



# Victims of Crime Assistance Tribunal Capacity Building Project

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## **DISCUSSION PAPER**

April 2011

Whittlesea Community Connections

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# Executive Summary

This Discussion Paper provides an analysis of the current legal framework for the assistance of victims of crime in Victoria with a particular focus on assistance provided by the Victims of Crime Assistance Tribunal (“VOCAT”).

The research and preparation of this Discussion Paper has been funded by a grant from the Legal Services Board of Victoria.

The research process involved consultations with organisations and individuals involved in the VOCAT process including legal practitioners working in the community sector, the private sector and legal aid; Victims Assistance and Counselling Programs (VACPs) and other victims’ support agencies; Victoria Police and the Victims of Crime Assistance Tribunal as well as a review of existing literature and statistics regarding victims of crime.

“Improving access to justice for victims of violent crime” was the primary motivation for the research.

The Discussion Paper seeks to evaluate the way in which the current legal framework responds to victims’ needs in order to explore the potential for law reform to enable the system to provide a better response to the needs of victims of crime.

The research was initiated in response to a noted decrease 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 in Victoria according to police statistics.

The research revealed that by 2009/2010 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. Despite this positive change, the research highlighted the fact that only a small proportion of victims who are eligible to claim compensation actually lodge an application. The results of the research indicate that barriers to victims accessing assistance from the Victims of Crime Assistance Tribunal still exist.

The barriers that were identified by the research include:

- lack of awareness of victims’ eligibility to recover compensation from VOCAT;
- difficulty in gaining access to legal representation;
- difficulties associated with obtaining documentation to support an application;
- the length of time that it takes for an application to be resolved and the negative impact this can have on the victim;
- the potential for the alleged offender to be notified of the hearing and the impact this can have on the victim .

Based on the research a number of areas where reforms could be made, either to the way in which the process is conducted or to the law, have been identified. Recommendations for reform discussed in the Discussion Paper are as follows:

In response to victims' lack of awareness of their ability to recover compensation:

- that greater education, training and information about the Victims of Crime Assistance Tribunal be provided to victims and to those who assist victims, including greater education and training for legal practitioners;

In response to victims' difficulties in gaining access to legal representation:

That measures be adopted to increase the capacity of the legal profession to undertake VOCAT work including:

- lifting the amount that legal practitioners' can claim from the VOCAT in legal costs;
- lifting the amount that a victim can recover in compensation including under the 'special financial assistance' and 'loss of earnings' categories;
- assessing the viability of funding a specialist victims' legal service;
- assessing the viability of funding specialist victims' legal positions within already established Community Legal Centres.

In response to legal practitioners' difficulties in obtaining documentation to support an application:

- the adoption of a court approved and vetted list/database of mental health professionals who have familiarity with and training in relation to the VOCAT process;
- encouraging legal practitioners' to make greater use of interim awards where appropriate;

In response to the finding that finalisation of a VOCAT application can be a lengthy process with a resulting negative impact on the victim:

That measures be adopted to reduce the time taken to resolve VOCAT applications including:

- conducting further research into the costs versus the benefits of removing the victims' right to attend a hearing in favour of having all matters resolved "on the papers" with a right to appeal;
- adopting a process whereby medical and other reports are provided directly to the Tribunal;
- conducting a cost/benefit analysis of introducing the 'case management' approach to applications currently being utilised in the Koori List for all VOCAT applications.

In response to the negative impact that potential notification of the alleged offender may have on the victim:

- considering removal of VOCAT's discretion to notify the alleged offender of the application and hearing;
- restricting VOCAT's exercise of the discretion to notify the alleged offender to 'exceptional circumstances';
- shifting the onus onto the alleged offender, once notified, to provide reasons why they should be allowed to attend the hearing.

The Discussion Paper also draws attention to some of the limitations of the research including the researcher's limited access to hearings and decisions of the Tribunal, the researcher's limited access to data recording the views of individual victims and the researcher's difficulty in collecting such data as well as the researcher's limited access to private legal practitioners.

## PURPOSE OF THE GRANT

This Discussion Paper is an outcome of a research project funded by a 2008/2009 “Project Grant” from the Legal Services Board of Victoria.<sup>1</sup>

The Discussion Paper is the first outcome of the research and provides an overview of the current legal framework for assisting victims of crime<sup>2</sup> in the State of Victoria.

The second outcome of the research will be the development of a “Best Practice Manual” that will be offered as a resource for Community Legal Centres and other legal practitioners who deal with victims of crime.

### Motivation for the Research: the Situation in 2006/2007

The impetus for Whittlesea Community Legal Service’s (“WCLS”) application to the Legal Services Board was concern for the decrease in the amount of compensation that was awarded by the Victims of Crime Assistance Tribunal in 2006/2007 (this was lower than 2004/2005 levels) at a time when there was a considerable increase in the rate of crimes against the person as recorded by Victoria Police Statistics<sup>3</sup>. In addition, the total number of applications finalised by VOCAT in 2006/2007 was equivalent to the number finalised in 2003/2004 (when the rate of crimes against the person was 22.4% lower).

The conclusion drawn from these figures was that, despite initiatives being taken by VOCAT to improve access to victims of crime in response to the 2002 Victims of Crime Report, including:

- the provision of education and information sessions to Victorian communities, service providers and legal practitioners; and
- the introduction of the Koori Victims of Crime Assistance Tribunal list pilot project

Victims of crime seeking assistance from VOCAT were still facing significant barriers to accessing assistance.

#### Strike-out rate

The number of applications that were struck out or withdrawn in 2006/2007, 1,139 in total or approximately 25% of all applications finalised, was taken to indicate that even once the

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<sup>1</sup> When determining which projects should receive grants the Legal Services Board gives priority to projects from non-profit organisations that improve access to justice and equity and specific and finite projects <<http://www.lsb.vic.gov.au/ProjectGrants.htm>>

<sup>2</sup> “Victims of crime” refers to victims of violent crime or crimes against the person, *Crimes Act 1958* (Vic) Part I, Division I.

<sup>3</sup> Between 2006/2007 and 2007/2008, according to Victoria Police Statistics, there was an increase of 1.4% in crimes against the person recorded in Victoria. “Crimes against the person” as recorded by Victoria Police Statistics include homicide, rape, sex (non rape), robbery, assault and abduction/kidnap offences. Aggravated burglaries also increased 4.3% in that period.

Tribunal had been accessed, applicants were finding the application process difficult to negotiate and deal with.

Given these statistics, at the time the project grant was applied for the priority areas for research were:

- to determine why the number of victims of crime accessing assistance from VOCAT had dropped;
- to determine what barriers face victims of crime who are attempting to access assistance from VOCAT and how these barriers may be overcome;
- to determine why the strike out rate for applications to VOCAT were so high; and
- to determine whether there was a need for law reform to enable more victims of crime to access assistance from VOCAT.

## The Situation in 2009/2010

The project grant was applied for in 2008/2009 in response to the situation in 2006/2007 with the research to take place from March 2009 to March 2010. For a number of reasons, including the diversion of resources at WCLS towards providing a response to clients affected by the 2009 Victorian bushfires, the research period was delayed and research was not completed until September 2010. In the intervening period a different picture in relation to victims' access to the Tribunal has emerged.

While Victoria Police Statistics show that the rate of reported crimes against the person has continued to rise with an increase of 1.4% in crimes against the person from 2006/2007 to 2007/2008, 1.8 % to 2008/2009 and 2.9% increase to 2009/2010, in the same period applications to VOCAT have also steadily increased.<sup>4</sup> (Expressed as a figure per 100,000 head of population the increase is 15.6% since 2000/2001<sup>5</sup>) The total number of victims of crime against the person in 2009/2010 was 39,032.

In 2007/2008, 4,743 applications were finalised by VOCAT and in 2008/2009, there was a further increase to 5,002 applications finalised.<sup>6</sup> The most recent Annual Report from the Tribunal shows that this trend has continued in the 2009/2010 period with an increase in the number of VOCAT applications finalised to a total of 5,920 (an increase of 18%).<sup>7</sup>

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<sup>4</sup> Increases in crime victimisation in Victoria should be viewed in light of the fact that the Australian Bureau of Statistics reported that the overall population of Victoria has also increased by 2% from 2009 to 2010.

<sup>5</sup> Victoria Police, 'Victoria Police Crime Statistics 2009/2010', p.16

<sup>6</sup> Victims of Crime Assistance Tribunal, *Victims of Crime Assistance Tribunal 2008-09 Annual Report*, [Table 1: Summary – applications for assistance lodged, finalised and pending, 2006/07 – 2008/09], p.40

<sup>7</sup> Victims of Crime Assistance Tribunal, *Victims of Crime Assistance Tribunal 2009-10 Annual Report*, [Table 1: Summary – applications for assistance lodged, finalised and pending, 2007/08 – 2009/10], p.36 and p.30.

There has also been an increase in the total amount of compensation that has been awarded by VOCAT in the same period.

In 2006/2007 the total amount of financial assistance awarded to victims of crime for both expenses already incurred (including legal costs) and expenses not yet incurred was \$32,569,192. This amount increased again in 2007/2008 and in 2008/2009 and by 2009/2010 the total amount awarded by VOCAT was \$49,582,976 (an increase of 28% from the previous year).<sup>8</sup> The Tribunal reported that in the year ending 30 June 2010 it awarded the “...highest amount of financial assistance under the Victims of Crime Assistance Act 1996 in a single year since commencement of the Tribunal on 1 July 1997.”<sup>9</sup>

The 2009/2010 figures indicate that more victims of crime are now accessing compensation from the Tribunal than ever before and this increase appears to be part of a trend which is an encouraging development.

The Tribunal itself attributes this increase to a number of factors including:

- In 2009/2010 an increase in applications from related victims, assault offences and arson related offences arising from the Victorian 2009 bushfires<sup>10</sup>;
- Community engagement and a pro-active approach to handling applications arising from major incidents<sup>11</sup>;
- Greater powers given to registrars to grant interim awards of financial assistance;<sup>12</sup>
- Success in building relationships with external agencies to assist Koori victims of crime through the Koori VOCAT list.<sup>13</sup>

## 2009/2010 Strike-Out Rate

The figures above represent the total number of applications that have been finalised by VOCAT but do not reflect the total number of applications that have been granted and an award made.

The number of applications to VOCAT that have been struck out, withdrawn or refused *increased* as a proportion of all applications finalised since 2006/2007 from 26.5% to 29% in 2008/2009.<sup>14</sup> The most recent VOCAT Annual Report shows that the overall number of applications that have been struck out or withdrawn by the applicant has *increased* in 2009/2010 by 10% from 1,324 to 1,454<sup>15</sup>.

<sup>8</sup> Ibid, [Table 8: ‘Total Amount of Financial Assistance Awarded and Legal Costs Ordered (Interim, Final determination, by Variation and on Review), 2009/10’], p.41.

<sup>9</sup> Ibid, [“Our Statistical Report - Commentary”], p.29.

<sup>10</sup> Ibid.

<sup>11</sup> Victims of Crime Assistance Tribunal, above n6, p.6.

<sup>12</sup> Ibid, p.5.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid, [Table 4: ‘Number of orders made upon final determination of applications for financial assistance by order type, 2006/7 – 2008/9’], p.41.

<sup>15</sup> Ibid, p.30

The number of applications *refused* by VOCAT has also risen in 2009/2010 from 125 to 156 applications (25% increase)<sup>16</sup> in total and has risen slightly as a *proportion* of all applications finalised (0.1% to 2.6%).<sup>17</sup>

However, even these statistics are not as dire as those from 2006/2007 with the number of applications struck out, withdrawn or refused as a proportion of all applications finalised having *decreased* in 2009/2010 to 24.6%.<sup>18</sup> This may indicate that applicants, or applicants' representatives, who are gaining access to VOCAT are now finding it easier to navigate through the system.

While the Victims of Crime Assistance Tribunal keeps statistics on the *number* of applications that are struck out, withdrawn or refused it does not record information indicating *why* applications are unsuccessful. In response to questions posed by the researchers regarding the strike out rate of applications to the Tribunal, the Victims of Crime Assistance Tribunal noted that where an award of assistance is *not* made it is most often due to the application being withdrawn by the applicant or struck out rather than being refused by the Tribunal.

Applications are usually struck out because the applicant has indicated that they no longer wish to proceed with the application or they have failed to respond to requests from VOCAT to file all documentation in support of the claim.

The Tribunal does not break down information about the rate of applications struck out, withdrawn or refused according to the category of offence. It is therefore difficult to ascertain whether victims of some types of offences are finding it harder to access assistance than others.

In the last two reporting periods (2008/2009 and 2009/2010), VOCAT has recorded statistical information regarding both the number of applications lodged according to category of the act of violence and the number of applications awarded.<sup>19</sup>

A comparison of these two tables gives some (approximate) indication of the success rate of various types of offences. In 2009/2010, robbery, burglary and "other" offences had the highest success rates. This was followed by claims lodged in relation to crimes of sex (non-rape) then homicide and then assault. Criminal damage by fire was the crime with the lowest success rate with only 9% of applications lodged in 2009/2010 being awarded in that year. This may be due to the fact that these applications take longer to process and awards are more likely to be made in the following or subsequent years (although in the previous reporting period the success rate was even lower at 5.8%) or that it is harder to establish an act of violence has occurred in relation to this type of crime.<sup>20</sup>

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<sup>16</sup> Ibid

<sup>17</sup> Victims of Crime Assistance Tribunal, above n7, [Table 3: 'Number of orders made upon final determination of applications for financial assistance by order type, 2007/08 – 2009/10'], p. 38.

<sup>18</sup> Ibid

<sup>19</sup> Victims of Crime Assistance Tribunal, above n6, [Table 3 and Table 4], p.41 and [Table 5]p.42; Victims of Crime Assistance Tribunal, above n7, [Table 6], p. 39 and [Table 8 and Table 9], p.41.

<sup>20</sup> *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092.

Success rates for rape and harassment were also relatively low, 66% for rape and 56.8% for harassment.

### ***Recommendation***

*VOCAT to record and make available, data regarding applications struck out, withdrawn or refused according to the category of the act of violence.*

### **Victim Profile**

Victoria Police statistics indicate that the *typical* victim of a crime against the person in 2009/2010 was male, aged 18-59 and the victim of an assault in a residential location.<sup>21</sup> The typical victim of crime who received an award in 2009/2010 correlates closely with Victoria Police statistics, also more likely to be male, aged 36-60 (31%) or 19-25 (21.5%) and the victim of an assault.<sup>22</sup>

Female victims of assault are the next most likely victims of crime and also the next most likely category of victim to lodge an application for assistance. In relation to female victims of crime, the next two categories of crime that females are most likely to be the victim of is sex (non-rape) and rape. Female victims of crime lodged applications for sex (non-rape) offences in numbers second only to assault but there were more applications from female victims in relation to homicide than to rape. This may be due to the fact that female victims of crime are more reluctant to lodge applications in relation to crimes of rape for a variety of reasons or alternatively it may be that multiple applications lodged in relation to homicide may lead to more female victims of crime being included under this category.

It is impossible to accurately determine what proportion of victims who are *eligible* to claim compensation from VOCAT actually lodge an application though it may be fair to surmise that the figures should generally correlate with the increase in acts of violence recorded by Police

An initial limitation is the fact that, in relation to Victoria, reliance must be placed on Victoria Police Statistics which immediately excludes all crimes that are *not* reported to police.<sup>23</sup> Comparing the total number of victims of crimes against the person in 2009/2010

<sup>21</sup> Victoria Police, above n5, p.18, p.24 and 25.

<sup>22</sup> Victims of Crime Assistance Tribunal, above n7, [Table 6: 'Number of Awards of Assistance made by category of offence and gender of awarded applicant, 2009/10'], p.39.

