

Submission to the Victorian Law Reform Commission's

Review of the *Victims of Crime Assistance Act 1996*

Schembri & Co Lawyers is a generalist legal practice with offices located in Essendon and Carlton. We provide legal services in a range of practice areas such as family law, criminal law, conveyancing, personal injury, commercial litigation, Wills and estate planning.

Our firm is also well known for its extensive experience in Victims of Crime matters. Schembri & Co Lawyers has a specialist team dedicated to Victims of Crime Assistance Applications and has been assisting victims of crime since 2005. We have also developed expertise in relation to assisting victims of family violence and sexual offences. Our firm represents approximately 1,000 victims per annum.

We welcome the opportunity to provide these comments to the Victorian Law Reform Commission, for the Attorney General, the Hon. Martin Pakula MP to review the *Victims of Crime Assistance Act 1996* ("the Act") to address any inadequacies, increase efficiency and consistency in the best interests of victims.

Awareness of VOCAT and Accessibility

Is the VOCAT system easy to navigate without legal representation? If not, why? Should the system be changed to make it more accessible for victims without legal representation? If so, what changes should be made to the Act and/or VOCAT processes?

We have observed that victims generally have multiple and complex needs. The VOCAT process can be overwhelming for distressed victims and lawyers play an important role, particularly in complex matters thus alleviating the pressure on victims to navigate the proceedings. Lawyers also assist to ensure that the victims apply for all the relevant entitlements under the Act. It is our experience that family violence victims, young victims, elderly victims, sexually abused victims, victims from culturally and linguistically diverse backgrounds, victims with Aboriginal background, victims with criminal records and victims with disabilities or mental health issues require the assistance of lawyers.

Victims are often silent during the criminal process. They have a right to access justice and this includes access to legal representation. It is unreasonable to expect traumatised victims to prepare and manage an application for assistance without legal assistance or advice. Lawyers increase the efficiency of processing the applications and assist VOCAT to determine matters expeditiously.

ESSENDON OFFICE:

Suite 6, Level 2
200-202 Buckley Street,
Essendon, Victoria 3040
DX 33601, Essendon
PO Box 88, Essendon 3040

CARLTON OFFICE:

Level 1
135-139 Cardigan Street,
Carlton, Victoria 3053
DX 95308, Carlton MBE
PO Box 63, Carlton South 3053

www.schembrilawyers.com.au

info@schembrilawyers.com.au

Schembri & Co Lawyers Pty Ltd
ABN 49 103 404 995

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In addition, lawyers are also able to provide assistance in relation to other related matters stemming from the act of violence. For example, our firm obtained an award from VOCAT to file a divorce application for a victim whose husband had sexually abused their daughter for many years. We also represented another victim of attempted murder by her husband in a family law property settlement wherein she retained 80% of the marital asset pool.

Our firm also advises victims in relation to compensation applications against the offender personally pursuant to Section 85B of the *Sentencing Act 1991*. Many of our clients who have been victims of sexual abuse have been awarded up to \$150,000.00 for pain and suffering experienced as a result of the act of violence which is significantly more than VOCAT can award. It should be noted that any compensation amount is reduced by the amount of Special Financial Assistance previously awarded to the victim by VOCAT.

Eligibility for Assistance and Financial Assistance Available

Should the definition of 'act of violence' in the Act be amended? Should it include forms of non-criminal behaviour, including family violence? If so, what forms?

An "act of violence" means a criminal act or a series of related criminal acts, whether committed by one or more persons, that has occurred in Victoria and directly resulted in injury or death as defined in Section 3 of the Act.

It is our view that the definition of "act of violence" should be amended to include a family violence related act of violence as defined by the *Family Violence Protection Act 2008* which includes physical and sexual abuse in addition to non criminal behaviour which is:

- (a) emotionally or psychologically abusive; or
- (b) is economically abusive; or
- (c) is threatening; or
- (d) is coercive; or
- (e) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- (f) damage to property in the presence of the victim.

The non criminal behaviour is relevant only in so far as to distinguish between the course of conduct in family violence matters rather than just a one off isolated criminal act which has not arisen out of a pattern of abusive behaviour.

Should the requirement for injury in the Act be removed for certain victims of crime? If so, for which categories of victim should the requirement be removed?

