

October 2017

## **Submission**

**To the Victorian Law Reform  
Commission**

**In response to:**

**Review of the *Victims of Crime Assistance Act 1996***

**Inquiries to:**

**Joshua Reimer and Paul Johnstone**

**Johnstone and Reimer Lawyers**

## **About Johnstone and Reimer Lawyers**

Paul Johnstone and Joshua Reimer of Johnstone and Reimer Lawyers have a strong history of assisting victims of crime to access services, support and financial assistance under the *Victims of Crime Assistance Act 1996* (VOCA Act). Having worked with thousands of victims since 2008, and having previously built a practice which was at the time responsible for 25% of Victims of Crime Assistance Tribunal (VOCAT) Applications in Victoria, Paul and Joshua work collaboratively with Victims Assistance Programs around the State.

Paul and Joshua now operate their own practice assisting victims of crime and more recently, Gina Cornehl has added depth to the team with her experience with personal injuries more generally.

Johnstone and Reimer Lawyers provide legal services to clients in both the Melbourne metropolitan area as well as regional Victoria. Paul and Joshua have provided numerous education workshops to Victims Assistance Programs and other Allied Health professionals.

Johnstone and Reimer are active members of the VOCAT key stakeholders focus group.

## **Executive Summary**

We refer to the Family Violence and the Victims of Crime Assistance Act 1996 Consultation Paper dated June 2017 together with the Supplementary Terms of Reference published on 7 July 2017. We thank you for allowing us the opportunity to provide submissions in response to this inquiry.

We have sought to address several issues raised by the Victorian Law Reform Commission Terms of Reference, including the following items:

- a) The definition of injury and its impact on people applying to VOCAT for financial assistance (questions 6, 7 and 8);
- b) Timeliness of awards (questions 42);
- c) The appropriateness of an administrative model (question 44);
- d) The importance of legal representation for victims of crime (question 57);
- e) The importance of retaining judicial decision for victim of crime (question 73).

This submission provides an overview of our experiences in the application of the VOCA Act and suggests potential for improvement which is aimed at greater empowerment and engagement of victims, as well as minimising delays experienced by victims.

We have also highlighted the valuable role that the judicial model provides and the importance of the Magistrates' Courts continuing involvement in providing access to services for victims of crime and caution against the adoption of an administrative model.

We support the continued involvement of lawyers in ensuring victims are heard, acknowledged and assisted through this process. We note that access to legal services should continue to be funded by the Tribunal as part of the provision of services for victims of crime to ensure the continued empowerment of victims and access to justice.

We provide the following recommendations:

**Recommendation 1.** Expand the definition of injury to include adverse effects which can be substantiated by a Victim Impact Statement, Statutory Declaration, Police brief material including Intervention Order where relevant.

**Recommendation 2:** Amend the VOCA Act to state that the Tribunal member must give consideration to resolving the matter at all possible stages including but not limited to when charges are filed by the Police and when a police brief has been submitted to the Tribunal.

**Recommendation 3:** The Victims of Crime Assistance Act should continue to be administered by the Courts and an administrative model should not be adopted.

**Recommendation 4:** The Victims of Crime Assistance Act should continue to provide for the provision of legal services to victims of crime.

## Response to the Background Paper

### The definition of 'injury'

#### 6. How does the definition of 'injury' in the Act impact on people applying to VOCAT for financial assistance?

##### a. Section 3(2) – deeming provision of injury

Section 3(2) of the VOCA Act provides the following in relation to the requirement of the victim to demonstrate injury:

Notwithstanding the definition of *injury* in subsection (1), if, in respect of an application under this Act by a primary victim or a secondary victim, the Tribunal is satisfied on medical or psychological evidence that treatment or counselling is required as a result of trauma associated with an act of violence, the person concerned is deemed for the purposes of this Act to be suffering an injury.

In our experience, the deeming injury provisions expressed within section 3(2) of the VOCA Act, requires victims of crime to demonstrate that they have sustained injury or required treatment because of the act of violence. This provision, therefore, often results in victims, who otherwise would choose to avoid treatment following a traumatic incident, being required to attend a psychological assessment for the purposes of substantiating section 3(2) of the VOCA Act.