<sup>23</sup> An Information Paper prepared by the Australian Bureau of Statistics, *Information Paper: Measuring Crime Victimisation, Australia: The Impact of Different Collection Methodologies, 2002*, (2004) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4522.0.55.011>> refers to the "dark figure" of crime, or the volume of crime that is not officially recorded. Administrative data on crime victimisation, including that derived from police statistics, has several limitations, including the fact

(39,032) with the total number of applications lodged with the Victims of Crime Assistance Tribunal in that same year (5,920) gives some indication. In 2009/2010 roughly **15.2%** of all victims of crime lodged applications with the Tribunal.

In addition, not all victims of crime may suffer an injury which will enable them to claim assistance from VOCAT and not all victims of crime may choose to claim assistance even where they are eligible.

A further limitation on the accuracy of this figure is the fact that the victim has two years<sup>24</sup> from the date of the act of violence to lodge an application. It cannot be assumed therefore that all applications lodged with the Tribunal in any given year will reflect victims of crime for that particular year. It is likely that the figure of **15.2%** is an *over* rather than an *under* estimate and indicates that a fraction of the victims who may be eligible are actually claiming assistance.

## The Whittlesea Local Government Area

The impetus for WCLS's specific involvement in the research was a notable increase in victimisation from crimes against the person in the Whittlesea Local Government Area (LGA).

The Whittlesea LGA (R3D1 LGA) is one of the largest (geographically) municipalities in Melbourne, the sixth most socio-economically disadvantaged in Melbourne and the twenty-seventh most disadvantaged in Victoria.<sup>25</sup> It was noted in the initial Legal Services Board grant application that in the period 2006/2007 armed robberies in the Whittlesea LGA increased 30.2% and aggravated burglaries by 20.8%.<sup>26</sup> The overall rate of "crimes against the person" in the Whittlesea LGA has continued to rise with the number of recorded offences jumping 28.2% (940 to 1,205) from 2008/2009 to 2009/2010.<sup>27</sup>

There has also been a significant increase in the number of "family violence incidents"<sup>28</sup> in both Victoria and the Whittlesea LGA from 2008/2009 to 2009/2010. In this period Victoria saw a 10.2% increase in the number of "family violence incidents"<sup>29</sup> recorded by police. In the Whittlesea LGA the increase from 2008/2009 to 2009/2010 was 13.5%.<sup>30</sup> Taking a longer view, statistics from the Victorian Local Government website that measure the rate of police callouts for family violence incidents per 100,000 of population, indicate that in the nine year period from 2002 to 2010 the rate of family violence callouts in the

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that incidents may never come to the attention of the authorities or the victim may never speak of the incident to anyone else.

<sup>24</sup> *Victims of Crime Assistance Act 1996* (Vic), s.29.

<sup>25</sup> The Department of Human Services: < <http://www.dhs.vic.gov.au/operations/regional/north-west/regional-information/demographic-information/northandwestregion13> >

<sup>26</sup> Victoria Police, 'Victoria Police Crime Statistics 2007/2008.'

<sup>27</sup> Victoria Police, 'Victoria Police Crime Statistics by LGA 2008-09 to 2009-10.'

<sup>28</sup> Crimes against the person are recorded as "family violence incidents" where police submit a "family incident report" in relation to the crime. In a proportion of these incidents Victoria Police will also have issued a Family Violence Safety Notice (FVSN) under s.31 of the *Family Violence Protection Act 2008* (Vic) which is taken to be an application for an Intervention Order (IVO).

<sup>29</sup> Victoria Police, 'Victoria Police Family Violence Statistics 2009-10'.

<sup>30</sup> *Ibid.*

Whittlesea area increased from 577 in 2002/2003 to 868 in 2009/2010 (a 50.4% increase). The rate of family violence callouts in the Whittlesea area has also increased in comparison to metropolitan Melbourne from being almost on par in 2002/2003 (at 577 to 567) to well above the Melbourne metro average in 2009/2010 at 868 compared with 622.<sup>31</sup>

The noted increase in family violence incidents is likely to be partially, though not wholly, attributed to the introduction of the *Family Violence Protection Act 2008* (Vic) which includes an expanded definition of ‘family violence’ and ‘family member’ as well as the introduction of police-issued family violence safety notices.<sup>32</sup>

Given the alarming statistics from the Whittlesea LGA, WCLS had a particular interest in evaluating the assistance offered by the Tribunal to victims of domestic/family violence.

## VICTIMS’ COMPENSATION SCHEMES: RATIONALES & HISTORY

### Experience of victims

For many victims of violent crime the experience is life changing. Research in “victimology” and crime victimisation indicates that victims of crime may experience a wide range of effects stemming from the crime, both immediate and long-term, including physical, psychological, emotional, and behavioural effects.<sup>33</sup>

Research consistently shows that the impact of crime victimisation varies greatly depending on the individual and their circumstances,<sup>34</sup> for example, an experience that may be catastrophic to one victim may not have a less extreme impact on another victim.

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<sup>31</sup> Victorian Local Governance Association < <http://www.vlga.org.au/>>

<sup>32</sup> See Department of Justice, ‘Family Violence’ page < <http://www.justice.vic.gov.au>> for a more in depth explanation of the changes.

<sup>33</sup> Harvey Wallace and Cliff Robertson, *Victimology: Legal, Psychological and Social Perspectives*, (3<sup>rd</sup> ed, 1998), p.68

<sup>34</sup> Bree Cook and Fiona David, *Victims’ Needs, Victims Rights’: Policies and Programs for Victims of Crime in Australia*, (1999), p.68

### *Case Example*

*The point is illustrated by a VOCAT hearing observed by the researcher involving a young man who was the victim of two separate, violent assaults within a short period of time.*

*Though the second assault involved far greater violence and resulted in a fractured skull, an injury that could have been potentially catastrophic, the victim was by far the more affected by a broken nose and scarring that resulted from the first assault.*

*The victim described to the Tribunal his discomfort at confronting his reflection every morning in the mirror and seeing the damage to his nose. The victim stated that seeing the physical evidence of the crime made it difficult for him to move on and it was extremely important to him that his face be returned to the way it looked prior to the assaults. (This is despite the fact that to the casual observer the scarring to his nose was barely noticeable).*

*The victim was so troubled by the appearance of his nose that he was intending to take out a personal loan of \$10,000 to pay for corrective plastic surgery if he was not successful in his claim to the Tribunal. (The victim was successful in this instance and was, in his own words “stoked,” by the Tribunal’s decision).*

In addition to the physical, emotional and psychological effects, victims of crime also frequently incur financial costs following the crime. Financial costs may include the incursion of medical expenses, such as counseling or the cost of hospital and other medical treatment; funding changes to lifestyle in the aftermath of a crime such as changing locks or costs associated with relocation; recovering lost income for time off to recover from the crime or to participate in the criminal justice system; and covering longer-term and unexpected expenses such as funeral costs or treatment for a permanent disability.<sup>35</sup>

Recognition of the multitude of possible effects that may be experienced by victims of crime has informed the response to victims by Government and other agencies. Compensation is one way in which the State gives recognition to victims’ needs and victims’ experiences.

The push for victim recognition developed partly in response to the treatment of the victim in an adversarial criminal justice system that has traditionally focused on the relationship between the offender and the State with the victim’s role confined to that of ‘witness’ for the State.<sup>36</sup>

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<sup>36</sup> Jo Goodey, *Victims and Victimology: Research, Policy and Practice*, (2005), p.126-127.

Governments have also recognised that it is beneficial to gain the co-operation of victims in both the investigation and prosecution of crime and the provision of compensation is one way of encouraging such co-operation. For example, in Victoria a victims' failure to report the matter to police within a reasonable time or to co-operate with the investigation or prosecution of a crime is a basis for refusal of an award.<sup>37</sup>

Goodey argues that generally there are *four key rationales* behind the adoption of compensation schemes for victims of crime by a State including:

- the 'legal duty' of the State to compensate crime victims for failure to prevent crime;
- the 'moral duty' of the State to assist victims on humanitarian or welfare grounds;
- a form of 'loss distribution' or 'social insurance';
- as a 'benefit to the State' because it gives political credibility to those who establish and administer such schemes.<sup>38</sup>

## Crimes Compensation in Australia

The first crimes compensation scheme in Australia was implemented by NSW in 1967 through the enactment of the *Criminal Injuries Compensation Act 1967* (NSW). For the first time, apart from a civil claim for recovery directly from the offender to which a victim in Australia has had a longstanding right, the victim could be compensated directly by the State for the harm caused by the offender.<sup>39</sup>

Prior to this period, in Australia, there was scant understanding or acknowledgment of the effects of crime upon victims by the criminal justice system or society at large, let alone an acceptance that the criminal justice process should be utilised to redress the harm caused to victims or that this use should be underwritten by the State.<sup>40</sup>

In 1972, the first Victorian crimes compensation legislation was enacted, constituting a one-person Tribunal who could award compensation for a number of expenses including 'pain and suffering.'<sup>41</sup>

By 1996, the success (and cost) of the crimes compensation scheme in Victoria led to the Liberal Government abolishing, with the introduction of the *Victims of Crime Assistance Act 1996* (Vic) ("the Act"), awards to victims of crime for pain and suffering. In its justification for the change the State Government cited the escalating costs of such awards and the prediction that, if the upward trend were to continue, the scheme would become too expensive for the State to fund. The practical effect of the change was that victims who had not suffered economic loss as a result of their injury were no longer able to access compensation save for a small number of victims who could demonstrate "exceptional

<sup>37</sup> *Victims of Crime Assistance Act 1996* (Vic), s.53(a).

<sup>38</sup> Goodey, above n36, p.141

<sup>39</sup> Professor Ian Freckleton, *Criminal Injuries Compensation: Law, Practice and Policy*, (2001), p.32

<sup>40</sup> *Ibid*, p.30

<sup>41</sup> *Ibid*, p.35

circumstances” and were able to receive expenses to assist in their recovery from the crime.<sup>42</sup>

Though the focus of the Liberal Government’s critique of the scheme was on its cost to the taxpayer, a number of arguments have been advanced against crimes compensation schemes in various jurisdictions including:

- inequity and social divisiveness resulting from victims of crime being given more support and greater recognition than other victims (ie, victims of natural disasters or accidents) as well as some victims receiving greater awards than others;<sup>43</sup>
- the high costs of administering such schemes that must be borne by the taxpayer;
- counter-therapeutic outcomes for victims resulting from the process such as unnecessary labeling of victims as suffering from physical or psychiatric disorders or delay in recovery caused by focus on injuries rather than on recovery;<sup>44</sup>
- potential for the system to be open to abuse;
- potential for victims to waste awards or for awards that are made failing to address victims’ needs.<sup>45</sup>

## CURRENT LEGAL FRAMEWORK

In 2000 the Labor State Government, which had been highly critical of the changes made to the crimes compensation scheme by the Liberal Government, delivered on its election promise to amend the Act and restore awards to victims for ‘pain and suffering.’

*‘While no amount of money can compensate victims for their harm, a sum of money – however small – provides them with recognition and acknowledgement that they have suffered as victims of crime. It provides an opportunity for the community, through the Tribunal, to say to victims, “We acknowledge your suffering and we’re sorry for your pain.”’<sup>46</sup>*

<sup>42</sup> Ibid, p.39-40; *Victims of Crime Assistance Act 1996* (Vic), ss.7-10

<sup>43</sup> D. Miers, *Responses to Victimisation: A Comparative Study of Compensation for Criminal Violence in Great Britain and Ontario*, p.240 in Freckleton, above n39, p.67

<sup>44</sup> Freckleton, above n39, p.71-72.

<sup>45</sup> Ibid, p.67 &76.

<sup>46</sup> Victoria, *Parliamentary Debates*, Legislative Assembly 2<sup>nd</sup> reading speech, 26 May 2000, 1912-1913, (Mr Hulls Attorney-General)

The new scheme, along with changes that were made to the *Sentencing Act 1991* (Vic) was intended to provide:

- a sympathetic and compassionate forum for applicants to relate their experiences as victims of violent crime;
- an opportunity for the State to make a payment to victims on behalf of the community in recognition of the victim having suffered a significant harm as a result of a crime of violence;
- a range and choice of services and support mechanisms; and
- avenues to make offenders financially accountable, wherever practicable, for the harm they cause.<sup>47</sup>

### Avenues for Compensation

Currently, victims of crime in Victoria have recourse to a number of avenues for financial assistance including recovery from the offender directly via:

- A compensation/restitution order under the *Sentencing Act 1991* (Vic) (“Sentencing Act”)

Under s.85B of the Sentencing Act the court is able to order a person who has been convicted and found guilty of a crime to pay an amount of compensation to their victim for “pain and suffering” as well as for reasonable counselling and medical expenses and other expenses incurred by the victim as a direct result of the crime (not including damage or loss to property).

In considering whether to make such an order the court will take into account the financial circumstances of the offender and the effect that such an order will have on them.<sup>48</sup>

Victims are not be precluded from pursuing a compensation or restitution order from the offender if they have already been awarded financial assistance from the Victims of Crime Assistance Tribunal, or vice versa, but the amount they have already received will be taken into account when making a subsequent award and the award is likely to be reduced by that amount.<sup>49</sup>

- A civil claim for damages.

Or recovery from the State via:

- An award of financial assistance made by the Victims of Crime Assistance Tribunal under the Act.

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<sup>47</sup> Ibid, 1911.

<sup>48</sup> *Sentencing Act 1991* (Vic), s.85H.

<sup>49</sup> *Sentencing Act 1991* (Vic), s.85I; *Victims of Crime Assistance Act 1996* (Vic), s.16.

### Victims of Crime Assistance Act 1996 (Vic)

Though the amount that a victim may recover via an action for recovery taken directly against the offender, if successful, is likely to be considerably more than an award for compensation made by the Victims of Crime Assistance Tribunal where the maximum amount is capped at \$60,000 for primary victims<sup>50</sup>, in practice, recovery from VOCAT is often the best or the only option.

There are a number of advantages in pursuing an award for compensation from VOCAT in comparison to other avenues for recovering financial assistance including:

- an award of financial assistance is not dependent upon an offender being convicted, found guilty or even identified;
- compensation is awarded and funded by the State and is therefore not contingent on the offender having financial means;
- legal costs are paid directly to the victims' legal practitioner by VOCAT so the victim is not liable for legal costs;
- the victim may elect to have the application for compensation resolved "on the papers," eliminating the need for the victim to attend a court Hearing;
- the standard of proof for establishing both an 'act of violence' and an 'injury' is lower than for the criminal jurisdiction ('on the balance of probabilities' as opposed to 'beyond reasonable doubt');
- an application for compensation from VOCAT is often the quickest and most straightforward means for the victim to access financial assistance.

The Act establishes a crimes compensation scheme in Victoria with **three** stated objectives:

- to assist victims of crime in their recovery by paying for expenses incurred, or reasonably likely to be incurred, as a direct result of the crime; and
- to pay certain victims of crime financial assistance as a symbolic expression by the State of the community's sympathy, condolence for, and recognition of, significant adverse effects experienced or suffered by victims of crime; and
- to allow victims of crime to have recourse to compensation under the Act where compensation cannot be obtained from other sources.<sup>51</sup>

To be eligible to claim compensation under the scheme the victim must establish that they have suffered an act of violence and sustained an injury, either mental or physical, as a direct result of that act of violence.<sup>52</sup>

<sup>50</sup> *Victims of Crime Assistance Act 1996* (Vic), s.8(1).

<sup>51</sup> *Victims of Crime Assistance Act 1996* (Vic), s.1

<sup>52</sup> *Victims of Crime Assistance Act 1996* (Vic), s.50 note, pregnancy is also included within the definition of 'injury.'

