



**SUBMISSIONS TO THE VICTORIAN LAW REFORM COMMISSION
REVIEW OF THE *VICTIMS OF CRIME ASSISTANCE ACT 1996***

31 October 2017

Victorian Law Reform Commission
Level 3
333 Queen Street
Melbourne Victoria 3000 Australia

By Email: law.reform@lawreform.vic.gov.au & Post

To whom it may concern,

We provide the following submissions in relation to the review of the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA) and the Victims of Crime Assistance Tribunal (VOCAT). We note that the terms of reference are to examine the operation and effectiveness of VOCAA and VOCAT for all victims of crime, including family violence victims.

This is a submission provided by YourLawyer, a private firm practising in a number of legal areas, including the provision of legal assistance to victims of crime both in VOCAT Applications and Applications for compensation under section 85B of the *Sentencing Act 1991* (Vic).

About YourLawyer

Our firm has offices in Ringwood and the Melbourne CBD, together with satellite/visited offices in Geelong, Narre Warren, Werribee, the Hume region (including Wangaratta, Wodonga, Shepparton, Seymour) and the Latrobe Valley (including Moe, Morwell, Sale, Bairnsdale, Wonthaggi, Trafalgar, Yarragon, Traralgon). Our firm is able to assist clients either by in-person appointments, or by telephone if that is preferred (for example due to geographical location or disability).

Our firm regularly assists victims of a wide range of acts of violence against the person, including:

- sexual assaults and rapes;
- family violence;
- physical assaults including ‘coward-punches’;
- family members of homicide victims;
- childhood sexual abuse;
- aggravated burglaries; and
- stalking,

amongst other offences.

We are able to assist victims of crime from the start to completion of their VOCAT claim, including preparing the Application forms necessary to commence the process, applying for Interim Awards for urgent assistance where necessary (such as counselling treatment), and representation at a Hearing of their application at the Tribunal.

In a high proportion of matters, we make applications for Interim Awards (for example for counselling treatment, payment of Ambulance Victoria invoices and payment of funeral expenses in related victim applications).

We find that the majority of matters settle ‘on the papers’ as opposed to proceeding to a Hearing for determination.

Key Issues

We have confined this submission to the following key issues:

- (i) Judicial vs administrative model
- (ii) Value lawyers provide
- (iii) Areas for potential reform to the current model

(i) JUDICIAL VS ADMINISTRATIVE MODEL

Benefits of a Hearing

We note that the current VOCAT system involves an application being heard and determined by a Tribunal Member (a member of the Magistrates’ Court of Victoria). Often, an application may be determined ‘on the papers’, by way of an offer from the Tribunal pursuant to Section 33 of the VOCAA, as opposed to at a Hearing.

In some matters, however, a matter is determined at a Hearing at the Tribunal. A matter may proceed to Hearing for a number of reasons, including:

1. If the applicant would like the opportunity for their story to be heard in order to receive recognition and acknowledgement as a victim of crime;
2. If a section 33 Advice (offer) has been made which does not include items that the applicant is seeking;

3. If the criminal proceedings have not proceeded due to a lack of evidence, evidence may be tested at a Hearing to determine whether there can be a finding that an act of violence occurred on the balance of probabilities;
4. If notification of the alleged offender has occurred or is to occur;
5. If there are questions relating to the injury or extent of the injury to the applicant;
6. If there are questions as to the appropriate division of the 'pool' to applicants in related victim applications; and
7. If there are questions as to the items being claimed by the applicant (such as how the items claimed would assist their recovery from the act of violence, or whether or not the medical expenses being claimed are directly related to the injuries sustained in the act of violence).

It is our submission that one of the key strengths of the current VOCAT system is the procedure by which an applicant can elect to have their application finalised 'on the papers', if and when a Section 33 Advice (offer) is made, or elect to proceed to a Hearing to have their application determined. The choice offered to applicants can assist to address any concerns raised by the Commission (at [11.38] to [11.41]).