It is our experience that some victims do not wish to seek counselling immediately or in some situations, at all. Under the current system, we believe that many victims who would otherwise avoid seeing a mental health professional, do so for the sole purpose of meeting the Application requirements under s3(2).

Not only can this result in unnecessary trauma due to victims being required to repeat their story, it also creates additional costs associated with the preparation of reports as well driving further delays as this material is being prepared.

In other cases, clients have had significant counselling in the past, however they cannot obtain a report from their psychologist documenting this. Significant delays and costs are incurred in having them “re-referred” to a new psychologist for the sole purpose of obtaining a report to support the injury requirement.

**7. Should the definition of injury in the Act be amended to include other forms of harm? If so, what forms of harm should be included?**

It is our recommendation that the deeming provision in section 3(2) of the VOCA Act should be expanded to include adverse effects and not necessarily require diagnosis and the requirement of a psychologist report to be substantiated. Rather, the Tribunal should be permitted to consider evidence of any available material, including but not limited to, Victim Impact Statement, Statutory Declaration, material in the police brief or police application for Intervention Order for an injury to be deemed under the VOCA Act.

**Recommendation 1.** Expand the definition of injury to include adverse effects which can be substantiated by a Victim Impact Statement, Statutory Declaration, Police brief material including Intervention Order where relevant.

**8. Should the requirement for injury in the Act be removed for victims of certain crimes? If so, for what categories of victim should the requirement be removed?**

Rather than removing the requirement for injury, we believe that the injury requirement as discussed in point 7 that the deeming provision be significantly expanded in all crimes. In our experience, each victim’s therapeutic needs and circumstances will differ and cannot be sufficiently managed by distinguishing between different crimes. We would reiterate our comments and recommendation that the injury requirements should be expanded for all victims of crime, regardless of the nature of the offence.

## Chapter 10 Timeliness of Awards

### Practice Direction to expedite decision making

42. Is there a need to amend section 32(3) and section 41 of the Act to clarify the need for speedy determinations? Alternatively, would an appropriate Practice Direction provide sufficient guidance.

#### Section 41(2)

Section 41(2) of the VOCA Act provides that the Tribunal may wait for criminal proceedings prior to finalising a victim's Application. In practice, it has been our experience that the Tribunal Member will generally wait until the conclusion of the criminal proceeding prior to making a final award. Consequently, the majority of victims endure lengthy delays before their Application is finalised. This often results in increased emotional distress and trauma as well as the dissatisfaction with the legal process.

In addition, where the Application has not been finalised, we have often experienced a reluctance of the Tribunal to extend interim awards in circumstances involving safety related expenses and financial assistance for loss of earnings. Whilst the Tribunal often grants interim counselling, many victims of crime are left unable to be assisted with urgent financial, relocation or security expenses.

The vast majority of applications we assist with have final statements of claim lodged within 2-3 months (any further delay is normally attributable to awaiting psychological reports and other supporting material). In our experience, where there are associated criminal matters, these matters generally go unresolved for at least a further 3 to 12 months, awaiting resolution of associated criminal matters.

**Recommendation 2:** Amend the VOCA Act to state that the Tribunal member must give consideration to resolving the matter at all possible stages including but not limited to when charges are filed by the Police and when a police brief has been submitted to the Tribunal.

It is our recommendation that significant reductions in delays would be achieved if the Tribunal was encouraged to consider finalising matters at every possible stage if they were satisfied upon the balance of probabilities that an act of violence had been committed, as set out in section 31 of the VOCA Act. We suggest this would occur, but not be limited to, when the police file charges and when a police brief is submitted to the Tribunal. We therefore propose that section 41(2) be removed and replaced with a provision which encourages the early resolution of Applications.

In our opinion, this change, if implemented, would promote significant improvements in the average wait times experienced by victims in the resolution of their VOCAT Application.