The Act recognises harm caused to ‘primary’ victims, who are either injured or killed as a direct result of the act of violence. Included within the definition of ‘primary’ victim are those victims who are either injured or killed as a direct result of:

- trying to arrest someone whom he or she believes 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 he or she believes on reasonable grounds is a victim of an act of violence

whether or not an act of violence is actually committed.<sup>53</sup>

In addition, the Act recognises the harm caused to ‘related’ victims who are the close family members of a primary victim who has died as a direct result of the act of violence.<sup>54</sup>

‘Secondary victims’ who have been injured by witnessing an act of violence or by learning of an act of violence where the primary victim is a child under 18 and the secondary victim is the parent or guardian of that child are also eligible to receive compensation under the Act.<sup>55</sup>

Awards of special financial assistance, an equivalent to awards for pain and suffering, are available for primary victims who have suffered ‘significant adverse effects’ as a direct result of the act of violence.<sup>56</sup> Awards for related victims may also include an amount for any ‘distress’ caused by the death of the primary victim.<sup>57</sup> The amount that a victim can receive in special financial assistance is pegged to the category of act of violence the victim has suffered.<sup>58</sup> Victims may also recover compensation for medical expenses, counselling, loss of earnings and’ expenses to assist the victim in their recovery in ‘exceptional circumstances’.<sup>59</sup>

The victim also has the ability to elect to attend a Tribunal Hearing or to have the matter resolved “on the papers.”<sup>60</sup>

## Victims Charter

In 2006, the *Victims Charter Act 2006* (Vic) came into effect with the purpose of minimising secondary victimisation of victims of crime through the prosecution and trial process by bringing together all existing legislative rights and entitlements for victims of crime.

<sup>53</sup> *Victims of Crime Assistance Act 1996* (Vic), s.7(1),(2).

<sup>54</sup> *Victims of Crime Assistance Act 1996* (Vic), s.11

<sup>55</sup> *Victims of Crime Assistance Act 1996* (Vic), s.9

<sup>56</sup> *Victims of Crime Assistance Act 1996* (Vic), s.8A

<sup>57</sup> *Victims of Crime Assistance Act 1996* (Vic), s.13(2)(c)

<sup>58</sup> *Victims of Crime Assistance Act 1996* (Vic), s. 8A; *Victims of Crime (Special Financial Assistance) Regulations 2000* (Vic), Schedule 1.

<sup>59</sup> *Victims of Crime Assistance Act 1996* (Vic), s.8

<sup>60</sup> *Victims of Crime Assistance Act 1996* (Vic), s.33.

*'...enshrining these principles in legislation provides a clear recognition by the Government of victims of crime and their important role in the criminal justice process.'*<sup>61</sup>

The Act also establishes requirements for monitoring and reviewing those principles. The objects of the Act are to:

- Recognise the impact of crime on victims;
- Recognise the right of victims of crime to receive information to enable them to access appropriate services to help with their recovery and to be treated with respect by investigatory, prosecutor and victims' services agencies;
- Reduce the likelihood of "secondary victimisation" by the criminal justice system.<sup>62</sup>

To this end, Part 2 of the Act contains a "Charter" with twelve principles governing: the treatment of the victim, information to be given to the victim about the offender and the investigation and prosecution of the offender, victim impact statements and victim privacy. A victims' right to apply for compensation under the *Sentencing Act 1991* (Vic) and the *Victims of Crime Assistance Act 1996* (Vic) is set out in Principle 16.

Part 3 of the Act requires agencies who deal with victims of crime to have regard to the Charter principles and also requires the Secretary of the Department of Justice to monitor the operation of the Act and promote the Charter principles as well as developing a procedure for complaints if the Charter principles are not upheld.<sup>63</sup>

The Liberal Party, in Opposition were critical of the Act on the basis that it represented nothing more than 'word smithing' and a rehashing of existing victims' rights rather than a Act to establish new rights for victims.<sup>64</sup>

The Act essentially represents a consolidation of existing victims' rights. Organisations such as Victoria Police confirmed that they have responded to the implementation of the *Victims Charter Act 2006* (Vic) by implementing policies and operational procedures that ensure the organisation complies with their responsibilities under the Charter.

One criticism that has been made of the Charter however is that the complaint mechanism "lacks teeth" should a victim wish to have recourse against an agency who has failed to meet their obligations under the Charter.

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<sup>61</sup> Victoria, *Parliamentary Debates*, Legislative Assembly 2<sup>nd</sup> reading speech, 14 June 2006, (Rob Hulls Attorney-General), 2046.

<sup>62</sup> *Victims Charter Act 2006* (Vic), s.4(1). The objects of the act are intended to give effect to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power by the General Assembly of the United Nations by *Resolution 40/34* of 29 November 1985.

<sup>63</sup> *Victims Charter Act 2006* (Vic), s.18 and s.20.

<sup>64</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 8 August 2006, (Mr McIntosh Shadow Attorney-General), 2574-2578.

# Methodology

## CHOOSING THE SCOPE OF THE RESEARCH

While at the time the initial grant application was made it was the intention of WCLS to conduct research into *all* potential avenues of assistance available to victims of crime in Victoria, a decision was made after starting the research to focus in particular upon compensation available under the Act.

This decision was made for a number of reasons. Firstly, in the interim between WCLS's application for the grant and the research period, the Department of Justice launched its own review into existing compensation schemes in Victoria with scope for reviewing both the *Victims of Crime Assistance Act 1996* (Vic) scheme and the provisions under the *Sentencing Act 1991* (Vic). The Department of Justice review will determine whether changes are needed to make the system "...fairer, clearer, more responsive and more accessible..."<sup>65</sup>

Secondly, it was the intention of the research to utilise the expertise that WCLS has developed in dealing with complex victims of crime issues as well as the strong relationships it has with other legal, welfare and community service providers. As WCLS's main expertise in this area is in assisting victims of crime to lodge applications under the Act ("VOCAT applications") and its strongest relationships and contacts are with other Community legal centres who are also more likely to assist clients to lodge VOCAT applications than to pursue other avenues for compensation, a decision was made to focus on the Victims of Crime Assistance Tribunal.

### Research Method

A broad survey approach was undertaken to gain a "snapshot" of the current state of the law regarding victims' compensation in Victoria.<sup>66</sup>

For consultations with legal practitioners, victims' support agencies and other organisations that have contact with victims of crime, semi-structured interviews conducted either face-to-face or by phone were favoured. This research method was chosen because it allowed the interviewee to elaborate on ideas and develop suggestions when prompted by an open-ended question from the interviewer.<sup>67</sup>

To ensure consistency and to enable comparison of data the same list of questions was used for each interview. Not all interviewees responded to all questions put to them and there was a tendency for interviewees to focus on different aspects of the VOCAT process.

One-on-one interviews tend to have a more personal element that it was hoped would encourage interviewees to be more candid in their opinions and would also lead to a higher

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<sup>65</sup> The Department of Justice, *Discussion Paper: Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Award*, (December 2009), p. 4

<sup>66</sup> Martyn Denscombe, *The Good Research Guide: for small-scale social research projects*, (2<sup>nd</sup> ed, 2003), p.6-7.

<sup>67</sup> *Ibid*, p.22-23.

response rate than if written questionnaires were used. Where contributors were unable to participate in an interview, a written response to a list of questions was provided.

In addition to data gathered via interviews reliance was placed on other research methods and information sources including:

- questionnaires (see Appendix 2 and discussion at pages 29-30);
- statistics recorded by Victoria Police and VOCAT;
- VOCAT Annual Reports;
- legislation and case law;
- articles from journals and textbooks;

## SAMPLE SELECTION

At various points in the VOCAT application process a victim of crime is likely to come into contact with a number of “service providers” who will either provide the victim with general support or specific assistance with their application for compensation (ie, solicitors, barristers, counselors, victims support agencies, Victoria Police etc).

Whittlesea Community Legal Service (“WCLS”) aimed to consult with as many “service providers” as possible in relation to their experience of the VOCAT process as well as their observations of the victim’s experience of the VOCAT process.

### Legal Practitioners

WCLS focused in particular upon legal practitioners, from both the community and the private sector for consultations regarding the VOCAT process. Legal practitioners who conduct VOCAT applications on behalf of clients are well placed to comment on the current legal framework and the way in which the system works *in practice*.

The Federation of Community legal centres lists sixty-two legal centres in its ‘Victorian Community Legal Centres Directory.’<sup>68</sup> Of these, thirty three are listed as ‘generalist’ and twenty nine as ‘specialist’ Community legal centres.<sup>69</sup>

For the purposes of this research WCLS contacted *all* generalist Community legal centres listed on the Federation’s website<sup>70</sup> at least once either by phone, email or both in order to determine:

<sup>68</sup> The Federation of Community Legal Centres is the peak body for Victorian Community legal centres: <<http://www.communitylaw.org.au/centres.php>>

<sup>69</sup> Generalist Community legal centres provide advice and services to clients on a wide range of legal issues in their local geographic area whilst Specialist Community legal centres concentrate on communities or individuals with specific needs, Federation of Community Legal Centres Victoria, *Improving Access to Justice for Victims of Crime*, (3 October 2007), p.4.

- Whether the Community legal centre provides assistance to victims of crime in relation to VOCAT applications; and
- Whether a representative from the Community legal centre was willing to be interviewed by the researcher regarding their experience with the VOCAT process.

WCLS also contacted nineteen of the twenty four specialist Community legal centres listed on the Federation’s website.<sup>71</sup> Specialist Community legal centres who were contacted were selected on the basis that their practice was likely to include VOCAT and related matters or it was unclear what areas their practice included. Those specialist CLCs whose practice clearly fell outside of the relevant area (e.g. Environment Defender’s Office (Victoria ) Ltd and Consumer Action Law Centre Ltd etc) were not contacted.

Of the Community legal centres contacted a total of twenty-three, both specialist and generalist, participated in the consultation process.

In addition, two Victoria Legal Aid solicitors contributed to the research via written responses to a set interview template. Victoria Legal Aid also provided their submission to the Department of Justice review to the researcher.

Of the sixteen private practitioners identified and contacted by the researcher, six were in a position to contribute to the research.<sup>72</sup>

### **Victims Support Agencies**

WCLS consulted with representatives from both the VACPs and other relevant victims’ support agencies who were identified either through the Whittlesea Community Directory<sup>73</sup>, the VOCAT website, general research or via word of mouth and referrals.

In total, representatives from seven victims support agencies agreed to be interviewed in person or by phone or answer interview questions in writing.

### **Victims of Crime Assistance Tribunal**

WCLS consulted with a VOCAT Registrar and Magistrate.

### **Victoria Police**

WCLS conducted a face-to-face interview with the Manager of the Victims’ Advisory Unit, Victoria Police.

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<sup>70</sup> It should be noted that the actual number of generalist CLCs who were contacted for this research, excluding Whittlesea Community Legal Service itself, is twenty six. Where a Victorian CLC has multiple branches (which is the case for three CLCs), only *one* of those branches was contacted.

<sup>71</sup> As was the practice in relation to generalist CLCs, where specialist CLCs have multiple branches (which is the case for two CLCs), only *one* of those branches was contacted.

<sup>72</sup> Please note, not all private practitioners who contributed to the research wished to be named on the “acknowledgements” page.

<sup>73</sup> A publication prepared by Whittlesea Community Connections listing agencies and organisations in the Whittlesea region.

## Limitations

### Limited Access to Hearings and Decisions

The Act provides that hearings are to be open to the public unless the Tribunal directs otherwise. The Tribunal may direct that the whole or a part of a hearing be closed to members of the public or restricted to a particular person or class of persons either on its own initiative or in response to an application by a party.<sup>74</sup>

The Tribunal will often have very compelling reasons to give such a direction. Under **s.42(3)** of the Act, the Tribunal must direct that a hearing be closed where the offence is in the category of sexual offences under the *Crimes Act 1958* (Vic), the victim is a child or is suffering from a cognitive impairment or the Tribunal is of the opinion that an applicant is likely to suffer distress or to feel intimidated if the direction is not given.

From the researcher's point of view lack of access to hearings made it difficult to gauge the way in which hearings are typically conducted in the Victims of Crime Tribunal. The researcher was able to observe one hearing with the assistance of Counsel assisting the applicant who sought permission from the victim for the researcher's attendance. At the conclusion of the hearing the presiding Magistrate made it clear that hearings are not closed *as a matter of course* in the jurisdiction. However, when contact was initially made with the Magistrates Court they advised WCLS that it would be difficult if not impossible to observe a hearing, even for research purposes.

The Tribunal places further restrictions on the publication of evidence, information or documentation produced at a hearing likely to identify a party or other person who has appeared at a hearing.<sup>75</sup> The Tribunal may give leave for publication upon the application of a party or on its own initiative if it is in the public interest to do so.<sup>76</sup>

The Tribunal does not prepare written reasons for every decision it makes. Where there is an application to the Victorian Civil and Administrative Tribunal for review of a Tribunal decision the applicant or applicant's legal representative may request a *written* statement of reasons for the decision.<sup>77</sup> The Tribunal may also decide to prepare reasons for a decision on its own initiative (usually this will occur where the Tribunal has refused an application for assistance). Even where reasons for a decision are provided to the applicant, the Tribunal does not publish those reasons on a website so they are not readily accessible by either the public or other legal practitioners.<sup>78</sup>

As well as having implications for research, lack of access to hearings and reasons for decisions also has implications for the education of legal practitioners. Decisions and reasons for decisions play an educative role for the legal profession.

<sup>74</sup> *Victims of Crime Assistance Act 1996* (Vic), s.42(1),(2).

<sup>75</sup> *Victims of Crime Assistance Act 1996*(Vic), s.43(3), publication not to occur unless ordered by the Tribunal under s.43(1).

<sup>76</sup> Victims of Crime Assistance Tribunal.

<sup>77</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic),s.45.

<sup>78</sup> Victims of Crime Assistance Tribunal.

In addition to education of the legal profession, decisions and reasons for decisions have an important role to play in illuminating the experience of victims and educating the general public regarding the *impact* of violent crime on a victim.

### *Discussion*

*Is it appropriate for the Tribunal to relax restrictions on publication in some circumstances?*

*Should publication be a matter of course and only where an application is made to the Tribunal should publication be restricted?*

*What criteria should be used to restrict publication?*

### **Limited Access to Victims**

Victims of crime themselves have been largely absent from the consultation process.

While it was envisaged at the beginning of the consultation process that WCLS would have an opportunity to consult directly with victims of crime either via interviews or questionnaires, it was difficult for the researcher to produce a statistically significant<sup>79</sup> sample of victims due to a number of practical and ethical considerations.

Firstly, the researcher was unable to access former clients (“victims”) of legal practitioners directly. The fact that legal practitioners owe certain duties, including a duty of confidentiality to their clients, dictated that the researcher rely upon the individual lawyer who had assisted the victim with their application to contact the victim.<sup>80</sup>

Due to time and resource constraints it was not possible for the researcher to access enough former victims using this method. The researcher was therefore limited to surveying former clients of Whittlesea Community Legal Service *only*.

Questionnaires were chosen as the best method of data collection in this instance due to the relative ease with which they can be composed and administered and the fact that their anonymous nature is more likely to garner honest responses from participants where questions relate to sensitive information.<sup>81</sup>

<sup>79</sup> A sample of at least thirty or more is needed for the research to have sufficient validity, Terry Hutchinson, *Researching and Writing in Law*, (2006), p.101

<sup>80</sup> The researcher consulted with the Law Institute of Victoria regarding the ethical ramifications of contacting former clients in relation to the research.

<sup>81</sup> Terry Hutchinson, above n79, p.98.

