies).

47 Consultation 13 (Regional Consultation—Mildura Legal Professionals).

48 Submission 26 (Hume Riverina Community Legal Service).

Broader community awareness of VOCAT

- 17.23 Some stakeholders suggested broader community awareness of VOCAT was low,⁴⁹ and that an extensive awareness campaign was needed.⁵⁰
- 17.24 The Commission was told that after a crime occurs, victims often only ‘vaguely’ recall that there might be a ‘victims of crime’ service, but do not know any specifics.⁵¹ Other stakeholders agreed, submitting that victims will often use ‘victims of crime’ as an internet search, which can be problematic as victims may mis-identify services⁵² and mistakenly think that they have made contact with VOCAT when in fact they have contacted a private company.⁵³
- 17.25 Given the lack of awareness of VOCAT in the general community, a number of stakeholders submitted that a general community awareness campaign was required, like those used by the Transport Accident Commission (TAC) and WorkSafe.⁵⁴ One submission also suggested VOCAT undertake more community outreach work.⁵⁵
- 17.26 Domestic Violence Victoria members told the Commission that information needed to be ‘widely broadcast’ through universal services including general practitioners, helplines, family relationship centres, courts and lawyers.⁵⁶ Some stakeholders suggested posters be made available in Easy English and other community languages, and placed at local community health centres, legal centres, train stations, supermarkets and cultural centres.⁵⁷ Eastern Community Legal Centre also submitted that information was needed at hospitals, police stations, community houses and offices of government departments.⁵⁸

Support sector awareness of VOCAT

- 17.27 Stakeholders also told the Commission that awareness and understanding of VOCAT is low even among support agencies and police⁵⁹ and that community organisations needed training and education to increase their awareness of VOCAT and to improve their ability to support victims through the financial assistance process.⁶⁰
- 17.28 Both Hume Riverina Community Legal Service and Springvale Monash Legal Service submitted that funding should be allocated to community legal services to promote state-funded financial assistance and provide community education sessions about the process.⁶¹ In this context, the Aboriginal Family Violence Prevention & Legal Service Victoria also submitted that investing in culturally safe and specialist community legal education and early intervention programs are critical to building Aboriginal awareness of entitlements.⁶²
- 17.29 Raising sector awareness of state-funded financial assistance was highlighted as a key function of the respective administrative schemes by victims’ commissioners in both New South Wales and the Australian Capital Territory.⁶³
- 17.30 The NSW Commissioner of Victims Rights told the Commission that part of her role is to advocate on behalf of victims and to raise awareness of the supports available with victim-support agencies on the ground. This includes raising awareness with support

49 Submission 15 (Merri Health Victims Assistance Program).

50 Submission 26 (Hume Riverina Community Legal Service); Consultations 17 (Family Violence Diverse Communities and Intersectionality Working Group), 25 (Children’s Court of Victoria).

51 Consultation 11 (Regional Consultation—Victoria Legal Aid—Gippsland).

52 Submissions 18 (cohealth), 27 (Name withheld).

53 Submission 18 (cohealth); Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

54 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

55 Submission 36 (Name withheld).

56 Consultation 9 (Domestic Violence Victoria Members).

57 Submission 10 (Eastern Metropolitan Regional Family Violence Partnership).

58 Submission 33 (Eastern Community Legal Centre).

59 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

60 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 51 (Law Institute of Victoria); Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

61 Submissions 26 (Hume Riverina Community Legal Service), 41 (Springvale Monash Legal Service).

62 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

63 Consultations 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

services that specialise in domestic violence and sexual assault, as well as organisations that work with the LGBTIQ community, the Aboriginal community, multicultural communities and the disability sector. To support this work, Victims Services NSW has a small community engagement team.⁶⁴

- 17.31 Similarly, the ACT Victims of Crime Commissioner told the Commission that community engagement activities have resulted in increased awareness of the ACT scheme, particularly among key support and community agencies following completion of around 120 community engagement activities, along with associated website and radio promotion activities. The ACT Victims of Crime Commissioner told the Commission that the ability to undertake comprehensive community engagement activities was one of the benefits of moving from a court-based model to an administrative model.⁶⁵

Accessibility of VOCAT

- 17.32 Some stakeholders told the Commission that little had been done in 20 years to improve the accessibility of VOCAT,⁶⁶ that it was a 'bureaucratic nightmare', and that most victims do not know how to access it.⁶⁷

- 17.33 Stakeholders raised concerns about the accessibility of VOCAT in four main ways:

- the practical accessibility of VOCAT, particularly accessibility of its forms and information
- cultural barriers to accessing the existing scheme, such as barriers for particular victim cohorts
- structural barriers to accessibility, such as VOCAT being part of the court system and victims needing to engage lawyers to access the existing scheme
- technical barriers to accessibility as a result of the VOCAA's complexity and extensive documentary evidence requirements.

- 17.34 In Part 3 of this report, the Commission considered structural barriers to accessibility of VOCAT (being part of the court system and victims needing to engage lawyers) and in Part 4, technical barriers to accessibility (as a result of the extensive documentary evidence requirements). In Chapter 10, the Commission also examined accessibility of the existing scheme for Aboriginal victims of crime, including the current operation of VOCAT's Koori List. In that chapter, the Commission made recommendations in relation to specialisation under the proposed scheme which, among other things, aims to improve accessibility of the proposed scheme for particular cohorts of victims.

- 17.35 This chapter does not discuss structural and technical barriers, nor does it consider specialisation in detail. This part of the chapter considers and makes recommendations only in relation to:

- the practical accessibility of VOCAT, particularly accessibility of its forms and information
- cultural barriers to accessing the proposed scheme, such as barriers for particular victim cohorts.

64 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).
 65 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).
 66 Consultation 7 (Family Violence and Advocacy Organisations).
 67 Consultation 24 (Community Safety Trustee, Victoria).

Accessibility of VOCAT forms and information

- 17.36 A number of stakeholders raised concerns about the accessibility of the VOCAT forms and documentation requirements under the VOCAA.⁶⁸
- 17.37 While some stakeholders told the Commission that forms should be revised so that they are easy enough for victims to complete on their own,⁶⁹ victims of crime also told the Commission that following a serious crime, many victims are simply focused on ‘surviving’ and therefore, may be unable to complete even simple forms.⁷⁰
- 17.38 However, many stakeholders did not consider the VOCAT application form to be simple. For example, stakeholders submitted that the application form is not simple for many family violence victims to complete because the form requires information about ‘single’ acts of violence as well as details of a report to police, neither of which may apply in family violence situations.⁷¹ The Aboriginal Family Violence Prevention & Legal Service Victoria also submitted that the VOCAT form fails to recognise the complexity of family violence and may discourage victims from making an application.⁷²
- 17.39 Women’s Legal Service Victoria and Domestic Violence Victoria submitted that the form uses complex legal concepts, such as ‘primary’, ‘secondary’ and ‘related’ victims.⁷³ Similarly, Project Respect submitted:

The complexities of legislative text can be challenging for the general public, and even more so for those who speak English as a second language or have had limited education. In order to practice self-determination and autonomy it is integral for women to fully understand their legal rights and entitlements.⁷⁴

- 17.40 Support organisations agreed that the use of legal concepts in the application form meant victims would be unlikely to understand the requirements without assistance.⁷⁵ The Commission was told that the VOCAT application form was too difficult for victims to complete on their own without support,⁷⁶ emphasising the need for victims to have support when completing forms.⁷⁷
- 17.41 Women’s Legal Service Victoria and Domestic Violence Victoria also submitted that the form asks victims to provide information about whether they have received financial assistance from other sources such as through WorkSafe or TAC which may raise concerns that victims will be disadvantaged if they have applied for funds from other sources.⁷⁸
- 17.42 On the other hand, the submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria noted the increased numbers of applications lodged since the implementation of a new online VOCAT form, suggesting the accessibility of the VOCAT form had improved. They submitted, for example, that:

commencement of online application capability in 2016 resulted in a 17 per cent jump in applications, indicating that the need to lodge a physical application might have deterred some victims from seeking VoCAT assistance.⁷⁹

68 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria); Consultations 6 (Victims’ Advocacy Organisations), 9 (Domestic Violence Victoria Members), 23 (Community Safety Trustee, Victoria).

69 Submission 14 (Inner Melbourne Community Legal); Consultation 9 (Domestic Violence Victoria Members).

70 Consultation 8 (Victims’ Representatives—Victims of Crime Consultative Committee).

71 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

72 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

73 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

74 Submission 16 (Project Respect).

75 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria); Consultation 12 (Regional Consultation—Mildura Victim Support Agencies).

76 Consultations 15 (Regional Consultation—Ballarat Victim Support Agencies), 23 (Community Safety Trustee, Victoria).

77 Consultations 9 (Domestic Violence Victoria Members), 15 (Regional Consultation—Ballarat Victim Support Agencies).

78 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

79 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

- 17.43 However, the Commission was also told in some consultations that the online application form was problematic.⁸⁰ Some lawyers raised concerns about victims attempting to undertake the VOCAT application process unsupported by submitting an online application form, but then requiring lawyers to ‘take over’ when issues arise.⁸¹ One lawyer suggested that the online form was inefficient and confusing as once it had been submitted online, the form has to be posted back to the applicant to sign before being sent back to VOCAT again which victims find confusing.⁸² The Commission was told that it is not uncommon for victims to attempt to make VOCAT applications on their own, but later engage lawyers because issues arise.⁸³
- 17.44 A number of stakeholders said that the VOCAT forms and information should be revised and:
- made more accessible, including published in other languages or other formats for people with disability⁸⁴
 - made available in plain English⁸⁵
 - designed from a client-centred perspective⁸⁶
 - should accommodate varied experiences of victimisation, including family violence and other forms of violence that may involve multiple incidents or patterns of violence over time⁸⁷ including acknowledging the cumulative impact of family violence⁸⁸
 - in line with Victorian Government’s LGBTIQ strategy, provide alternate options to the tickboxes of ‘male’ and ‘female’.⁸⁹
- 17.45 The submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also agreed that ‘simplifying the administrative processes involved in lodging and progressing VoCAT applications is an important part of improving the scheme’s accessibility’.⁹⁰

Cultural barriers to accessibility

- 17.46 Eastern Metropolitan Regional Family Violence Partnership submitted that:
- Multiple non-legislative barriers exist for victim-survivors of family violence in accessing VOCAT. Using a lens of inclusion and acknowledging that every woman’s experience is unique means it is crucial to consider issues such a fear of authority and a complete distrust of institutions as legitimate non-legislative barriers to women in accessing VOCAT.⁹¹
- 17.47 Other stakeholders told the Commission that for some communities, there might be a stigma associated with accessing VOCAT which creates a cultural barrier to accessing the existing scheme.⁹² For example, Women’s Legal Service Victoria and Domestic Violence Victoria submitted that women from culturally and linguistically diverse communities often face multiple barriers to accessing VOCAT including cultural stigma and isolation exacerbated by a lack of accessible information.⁹³

80 Consultations 2 (Legal Professionals—Private Practice), 13 (Regional Consultation—Mildura Legal Professionals), 16 (Regional Consultation—Ballarat Legal Professionals).

81 Consultations 2 (Legal Professionals—Private Practice), 13 (Regional Consultation—Mildura Legal Professionals).

82 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

83 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultations 2 (Legal Professionals—Private Practice), 13 (Regional Consultation—Mildura Legal Professionals).

84 Submissions 14 (Inner Melbourne Community Legal), 16 (Project Respect), 36 (Name withheld), 37 (safe steps Family Violence Response Centre).

85 Submissions 5 (Anglicare Victoria Victims Assistance Program), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 36 (Name withheld), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 43 (knowmore), 51 (Law Institute of Victoria).

86 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

87 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

88 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

89 Submission 10 (Eastern Metropolitan Region Regional Family Violence Partnership).

90 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

91 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 31 (Victorian Council of Social Service).

92 Consultation 17 (Family Violence Diverse Communities and Intersectionality Working Group).

93 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

- 17.48 Cultural barriers to accessibility were also raised in relation to more specific and vulnerable members of the community, such as women working in the sex industry or victims with a disability. For example, Project Respect submitted that:
- Women in the sex industry (WISI) and survivors of trafficking report a multitude of barriers to access legal help or services ... This can be due to many reasons such as past stigma and mistreatment from police, language or cultural barriers and fear of reprisal from pimps and traffickers. Women from [culturally and linguistically diverse] backgrounds are highly represented in the sex industry.⁹⁴
- 17.49 CASA Forum also submitted that victims of sexual assault or family violence who have disabilities may not be aware of their right to apply to VOCAT, particularly if they have high support needs and may not be able to access information independently.⁹⁵
- 17.50 The Commission was told that to address cultural barriers to accessibility, the victims require information in plain English, Easy English, languages other than English and in non-written forms such as animation and audio.⁹⁶ In particular, stakeholders submitted that the current form was not inclusive as it does not cater to intersectionality including victims from the LGBTIQ community, women from migrant and refugee backgrounds, women with disability and women with low literacy.⁹⁷ The Commission was also told that forms and information should be accessible for people with disability.⁹⁸
- 17.51 A small number of submissions raised issues relating to victims not accessing the existing scheme due to feelings of not being 'worthy'.⁹⁹ It was suggested that this might apply to more marginalised victims—such as male victims of family violence.¹⁰⁰
- 17.52 As discussed in Chapter 10, the joint submission by the Magistrates' Court of Victoria and VOCAT highlighted VOCAT's Koori List as a key initiative of the Tribunal to improve its accessibility for Aboriginal victims of crime.¹⁰¹ The Magistrates' Court of Victoria and VOCAT submitted that the VOCAT Koori List aims to improve accessibility through:
- experienced and culturally aware magistrates, registrars and administrative staff
 - continuity in the management of each application (the same magistrate manages an application from start to finish)
 - culturally appropriate venues and communication
 - a strong community engagement element to raise awareness of the List and to encourage dialogue with communities.
- 17.53 The Aboriginal Family Violence Prevention & Legal Service Victoria also noted that the VOCAT Koori List was introduced to improve VOCAT's accessibility for Aboriginal victims and to strengthen the Tribunal's capacity to respond to Aboriginal victims of crime in a culturally appropriate and respectful manner.¹⁰² The Aboriginal Family Violence Prevention & Legal Service Victoria submitted that while they strongly support the aims of the VOCAT Koori List, they also submitted that 'in recent years a number of our clients' experiences of the system have not differed markedly from the general administration of the [VOCAA]'.¹⁰³
- 17.54 In addition, the Aboriginal Family Violence Prevention & Legal Service Victoria submitted that the VOCAT Koori List was under-resourced, resulting in lengthy delays.¹⁰⁴

94 Submission 16 (Project Respect).

95 Submission 30 (CASA Forum).

96 Consultations 9 (Domestic Violence Victoria Members), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

97 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 29 (Women's Legal Service Victoria and Domestic Violence Victoria).

98 Consultations 9 (Domestic Violence Victoria Members), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

99 Submissions 33 (Eastern Community Legal Centre), 36 (Name withheld).

100 Submission 36 (Name withheld).

101 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

102 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

103 Ibid.

104 Ibid.

Discussion and recommendations

- 17.55 As outlined above, statistics suggest access to, and awareness of, VOCAT is low, with many stakeholders agreeing that many victims are unaware of VOCAT and their entitlements under the VOCAA.¹⁰⁵
- 17.56 These findings are also consistent with previous Victorian research in relation to VOCAT, including research by:
- Women’s Legal Service Victoria in 2015, which found that many victims of family violence are simply unaware of the existence of VOCAT¹⁰⁶
 - Victims Support Agency in 2011, which found a general lack of awareness and understanding of VOCAT, even among victims who had been through the VOCAT process¹⁰⁷
 - Whittlesea Community Legal Service in 2011, which found a lack of awareness among victims regarding financial assistance available through VOCAT.¹⁰⁸
- 17.57 Although awareness of compensation and state-funded financial assistance has been raised as one of the most critical barriers to the effectiveness of any victims of crime financial assistance or compensation scheme,¹⁰⁹ awareness of such schemes appears to be low in many Australian¹¹⁰ and international jurisdictions.¹¹¹ Geneviève Parent has observed in relation to the equivalent state-funded financial assistance scheme in Quebec, Canada that many victims only learned about the scheme ‘accidentally’.¹¹²
- 17.58 In the Commission’s view, some issues relating to awareness and accessibility of the proposed scheme are likely to be addressed by the proposed model—an administrative scheme embedded within an independent agency whose mandate includes advocating for the recognition, inclusion, participation and respect of victims of crime.¹¹³ Key to this approach is the ability for a dedicated administrative decision maker to undertake community engagement activities to raise awareness of the proposed scheme.¹¹⁴ The Commission was told that community engagement activities in the Australian Capital Territory and New South Wales have resulted in increased awareness of their state-funded financial assistance schemes, particularly among key support and community organisations.¹¹⁵ Such activities in New South Wales are supported by a community engagement team that creates partnerships with organisations to increase awareness and access to the scheme.¹¹⁶

105 Submissions 6 (Forgetmenot Foundation Inc), 10 (Eastern Metropolitan Regional Family Violence Partnership), 15 (Merri Health Victims Assistance Program), 26 (Hume Riverina Community Legal Service), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 43 (knowmore), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria), 51 (Law Institute of Victoria); Consultations 2 (Legal Professionals—Private Practice), 3 (Legal Professionals—Community Legal Centres), 4 (Victim, Witness and Court Support), 7 (Family Violence and Advocacy Organisations), 8 (Victims’ Representatives—Victims of Crime Consultative Committee), 10 (Regional Consultation—Morwell Victim Support Agencies), 11 (Regional Consultation with Victoria Legal Aid—Gippsland), 12 (Regional Consultation—Mildura Victim Support Agencies), 13 (Regional Consultation—Mildura Legal Professionals), 16 (Regional Consultation—Ballarat Legal Professionals), 25 (Children’s Court of Victoria).

106 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.

107 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 57–8.

108 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 32.

109 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.

110 *Ibid* 17.

111 Independent Inquiry into Child Sexual Abuse (United Kingdom), *Criminal Compensation Issues Paper: A Summary of the Themes Raised by Respondents* (2017) 4; Jennifer Alvidrez et al, ‘Reduction of State Victim Compensation Disparities in Disadvantaged Crime Victims through Active Outreach and Assistance: A Randomized Trial’ (2008) 98(5) *American Journal of Public Health* 882, 882; Maarten Kunst et al, ‘Performance Evaluations and Victim Satisfaction with State Compensation for Violent Crime: A Prospective Study’ (2015) 32(19) *Journal of Interpersonal Violence* 1, 2; David Miers, ‘Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012’ (2014) 34(2) *Legal Studies* 242, 277.

112 Geneviève Parent, ‘When Crime Pays: The Politics of Crime, Law, and Victim Compensation in Quebec’ (Paper presented at the Canadian Political Science Association Conference, Toronto, 1–3 June 2006) 11.

113 *Victims of Crime Commissioner Act 2015* (Vic) s 13(1).

114 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

115 Consultation 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).

116 *Ibid*.

17.59 However, beyond matters relating to the model of state-funded financial assistance, the Commission considers that a number of further initiatives are required to improve awareness and accessibility of the proposed scheme. Outlined below are the Commission's conclusions in relation to three broad areas of reform:

- engagement and training
- improved forms and information
- specialisation to increase accessibility.

Engagement and training

Community engagement and awareness raising

17.60 Njeri Mathis Rutledge has suggested that state-funded financial assistance schemes need to 'be more diligent in trying to reach victims. If anyone can be the victim of a crime, then everyone should know [Crime Victim Compensation] funds exist.'¹¹⁷ Rutledge suggests schemes should conduct appropriate outreach activities and establish partnerships with media.¹¹⁸

17.61 In Australia, Chan et al have suggested that a potential way to raise awareness of victims' financial assistance schemes is to advertise assistance through the media, similar to the way in which Lifeline contact details are provided during reporting of serious incidents.¹¹⁹

17.62 The Commission notes the initiatives undertaken in the Australian Capital Territory to increase awareness of the ACT scheme, including conducting around 120 community engagement activities, along with associated website and radio promotion activities since the establishment of the new administrative scheme in 2016.¹²⁰

17.63 In Victoria, both the Transport Accident Commission (TAC)¹²¹ and WorkSafe¹²² use public awareness campaigns to raise awareness of their organisations, along with aiming to prevent transport and workplace accidents.¹²³ For example, WorkSafe's Annual Report for 2017 stated:

Public awareness campaigns contribute to the community service measure, by delivering safety and prevention messages across the community ... our approach to raising awareness has expanded to include targeted channels. We use digital and social media to address specific audiences, such as young workers and culturally and linguistically diverse communities, with tailored messages. We are increasingly adopting an 'always on' approach to campaigns, so that audience reach and impact are greater.¹²⁴

17.64 In the Commission's view, broad awareness campaigns are crucial given victimisation can be 'unpredictable' and 'unexpected'.¹²⁵ In this context, the greater general awareness a victim has before crime, the more likely they will be to recall that a service may be available to them after a crime has occurred.

117 Njeri Mathis Rutledge, 'Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims' (2011) 19 *Duke Journal of Gender Law and Policy* 223, 271.

118 Ibid.

119 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.

120 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

121 The TAC is a Victorian Government-owned organisation set up to pay for treatment and benefits for people injured in transport accidents. See Transport Accident Commission, *What We Do* (accessed 30 May 2018) <www.tac.vic.gov.au/about-the-tac/our-organisation/what-we-do>.

122 Victoria's WorkCover Authority, known as WorkSafe Victoria provides compensation to eligible workers injured at work. See WorkSafe Victoria, *Annual Report 2017* (2017) 2.

123 See Transport Accident Commission, *2016/17 Annual Report* (2017) 15; WorkSafe Victoria, *Annual Report 2017* (2017) 8.

124 WorkSafe Victoria, *Annual Report 2017* (2017) 8.

125 Canadian Resource Centre for Victims of Crime, *The Impact of Victimisation* (October 2005) <www.crcvc.ca/docs/victimization.pdf>.

- 17.65 Accordingly, the Commission considers:
- that the proposed new state-funded financial assistance Act (proposed Act) should provide that ongoing community engagement and public awareness activities are an essential component of the proposed scheme
 - the proposed scheme should be required to report annually¹²⁶ on community engagement and public awareness activities undertaken, and that such activities should be part of the proposed scheme's key performance indicators.
- 17.66 Additionally, the Commission considers that the Victims of Crime Commissioner, as the proposed scheme administrator, should be provided with appropriate funding and resourcing to enable ongoing community engagement and public awareness activities about the proposed scheme.

Sector training and education

- 17.67 Despite a substantial body of literature confirming that victims of crime want timely information about the types of support and services available to them,¹²⁷ stakeholders told the Commission that awareness and understanding of VOCAT is low even among support agencies and police.¹²⁸ Research in other jurisdictions suggests up to half of all eligible victims are not advised of the right to financial assistance, significantly impacting a victim's access to such schemes.¹²⁹ The importance of victim support and other criminal justice agencies advising victims of the right to seek financial assistance was highlighted by Betty Chan et al who noted that victim support and advocacy groups:
- play an important role in enabling victims to ... overcome the barriers to seeking help from [financial assistance] schemes. They understand the complexity of the circumstances that victims face and they are experienced in helping the victim navigate the different services they may need.¹³⁰
- 17.68 Accordingly, some stakeholders suggested that community organisations needed training and education to increase their awareness of VOCAT so as to improve their ability to support victims through the financial assistance process.¹³¹ For example, the Law Institute of Victoria submitted that increased training is needed to help professionals in the broader family violence system to identify when a victim may be eligible for state-funded financial assistance.¹³²
- 17.69 The Commission notes VOCAT's current activities with respect to sector training and education. For example, in 2016–17 VOCAT's Supervising Magistrates provided structured information and training to police recruits about the important role Victoria Police play in assisting victims to access VOCAT.¹³³ In addition, VOCAT convened a VOCAT user group in 2017 to enable the Supervising Magistrates, Principal Registrar and other Registry staff to meet with representatives of the legal profession who regularly assist VOCAT applicants.¹³⁴ VOCAT also state in their Annual Report that they 'regularly attend at or present at relevant community engagement forums'.¹³⁵

126 Data reporting under the proposed scheme is discussed in Ch 18 of this report.

127 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth, 2016) 13.

