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Victorian Law Reform Commission
GPO Box 4637
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Dear Commissioners

Review of the *Victims of Crime Assistance Act 1996*

Victoria Legal Aid (**VLA**) welcomes the opportunity to contribute to the Victorian Law Reform Commission's Review of the *Victims of Crime Assistance Act 1996* (Vic) (**VOCA Act**). We are grateful for the extension of time to provide this submission.

About Victoria Legal Aid

VLA is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA plays a leading role in the coordination of family violence legal services in Victoria. We provide information, advice and legal representation to women, men and children who are affected by family violence in the State and Commonwealth civil, criminal and family law systems. We provide these services through our network of offices across the state. We also fund private practitioners and community legal centres to deliver family violence legal services. People who have experienced, are experiencing, or are at risk of experiencing family violence are priority clients for Victoria Legal Aid and we are committed to the elimination of family violence in the community.

VLA provides information, advice and representation to victims of crime seeking to access financial assistance from the Victims of Crime Assistance Tribunal (**VOCAT**). It is supported in this work by law firm DLA Piper, which provides pro bono legal assistance to certain clients referred to it by VLA with crimes compensation claims. DLA Piper assists certain victims of crime with criminal histories, and prisoners who are currently serving sentences, with their

applications to the Tribunal for financial assistance. VLA only assists clients with a claim under the VOCA Act who are unable to obtain assistance from a private practitioner. This means VLA's VOCAT practice remains relatively small.

Summary of submission

VLA's submission focusses on barriers to eligibility under the VOCA Act impacting on our clients. In summary, we make the following recommendations:

1. That resources be allocated and procedures put in place to enable interim awards to be made on the same day that a victim of family violence attends court in relation to an Intervention Order application.
2. That special consideration be given to victims of family violence when considering whether the victim reported the act of violence within a reasonable time and provided reasonable assistance to authorities.
3. That the notification requirement be removed.
4. That the requirement for VOCAT to have regard to a victim's criminal activity be removed.
5. That the importance of legal representation in novel or complex matters be recognised when considering reforms to the nature of the scheme.

While our submission is focussed on the questions posed in the Supplementary Consultation Paper, our recommendations also relate to victims of family violence and the initial terms of reference.

Interim awards

Questions 17 and 45 in the Supplementary Consultation Paper ask whether interim awards available under the VOCA Act are adequate, and what benefits might be achieved by enabling all magistrates to make interim awards at the same time as hearing other matters.

In VLA's experience, interim awards offer important and timely assistance to VOCAT applicants. Interim awards allow the Tribunal to respond quickly and effectively to ensure the safety and security of claimants, and to maximise potential recovery from trauma. The availability of interim awards are of particular importance given the current time taken to finalise VOCAT awards.¹

Interim orders are particularly significant in the context of family violence. At the point when a family violence intervention order is made in the Magistrates' Court, a family violence survivor often faces a range of expenses associated with making use of the order and maximizing their safety. Survivors face expenses like changing the locks on their home, and accessing counselling and other supports.

¹ In 2015-16, almost 40% of applications were not finalized within 12 months: Victims of Crime Assistance Tribunal Annual Report (2015-16) 36.

When time allows, VLA duty lawyers will assist family violence survivors to make VOCAT applications while the survivor is at the Magistrates' Court for the making of an interim family violence intervention order.

However, time is required for the VOCAT file number to be generated and associated processes to take place before the Magistrate can make a VOCAT order. In a busy family violence list, there is not always time for VOCAT orders to be made for every family violence survivor who might be eligible.

Better integration of VOCAT matters into family violence intervention order lists could reduce the administrative burden and time required to realise a person's entitlement under the Act, making the process easier for survivors and all other participants.

Adequate time and resourcing for better integration of VOCAT processes into the design of the new Specialist Family Violence Courts will be particularly important.

Recommendation 1: Ensure that the Family Violence Court Division of the Magistrates' Court, the Specialist Family Violence Courts, and services working in the Courts have the resources to enable victims of family violence to apply for and receive interim VOCAT orders on the same day their intervention order matter is heard.

Barriers to access – time limits and reporting requirements

Questions 26 to 28 in the Supplementary Consultation Paper relate to the application time limit and the granting of extensions of time. Questions 30 and 31 relate to the requirements to report to police and to provide reasonable assistance to police and prosecution.

VLA supports reforming the eligibility requirements for claimants under the VOCA Act, so that victims of family violence and historical abuse have improved access to assistance. In our experience, 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. This is because section 52 of the VOCA Act directs a Tribunal to refuse financial assistance where the offending was not reported within a reasonable time, or where the applicant did not provide reasonable assistance to authorities, unless there were special circumstances.