Twenty former clients were identified by WCLS and a short questionnaire was composed and sent to each client with an accompanying cover letter (see Appendix 2) explaining the purpose of the questionnaire, storage and use of data and confidentiality (the questionnaire was kept deliberately short in order to hold the attention of the recipient and to maximise the chance of a response.<sup>82</sup> (See Appendix 3) Only *three* former clients completed and returned questionnaires to the researcher. The reason for the low rate of response is likely to be due to a number of factors including:

- some client’s difficulties with reading and comprehending English;
- the fact that clients may view the finalisation of their VOCAT claim as “closure” and prefer to move on rather than revisit the experience; and
- the fact that questionnaires/surveys, as a form of data collection generally tend to have a low response rate.<sup>83</sup>

Including another victim who gave permission to the researcher to observe their attendance at a hearing and to answer questions prior to and following the hearing, a total of *four* victims were consulted directly during the course of this research.

It was therefore necessary, in order to ensure that the “victim’s voice” was not absent from the research, to rely on those agencies who have regular contact with and provide assistance to victims (for example VACPs and other victim’s support agencies, solicitors and barristers) to shed light on the experience of victims of crime.

### **Limited access to private practitioners**

A preliminary hurdle the researcher encountered when seeking to consult with private practitioners working in the area of victim’s compensation was *identifying* these practitioners.

Neither the Law Institute of Victoria nor the Victoria Law Foundation *lists* private practitioners who work in this area (though they will provide a referral letter to an individual client who seeks to contact a practitioner).

The researcher therefore had to rely on the “snowball” or word of mouth sampling method, where one contact suggests another contact who suggests another contact and so on and so forth, to find private practitioners who conduct VOCAT applications.<sup>84</sup>

Without a comprehensive resource it was impossible for the researcher to gain an accurate picture of the *total number* of private practitioners who conduct VOCAT work in Victoria with anecdotal evidence from those individuals and organisations consulted suggesting that the number is quite low.

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<sup>82</sup> Martyn Denscombe, above n66, p.7-8.

<sup>83</sup> Terry Hutchinson, above n79, p.98.

<sup>84</sup> Martyn Denscombe, above n66, p.16.



# Awareness of VOCAT

As already noted in the introduction to this Discussion Paper, only **15%** of potentially eligible victims currently make applications to the Tribunal.

A *preliminary barrier* to victims accessing compensation identified by the research is a lack of awareness amongst victims of their eligibility to access financial assistance. It was a perception that emerged through consultations with legal practitioners and victims support agencies that victims are often not aware of their right to claim compensation and for this reason the system in Victoria is under utilised.

Freckleton quotes a 1994 study conducted by the Victorian Community Council Against Violence that surveyed individual victims of crime via questionnaire or phone interview and discovered that the most frequently cited reason for a victim's failure to make an application was a lack of awareness that they were eligible to do so.<sup>85</sup>

There was also concern raised by those legal practitioners working in private practice that *too much* focus on VOCAT and a lack of awareness of other avenues for assistance may be leading legal practitioners, particularly in Community Legal Centres, to ignore other avenues for assistance that may provide equal or greater benefit to victims of crime. For example, the researcher consulted with a legal practitioner who has utilised, on behalf of clients, an alternative dispute resolution process put in place by an institution to deal with the historical sexual abuse of children. In the opinion of the legal practitioner this avenue for assistance or a claim for negligence/damages was likely to yield a more lucrative outcome for the victim, particularly where there are instances where there is more than one claimant.

## HOW DO VICTIMS GAIN ENTRY TO THE SYSTEM?

Legal practitioners who were consulted for this research gained VOCAT clients through a variety of avenues including:

- Referrals from the *Victims Support Agency*;
- Referrals from the *Victims Assistance and Counselling Program*;
- Referrals from other *victims support agencies* such as the Centres Against Sexual Assault (CASA);
- Referrals from Counselors, Psychologists or Psychiatrists;
- Referrals from GPs and other Medical Practitioners;
- Referrals from Schools, social workers and community health workers; and
- Referrals from *Victoria Police*.

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<sup>85</sup> Victorian Community Council Against Violence, *Report Upon an Inquiry into Services for Victims of Crime*, (1994) in Professor Ian Freckleton, above n39, p.64.

Some legal practitioners have direct links with an individual victims support agency that refers clients to them. Victims may also approach legal practitioners for advice in relation to an unrelated legal matter and at this point the legal practitioner may advise the victim of their eligibility to apply for assistance from the Tribunal.

Victims are more likely to be alerted to the existence of VOCAT and their eligibility to claim assistance by a victims' support or community service agency or by a legal practitioner than to specifically seek legal assistance to file a VOCAT application. Legal practitioners indicated that it was more unusual for victims to "walk in off the street" than to be referred by another agency.

Given that the majority of victims are first coming into contact with VOCAT through someone other than a legal practitioner it is imperative that victims get access to accurate and timely information about the Tribunal process from these sources.

Anecdotal evidence from legal practitioners suggested that the more accurate the information that the victim receives at the outset the easier it is for the legal practitioner to "manage the expectations" of the victim throughout the process.

## **Victims Support Agency**

The Victims Support Agency ("VSA") sits within the Department of Justice and is charged with coordinating and funding a "whole of government" approach to provision of services to victims of crime. The VSA is a centralised agency responsible for forging links and partnerships with and between service providers to ensure that victims are not required to continuously re-tell their story to different agencies.<sup>86</sup>

The VSA provides a telephone helpline for victims of crime that provides information and advice about the criminal justice system and the Tribunal as well as referrals to relevant support services where the victim requires assistance.

## **Victims Assistance and Counselling Program**

The Victims Assistance and Counselling Program (VACP) is an initiative funded by the VSA. The VACPs are a network of agencies located in each region throughout Metropolitan and regional Victoria. Each agency is independently run but shares guidelines with other VACPS. Each VACP offers a range of practical and other assistance to victims including:

- providing support to make a police report and liaising with police on behalf of the victim;
- helping victims to find accommodation;
- linking victims to support groups and other services including legal practitioners;

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<sup>86</sup> See Department of Justice website: <[www.justice.vic.gov.au](http://www.justice.vic.gov.au)>

- providing information about the court system and supporting victims involved in the criminal justice system including assisting victims to complete victim impact statements and assisting victims to attend court; and
- assisting victims with their VOCAT application.

The VACPs may also refer victims to counselors or psychologists/psychiatrists if required and assist victims to meet immediate needs such as food, shelter, security, medical and other costs.<sup>87</sup>

The Department of Justice in its Discussion Paper reports that the VACPs provide services to approximately 7,500 victims of crime each year and act as a referral point for VOCAT as well as often being the first or one of the first places where the victim may hear about their eligibility to claim assistance from VOCAT.<sup>88</sup>

## Victims Support Agencies and Community Service Agencies

Other agencies in Victoria that fall outside the VACP network may also provide assistance to victims of crime including:

- Centres Against Sexual Assault;
- Berry Street;
- Immigrant Women's Domestic Violence Service;
- Women's Health Victoria;
- International and other student welfare services;<sup>89</sup>
- Migrant Resource Centres;
- Community Health Centres;
- Community Agencies.

## Victoria Police

Victoria Police will often be the first point of contact victims of crime will have with the criminal justice system. The information that victims receive from Victoria Police and the way in which they are dealt with by the police force may therefore be crucial in determining whether or not the victim proceeds to make a claim through VOCAT.

Victoria Police acknowledge the important role they play in responding to victims of crime, providing victims with support and information and through their dealings with victims, attempting to minimise the long-term impact of crime in Victoria in their future policy document "The Way Ahead."

<sup>87</sup> The Department of Justice, State Government of Victoria, *Victims' Services pamphlet*.

<sup>88</sup> The Department of Justice, above n65, p.13.

<sup>89</sup> This does not represent a comprehensive list of all agencies within Victoria who provide support and assistance to victims of crime but provides an indication of some of the alternative agencies that assist victims of crime.

Victoria Police has a specialist Victims Advisory Unit (“VAU”) with the dual role of:

- producing and implementing policy for Victoria Police in relation to victims of crime; and
- liaising with victims of crime and police officers who are dealing with victims of crime.

At a policy level, the VAU ensures that Victoria Police are in compliance with their obligations under the Victims Charter. The VAU is charged with implementing and monitoring the implementation of the Victims Charter across the organisation as well as conducting research and keeping up to date with developments in relation to victims, including alterations to rights and obligations that may be relevant to Victoria Police.

The Victims Advisory Unit also has a direct role in providing support and assistance to police officers on the ground. Support provided to individual police officers includes a 24 hour service that operational police officers can access for guidance on dealing with victims of crime, both primary and related victims and witnesses. The VAU is generally consulted by police officers in relation to serious violent crimes such as homicide or culpable driving offences as well as crimes that may involve a large number of witnesses and where gathering evidence may be difficult. (For example, a recent case where the VAU became involved concerned a homicide at a service station on a busy main road during peak hour). The VAU also automatically becomes involved in police shootings or death resulting from a police pursuit.

### **Victoria Police and VOCAT**

Both the VAU and individual police stations provide information to victims about VOCAT and the application process.

Victim Liaison Officers within the VAU provides victims with verbal information about VOCAT as well as a more detailed booklet prepared by the Victim Support Agency. Where necessary, the VAU may refer victims to private practitioners to assist them with the application process or assist victims to fill in forms (almost always for related victims) and the private practitioner will liaise directly with the Tribunal on behalf of victims. The VAU may also assist victims to apply for interim awards where appropriate (for example, where the victim is concerned about funeral expenses) by referring them to a private practitioner or assist victims in relation to other avenues for compensation such as through the Transport Accident Commission.

Individual police complexes are required to give victims either an “L1” form with the Victims Helpline number on it or a booklet prepared by Victim Support Agency. These forms and booklets, according to the Manager of the VAU, are held in every storeroom in every police complex in Victoria.

At an individual police complex level, there are policy and Operational Procedures relating to victims of crime that apply consistently across the organisation. Clear guidelines are also in place regarding specific categories of victims, such as victims of sexual assault and family violence with liaison officers and special units to deal with these victims.

Although, victims generally reported positive interactions with Victoria Police, anecdotal evidence emerged during the course of the research and consultation process suggesting that the response victims receive from police may vary depending on which police complex or even which police officer the victim comes into contact with. The reaction of the police, whether conscious or not, may discourage victims from proceeding with a claim (for example, anecdotal evidence from victims that was related to the researcher included a police officer telling a victim “it will be his word against yours in court” and “there is not enough evidence to show that a crime has been committed”). Without access to individual victims or individual police officers the researcher was unable to confirm whether this anecdotal evidence is indicative of a common occurrence or just a few isolated instances.

The Manager of the VAU confirmed that police officers receive considerable training in relation to victims of crime and the Victims of Crime Assistance Tribunal. Recruits at the Police Academy receive a double lecture on the Victims Charter which includes information about VOCAT.

Given the clear procedural guidelines surrounding the police’s dealings with victims, the Manager of the VAU indicated that there should be little or no variation in the information that victims receive from Victoria Police, although the Manager of the VAU noted that it is impossible to know whether there is variation between police complexes.

The VAU does conduct periodic training for police officers where specific problems or deficiencies are noted and also conducts regular audits of the system.

### ***Making a Police Report***

For some victims, particularly victims of sexual assault or family violence, the very act of approaching Victoria Police to report a crime or make a statement is often an onerous first step.

Victim’s reluctance to approach police can present a barrier to victim’s claiming compensation from VOCAT. This is because it is virtually impossible for a victim to be granted an award of compensation where they have not reported the matter to police. Failure to report the crime within a reasonable period of time is grounds for mandatory refusal of an award under the Act.<sup>90</sup>

One victims’ support agency that regularly assists victims of sexual assault shed some light on the many fears that a victim may have in relation to coming forward to report the crime to police including:

- fear of loss of privacy
- fear of not being believed or being blamed

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<sup>90</sup> *Victims of Crime Assistance Act 1996* (Vic), s.52.

- fear of being dismissed or the crime being minimised
- fear of a subsequent investigation being triggered, including interviews being conducted with close family members or friends resulting in the crime becoming an “open” rather than a confidential matter.

## **DISCUSSION: SUGGESTIONS FOR REFORM**

Given that the evidence suggests that most victims first come into contact with VOCAT through someone other than a legal practitioner the quality of information they receive from these individuals and organisations is of paramount importance.

### **VOCAT Materials to be available in a greater variety of languages**

The provision of a ‘translations’ page on the VOCAT website providing translations of VOCAT information into a wide variety of languages should be applauded. The more information about VOCAT that is available in languages other than English the greater is the awareness and access to the Tribunal for people from non-English speaking backgrounds.<sup>91</sup>

It is noted that although there are currently ‘Arabic’ translations available on the website there are no translations available in other African languages and it is suggested that further translation of VOCAT materials into these languages should be undertaken.

### **Education/training for those assisting victims of crime**

While many victims’ support agencies have an in-depth understanding of the VOCAT process and are able to educate victims about the VOCAT process, not all victims’ support agencies the researcher consulted with had an adequate understanding of VOCAT.

There was a particular need identified during the consultation process for Community Legal Education to be provided to some victims support agencies, particularly focusing on the use of interim awards to cover urgent expenses. (See discussion at pages 45 to 47).

Ongoing Community Legal Education should be provided to those agencies who have contact with victims of crime and should extend beyond those agencies who are part of the VACP network to include other organisations such as schools, universities, medical practices etc.

### **Education of the legal profession**

There is also a need for the legal profession itself to be better educated regarding VOCAT to ensure that clients who may be assisted by compensation are identified and directed to the most appropriate avenue for compensation.

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<sup>91</sup> Victims of Crime Assistance Tribunal website:

<<http://www.vocat.vic.gov.au/wps/wcm/connect/justlib/VOCAT/Find/Translations/>>

The second phase of the VOCAT Capacity Building Project will involve the compilation of a “Best Practice Manual” that will provide a resource for legal practitioners who are conducting VOCAT applications.

As well as providing in-depth guidance in relation to the VOCAT process the “Best Practice Manual” will also attempt to address legal practitioners’ limited awareness of other avenues for assistance by highlighting the range of avenues for compensation available to victims.

In addition to the Best Practice Manual it may also be beneficial for educational institutions that provide training to lawyers, either Continuing Professional Development, Practical Legal Training, undergraduate or post-graduate courses to include a VOCAT component.

### **Pro-active approach by the Tribunal**

A suggestion was made by one victims’ support agency during the course of the research that the Tribunal itself might be able to take a pro-active approach in alerting victims to their potential to claim compensation. For example, in relation to victims of domestic violence, it was suggested that those victims who have been granted an Intervention Order by the court could be informed (ie, 6 months or 1 year later) of their potential to seek compensation from VOCAT.

The suggestion of a 6-12 month period was made in recognition of the “information overload” that victims often experience at the time of the act of violence. Victims and the Court at the Intervention Order stage are often focused on meeting the immediate needs of the victim and often it is only once some time has passed and the victim is no longer in “crisis” mode that they are able to engage with the VOCAT process.

# Obtaining documentation

Legal practitioners consulted for this research nominated obtaining relevant supporting documentation from third parties as one of the *principal difficulties* of running a VOCAT case. Of the thirty-two legal practitioners who were consulted, *nineteen* (59%) nominated difficulties obtaining documentation as contributing to both:

- the length of time taken to prepare an application; and
- the legal practitioner's costs of running the application.

Of the remaining eleven (34%) legal practitioners, seven did not raise difficulties obtaining documentation as an issue that affected their ability to successfully run VOCAT cases and three specifically said that they had experienced no difficulty in obtaining third party documentation.

Difficulties obtaining a report from Psychologists/Psychiatrists or Counsellors was most often cited as contributing to delays and costs with twelve out of twenty-nine legal practitioners (excluding barristers) or 41% citing delays with Psychologists/Psychiatrists, followed by obtaining reports from Medical Practitioners generally (six out of twenty-nine or 20% of legal practitioners), obtaining documentation from Victoria Police (four out of twenty-nine or 13%) and obtaining quotes and invoices from other sources (four out of twenty-nine or 13% of legal practitioners).