128 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

129 Jo-Anne Wemmers and Katie Cyr, *Victims' Needs within the Context of the Criminal Justice System* (University of Montreal, 2006) 71.

130 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) 18.

131 Submissions 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 51 (Law Institute of Victoria); Consultation 10 (Regional Consultation—Morwell Victim Support Agencies).

132 Submission 51 (Law Institute of Victoria).

133 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 9.

134 *Ibid* 10.

135 *Ibid* 39.

- 17.70 In the Commission's view, further funding and resources are required to engage more effectively with the broader victim support sector, as well as less specialised services. Although some victims will access specific victim services, other victims may access less specialised services following a crime, such as general practitioners (GPs), hospitals or private psychologists or counsellors. If a broader range of victim support and general services are well informed about the proposed scheme, the numbers of victims referred to the proposed scheme are likely to increase.
- 17.71 The Commission notes that a 2008 study in the United States of America piloted active outreach through a trauma recovery service to improve access to its state-funded financial assistance scheme. Active outreach was found to increase the overall proportion of victims applying for compensation—in fact, of the sample group provided with active outreach and support to submit an application, only three per cent did not submit a financial assistance application.¹³⁶ This is in comparison with close to 90 per cent of potentially eligible victims in Victoria not making an application to VOCAT.
- 17.72 Ongoing sector training and education are vital to ensure victims are informed by frontline workers about the proposed scheme. Accordingly, the Commission considers that:
- the proposed Act should provide that ongoing sector training and education regarding the proposed scheme, including the training and education of victim support workers, advocates and legal professionals, are an essential component of the scheme.
 - ongoing sector training and education activities should form part of the proposed scheme's day-to-day operations and key performance indicators, and such activities should be appropriately funded and resourced.
- 17.73 In addition, the Commission considers that the proposed scheme should undertake more specific and targeted outreach activities with relevant frontline and community sector organisations, including police, victim support organisations, hospitals, community health organisations, culturally and linguistically diverse and LGBTIQ advocacy organisations, Aboriginal Community Controlled Organisations and legal services, to improve the numbers of victims accessing state-funded financial assistance. Such targeted outreach activities could include promoting the proposed scheme to both staff and victims attending these services as well as co-locating scheme staff at these locations on a part time basis to assist victims with submitting applications or paperwork to increase the overall accessibility of the proposed scheme.
- 17.74 Targeted outreach activities could be leveraged off existing outreach activities in Victoria, including the current co-location of Victims Assistance Program services at Victoria Police stations across Victoria.¹³⁷ Outreach activities such as co-location would improve geographic spread of locations where victims can engage with the proposed scheme, which should help improve its accessibility for victims in rural and regional areas of Victoria.

136 Jennifer Alvidrez et al, 'Reduction of State Victim Compensation Disparities in Disadvantaged Crime Victims through Active Outreach and Assistance: A Randomized Trial' (2008) 98(5) *American Journal of Public Health* 882, 886.

137 For example, Windermere, a community organisation which delivers the Victims Assistance Program in Victoria, is currently co-located in both the Gippsland and Frankston Police stations two days a week. See Windermere, *Co-Location Supports Victims of Crime* (2016) <www.windermere.org.au/news/co-location-supports-victims-of-crime>.

Recommendations—engagement and training

- 90** The proposed Act should:
- (a) provide that ongoing community engagement, public awareness and sector training and education activities regarding the proposed scheme are an essential component of the proposed scheme, including the training and education of victim support workers, advocates and legal professionals
 - (b) provide that the scheme decision maker must:
 - (i) undertake targeted outreach activities regarding the proposed scheme with relevant frontline and community sector organisations including police, victim support organisations, hospitals, community health organisations, culturally and linguistically diverse advocacy organisations and legal services, to improve the numbers of victims accessing state-funded financial assistance
 - (ii) report annually on community engagement, public awareness and sector training and education activities.
- 91** The proposed scheme should be appropriately funded and resourced to enable ongoing community engagement, public awareness and sector training and education activities about the proposed scheme to be conducted.
- 92** Annual reporting on community engagement and public awareness activities undertaken should be part of the proposed scheme’s key performance indicators.

Improved forms and information

- 17.75 A number of stakeholders raised concerns with the current VOCAT application form and information.¹³⁸ Concerns were raised in relation to:
- the application form’s complexity¹³⁹ and use of legal concepts¹⁴⁰
 - the fact that many victims would be unlikely to be able to complete the application form on their own¹⁴¹
 - the fact that the current application form did not cater to different victims’ needs.¹⁴²
- 17.76 A number of stakeholders said that the VOCAT forms and information should be revised and made more accessible, including being published in other languages or other formats for people with disability,¹⁴³ made available in plain English,¹⁴⁴ designed from a client-centred perspective¹⁴⁵ and accommodate varied experiences of victimisation.¹⁴⁶

138 Submissions 10 (Eastern Metropolitan Regional Family Violence Partnership), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria); Consultations 6 (Victims’ Advocacy Organisations), 9 (Domestic Violence Victoria Members), 23 (Community Safety Trustee, Victoria).

139 Submission 14 (Inner Melbourne Community Legal); Consultation 9 (Domestic Violence Victoria Members).

140 Submission 29 (Women’s Legal Service Victoria and Domestic Violence Victoria).

141 Submission 14 (Inner Melbourne Community Legal); Consultation 9 (Domestic Violence Victoria Members).

142 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

143 Submissions 14 (Inner Melbourne Community Legal), 16 (Project Respect), 36 (Name withheld), 37 (safe steps Family Violence Response Centre).

144 Submissions 5 (Anglicare Victoria Victims Assistance Program), 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 36 (Name withheld), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 43 (knowmore), 51 (Law Institute of Victoria).

145 Submission 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

146 Submissions 29 (Women’s Legal Service Victoria and Domestic Violence Victoria), 44 (Aboriginal Family Violence Prevention & Legal Service Victoria).

- 17.77 Concerns with the VOCAT application form were also raised in Victims Support Agency research in 2011 where a victim of historical childhood sexual assault said the application form was not suitable for sexual assault victims.¹⁴⁷ Similarly, stakeholders told VOCAT in 2010, as part of its review of the pilot Koori List, that:
- correspondence was too complex for Koori applicants to understand. Lawyers can understand the correspondence and filing requirements, but if this information is sent directly to applicants, they can get turned off by the process.¹⁴⁸
- 17.78 As noted in the introduction to this chapter, providing information about the legal system in plain language, and other accessible formats, is critical to access to justice.¹⁴⁹ The Commission also noted in its 1987 report (republished in 2017) that writing in plain English improves accessibility, and can also decrease costs associated with the administration and application of legislation.¹⁵⁰
- 17.79 The Commission notes the contrast between the VOCAT application form and the form for Victim Impact Statements produced by the Department of Justice and Regulation. While the Victim Impact Statement form is also a legal form, being a statutory declaration submitted to the court during the sentencing phase of a criminal trial, it has been designed to provide more guidance, information and space for a victim to convey their story in a more sensitive and victim-friendly way.¹⁵¹ Similar ‘victim-friendly’ information has also been used by the Office of Public Prosecutions in relation to victim and family member reports for submission to the court under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).¹⁵²
- 17.80 As noted above, the provision of forms and information in plain language and other accessible formats is critical to access to justice.¹⁵³ As observed by the Department of Justice and Regulation in its *Access to Justice Review*, accessible legal information can enable individuals to resolve their legal problems independently.¹⁵⁴
- 17.81 The need for plain language is particularly important in relation to matters such as eligibility. Current information in relation to eligibility under the existing scheme uses legally defined terms such as ‘primary victim’ or ‘secondary victim’ but not all victims will necessarily understand whether they are a ‘primary’, ‘secondary’ or ‘related’ victim as defined by the VOCAA. These definitions then determine how and where a victim may be required to apply to VOCAT. For example, applications need to be filed in different ways or locations depending on whether the applicant:¹⁵⁵
- is a related victim
 - is a primary or secondary victim who is aware of the existence of a related victim
 - resides outside Victoria
 - identifies as Aboriginal and/or Torres Strait Islander and should be managed within VOCAT’s Koori List.

147 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime: An Examination of the Counselling Experiences of 62 Applicants to the Victorian Victims of Crime Assistance Tribunal* (June 2011) 33.

148 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 24.

149 See generally Department of Justice and Regulation (Vic), *Access to Justice Review: Volume 1 Report and Recommendations* (Victorian Government, 2016) 131.

150 For example, the use of plain English in government forms in the United Kingdom has reduced errors in completed government forms, resulting in benefits to both government departments and individuals who spent less time on administration. This has been directly linked to significant cost savings for government: Victorian Law Reform Commission, *Plain English and the Law* (2017) 46.

151 Victims Support Agency, Department of Justice and Regulation (Vic), *Guide to Victim Impact Statements*, Brochure (2017).

152 Office of Public Prosecutions (Vic), *Victim or Family Member Report Form*, Brochure (2012).

153 Victorian Law Reform Commission, *Plain English and the Law* (2017) vii; see also Department of Justice and Regulation (Vic), *Access to Justice Review: Volume 1 Report and Recommendations* (Victorian Government, 2016) 131.

154 Department of Justice and Regulation (Vic), *Access to Justice Review: Volume 1 Report and Recommendations* (Victorian Government, 2016) 119.

155 Victims of Crime Assistance Tribunal, *Where to Apply* (12 April 2018) <www.vocat.vic.gov.au/how-apply/where-apply>.

- 17.82 In Chapter 14, the Commission made a number of recommendations to address some of the complexity with making an application,¹⁵⁶ as well as to take into account the experiences of victims of family violence.¹⁵⁷ These changes aim to ensure the application form is more accessible to victims who have experienced violence over time rather than a one-off incident of violence.
- 17.83 Further to these recommendations in Chapter 14, the Commission considers that the proposed scheme decision maker should, as an integral part of the establishment of the proposed scheme, review and redesign all forms and information. In particular, the Commission notes stakeholder concerns that forms and information should be published in other languages, other formats for people with disability,¹⁵⁸ and be made available in plain English.¹⁵⁹
- 17.84 In reviewing and redesigning all forms and information, the proposed scheme decision maker should ensure they are available in plain language as well as different formats and languages, including Easy English, formats for victims with disability and victims from culturally and linguistically diverse backgrounds. In addition, the Commission considers that forms and information should be:
- appropriate and accessible for victims of all crime types, including family violence and other types of crime where the effects may be cumulative, or where the offences may have occurred over time
 - victim-centred and victim-friendly in their design, including
 - providing more guidance to victims who may be completing the form without assistance
 - leaving appropriate space for a victim to convey their story in their own words
 - avoiding unnecessary technical or legal language
 - not being unnecessarily lengthy.
- 17.85 In order to ensure accessibility of forms and information beyond the initial establishment phase of the proposed scheme, the Commission considers it important that the proposed Act require all forms and information relevant to the proposed scheme be in plain language, readily available and in a range of formats.

Recommendation—forms and information

- 93** The proposed Act should provide that all forms and other information relevant to the proposed scheme must be in plain language, readily available and accessible in a range of formats.

¹⁵⁶ For example, to improve accessibility, the Commission recommended that there be a single application form for all streams of assistance, including immediate assistance, rather than requiring an applicant to complete separate or multiple application forms.

¹⁵⁷ In Chapter 14, the Commission made recommendations in relation to the application form to allow applicants to list multiple family violence incidents or, where abuse is ongoing, list a range of dates over which the violence occurred; describe any cumulative harm suffered, as opposed to harm resulting from any one incident; list one or multiple perpetrators; and describe any harm suffered by their children or other family members.

¹⁵⁸ Submissions 14 (Inner Melbourne Community Legal), 16 (Project Respect), 36 (Name withheld), 37 (safe steps Family Violence Response Centre).

¹⁵⁹ Submissions 5 (Anglicare Victoria Victims Assistance Program), 29 (Women's Legal Service Victoria and Domestic Violence Victoria), 36 (Name withheld), 37 (safe steps Family Violence Response Centre), 41 (Springvale Monash Legal Service), 43 (knowmore), 51 (Law Institute of Victoria).

Specialisation to increase accessibility

- 17.86 As noted in Chapter 10, increasing specialisation within the proposed state-funded financial assistance scheme should also improve accessibility for specific victim cohorts.
- 17.87 Specialisation within the proposed scheme will enable the proposed scheme's staff and decision makers to apply the relevant legislation more efficiently to the specific needs or circumstances of particular victims, and will ensure victims using the proposed scheme come into contact with staff with a better understanding of the nature, features and dynamics of particular crimes or circumstances. In the Commission's view this approach will help ensure a beneficial approach for victims with specialised needs as well as improving scheme accessibility for victims who might otherwise face barriers in accessing the proposed scheme.
- 17.88 The Commission's recommendations in relation to specialisation are set out in Chapter 10.

Costs and sustainability of the proposed victims of crime financial assistance scheme

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18. Costs and sustainability of the proposed victims of crime financial assistance scheme

Introduction

- 18.1 This chapter considers and makes recommendations, in relation to the costs and sustainability of the proposed state-funded financial assistance scheme (proposed scheme), including:
- costs associated with establishing the proposed scheme
 - demand for the existing scheme, and possible demand of the proposed scheme
 - mechanisms to ensure scheme sustainability, including the applicability of offender contribution under the proposed Act.
- 18.2 This chapter primarily relates to the objective outlined in the supplementary terms of reference that the state-funded financial assistance scheme must be efficient and sustainable for the state.
- 18.3 In considering the applicability of offender contribution under the proposed Act, this chapter also considers the extent to which the proposed scheme can maximise therapeutic effect for victims. This relates to the matter in the supplementary terms of reference asking the Commission to bear in mind that a state-funded financial assistance scheme should seek to achieve outcomes for victims that maximise therapeutic effect.

Establishment of and demand for the proposed victims of crime financial assistance scheme

VOCAT's current operating costs

- 18.4 This part of the chapter outlines the current operating costs of the Victims of Crime Assistance Tribunal (VOCAT), including salaries and associated expenditure, special appropriations, the average cost per finalised VOCAT claim, and the Magistrates' Court of Victoria's subsidisation of VOCAT operations.

Salaries, operating costs and special appropriations

- 18.5 The costs and expenses of establishing, maintaining and administering VOCAT as well as the amounts of assistance awarded under the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) are paid out of the Consolidated Fund of the State of Victoria (consolidated revenue).¹

- 18.6 VOCAT's Financial Statement for the year ending 30 June 2017 reported VOCAT's total expenditure as follows:²
- Salaries and associated expenditure: \$2,231,805
 - Operating expenditure: \$724,523
- 18.7 Accordingly, for the year ending 30 June 2017, VOCAT's total salary and operating expenditure was \$2,956,328.³ This represented an increase of four per cent from the previous financial year.⁴
- 18.8 During the same period, VOCAT also paid \$43,408,546 in financial assistance to victims of crime, a figure which includes fees paid to service providers and legal practitioners.⁵
- 18.9 Accordingly, the total costs of VOCAT's operations for the year ending 30 June 2017, including salaries, operating costs, financial assistance paid to victims of crime, and fees paid to service providers and legal practitioners, was \$46,364,874.

Average cost per finalised claim

- 18.10 For the year ending 30 June 2017, the average cost per finalised application for financial assistance was \$410, excluding the costs met by the Magistrates' Court of Victoria's operating budget, including corporate services and magistrates' salaries.⁶ In this context, the average cost per finalised claim does not 'accurately reflect the true costs of VOCAT's operations'.⁷
- 18.11 The Magistrates' Court of Victoria's subsidisation of VOCAT's operations is outlined further below and discussed below in relation to responses from stakeholders.

Magistrates' Court of Victoria—subsidisation of VOCAT

- 18.12 VOCAT's Annual Report for 2016–17 notes that VOCAT's operating costs are low as a result of its subsidisation by the Magistrates' Court of Victoria. This includes:⁸
- being accommodated within Magistrates' Court venues
 - having magistrates as decision makers
 - being supported by Magistrates' Court registrars.
- 18.13 Accordingly, and as VOCAT acknowledges in its annual report, the Magistrates' Court of Victoria 'absorbs a large proportion of VOCAT's operating costs, including magistrates' salaries, infrastructure costs and corporate service expenses'.⁹

2 Victims of Crime Assistance Tribunal, *Annual Report 2016–17 (2017)* 65.

3 Ibid.

4 Ibid 64.

5 Ibid 63. This figure relates to award payments for expenses, lump sum payments to applicants, reimbursement costs for service providers and legal costs: 65.

6 Ibid 64.

7 Ibid.

8 Ibid.

9 Ibid.

VOCAT's current demand

Number of applications

- 18.14 Over the past four years, there has been a steady increase in the number of new applications filed with VOCAT each year, as follows:
- 2016–17: 7312 applications filed¹⁰
 - 2015–16: 6221 applications filed¹¹
 - 2014–15: 6113 applications filed¹²
 - 2013–14: 5722 applications filed¹³
- 18.15 VOCAT has observed that since VOCAT's establishment 20 years ago, applications to the Tribunal have increased almost every year.¹⁴ In their joint submission to the Victorian Royal Commission into Family Violence, the Magistrates' Court of Victoria and the Children's Court of Victoria also stated there had been a 337 per cent increase in VOCAT's case load between 2001–02 and 2013–14.¹⁵
- 18.16 More recently, VOCAT observed that in the 2016–17 financial year VOCAT had 'one of the biggest growths in the Tribunal's history',¹⁶ with an increase of 17.5 per cent in the number of applications received compared with the previous financial year.¹⁷ VOCAT suggested in its Annual Report for 2016–17 that this significant increase may be attributed to an increased number of applications filed electronically, and to VOCAT's delivery of structured information and training sessions to police recruits potentially improving awareness of VOCAT.¹⁸

Demand for different types of assistance under the VOCAA

- 18.17 VOCAT's Annual Report for 2016–17 outlines the total amount of assistance awarded by assistance type, as well as the fees paid to service providers and legal practitioners.¹⁹
- 18.18 Together, these figures provide an overview of the demand for different types of assistance under the VOCAA, as well as the costs of paying for reports from service providers (such as counselling/psychological/psychiatric reports) and reimbursing the costs of legal practitioners.

10 Ibid 3.

11 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 3.

12 Victims of Crime Assistance Tribunal, *Annual Report 2014–15* (2015) 4.

13 Victims of Crime Assistance Tribunal, *Annual Report 2013–14* (2014) 4.

14 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 14.

15 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.

16 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 14.

17 Ibid 32.

18 Ibid 9.

19 Ibid 56.

18.19 Table 4 below sets out the total amount of assistance awarded by assistance type, and fees for service providers and legal practitioners in the 2016–17 financial year.²⁰

Table 4: Total amount of assistance awarded by assistance type, and fees for service providers and legal practitioners—2016–17 financial year

Assistance type/fee for service	Amount	Percentage of total assistance awarded/fees for services
Special financial assistance	\$11,832,023	21.9%
Counselling	\$8,431,782	15.6%
Other expenses to assist recovery	\$8,158,252	15.1%
Distress	\$7,236,120	13.4%
Legal costs	\$5,762,959	10.7%
Loss of earnings	\$3,537,701	6.6%
Medical expenses	\$3,410,608	6.3%
Safety-related expenses	\$2,872,930	5.3%
Counselling/psychological/psychiatric reports	\$1,891,161	3.5%
Funeral expenses	\$552,836	1%
Loss/damage to clothing	\$138,342	0.3%
Pain and suffering	\$40,000	0.1%
Dependency	\$54,461	0.1%

- 18.20 Table 4 above shows that the top five areas of demand for VOCAT assistance and costs are:²¹
- awards of special financial assistance—21.9 per cent
 - awards for counselling—15.6 per cent
 - awards for other expenses to assist recovery—15.1 per cent
 - awards for distress—13.4 per cent
 - legal costs (reimbursements to legal practitioners for assisting victims with their VOCAT applications)—10.7 per cent.

Average award amounts

- 18.21 Average award amounts under the VOCAA are relatively consistent year to year. For example, the average amount of financial assistance awarded by VOCAT in 2016–17 was \$7983²² and the average amount of financial assistance awarded by VOCAT in 2015–16 was \$7784.²³
- 18.22 This is similar to the two previous financial years, which were \$7639 and \$7336 respectively.²⁴

Responses

Efficiency and sustainability

- 18.23 In its supplementary consultation paper, the Commission sought community and stakeholder views on whether the existing scheme was efficient and sustainable for the state.
- 18.24 As noted in Chapter 7, a number of stakeholders considered the use of judicial decision makers reduced the overall efficiency and sustainability of the existing scheme for the state. For example, stakeholders said that using magistrates and court staff for VOCAT purposes burdens an already stretched criminal justice system.²⁵ A number of stakeholders suggested that one of the benefits of an administrative scheme would be the freeing up of judicial resources.²⁶
- 18.25 Some stakeholders also suggested that the existing scheme’s reliance on lawyers was inefficient. For example, the Victims of Crime Commissioner submitted:
- If an administrative model was introduced and clear instructions, eligibility criteria and evidence required to support the application were documented, then legal representation would not be required, thus creating an almost \$6M saving to the public purse. Alternatively, this money could be used to provide further services to victims of crime in Victoria.²⁷
- 18.26 However, beyond consideration of alternative models of state-funded financial assistance, few stakeholders expressed a view on the efficiency and sustainability of the existing scheme.

21 Ibid.

22 Ibid 3.

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

24 \$7639 in 2014–15 and \$7336 in 2013–14: Victims of Crime Assistance Tribunal, *Annual Report 2014–15* (2015) 5; Victims of Crime Assistance Tribunal, *Annual Report 2013–14* (2014) 5.

25 Submission 49 (Victims of Crime Commissioner, Victoria); Consultations 4 (Victim, Witness and Court Support), 14 (Chief Magistrates’ Family Violence Taskforce); 16 (Regional Consultation—Ballarat Legal Professionals).

26 Submissions 2 (Victorian Civil and Administrative Tribunal), 31 (Victorian Council of Social Service), 37 (safe steps Family Violence Response Centre), 49 (Victims of Crime Commissioner, Victoria); Consultation 7 (Family Violence and Advocacy Organisations).

27 Submission 49 (Victims of Crime Commissioner, Victoria).

- 18.27 Some stakeholders did comment on the need for adequate funding and resourcing of any state-funded financial assistance scheme. For example, knowmore submitted that:
- while sustainability of the statutory scheme is an important consideration, it is not one that should impact in an unfair way upon victims, through inadequate awards. The intent of the Act should not be dissipated by inadequate resourcing of the scheme.²⁸
- 18.28 Similarly, Ryan Carlisle Thomas Lawyers submitted that ‘proper’ funding of the state-funded financial assistance scheme would assist the government to provide ‘timely, equitable and just administration of assistance to those victims in need’.²⁹

Operating costs of VOCAT

- 18.29 The Commission did not seek stakeholder views on the current operating costs of VOCAT, nor on what the establishment or operating costs of a new state-funded financial assistance scheme might be if one was introduced.
- 18.30 Nonetheless, some submissions addressed both the current operating costs of VOCAT, and the costs that might be associated with establishing a new scheme.
- 18.31 For example, the Victims of Crime Commissioner submitted that an administrative scheme ‘would result in considerable savings, notwithstanding the fact that VOCAT Magistrates are not paid out of VOCAT’s operating budget’.³⁰ In this context, the Victims of Crime Commissioner submitted that the ‘total operating costs for an administrative model would be in the vicinity of \$4,466,803’ per year.³¹
- 18.32 In contrast, VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria submitted that the existing VOCAT model is already efficient and sustainable, as it is heavily subsidised by the Magistrates’ Court of Victoria, enabling VOCAT to use court staff, judicial officers and court infrastructure and thereby limit its overall running costs.³² In this context, the joint submission of the Magistrates’ Court of Victoria and VOCAT also provided the Commission with an overview of trends in VOCAT operating expenditure over the past five years. These trends are outlined in Table 5 below.