VOCAT must be satisfied that the Applicant has suffered any injury as defined in Section 3(1) of the Act as a direct result of the act of violence. In the event that the Applicant did not sustain a physical

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injury, a psychological assessment report must be in support of psychological injury so that VOCAT can grant an award of Special Financial Assistance.

We believe that the requirement for injury should be removed in relation to primary victims of family violence as they may not always have sustained a physical or psychological injury. There should be a baseline award for family violence offences which recognises the overall impact and disruption to the victim's wellbeing without having to prove injury. An option to increase the award should be available in the event the victim files medical and psychological evidence of injury.

Also, the requirement for injury should be removed for victims of childhood sexual abuse. It is our experience that victims are reluctant to attend counselling fearing that it will trigger the trauma and memories of the abuse. It is well known that victims of child sexual abuse experience mental health issues such as Depression, Anxiety and Post Traumatic Stress Disorder. The award should be based on the sexual offence committed against the victim.

Is it appropriate for the Act to limit awards for recovery expenses to 'exceptional circumstances'? If not, what changes should be made to the Act?

Section 8(3) of the Act states that, in exceptional circumstances, VOCAT may award an amount for other expenses to assist recovery from the act of violence. For example, VOCAT has granted awards in relation to replacement bedroom furniture for sexual assault victims, education costs to assist with retraining and employment prospects, gym memberships, yoga, massage, motor vehicle and driving lessons to increase mobility, relocation costs, bond and first month's rental, purchase of a pet, music lessons, computer and respite holiday to assist a victim's recovery.

The reference to "exceptional circumstances" is not defined in the Act, however, it is generally accepted to mean out of the ordinary and is often interpreted by VOCAT without consistency. 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.

The reference to "exceptional circumstances" should be removed from the Act so that victims who genuinely require certain expenses to assist recovery, such as sexual assault victims and family violence victims, can obtain a tailored and therapeutic approach towards their recovery.

Family violence can disrupt a victim's entire life including accommodation, employment, finances and children's education which then exacerbates the effects of the act of violence. VOCAT should be able to make specific awards to ease this burden for victims of family violence.

We refer to the Royal Commission into Family Violence and note that in the Summary and Recommendations 2016, the Commission outlines the three essential pillars of recovery for victims of family violence, namely, "*secure and affordable housing, financial security, and health and well being.*"

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The Commission acknowledges that victims should be provided with the opportunity to pursue further education or re-establish a career to rebuild their lives. We note that at page 30 the Commission states that:

“The second pillar of recovery is financial security. Women who have lived with a violent partner are more likely than other women to experience financial difficulty, and many women experience poverty as a result of family violence. The associated abuse can be financial in nature (defined by law as economic abuse) or can be characterised by other forms of family violence that affect a victim’s financial wellbeing. A range of factors can exacerbate victims’ experience of financial insecurity—among them difficulty obtaining child support payments, tenancy problems, a lack of control over household finances, and credit, utility and car-related debt incurred by the perpetrator. Securing paid employment can help victims of family violence become financially secure and recover from the economic and non-economic consequences of family violence. Victims should have access to education and employment assistance through the greater use and availability of individualised funding packages”.

Should the special financial assistance formula be amended to recognise the cumulative harm of a series of related criminal acts or the experiences of vulnerable victims? If so, how should the special financial assistance formula be amended?

The current awards for family violence victims are inadequate. For example, a victim of a random assault is entitled to an amount of \$650.00 - \$1,300.00 for Special Financial Assistance.

A victim of family violence may be entitled to a Category C maximum amount in the amount of \$1,300.00 for a Category D act of violence if the victim can establish that she has been the victim of related criminal acts of violence pursuant to regulation 8 of the Victims of Crime Assistance (Special Financial Assistance) Regulations 2011 (“the Regulations”).

It is proposed that Category A maximum amount be available for family violence victims for Category B, C and D offences.

The current awards for family violence victims do not acknowledge or reflect the injury caused over a long period of time. The amount of Special Financial Assistance in Category A should be increased to \$20,000.00 to acknowledge cumulative harm of related criminal acts of violence.

Victims should have the opportunity to claim an increased lump sum for incremental harm caused over a long period of time as a result of family violence or sexual abuse. This could be reflected in the uplift provisions in the Regulations.