## BACKGROUND

Documentation is required to establish that the victim is eligible to claim assistance from VOCAT as either a “*primary*”, “*secondary*” or “*related*” victim.

To claim eligibility as a “*primary victim*” the victim must show that both an “*act of violence*” has occurred and that an “*injury*” has been sustained from that act of violence.<sup>92</sup> To be eligible to claim assistance as a “*secondary*” victim, the victim must have been present at the scene of the act of violence and have sustained an injury from *witnessing* the act.<sup>93</sup> A “*related*” victim is eligible to claim assistance where the primary victim has died as a result of the act of violence and at the time the act of violence occurred they were either a “*close family member*,” “*dependent*” or person who had an “*intimate personal relationship*” with the primary victim.<sup>94</sup>

Documentation (receipts, invoices, quotes etc) is also required to support a claim for items listed under **s.8** of the Act.

### Evidence of an “*act of violence*” and an “*injury*”

Where the victim has made a statement to police, the Tribunal is able to rely primarily upon this information and other information provided by Victoria Police to determine the existence of an act of violence. A request will be made to Victoria Police in writing, shortly

<sup>92</sup> *Victims of Crime Assistance Act 1996* (Vic), s7.

<sup>93</sup> *Victims of Crime Assistance Act 1996* (Vic), s.9.

<sup>94</sup> *Victims of Crime Assistance Act 1996* (Vic), s.11.

after the application is received by the Tribunal and it will typically be provided with a summary of the offence, statements contained in the hand up brief and the relevant criminal history of both the applicant and the alleged offender.<sup>95</sup>

The Tribunal reports that a response is generally received from Victoria Police within *four to eight weeks* of a request being made.<sup>96</sup>

Where the victim has *not* reported the act of violence to police they must file a statutory declaration setting out the circumstances of the act of violence and the reason for the failure to make a report to the police with the Tribunal.<sup>97</sup>

Once an application has been lodged with the Tribunal the applicant has *four months* to file all the documentation necessary to support the application.

Where a *physical injury* has been sustained the applicant will be required to provide a report from the medical practitioner who treated them demonstrating that the injury was sustained as a direct result of the act of violence. Where the applicant has sustained *psychological injury*, they are required to provide a report to the Tribunal from a psychologist, psychiatrist or other medical practitioner in relation to the injury.<sup>98</sup>

## Evidence for items claimed under s.8

Under s.8 of the Act, a primary victim may be awarded assistance to a *maximum of \$60,000* for a combination of expenses including:

- up to \$20,000 for loss of earnings (**s.8(2)**) for a period of two years (**s.17**) after the crime;
- medical, counseling and reasonable safety-related expenses;
- the cost of replacing clothing worn at the time of the offence that has been lost or damaged (s8(2)); and
- expenses actually and reasonably incurred to assist in the recovery from the act of violence (s.8(3)) (where “exceptional circumstances” can be shown)<sup>99</sup>

## COSTS AND DISBURSEMENTS

As well as increasing the amount of time that it takes for an application to proceed, obtaining documentation in support of an application can also lead to the incursion of extra costs by the legal practitioner in the form of disbursements.

<sup>95</sup> Victims of Crime Assistance Tribunal, in response to questions from the researcher.

<sup>96</sup> Ibid.

<sup>97</sup> *Victims of Crime Assistance (Procedure) Rules 2007* (Vic), Form 1.

<sup>98</sup> Victims of Crime Assistance Tribunal.

<sup>99</sup> Carmen Harbour (ed.), ‘Assistance for Victims’ of Crime’, *The Law Handbook 2010* (2009), p.774.

Legal practitioners' difficulty in carrying the cost of disbursements was raised by practitioners working in the Community and private sector alike.

It is within the discretion of the Tribunal to award the legal practitioner costs associated with preparation of the application at the time the Final Order is made.<sup>100</sup> The amount that the Tribunal can award to cover the cost of the preparation of a Psychological Report is covered by *Guideline 2 of 2007*.<sup>101</sup> In addition to the preparation of Psychological Reports, the cost of reports prepared by other medical professionals and "safety-related expenses" were also commonly incurred by legal practitioners on behalf of clients.

*"One of the main causes for delay is establishing what items would be claimable under a claim for 'exceptional circumstances' and then substantiating the cost of these items"*

*(Legal Practitioner)*

While a legal practitioner may recover their costs when a final determination is made, there is no guarantee that the Tribunal will make an award to cover all of the legal practitioner's costs. The Tribunal has a broad discretion in relation to the costs of the proceeding. Indeed one advantage of the Tribunal's discretion in this area is that it may decide to award the legal practitioner costs associated with the application even where the claim is not ultimately successful.

There is also no guarantee that an application, once initiated, will proceed to a final determination and in this instance, the legal practitioner may be out of pocket for expenses incurred in preparing the application.

Even where disbursements are awarded to a legal practitioner at the time of final determination, the legal practitioner must still carry the cost of disbursements in the intervening (and potentially lengthy) period. For private practitioners, this may entail placing disbursement costs onto an overdraft facility resulting in the accrual of interest. For Community Legal Centres there is often little or no capacity to cover up front costs.

<sup>100</sup> *Victims of Crime Assistance Act 1996 (Vic), s.48.*

<sup>101</sup> The Tribunal recommends that a registered Psychologist/non-Psychologist receive \$250 for an initial Report for less than 5 hours recommended counseling, \$300-\$500 for an initial Report for more than 5 hours recommended counselling and \$250 for a subsequent Report. The guideline does not vary the rate depending on whether the practitioner writing the Report is a registered Psychologist or a non-Psychologist but does differentiate between a Psychologist and non-Psychologist for the purposes of the authorised counselling rate. The award for the Report also includes up to two hours billed at the authorised rate for any testing that was required to prepare the Report, *Guideline Number 2 of 2007*.

*The researcher came across one instance where a Community Legal Centre had a practice of handing out lump sums to cover short-term expenses for victims (for example for the cost of lock changes or relocation costs to assist victim recovery) in the expectation that they would receive the money back from the Tribunal. This did not always occur and the Community Legal Centre had to eventually cease giving lump sum handouts due to the shortfall that was experienced.*

*(Legal Practitioner)*

Legal practitioners consulted for this research stated that where psychologists and other medical professionals were familiar with the VOCAT process there was a much greater willingness on their part to forego upfront fees. The standard of reports was also reported to be higher where medical professionals were familiar with VOCAT and the purpose of the report.

Where medical professionals and others were not familiar with the VOCAT process it was often more difficult and costly for the legal practitioner to gain the documentation required to support the application.

Legal practitioners reported that it is often difficult to find medical practitioners and psychologists/psychiatrists who are familiar with the VOCAT process. This was a problem cited by thirteen of twenty-nine (or approximately 45% of legal practitioners consulted).

*“It is a major problem dealing with medical practitioners/psychologists. They want: payment up front which the CLC cannot afford to cover; they want an undertaking from the CLC that they will get payment from the Tribunal which the CLC does not want to give and they want payment to prepare a Report for the Tribunal”*

*(Legal Practitioner)*

*“The main difficulty is actually with medical practitioners, rather than with Psychologists. They are often not experienced with the VOCAT process and are therefore more difficult to deal with. Often they are not clear on why they are being approached for a Report and what the Report will be used for and they tend to chase clients for payment as they don’t realise that they will be receiving payment directly from the Tribunal itself”*

(Legal Practitioner)

Those legal practitioners working in regional areas reported an added difficulty in locating an appropriate medical professional where there was a smaller pool to choose from. Some legal practitioners also nominated particular difficulties in finding psychologists/psychiatrists to assist inter-State clients.

Those legal practitioners who did not report difficulties finding medical professionals to write reports advised that the best method of working with psychologists/psychiatrists and other medical practitioners is to form and maintain a good relationship with one or a pool of professionals and refer clients to those professionals as well as asking for word of mouth recommendations where they are not able to assist.

The cost of providing “safety-related” and other urgent expenses to victims’ in the immediate aftermath of a crime was also raised as a significant issue by some victims support agencies. “Brokerage money” is one source that such agencies (although not all) can rely on to cover these expenses. However, even where such agencies had access to brokerage money currently the continued provision of these funds was often not guaranteed. (This problem may be partially addressed by greater utilisation of interim awards, see discussion at page 37 to 40).

## **DISCUSSION: SUGGESTIONS FOR REFORM**

### **Court approved list of Psychologists/Psychiatrists**

A court approved list of psychologists/psychiatrists is one way of addressing legal practitioners’ concerns regarding the availability of informed psychologists/psychiatrists who can provide a report.

The suggestion for a court approved list was made by a Community sector legal practitioner and the idea received a positive response from legal practitioners with twenty legal practitioners (62.5%) stating that such a list would be beneficial, would aid the legal practitioner in obtaining supporting documentation and would therefore be likely to reduce the amount of time spent on the application.

### NSW Crimes Compensation Scheme

An example of how such a list or database might work is provided by the NSW Crimes Compensation Scheme.

The equivalent NSW crimes compensation legislation requires a report by a suitably qualified person to establish a chronic psychological or psychiatric disorder.<sup>102</sup> Any victim who wishes to claim such a disorder is allocated an “Authorised Report Writer” (“ARW”) by victims services. The ARW is an “*independent clinical psychologist or psychiatrist who prepares an objective medico-legal report...*” diagnosing the particular disorder and disability resulting from it. The compensation assessor relies on this Report when making their compensation assessment, the legislation (**s.5(1)(A)** of Schedule 1) specifically states that the compensation assessor is not required to have regard to any report or assessment other than the ARW report.<sup>103</sup> The compensation assessor may have regard to other material provided by the applicant or their legal representative, or they may choose to use the ARW report as their sole resource. All ARW reports are paid for by the Tribunal at a set rate.<sup>104</sup>

Similarly, a list of “approved counselors” is provided under the “approved counseling scheme.” A link on the NSW Victims Services website enables the victim or their representative to search a list of 350 approved counselors. Applicants may narrow down the list to determine which approved counselors are located in a particular region or postcode.

A number of concerns were raised by legal practitioners in Victoria regarding how a similar list may operate in this State.

For legal practitioners practicing in regional Victoria there was concern that a requirement to choose a medical professional from a court approved list may contribute to the length of time it takes to gather supporting documentation, for example, a client may have difficulty getting an appointment with a psychologist where there are only one or two on the list in a particular region.

- One way of addressing this concern would be to make referrals to health professionals on the list *optional*.

Concern was also raised about the quality of reports produced by psychologists/psychiatrists. Legal practitioners reported poor experiences with psychologists/psychiatrists who hold themselves out as being experienced with VOCAT but ultimately produce reports that do not address relevant issues.

<sup>102</sup> *Victims Support and Rehabilitation Act 1996* (NSW), cl. 5, Schedule 1.

<sup>103</sup> NSW Government Victims Services website:

<[http://www.lawlink.nsw.gov.au/lawlink/victimsservices/II\\_vs.nsf/pages/VS\\_compensationarws](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/II_vs.nsf/pages/VS_compensationarws)>

and responses to questions put to the NSW Victims Compensation Tribunal.

<sup>104</sup> *Ibid.*

*“A man was bashed at random while walking down the street. The Psychologist was inexperienced and went into extensive detail about the victim’s childhood and other issues but never asked the victim about the actual incident. The victim felt let down by not being given the chance to talk about the incident.”*

*(Legal Practitioner)*

*“Psychiatrists are a “nightmare” to work with. Often they will see VOCAT work as a bit of a “cash cow” and will inevitably say “yes” when asked whether they do VOCAT work even where they clearly don’t have a clue as to what is involved.”*

*(Legal Practitioner)*

- In NSW, both approved counselors and authorised report writers are ‘vetted’ by the Professional Advisory Panel and must meet minimum standards regarding qualifications and experience.<sup>105</sup> The adoption of similar standards for health professionals in Victoria may improve the quality of reports produced.

Legal practitioners acknowledged that the list would probably be most useful where the victim is not already seeing a psychologist or counselor. Where the victim already has a treating health professional that professional is likely to be in a better position to provide a report to the Tribunal.

The Victims of Crime Assistance Tribunal stated unequivocally that it does not provide any sort of ‘accreditation’ or ‘approval’ to individual psychologists or medical practitioners to provide services that are funded by the Tribunal. However it does have a panel of psychologists/psychiatrists it may call on to provide independent assessments.<sup>106</sup>

There was some confusion regarding the existence of a “list” of health professionals recommended by the Tribunal. Some legal practitioners stated that VOCAT had produced a

<sup>105</sup> <<http://www.lawlink.nsw.gov.au>>

<sup>106</sup> *Victims of Crime Assistance Act 1996* (Vic), s.39.

list of recommended psychologists/psychiatrists in the past and some health professionals on the list were either no longer practicing or proved to be inexperienced with VOCAT. Some legal practitioners also reported positive experiences with health professionals on the list.

## Greater utilisation of interim awards

It was inconclusive, based on the research, whether legal practitioners' difficulties in carrying the cost of disbursements could be partly attributed to a lack of awareness of the availability of interim awards for expenses already incurred. Interim awards can be applied for to meet urgent "reasonable expenses" incurred prior to the application being determined.<sup>107</sup>

Of the thirty-two legal practitioners consulted for this research, over 50% did not make regular use of interim awards and some had never applied for an interim award on behalf of a client. The research did not conclusively indicate whether some legal practitioners' failure to make use of interim awards on behalf of clients is due to the fact that their particular clients are not eligible for interim awards (ie, they don't have significant up-front costs) or whether the legal practitioner was simply not aware that an interim award could meet up-front costs on behalf of clients.

Greater use of such awards may be one solution to meeting legal practitioners' costs.

According to the Annual Report in 2009/2010 the Tribunal made 2,052 awards of interim financial assistance for expenses already incurred with the average payout being \$973.<sup>108</sup>

Recently, the Victorian State Government made provision for more interim awards to be made by Registrars through amendments made to the *Victims of Crime Assistance Act 1996* (Vic).<sup>109</sup>

The most recent VOCAT Annual Report shows that since the amendments came into effect over 50% of interim awards were made by Registrars as opposed to Tribunal members. This represents a 27% increase in the number of interim awards made by Registrars and a corresponding 26% decrease in the number of interim awards made by Tribunal members.<sup>110</sup>

The Tribunal stated that only a small number of applications for interim awards are refused. However, even an interim award must be supported by evidence that the applicant is eligible to claim assistance under the Act as a 'victim of crime' and that the proposed expense is reasonable in the circumstances (requiring provision of a receipt, quote or invoice).

<sup>107</sup> *Victims of Crime Assistance Act 1996* (Vic), s.56.

<sup>108</sup> Victims of Crime Assistance Tribunal, above n7 [Table 17: 'Number of Interim Awards of Financial Assistance made where Financial Assistance was awarded for expenses already incurred, and amount awarded 2007/08 – 2009/10'], p. 46.

<sup>109</sup> *Victims of Crime Assistance (Miscellaneous Amendments) Bill 2002* (Vic), Explanatory Memorandum.

<sup>110</sup> Victims of Crime Assistance Tribunal, above n7, p.33.

Some legal practitioners also complained that in their experience interim awards sometimes take just as long or longer to process than a final determination thus defeating the purpose of the interim award.

There is also no guarantee that expenses that have already been incurred by the legal practitioner will be deemed 'reasonable' by the Tribunal.

### **“Safety-related expenses”**

An amendment to the Act to enable victims to claim financial assistance for reasonable “safety-related expenses” (s.8(2)(e)) without the need to establish “exceptional circumstances” came into effect from 1 July 2010. (“Safety-related expenses” has not been defined in the legislation but it can be presumed that it will cover such expenses as lock changes, relocation costs, self defence classes, etc.)