Table 5: Trends in VOCAT operating expenditure³³

	2012/13	2013/14	2014/15	2015/16	2016/17
Operating costs	\$2,515,697	\$2,784,087	\$2,853,810	\$2,841,031	\$2,956,328
Increase from previous year (\$)	\$15,697	\$268,390	\$69,723	\$-12,779	\$11,5297
Variation from previous year (%)	1	11	3	0	4
Average \$ variation per annum					\$106,258.67
Average % variation per annum					3.5 per cent

- 18.33 Table 5 above shows that on average the operating expenditure of VOCAT has grown by an average 3.5 per cent each year, although some years might experience low or no growth (eg 2015/16) while other years may experience high growth (eg 2013/14 and 2016/17).

28 Submission 43 (knowmore).

29 Submission 38 (Ryan Carlisle Thomas Lawyers).

30 Submission 49 (Victims of Crime Commissioner, Victoria).

31 Ibid.

32 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

33 Submission 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal).

18.34 However, the joint submission of the Magistrates' Court of Victoria and VOCAT submitted that VOCAT's operating costs do not reflect 'the degree of subsidisation provided by MCV'.³⁴

18.35 Accordingly, the true operating cost of VOCAT is not known.

Demand

18.36 In its joint submission, the Magistrates' Court of Victoria and VOCAT submitted that:

Over the past 20 years, the Tribunal has received 93,944 applications for financial assistance, and awarded \$747 million to victims of crime. This has included 72,947 awards of financial assistance, and tens of thousands of awards of interim financial assistance.³⁵

18.37 VOCAT, the Magistrates' Court and the Children's Court also submitted that VOCAT has experienced 'steadily growing demand' and 'increasing system pressures'.³⁶

18.38 More specifically, the VOCAT, the Magistrates' Court and the Children's Court of Victoria noted:

an unsustainable upward trend in applications (on current resourcing levels) driven by: major recent justice reforms, such as implementation of [Royal Commission into Family Violence] recommendations; the commencement of online applications; and growing community rejection of the cultural "normalisation" of family violence.³⁷

18.39 In their joint submission, the Magistrates' Court of Victoria and VOCAT identified a number of demand drivers for the increased case load. These include:³⁸

- major justice reforms over recent years in response to landmark inquiries such as the Royal Commission into Family Violence and the Access to Justice Review
- the commencement of online applications in 2014 and its contribution to a sharp increase in applications between 2015–16 and 2016–17—the largest growth in the Tribunal's history
- increasing community understanding and rejection of the 'normalisation' of violence, particularly family violence
- government prioritisation of community safety initiatives, including promoting awareness of supports such as VOCAT.

18.40 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that there was significant pressure on VOCAT's sustainability because of:

- the increasing demand and complexity of cases, which take longer and contribute to delays
- VOCAT's operational budget, which is not keeping pace with demand
- a disproportionate component of the budget being spent on legal expenses as a proportion of award payments (11 per cent)
- reliance on Magistrates' Court of Victoria resources to subsidise VOCAT operations within an increasingly restrictive fiscal environment
- the impact of major justice reforms, such as those flowing from the Royal Commission into Family Violence
- systemic inefficiencies across the VOCAT service delivery model.³⁹

34 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

35 Ibid.

36 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

37 Ibid.

38 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

39 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria).

18.41 During the reporting period 2016–2017, 7312 applications were filed with VOCAT. This represents a 17.5 per cent increase over the previous year (6221). As noted in the joint submission of the Magistrates’ Court of Victoria and VOCAT, the effect of these demand drivers is that during this period, most major courts saw an increase in applications lodged.⁴⁰ For example Sunshine and Werribee experienced a 44 per cent and 43 per cent increase respectively, while Broadmeadows, Dandenong, Ringwood, Melbourne, Moorabbin, Geelong, Warrnambool and Heidelberg all had increases of over 20 per cent.⁴¹

VOCAT initiatives in response to demand

18.42 To address the demand pressures noted above, the Magistrates’ Court of Victoria and VOCAT submitted that VOCAT has introduced a number of initiatives aimed at improving system efficiencies and responding to increased demand, including:⁴²

- advocating for legislative changes to increase the financial delegation for registrars to make interim awards from \$1000 to \$5000 and to enable increases in the number of awards of interim financial assistance made by registrars
- enabling judicial registrars to consider less complex applications and variation requests
- developing guidelines and practice directions around common expense types such as funerals, psychological and psychiatric assessment reports and counselling fees
- improving consistency in decision making and administrative practices by enhancing training for and support to Tribunal members, judicial registrars and registrars
- introducing strategic coordination of applications for assistance arising from major incidents
- streamlining the processing of applications arising from sexual offences alleged to have been committed against multiple applicants by the same offender.

18.43 The joint submission of the Magistrates’ Court of Victoria and VOCAT also observed that the average amount of financial assistance awarded in 2016–17 (\$7983) was consistent with previous years. In this context, the Magistrates’ Court of Victoria and VOCAT also noted that the average amount of assistance awarded has remained fairly consistent over the past 20 years, and that this demonstrated that Tribunal members are applying the legislation consistently.⁴³

18.44 The submission by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria also noted that any changes to technical aspects of the VOCAA, including eligibility, assistance available and factors to be considered by the decision maker, would have resulting demand and cost implications.⁴⁴

18.45 VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria stated that ‘a review of VoCAT’s budget is long overdue’ while also acknowledging that demand modelling was required to anticipate projected demand for VOCAT because significant data gaps currently exist.⁴⁵

40 Submission 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal).

41 Ibid.

42 Ibid.

43 Ibid. The Commission notes, however, that as the average amount awarded has remained consistent rather than rising with inflation, the average award amount is actually reducing in real terms over time.

44 For example, any changes to the factors to be considered by the decision maker under sections 52 and 54 of the VOCAA, ‘would expand eligibility under the Act, allowing applications in circumstances where assistance may have been previously refused, with consequent demand and cost implications’: submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

45 Ibid.

Discussion and recommendations

Demand for the proposed scheme

- 18.46 Statistical analysis suggests demand for state-funded financial assistance—regardless of whether the current model is retained or a new model is introduced—is likely to increase each year. VOCAT has observed that since VOCAT’s establishment 20 years ago, applications to the Tribunal have increased almost every year,⁴⁶ and over the past four years, there has been a steady increase in the number of new applications filed with VOCAT each year.⁴⁷
- 18.47 In the Commission’s view, although demand for state-funded financial assistance is likely to increase, demand directed to VOCAT, or the proposed scheme, is difficult to quantify or project because demand is likely to be affected by:
- **Major justice reforms:** such as implementation of recommendations from the Royal Commission into Family Violence, which are likely to increase community awareness of family violence, leading to increased reporting and detection of family violence.⁴⁸
 - **Availability of other forms of financial assistance** including:
 - Family Violence Flexible Support Packages, which may be subject to annual budget fluctuations or changes⁴⁹
 - implementation of the proposed national redress scheme for institutional child sexual abuse, which might ultimately reduce reliance on state-funded financial assistance once operational⁵⁰
 - **Fluctuations in awareness of VOCAT or the proposed scheme:** with up to 90 per cent of eligible victims not currently accessing VOCAT, any increase in community awareness is likely to lead to an increase in application numbers⁵¹
 - **Any reduction in technical or legal barriers to assistance:** for example, if recommendations in this report are adopted, legal provisions that may have previously excluded some victims from accessing assistance, such as application time limits, may expand the numbers of eligible victims.⁵²
- 18.48 Accordingly, while statistical analysis suggests the upward trend in financial assistance applications is likely to continue, as it has since VOCAT’s inception,⁵³ in the Commission’s view, comprehensive demand modelling is required to explore VOCAT’s, or the proposed scheme’s, projected demand. Such modelling would need to take into account any schemes’ interaction with other justice initiatives and other relevant financial assistance programs (such as TAC or WorkCover), while at the same time, accounting for any recommendations in this report that, if implemented, may increase access to state-funded financial assistance.
- 18.49 The Commission notes that the NSW Department of Attorney General and Justice commissioned PricewaterhouseCoopers to review the *Victims Support and Rehabilitation Act 1996* (NSW) in 2012,⁵⁴ including providing a comprehensive costing of a proposed

46 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 14.

47 Ibid 3; Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 3; Victims of Crime Assistance Tribunal, *Annual Report 2014–15* (2015) 4; Victims of Crime Assistance Tribunal, *Annual Report 2013–14* (2014) 4.

48 Submission 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal).

49 See, eg, Victorian Government, *Family Violence Housing Support* (accessed 31 May 2018) <www.vic.gov.au/affordablehousing/housing-services/family-violence-housing-support.html>.

50 Subject to the passage of legislation, the Victorian Government will refer powers to the Commonwealth to ensure that Victorian state institutions participate in the proposed Commonwealth redress scheme: National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Vic) cl 1(2). The Commonwealth, and all state and territory governments (with the exception of Western Australia) have committed to join the proposed scheme. A number of non-government institutions have also committed to join the proposed scheme, including the Catholic Church, Anglican Church, the Salvation Army, the YMCA and Scouts Australia: Department of Social Services (Cth), *National Redress Scheme for People Who Have Experienced Institutional Child Sexual Abuse* (5 June 2018) <www.dss.gov.au/national-redress-scheme-for-people-who-have-experienced-institutional-child-sexual-abuse>.

51 Chapter 17 of this report makes recommendations to improve the overall awareness and accessibility of the proposed scheme.

52 Recommendations in Chs 12–16 of this report include proposals that may affect the numbers of victims accessing assistance, and certain types of assistance, under the proposed scheme.

53 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 14.

54 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012).

scheme. In addition, the Royal Commission into Institutional Responses to Child Sexual Abuse commissioned an independent report to project indicative participant volumes, costs and funding requirements associated with any proposed national redress scheme.⁵⁵

- 18.50 Although projecting the potential demands for VOCAT or a proposed scheme, as well as associated costs, are outside the terms of reference for this review, the Commission notes that the PricewaterhouseCoopers report projected the anticipated costs of the proposed scheme in New South Wales by:⁵⁶
- projecting the number of violent crimes
 - projecting the proportion of victims who might lodge a claim
 - estimating the proportion of claims that might use each category of support
 - estimating the average cost per claim of each category of support
 - projecting the total costs of each category of support
 - adding an allowance for cases management and administration of the scheme.
- 18.51 Similarly, Finity Consulting projected the anticipated costs of the proposed national redress scheme by assessing state populations, victim profiles, the number of redress participants in other schemes, the projected severity of abuse, payment scales, counselling needs, administrative costs and payment patterns.⁵⁷
- 18.52 In the Commission’s view, such methodology could be used in Victoria and cross-referenced with existing VOCAT data relating to the total amount of assistance awarded under the existing scheme, demand for the different types of assistance, and current fees paid to service providers and legal practitioners outlined above in Table 4. Such demand modelling should also make appropriate calculations for other environmental factors such as major justice reforms,⁵⁸ the availability of other forms of financial assistance, any fluctuations in awareness of VOCAT or the proposed scheme, and any reduction in technical or legal barriers to assistance if the recommendations in this report are adopted.
- 18.53 The need for demand modelling was also raised by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria in their joint submission, where it was acknowledged that demand modelling was required to anticipate projected demand for VOCAT in light of significant data gaps under the existing scheme.⁵⁹
- 18.54 In the Commission’s view, demand modelling is essential to not only better understand not only current unmet demand, but also appropriate budgeting requirements for any establishment or operating costs for the proposed scheme.
- 18.55 Accordingly, the Commission considers that a comprehensive demand modelling project be undertaken to assess the current unmet demand under the existing scheme, and anticipated demand under the proposed scheme including projecting:
- the potential number of eligible victims under the proposed Act
 - the proportion of victims that might apply to the proposed scheme, having regard to relevant justice initiatives, other financial assistance or redress schemes and the recommendations in this report that aim to reduce barriers, improve victim awareness and increase the number of victims accessing state-funded financial assistance.

55 Finity Consulting, *National Redress Scheme Participant and Cost Estimates—Royal Commission into Institutional Responses to Child Sexual Abuse* (2015).

56 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 74.

57 Finity Consulting, *National Redress Scheme Participant and Cost Estimates—Royal Commission into Institutional Responses to Child Sexual Abuse* (2015) 11–12.

58 Submission 53 (Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal) refers to justice reforms such as the Royal Commission into Family Violence

59 Submission 59 (Victims of Crime Assistance Tribunal, Magistrates’ Court of Victoria and Children’s Court of Victoria).

Recommendation—scheme establishment and demand

- 94** A comprehensive demand modelling project should be undertaken to assess current unmet demand under the existing scheme and anticipated demand under the proposed scheme.

Proposed establishment and operating costs

- 18.56 In Chapter 8, the Commission recommended that a new state-funded financial assistance scheme (the proposed scheme) be established, led by an independent, dedicated and specialised decision maker.
- 18.57 In Chapter 9, the Commission made recommendations relating to the establishment of the new scheme decision maker, specifically that the Office of the Victims of Crime Commissioner be expanded, with the Victims of Crime Commissioner’s functions and powers expanded to oversee the proposed scheme.
- 18.58 In making this recommendation, the Commission noted that additional staff would be required to support the expansion of the office of the Victims of Crime Commissioner to administer the proposed state-funded financial assistance scheme. The Commission recommended that the Victims of Crime Commissioner be provided with the appropriate staffing and funding necessary to assist the Commissioner in properly performing their functions consistent with section 16 of the *Victims of Crime Commissioner Act 2015* (Vic).⁶⁰
- 18.59 In Chapter 9, the Commission noted the staffing arrangements in other Australian jurisdictions with administrative schemes. Table 6 below provides an overview of approximate staffing in other administrative schemes, noting staffing numbers are subject to frequent change and are indicative numbers only.⁶¹

Table 6: Staffing arrangements in other Australian jurisdictions with administrative state-funded financial assistance schemes

Jurisdiction	Average number of applications per year (2016/17 figures)	Approximate number of staff
New South Wales ⁶²	19,573*	22 assessors (supported by a victim support team of 93 workers providing case management)
Western Australia ⁶³	3313	3 full-time assessors and 17.2 full-time administrative employees supporting assessors
Queensland ⁶⁴	2500	12 assessors

* includes all individual applications for counselling, financial support and recognition payments. Applications in all three categories have been counted as three separate applications, which accounts for the significantly higher numbers in New South Wales.

- 60 The Secretary of the Department of Justice and Regulation is required to ensure that the Victims of Crime Commissioner is provided with any employees necessary to assist the Commissioner in performing the Commissioner’s functions: *Victims of Crime Commissioner Act 2015* (Vic) s 16.
- 61 Staffing numbers are approximate, based on numbers provided during consultations, and are indicative only: Consultations 1 (Victim Assistance Queensland), 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT), 22 (Victims Services, NSW and the Commissioner of Victims Rights, NSW).
- 62 Application and staffing numbers were provided in Consultation 22 (Victims Services New South Wales and the Commissioner for Victims’ Rights NSW) and Submission 49 (Victims of Crime Commissioner, Victoria).
- 63 Application and staffing numbers are outlined in Office of Criminal Injuries Compensation, Department of the Attorney General Western Australia, *Chief Assessor’s Report 2016/17* (2017) 4.
- 64 Application and staffing numbers were provided in Consultation 1 (Victim Assistance Queensland).

- 18.60 As shown in Table 6, each jurisdiction uses different combinations of staff to undertake various assessment, case management and administrative duties. Due to the differing compositions of teams in the various state-funded financial assistance schemes, it is difficult to directly compare staffing numbers against relative demand for each scheme.
- 18.61 Comparing these staffing numbers against Victoria's current decision making approach is also challenging because:
- VOCAT comprises the Chief Magistrate and all magistrates and reserve magistrates under the *Magistrates' Court Act 1989* (Vic),⁶⁵ but the number of cases allocated to each magistrate is not published so it is unclear how many VOCAT cases each magistrate is allocated.
 - VOCAT is supported by Magistrates' Court registrars, but the Commission is unable to determine the percentage of VOCAT work undertaken by Magistrates' Court of Victoria staff.⁶⁶
 - VOCAT decision making is currently split between judicial registrars, who make approximately 20 per cent of final awards, and magistrates who make approximately 80 per cent of final awards.⁶⁷
- 18.62 Accordingly, in the Commission's view, the following establishment and operating costs will require further costing and consideration:
- **Scheme salaries and operating expenditure:** Current salaries and operating expenditure amount to approximately \$3 million per annum under the current VOCAT model,⁶⁸ increasing by approximately 4 per cent per year.⁶⁹ However, this figure does not take into account the subsidisation by the Magistrates' Court of some of VOCAT's operating costs, including the costs of using magistrates as decision makers, VOCAT being accommodated within Magistrates' Court venues and VOCAT being supported by Magistrates' Court registrars.⁷⁰
 - **Office infrastructure:** VOCAT's operating costs are lower as the physical infrastructure required for the Tribunal's operations is accommodated within Magistrates' Court venues.⁷¹ The physical infrastructure required to establish an expanded Office of the Victims of Crime Commissioner, including relevant regional presence, would need to be fully costed.
 - **Average cost per finalised claim:** As stated above, for the year ending 30 June 2017, the average cost per finalised application for financial assistance was \$410, excluding the costs met by the Magistrates' Court's operating budget, such as corporate services and magistrates' salaries.⁷² The administrative costs per finalised claim would require further costing and consideration, particularly in light of the administrative costs for the proposed national redress scheme being estimated at approximately \$3000 per scheme participant.⁷³

65 *Victims of Crime Assistance Act 1996* (Vic) s 19(2).

66 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 64.

67 *Ibid* 3.

68 *Ibid* 65.

69 Submission 53 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

70 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 64.

71 *Ibid*.

72 *Ibid*.

73 Finity Consulting, *National Redress Scheme Participant and Cost Estimates—Royal Commission into Institutional Responses to Child Sexual Abuse* (2015) 55.

Sustainability of the proposed victims of crime financial assistance scheme

Factors and initiatives promoting sustainability of the proposed scheme

- 18.63 In Chapters 9–16, the Commission made a number of detailed recommendations regarding the proposed Act and scheme. This included recommendations in relation to eligibility under the proposed Act, assistance available under the proposed Act and the interaction of the proposed scheme with other assistance. A number of the recommendations in those chapters aim to balance the need to provide victims with appropriate financial assistance to assist in their recovery, with the need to ensure the proposed scheme is efficient and sustainable for the state.
- 18.64 Efficiency and sustainability considerations underpinning these recommendations include that:
- the state’s judicial and court resources be reserved for decision making that requires judicial oversight, rather than using the Magistrates’ Court to supplement Victoria’s state-funded financial assistance scheme, by proposing the establishment of a new state-funded financial assistance scheme overseen by a new decision maker
 - the proposed scheme be overseen by an expanded Office of the Victims of Crime Commissioner, rather than establishing a new statutory entity
 - the proposed scheme be structured in a way that will reduce reliance on legal representation, noting that reimbursing lawyers for assisting victims with their VOCAT applications currently costs approximately \$5,762,959 per year
 - the proposed Act limit assistance to circumstances where assistance (for the same purpose) cannot be obtained from another scheme
 - the criminal basis to the state-funded financial assistance scheme be maintained—for example, by not extending assistance to non-criminal forms of violence, abuse or harassment
 - the definition of ‘injury’ under the proposed Act not include property damage
 - the assistance provided under the proposed Act be ‘reasonable’, certain categories of assistance be ‘capped’ and the ‘related criminal acts’ provisions be retained
 - application time limits be retained
 - the two separate categories of special financial assistance and expenses to assist recovery are consolidated into one recovery payment.
- 18.65 While there are a number of factors and initiatives incorporated into the proposed Act and scheme to promote its efficiency and sustainability, the next part of this chapter reviews, and makes recommendations in relation to, mechanisms for contribution by convicted offenders as a further means to also improve sustainability of the state-funded financial assistance schemes.

Contribution from convicted offenders

- 18.66 Contributions from convicted offenders, often called ‘offender recovery’ in the context of state-funded financial assistance schemes, enables the state to recover money from the responsible offender.⁷⁴ This is in circumstances where they have been convicted of the crime which relates to the state-funded financial assistance awarded to an individual victim in a particular matter.⁷⁵

74

Although most jurisdictions use the term ‘offender recovery’, this report refers to offender recovery as ‘offender contribution’ as the term ‘recovery’ in this report relates to victim recovery from a criminal act.

75

This differs to other mechanisms for offender contribution such as victim levies, discussed below.

- 18.67 Offender contribution only occurs where a person is charged, prosecuted and convicted of an offence. Offender contribution provides for contribution by an individual offender in relation to the specific crime they committed, and in relation to the specific victim/s associated with their offending. However, in many circumstances, offenders may not be able to be identified, or there may be insufficient evidence to support a prosecution or a conviction. Accordingly, offender contribution may not apply to the particular circumstances of many victims.
- 18.68 Offender contribution can be used by state-funded financial assistance schemes to supplement other funding sources, and to offset some of the costs of administering such schemes. Accordingly, in the Commission's supplementary consultation paper, the Commission sought community and stakeholder views on offender contribution under the existing VOCAA, and also sought views on whether offender contribution should remain part of a state-funded financial assistance scheme.⁷⁶

Current law

- 18.69 The VOCAA enables a victim to assign to the state their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates.⁷⁷ The effect of this provision is that where a victim exercises their right of assignment, the state stands in the shoes of the victim for the purpose of recovering any other award that may be available to the victim by way of separate proceedings for damages or compensation and determined in accordance with the relevant standard of proof.
- 18.70 Offender contribution, for example by way of a civil law claim for compensation, or an application for a restitution or compensation order under Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic) following the conviction of an offender, is therefore enabled by section 51 of the VOCAA, as the provision is broad and enables the state to recover 'from any other person'. However, in the absence of a victim assigning this right to the state, the state cannot recover monies from an offender.
- 18.71 Section 51 of the VOCAA is also supported by section 61 of the VOCAA, which reiterates that 'the making of an award of assistance [under the VOCAA] does not affect the right of a person to recover from any other person'.⁷⁸
- 18.72 Where money is recovered by the state in the exercise of a right assigned to it in accordance with section 51(1) of the Act, monies must be dealt with as follows:⁷⁹
- an amount equal to the expended amount, or the total money recovered if it is less than the expended amount, must be paid into the Consolidated Fund
 - the balance, if any, must be paid to the assignor.
- 18.73 The effect of this is where money is recovered by the state, the victim would only receive the balance after the costs incurred by the state in recovering the monies were paid into the Consolidated Fund.
- 18.74 As the current offender contribution provision in the VOCAA relies on a victim electing to assign their right to recover to the state, the VOCAA's offender recovery provision is quite narrow. For example, it does not go as far as the provisions in the former *Criminal Injuries Compensation Act 1983* (Vic) which enabled the tribunal established under that Act to order an offender to refund compensation paid on application of the Director of Public Prosecutions.⁸⁰

76 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 199. In the Supplementary Consultation Paper, the Commission used the term 'offender recovery'.

77 *Victims of Crime Assistance Act 1996* (Vic) s 51(1).

78 *Ibid* s 61.

79 *Ibid* s 51(2).

80 *Criminal Injuries Compensation Act 1983* (Vic) s 27. The effect of this former provision can also be seen in the Transitional Provisions of the *Victims of Crime Assistance Act 1996* (Vic) sch 1 s 8.