#### **An administrative model**

**44 As an alternative approach, should an administrative model be adopted? Yes, what benefits would be achieved for victims through the adoption of an administrative model? How would this work in practice? What would be the disadvantages of an administrative model?**

#### **Reducing reliance on lawyers**

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

#### **A new decision maker?**

**73. What are the benefits and disadvantages of retaining judicial decision making for the provision of state-funded financial assistance for victims of crime? Are there alternative decision-making models that should be considered? If so, which?**

In response to questions 44, 57 and 73, we believe it is critical that VOCAT continue to run as a part of the Magistrates Court system, and not be delegated to an administrative or alternative body. We also believe that there exist significant benefits in continuing to support the role of lawyers in application of the VOCA Act.

#### **a. Value of a Judicial model**

We are of the opinion that maintaining the role of the Courts within the VOCAT process is essential to ensuring access to justice for victims and to provide optimal therapeutic benefit.

We understand that running VOCAT as part of the Magistrates Court brings with it a number of inefficiencies and would be potentially more expensive than if it were operated through a separate administrative body. The application of VOCAT within the Court system, however, has some significant benefits.

One important benefit is that all Magistrates, acting in their capacity as Tribunal Members, are regularly required to turn their mind to the victim's experience. In many respects, it assists to ensure Magistrates do not lose sight of the effect of offending on members of the community when they sentence defendants and empowers victims who frequently feels marginalised from a Court system which is 'offender focused'.

By way of example, client A was young woman who was allegedly raped by her former partner. The police were unable to bring charges due to lack of evidence. Her matter proceeded to a hearing which involved her providing evidence in relation to the act of violence. The Tribunal Member found, on the balance of probabilities, that A had been a victim of rape and offered his condolence and sympathy on behalf of the State of Victoria. She left court crying and repeating, "He believed me, he believed me." This recognition validated A's experience and was very powerful in providing A with the opportunity to move forward having now felt had her experience validated by a Magistrate, offering significant therapeutic value.

Even for the majority of victims who choose not to attend a hearing and have their claim determined without attending a hearing, in our experience 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.

If an Administrative system was adopted, there is a significant risk of isolating and disempowering victims from the criminal justice process. This is inconsistent with the objectives of the VOCA Act and the current political climate which has shifted heavily towards evaluating, informing and empowering victims to seek justice within the criminal



justice system. Preserving the role of the Courts in the VOCAT system ensures that victims' experience is heard, and that Magistrates are presented with a wholistic representation of the victim's journey.

**b. Interpretation and application of the VOCA Act**

We are of the opinion that the VOCA Act in its current form is well-drafted and is vastly simpler than other comparative legislation. Despite this, the Act includes provisions which can be technical and complex in nature. For example, s54 which outlines the matters which the Tribunal must have regard to in the making of an Award often requires the drafting of submissions and the interpretation of case law in its application.

A non-legally trained person or service provides an inherent risk for the misinterpretation of the VOCA Act and the VOCA (Special Financial Assistance) Regulations concerning criteria for potential uplift for Special Financial Assistance, and this may impact victims' potential entitlements applied for and the subsequent award made.

In this regard, we agree with the comments of the New South Wales Law Society in their submission to the NSW Department of Justice dated 3 August 2016, made in relation to contemplated changes to the New South Wales victim's assistance system, in that:

The material that is required to support a well-drafted application cannot be easily prepared by most people without legal advice.<sup>1</sup>

We note that in NSW, the current, reformed Victims of Crime model employs the use of Victim Services Support Coordinators and Case Managers to assist in the process of making an application. We share the concern of the NSW Law Society that if a similar model was adopted in Victoria, many victims would go without legal advice as these professionals would not be able to provide legal advice in relation to a victim's entitlements and the interpretation and application of the VOCA Act.<sup>2</sup>

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<sup>1</sup> The Law Society of New South Wales, Submission to the NSW Department of Justice, *Review of the Victims' Rights and Support Act 2013 (NSW)*, 3 August 2016, 2.