At the time the research was undertaken the “safety-related expenses” amendment was too recent for the researcher to gain much indication of whether and how much difference it will make to legal practitioner’s costs but it was generally considered to be a positive step by the Tribunal and one that would prove useful for legal practitioners and their clients, particularly those legal practitioners assisting clients who are the victims of domestic or family violence offences.

The use that can be made of interim awards to assist both the client and the legal practitioner was highlighted by one legal practitioner who regularly assists clients in the integrated family violence jurisdiction at Heidelberg and Ballarat Magistrate’s Court. If applying for an Intervention Order (IVO) on behalf of a client, the legal practitioner also applies for an interim award to cover urgent expenses. The IVO provides evidence to the Tribunal that an ‘act of violence’ has occurred.

From her observations, not enough legal practitioners are utilising interim awards to assist victims of domestic and family violence.

### **Childcare Expenses**

The inclusion of “childcare expenses” was suggested as a useful addition to the types of expenses that can be claimed under an interim award.

This may be of particular benefit to victims in family violence situations where the victim may have to spend time making practical arrangements for their own safety and that of their family (for example, organising for locks to be changed, finding alternative accommodation or visiting lawyers, counselors, medical practitioners etc) and may not have access to affordable childcare.

Given the context in which such expenses are likely to be claimed it is possible that they may fit within the pre-existing “safety-related expenses” category, depending on how broadly the court chooses to interpret the amendment.

It was suggested that a claim for childcare expenses be limited in amount to reduce the cost to the Tribunal and be limited in time to provide an incentive for victims to “get things moving” in relation to their application.

A number of practical difficulties with the suggestion were raised by a victims’ support agency who regularly deal with female victims of domestic violence. Though a good idea in theory they were concerned that it may be difficult to implement in practice due to the challenge involved in finding a childcare centre that has the capacity to take children on a one-off or limited basis for the appropriate length of time. In their experience access to childcare was also an *ongoing* problem for female victims of domestic violence rather than an issue that could be addressed by limited or one-off funding.

### ***Discussion***

*Would childcare expenses be a useful addition to expenses claimable under an interim award?*

## **Less Reliance on “medico-legal” material**

To reduce the cost and time spent on VOCAT applications a suggestion made by the Tribunal itself is for legal practitioners to place less reliance on what they term “medico-legal” material.

The Tribunal noted a trend amongst legal practitioners to rely on “medico-legal” psychological assessment which, in many instances, is of limited assistance to the Tribunal:

*“The Tribunal is generally assisted in receiving reports from treating doctors/other health professionals which provide a greater insight and more detailed understanding of the impact of crime on the applicant and in addressing the types of expenses that may “go to the heart” of assisting an applicant in their recovery.*

*In the Tribunal’s experience, a statutory declaration/victim impact statement provided by the applicant that tells the victim’s story in their own words, will provide far greater insight into the impact of the crime than medico-legal material.”*



# Access to legal representation

Reluctance on the part of legal practitioners to deal with VOCAT matters was identified in the Grant Application as a *key barrier* to victims of crime accessing assistance from the Tribunal.

Though the Tribunal does not keep statistics on the proportion of applications that are filed by a legal representative on behalf of an applicant, when consulted for this research the Tribunal stated that in their experience the *majority* of applications fall into this category with applications filed by the applicant themselves constituting the second largest category.

This would tend to suggest that applicants either need legal representation to pursue a VOCAT claim or that, given the choice, applicants will opt for legal representation in the majority of cases. Those consulted for the research were generally of the opinion that victims involved in the criminal justice system have no less need to be legally represented than offenders. As one legal practitioner phrased it, it “pays homage and respect” to victims to have access to proper legal representation and is in keeping with the spirit of the Act.

Legal practitioners consulted for this research nominated a variety of reasons why they, or other legal practitioners, may be reluctant to assist VOCAT clients including:

- the length of time the process takes;
- the fact that victims often don’t receive large enough payments from the Tribunal to make it worth pursuing a claim for compensation; and
- the fact that victims, as a client group, are often more “demanding” and “high needs” than other clients.

But by far the issue that was most often nominated as affecting a legal practitioner’s willingness to take on VOCAT matters was:

- the low costs awarded to legal practitioners by the Tribunal.

## **COSTS AWARDED TO LEGAL PRACTITIONERS BY THE TRIBUNAL**

### **Background**

The Act stipulates that a legal practitioner who acts for an applicant is not entitled to recover the costs of either the preparation of the proceeding or the appearance from the applicant. Rather the legal practitioner’s “reasonable costs” are paid directly to the legal practitioner by the Tribunal if the application is successful.<sup>111</sup>

Under the Act the Tribunal retains *full discretion* to determine the costs of and incidental to the proceedings and has “full power to determine by whom, to whom and to what extent

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<sup>111</sup> Victims of Crime Assistance Tribunal, above n6, p. 13.

the costs are to be paid”.<sup>112</sup> In the exercise of its discretion the Tribunal is guided by Practice Directions or Guidelines issued from time to time by the Tribunal.<sup>113</sup>

The most recent Guideline was issued in August 2007. The Guideline sets the fee for the preparation of an application of “modest complexity” at between \$680 and \$780, and for an application of “greater complexity” between \$780 and \$990. Multiple Claims and Related Victim Applications attract a fee between \$680 and \$990 for the Main application with a 30% to 50% recoverable for subsequent applications.<sup>114</sup>

The Tribunal does not provide further guidance as to how it determines whether a matter is of “modest” or “greater” complexity or what factors it might take into account in determining whether the costs recovered by the legal practitioner should be at the higher or lower end of the range.

It is a view widely held amongst legal practitioners who were consulted for this research that the amount awarded by the Tribunal to cover legal costs *does not accurately reflect* the amount of work that goes into the preparation of a typical VOCAT application.

*“The amount that can be awarded by the Tribunal in legal costs is totally inadequate”*

*(Legal Practitioner)*

*“For most private practitioners, a decision to run VOCAT matters is a poor financial decision”*

*(Legal Practitioner)*

Of the thirty-one legal practitioners who were consulted, including representatives from Community Legal Centres, Victoria Legal Aid, private practitioners and barristers, twenty-four (77%) expressed the view that the fee currently set by the Tribunal for VOCAT matters is too low. Only two legal practitioners considered that the amount that can be recovered from the Tribunal was an adequate reflection of the work undertaken and four did not express a view either way.

The views of the legal practitioners consulted for this research are in line with the results of an earlier study conducted by the Women’s Legal Service. That study surveyed 150 private practitioners who had received VOCAT training via phone interviews (conducted between

<sup>112</sup> *Victims of Crime Assistance Act 1996 (Vic)*, s.48.

<sup>113</sup> *Victims of Crime Assistance Act 1996 (Vic)* s.58 and s.45(1A).

<sup>114</sup> Victims of Crime Assistance Tribunal, *Guideline No. 1 of 2007*.

2003 and 2005) and confirmed that most private practitioners felt that “... *there was a lack of balance between the amount of work required to properly prepare a VOCAT case and the legal costs ultimately awarded by the Tribunal.*”<sup>115</sup>

As part of its study The Women’s Legal Service also had three of its own files analysed by a costing professional to provide a comparison between the costs awarded by VOCAT with the costs that would have been awarded had the work been assessed according to the Magistrates’ Court Scale. The analysis found that for each file the costs awarded by VOCAT fell well below the amount that the Magistrates’ Court Scale recommended. For example in one case the \$1,320 awarded by VOCAT for 15+ months of work would have translated to \$7,455.30 under the Magistrates’ Court Scale.<sup>116</sup>

A survey of twelve randomly selected VOCAT files conducted by WCLS between 2006 and 2010 revealed that the average amount of time taken to run a file from taking instructions to the final order being made was *17.5 months*. Most of these files required *20 or more hours* of work by the legal practitioner regardless of how long they took to resolve.<sup>117</sup> Even excluding a file which took over 43 months to conclude due to the matter being struck out and later re-instated, the average amount of time taken to run a VOCAT case was *15 months*.

Despite the hours and time taken to run each VOCAT case the *maximum* amount that WCLS has received from the Tribunal in legal costs is \$850.00.

Two effects flow from the low costs awarded to legal practitioners and the perception that running VOCAT matters is a poor financial decision for legal practitioners:

- Legal practitioners are reluctant to conduct VOCAT matters;
- The quality of VOCAT applications is adversely affected.

### **Legal Practitioners reluctant to conduct VOCAT matters**

It is also a view widely held amongst legal practitioners who were consulted for this research that the inadequate costs legal practitioners can recover from the Tribunal acts as a *major disincentive* for legal practitioners to take on VOCAT cases.<sup>118</sup>

The Department of Justice Review into victims of crime compensation also raises the issue of lawyer’s costs as an area for potential reform after initial consultations for its Discussion

<sup>115</sup> The findings of the study were reported in the Federation of Community Legal Centres Report *Improving Access to Justice for Victims of Crime* (October 2003), p.5.

<sup>116</sup> It should be noted that a possible limitation of this analysis is that only files that took *over 15 months* were reviewed by the costings professional. While there is obviously a huge disparity between the amount awarded by VOCAT in these cases, where the file takes less than 15 months to run, there is no indication of whether the disparity between the VOCAT award and the Magistrate’s Court Scale is as great.

<sup>117</sup> The CLSIS system for recording information about Community legal centre files has only three options: 0-5 hours, 6-20 and 20+.

<sup>118</sup> Of the seventeen legal practitioners who expressed the view that the fees for legal practitioners currently set by the Tribunal are too low, *all* also indicated that the effect was to discourage private practitioners from conducting VOCAT matters.

Paper revealed that “some lawyers felt the rates allowed by VOCAT did not offer adequate payment for the time required: particularly where lawyers were less experienced with VOCAT procedures.”<sup>119</sup>

Reluctance by legal practitioners to take on VOCAT cases has direct implications for victims’ access to justice. Put simply, the less legal practitioners there are who conduct VOCAT cases the harder it is for victims to access legal representation.

### Community Legal Centres and Victoria Legal Aid

Whilst the amount awarded by VOCAT to legal practitioners does not act as a disincentive for Community legal centres (“CLCs”) or Victoria Legal Aid<sup>120</sup> to take on VOCAT clients (Community legal centres are independent, non-profit community organisations that provide free legal services to the public<sup>121</sup>), the reluctance of private practitioners to take on VOCAT clients has an *indirect* impact on their capacity to take on this work.

For example, in the Grant Application it was noted that there was anecdotal evidence to suggest that an increasing number of neighbouring Community legal centres were referring VOCAT cases to WCLS in situations where neighbouring Community legal centres did not have the capacity to assist the client. Where there are fewer private practitioners available to represent VOCAT clients, clients necessarily turn to the Community and Government funded legal sector for assistance.

Of the thirty generalist CLCs contacted by the researcher, the majority, (*twenty*) provide some form of assistance to victims of crime in the preparation of VOCAT applications.

Of the twenty-four specialist CLCs contacted by the researcher, (*six*) provide some form of assistance to victims of crime in the preparation of VOCAT applications, sixteen do not and it is unclear whether the remaining two do or do not provide assistance to victims of crime.

Worryingly, at least three CLCs who were contacted by the researcher who *had* conducted VOCAT work in the past no longer did so. Several more CLCs, while not abandoning their VOCAT practice, expressed the view that currently or in the near future they would have *no capacity* to take on further VOCAT matters.

Victoria Legal Aid also assists VOCAT clients in applications under their recently created VOCAT guideline. The guideline provides that Victoria Legal Aid will assist VOCAT clients to be represented either by an in-house practitioner or a Community Legal Centre where the matter meets their State Merit Test.<sup>122</sup>

<sup>119</sup> The Department of Justice, above n65, p. 43.

<sup>120</sup> “Victoria Legal Aid employs 206 lawyers who provide legal services from 14 offices across metropolitan and rural Victoria...Victoria Legal Aid regularly assists clients with applications to the Victims of Crime Assistance Tribunal (VOCAT)”, Victoria Legal Aid submission to the Department of Justice Review. Victoria Legal Aid receives funding from both the State and Commonwealth Governments but operates independently of Government.

<<http://www.legalaid.vic.gov.au/whowere.html>>

<sup>121</sup> Website of the National Association of Community Legal Centres: <<http://www.naclc.org.au>>

<sup>122</sup> The guideline, including the State Merit Test, can be found in: ‘Chapter 2 – Qualifying for Legal Assistance’, *VLA Handbook for Lawyers*: <[www.legalaid.vic.gov.au/handbook.htm](http://www.legalaid.vic.gov.au/handbook.htm)>.

Reasons cited by CLCs for abandoning or reducing their VOCAT caseload included:

- Loss of expertise

Where a legal practitioner was handling all or a majority of VOCAT matters for a CLC and had resigned, there was a lack of confidence that the expertise of the remaining staff could fill the gap or that there were adequate existing resources for staff with no prior experience of conducting VOCAT matters to rely on when assisting clients.

- Clients receive funding for legal representation from the Tribunal

For some CLCs VOCAT work is not a priority due to the fact that clients' legal representation is funded by the Tribunal. VOCAT clients are therefore able to seek assistance from a private practitioner. Some CLCs felt more comfortable referring VOCAT clients to private practitioners knowing that neither the private practitioner nor the client would be out of pocket and taking on other legal matters where the client has no alternative means of accessing legal representation.

Of course there was an assumption on the part of these CLCs that private practitioners would be available to take referrals. A representative from one CLC who was considering referring more victims to private practitioners acknowledged that their impression was that there were "*not a lot of private practitioners around who do VOCAT work*" and that given the high needs of their clientele there was a strong likelihood that private practitioners may be reluctant to take on clients whose cases were not "clean or quick" to resolve.

In the Grant Application it was noted that the Women's Legal Service Victoria had received funding for several years for a full time VOCAT lawyer but were unable to secure ongoing funding for this position. Recently, after six years without a devoted VOCAT lawyer, the Women's Legal Service Victoria has again received funding but currently the position is restricted to two days a week and there is no certainty regarding continued funding of the position into the future.

### **Private Practitioners**

Anecdotal evidence from legal practitioners working in private practice and Community Legal Centres, victims support agencies and Victoria Police suggested that it is difficult to find private practitioners in Victoria who conduct VOCAT matters. For reasons previously mentioned (see discussion under "Limitations" at page 19) it was not possible for the researcher to determine how many private practitioners conduct VOCAT matters in Victoria but the perception is that the number is quite low.

The private practitioners who were contacted by the researcher cited a combination of low costs awarded to legal practitioners by the Tribunal along with the fact that VOCAT clients, as clients who may be experiencing trauma and distress tend to be more demanding than other clients, as discouraging private practitioners from entering or remaining in this area of practice. These factors were reiterated by legal practitioners from Community Legal Centres when asked to comment on why so few private practitioners might choose to practice in this area.

*“In terms of the practice the amount that can be awarded in costs from VOCAT is so low that the practice really only runs VOCAT matters as a community service. Not many private practitioners will take on these matters for the simple reason that the amount that they can recover from the Tribunal is barely enough to cover the wages of the administrative staff and other expenses. VOCAT matters can be run because they are a complementary adjunct of other practice areas for some practices but it actually costs money to run it rather than it being a way of making money.”*

(Legal Practitioner)

*“The amount that is awarded to lawyers by the Tribunal in costs is often not enough to cover the work that has been done on the matter. Some clients are very demanding in terms of the amount of time that the lawyer has to spend with the client. The Tribunal would have to increase quite substantially the amount of money that is awarded before private practitioners would see VOCAT as a lucrative enough area to encourage them to practice in this area. A couple of hundred dollars is not going to be enough to significantly change the number of private practitioners who are willing to take on VOCAT matters.”*

(Legal Practitioner)

This is despite the fact that these practitioners spoke of the professionally rewarding nature of this work and the personal satisfaction they derived from assisting victims of crime.