To improve the operation of the scheme, section 52 of the VOCA Act should be amended to **expressly** require consideration of the nature of the relationship between the victim and the offender when assessing whether the victim took reasonable, timely steps in reporting the act and providing assistance to authorities.

Amending the VOCA Act in this way would provide greater certainty in cases of historical abuse and family violence, where the victim may be reluctant to immediately report acts of violence due to their relationship with the offender and/or concerns about their own wellbeing and that of others in the home.

Recommendation 2: That barriers to accessibility for victims of family violence be removed by amending section 52 of the Act to explicitly require consideration of the nature of the

relationship between the victim and the offender when assessing whether the applicant has reported the act within a reasonable time and provided reasonable assistance to authorities. Further that training be provided to Tribunal members on the nature and dynamics of family violence to ensure they are equipped to take these factors into account in making their decisions.

Barriers to access – perpetrator notification requirements

Questions 48 and 49 relate to the rights of perpetrators to be notified or appear. The relevant provisions in the VOCA Act (sections 34 and 35) recognise that perpetrators may have a legitimate or substantial interest in the matter.

In VLA's view, the perpetrator notification and appearance provisions give rise to serious concerns about victim safety. Our experience demonstrates that the mere risk of notification can be a significant deterrent to victims of crime proceeding with a claim. It is not enough to assure clients that notification is rarely ordered. The likelihood of notification is increased where an incident has not been reported to the police or where there is little evidence to support an applicant's claim. This means that notification is more likely for low reported crimes such as sexual assault and family violence. Victims of these crimes are particularly vulnerable to re-traumatisation.

VLA also considers that the perpetrator notification and appearance provisions may compromise the therapeutic potential of a VOCAT hearing. In VLA's experience, there is scope for a VOCAT hearing to offer victims of crime an opportunity to be heard, and to have recognition in a court-like setting of an act of violence against them, and a formal acknowledgment of the harm that resulted. The notification or appearance of a perpetrator may compromise the potential therapeutic benefits of a hearing and increase the risk of re-traumatisation.

The purpose of the VOCA Act is to provide assistance to victims of crime. VLA supports the amendment of the VOCA Act to remove existing provisions relating to perpetrator notification and appearance, and replace them with a legislative presumption against notification and appearance.

In this context, VLA notes that section 51 of the VOCA Act allows a person who receives an award of assistance to assign to the State their right to recover from another person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates. In effect, this provision allows the State to recover from a perpetrator some or all of the amount expended on a claim. To the extent that this provision gives rise to a 'legitimate interest' on the part of perpetrators, consideration should be given to the purpose and utility of retaining such a provision, including the extent to which it has been applied in practice.

Recommendation 3: That consideration be given to removing existing perpetrator notification and appearance provisions, and including a legislative presumption against perpetrator notification and appearance unless required to reach a fair decision.

Barriers to access – consideration of criminal activity

Questions 34, 35 and 36 in the Supplementary Consultation Paper relate to section 54 of the VOCA Act and the discretion to take into consideration the applicant's criminal record in making an award.

Section 54(a) compels the Tribunal to have regard to 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 violence. A significant part of VLA's VOCAT practice involves representing clients who have been unable to obtain representation elsewhere because they have a criminal record.

In VLA's experience, the discretion to take into consideration an applicant's past criminal record is overly broad and reinforces a false dichotomy between 'deserving' victims of crime and 'undeserving' perpetrators of crime. There is a known and recognised link between victimisation and offending behaviour. The LAW Survey found that of the respondents who had been alleged to have committed a crime, 41.1% also reported having been a victim of crime.² For VOCAT applicants who have an award refused or reduced because of a criminal record, section 54 has the effect of those individuals being punished twice for the same transgression. In VLA's view, the discretion to take into considering an applicant's past criminal record should be removed or limited, in recognition of the relationship between victimisation and offending behaviour.

In practice, VLA has found that the broad discretion in section 54(a) gives rise to inconsistent decisions and makes it difficult to predict the Tribunal's approach to clients with a criminal history. There is little guidance given about the scope of relevant considerations (for example, 'behaviour' and 'attitude' are not exhaustively defined); what weight should be given to those considerations in determining whether or not to make an award; and how such considerations might impact upon quantum if an award is made. The discretion is sufficiently broad for a Tribunal member to reduce or refuse an award due to an applicant having a history of unrelated or insignificant offending.