- 18.75 As discussed in the Commission's supplementary consultation paper, the offender contribution provision in section 51 of the VOCAA is rarely used.⁸¹ In the then-Department of Justice's 2009 review of victims of crime compensation, the Department of Justice stated that section 51 of the VOCAA had not been exercised in practice.⁸²
- 18.76 Victoria's state-funded financial assistance scheme has no other offender contribution mechanisms, although, as discussed in Chapter 4, victims of crime can seek compensation or restitution under the *Sentencing Act 1991* (Vic) or pursue a civil action against an offender for an award of damages.⁸³
- 18.77 Victoria's approach to offender contribution is quite different to the approach in other jurisdictions. As discussed below, other jurisdictions provide the state with an express right to recover directly from an offender and to seek enforcement of that debt as a statutory debt against the state. However, the VOCAA contains no such equivalent provision.

Offender contribution in other jurisdictions

- 18.78 In New South Wales, the Commissioner of Victims Rights can make a provisional order for restitution against a convicted offender⁸⁴ which may be enforced as if it were an order made in civil proceedings.⁸⁵ Victims Services NSW states that the purpose of such provisions 'is to place responsibility on offenders to contribute to assisting victims in recovering from the act of violence'.⁸⁶
- 18.79 Under the *Victims of Crime (Financial Assistance) Act 2016* (ACT) the Victims of Crime Commissioner must, as far as practicable, recover from an offender the amount of financial assistance provided to a victim.⁸⁷ However, there are a number safeguards, and limits to such actions, including:⁸⁸
- The commissioner must not take, or continue, recovery action without taking into account the objective risks to the safety of any person and the subjective concerns of an assisted person about the commissioner's contact with an offender or recovery action generally.
 - The commissioner must consult the assisted person (victim) before giving a recovery intention notice to an offender, providing the assisted person 28 days to raise any concerns about such action.
 - The Commissioner must not give the offender confidential information about a person who has received financial assistance or payments including the name, contact details, medical or psychological reports, counselling notes or other identifying information about the assisted person.
 - The commissioner must be satisfied on reasonable grounds that recovery is practicable and appropriate.
- 18.80 *The Victims of Crime Assistance Act 2009* (Qld) also provides for the state to recover assistance granted for an act of violence from a person who is convicted of a relevant offence for the act.⁸⁹ Unlike the ACT legislation, the Queensland legislation does not provide for consideration of a victim's view or safety concerns.

81 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 197.

82 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 49.

83 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 33–4; Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 17.

84 *Victims Rights and Support Act 2013* (NSW) s 59.

85 *Ibid* s 72.

86 Department of Justice (NSW), *Victims Services Data Profiles: Restitution 2015/6*, Information Sheet (2016) 1.

87 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 71(1)

88 *Ibid* ss 72–73, 76.

89 *Victims of Crime Assistance Act 2009* (Qld) ss 107, 109.

Commonwealth proposal for the early release of superannuation benefits for victims of crime

- 18.81 On 8 December 2017, the Australian Government announced a Treasury-led review of the rules governing early release of superannuation.⁹⁰
- 18.82 An issues paper was released in December 2017 which considered whether State or Territory compensation schemes for victims of crime should be able to recover costs from a perpetrator's superannuation,⁹¹ and whether victims of crime should be able to access a perpetrator's superannuation for the purposes of a compensation or restitution order.⁹²
- 18.83 A media report in March 2018 stated that 'The Government is in the process of drafting the legislation with plans to introduce it to Parliament by the end of the year'.⁹³ On 28 May 2018, the Government released for public consultation two draft proposals for how victims of crime might access a perpetrator's superannuation in certain circumstances:⁹⁴
- a 'claw-back' mechanism for 'out of character' superannuation contributions made by offenders to shield their assets
 - allowing victims of serious, violent crimes to be able to access a perpetrator's superannuation as compensation where other assets have been exhausted, subject to appropriate limits and thresholds.
- 18.84 These proposals may impact offender contribution for the purposes of state-funded financial assistance in two ways:
- state or territory state-funded financial assistance or compensation schemes, like VOCAT or the proposed scheme, may be able to access a perpetrator's superannuation as part of offender contribution mechanisms in state legislation⁹⁵
 - victims of crime may be able to access a perpetrator's superannuation for the purposes of enforcing a compensation or restitution order.⁹⁶ This may ultimately reduce reliance on state-funded financial assistance.
- 18.85 As at May 2018, the public consultation was ongoing. Accordingly, it is not clear how the proposals to enable release of superannuation benefits for victims of crime will intersect with VOCAT or the proposed scheme.

Responses

- 18.86 Few stakeholders commented on the operation of offender contribution under section 51 of the VOCAA. The Victims of Crime Commissioner submitted:

There is no evidence to suggest that any victim of crime in Victoria has ever assigned their rights to the State of Victoria, or to suggest that the State has ever commenced proceedings to recover money from an offender.⁹⁷

90 Kelly O'Dwyer, 'Government to Review Rules for Early Release of Superannuation, including Victims of Crime Compensation' (Media Release, 8 December 2018) <<http://kmo.ministers.treasury.gov.au/media-release/118-2017/>>.

91 The Treasury (Cth), *Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation*, Issues Paper (2017) 23.

92 The Treasury (Cth), *Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation*, Issues Paper (2017) 19.

93 Elise Fantin 'Victims of Crime Could Access the Superannuation of their Perpetrators under New Proposal', *ABC News* (online), 26 March 2018, <www.abc.net.au/news/2018-03-26/proposal-for-victims-of-crime-access-perpetrators-superannuation/9587154>.

94 The Treasury (Cth), *Review of Superannuation and Victims of Crime Compensation* (2018) <<https://treasury.gov.au/consultation/c2018-t293803/>>.

95 For details of this proposal see: The Treasury (Cth), *Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation*, Issues Paper (2017) 23. For example, under the *Victims of Crime Assistance Act 1996* (Vic) s 51, a victim may assign their right to recover from an offender to the State.

96 The Treasury (Cth), *Early Release of Superannuation Benefits: Under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation*, Issues Paper (2017) 19.

97 Submission 49 (Victims of Crime Commissioner, Victoria).

- 18.87 The Victims of Crime Commissioner also submitted that:
- Offenders should be held not only criminally responsible for their actions, but financially as well. It is iniquitous that law abiding citizens have to pay to compensate victims of crime (through the payment of their taxes), when the person who caused the injuries is absolved from financial responsibility.⁹⁸
- 18.88 The Victims of Crime Commissioner submitted that the state should attempt to recover funds from convicted offenders, but did not state definitively whether that responsibility should sit with his office or another area of government.⁹⁹
- 18.89 Schembri & Co Lawyers submitted that VOCAT should use section 51 of the VOCAA and 'recover awards from offenders who have been convicted and found guilty of the act of violence to alleviate the financial burden from the State and make offenders accountable for their behaviour'.¹⁰⁰ A representative of the Anglicare Victoria Victims Assistance Program suggested Victoria should attempt to recover monies from offenders as other Australian jurisdictions do.¹⁰¹
- 18.90 One submission suggested section 51 was a 'convoluted aspect' of the existing scheme, given the provision relies on the victim to assign their rights to the state, and that it might be suitable to retain the provision but that such assignment should be sought and pursued more often.¹⁰² Conversely, Springvale Monash Legal Service submitted that section 51 of the VOCAA was 'impractical' and should be removed.¹⁰³
- 18.91 Consultations with relevant state-funded financial assistance schemes in other Australian jurisdictions provided insight into the practical operation of offender contribution in circumstances when the relevant legislation does not rely on a victim assigning their right to seek offender contribution to the state.
- 18.92 During consultations with Victim Support ACT, the ACT Victims of Crime Commissioner told the Commission that Victim Support ACT is cautious about seeking repayments from offenders and takes into account victims' views.¹⁰⁴ The Victims of Crime Commissioner also acknowledged that offender contribution is not the primary focus of the ACT scheme and so little money is ever recovered from offenders.¹⁰⁵ The Victims of Crime Commissioner told the Commission that offender contribution must be appropriately resourced if it is to be effective and that Victim Support ACT are not resourced to prioritise offender contribution, as their resources are stretched finalising victim applications.¹⁰⁶ The Victims of Crime Commissioner also raised concerns about whether offender contribution is appropriate in administrative schemes as it might be inferred by an offender that such recovery is victim-initiated.¹⁰⁷
- 18.93 In a consultation with Victim Assist Queensland (VAQ), the Commission was told that VAQ have a small debt recovery team of two staff members to support offender contribution.¹⁰⁸ The Commission was told that victims are given notice of the potential for offender contribution when they apply for the scheme.¹⁰⁹ As debt recovery only occurs if an offender is found guilty, VAQ told the Commission that this usually mitigates most safety issues but any concerns raised by victims are treated on a case by case basis. In this context, VAQ may decide not to proceed with the offender contribution process.¹¹⁰

98 Ibid.

99 Ibid.

100 Submission 19 (Schembri & Co Lawyers).

101 Submission 5 (Anglicare Victoria Victims Assistance Program).

102 Submission 27 (Name withheld).

103 Submission 41 (Springvale Monash Legal Service).

104 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

105 Ibid.

106 Ibid.

107 Ibid.

108 Consultation 1 (Victim Assist Queensland).

109 Ibid.

110 Ibid.

VAQ emphasised the importance for victims of seeing offenders being made accountable, noting that some victims have told VAQ that they want the offender, rather than the state, to pay.¹¹¹

- 18.94 From a practical perspective, VAQ works closely with Queensland's State Penalties Enforcement Registry (SPER) to increase the chances of recovering monies.¹¹² VAQ only recovers monies relating to lump sum payments, rather than awards for other expenses to ensure offenders are not given specific information about a victim's loss of earnings or other personal expenses.¹¹³
- 18.95 VAQ told the Commission that one issue associated with offender contribution is that offenders may not be informed by their lawyers that by pleading guilty (for example, to a lesser charge or to avoid the significant costs of a trial), their guilty plea will automatically trigger the offender contribution process if the victim has applied for assistance.¹¹⁴

Discussion and recommendations

- 18.96 As noted above, few stakeholders commented on the operation of section 51 of the VOCAA. Only two submissions suggested section 51 of the VOCAA be retained or reformed,¹¹⁵ and one submission suggested the provision was 'impractical' and should be removed.¹¹⁶
- 18.97 In the Commission's view, there are three main considerations in relation to offender contribution:
- First, and as a threshold issue, is it appropriate for state-funded financial assistance schemes to make provision for offender contribution in all, or limited, circumstances?
 - Secondly, are the potential advantages of offender contribution outweighed by the potential disadvantages? Disadvantages include:
 - the risk of an offender retaliating against a victim for the state's pursuit of contribution
 - the practical difficulties with enforcing debts against offenders, many of whom are unlikely to have means to pay
 - the need to divert scheme resources away from assisting victims to pursuing offenders for debts.
 - Finally, if offender contribution is retained under the proposed scheme, is the existing provision in section 51 of the VOCAA, which relies on victims assigning their right to the state, the best mechanism by which to seek such contribution?
- 18.98 The Commission considers each of these matters below.

Is it appropriate for state-funded financial assistance schemes to make provision for offender contribution?

- 18.99 In the Commission's report *The Role of Victims of Crime in the Criminal Trial Process*, the Commission explored victims' views on receiving money direct from an offender as opposed to state-based financial assistance.¹¹⁷ In that report, the Commission noted that some victims may not want to receive money direct from the offender, particularly over a long period, while other victims would prefer to receive compensation direct from the offender than from the state, noting money from the offender may represent acknowledgment of the harm caused.¹¹⁸ J D W E Mulder has also observed that some victims of crime have a strong preference for compensation direct from the offender

111 Ibid.

112 Ibid.

113 Ibid.

114 Ibid.

115 Submissions 19 (Schembri & Co Lawyers), 27 (Name withheld).

116 Submission 41 (Springvale Monash Legal Service).

117 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 229.

118 Ibid.

rather than the state for reasons such as reinforcing responsibility for the harm incurred.¹¹⁹ This is also reflected in research by Hayley Catherine Clark where some victims of sexual assault identified the importance of money coming from the perpetrator, who 'owes' victims for their wrongs, rather than from the state.¹²⁰

- 18.100 The matter of whether victims derive benefit from receiving money direct from the offender, as compared to state-funded financial assistance, is complicated by the delay victims experience when pursuing restitution or compensation direct from an offender. Such avenues require the completion of either a civil or criminal court matter, and are frequently subject to significant delays. As discussed in Chapters 7 and 8, research consistently demonstrates that delays in the payment of financial assistance to victims of crime can have a counter-therapeutic effect.¹²¹
- 18.101 As detailed in Chapter 7 of this report, victims' 'justice needs' vary and accordingly, some victims may be deterred from applying for state-funded financial assistance if they are aware offender contribution might be pursued; while other victims may consider it an important component of state-funded financial assistance that offenders contribute to the costs of state-funded financial assistance awards. NSW Victims Services states, for example, that the purpose of offender contribution 'is to place responsibility on offenders to contribute to assisting victims in recovering from the act of violence'.¹²²
- 18.102 The Commission notes that most other Australian jurisdictions provide for the relevant state-funded financial assistance scheme to recover monies from offenders if the perpetrator is convicted or found guilty without requiring a victim to assign their right to the state.¹²³
- 18.103 Given some victims do consider it appropriate for offenders to contribute money towards their assistance or recovery, and noting that offender contribution provisions are provided for by most other Australian jurisdictions, the Commission considers that it is appropriate that state-funded financial assistance schemes make provision for offender contribution. In particular, the Commission notes the potential for victims to feel validated and acknowledged by the offender's financial contribution, thereby maximising the therapeutic effect of state-funded financial assistance for victims, as well as enabling the state to recoup some of the costs of state-funded financial assistance.
- 18.104 However, the potential advantages of offender contribution must also be considered alongside the potential disadvantages, as discussed further below.

Are the potential advantages of offender contribution outweighed by the potential disadvantages?

- 18.105 The potential advantages of offender contribution, such as holding perpetrators to account for the harms caused,¹²⁴ may be outweighed by the potential disadvantages of pursuing offender recovery, including:
- the potential safety risks for victims should an offender retaliate against a victim for the state's pursuit of contribution
 - the practical difficulties with enforcing debts against offenders, many of whom are unlikely to have means to pay
 - the need to divert scheme resources away from assisting victims, to pursuing offenders for debts.

119 J D W E Mulder, *Compensation: The Victim's Perspective* (Wolf Legal Publishers, 2013) 25.

120 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 123.

121 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 69.

122 Department of Justice (NSW), *Victims Services Data Profiles: Restitution 2015/6*, Information Sheet (2016) 1.

123 See, eg, *Victims Rights and Support Act 2013* (NSW) s 59; *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 71(1); *Victims of Crime Assistance Act 2009* (Qld) ss 107–109; *Victims of Crime Assistance Act 1976* (TAS) s 7A; *Criminal Injuries Compensation Act 2003* (WA) s 49.

124 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 229.

Safety issues

- 18.106 In the Commission's supplementary consultation paper, the Commission noted academic concerns about offender contribution mechanisms in relevant Australian jurisdictions' financial assistance legislation due to concerns about victim safety and wellbeing, particularly with for victims of family violence.¹²⁵
- 18.107 Concerns about victim safety with respect to offender contribution were also raised during the Commission's consultations with other Australian jurisdictions. For example, the Commission was told by the ACT Victims of Crime Commissioner that Victim Support ACT is cautious about seeking repayments from offenders and takes into account victims' views.¹²⁶ The Victims of Crime Commissioner also raised concerns about whether offender contribution is appropriate in administrative schemes as an offender might assume that such contribution is victim-initiated.¹²⁷
- 18.108 In this respect, the Commission notes that under the ACT legislation, the Victims of Crime Commissioner must not take, or continue, offender contribution action without taking into account:¹²⁸
- the objective risks to the safety of any person
 - the subjective concerns of an assisted person about the commissioner's contact with an offender or contribution action generally.
- 18.109 Isobelle Barrett Meyering has observed that 'while the concept of perpetrator accountability is attractive in theory, the impact of making recovery orders on victims' experiences of the compensation process needs to be carefully weighed'.¹²⁹

Practical difficulties with offender contribution

- 18.110 The practical difficulties pursuing offender contribution include:
- the fact that many offenders are unlikely to have means to pay
 - the need to divert scheme resources away from assisting crimes, to pursuing offenders for debts.
- 18.111 During consultations with Victim Assistance Queensland (VAQ), the Commission was told that VAQ has a small debt-recovery team (two staff members) to assist with offender contribution.¹³⁰ VAQ work closely with Queensland's State Penalties Enforcement Registry (SPER) to increase the chances of contribution.¹³¹
- 18.112 In the supplementary consultation paper, the Commission noted the practical difficulties beyond resourcing implications in recovering monies from offenders. These include:
- that the majority of offenders are generally from lower socio-economic backgrounds and do not have accumulated assets
 - that many offenders are unemployed for significant periods of time or may be incarcerated and thus have limited ability to pay
 - that many offenders are difficult to locate to enforce debts.¹³²

125 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 197. See also Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 12.

126 Consultation 21 (Victim Support ACT and the Victims of Crime Commissioner, ACT).

127 Ibid.

128 *Victims of Crime (Financial Assistance) Act 2016 (ACT) s 72.*

129 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 11.

130 Consultation 1 (Victim Assist Queensland).

131 Ibid.

132 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 198. See also Department of Justice (NSW), *Victims Services Data Profiles: Restitution 2015/6*, Information Sheet (2016) 2.

- 18.113 Some of these issues are illustrated by the experience in New South Wales. In New South Wales, 2454 provisional orders were issued in 2015–16 for \$20.06 million, of which only 48 were paid in full.¹³³ To enforce such orders, Victims Services must work with the State Debt Recovery Office.¹³⁴
- 18.114 Nonetheless, \$4.37 million was recovered during the 2015–16 financial year from such restitution processes which, in addition to victim levies, provided almost \$15 million to the NSW financial assistance scheme that year.¹³⁵
- 18.115 Additionally, the Commission notes that the Australian Government has released for public consultation two draft proposals for how victims of crime might access a perpetrator’s superannuation in certain circumstances. Should such proposals proceed,¹³⁶ it is possible that the monies able to be recovered from offenders may be increased and therefore, some of the practical difficulties associated with offender contribution reduced.

Is section 51 of the VOCAA the best way to achieve offender contribution?

- 18.116 As noted above, few stakeholders commented on section 51 of the VOCAA. Research indicates that section 51 of the VOCAA appeared to be used rarely (if at all).¹³⁷
- 18.117 The fact that section 51 of the VOCAA appears not to be used in practice raises questions about the effectiveness of the provision. However, unlike provisions in some other jurisdictions, which provide an express right for the state to recover directly from an offender, the Commission considers that the current formulation of section 51, which enables a victim to assign to the state their right to recover from any person, including an offender, has some positive benefits. For example, many of the concerns about safety in relation to offender contribution in other jurisdictions do not apply in Victoria as the VOCAA first requires a victim to elect to assign their right to seek offender contribution to the state. Victims who do not want the offender pursued because of safety or wellbeing concerns would be unlikely to elect to assign their rights to the state. In this context, section 51 is a victim-centred provision, prioritising victims’ safety. At the same time, however, reliance on a victim assigning their right to the state as the trigger for offender contribution may not be as effective as other schemes that do not rely on such a trigger for offender contribution. In this context, it is also unclear whether, or how, victims are advised of this right during the VOCAT process.
- 18.118 In addition, the Commission notes that where a victim assigns their right to the state in accordance with section 51 of the VOCAA, and the state decides to pursue recovery, the state must instigate separate proceedings to be determined in accordance with the relevant standard of proof. In relation to an alleged offender, and as noted above, such proceedings could be a civil law claim for compensation or an application for a restitution or compensation order under Divisions 1 and 2 of the *Sentencing Act 1991* (Vic).

Offender contribution under the proposed Act

- 18.119 As outlined above, the Commission considers it is appropriate that state-funded financial assistance schemes make provision for offender contribution in some circumstances. In reaching this conclusion, the Commission notes:
- the current provision in the VOCAA enabling such contribution, notwithstanding this approach is different to the approach adopted in other jurisdictions
 - some victims’ views that it may assist in their recovery to have an offender contribute

133 Department of Justice (NSW), *Victims Services Data Profiles: Restitution 2015/6*, Information Sheet (2016) 2.

134 Ibid 1.

135 Ibid.

136 As at 28 May 2018, the public consultation was ongoing: The Treasury (Cth), *Review of Superannuation and Victims of Crime Compensation* (2018) <<https://treasury.gov.au/consultation/c2018-t293803/>>.

137 See, eg, Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 197; Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 49.

- the fact that offender contribution provisions are provided for by most other Australian jurisdictions, albeit as a directly enforceable statutory debt.
- 18.120 In the Commission's view, the safety issues relating to offender contribution can also be mitigated by:
- enabling offender contribution only in circumstances where a victim elects for such a process to be initiated as provided by the current provisions of the VOCAA
 - requiring a decision maker, notwithstanding a victim's wishes that offender contribution be pursued, to assess the objective risks to the safety of any person if such offender contribution were to be pursued. This proposed approach is similar to the safety provisions incorporated into the ACT legislation whereby the Victims of Crime Commissioner must not take, or continue, recovery action without taking into account objective risks to the safety of any person.¹³⁸
- 18.121 In terms of the practical difficulties with offender contribution, the Commission is also of the view that these difficulties can be mitigated by:
- not requiring a decision maker to pursue contribution where such recovery does not have a reasonable prospect of success, noting evidence suggesting many offenders will have limited financial resources¹³⁹
 - providing appropriate resourcing for offender contribution, separate to any resourcing of the scheme established for the purposes of assisting victims.
- 18.122 Although section 51 of the VOCAA is rarely used, the Commission considers that section 51 of the VOCAA appropriately balances victim safety and the ability for the state to pursue offender contribution. Unlike provisions in other jurisdictions, many of the concerns about safety in relation to offender contribution do not apply in Victoria. As the VOCAA requires a victim to elect to assign their right, victims who do not want the offender pursued because of concerns for their own safety or wellbeing would be unlikely to elect to assign their rights to the state.
- 18.123 The Commission notes that the reliance on a victim assigning their right to the state is only effective if a victim is advised of this right, and the scheme is operationally resourced to undertake such recovery. In the Commission's view, it is not the current construction of section 51 of the VOCAA that is an issue, but the absence of any advice, information, resources or infrastructure to operationalise it.
- 18.124 Accordingly, the Commission considers that a victim should remain able to assign to the state their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates, as is currently provided for under section 51 of the VOCAA. However, to support this provision, the Commission considers that the proposed new state-funded financial assistance Act (proposed Act) should also require the scheme decision maker to advise victims of this right.
- 18.125 To ensure victim safety remains paramount, the Commission also considers that the proposed Act should require the scheme decision maker to assess any objective safety risks. This is similar to the approach adopted in the Australian Capital Territory where the *Victims of Crime (Financial Assistance) Act 2016 (ACT)* provides that the Commissioner must not take, or continue, contribution action without taking into account objective risks to the safety of any person.¹⁴⁰

- 18.126 To ensure scheme efficiency and sustainability, the Commission also considers that the proposed Act should provide the scheme decision maker with discretion not to recover an amount from an offender where the decision maker determines that the recovery does not have a reasonable prospect of success. This is also similar to the provision in the ACT legislation.¹⁴¹ To support this, the proposed Act should provide the proposed scheme with appropriate power to investigate and obtain information to assist in determining whether the offender contribution has a reasonable prospect of success.
- 18.127 The VOCAA currently provides VOCAT with broad investigative powers,¹⁴² and broad powers to obtain information, including requiring other government departments or services to provide VOCAT with any information or documents relevant to the application.¹⁴³ Accordingly, similar powers should be provided for under the proposed Act to ensure the scheme can determine whether offender contribution has a reasonable prospect of success.
- 18.128 Finally, to enable the proposed scheme to pursue offender contribution effectively, the Commission considers that the proposed scheme decision maker should be provided with dedicated funding and resourcing sufficient to pursue such contributions and so as not to impact on the provision of support to victims under the proposed scheme. In this context the Commissioner considers that further government consideration of the appropriate agency for pursuing such contributions is required. Similarly to the approach in Queensland, and to maximise efficiencies and expertise, the recovery functions of the proposed scheme decision maker could be undertaken in conjunction with relevant Department of Justice and Regulation enforcement agencies, such as Infringement, Management and Enforcement Services.