A 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, as noted by the Commission (at [11.34] to [11.37]). This is particularly the case where criminal investigations or proceedings have not been able to proceed, which has meant that the victim often feels that justice has not been done.

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 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.

Another key strength of the VOCAT system is the judicial discretion that the current VOCAA affords. For instance, under the VOCAA currently, a Tribunal Member may award items to assist a victim's recovery in exceptional circumstances. This discretion can be utilised with profoundly positive effect on the victim.

It is our submission that an administrative system whereby applications are determined 'on the papers' by a government official or employee would have none of the therapeutic benefit of a VOCAT Hearing. It is imperative that the right to a Hearing is maintained, in order that victims feel that they have had an opportunity to tell their story and have their 'day in court'. Furthermore, a right to a Hearing allows the applicant the opportunity to argue their case and to ensure that all the relevant evidence has been taken into account by the decision-maker. We would be concerned that an administrative system whereby a decision is made 'on the papers' without recourse to challenge may lead to a perception of procedural unfairness and bias against the applicant.

Example 3:

A matter whereby the applicant claimed extensive dental and orthodontic treatment due to the adverse impacts of bruxism during sleep, which medical practitioners attributed to the psychological impacts stemming from childhood sexual abuse perpetrated against the applicant. The applicant was unable to afford the treatment that was required. A statement of claim was filed claiming the relevant dental and orthodontic expenses, amongst other items claimed, together with supporting medical evidence. The Tribunal made an offer pursuant to Section 33 of the VOCAA, which did not include an offer to fund the dental/orthodontic treatment. The applicant opted to exercise their right to proceed to a Hearing, rather than accepting the offer. Proceeding to a Hearing in that matter allowed the applicant an opportunity to be heard, for the evidence to be tested and for any issues related to the reasonableness of the treatment to be discussed. The Tribunal Member was able to exercise their discretion to award the expenses and this was of profoundly positive impact to the applicant.

It has been suggested that an administrative model (where claims are determined by a government agency or service as opposed to a judicial or quasi-judicial system where claims are determined by a court or Tribunal) would not afford the applicant an opportunity to have a Hearing. We would be concerned if the ability to proceed to a Hearing before a Judicial Officer was removed.

It is our submission that the current system could be improved by the introduction of specialist Tribunal Members who are Judicial Officers trained in the VOCAA and trained in the specialist needs of victims (for instance specialist training in trauma and family violence). We believe that the introduction of a specialist list for VOCAT matters would alleviate some of the inconsistencies apparent across the VOCAT system, both in approaches towards victims and outcomes of applications. We note that the Commission has identified the risks of re-traumatisation of victims applying to VOCAT under the current system (at [11.39] to [11.41])

(ii) VALUE LAWYERS PROVIDE

Many of our clients suffer from serious mental health issues, trauma, substance abuse issues, socio-economic disadvantage and disability. We also assist clients who have little or no English language and who require interpreters. Our client-base require a hands-on trauma sensitive approach from a trusted individual who they feel confident are on their side and who they trust to advocate on their behalf.

Due to their background or present circumstances, many clients do not have the capacity to navigate an administrative or legal system in order to access assistance. Our clients rely heavily on both their legal representative and their Victims Assistance Program worker for support.

As legal representatives we provide specialised skills to the client to advocate for them as a victim, whilst the Victims Assistance worker is often able to provide social and administrative support, such as assisting with referrals to a counsellor, arranging appointments, and supporting the victim at court. Each role is different and one relies on the other to be able to perform their role effectively and efficiently.

Having a lawyer as their advocate instills confidence in the victim that they are being represented to a high standard by an independent professional who is legally trained, and who will ensure that their full entitlements are being obtained.

We would have serious concerns if an administrative system was adopted whereby the body or organisation responsible for making a decision about entitlements was also the same body or organisation that was responsible for advising and assisting clients. It would be difficult to avoid the perception of a lack of independence and a bias against the applicant if they were not satisfied with the decision about their entitlements.