One victims’ support agency found that legal costs were such an issue for private practitioners that when the agency attempted to refer clients to legal practitioners who had previously done an excellent job with VOCAT applications they were often told that the legal practitioner would not take on another VOCAT case.

### ***Requirement to lodge in the Court closest to the applicant***

VOCAT applications must be lodged in the Court closest to the residence of the applicant. This is a requirement under the *Victims of Crime Assistance (Procedure) Rules 2007* (Vic) where the applicant resides in Victoria, is not a related victim and is not aware of the existence of a related victim in relation to the act of violence the subject of the application.<sup>123</sup>

<sup>123</sup> *Victims of Crime Assistance (Procedure) Rules 2007* (Vic), s.5.

For Community Legal Centres or Victoria Legal Aid where clients are usually drawn from the local area this is not necessarily an onerous requirement because the Court closest to the applicant will usually also be the Court closest to the legal practitioner.

For private practitioners, whose clients may be drawn from a broader geographic region, this can be an added disincentive for conducting VOCAT matters. The travel costs involved in assisting clients at different Tribunal locations, such as fuel and accommodation costs as well as the opportunity cost for the legal practitioner in being away from the office, decreases the profitability of running these matters.

A legal practitioner consulted for this research stated that they will brief Counsel for some hearings in cases where it is not strictly necessary simply because they cannot be *physically* present at the Tribunal location.

VOCAT, in its Annual Report, points to the fact that Tribunals operating in every Magistrates Court in Victoria, or fifty-four venues, contribute to the “physical accessibility” of the Tribunal for victims.<sup>124</sup> If the **s.5** requirement were abolished it may lead to the incursion of extra costs by the client if they are obligated or choose to attend a hearing in a location far from their residence (for example, a client living in regional Victoria may be required to travel to Melbourne to attend a hearing) and may decrease physical accessibility to the Tribunal.

There is some flexibility in the *Victims of Crime Assistance (Procedure) Rules 2007* (Vic), a Registrar of the Tribunal *may* accept an application lodged with a venue other than the venue closest to the residence of the applicant,<sup>125</sup> but for private practitioners attempting to comply with the **s.5(1)** requirement this can lead to added cost and inconvenience.

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<sup>124</sup> Victims of Crime Assistance Tribunal, above n7, p.5

<sup>125</sup> *Victims of Crime Assistance (Procedure) Rules 2007* (Vic), s.5(3).

**Recommendations:**

*Consider amending the Victims of Crime Assistance (Procedure) Rules 2007 (Vic) to remove the requirement that the application be lodged in venue closest to the applicant;*

*Consider addressing the problem of costs incurred by legal practitioners in travelling to and from VOCAT venues by increasing the amount that legal practitioners can receive from the Tribunal in costs (see discussion at pages 49 to 51);*

*Consider the Department of Justice's proposal to centralise VOCAT into one location.*

**Private Practitioners in the City of Whittlesea**

Prior to the research being conducted a preliminary enquiry was made to the Moreland Community Health Service (in September 2008) to gain an estimate of how many private practitioners in the municipality of Whittlesea specialise in VOCAT applications. At that time it was reported that there were no private practitioners in the municipality of Whittlesea who specialised in this area.

The Moreland Community Health Service as an entity no longer exists so it was not possible for the researcher to make a follow up enquiry. However, a phone survey of private practitioners WCLS regularly makes referrals to (and who practice in and around the Whittlesea municipality) reveal that of twenty-two legal practitioners on the list, only five assist clients to conduct VOCAT applications.

In addition, two private practitioners who were approached by the researcher because they were known to conduct VOCAT applications informed the researcher that they no longer assisted clients in relation to these matters.

**Counsel**

The researcher relied on information provided by the Clerks of the Victorian Barristers' Lists to determine the number of practicing barristers who have experience appearing on behalf of the applicant in VOCAT matters.

Thirteen lists had a total of **thirty-four** Counsel with expertise in this area while two lists had no Counsel with such experience. The researcher also became aware, through consultations with legal practitioners, of a further three Counsel who were not identified by Clerks who have experience appearing on behalf of the applicant. Of thirty-four Counsel identified, sixteen (47%) signed the Bar Roll in the last three years.

Not all legal practitioners consulted for this research had direct experience of dealing with barristers, either because they had never attended a hearing or because, if they had

attended a hearing, they had represented clients themselves rather than briefing Counsel. Legal practitioners consulted for this research who did brief Counsel on a regular basis were generally of the opinion that it is not difficult to find Counsel to appear on behalf of an applicant at the Tribunal and of the thirteen legal practitioners who did brief Counsel, only two reported difficulties in finding Counsel willing to accept a brief.

Legal practitioners did report finding it harder to locate barristers who are specialists in VOCAT.

Both legal practitioners and Counsel themselves reported that the costs awarded to Counsel by VOCAT (which is currently set at between \$260 and \$410 for a Directions Hearing and \$565 to \$875 for a Final Hearing depending on the complexity of the matter<sup>126</sup>) are adequate but VOCAT is not viewed as a particularly lucrative area of practice. While junior barristers are willing to accept VOCAT work, the view amongst legal practitioners is that barristers will generally move on to more lucrative practice areas once they gain experience and seniority.

Legal practitioners who briefed Counsel regularly, especially those who relied on a network of barristers experienced with VOCAT were convinced of the value that experienced Counsel can bring to a client's case, particularly where there is room to move the victim up to a higher category of injury for "special financial assistance".

### *Conflict of Interest*

Fewer legal practitioners who are willing to take on VOCAT matters also means less choice for clients in relation to legal representation.

The researcher anticipated that "conflicts of interest" may be another barrier preventing legal practitioners from assisting clients, that is, if a legal practitioner is already representing the offender in relation to the criminal matter then they may be unable to represent the applicant in relation to their VOCAT application.

Surprisingly, the evidence from legal practitioners consulted for this research indicated that "conflict of interest" is not a major barrier to legal practitioners taking on applicant clients in relation to VOCAT. Of all legal practitioners consulted only three cited a situation where a "conflict of interest" prevented them from taking on a VOCAT applicant and of these, two were located in regional Victoria.

These results may indicate that "conflict of interest" is not a barrier to victims accessing VOCAT or alternatively that "conflict of interest" is not a barrier faced by those victims represented by Community Legal Centres, who make up the majority of the sample surveyed.

The fewer legal practitioners there are practicing in this particular area of law the more potential there is for "conflict of interest" to prevent a victim accessing legal representation, particularly for those victims located in regional Victoria or in communities where both victims and offenders live in close proximity.

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<sup>126</sup> Victims of Crime Assistance Tribunal, *Guideline Number 1 of 2007*.

## The quality of VOCAT applications is adversely affected

*“Because VOCAT costs money to run as a practice, some suburban and smaller firms tend to use paralegals or secretaries to run matters and this, in the opinion of some lawyers, leads to poorer outcomes for clients. Less well trained solicitors who have little experience of VOCAT are likely to be less creative in terms of what they ask from the Tribunal and also how they use the “other” category. There is therefore less ability for the person running the case to maximise returns for clients.”*

(Legal Practitioner)

The Tribunal does not record statistics on outcomes for applicants who are legally represented as opposed to unrepresented. When asked to comment on the overall quality of applications made to the Tribunal the Tribunal response was that the quality of applications is “variable” and not necessarily related to whether an applicant is legally assisted in making their application.

There was concern amongst legal practitioners that measures designed to encourage more private practitioners to take on VOCAT matters may lead to poorer outcomes for clients and there seemed to be a genuine concern that private practitioners are unlikely to spend enough time on VOCAT files.

The practice by some legal practitioners of relying on secretaries, paralegals and other support staff to assist with applications also proved to be controversial.

Without relevant data in this area it is impossible to say whether these concerns are justified and whether clients who are assisted by private practitioners have poorer outcomes at the Tribunal than those who are assisted by legal practitioners from Community Legal Centres. It is also impossible to say whether reliance on non-lawyers or junior lawyers to assist in the conduct of VOCAT matters *necessarily* leads to poorer outcomes for victims.

Legal practitioners, both in Community Legal Centres and in private practice varied in their approach to VOCAT applications. Some legal practitioners were confident that junior lawyers were competent to run VOCAT applications because VOCAT matters are viewed as relatively straightforward. Legal practitioners who involved secretaries and/or paralegals in the application process were also confident that this did not adversely affect the quality of applications.

It was the view of one legal practitioner that involving support staff in the running of VOCAT applications was actually beneficial for both the victim and the support staff. Victims benefitted from having greater access to support staff able to respond to queries where a lawyer may have been too busy and from the continuity provided by having one person assisting in the application process from beginning to end. In turn, support staff were said to gain a sense of achievement and fulfillment from assisting victims.

## COMPENSATION AWARDED TO VICTIMS BY THE TRIBUNAL

The amount of compensation victims can recover from the Tribunal, particularly the lump sum payment that can be recovered under the **section 8A** “special financial assistance” provision was considered too low by approximately 40.6% of legal practitioners and a factor contributing to their reluctance to take on VOCAT matters.

### Background

Primary victims can recover assistance of up to \$60,000 from the Tribunal for expenses already incurred or reasonably likely to be incurred, made up of amounts for:

- counselling services;
- medical expenses;
- loss of earnings (capped at \$20,000);
- expenses for loss or damage to clothing worn at the time of the offence.

Included in the award up to \$60,000 may be an amount for expenses to assist the victim in their recovery from the act of violence where the victim can show “exceptional circumstances”.<sup>127</sup>

In addition, where the victim can demonstrate they have suffered a “significant adverse effect” as a direct result of the act of violence they may recover an amount of special financial assistance.<sup>128</sup> The amount that the victim can recover is prescribed by the Regulations and is currently capped at \$10,000 (as of 2008 when the amount was increased from \$7,500). The maximum amount available to a victim is based on the Category of offence suffered, either A, B, C or D, with provision for the victim to be “bumped up” to the next category where the victim suffers a serious injury or disease or is the victim of a series of related criminal acts of sexual assault or sexual penetration.<sup>129</sup>

Although a primary victim can receive up to \$60,000, it was the experience of legal practitioners consulted that awards made to primary victims are generally nowhere near the maximum amount. The average amount of financial assistance awarded to primary victims in 2009/2010 was \$8,740 with the average amount of special financial assistance awarded for Category A offences \$7,883 and Category D offences, \$620.<sup>130</sup>

### Amounts to assist in recovery and Special Financial Assistance

The ‘inadequate’ or ‘tokenistic’ amount that a victim can recover as a lump sum payment for ‘significant adverse effects’ was another criticism made by legal practitioners.

Prior to changes that occurred in 1996 when the Victorian Government abolished awards for pain and suffering altogether, victims could recover up to \$20,000 for ‘pain and

<sup>127</sup> *Victims of Crime Assistance Act 1996* (Vic), s.8(1),(2) and (3).

<sup>128</sup> *Victims of Crime Assistance Act 1996* (Vic), s.8A

<sup>129</sup> *Victims of Crime Assistance (Special Financial Assistance) Regulations 2000* (Vic), s.6

<sup>130</sup> *Victims of Crime Assistance Tribunal*, above n7, p.44.

suffering'. In 2000 the State Labour Government re-introduced awards for the equivalent of 'pain and suffering,' for victims suffering 'significant adverse effects,' including: grief, distress, trauma or injury, under **s8A**. The amount a victim could recover under this provision was originally capped at \$7,500 with a subsequent increase of 30% for Categories D – B and 33% for Category A to a maximum \$10,000 in 2007.<sup>131</sup>

The table below provides a comparison of the maximum amount that victims can receive for 'pain and suffering' in other Australian jurisdictions:

Western Australia	<i>Criminal Injuries Compensation Act 2003</i>	Compensation from a total pool of \$75,000
South Australia	<i>Victims of Crimes Act 2001</i>	Maximum of \$50,000 with injuries being assessed on a points scale of 1-50 (50 being the most serious injury). Victims unable to recover for injuries of less than two points.
Queensland	<i>Victims of Crime Assistance Act 2009</i>	Compensation from a total pool of \$75,000
New South Wales	<i>Victims Support and Rehabilitation Act 1996</i>	Maximum of \$50,000 based on the type and severity of injury sustained.
Tasmania	<i>Victims of Crime Assistance Act 1976</i>	Compensation from a total pool of \$30,000
Northern Territory	<i>Victims of Crime Assistance Regulations 2007</i>	Compensation from a total pool of \$40,000
Australian Capital Territory	<i>Victims of Crime Financial Assistance Act 1983</i>	\$30,000 or up to \$50,000 for an 'extremely serious' injury arising as a result of a sexual offence or sustained by a police, fire or other public officer in the course of their duties.

Compared to the amount of compensation for 'pain and suffering' available to victims of crime in most other Australian jurisdictions, awards in Victoria are minimal.

The amount that a victim may recover from VOCAT is also likely to be less than the amount recovered if the victim pursues an action for common law damages or a compensation order under the *Sentencing Act 1991* (Vic) where the offender has been convicted and has financial means. (Of course, it is a fact that quite often even where the offender has been convicted they will not have financial means).

<sup>131</sup> *Victims of Crime Assistance Amendment Bill 2007* (Vic), Explanatory Memorandum.

*“When the Government decided to reduce the amount that could be recovered for pain and suffering below \$20,000 the number of VOCAT matters we conducted dropped off significantly. Even now, for a client who has suffered a D scale offence I would barely recommend that they waste their time on an application.”*

*(Legal Practitioner)*

In 2009/2010 the Transport Accident Commission paid out a total of \$909.3 million for 19,559 claims,<sup>132</sup> with an average payment of approximately \$46,400.00. By comparison, in 2009/2010 the Victims of Crime Assistance Tribunal paid out a total of \$39,929,279<sup>133</sup> with an average payment of \$8,740 to each victim.<sup>134</sup>

Most legal practitioners agreed that victims were adequately compensated by the Tribunal for medical and counselling expenses. However, for victims who did not have significant medical expenses it was harder to recover financial assistance from VOCAT.

The provision to recover for “loss of earnings” was also less relevant for clients who were unemployed, receiving Centrelink or casually employed.

The requirement that “exceptional circumstances” be proved before an amount to assist a victims’ recovery can be awarded also poses difficulties for legal practitioners, particularly given the dearth of case law on this question. Legal practitioners reported that it was often difficult to predict how much a client would receive under this section, with the amount recovered reported to depend on any number of factors, including which court the application was filed in and which decision-maker made the award. This in turn made it more difficult for legal practitioners to manage clients’ expectations.

Legal practitioners’ experiences were mixed in relation to success in recovering “special financial assistance,” with one legal practitioner stating that she always applies for financial assistance on behalf of clients and had only once been refused while others stated that they very rarely sought special financial assistance on behalf of clients.

<sup>132</sup> Transport Accident Commission, *Annual Report 2009-10*, p.32.

<sup>133</sup> Victims of Crime Assistance Tribunal, above n7, p.50

<sup>134</sup> *Ibid*, [Table 13], p.44.

## DISCUSSION: RECOMMENDATIONS FOR REFORM

Based on the findings of the research there is a strong case to be made for maintaining or increasing the capacity of the legal profession to undertake VOCAT matters. The research identified a number of ways in which this goal might be achieved.

### Increase the costs that can be recovered by legal practitioners

Increasing the amount that the Tribunal can award to legal practitioners would encourage more private practitioners to take on VOCAT matters, reducing the burden on CLCs.

Increasing the amount that the Tribunal can award to barristers, though not such a great disincentive as the amount awarded to solicitors, may encourage more barristers to specialise in this area of practice.