141 Ibid s 71(1)

142 *Victims of Crime Assistance Act 1996* (Vic) s 39.

143 Ibid s 40.

Recommendations—sustainability of the proposed scheme—offender recovery

- 95 The proposed Act should:
- (a) enable a victim to assign to the state their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates, as is currently provided for under section 51 of the *Victims of Crime Assistance Act 1996* (Vic)
 - (b) require any amount equal to the expended amount to be paid into the Consolidated Fund with the balance, if any, to be paid to the assignor, as is currently provided for under section 51 of the *Victims of Crime Assistance Act 1996* (Vic)
 - (c) provide that the scheme decision maker must advise all victims that they may assign to the state their right to recover from any other person, and provide clear information on the process for such recovery
 - (d) notwithstanding a victim's assignment of their right, provide the proposed scheme decision maker with discretion not to recover or continue to recover an amount from an offender because:
 - (i) of the scheme decision maker's assessment of the objective risks to the safety of any person; or
 - (ii) the scheme decision maker determines that the recovery does not have a reasonable prospect of success
 - (e) provide the scheme decision maker with the power to investigate and obtain any information reasonably necessary to assist in determining whether the recovery has a reasonable prospect of success.
- 96 To enable offender contributions to be effectively pursued, where a victim elects for the state to do so:
- (a) the scheme decision maker should be provided with dedicated funding and resourcing to pursue such contributions and this funding should be sufficient not to divert resources from the provision of support to victims under the proposed scheme, and
 - (b) there should be further government consideration of the appropriate agency for pursuing such contributions.

Levies imposed on convicted offenders—‘victim levies’

- 18.129 A levy imposed on convicted offenders—usually referred to as a ‘victim levy’—is a standard amount levied on all offenders found guilty of certain offences, with the monies received directed to a special funding ‘pool’ to supplement funding sources for state-funded financial assistance or other state purposes. Unlike offender recovery outlined above, victim levies are applied against all specified offenders,¹⁴⁴ with the monies collected directed to a pool of funds, not towards specific victims.
- 18.130 Victoria does not currently have a victim levy. However, as other state-funded financial assistance schemes use such levies to assist with the funding of state-funded financial assistance schemes, and noting the supplementary terms of reference objective that the state-funded financial assistance scheme should be efficient and sustainable for the state, the Commission sought community and stakeholder views on victim levies in its supplementary consultation paper.¹⁴⁵
- 18.131 A proposal by the Victorian Victims of Crime Commissioner to introduce victim levies in Victoria was also the subject of recent media reports.¹⁴⁶ This proposal was also included in the Victims of Crime Commissioner’s submission to this review, and is discussed below in relation to stakeholder responses.¹⁴⁷
- 18.132 Media reports in February 2018 suggested the Victorian Government was considering the Victims of Crime Commissioner’s proposal to introduce a victim levy, but would await the outcome of this review.¹⁴⁸ The Sentencing Advisory Council in its *Restitution and Compensation Orders: Issues and Options Paper*, released in March 2018, also noted that the Commission has sought stakeholder and community views in relation to victim levies.¹⁴⁹

Victim levies in other jurisdictions

- 18.133 A number of jurisdictions both in Australia and internationally have implemented victim levies to supplement the funding of their financial assistance schemes. In Australia, there are now victim levies in all jurisdictions except Victoria and Western Australia¹⁵⁰ as follows:
- **New South Wales:** A Victims Support Levy of \$79 is imposed for summary offences and \$177 for indictable offences on convicted offenders.¹⁵¹ The levy contributes to the Victims Support Fund and is imposed automatically under the *Victims Rights and Support Act 2013* (NSW), rather than as a penalty imposed by a court.
 - **Australian Capital Territory:** A \$50 victims’ services levy is imposed on adults convicted of an offence as a source of revenue to improve services for victims of crime.¹⁵²
 - **South Australia:** A \$60–\$160 levy is imposed for summary offences¹⁵³ and \$260 for indictable offences¹⁵⁴ to generate revenue for the Victims of Crime Fund.

144 Schemes generally distinguish in their application between infringements and criminal offending, as well as levying different amounts for summary or indictable (serious) crimes. Terminology also differs across jurisdictions—some refer to such levies as ‘offender levies’ (for example, Queensland), while others call them ‘victim levies’. The different schemes are summarised below.

145 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 199.

146 See, eg, Australian Broadcasting Corporation, ‘Proposal to Add Fees to Victorian Fines for Victims of Crime Fund being Considered’ *ABC News* (online), 6 February 2018 <www.abc.net.au/news/2018-02-06/proposal-to-add-fees-to-fines-for-victims-of-crime-fund/9399316>.

147 Submission 49 (Victims of Crime Commissioner, Victoria).

148 Australian Broadcasting Corporation, ‘Proposal To Add Fees to Victorian Fines for Victims of Crime Fund Being Considered’ *ABC News* (online), 6 February 2018 <www.abc.net.au/news/2018-02-06/proposal-to-add-fees-to-fines-for-victims-of-crime-fund/9399316>.

149 Sentencing Advisory Council (Vic), *Restitution and Compensation Orders*, Issues and Options Paper (2018) 6.

150 Heather Douglas and April Chrzanowski, ‘A Consideration of the Legitimacy and Equity of Queensland’s Offender Levy’ (2013) 24(3)

151 Department of Justice (NSW), *Paying Costs* (2017) <www.lawaccess.nsw.gov.au/Pages/representing/driving_offences_and_crime/driving_and_crime_after_court/paying_costs.aspx>. See also *Victims Rights and Support Act 2013* (NSW) s 104.

152 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 82–83. The victims’ services levy is in addition to, and does not form part of, a fine.

153 The levy in respect of a summary offence is \$60 if the offence is expiated without the making of an enforcement determination under section 13 of the *Expiation of Offences Act 1996* (SA) in relation to the expiation notice. The levy in respect of a summary offence in all other circumstances is \$160: *Victims of Crime (Fund and Levy) Regulations 2003* (SA) sch 1 cl 1(a)(i)–(ii).

154 *Victims of Crime (Fund and Levy) Regulations 2003* (SA) sch 1 cl 1(b).

- **Tasmania:** A compensation levy of \$20–50 (or a prescribed amount) is imposed to provide revenue for the Victims Assistance Fund.¹⁵⁵
 - **Northern Territory:** A levy of \$200 for an indictable offence and \$150 for any other offence is imposed on adult offenders. A levy of \$50 is also imposed on child offenders. Levies provide a source of revenue for the Victims Assistance Fund.¹⁵⁶
- 18.134 In Queensland, rather than a victim levy, an ‘offender levy’ is applied to sentences imposed in the Magistrates’, District and Supreme Courts. Unlike other jurisdictions, this levy does not fund assistance for victims of crime but is used instead to pay for law enforcement and administration costs.¹⁵⁷
- 18.135 There are equivalent international examples of victims’ or offender levies in New Zealand, England and Wales, Northern Ireland and the Canadian Federal System.¹⁵⁸
- 18.136 These levies have the potential to generate significant funds. For example, the Victims Support Levy in New South Wales contributed \$11.69M in 2016–17 towards the Victims Support Fund.¹⁵⁹ If applied in the Victorian context, this would contribute around a quarter of the \$43,408M paid out by VOCAT during the 2016–17 financial year.¹⁶⁰

Responses

- 18.137 A number of stakeholders generally supported the introduction of a victim levy on offenders.¹⁶¹ In particular, stakeholders said that funding state-funded financial assistance through a victim levy could have a therapeutic effect for victims, as it would be seen to hold offenders accountable by requiring them to contribute to victims’ payments.¹⁶²
- 18.138 Moreover, the Victims of Crime Commissioner submitted that such a levy would ‘provide considerable additional funding’¹⁶³ to state-funded financial assistance, while at the same time only adding ‘a very small cost to those who commit criminal and other offences’.¹⁶⁴ The Victims of Crime Commissioner estimated that if a \$20 levy were imposed on infringement notices and a \$50 levy on court-imposed penalties, it could generate almost \$90 million per annum.¹⁶⁵
- 18.139 A number of stakeholders said that if a victim levy were established, it should be directed into a general pool to supplement the funds available to victims, rather than provided to individual victims.¹⁶⁶ For example, cohealth submitted that:¹⁶⁷

An across the board levy against offenders could be imposed, but only if it was contributed to by offenders as part of a general pool, rather than awarded directly to the person harmed by the crime ... it would be preferable if collection of these funds did not have any connection to the payment of financial assistance to victims, but was rather a revenue raising measure to supplement the pool of funds available to victims.

155 *Victims of Crime Compensation Act 1994* (Tas) s 5(3).

156 *Victims of Crime Assistance Act 2006* (NT) ss 60–61.

157 Queensland Courts, *Offender Levy* (2017) <www.courts.qld.gov.au/about/offender-levy>.

158 Heather Douglas and April Chrzanowski, ‘A Consideration of the Legitimacy and Equity of Queensland’s Offender Levy’ (2013) 24(3) *Current Issues in Criminal Justice* 317, 332.

159 Department of Justice (NSW), *Victims Services Data Profiles: Restitution and Revenue 2016/7*, Information Sheet (2017) 1.

160 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 63. This figure includes fees for services and awards paid.

161 Submissions 15 (Merri Health Victims Assistance Program), 18 (cohealth), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 49 (Victims of Crime Commissioner, Victoria); Consultations 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 8 (Victims Representatives—Victims of Crime Consultative Committee), 15 (Regional Consultation—Ballarat Victim Support Agencies), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

162 Submission 41 (Springvale Monash Legal Service); Consultations 1 (Victim Assist Queensland), 15 (Regional Consultation—Ballarat Victim Support Agencies).

163 Submission 49 (Victims of Crime Commissioner, Victoria).

164 Ibid.

165 Ibid.

166 Submissions 18 (cohealth), 41 (Springvale Monash Legal Service); Consultation 15 (Regional Consultation—Ballarat Victim Support Agencies).

167 Submission 18 (cohealth).

- 18.140 Springvale Monash Legal Service agreed that such an approach ‘would allow family violence victims to anonymously seek financial assistance ... without the need for perpetrator notification’.¹⁶⁸
- 18.141 Ryan Carlisle Thomas submitted that the imposition of a victim levy should not prejudice the ability of a victim to recover from that offender under the *Sentencing Act 1991* (Vic).¹⁶⁹
- 18.142 Some stakeholders, while supportive of a victim levy, expressed concern about the impact that it may have on impecunious offenders.¹⁷⁰ In particular it was noted that it may cause offenders undue hardship, which could in turn lead to further offending.¹⁷¹ One proposal to overcome these concerns was to afford sentencing magistrates and judges a discretion to waive the levy where appropriate.¹⁷² Another option put forward was to impose levies of differing amounts according to an offender’s income or ability to pay.¹⁷³
- 18.143 In addition, some stakeholders raised concerns about the cost implications and administrative burden of enforcing a victim levy.¹⁷⁴ Adviceline Injury Lawyers, for example, submitted that ‘the administration and collection of a levy would far outweigh the benefits recovered’.¹⁷⁵
- 18.144 One stakeholder opposed the imposition of a victim levy on offenders on the grounds that ‘the notion of victims of crime support is or at least should be a responsibility of our society’.¹⁷⁶ Accordingly, this stakeholder supported imposing a levy on all members of the community, since all members of the community ‘would like to receive adequate support if we suddenly became a victim of crime.’¹⁷⁷

Discussion and recommendations

- 18.145 As discussed above, Victoria does not currently have a victim levy although other Australian jurisdictions use victim levies to assist with the funding of their state-funded financial assistance schemes.
- 18.146 The Commission considers there are three main considerations in relation to a victim levy:
- First, what are the advantages of imposing a victim levy?
 - Secondly, are the potential advantages of a victim levy outweighed by the potential disadvantages? These disadvantages may include:
 - the impact on offenders who may not have the means to pay
 - enforcement costs incurred by the state in pursuing offenders who cannot pay a victim levy
 - other potential legal implications, including potential constitutional or human rights issues.
 - Finally, if a victim levy is appropriate, which government body or agency should be responsible for its administration?
- 18.147 The Commission considers each of these matters below.

168 Submission 41 (Springvale Monash Legal Service). Safety concerns that may arise in relation to victim levies were also discussed in Consultation 4 (Victim, Witness and Court Support).

169 Submission 38 (Ryan Carlisle Thomas Lawyers).

170 Ibid; Consultation 17 (Family Violence Diverse Communities and Intersectionality Working Group).

171 Submissions 27 (Name withheld), 38 (Ryan Carlisle Thomas Lawyers).

172 Submission 38 (Ryan Carlisle Thomas Lawyers).

173 Consultation 17 (Family Violence Diverse Communities and Intersectionality Working Group).

174 Submissions 13 (Adviceline Injury Lawyers), 27 (Name withheld); Consultation 4 (Victim, Witness and Court Support).

175 Submission 13 (Adviceline Injury Lawyers).

176 Submission 27 (Name Withheld).

177 Ibid.

Advantages of victim levies

- 18.148 The introduction of a victim levy is supported by precedent in other jurisdictions. A number of jurisdictions both in Australia and internationally have implemented victim levies to supplement the funding of their victims of crime financial assistance schemes. In Australia, there are now victim levies in all jurisdictions except Victoria and Western Australia.¹⁷⁸
- 18.149 The Commission notes that a number of stakeholders generally supported the introduction of a victim levy on offenders.¹⁷⁹ In particular, stakeholders said that funding state-funded financial assistance through a victim levy could have a therapeutic effect for victims, as it would be seen to hold offenders accountable by requiring them to contribute to victims' payments.¹⁸⁰
- 18.150 Beyond possible therapeutic considerations, victim levies have the capacity to generate significant funds.
- 18.151 As submitted by the Victims of Crime Commissioner, a victim levy in Victoria could provide considerable additional funding to state-funded financial assistance, while adding only 'a very small cost to those who commit criminal and other offences'.¹⁸¹

Disadvantages of Victim Levies

Potential legal implications

- 18.152 There are academic concerns about the constitutional implications of imposing a victim levy on offenders. Douglas and Chrzanowski suggest that a victim levy, depending on how it is drafted, could give rise to issues relating to the separation of judicial and administrative powers under the *Australian Constitution*.¹⁸² For example, if judges are required to impose the levy on offenders but are prohibited from taking it into account in sentencing—as in Queensland—it could be argued that it undermines judicial independence and the integrity of the courts.¹⁸³
- 18.153 The Canadian experience of its 'victim surcharge' also raises concerns that a victim levy may give rise to human rights concerns.¹⁸⁴ In that jurisdiction, a number of judges have found that their inability to waive the mandatory victim surcharge for impoverished offenders violates both the right to life, liberty and security of the person and the right to freedom from cruel and unusual punishment under the *Canadian Charter of Rights and Freedoms*.¹⁸⁵
- 18.154 Given Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the right to protection from cruel, inhuman and degrading treatment under section 10(b) of the Charter, any victim levy scheme would need to carefully consider Canada's experience in relation to impecunious offenders.
- 18.155 Nonetheless, as outlined in detail above, many Australian jurisdictions have victim levies in place, suggesting these legal considerations may be adequately overcome through effective safeguards incorporated into the relevant legislation.

178 Heather Douglas and April Chrzanowski, 'A Consideration of the Legitimacy and Equity of Queensland's Offender Levy' (2013) 24(3) *Current Issues in Criminal Justice* 317, 319.

179 Submissions 15 (Merri Health Victims Assistance Program), 18 (cohealth), 38 (Ryan Carlisle Thomas Lawyers), 41 (Springvale Monash Legal Service), 49 (Victims of Crime Commissioner, Victoria); Consultations 4 (Victim, Witness and Court Support), 5 (Victims of Crime Commissioner, Victoria), 8 (Victims Representatives—Victims of Crime Consultative Committee), 15 (Regional Consultation—Ballarat Victim Support Agencies), 17 (Family Violence Diverse Communities and Intersectionality Working Group).

180 Submission 41 (Springvale Monash Legal Service); Consultations 1 (Victim Assist Queensland), 15 (Regional Consultation—Ballarat Victim Support Agencies).

181 Submission 49 (Victims of Crime Commissioner, Victoria).

182 Heather Douglas and April Chrzanowski, 'A Consideration of the Legitimacy and Equity of Queensland's Offender Levy' (2013) 24(3) *Current Issues in Criminal Justice* 317, 320–2. See also Helen Kempton, 'Fears Crime Levy Plan is Unconstitutional and the Cost of Collection Will Exceed Proceeds', *Mercury* (online), 3 September 2014 <www.themercury.com.au/news/scales-of-justice/fears-crime-levy-plan-is-unconstitutional-and-the-cost-of-collection-will-exceed-proceeds/news-story/53b0df37bd81c53bfe450b6c2984b180>.

183 Heather Douglas and April Chrzanowski, 'A Consideration of the Legitimacy and Equity of Queensland's Offender Levy' (2013) 24(3) *Current Issues in Criminal Justice* 317, 321.

184 See generally Graham Mayeda, 'Squeezing Blood from the Stone: Narrative and Judicial Resistance to the Mandatory Victim Surcharge' (2016) 21 *Canadian Criminal Law Review* 195, 199.

185 See *ibid* 208.

Impact on impecunious offenders

- 18.156 Some stakeholders expressed concerns about the impact that a victim levy may have on impecunious offenders.¹⁸⁶ It was noted in particular that a levy may cause offenders undue hardship, which could in turn lead to further offending.¹⁸⁷
- 18.157 Douglas and Chrzanowski note that levies such as Queensland's 'offender levy' can place financial stress on people who are already in financial crisis, suggesting levies can have 'a discriminatory effect on the most vulnerable including Indigenous people, those who have intellectual impairment or mental illness, and poor and homeless people' because such groups are already overrepresented in the criminal justice system.¹⁸⁸
- 18.158 Douglas and Chrzanowski's concerns echo those raised by some stakeholders consulted about impoverished offenders.¹⁸⁹
- 18.159 In this context, the Commission questions whether such a levy imposed on those who are unlikely to have the means to pay effectively results in such offenders being doubly punished, exposing poorer offenders to a greater punitive burden than wealthier offenders.¹⁹⁰

Enforcement costs

- 18.160 Another issue relating to victim levies is the extent to which their enforcement costs outweigh their capacity to generate revenue.
- 18.161 A number of stakeholders raised concerns about the cost implications and administrative burden of enforcing a victim levy.¹⁹¹ Adviceline Injury Lawyers, for example, submitted that 'the administration and collection of a levy would far outweigh the benefits recovered'.¹⁹²
- 18.162 This echoes concerns previously raised in relation to the introduction of such a levy in other jurisdictions.¹⁹³ These concerns are most likely based on the difficulties experienced in relation to the enforcement of court fines and infringement penalties, which are regularly left unpaid.¹⁹⁴ As noted by Warner and Gawlick, there are also significant enforcement problems in relation to compensation orders for crime victims across Australian jurisdictions.¹⁹⁵
- 18.163 Nevertheless, some jurisdictions have managed to establish victim levy schemes that generate considerable revenue—such as South Australia. In 2014, before South Australia increased the maximum payment under its state-funded financial assistance scheme, a representative of the Victim Support Service stated that 'the revenue that that [victim levy] fund generates far outweighs the amount of compensation that's paid out'. At that time, there was \$160 million surplus in the fund.¹⁹⁶ In New Zealand, the revenue generated exceeded projections in its first year of operation.¹⁹⁷

186 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultation 17 (Family Violence Diverse Communities and Intersectionality Working Group).

187 Submissions 27 (Name withheld), 38 (Ryan Carlisle Thomas Lawyers).

188 Heather Douglas and April Chrzanowski, 'A Consideration of the Legitimacy and Equity of Queensland's Offender Levy' (2013) 24(3) *Current Issues in Criminal Justice* 317, 326.

189 Submission 38 (Ryan Carlisle Thomas Lawyers); Consultation 17 (Family Violence Diverse Communities and Intersectionality Working Group).

190 This was also discussed in relation to restitution and compensation orders in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 242.

191 Submissions 13 (Adviceline Injury Lawyers), 27 (Name withheld); Consultation 4 (Victim, Witness and Court Support).

192 Submission 13 (Adviceline Injury Lawyers).

193 For example, in relation to such concerns being expressed in the context of Tasmania, see Helen Kempton, 'Fears Crime Levy Plan is Unconstitutional and the Cost of Collection Will Exceed Proceeds', *Mercury* (online), 3 September 2014 <www.themercury.com.au/news/scales-of-justice/fears-crime-levy-plan-is-unconstitutional-and-the-cost-of-collection-will-exceed-proceeds/news-story/53b0df37bd81c53bfe450b6c2984b180>.

194 See, eg, Sentencing Advisory Council (Vic), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report* (2014).

195 Kate Warner and Jenny Gawlick, 'Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice' (2003) 36(1) *Australian and New Zealand Journal of Criminology* 60, 60.

196 James Hancock, 'SA Victims of Crime Payments to Double, Lawyers Say Most Will Not Benefit', *ABC News* (online), 29 August 2014 <www.abc.net.au/news/2014-08-29/sa-government-increase-maximum-payout-to-victims-of-crime/5706500>.

197 Simon Power, 'Offender Levy Nearly Double Projection in First Year' (Media Release, 21 July 2011).

- 18.164 This suggests that issues relating to enforcement may be outweighed by the potential to generate significant revenue.

Should victim levies form part of the proposed scheme?

- 18.165 Notwithstanding the potential advantages and disadvantages of victim levies, outlined above, the Commission has also considered the extent to which, even if a victim levy is considered appropriate, such a levy could or should form part of a state-funded financial assistance scheme.
- 18.166 Although a victim levy could generate supplementary revenue for a state-funded financial assistance scheme, the Commission questions whether it is efficient or sustainable for the proposed scheme to administer a victim levy scheme and oversee its enforcement.
- 18.167 It may be more appropriate, if a victim levy is imposed at the conviction or sentencing stage of a criminal matter, for responsibility for enforcement of that levy to be transferred to the Infringement Management and Enforcement Services (IMES), Department of Justice and Regulation given this part of government already manages infringements and enforcement.¹⁹⁸ During consultations regarding the introduction of an 'Offender Levy'¹⁹⁹ in Northern Ireland, the Department of Justice noted that in relation to the administration of the levy, 'processes should be mapped onto existing financial systems and procedures, thereby reducing administrative complexity and minimising operational costs'.²⁰⁰
- 18.168 In the Commission's view, the introduction of a victim levy could have a significant impact on courts and enforcement agencies in Victoria, depending on any proposed levy's legislated purpose, definition and interaction with the conviction and sentencing phase of criminal matters. For example, Douglas and Chrzanowski suggest that a victim levy, depending on how it is drafted, could give rise to constitutional issues relating to the separation of judicial and administrative powers.²⁰¹ In addition, if judges are required to impose the levy on offenders but are prohibited from taking it into account in sentencing—as in Queensland—it could be argued that it undermines judicial independence and the integrity of the courts.²⁰²
- 18.169 These are matters beyond the Commission's terms of reference as part of a review of state-funded financial assistance.

The need for a dedicated review

- 18.170 The question of whether it is appropriate for a victim levy to be introduced in Victoria has been open since 2009, when the then-Department of Justice also inquired into the issue in its discussion paper *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*.²⁰³ A final report was not published.
- 18.171 More recently, this issue has gained public attention following the Victims of Crime Commissioner's proposal in his submission to this review, that a victim levy should be introduced.²⁰⁴

198 The Commission notes that the Sentencing Advisory Council has suggested that state enforcement of restitution and compensation orders in relation to offenders could be introduced by transferring such orders to IMES in the Department of Justice and Regulation, which oversees the execution of civil enforcement mechanisms by the Sheriff: Sentencing Advisory Council (Vic), *Restitution and Compensation Orders, Issues and Options Paper* (2018) xxii, 44.