<sup>2</sup> Ibid, 2-3.

For example, client B sought our assistance having attempted to manage her VOCAT Application independently and with some assistance from a community based support service. The client had a chronic mental health condition and as a result of the crime, was now suffering additional acute mental health concerns. The initial Application drafted by the community based support service did not include the multiple physical and sexual assaults committed against her or address the victim's section 29 issues, despite a number of medical reports substantiating the Application and the client's reports to the police, nor did it claim the full range of benefits that the client was seeking.<sup>3</sup> The matter was referred to us by her treating psychologist and we amended the Application to include the totality of her experience, all of her medical expenses, and details of her police report in addition to obtaining a treating psychologist report and interim award for counselling. Her final statement of claim was finalised in 6 weeks to ensure she could focus on her recovery and improve her overall wellbeing.

There also exists the concern of impartiality and the potential for a conflict of interest in the circumstance where the Government Department that is responsible for the Award also governs the resources employed to advocate on behalf of victims in relation to the Award made.

### **c. Affordability of legal services**

Victims of crime are often vulnerable, experiencing high levels of trauma and significant psychosocial challenges in addition to financial and socioeconomic disadvantage impacting on their overall quality of life. There is a concern that access to justice will be denied to victims whom are unable to afford legal services should legal fees not be funded under the VOCA Act.

For example, client C, a young homeless youth whom presented as extremely traumatised following multiple armed robberies during the course of her casual employment was referred by a victim support worker. We lodged her VOCAT Application and ensured her WorkCover claim was lodged simultaneously so that she had immediate access to weekly wages and medical expenses. We were also able to refer her to a community housing

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<sup>3</sup> An application must be made within 2 years of the occurrence of the alleged act of violence and to is otherwise be struck out unless particular circumstances have been made out.

program and financial counsellor to assist with her immediate housing needs whilst an interim award was requested from VOCAT.

In this instance, as is the case with the vast majority of victims of crime, the client was able to access legal advice which ensured the provision of her dual VOCAT and WorkCover entitlements. If funding was not available, the majority of victims would be precluded from accessing legal services due to lack of financial capacity.

**d. Advice on concurrent benefits under alternatives schemes**

Victims of crime often have multiple legal benefits available under a number of schemes pursuant to the Sentencing Act and WorkCover, TAC and Superannuation legislation. The involvement of lawyers and legal services ensures that victims are provided with legal advice on all their potential rights and entitlements.

For example, many of the Bourke Street victims have dual TAC, WorkCover, ComCare or Superannuation entitlements and in multiple instances, victims had not been referred to the appropriate scheme or had claims lodged despite efforts of support organisations to facilitate this.

**e. Concerns regarding an administrative or quasi-administrative model**

In our experience, victims of crime often present as traumatised and vulnerable with limited ability to self-advocate and complicated psychosocial issues.

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 specific to their circumstances and needs which are often complicated and multi-faceted. We contend that these needs cannot be adequately addressed through case management or administrative models without significant restriction on the types of benefits offered to victims and that each victim should have the right to legal advice which is funded and regulated by the Tribunal.

The current system allows for interim awards to be made for those items which are urgent in nature including counseling, medical expenses, loss of income and safety related expenses. If judicial resources were increased and the discretion of Registrars to make

interim awarded was increased, then the current system would operate more efficiently, thereby providing more timely assistance to victims who need services and support.

It is important that the support offered to victims includes their right to legal advocacy and is not curtailed by an administrative model. A historical review of victims of crime legislation has witnessed a move from crimes compensation to the current model of assistance and recognition. We note that a move to an administrative model would serve to further disenfranchise victims from the criminal justice system, tokenizing the benefits which are offered to victims and failing to consider the specific needs and circumstances of each victim. We would accordingly recommend that an administrative model not be adopted.

**Recommendation 3:** The Victims of Crime Assistance Act should continue to be administered by the Courts and an administrative model should not be adopted.

**Recommendation 4:** The Victims of Crime Assistance Act should continue to provide for the provision of legal services to victims of crime.