Alternatively, there could be a separate table for Special Financial Assistance for family violence victims to provide for the varying degrees of family violence offending.

It is recognised that children who witness family violence suffer psychological and developmental problems. As secondary victims, the Act should be amended so that they are also awarded Special

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Financial Assistance which acknowledges the long term harm caused to children exposed to family violence.

Should the definition of 'related criminal acts' be amended to have regard to the cumulative impact of family violence or other long-term abuse on victims? If so, how should this be done?

Section 3 of the Act defines a singular 'act of violence' as including a combination of acts of violence which it defines as "related criminal acts". This includes a range of offences committed against the victim, at different times and places by the same offender.

Currently, a victim of three random assaults by three different offenders would be eligible to file three applications with VOCAT and be awarded three separate amounts of Category D Special Financial Assistance \$650.00 resulting in a total of amount of \$1,950.00.

A victim of family violence who was assaulted by her husband on three different occasions is only entitled to one payment of Special Financial Assistance up to \$1,300.00 if she can establish related acts of violence.

The definition of related criminal acts should also include a pattern of family violence non criminal abusive behaviour.

There should be provision for related criminal acts to be reflected in the uplift provisions in the Regulations.

Time Limits and the Making of Awards

Are the current factors VOCAT may consider in determining whether to hear an application out of time sufficient? Should other factors be included in the Act? If so, what additional factors should be included?

Section 29 of the Act states that if an application that is not made within the two year time limit may be struck out unless VOCAT considers, in the particular circumstances, that it ought not to be struck out. In this regard, the Applicant must file an explanation for the delay in lodging the application and seek permission from VOCAT to proceed with the application for assistance. This section should be amended to include the following exceptions that do apply to applications which are out of time:

- (a) criminal proceedings have taken a significant time to finalise;
- (b) sexual offences; and
- (c) family violence offences.

An application for extension of time should be abolished in relation to offences involving historical childhood sexual abuse, sexual assault and family violence. These offences may not be disclosed due to confusion, shock, guilt, helplessness, fear of the offender and the majority of these offences

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are reported many years later. Also, psychological symptoms may develop many years after the act of violence.

We note that Section 54 of the *Juries Directions Act 2015* (Vic) directs trial judges to direct juries that a delay in reporting a sexual offence is common and that there is no typical response to a sexual offence.

Family violence victims experience a cycle of abuse comprising lesser degrees of offending committed against them, such as minor assaults, stalking, threats to harm and kill which occur over the long term causing cumulative psychological harm. It also takes most victims a significant period of time to finally terminate an abusive relationship, report it to police and access support.

Should some, or all, of the Section 54 considerations be excluded for certain victims, such as victims of family violence? If so, what considerations should be excluded?

Section 54 of the Act requires VOCAT to consider the Applicant's criminal history or inappropriate behaviour. This should be disregarded in relation to victims of family violence and sexual abuse. These victims are often vulnerable and have mental health issues which stem from the acts of violence committed against them. These victims have low self esteem and self medicate with drugs and alcohol which is often the underlying cause of their criminal history.

Similarly, Section 52 of the Act states that VOCAT must refuse to grant an award if the Applicant failed to report the offence to police within a reasonable time or provide reasonable assistance to Victoria Police unless there are special circumstances. This section should be amended to specify family violence and sexual abuse offences as an exception eliminating the requirement for the victim to provide an explanation for the failure or delay to report the act of violence to police.

The majority of victims of family violence and sexual abuse are in fear of the offender, may feel confused, shocked, embarrassed or ashamed by the offences committed against them. Sexual offences are also usually committed by somebody that is known to the victim such as a relative or friend as is family violence which is committed by a spouse or intimate partner. It is for these common reasons that most victims do not report or delay reporting the act of violence to police.

Review, variation and timeliness of awards

What benefits might be achieved by enabling all Magistrates to make interim VOCAT awards at the same time as hearing other matters? How would this work in practice?

Magistrates could make interim awards to family violence victims who attend court for intervention orders or in a criminal matter in relation to safety related expenses such as lock changes or relocation expenses.

An interim lump sum crisis payment would be also be beneficial to victims to utilise in a manner most effective for them given their circumstances at the time.