199 This jurisdiction uses the term offender levy rather than victim levy, representing the application of the levy to offenders.

200 Department of Justice Northern Ireland, *Offender Levy and Victims of Crime Fund: A Consultation—Summary of Responses and Way Forward* (2010) 18.

201 Heather Douglas and April Chrzanowski, 'A Consideration of the Legitimacy and Equity of Queensland's Offender Levy' (2013) 24(3) *Current Issues in Criminal Justice* 317, 320–2. See also Helen Kempton, 'Fears Crime Levy Plan is Unconstitutional and the Cost of Collection Will Exceed Proceeds', *Mercury* (online), 3 September 2014 <www.themercury.com.au/news/scales-of-justice/fears-crime-levy-plan-is-unconstitutional-and-the-cost-of-collection-will-exceed-proceeds/news-story/53b0df37bd81c53bfe450b6c2984b180>.

202 Heather Douglas and April Chrzanowski, 'A Consideration of the Legitimacy and Equity of Queensland's Offender Levy' (2013) 24(3) *Current Issues in Criminal Justice* 317, 321.

203 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 49–50.

204 Submission 49 (Victims of Crime Commissioner, Victoria). See also, eg, Australian Broadcasting Corporation, 'Proposal to Add Fees to Victorian Fines for Victims of Crime Fund being Considered' *ABC News* (online), 6 February 2018 <www.abc.net.au/news/2018-02-06/proposal-to-add-fees-to-fines-for-victims-of-crime-fund/9399316>.

- 18.172 However, the question of whether a victim levy should be introduced in Victoria is best considered as part of a separate, specific and dedicated review due to its potentially wide-ranging implications across the justice system, and the broader community.
- 18.173 The matter of a victim levy needs to be addressed in its own right, with regard to:
- **Victims' and stakeholders' views:** through a comprehensive and dedicated consultation process exploring the possible therapeutic benefits for victims, as well as the potential ramifications for vulnerable members of the community and in particular, considering the overlap between victimisation and criminal offending.
 - **Legal implications:** including any constitutional or human rights issues. For example, consideration may need to be given to whether any law introducing a victim levy imposes limitations on judicial power or breaches provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
 - **Operational experiences in other jurisdictions:** including a comparative analysis of how victim levies are legislatively established, how victim levy schemes are implemented and the most effective methods of enforcement.
 - **Cost benefit analysis:** including the extent to which the costs of enforcement are outweighed by the revenue generated.
 - **Social implications:** for example, the extent to which such levies may disproportionately affect certain members of the population, such as those experiencing homelessness who are more likely to interact with the criminal justice system because they are forced to carry out their private lives in public places.²⁰⁵
- 18.174 In the Commission's view, such a review should also consider whether victim levies should be established, administered and enforced under a state-funded financial assistance scheme, or whether a victim levy scheme is better administered and enforced through another arm of government.

Recommendation—sustainability of the proposed scheme—'victim levies'

- 97 To assist with scheme sustainability, further consideration should be given by government to the introduction of a 'victim levy' payable by offenders on conviction.

Monitoring the operation of the proposed Act and scheme for victims of crime financial assistance to ensure best practice

504 Introduction

505 Reporting and publication of data

508 Legislative review of the proposed Act and scheme for
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510 Transitioning to the proposed Act and scheme for victims
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19. Monitoring the operation of the proposed Act and scheme for victims of crime financial assistance to ensure best practice

Introduction

- 19.1 Although not a matter raised directly in either the first or supplementary terms of reference, this chapter considers and makes recommendations in relation to the monitoring and review of the proposed Act and scheme.
- 19.2 As the Victims of Crime Assistance Tribunal (VOCAT), the Magistrates' Court of Victoria and the Children's Court of Victoria noted in their joint submission, many of the adverse impacts of the current provisions of the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) can be linked to the failure of the Act to keep pace with changes in community understanding and expectations about what constitutes an act of violence or injury, and what recovery means or involves for victims.¹
- 19.3 To help address this issue, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria proposed the inclusion of an automatic review provision to enable a systematic and regular process for reviewing the operation of the Act to assess whether the application of the Act is keeping pace with its intent over time.² To ensure such an assessment is meaningful, the courts considered that such a review should be informed by relevant performance criteria, ongoing data collection, and trend analyses and forecasting.³
- 19.4 This chapter considers the data and reporting requirements necessary to support and inform such a legislative review, as well as the timing for such a review.
- 19.5 In addition, and having regard to concerns raised with the Commission by some stakeholders during consultations,⁴ and the experiences of other jurisdictions in reforming their state-funded financial assistance schemes, this chapter considers the transitional arrangements necessary for the implementation of the proposed Act and scheme.

1 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria).
2 Ibid.
3 Ibid.
4 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

Reporting and publication of data

Current law

- 19.6 Under section 68(1) of the VOCAA, VOCAT is required submit an annual report to the Minister on the performance by the Tribunal of its functions, powers and duties during that year. VOCAT's annual report is then required to be tabled in both houses of parliament.⁵
- 19.7 VOCAT's annual reports contain some data on applications lodged and awards granted during that financial year. For example, they include information on how many people applied to the scheme, the geographical spread of applications, the offence category to which applications relate, the age and gender of applicants, how many awards were made, and the average quantum awarded.⁶
- 19.8 However, as discussed in both the first and supplementary consultation papers, there are significant gaps in VOCAT's annual report data. For example, the first consultation paper noted the inadequacies of VOCAT's data concerning family violence, such as the use of self-reporting to classify an application as relating to family violence.⁷
- 19.9 Moreover, and as noted in the supplementary consultation paper, VOCAT's data currently does not currently distinguish between applications that were struck out and applications that were withdrawn.⁸ This makes it difficult to know how the time limit under section 29 is functioning. In addition, VOCAT's annual report contains no data on refund of awards, including whether these provisions are actually used.⁹
- 19.10 Beyond the requirement to submit an annual report, there is currently no requirement under the VOCAA for VOCAT to collect, record or publish data.

Responses

- 19.11 A number of stakeholders told the Commission that there are deficiencies in VOCAT's current collection and publication of data.¹⁰
- 19.12 In their joint submission, VOCAT, the Magistrates Court of Victoria and the Children's Court of Victoria told the Commission that significant data gaps exist, particularly in relation to systemic issues, such as demand.¹¹
- 19.13 Other stakeholders also noted deficiencies in VOCAT's data in relation to specific cohorts of victims. For example, safe steps Family Violence Response Centre noted inadequacies in VOCAT's family violence data collection, such as the use of self-reporting.¹²
- 19.14 Stakeholders told the Commission that effective collection and recording of data would enable better monitoring of the scheme into the future. Safe steps Family Violence Response Centre submitted:

Gaining an accurate picture of the scheme's applicants and their journey through the process, including the awards they receive, will be crucial to any further evaluation of any changes to the award structure. Accurate and comprehensive data collection is important more generally to enable measurement of any amendments to the Act and the scheme.¹³

5 *Victims of Crime Assistance Act 1996* (Vic) s 68(2).

6 See generally Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017).

7 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 64.

8 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 103. See also Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 61.

9 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 130. Submissions 37 (safe steps Family Violence Response Centre), 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria).

11 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria).

12 Submission 37 (safe steps Family Violence Response Centre).

13 Ibid.

- 19.15 Moreover, and as noted in Chapter 15, stakeholders told the Commission that there should be improved publication of data relating to decision making in order to improve consistency and transparency.
- 19.16 In particular, a number of stakeholders submitted that de-identified information relating to application results and reasons for decisions should be published.¹⁴ Stakeholders made these submissions in relation to application outcomes,¹⁵ as well as decisions made on whether to strike out an application for being out of time.¹⁶

Discussion and recommendations

Collection and recording of data

- 19.17 As outlined above, a number of stakeholders submitted that robust collection and recording of data would better enable effective monitoring of the scheme into the future.¹⁷
- 19.18 In particular, the joint submission of VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria stated that significant data gaps need to be addressed before budget, projected demand and sustainability of the scheme could be assessed.¹⁸
- 19.19 The Commission notes that the importance of data collection in relation to scheme monitoring was also raised during the Senate Community Affairs Legislation Committee Inquiry into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse,¹⁹ as well as in the recent reviews of the victims of crime assistance schemes in Queensland²⁰ and New South Wales (ongoing).²¹
- 19.20 In response to stakeholder submissions regarding the need for data recording, the Senate Community Affairs Legislation Committee recommended that the redress scheme include in its annual report 'detailed data to understand the experiences of people going through the Redress Scheme and to provide a basis of any necessary refinements to the Scheme'.²²
- 19.21 The Commission considers that the proposed scheme should undertake robust collection and recording of data in order to ensure that the effectiveness and sustainability of the scheme can be monitored. In particular, the Commission considers that detailed data should be collected in relation to the number of and types of applications made, application outcomes, including, quantum of awards and duration of assistance, as well decisions relating to other aspects of the scheme, such as those concerning the time limit.
- 19.22 Moreover, the Commission notes stakeholder support for the collection and recording of data in relation to vulnerable groups or groups that experience discrimination and disadvantage.
- 19.23 As noted above, safe steps Family Violence Response Centre submitted that there is a need for improved data collection specifically in relation to family violence victims.²³
- 19.24 The need for effective data collection in relation to family violence victims also reflects broader concerns identified by the Victorian Royal Commission into Family Violence regarding the inadequacy of data on family violence in Victoria generally.²⁴

14 Submissions 31 (Victorian Council of Social Service), 41 (Springvale Monash Legal Service), 43 (knowmore).

15 Submissions 31 (Victorian Council of Social Service), 43 (knowmore).

16 Submission 41 (Springvale Monash Legal Service).

17 Submissions 31 (Victorian Council of Social Service), 41 (Springvale Monash Legal Service), 43 (knowmore).

18 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria).

19 Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) 89.

20 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 37.

21 See, eg, Community Legal Centres NSW, Submission to New South Wales Department of Justice, *Review of the Victims Rights and Support Act*, 26 July 2016, 18–19.

22 Senate Community Affairs Legislation Committee, Parliament of Australia, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) 95 (Recommendation 10).

23 Submission 37 (safe steps Family Violence Response Centre).

24 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 137.

- 19.25 The need to improve data collecting practices in relation to vulnerable groups or groups that experience discrimination and disadvantage was also raised in both the NSW and Queensland reviews of their victims of crime assistance schemes.
- 19.26 The need to strengthen data collection abilities to determine access of victims with a culturally and linguistically diverse (CALD) background was identified during Queensland's 2015 *Review of the Victims of Crime Assistance Act 2009*.²⁵
- 19.27 In addition, in its 2016 submission to the NSW *Review of the Victims Rights and Support Act*, Community Legal Centres NSW stated that there should be specific data collection in relation to the applications and awards of certain cohorts of victims, including Aboriginal and Torres Strait Islander victims and victims of domestic violence and/or sexual assault.²⁶
- 19.28 As such, the Commission also considers that the proposed scheme should also enable specific data collection in relation to applications made by persons from vulnerable groups or groups that experience discrimination and disadvantage, including family violence victims and victims from CALD and Aboriginal and Torres Strait Islander backgrounds in order to monitor and improve scheme effectiveness and accessibility for these cohorts.

Publication of data

- 19.29 As described above, a number of stakeholders supported the publication of de-identified reasons for decisions in order to promote scheme predictability and transparency.
- 19.30 The important role that publication of data can play in promoting public confidence was also noted in submissions to the Senate Community Affairs Legislation Committee Inquiry into the Commonwealth Redress Scheme for Institutional Child Sexual Abuse. For example, Professor Kathleen Daly submitted to the Senate Community Affairs Legislation Committee that 'the more information [that] is conveyed to survivors, advocates, and members of the general public, the greater the likelihood that there will be trust in the operator and scheme'.²⁷
- 19.31 The Commission is of the view that data collected and recorded by the proposed scheme should be made publicly available. This data should be published in an annual report to be presented to the Minister and tabled in the Victorian Parliament so that it can be subject to parliamentary scrutiny.
- 19.32 In addition, simplified data should be published in the form of factsheets and informational brochures in order to enable applicants and potential applicants to understand how the scheme operates. This could be done in a similar manner to Victims Services NSW, which publishes data profiles and factsheets online.²⁸
- 19.33 These fact sheets should include sufficiently de-identified information relating to decision making, especially in relation to decisions made under discretionary provisions in the proposed Act, such as regarding recovery payments. This could be done in the form of de-identified case summaries.
- 19.34 The Commission considers that such documents should be available in hardcopy and on the new scheme's website in order to enhance accessibility.

25 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 37 (Appendix 3).

26 Community Legal Centres NSW, Submission to New South Wales Department of Justice, *Review of the Victims Rights and Support Act*, 26 July 2016, 18–19.

27 Kathleen Daly, Submission No 44 to Senate Community Affairs Legislation Committee, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 [Provisions] and Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 [Provisions]* (March 2018) 7.

28 See generally Victims Services, Department of Attorney General and Justice (NSW), *Victims Services* (2018) <www.victimsservices.justice.nsw.gov.au/>.

Recommendation—reporting and publication of data

- 98 The proposed Act should provide that the scheme decision maker must annually publish and make publicly available in readily accessible form information and data relating to all aspects of the scheme, including but not limited to:
- (a) the number and type of applications lodged
 - (b) applicant details, including geographical location, gender, age and whether they are a member of a vulnerable group or groups that experience discrimination and disadvantage
 - (c) application outcomes, including the number and type of awards granted
 - (d) the amount and duration of assistance
 - (e) processing times
 - (f) decision making, particularly in relation to the application of discretionary provisions in the proposed Act
 - (g) offender recovery.

Legislative review of the proposed Act and scheme for victims of crime financial assistance

Current law

- 19.35 The VOCAA currently does not include any provision requiring it to be subject to review.
- 19.36 However, in some other Australian jurisdictions an automatic review provision is included in their relevant victims of crime assistance legislation.
- 19.37 In New South Wales, section 119(1) of the *Victims Rights and Support Act 2013* (NSW) requires the Minister to undertake a review of the Act in order to 'determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.' Section 119(2) of that Act requires the first review to be completed as soon as possible after three years from the date of assent to the Act and then subsequent reviews to be completed at three- to five-year intervals.
- 19.38 Queensland also originally included an automatic review provision under section 144 of the *Victims of Crime Assistance Act 2009* (Qld), which provided that the Minister must review the Act within five years of the commencement 'to decide whether the Act's provisions remain appropriate'.²⁹ The Act also required the review report to be tabled in the Legislative Assembly.³⁰ This section was repealed following the 2015 review and the subsequent implementation of its recommendations.³¹

29 *Victims of Crime Assistance Act 2009* (Qld) s 144(1) [as enacted].
30 *Ibid* s 144(2) [as enacted].
31 *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 90.

Responses

- 19.39 As noted above, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria submitted that consideration should be given to having an automatic review provision, similar to section 119 of the *Victims Rights and Support Act 2013* (NSW).³²
- 19.40 VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria told the Commission that this would enable the scheme to keep up with changing social standards and policy positions. They submitted:
- An automatic review provision would assist the legislation to be more responsive to the impact of significant government policy reforms (such as those flowing from the [Royal Commission into Family Violence]), keep better pace with the evolving body of expert knowledge and understanding around victim support, and would better reflect community expectations as they evolve.³³
- 19.41 In addition, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria highlighted the relationship between an effective automatic review provision and robust data collection and analysis. They submitted that:
- ... it is essential that such a mechanism can meaningfully assess whether the application of the Act is keeping pace with its intent over time, and is informed by relevant performance criteria, ongoing data collection, trend analyses, and forecasting capacity.³⁴

Discussion and recommendations

- 19.42 As noted earlier in this report, the Commission's review of the VOCAA finds its origins in the Royal Commission into Family Violence. The Royal Commission recommended that the Commission consider the application of the VOCAA to victims of family violence in light of stakeholder concerns that such victims encounter multiple barriers in accessing state-funded financial assistance for victims of crime. This led to the first terms of reference, subsequently expanded by the supplementary terms of reference.
- 19.43 The difficulties encountered by victims of family violence in relation to the VOCAA are in many ways the product of the scheme having been designed without such victims in mind. As VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria observed in their submission:
- ... the absence of reference in the Act to family violence is reflective of the time the Act came into effect, when community understanding about and tolerance for family violence was vastly different from today.³⁵
- 19.44 This history demonstrates that there is a need for the proposed Act and scheme to be able to evolve with changing times and to remain practical, effective and inclusive into the future.
- 19.45 The Commission considers that an effective way to do this is to provide for a statutory review of the Act and scheme not more than five years after its commencement. Such a review would enable the operation and effectiveness of the Act and scheme to be assessed and for any changes to be made in response to any changing societal standards, community expectations and policy initiatives as may be required. The substantial recommendations made by Queensland's review in 2015,³⁶ subsequently implemented

32 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria).

33 Ibid.

34 Ibid.

35 Ibid.

36 See generally Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015).

in 2017,³⁷ are an example of this. This review resulted in extensive changes being made to the *Victims of Crime Assistance Act 2009* (Qld), in particular in relation to domestic violence.³⁸

- 19.46 Moreover, an automatic review provision is an effective way to monitor scheme sustainability. As Chapter 18 discussed, it is difficult without sufficient data to determine demand projections and costings. While comparative data from other Australian jurisdictions is helpful in providing some estimates, it remains to be seen whether the Victorian experience will be different.
- 19.47 It was for similar reasons that the 2012 review of the former victims of crime assistance scheme in New South Wales recommended that the new Act include an automatic review provision.³⁹ The NSW review relied on Queensland data for part of its analysis, and noted that ‘there is uncertainty whether the experience in NSW will be similar to QLD’.⁴⁰ As such, that review recommended:
- The initial scheme review should be conducted after 3 years and subsequent reviews should be conducted every 3-5 years to provide the opportunity to recalibrate either funding or benefits to ensure that the scheme is delivering on its objectives.⁴¹
- 19.48 The Commission considers that the proposed Act should include a provision for review after not more than five years.

Recommendation—review of the proposed Act

- 99** The proposed Act should provide for a review of the operation and effectiveness of the Act and the scheme not more than five years after its commencement.

Transitioning to the proposed Act and scheme for victims of crime financial assistance

Current law

- 19.49 The VOCAA sets out transitional provisions in sections 76 to 82 and schedule 1.
- 19.50 Section 76 and schedule 1 relate to the transition from the former Act, the *Criminal Injuries Compensation Act 1983* (Vic), to the VOCAA. Clause 2 of schedule 1 abolishes the former Tribunal (the Crimes Compensation Tribunal) and vests its rights and property in VOCAT.
- 19.51 Clause 4 of schedule 1 of the VOCAA provides that all pending applications or matters made under the former Act are to be determined by the new Tribunal (VOCAT) in accordance with the former Act.
- 19.52 Clause 5 of schedule 1 states that the VOCAA applies to all new applications, including those relating to acts of violence that occurred before its commencement date.
- 19.53 Sections 77 to 81 address the transitional arrangements in relation to a several amending Acts, from the *Victims of Crime Assistance (Amendment) Act 2000* (Vic) to the *Justice Legislation Amendment (Victims) Act 2018* (Vic).

37 See generally *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld).
38 For an overview of these changes, see Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Supplementary Consultation Paper (2017) 103. See also Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 25–6.
39 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 89 (Recommendation 46).
40 Ibid.
41 Ibid.

- 19.54 The most extensive of these provisions are those in section 77, which deal with the transitional arrangements relating to the *Victims of Crime Assistance (Amendment) Act 2000* (Vic). This is the amending Act that introduced special financial assistance.
- 19.55 Section 77(1) provides that applicants may only make an application for special financial assistance if the act of violence that is the subject of the application occurred on or after 1 July 2000. Section 77(3), however, makes an exception for victims of sexual offences which occurred while they were under the age of 18 years. Such applicants may make an application for special financial assistance if the act of violence in question occurred on or after 1 July 1997⁴² or the perpetrator was committed, directly presented for trial or charged on or after 1 July 1997.⁴³
- 19.56 The transitional provisions in the VOCAA are long and complex. These provisions, including schedule 1, span 17 pages and are very technical in nature. Moreover, these provisions employ different transitional principles. While the transitional provisions in schedule 1 regarding the transition from the former Act to the VOCAA focus on the date the application was made, those pertaining to the introduction of special financial assistance are based on the date of the act of violence and the nature of the offence. As a result, these provisions can be confusing for victims and increase reliance on legal practitioners.

Responses

- 19.57 In consultation meetings and submissions, stakeholders raised concerns about the complicated nature of the current transitional provisions in the VOCAA, in particular those relating to special financial assistance.
- 19.58 In their joint submission, VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria described the transitional provisions in section 77 of the VOCAA as 'complex and poorly understood', and stated that they can often operate to stop many victims of 'historical offences' from being able to access special financial assistance.⁴⁴
- 19.59 A number of other stakeholders also stated concerns about section 77 and historical offences. Knowmore submitted that most of its clients who are victims of childhood sexual abuse would not be eligible for special financial assistance under the VOCAA because the offending occurred prior to 1 July 2000 and charges have not been laid.⁴⁵ It described the adverse impact that this can have on such victims:
- For victims of historical sexual abuse, being advised that they have no claim for SFA under the current Act is often very distressing as they do not feel they are receiving adequate recognition for the significant trauma they suffered and that continues to adversely affect their lives.⁴⁶
- 19.60 Similarly, in a regional consultation meeting with legal practitioners in Ballarat, the Commission heard that the transitional provisions in section 77 result in a cohort of victims 'falling through the gaps'.⁴⁷

Discussion and recommendations

- 19.61 The Commission notes stakeholder concerns that the current transitional provisions are complicated and difficult to understand, as well as that the current transitional provisions have an exclusionary effect for victims of historical offences.
- 19.62 The Commission considers that the transitional provisions in the proposed Act should be simple and easy to understand, and should attempt, as far possible, to apply to all applicants equally.

42 *Victims of Crime Assistance Act 1996* (Vic) s 77(3)(d)(i).

43 *Ibid* 77(3)(d)(ii)-(iii).

44 Submission 59 (Victims of Crime Assistance Tribunal, Magistrate's Court of Victoria and Children's Court of Victoria).

45 Submission 43 (knowmore).

46 *Ibid*.

47 Consultation 16 (Regional Consultation—Ballarat Legal Professionals).

- 19.63 Accordingly, the Commission considers that the proposed Act should apply in its entirety to all new applications for state-funded financial assistance for victims of crime made after the commencement date, regardless of when the criminal act occurred.
- 19.64 Moreover, all non-pending applications for a variation of an existing VOCAT award should be made as new applications under the proposed scheme. Such applications should be considered within the new maximum amount available, taking into account any VOCAT award already received by the applicant. This would enable this cohort of victims to also benefit from any increase in the assistance available under the proposed Act.
- 19.65 However, in relation to pending applications to VOCAT, the Commission considers it necessary to maintain continuity with the current scheme in order to reduce administrative burden on applicants and promote legal certainty.
- 19.66 In particular, the Commission notes the difficulties experienced by some victims in New South Wales as result of the transitional arrangements following the enactment of the *Victims Rights and Support Act 2013* (NSW), which required pending applications made under the former Act to be treated as if they were applications under the new Act.⁴⁸ The retroactive effect of these transitional provisions led to substantial victim outcry because the awards such victims received departed drastically from their expectations.⁴⁹ This eventually led the NSW Government to introduce changes that enabled this cohort to have their applications reassessed under the former scheme.⁵⁰
- 19.67 As such, the Commission considers that as at the date of commencement of the proposed Act, all pending applications made under the VOCAA, including pending applications for a variation, should continue to be determined under the VOCAA. In this context, the Commission notes that as at the end of the 2016–17 reporting period, 7207 applications were still pending.⁵¹
- 19.68 However, given the experience of in New South Wales, the Commission considers that further consideration should be given to which body is best placed to finalise all pending applications under the VOCAA.
- 19.69 One option is to have VOCAT determine all matters which have not yet been finalised at the date of commencement of the proposed scheme. VOCAT would cease to exist following the finalisation of these matters.
- 19.70 This approach is similar to that taken by Queensland, which required the court to hear or continue hearing all pending applications made under its former judicial model.⁵² In the Commission's view this option would do the most to reduce administrative burden on victims and maintain legal certainty. Moreover, as these applications would benefit from VOCAT's expertise in relation to the VOCAA, it may be the most efficient way to finalise all pending applications.
- 19.71 However, unlike in Queensland, in Victoria this would involve VOCAT existing alongside the proposed scheme for a period of time. This could be confusing for victims and result in possible jurisdictional and/ or administrative complications.
- 19.72 Another option would be to have the new scheme determine all pending applications pursuant to the VOCAA. This would enable the immediate abolition of VOCAT and centralise all state-funded financial assistance for victims of crime. However, it may result in substantial administrative burden on the new scheme as it would require it to administer two Acts for a period of time, including one which was built for a judicial model.