VLA proposes that the requirement to have regard to the criminal activity of a victim of crime be removed from the VOCA Act. In the alternative, the discretion to consider criminal activity should be limited to activity occurring prior to the act of violence, recognising the link between victimisation and offending behaviour. At very least, VLA considers it appropriate that offending that is directly related to the trauma associated with prior victimisation should not be a relevant consideration (and this should be provided for expressly in the body of the provision).

Recommendation 4: That section 54 be amended to remove the requirement that VOCAT have regard to the criminal activity of a victim of crime, in the alternative that this section be limited to criminal activity occurring prior to the act(s) of violence. This is a significant barrier

² LAW survey cited by Pascoe Pleasence and Hugh McDonald, Crime in context: criminal victimisation, offending, multiple disadvantage and the experience of civil legal problems (2013) [Updating Justice](#)

to access to counselling and financial assistance for many of our clients and fails to recognise the link between being a victim of crime and offending.

Importance of legal representation and preferred model

Question 57 in the Supplementary Consultation Paper asks whether the VOCAT system is easy to navigate without legal representation. Question 44 asks whether as an alternative approach, an administrative model ought to be adopted.

As noted above, VLA only assists and represents clients in VOCAT matters who have been unable to obtain a private practitioner to assist them with a claim. These matters tend to involve novel and complex issues of law which require additional time and research. Many of VLA's clients would face significant barriers to making a claim without legal representation. While many claims considered by the Tribunal will be straightforward, there will always be novel and complex matters where applicants would be assisted by legal representation.

In addition, VLA and CLC lawyers play an important role in proactively encouraging existing clients with potential VOCAT claims to make such claims. For example, VLA's Aboriginal Community Engagement officer in Morwell has engaged with a number of Aboriginal and Torres Strait Islander clients who were not aware that they were eligible to make a VOCAT claim. VLA understands that the VOCAT Koori List was established because VOCAT recognised that Aboriginal and Torres Strait Islander people were not accessing the assistance available through VOCAT at a corresponding level. There appears to still be a significant level of unmet need.³ Given the work that still needs to be done to build awareness of the scheme, there is a risk that a move away from legal representation could reduce the role played by VLA and CLC lawyers in encouraging clients with potential claims, and thereby reduce the number of people accessing the VOCAT scheme.

As noted above, VLA recognises the potential for a VOCA hearing to offer victims of crime an opportunity to be heard, to have judicial recognition of an act of violence against them, and a formal acknowledgment of the harm that resulted. This opportunity to be heard is a strength of the Victorian system.

However, for other victims of crime, the current process of going to hearing to determine whether an act of violence took place can be stressful and traumatic. The process is anomalous compared with other statutory compensation schemes such as TAC and Workcover. Many VOCAT claims are straightforward and administrative in nature, and should not require legal representation or a hearing.

In summary, VLA does not express an ultimate preference for a judicial model or an administrative model. We take the view that there are benefits and disadvantages of each model, and careful consideration needs to be given to ensure that the model adopted does not create unintended barriers to accessing the scheme. VLA considers that any change to the

³ There were 238 applications to the Koori list out of 6,221 applications to VOCAT in 2015-16. ABS data shows that in 2016 there were 47,788 people in Victoria who reported that they were of Aboriginal and/or Torres Strait Islander origin.

VOCAT scheme should include access to legal help in novel and complex cases for disadvantaged clients. One option would be to incorporate provision of such advice and assistance into the legal service for victims recommended by the VLRC in *The Role of Victims of Crime in the Criminal Trial Process* (August 2016).⁴

Recommendation 5: That the following factors be taken into account in considering a more administrative scheme: (1) the current process involving a hearing to determine whether the act of violence took place is anomalous compared to other statutory compensation schemes such as TAC and Workcover; (2) the importance of and need for lawyers in matters that involve novel or complex issues; and (3) VLA and CLC staff play an important role in proactively encouraging existing clients with potential VOCAT claims to make such claims, and a move away from legal representation could reduce this role over time. We consider that any change to the VOCAT scheme should include access to legal help in novel and complex cases for disadvantaged clients and suggest that this could be incorporated into the legal service for victims previously recommended by the VLRC.

Conclusion

The VOCA Act establishes a framework for an important state-funded scheme of victims' compensation. However, there is significant scope for the operation and effectiveness of the scheme to be improved for all victims and, in particular, victims of family violence. The recommendations above are based on VLA's practice experience in this area. We take the view that implementing these recommendations would go some way towards improving the current scheme.

Thank you again for the opportunity to contribute to this review.

Yours faithfully



BEVAN WARNER

Managing Director

⁴ Recommendation 23.