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In practice, victims should be encouraged to complete the application for assistance and file it with the registry on the same day they first attend court. The VOCAT file and other related files should remain together and be heard by the same Magistrate until all matters are concluded and victims encouraged to obtain legal representation to finalise the application to ensure they are awarded all their entitlements.

Ideally, all the related matters such as the criminal proceedings, the intervention order, family law matters and VOCAT should be heard by the same Magistrate in the specialist family violence courts throughout Victoria which will ultimately operate as a 'one stop shop' model for victims of family violence as recommended by the Royal Commission into Family Violence and to be implemented by the State Government.

VOCAT hearing process

How do the rights of perpetrators—to be notified or appear—fit with the purpose of the Act, which is to provide assistance to victims of crime? What changes, if any, should be made to the Act to appropriately balance the rights of perpetrators and the rights of victims?

Where the offence was not reported to police or the charges withdrawn or the alleged offender has been acquitted, VOCAT may not be satisfied that an act of violence has occurred and may notify the alleged offender to appear in a final hearing. The victim is always provided the opportunity to object to the notification. In the event the matter proceeds to a final hearing with the alleged offender, the victim can request to appear by video link or behind a screen.

The Act should be amended in this regard to specifically prohibit alleged offenders directly cross examining family violence victims and sexual abuse victims.

The Act could be amended to allow VOCAT to issue a certificate to protect the alleged offender from prosecution where there is uncharged criminal offending for the purpose of satisfying itself that an act of violence has been committed on the balance of probabilities.

Should the Act be amended to include a legislative presumption against perpetrator notification? If so, how should the Act be amended?

The rules of natural justice ensure that a decision is fair and reasonable. It is a matter for VOCAT to decide whether or not there should be a hearing. Each case turns on its own facts and evidence must be tested when there is doubt or insufficient information filed with VOCAT.

Should VOCAT application materials be admissible as evidence in criminal or family law proceedings? If not, how should the Act be amended?

The VOCAT documents should be inadmissible as evidence in family law or criminal proceedings unless the applicant provides written consent.

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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.

**What factors currently impact on consistency in practice, procedure and the making of awards?
How should this variability best be addressed?**

In certain circumstances VOCAT can have too much discretion which can lead to inconsistency in practice, procedure and final awards. Practice Directions and Guidelines should be more specific with a view to minimising these inconsistencies. However, a degree of discretion remains necessary to enable VOCAT to deal with the very wide variety of applications and the differing needs of victims. There is a difficult balance that needs to be found.

Is VOCAT the Right Model?

Is VOCAT the right model or alternatively is state funded financial assistance to victims of crime better provided as part of victim support? If so, why and how should this operate?

It is our view that VOCAT is the appropriate model as it gives all victims the opportunity to access legal representation to assist their rehabilitation from an act of violence and to ensure they receive all relevant entitlements available to them.

Lawyers play a crucial role in VOCAT proceedings and especially in complex matters. Many victims will likely have difficulty navigating an administrative model particularly those who have been traumatised by the offence, suffer from mental illness, have sustained extensive physical injuries and victims from culturally and linguistically diverse backgrounds.

Without the assistance of legal representation, victims may not be aware of their entitlements which may result in a decrease of financial assistance to victims.

The administrative model that deals with victims of crime applications in New South Wales is problematic, inadequate, has caused less entitlements to victims, further delays and confusion according to the Submission by the President of the Law Society of New South Wales dated 3 August 2016 to the NSW Department of Justice. The conclusion states:

“Providing effective support for victims of crime is one of the key objectives of the Act. The Law Society submits that the scheme under the Act provides inadequate support for victims of acts of violence. Recognition payments should be substantially increased, and legal advice should be permitted, and paid for, under the scheme”.

Should the State Government be seeking to reduce the costs associated with VOCAT, we suggest that VOCAT utilise the provisions of Section 51 of the Act and recover awards from offenders who

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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.

An efficient scheme to assist victims in their recovery is essential in Victoria. It empowers victims and recognises their suffering. An act of violence against a victim is often life changing. It is our observation that many victims experience Post Traumatic Stress Disorder, significant Anxiety and/or Clinical Depression which limits their capacity to participate fully in society and their only option for recovery is VOCAT. We should not abandon our victims to an administrative process.

Prepared by
Anita Plesa
Senior Associate
Schembri & Co Lawyers

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