48 *Victims Rights and Support Act 2013* (NSW) sch 2 cl 5.

49 Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Macmillan, 2016) 256. See also Tim Barlass, 'Rape Victim Offered \$15,000 over 'Mistaken' Compensation Reforms Told to Reapply', *The Sydney Morning Herald* (online), 2 August 2015 <www.smh.com.au/national/nsw/rape-victim-offered-15000-over-mistaken-compensation-reforms-told-to-reapply-20150801-gipbc6.html>.

50 *Victims Rights and Support Amendment (Transitional Claims) Regulation 2015* (NSW).

51 Victims of Crime Assistance Tribunal, *Annual Report 2016–17* (2017) 37.

52 *Victims of Crime Assistance Act 2009* (Qld) s 167(2).

- 19.73 Finally, and as a third alternative, all pending applications made under the VOCAA could be transferred to the Victorian Civil and Administrative Tribunal (VCAT). This was the approach taken by New South Wales, which abolished the Victims Compensation Tribunal (NSW) and transferred all pending matters to the Administrative Decisions Tribunal (NSW).⁵³
- 19.74 This middle ground option may be the most effective, as VCAT is familiar with the VOCAA, being the relevant review body under that Act, and connected to the proposed Act as its future external review body. However, this option may also result in administrative and budgetary issues for VCAT. As noted above, VOCAT's 2016–17 Annual Report stated that at the end of the reporting period, there were 7207 pending applications before it.⁵⁴ Transferring a similar number of applications to VCAT could substantially increase its case load for a period of time and result in the delayed resolution of pending matters.
- 19.75 These are issues that require further consideration by government. In determining the most suitable body to decide all outstanding matters made under the VOCAA at the time of transition, careful consideration should be given to administrative and budgetary issues, as well as the impact that it may have on victims.

Recommendation—transitioning to the proposed Act and scheme

- 100** The proposed Act should provide for the following transitional provisions:
- (a) All pending applications before the Victims of Crime Assistance Tribunal at the commencement date of the proposed Act should be finalised under the *Victims of Crime Assistance Act 1996* (Vic).
 - (b) All new applications for financial assistance for victims of crime made on or after the commencement date of the proposed Act should be made under the proposed Act and determined by the proposed scheme.
 - (c) All applications for variations of existing awards made under the *Victims of Crime Assistance Act 1996* (Vic) on or after the commencement date of the proposed Act should be treated as new applications made under the proposed Act.

PART SIX: CONCLUSION

Conclusion

20. Conclusion

- 20.1 For many victims, the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) is the only avenue of financial assistance available to them in the aftermath of a criminal act. However, and as this report has discussed, victims often face barriers in accessing the scheme and delays in receiving assistance. The process of making an application can also be traumatic for victims, particularly if a hearing is required or the perpetrator is notified.
- 20.2 In undertaking this review, the Commission was asked to consider the operation and effectiveness of the VOCAA and the Victims of Crime Assistance Tribunal for all crime victims, including victims of family violence. In doing so, the Commission was also asked to consider whether there are other models that would more effectively deliver assistance.
- 20.3 Victoria is one of the few remaining jurisdictions with applications for assistance being determined by judicial decision makers. The Commission considers that the current model is not victim-centred or beneficial in its approach because of its prioritisation of procedural and evidentiary processes over victims' needs and because of the delays experienced by victims in accessing financial assistance through a court-based model.
- 20.4 In the Commission's view, the existing judicial model no longer reflects a contemporary approach to state-funded financial assistance and does not effectively deliver assistance to victims, especially in terms of timeliness, minimising trauma and reducing reliance on legal representation. The Commission also considers that the existing model is no longer the most efficient or sustainable model of state-funded financial assistance.
- 20.5 In the Commission's view, the most effective model to meet the reference objectives and to deliver Victoria's state-funded financial assistance scheme is a new administrative model prioritising victims' recovery from a criminal act, separate from Victoria's criminal court system and the potential for any perpetrator involvement.
- 20.6 The Commission's proposal for a new model of state-funded financial assistance represents a significant departure from the current model. In recommending this significant change, the Commission has strived to ensure victim needs are at the centre of its reform proposals. The proposed scheme places victims' needs at the centre by providing for a beneficial approach that meets not only financial and practical needs, but prioritises victims' safety and wellbeing and provides a forum for acknowledgement and recognition. Most significantly, the proposed scheme removes financial assistance from Victoria's court system, thereby removing any need for victims to attend court, be called to give evidence and cross-examined, or be required to face an alleged perpetrator at a hearing.

- 20.7 Research, and the Commission's findings, demonstrate that a victim-centred justice process is one that takes into account victims' emotional needs, their information needs, victims' need for practical supports including safety and security, financial assistance needs and the need to be treated with dignity and respect throughout the justice process. The Commission's recommendations aim to fulfil each of these needs.
- 20.8 The Commission also recognises that for some victims of crime, financial assistance may represent more than monetary assistance—it can serve to recognise their victimisation and validate their experiences, including the often significant impacts of crime victimisation that may be ongoing. Accordingly, the Commission's recommendations aim to ensure that a victim-centred financial assistance scheme does more than simply provide financial assistance to victims. The Commission makes recommendations to ensure the proposed scheme meets victims' emotional needs, information needs, victims' needs for practical and financial support and most importantly, victims' need for acknowledgement.
- 20.9 In this report, the Commission sought and listened to the voices of victims.
- 20.10 The Commission expresses its appreciation of the contributions to this report made by victims, victim support and advocacy organisations, family violence support and advocacy organisations, the judiciary, legal services and government departments, academics and others.
- 20.11 The Commission is pleased to have had the opportunity to contribute to the modernisation and reform of this significant area of law.
- 20.12 The Commission commends this report to you.



Appendices

520 Appendix A: Submissions

523 Appendix B: Consultations

525 Appendix C: Summary of recommendations relating to family violence

**528 Appendix D: First and supplementary terms of reference—
summary of matters considered in the report**

Appendix A: Submissions

- 1 Judicial Advisory Group on Family Violence
- 2 The Victorian Civil and Administrative Tribunal
- 3 Director of Public Prosecutions Victoria
- 4 Crime Victims Support Association
- 5 Anglicare Victoria Victims Assistance Program
- 6 Forgetmenot Foundation Inc.
- 7 Dr Kate Seear, Professor Suzanne Fraser, Professor David Moore, Associate Professor Helen Keane and Associate Professor Kylie Valentine
- 8 Victim Survivors' Advisory Council
- 9 Alannah & Madeline Foundation
- 10 Eastern Metropolitan Regional Family Violence Partnership
- 11 Seniors Rights Victoria
- 12 Jesuit Social Services
- 13 Adviceline Injury Lawyers
- 14 Inner Melbourne Community Legal
- 15 Merri Health Victims Assistance Program
- 16 Project Respect
- 17 Centre for Excellence in Child and Family Welfare
- 18 cohealth
- 19 Schembri & Co Lawyers
- 20 Office of the Victorian Information Commissioner
- 21 Confidential
- 22 YourLawyer
- 23 Johnstone & Reimer Lawyers
- 24 Darebin Community Legal Centre
- 25 Public Health Association of Australia

- 26 Hume Riverina Community Legal Service
- 27 Name withheld
- 28 South Metropolitan Integrated Family Violence Executive
- 29 Women’s Legal Service Victoria and Domestic Violence Victoria
- 30 CASA Forum
- 31 Victorian Council of Social Service
- 32 Australian Psychological Society
- 33 Eastern Community Legal Centre
- 34 Dr Cassandra Cross
- 35 Brockway Legal
- 36 Name withheld
- 37 safe steps Family Violence Response Centre
- 38 Ryan Carlisle Thomas Lawyers
- 39 Victorian Aboriginal Legal Service
- 40 Confidential
- 41 Springvale Monash Legal Service
- 42 Joint Submission Springvale Monash Legal Service, CASA Forum, knowmore, South Eastern Centre Against Sexual Assault, Amanda Ryan, Annie Rosenthal, Arnold Dallas McPherson Lawyers, Atherton Legal, Australian Lawyers Alliance, Bernadette Bomford, Disability Justice Advocacy Inc., Effie Lagos, Farris Legal, Federation of Community Legal Centres, Flemington Kensington Legal Service, Goulburn Valley Community Legal Service, Hutchinson Legal, Institute of Legal Executives, Janet Morgan, Joan Callahan & Associates, Joan James, Linda Hansen, Loddon Campaspe Community Legal Service, Marie Reilly, Marita Ham, Michael Gregurek, Michael Smith and Associates, Peninsula Community Legal Service, Ryan Carlisle Thomas Lawyers, Schembri & Co Lawyers, Sdrinis Legal, Sladen Street Psychology, Sonja Roglic, Stringer Clark, Tanya Lakic, Thracy Vinga, Trevor Corran, Victoria Campbell, Waller Legal, WEstjustice, Wisniak Legal, YourLawyer, Youthlaw and Zapparas Lawyers
- 43 knowmore
- 44 Aboriginal Family Violence Prevention & Legal Service Victoria
- 45 Daniel Myles, Dr Sandra Braaf, Dr Melita Giummarra and Professor Belinda Gabbe
- 46 Victoria Legal Aid
- 47 Centre for Innovative Justice
- 48 Confidential
- 49 Victims of Crime Commissioner, Victoria
- 50 Confidential
- 51 Law Institute of Victoria
- 52 Slavery Links
- 53 Magistrates’ Court of Victoria and Victims of Crime Assistance Tribunal

54	Victorian Gay and Lesbian Rights Lobby
55	Jacqueline Simpkin
56	Sandra Betts
57	Victims of Crime Assistance League
58	Judicial Advisory Group on Family Violence Supplementary Submission
59	Victims of Crime Assistance Tribunal, Magistrates' Court of Victoria and Children's Court of Victoria
60	BFK

Appendix B: Consultations

The Commission conducted consultations with the individuals and organisations listed below.

- 1 Victim Assist Queensland
- 2 Legal Professionals—Private Practice: Johnstone & Reimer Lawyers; Sharon Lacy, Barrister; RT Legal; Ryan Carlisle Thomas Lawyers; Schembri & Co Lawyers; Tanya Lakic Lawyers; YourLawyer
- 3 Legal Professionals—Community Legal Centres: Aboriginal Family Violence Prevention & Legal Service Victoria; Darebin Community Legal Centre; InTouch Multicultural Centre Against Family Violence; knowmore; Springvale Monash Legal Service; Victorian Aboriginal Legal Service; Victoria Legal Aid; Whittlesea Community Legal Service; Women’s Legal Service Victoria; Youthlaw
- 4 Victim, Witness and Court Support: Child Witness Service; Court Network; Office of Public Prosecutions; Victims Assistance Program—Centacare; Victims Assistance Program—cohealth; Victims Assistance Program—Eastern Victim Assistance Program; Victims Assistance Program—Merri Health; Victims Support Agency
- 5 Victims of Crime Commissioner, Victoria
- 6 Victims’ Advocacy Organisations: Crime Victims Support Association; Victims of Crime Assistance League
- 7 Family Violence and Advocacy Organisations: Relationships Australia Victoria; Victorian Association for Restorative Justice Committee/ South Eastern Centre Against Sexual Assault; Victorian Council of Social Service
- 8 Victims’ Representatives—Victims of Crime Consultative Committee
- 9 Domestic Violence Victoria Members
- 10 Regional Consultation—Morwell Victim Support Agencies: Court Network; Gippsland Centre Against Sexual Assault; Victims Assistance Program—Windermere
- 11 Regional Consultation—Victoria Legal Aid (Gippsland)
- 12 Regional Consultation—Mildura Victim Support Agencies: Mallee Sexual Assault Unit and Mallee Domestic Violence Services; Victims Assistance Program—Anglicare Victoria
- 13 Regional Consultation—Mildura Legal Professionals: Martin Irwin & Richards Lawyers; Victoria Legal Aid
- 14 Chief Magistrate’s Family Violence Taskforce

- 15 Regional Consultation—Ballarat Victim Support Agencies: Court Network; Ballarat Centre Against Sexual Assault; Victims Assistance Program—Centacare
- 16 Regional Consultation—Ballarat Legal Professionals: Central Highlands Community Legal Centre; Justin Burke Lawyers
- 17 Family Violence Diverse Communities and Intersectionality Working Group
- 18 PartnerSPEAK
- 19 RMIT Centre for Innovative Justice
- 20 Academics: Dr Ian Freckelton QC, Professor, The University of Melbourne; Dr Suzanne Fraser, Professor, Curtin University; Dr Kate Seear, Senior Lecturer, Monash University; Dr Genevieve Grant, Senior Lecturer, Monash University; Dr Robyn Holder, Postdoctoral Fellow, Griffith University
- 21 Victim Support ACT and the Victims of Crime Commissioner, ACT
- 22 Victims Services, NSW and the Commissioner of Victims Rights, NSW
- 23 Community Safety Trustee, Victoria
- 24 Slavery Links
- 25 Children’s Court of Victoria
- 26 Individual Victim Survivor
- 27 Victim Survivors’ Advisory Council
- 28 Magistrates’ Court of Victoria and VOCAT
- 29 Victims of Crime Consultative Committee
- 30 Victims Support Agency

Appendix C: Summary of recommendations relating to family violence

Introduction

- 1 The first terms of reference ask 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) (VOCAA).
- 2 Although the supplementary terms of reference expand the Commission's inquiry to consider the operation of the VOCAA and the Victims of Crime Assistance Tribunal (VOCAT) for all victims of crime, this appendix provides a summary of how relevant recommendations in this report have considered the unique circumstances of victims of family violence.

Recommendations relating to family violence

- 3 **Recommendations 1–2: Models of assistance.** While the proposed Model was assessed according to the objectives outlined in the supplementary terms of reference—which relate to all victims of crime—the Commission considered how the existing model impacted certain victim cohorts, including victims of family violence. In recommending a new model of state-funded financial assistance, the Commission has acknowledged that the current court-based model may be particularly challenging for victims of family violence given they are often already managing a number of concurrent legal proceedings and because a court-based model results in a number of additional safety concerns for victims of family violence that may not arise for other victims of crime. Additionally, the importance of timely decision making in family violence matters has been considered by the Commission in recommending an administrative model of assistance, noting that more timely assistance may enable a victim of crime to flee a violent situation and establish safe and secure housing.
- 4 **Recommendation 9: The proposed decision maker.** In recommending that the proposed scheme be overseen by a dedicated and specialised decision maker—and deputy decision makers who are subject matter specialists—the Commission has had regard to the need for decision makers to be trauma-informed and victim-centred. The Commission considers that deputy decision makers would enable the scheme to further specialise in matters such as family violence, sexual assault and historical child sexual abuse to ensure victims who have contact with the scheme will be provided with a specialised response tailored to their specific needs.
- 5 **Recommendation 14: Key components of the proposed scheme.** In recommending that victim conferences under the proposed Act provide a forum for victims to be acknowledged and heard—rather than being held for the purpose of determining an application—the Commission has had regard to stakeholder concerns about the impact that offender notification provisions have on victims of family violence victims under the

existing scheme. By reconceiving victim conferences as a forum for acknowledgement and validation, the Commission recommends that the proposed Act not enable alleged perpetrators to be notified about an application to the proposed scheme, protecting family violence victims' safety and wellbeing during the financial assistance application process.

- 6 **Recommendation 21: The purpose, objectives and principles of the proposed Act.** The Commission recommends that under the proposed Act, there be no reference to 'certain victims of crime' in the objectives as currently provided for under the VOCAA. This will address some issues encountered by victims of family violence who, due to the nature and dynamics of family violence, may be more likely to encounter subjective assessments of whether they are 'certain victims' under the VOCAA, having regard to matters such as whether a crime has been reported to police, whether a victim has co-operated with police or whether a victim has engaged in criminal activity. The Commission also recommends the inclusion of guiding principles in the proposed Act, including that victims' needs, safety and wellbeing should be paramount. This would address concerns that under the VOCAA, victims of family violence may encounter processes that impact their safety and wellbeing, such as perpetrator notification and the requirement to report a matter to police.
- 7 **Recommendation 24: Definition of victim.** It is proposed that the definition of victim include children who witness, hear, or are otherwise exposed to a criminal act to reflect the significant impact that exposure to violence—particularly family violence—has on children.
- 8 **Recommendation 27: Definition of criminal act.** It is proposed that the definition of a 'criminal act' include a range of additional offences that occur in the context of family violence that are not offences against the person and which would not otherwise be covered by the proposed Act.
- 9 **Recommendation 31: Requirement to prove injury.** It is proposed that a victim would not have to provide evidence that they suffered an injury as a result of a criminal act, where the criminal act occurred in the context of family violence. This would also apply to children who are exposed to a criminal act that occurred in the context of family violence.
- 10 **Recommendation 33: Streams of assistance.** The proposed new streams of assistance would better meet family violence victims' needs, particularly with respect to immediate (urgent) assistance, as well as housing and safety expenses.
- 11 **Recommendation 40: Recovery payments and plans.** To address issues relating to the VOCAA not sufficiently having regard to the cumulative impact of family violence, the Commission recommends that under the proposed Act, the VOCAA categories of 'special financial assistance' and 'recovery expenses' be consolidated into a new, flexible stream of assistance called 'Recovery payments and plans'. This new stream of assistance would be available to all victims of crime, including all eligible victims of family violence. When determining the amount of assistance to be provided under recovery payments/plans, decision makers under the proposed scheme would be required to consider whether the criminal act occurred in the context of a pattern of abuse, including family violence, as defined in the *Family Violence Protection Act 2008* (Vic). This would enable non-criminal forms of abuse—including non-criminal family violence—and the cumulative impact of such violence, to effectively operate as an 'uplift' on the amount of a recovery payment.
- 12 **Recommendations 41, 80: Recovery payments and plans.** It is proposed that the scheme decision maker be able to award a recovery payment in accordance with a recovery plan which, in the context of family violence, would mean that victims of family violence would not have lump sum payments refused on the basis of 'perpetrator

benefit', as is currently the case under the VOCAA. Rather than refuse to make an award because of 'perpetrator benefit', a scheme decision maker could hold monies on trust and administer the funds in accordance with a recovery plan for the victim's benefit.

- 13 **Recommendation 43: Amounts of assistance.** It is proposed that applicants who are the victim of two or more 'related criminal acts' would be eligible for up to \$25,000 in the form of a recovery payment/plan (rather than the maximum amount of \$20,000). This is to recognise the cumulative impact of patterns of abuse in circumstances such as family violence.
- 14 **Recommendation 57: How to make an application.** The Commission recommends that the proposed scheme's application form enable applicants to list multiple criminal acts by the same perpetrator and indicate that the criminal act/s occurred in the context of a pattern of abuse and list a range of dates over which time such abuse occurred.
- 15 **Recommendations 60, 62: Documentary evidence requirements—establishing a criminal act and injury.** The Commission recommends that applicants, in support of their application, may provide a Family Violence Intervention or Family Violence Safety Notice to assist the decision maker in determining whether a criminal act occurred. To establish a criminal act or injury, an applicant may also provide a report from a range of social and medical services, including a family violence service. This means that victims of family violence would be able to 'report' matters to, amongst other services and professionals, a family violence service.
- 16 **Recommendation 66: Use of application materials.** It is proposed that all documents related to an application under the proposed Act would be inadmissible in other legal proceedings (except in certain circumstances). While addressing other concerns relating to their use in criminal trials more broadly, this recommendation also specifically addresses concerns that family violence perpetrators are using such materials against victims in family law proceedings and to discredit them in criminal law proceedings.
- 17 **Recommendation 71: Time limits for applications.** It is proposed that there be longer application time limits for family violence victims (10 years as opposed to 3 years), as well as a further discretion for the proposed scheme decision maker to extend the application time limit having regard to the nature, dynamics and circumstances of the criminal act, including whether it occurred in the context of a pattern of abuse, including family violence.
- 18 **Recommendation 79: Factors to be considered by the decision maker when determining an application.** It is proposed that under the proposed Act, victims would no longer need to make a report to police, and co-operate with police and prosecution, as is currently required under section 52 of the VOCAA. Instead, under the proposed Act, a police report may be used by an applicant to assist them to meet evidentiary requirements for scheme eligibility. This responds to stakeholder concerns that such requirements are particularly difficult for victims of family violence to comply with because of the nature and dynamics of family violence. Additionally, it is proposed that the previous section 54 'character and behaviour' considerations under the VOCAA be replaced with a more specific consideration of an applicant's criminal history (in certain circumstances). Many of the broader character and behaviour considerations were particularly problematic for family violence victims because of the nature and dynamics of family violence—including the decision maker being required to have regard to perpetrator benefit, contributory conduct and provocation, which may lead to 'victim blaming'.

Appendix D: First and supplementary terms of reference—summary of matters considered in the report

Introduction

- 1 This appendix provides a summary of how each of the matters identified in the first and supplementary terms of reference are considered in this report.

First terms of reference

- 2 The first terms of reference ask 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) (VOCAA). The first terms of reference state that in conducting the review, the Commission should consider the following matters raised by 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.
- 3 Fundamentally, the first terms of reference seek answers to the question of what changes should be made to the VOCAA to better assist victims of family violence rebuild their lives and recover?

Supplementary terms of reference

- 4 The supplementary terms of reference expand the Commission's review to consider the operation and effectiveness of the VOCAA and the Victims of Crime Assistance Tribunal (VOCAT) for all victims, including family violence victims, in achieving the purposes of the VOCAA.
- 5 The supplementary terms of reference ask the Commission to bear in mind that a state-funded financial assistance scheme for victims should seek to achieve outcomes for victims that:
 - are fair, equitable and timely
 - are consistent and predictable
 - minimise trauma for victims and maximise the therapeutic effect for victims.
- 6 The Commission is also asked to bear in mind that a state-funded financial assistance scheme must also be efficient and sustainable for the state.
- 7 In particular, the Commission is asked to consider whether:
 - 1) The VOCA Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support.
 - 2) The VOCA Act recognises the appropriate people as victims.
 - 3) The tests for eligibility for assistance and the evidence required to meet those tests can be simplified to avoid unnecessary or disproportionate costs being incurred.
 - 4) The definition of 'act of violence', the time limits, categories of assistance and structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime.
 - 5) The basis of the formula in section 8A of the VOCA Act used to quantify special financial assistance is the most appropriate way to calculate the amount payable by the state for harm arising from crime.
 - 6) It is appropriate and fair to award assistance to aid recovery in exceptional circumstances (as allowed by section 8 of the VOCA Act) and whether there are other ways to promote the recovery of victims from the effects of crime.
 - 7) It is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or to be called to give evidence.
 - 8) Any processes, procedures or requirements under the VOCA Act cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi administrative model.
- 8 The supplementary terms of reference significantly expand the scope of the Commission's review. In particular the question of other models at matter eight above necessitates the consideration of the existing scheme as a whole, not just in relation to matters of delay. This is discussed further below.

Consideration of the first terms of reference

Should the eligibility test be expanded to include non-criminal family violence?