In order to ensure a fair process and also to ensure confidence in the system, it is imperative that funding continue to allow independent, legally qualified advocates to represent victims.

Legal fees recoverable from VOCAT are modest. Lawyers provide added value for the scale costs payable under current guidelines, as often many hours of work are undertaken for which fees are not recovered. Lawyers also provide a ‘gate-keeping’ service in fielding many of the queries as to assistance and eligibility that would otherwise need to be dealt with by Registrars and other court staff. Furthermore, lawyers are able to ‘field’ eligibility enquiries by providing advice to potential applicants who may in fact be ineligible for VOCAT assistance, thereby preventing ineligible claims and thus freeing up court resources.

(iii) AREAS FOR POTENTIAL REFORM TO THE CURRENT MODEL

The current VOCAT system does have areas which are in need of reform, many of which have been identified by the Commission. We submit that these issues would best be addressed by way of amendments to the current system, rather than a complete overhaul of the system.

Introduction of a specialist VOCAT list

We recommend the introduction of a specialist VOCAT list, presided over by judicial officers who are trained in the specialist needs of victims (for instance specialist training in trauma and family violence). We believe that the introduction of a specialist list for VOCAT matters would alleviate some of the inconsistencies apparent across the VOCAT system, both in approaches towards victims and outcomes of applications. We submit that a specialist list would also allow for trauma-informed approaches to applications for assistance.

Reforms to the Act

Reforms to the Act could be introduced to adequately address issues in the current system, particularly in relation to applications involving family violence and applications involving historical childhood sexual abuse.

Time for Making Application

We submit s 29, together with the transitional provisions in s 77, operate effectively in most circumstances to impose a fair time limit for a victim to apply. However, we would support the introduction into s 29(3), as factors to which the Tribunal must have regard, consideration of

whether legal proceedings have recently finalised, and whether the act of violence was committed in a circumstance of family violence.

Requirement to Assist Police

We submit that, similarly to the considerations under s 29, s 53 should be amended to include as a factor to which the Tribunal may have regard:

- Whether the act of violence was committed in a circumstance of family violence;
- Whether the delay in reporting affects the Tribunal's ability to make a fair decision; and
- Whether the perpetrator was in a position of trust, power, or influence over a child under the age of 18 years for whom the victim was legally responsible;

Eligibility of Certain Victims

We note the Commission's comments (at [5.65] of the Consultation Paper) that the widely recognised impacts of exposure to violence on children are not recognised adequately by the current victim categories. In the consultation paper (at [5.70]) the Commission identifies a key issue for children who are exposed to family violence, that they are often not eligible for assistance when they have witnessed the aftermath of an act of violence.

We support the suggestion put forward by the Commission (at [5.71]) to recognise children who witness, hear, or are exposed to the effects of violence through the addition of a new s 7(3) in the terms suggested. We would further submit that it would be appropriate to amend s 8A to include under the scope of those eligible to receive special financial assistance persons who were primary victims under the new s 7(3).

Assistance Available to Close Family Members

We note the Commission's comments (at [5.81] to 5.93) regarding the recognition of adult close family members. We submit that an amendment ought be considered to include eligibility for close family members to apply directly to the VOCAT for the following expenses:

- Loss of earnings incurred because the person was providing aid/care to a primary victim;
- Costs of travel incurred by the person in taking a primary victim to medical/psychological appointments;
- Costs of medical or psychological treatment incurred directly by the person on behalf of the primary victim.

Conclusion

It is our recommendation that making some fairly minor amendments to the VOCAA (such as those suggested in these submissions), rather than a complete overhaul of the system, would effectively address some of the issues currently facing victims. It is our view that with sufficient resourcing, the introduction of specialised arbiters and the introduction of minor amendments to the VOCAA, the system could be improved to better address the needs of victims.