- 9 Matter 1 of the first 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’
- 10 Eligibility is considered in Chapters 5 and 12. Chapter 5 outlines issues identified in the consultation papers and stakeholder responses relating to eligibility. Chapter 12 discusses the eligibility test and associated matters, including the definitions of victim, criminal act and injury. In this chapter, the Commission considers whether eligibility should be expanded to include non-criminal acts, including non-criminal forms of family violence.
- 11 While the Commission acknowledges the significant impact that non-criminal forms of violence may have on victims, the Commission nonetheless concludes that providing assistance to victims of non-criminal violence, including non-criminal forms of family violence, would be inconsistent with the purpose of state-funded financial assistance schemes for victims of crime which aim to assist victims of criminal acts. Accordingly, the Commission considers that a state-funded financial assistance scheme for victims of crime should reflect offences in the criminal law and that it is a matter for parliament to determine what type of conduct constitutes a criminal offence.
- 12 However, to bring the proposed Act in line with changes to the law and community expectations, the Commission recommends that the range of criminal offences covered by the proposed scheme should be expanded to include all sexual offences, certain serious property offences and a range of additional offences that occur in the context of family violence that are not offences against the person. The Commission also recommends that the proposed Act replace the term ‘act of violence’ with ‘criminal act’ to better reflect the range of offences to be included in the proposed scheme and that only criminal conduct is included.

Categories and quantum of awards—the cumulative impact of family violence

- 13 Matter 2 of the first terms of reference ask the Commission to, ‘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’.
- 14 Assistance available is considered in Chapters 5 and 13. Chapter 5 outlines issues identified in the consultation papers and stakeholder responses to matters relating to assistance available under the existing scheme.
- 15 Chapter 13 discusses stakeholder concerns with the existing structure and quantum of awards under the VOCAA. Of particular relevance to this matter specified in the terms of reference, the Commission discusses:
 - the current provision in the VOCAA enabling VOCAT to award in ‘exceptional circumstances’ an amount for other expenses actually incurred or reasonably likely to be incurred to assist in the primary victim’s recovery. The Commission considers that these awards may disadvantage family violence victims because ‘exceptional circumstances’ may not always apply in family violence situations because VOCAT has interpreted ‘exceptional circumstances’ to mean ‘unusual, special, out of the ordinary’.
 - Whether special financial assistance sufficiently takes into account the cumulative harm of individual acts of violence as part of a pattern of abuse in a family violence context.

- 16 The Commission recommends that the current categories of award be abolished and replaced with six ‘streams of assistance’—immediate needs, funeral expenses, counselling expenses, practical assistance, recovery payments and recovery plans and recognition.
- 17 To address issues relating to the VOCAA not sufficiently having regard to the cumulative impact of family violence, the Commission recommends that under the proposed Act, the VOCAA categories of ‘special financial assistance’ and ‘recovery expenses’ be consolidated into a new, flexible stream of assistance called ‘Recovery payments and plans’. The new stream of assistance would be available to all victims of crime, including all eligible victims of family violence, and when determining the amount of assistance to be provided under recovery payments/plans, decision makers under the proposed scheme would be required to consider whether the criminal act occurred in the context of a pattern of abuse, including family violence, as defined in the *Family Violence Protection Act 2008* (Vic). This would enable non-criminal forms of abuse—including non-criminal family violence—and the cumulative impact of such violence, to effectively operate as an ‘uplift’ on the amount of a recovery payment.

Perpetrator notification

- 18 Matter 3 of the first terms of reference ask 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’.
- 19 VOCAT’s ability to give notice of the time and place for a VOCAT hearing to any other person whom the Tribunal considers to have a legitimate interest in the matter is considered in Chapters 5, 6, 10 and 14. Chapter 5 outlines issues identified in the consultation papers, relevant case law and stakeholder responses.
- 20 Chapter 6 considers the current law in relation to alleged perpetrator notification and appearance provisions under the VOCAA and the effects of such provisions on victim safety and wellbeing. It notes that the significant effects are unlikely to be ameliorated through legislative or procedural protections. The Commission also considers that alleged perpetrators do not have a legal interest in the matter of state-funded financial assistance to a victim of crime that needs to be met by matters of procedural fairness. This is because such a decision has no bearing on other legal matters. The Commission considers that an alleged perpetrator’s interest can be categorised, in the context of state-funded financial assistance as a reputational interest rather than a legal interest. Accordingly, the Commission proposes that perpetrator notification and appearance provisions be removed, and that this reflects a trauma-informed approach that prioritises victims’ safety and wellbeing.
- 21 Chapter 10 discusses the proposed scheme’s approach to hearings. The Commission recommends that VOCAT hearings be replaced by victim conferences—an ‘opt-in’ private hearing providing victims with an opportunity for validation and acknowledgement by the state.
- 22 The Commission considers that as victim conferences would be ‘opt-in’, and are not for the purposes of determining any application or the amount of any award, perpetrator notification and appearance provisions would not apply to victim conferences under the proposed Act. Although the Commission acknowledges concerns raised by some stakeholders that alleged perpetrators should have the opportunity to ‘defend themselves’, the Commission considers these concerns are no longer applicable under the proposed scheme. This is because, in contrast to hearings under the VOCAA, victim conferences under the proposed scheme would not be for the purpose of fact finding or making financial assistance determinations.
- 23 Chapter 14 further discusses the intended approach under the proposed scheme, noting that victim conferences would not form part of the application process and therefore, would not give rise to any actual or perceived issues of procedural fairness.

Refusal of an application except in special circumstances

- 24 Matter 4 of the first terms of reference ask the Commission to consider ‘the matters giving rise to refusal of an application except in special circumstances’.
- 25 Decision making under the existing scheme is considered in Chapters 5 and 15. Chapter 5 outlines issues identified in the consultation papers and stakeholder responses. Chapter 15 discusses factors to be considered by the decision maker under the proposed Act when determining an application, including refusal of applications.
- 26 The VOCAA requires VOCAT to refuse an award of assistance, unless there are special circumstances, if VOCAT is satisfied that an act of violence was not reported to police within a reasonable time; or 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).
- 27 Having regard to stakeholder concerns about refusal of awards under the VOCAA, the commission considers that the current requirements are not consistent with the purpose of the proposed Act—to assist victims of crime in their recovery. Accordingly, the Commission recommends that there be no mandatory requirement for a victim to make a report to police or assist with police or prosecution. Instead, under the proposed Act, a police report may be used by an applicant to assist them to meet evidentiary requirements for scheme eligibility.

Procedural matters to expedite the making of an award

- 28 Matter 5 of the first terms of reference ask the Commission to consider ‘procedural matters to expedite the making of an award’. Additionally, and as outlined below, the supplementary terms of reference require the Commission to bear in mind that a state-funded financial assistance scheme should be timely, and to consider whether there are any processes, procedures or requirements under the VOCAA which cause unnecessary delay to the provision of assistance to victims of crime.
- 29 Accordingly, timeliness of awards is a significant focus of the report and is considered in Chapters 5, 7, 8, 9, 11 and 15.
- 30 Chapter 5 outlines issues identified in the consultation papers and stakeholder responses to matters relating to timeliness. Chapters 7 and 8 discuss the importance of timely decision making in considering the effectiveness of VOCAT and other models of state-funded financial assistance. In Chapter 8, the Commission considers that a court-based model may not be able to provide the timeliest response to victims of crime because of resource constraints and the prioritisation of other court business. Accordingly, the Commission recommends that the most effective model to deliver Victoria’s state-funded financial assistance scheme is an independent and dedicated decision maker.
- 31 In Chapter 9, the Commission considers that it would be appropriate for the proposed scheme to be administered by Victoria’s Victims of Crime Commissioner. In considering the proposed expansion of the Office of the Victims of Crime Commissioner, the Commission notes the importance of appropriate resourcing of the Commissioner’s office, and delegation powers to ensure the proposed scheme provides a timely response to victims.
- 32 Timeliness of decision making is also considered in Chapters 11 and 15. In Chapter 11, the Commission recommends that there no longer be an objective in the proposed Act that the scheme be a scheme of ‘last resort’ because such an objective has the potential to cause substantial delay in decision making and would require some victims to exhaust other avenues that may be impractical, complex and lengthy.

- 33 In Chapter 15, the Commission notes that while a transition to an administrative model would likely to lead to improvements in overall timeliness of decision making, the Commission considers further safeguards should be incorporated into the proposed Act to ensure timeliness of awards for victims of crime. Accordingly, the Commission recommends that the scheme decision maker be required to act expeditiously in the determination of applications and to support this, that regulations should provide for time limits within which determinations for immediate assistance, funeral expenses, counselling and practical assistance should be made.

Consideration of the supplementary terms of reference

‘Reference objectives’

- 34 The supplementary terms of reference require the Commission ‘to bear in mind that a state-funded financial assistance scheme for victims should seek to achieve outcomes for victims that:
- are fair, equitable and timely
 - consistent and predictable
 - minimise trauma for victims and maximise the therapeutic effect for victims
 - efficient and sustainable for the state.’
- 35 The supplementary terms of reference require the Commission to bear in mind that a ‘state-funded financial assistance scheme must also be efficient and sustainable for the state’.
- 36 The above matters—along with consideration of whether the scheme is simple and easy for victims to understand and does not require victims to have legal support in all circumstances—are referred to throughout this report as the ‘reference objectives’. The reference objectives provide the Commission with its guiding framework for assessing:
- the operation and effectiveness of the existing scheme
 - whether there are other models of state-funded financial assistance that would more effectively deliver assistance, as required by the supplementary terms of reference.
- 37 The reference objectives are discussed in Chapters 7 and 8. Having regard to stakeholder views on the reference objectives, Chapter 7 concludes that there is a need for a new approach.
- 38 Chapter 8 considers two different approaches for reform—a reformed judicial model, as proposed by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria in their joint submission, and an administrative model. Having regard to the reference objectives, Chapter 8 concludes that although the reforms proposed by VOCAT, the Magistrates’ Court of Victoria and the Children’s Court of Victoria in their joint submission would be significant reforms, the more effective model to deliver state-funded financial assistance is an administrative model led by an independent, dedicated and specialised decision maker.

Can the VOCAA be simplified?

- 39 Matter 1 of the supplementary terms of reference ask the Commission to consider whether ‘the VOCA Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support’.
- 40 In Chapter 8, the Commission notes stakeholder concerns that the VOCAA is complex and outdated. The Commission recommends that the VOCAA should be repealed and replaced with a new Act which establishes the proposed scheme and incorporates further legislative reforms recommended in the report.

- 41 In Chapters 10, 12, 13 and 14, the Commission outlines a number of components of the proposed scheme, along with technical and procedural aspects of the proposed new Act, which aim to simplify the process for victims by:
- providing for both case management and legal representation under the proposed scheme
 - establishing a new, simplified and comprehensive definition of ‘victim’, removing the need for victims to identify as ‘primary’, ‘secondary’ or ‘related’ victims
 - expanding the definition of ‘injury’ so that a victim is not required to demonstrate they have a ‘mental illness or disorder’
 - removing the requirement for certain victims to prove injury and simplifying the causation requirement under the proposed Act
 - introducing new simplified streams of assistance defined in plain language
 - removing a number of the VOCAA’s ‘character and behaviour’ considerations relating to the making of awards and determining the amount of awards, simplifying the decision making process for both victims and decision makers under the proposed scheme, and
 - clarifying and simplifying provisions relating to the proposed scheme’s interaction with other financial assistance schemes and the refund of awards.

Does the VOCAA recognise the appropriate people as victims?

- 42 Matter 2 of the supplementary terms of reference ask the Commission to consider whether ‘the VOCA Act recognises the appropriate people as victims’.
- 43 This matter relates to the purpose of the VOCAA; eligibility under the VOCAA; eligibility for certain types of assistance under the existing scheme; and refusal or reduction of awards based on character and behaviour considerations. These matters are discussed in Chapters 11, 12, 13 and 15.
- 44 In Chapter 11, the Commission considers that the VOCAA objective of paying ‘certain victims’ financial assistance as a symbolic expression by the state of the community’s sympathy can result in a subjective assessment of whether a victim is an ‘appropriate’ or ‘worthy’ victim. The Commission recommends that the proposed Act not include such an objective and that all eligible victims should be entitled to assistance under the proposed Act according to the specified eligibility criteria.
- 45 As outlined above, Chapter 12 discusses the eligibility test and recommends that under the proposed Act, a person is eligible for financial assistance where the person is a victim of a criminal act and suffers an injury as a result of that criminal act.
- 46 Chapter 13 discusses assistance available under the VOCAA and notes stakeholder concerns regarding both the existing structure and quantum of awards under the VOCAA. In particular, Chapter 13 notes that some existing categories of award under the VOCAA—like special financial assistance and awards for ‘recovery expenses’—fail to recognise some victims. The Commission recommends that the proposed Act introduce new simplified streams of assistance. In particular, the Commission recommends that the VOCAA awards of ‘recovery expenses’ and ‘special financial assistance’—which currently exclude some victims—be replaced with a single stream of assistance available to all victims eligible under the proposed Act called ‘recovery payments and plans’.

- 47 In Chapter 15, the Commission discusses the current VOCAA factors resulting in refusal of awards, or the reduction of awards, including consideration of whether a victim has reported a matter to police or their broad character and behaviour 'at any time'. The Commission agrees with stakeholder concerns that such factors result in subjective assessments of whether victims are 'innocent' or 'deserving' and recommends that the proposed Act not replicate the VOCAA provisions. The Commission recommends that the proposed decision maker limit consideration of an applicant's behaviour to consideration of criminal behaviours with a nexus between the criminal act the subject of the application.

Can the tests for eligibility and the evidence required be simplified?

- 48 Matter 3 of the supplementary terms of reference ask the Commission to consider whether 'the tests for eligibility for assistance and the evidence required to meet those tests can be simplified to avoid unnecessary or disproportionate costs being incurred'.
- 49 Eligibility is considered in Chapters 5 and 12. Chapter 5 outlines issues identified in the consultation papers and stakeholder responses relating to eligibility. Chapter 12 discusses the eligibility test and associated matters, including the definitions of victim, criminal act and injury.
- 50 Chapter 12 discusses the eligibility test and recommends that under the proposed Act, a person is eligible for financial assistance where the person is a victim of a criminal act and suffers an injury as a result of that criminal act. Under the proposed Act, the Commission recommends removing the requirement for certain victims to prove injury and simplifying the causation requirement.
- 51 Chapter 14 discusses the evidence required to establish eligibility. Having regard to stakeholder concerns that some victims may find it difficult to provide evidence of a criminal act, the Commission recommends that an applicant should be able to provide a broader range of documentary evidence under the proposed Act to establish that they were the victim of a criminal act. The Commission also recommends that the evidentiary requirements for proof of injury should be broadened to enable a wider range of documentation to be submitted to prove injury. To further simplify the process for victims, the Commission recommends that the proposed scheme's case managers should assist victims with collecting documentary evidence.

The definition of 'act of violence', time limits, categories of assistance, structure and timing of awards

- 52 Matter 4 of the supplementary terms of reference ask the Commission to consider whether 'the definition of "act of violence", the time limits, categories of assistance and structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime'. These matters span a number of chapters as follows:
- **Chapter 12—eligibility test and the definition of 'act of violence'**. The Commission considers whether the definition of 'act of violence' should be amended to recognise non-criminal acts such as some forms of family violence. While acknowledging the significant impact that non-criminal forms of violence may have on victims, the Commission concludes that including non-criminal acts in the proposed scheme would undermine the fundamental purpose of state-funded financial assistance which is to assist victims of criminal acts. However, to bring the proposed Act in line with changes to the law and community expectations, the Commission recommends that the range of criminal offences covered by the proposed scheme should be expanded to include all sexual offences, certain serious property offences and a range of additional offences that occur in the context of family

violence (that are not offences against the person). The Commission also recommends that the proposed Act replace the term 'act of violence' with 'criminal act' to better reflect the range of offences to be included in the proposed scheme and that only criminal offences are covered.

- **Chapters 5 and 14—time limits.** Chapter 5 outlines issues identified in the consultation papers and stakeholder responses relating to eligibility. Chapter 14 notes stakeholder concerns about the disadvantages experienced by some victim cohorts as a result of the two-year application time limit under the VOCAA. To address these concerns, the Commission recommends increasing the time limit from two to three years for all victims, increasing the time limit further for some victims and abolishing the time limit entirely for others. Additionally, the proposed scheme decision maker would be able to consider applications made out-of-time, having regard to a range of expanded factors.
- **Chapter 13—categories and structure of awards.** The Commission notes stakeholder concerns regarding the categories and structure of awards under the VOCAA and, as outlined above, recommends that the current categories of award be abolished and replaced with six 'streams of assistance'—immediate needs, funeral expenses, counselling expenses, practical assistance, recovery payments and recovery plans and recognition.
- **Chapters 5, 13, 15—timing of awards.** Chapter 5 outlines issues identified in the consultation papers and stakeholder responses relating to timeliness of awards. Chapter 13 discusses assistance available under the VOCAA and in recommending new streams of assistance, the Commission highlights the importance of providing assistance for victims' urgent needs by creating a new stream of assistance for 'immediate needs'. In Chapter 15, the Commission notes that while a transition to an administrative model would likely lead to improvements in overall timeliness of decision making, the Commission considers further safeguards should be incorporated into the proposed Act to ensure timely decision making. Accordingly, the Commission recommends that the scheme decision maker should be required to act expeditiously in the determination of applications and to support this, regulations should provide for time limits within which determinations for immediate assistance, funeral expenses, counselling and practical assistance should be made.

Is the special financial assistance formula appropriate?

- 53 Matter 5 of the supplementary terms of reference ask the Commission to consider whether 'the basis of the formula in section 8A of the VOCA Act used to quantify special financial assistance is the most appropriate way to calculate the amount payable by the state for harm arising from crime'.
- 54 Chapter 13 discusses assistance available and notes a number of stakeholder concerns about the way in which the special financial assistance categories currently operate.
- 55 The Commission recommends that the current categories of award be abolished and replaced with six 'streams of assistance'—immediate needs, funeral expenses, counselling expenses, practical assistance, recovery payments / plans and recognition. Accordingly, special financial assistance and its associated formulas would not exist under the proposed Act.
- 56 Under the proposed Act, the decision maker would determine the amount of a recovery (lump sum) payment according to a range of factors including whether the criminal act was directly perpetrated against the victim; the nature of the victim's injury; the vulnerability of the victim and whether the alleged perpetrator was in a position of power, influence or trust; whether the criminal act occurred in the context of a pattern of abuse such as family violence of child abuse; and whether there were a series of related criminal acts.

Is it appropriate to award assistance in exceptional circumstances?

- 57 Matter 6 of the supplementary terms of reference ask the Commission to consider whether 'it is appropriate and fair to award assistance to aid recovery in exceptional circumstances (as allowed by section 8 of the VOCA Act) and whether there are other ways to promote the recovery of victims from the effects of crime'.
- 58 Assistance available is considered in Chapters 5 and 13. Chapter 5 outlines issues identified in the consultation papers and stakeholder responses to matters relating to eligibility. Chapter 13 discusses assistance available under the VOCAA and the proposed Act.
- 59 As outlined above, under the VOCAA, VOCAT may award in 'exceptional circumstances', an amount for other expenses actually incurred or reasonably likely to be incurred to assist in the primary victim's recovery ('recovery expenses'). VOCAT has interpreted 'exceptional circumstances' to mean 'unusual, special, out of the ordinary'.
- 60 In reviewing the current law in relation to assistance available under the VOCAA, the Commission considers that the 'recovery expenses' provisions of the existing scheme, which limit the award of such expenses to where there are 'exceptional circumstances', create uncertainty. In particular, the Commission notes stakeholder concerns about the lack of clarity regarding the expenses covered; inconsistency as a result of VOCAT's broad discretion; and the narrow interpretation of 'exceptional circumstances'. Taken together, the Commission concludes that the practical operation of the 'recovery expenses' provision is that it unfairly and inappropriately limits assistance to aid recovery.
- 61 Accordingly, the Commission recommends that under the proposed Act, the existing 'special financial assistance' and 'recovery expenses' awards should be consolidated into a new, flexible stream of assistance called 'Recovery payments and plans' available to all victims of crime which would be determined according to a range of factors.

Is it appropriate for alleged perpetrators to be notified or called to give evidence?

- 62 Matter 7 of the supplementary terms of reference ask the Commission to consider whether 'it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or to be called to give evidence'.
- 63 As outlined above, this matter was also raised in the first terms of reference and was considered in Chapters 5, 6, 10 and 14. Chapter 5 outlines issues identified in the consultation papers and stakeholder responses relating to perpetrator notification.
- 64 Chapter 6 considers the current law in relation to alleged perpetrator notification and appearance provisions under the VOCAA and the effects of such provisions on victim safety and wellbeing. It notes that the significant effects are unlikely to be ameliorated through legislative or procedural protections. The Commission also considers that alleged perpetrators do not have a legal interest in the matter of state-funded financial assistance to a victim of crime that needs to be met by matters of procedural fairness. This is because such a decision has no bearing on other legal matters. The Commission considers that an alleged perpetrator's interest can be categorised, in the context of state-funded financial assistance as a reputational interest rather than a legal interest. Accordingly, the Commission proposes that perpetrator notification and appearance provisions be removed, and that this reflects a trauma-informed approach that prioritises victims' safety and wellbeing.
- 65 Chapter 10 discusses the proposed scheme's approach to hearings. The Commission recommends that VOCAT hearings be replaced by victim conferences, an 'opt-in' private hearing providing victims with an opportunity for validation and acknowledgement by the state.

- 66 As victim conferences would be 'opt-in' only, and not for the purposes of determining any application or the amount of any award, the Commission considers that perpetrator notification and appearance provisions should not apply to victim conferences under the proposed Act. Although the Commission acknowledges concerns raised by some stakeholders that alleged perpetrators should have the opportunity to 'defend themselves' at a hearing, the Commission considers these concerns are no longer applicable under the proposed scheme. In contrast to hearings under the VOCAA, victim conferences under the proposed scheme would not be for the purpose of fact finding or making financial assistance determinations.
- 67 Chapter 14 further reiterates the intended approach under the proposed scheme in which victim conferences would no longer form part of the application or decision making process, as is the case under the existing scheme and accordingly, would not give rise to any actual or perceived issues of procedural fairness for alleged perpetrators.

Are there other models that would more effectively deliver assistance?

- 68 Matter 8 of the supplementary terms of reference ask the Commission to consider whether 'any processes, procedures or requirements under the VOCA Act cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi administrative model'.
- 69 In the Commission's view, the question of other models raised in the supplementary terms of reference necessitates a consideration of the existing scheme as a whole, not just in relation to matters of delay. This holistic approach is confirmed by the broad approach of the supplementary terms of reference, which ask the Commission to consider the operation and effectiveness of the VOCAA and VOCAT for all victims.
- 70 Matters relating to whether there are other models of state-funded financial assistance that would more effectively deliver assistance are considered in Chapters 7 and 8.
- 71 In Chapter 7, the Commission considers whether the existing scheme meets the objectives identified in the terms of reference. The Commission considers that while some victims may experience therapeutic outcomes, the existing scheme does not maximise therapeutic effects, nor minimise trauma, for all victims of crime because some victims can be distressed and traumatised by the adversarial nature of the VOCAT process, by how hearings may be conducted and by delays experienced in receiving awards. The Commission also considers that the existing scheme is not efficient and sustainable, timely, consistent and predictable, nor is it simple or easy to understand. Accordingly, the Commission considers that on balance, there are other models that would more effectively deliver assistance.
- 72 Chapter 8 considers two different approaches for reform—a reformed judicial model, as proposed by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria in their joint submission, and administrative models. Chapter 8 concludes that although the reforms proposed by VOCAT, the Magistrates' Court of Victoria and the Children's Court of Victoria in their joint submission would be significant reforms, the more effective model to deliver state-funded financial assistance is an administrative model led by an independent, dedicated and specialised decision maker.



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Victorian
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**Review of the Victims
of Crime Assistance Act 1996
REPORT**

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