While an increase of this kind would entail extra costs for the Tribunal, on the other hand there are benefits that are likely to be gained by the Tribunal from having all or most clients represented by a legal practitioner. For example, the fact that victims with legal representation are less likely to consume Registrars and court staff's time with queries that can be directed to their legal practitioner.

In 2009/2010, costs paid to legal practitioners constituted 9.3% of the total amount of financial assistance awarded by the Tribunal.<sup>135</sup>

Based on the research there would have to be a *substantial* increase in the amount that the Tribunal awards to legal practitioners in costs, with some legal practitioners suggesting that the amount would need to be at least tripled or be on a par with the Magistrates Court Scale of Costs before it would have a noticeable effect on the numbers of private practitioners entering this area of practice.

### Increase the amount of compensation that can be recovered by victims

#### *Increase amount recoverable for "loss of earnings":*

The amount that a victim can be paid for "loss of earnings" is currently capped at \$20,000 for a period of up to two years after the act of violence.<sup>136</sup> The Tribunal must also take into account any other entitlements the victim has received from another source when determining payment.<sup>137</sup>

The amount that a victim can receive for loss of earnings has not been amended since the Act came into operation in 1996. At the minimum it is suggested that this amount should be pegged to changes in the Consumer Price Index (CPI) or should reflect the federal minimum wage as determined by Fair Work Australia.

<sup>135</sup> Ibid, p.41

<sup>136</sup> *Victims of Crime Assistance Act 1996 (Vic)*, s.17.

<sup>137</sup> *Victims of Crime Assistance Act 1996*, s.16; see the decision in *Vaughan v VOCAT [2005] VCAT 1758* for an explanation of the operation of this section.

***Increase the amount that can be awarded for “special financial assistance” (s.8A):***

Legal practitioners stressed that often the victim will be satisfied with the recovery of even a small amount from the Tribunal. An award, even small, may serve as an “acknowledgement” of the crime by the State or “closure” for the victim. The researcher even came across a number of cases where the client never accessed their Tribunal award, even after their legal practitioner had notified them of the award.

However for some victims, a low payment can have a negative effect, as if the crime itself and the victim’s suffering are negated by the Tribunal’s decision.

*“A low payout can be a slap in the face for the victim”.*

*(Legal Practitioner)*

Legal practitioners consulted for the research were overwhelmingly in favour of lifting the amount victims’ can recover under **s.8A** while being wary of any changes that might lead the Government to abolish awards for ‘significant adverse effects’ altogether.

Some legal practitioners stated that they would be encouraged to take on more VOCAT cases if they knew that the victim could receive a larger amount of special financial assistance that more accurately reflected the impact of the crime upon the victim.

A higher payment can also make a real and significant difference to the victim’s circumstances with one legal practitioner noting surprising results in cases where the victim received a large lump sum payment:

*“Surprisingly, some victims who received an award of special financial assistance that you might have expected they would spend on drugs didn’t in fact spend their award in this way. It is almost as if a smaller amount could be frittered away but a larger amount actually requires the victim to think carefully about how the money might be best spent”.*

*(Legal Practitioner)*

## Funding for a dedicated Legal Service

In 2007 the Federation of Community Legal Centres argued for the establishment of one or a number of specialist Community Legal Services to provide assistance to victims of crime in relation to a range of legal issues, including a victims' right to compensation.<sup>138</sup>

The rationale for funding specialist Community Legal Services are similar to the issues that have been outlined in this paper including victims' lack of access to legal practitioners, legal practitioners' reluctance to conduct VOCAT matters and the quality of VOCAT applications.

As has been outlined in this paper, despite improvements since 2007 in the number of victims applying to the Tribunal, there are still valid reasons why the proposal for a dedicated Community Legal should be adopted or at least re-visited.

A devoted VOCAT Community Legal Service or Services could be established either as an alternative to increasing costs awarded to legal practitioners or as a complementary measure that would increase the capacity of the legal profession to conduct VOCAT matters as well as building up specific expertise in relation to victim's issues. Specialist Community Legal Services would also play an important role in providing community legal education around VOCAT and other victims' issues.

## Funding for dedicated VOCAT legal practitioners within existing Legal Services

In addition or as an alternative to funding a specialist victims' community legal service, it is recommended that further research be conducted into the viability of funding specialist legal positions within established Community Legal Centres.

As has been referred to in this Discussion Paper, the Women's Legal Service has recently re-instated their specialist VOCAT legal practitioner.

Funding similar positions in other Community Legal Centres has the potential to provide balance in a system which tends to place greater emphasis on legal issues relating to 'offenders' rather than 'victims'.

Having one dedicated victims' legal practitioner practicing (either full-time or part-time) in each VOCAT jurisdiction may help to overcome victims' difficulties in accessing legal assistance.

Having one dedicated victims' legal practitioner may also help to redress another problem identified in this Discussion Paper, that of Community Legal Centres placing too narrow a focus on VOCAT without providing victims with an overall assessment of their rights and the options available to them.

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<sup>138</sup> The Federation of Community Legal Centres, above n115.



# Timeframes

## BACKGROUND

The length of time that it takes to run a VOCAT case and for a victim to gain a final determination from the Tribunal was identified as a barrier to victims accessing assistance from the Tribunal.

There are two relevant timelines that dictate the running of a VOCAT case:

- the timeline for lodging an application with the Tribunal; and
- the timeline for filing supporting documentation once the application has been lodged.

### The timeline for lodging an application

The *Victims of Crime Assistance Act 1996* (Vic) (**section 29**) prescribes a 2 year period from the occurrence of an act of violence (or from the death of the primary victim in the case of a related victim) within which a victim can make an application to the Tribunal.

The Act provides that the Tribunal must *strike out* an application that is made outside of the prescribed time unless it considers, given the particular circumstances, that the application ought not to be struck out.<sup>139</sup>

### The timeline for filing supporting documentation

Once the application has been lodged with the Tribunal a letter is sent to the applicant or the applicant's legal practitioner advising the applicant they have *four months* to lodge all supporting documentation with the Tribunal.

## AVERAGE CASE PROCESSING TIMES

Determining the *average* amount of time that it takes to finalise a VOCAT application is difficult due to a lack of reliable data. VOCAT records statistical information on the proportion of applications finalised within 9 and 12 months of lodgment as well as the proportion of applications pending for 9 months or more or 12 months or more within any given year. Case processing times are measured as the time taken between lodgment of the application and finalisation.<sup>140</sup>

In the 2009/2010 period the Tribunal reported that there were 6,782 cases still pending as at 30 June as opposed to 6,162 in 2008/2009 and 5,084 in 2007/2008. Of these 40.6% had been pending for 9 months or more and 30.2% for 12 months or more. The percentage of applications finalised within 9 months of lodgement was 50.1% and 66.2% of applications were finalised within 12 months of lodgment.<sup>141</sup>

<sup>139</sup> *Victims of Crime Assistance Act 1996* (Vic), s.29(2), (3) lists matters the Tribunal must have regard to when deciding whether or not the application should be heard and determined out of time.

<sup>140</sup> Victims of Crime Assistance Tribunal, above n7, p.34.

<sup>141</sup> *Ibid*, p.36.

By comparison, the Magistrates Court of Victoria in the 2009/2010 period finalised 87.8% of all criminal cases within 6 months and 82.3% of all defended civil claims.<sup>142</sup>

Lodgment of the application is not the beginning of the VOCAT process however. Often a considerable amount of time and effort will have gone into preparation of the application (for example taking instructions, assembling documentation, etc) even prior to lodgment which is not reflected in the VOCAT case processing times.

Legal practitioners may also have to complete follow up work on a file even *after* the Tribunal has made an order finalising the matter, for example advising the client how to access their compensation payment.

Legal practitioners who were consulted for this research varied broadly in their estimation of the “average” amount of time taken to finalise a VOCAT matter. Estimates ranged from only four months in some cases to two years with a case that took *4.5 years* to conclude being the longest the researcher came across. According to the sample of Whittlesea Community Legal Service files (see discussion at page 20) the average amount of time taken to resolve an application was 17.5 months.

Some legal practitioners had dealt with so few VOCAT cases that they were reluctant or unable to provide an estimate of the average amount of time taken to resolve an application. The *majority* of legal practitioners consulted stated that the average amount of time taken to resolve a case was 12 months or more with the average estimate of the amount of time taken to resolve a case being 11 months.

The consensus amongst legal practitioners consulted for this research is that timelines for VOCAT matters are extremely variable and often very hard to predict. Aside from difficulties associated with obtaining evidence of the *injury to the victim* and quotes to support claims under s.8 of the Act, (see discussion at pages 38 to 39) legal practitioners consulted for this research also nominated difficulties associated with establishing the *existence of the act of violence* as well as a number of other factors as likely to contribute to the length of time between taking initial instructions and a final order being made.

These factors include:

- the complexity of the case
- the time it takes to gather supporting documentation
- the victim’s individual characteristics and circumstances
- the nature of the offence and whether or not a conviction has been recorded against the offender
- whether or not the offender has been charged and there is a criminal matter pending.

<sup>142</sup> The Magistrates’ Court of Victoria, *Annual Report 2009-10*, p. 25 and 26.

## THE COMPLEXITY OF THE CASE

Cases where the application is likely to be contested by the Tribunal were nominated by legal practitioners as taking longer to resolve. Cases more likely to be contested include those cases where:

- s.52 of the Act applies to the victim<sup>143</sup>
- where any of the matters the Tribunal must have regard to under s.54 are relevant to the victim, particularly past criminal history and the conduct of the victim at the time of the offence
- the victim is claiming loss of earnings from the Tribunal
- the victim has not reported the matter to the police or
- The offender is notified of the proceedings.

## THE TIME IT TAKES TO GATHER SUPPORTING DOCUMENTATION

The process of gathering evidence and documentation to support the application can add to the time taken to prepare an application (see discussion at pages 38 to 47)

## THE VICTIM'S INDIVIDUAL CHARACTERISTICS AND CIRCUMSTANCES

Legal practitioners consulted for this research reported that the *average* length of time taken for a VOCAT matter to be resolved was heavily dependent on the typical clientele whom the legal practitioner assisted.

Legal practitioners also reported that it was often difficult to get the co-operation of clients traumatised by the act of violence. Clients experiencing trauma were described by legal practitioners as “emotional”, “confused”, and “overwhelmed” and often unable or slow to assist the legal practitioner to gather paperwork, make the appropriate phone calls or fill out forms.

Clients suffering from existing mental health issues were also nominated as being particularly difficult to assist.

Some legal practitioners reported longer case processing times because clients that they regularly assisted fell into a category of special disadvantage such as itinerant or homeless clients, Aboriginal or Torres Strait islander victims or refugees.

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<sup>143</sup> The section provides for mandatory refusal of assistance by the Tribunal if satisfied that the act of violence was not reported to police within a reasonable time or the victim failed to provide reasonable assistance to the investigation; the application is made in collusion with the person alleged to have committed the act of violence or an earlier application arising from the same act of violence has been made.

One legal practitioner who regularly assisted aboriginal clients living in remote communities reported that even locating the client or finding an address to send paperwork to presented difficulties.

## THE NATURE OF THE OFFENCE AND THE OFFENDER

Some acts of violence are inherently more difficult to prove than others, for example historical sexual abuse or sexual assault and family violence, particularly where the offender has not been charged.

The majority of legal practitioners who commented on this issue said that it was their experience that where the offender has been charged and a conviction recorded it is far easier to gain a successful outcome from the Tribunal and the process takes less time to resolve.

## CRIMINAL MATTER ON FOOT

It is not a requirement under the Act that an offender be charged, found guilty or convicted of an offence for the victim to receive assistance from the Tribunal. The Tribunal need only be satisfied on the balance of probabilities that an act of violence of a particular category was involved.<sup>144</sup>

However, it is far easier to establish that an act of violence of a particular category has occurred where the offender has been convicted of that offence or a similar offence resulting in the injury to the victim.

Despite the wording of the Act, it was the experience of **all but one** legal practitioner who responded to a question from the researcher regarding criminal conviction and the act of violence (thirteen out of fourteen) that in practice, the Tribunal will delay the final hearing until the outcome of the criminal matter is known where there is a criminal matter on foot. Legal practitioners stated that this propensity by the Tribunal is one of the **major causes** for delay in the process.

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<sup>144</sup> *Victims of Crime Assistance Act 1996* (Vic), s.7(7).

**Case Example**

*“The VOCAT application including all supporting documentation was finalised and filed in June 2009. The Tribunal postponed finalisation of the claim until the outcome of a concurrent criminal matter (for the offender) was known. In February 2010 the legal practitioner had to argue on behalf of the victim that they should receive counseling to support them up until the conclusion of the trial as the process, particularly the length of time it was taking to reach a resolution, was causing them trauma. The victim received an interim award for counseling but the criminal trial (and the VOCAT claim) was postponed until December 2010. The victim is now reluctant to continue with the VOCAT claim.”*

*(Legal Practitioner)*

*“The offender was charged by police and the victim complied with a request to postpone their VOCAT application for 12 months until the outcome of the criminal matter was known. The offender was tried and found guilty. At that point the Tribunal requested that a new and updated psychological report be prepared for the victim due to the amount of time that had elapsed. The victim felt re-victimised by the process and at that point refused to proceed with the VOCAT claim.”*

*(Legal Practitioner)*

Some legal practitioners stated that, given that it may take longer than two years before the outcome of the criminal matter is known, a VOCAT application is often lodged prior to the criminal matter being resolved. Regardless of the attitude of the Tribunal, some legal practitioners would advise their clients to wait for the outcome of the criminal matter, if possible, before proceeding with their VOCAT application.

Legal practitioners, VACPs and victims support agencies agreed that every victim reacts differently to the VOCAT process but generally a more lengthy and drawn out process will have a negative impact on the victim. VACP’s and victims support agencies described the process as being “traumatic” and “arduous” for the victim, and this is exacerbated where the VOCAT application takes a long time to resolve.

Also for many victims the VOCAT application process will not be their first contact with the criminal justice system. Some victims may have already been through a police investigation and criminal trial before applying for assistance from the Tribunal.

*“For the victim the police investigation is arduous and distressing, the criminal justice process is arduous and distressing and often when the victim finally comes to the VOCAT process they are not interested in going through another legal process – they just can’t face it.”*

*(Victim’s support agency)*

Managing the victim’s expectations was said to be crucial to minimise any negative effects the process may cause.

*“[VOCAT] is a lengthy process and you have to wait a long time for your case to be heard. It shouldn’t be that way. A victim shouldn’t have to wait more than a year for the hearing but it’s really out of our hands and we have to be patient but as a victim it’s sad to see that it takes this long and you feel like no one really cares about what you have gone through”*

*(Victim of crime)*

## Freedom of Information (FOI)

It was a trend noted amongst some legal practitioners that Victoria Police have recently been requesting that legal practitioners file a Freedom of Information (“FOI”) request before they access police materials.

Legal practitioners who raised this point stated that the FOI process is usually extremely slow and is another factor that can add to the timeline for processing applications.

When questioned regarding FOI the Manager of the VAU did not indicate that there was a policy in place requiring legal practitioners to lodge an FOI application prior to gaining access to police materials. She did question why it was necessary for legal practitioners to approach police for this information when legal practitioners could gain access to the relevant information from the Tribunal itself.

Legal practitioners who requested this information from the Tribunal complained that they were not allowed to photocopy documents but were confined to viewing documents and making their own notes.

## APPLICATIONS FOR EXTENSIONS OF TIME

### The four month timeline for filing documentation

Legal practitioners consulted for the research were divided in relation to whether the four month timeline for filing documentation allows enough time to collect all relevant documents.

*“Generally the 4 month timeframe is too short. Courts should allow this to be extended. Rather than a 4 month timeframe maybe the time for filing should be after a certain number of counselling sessions have been used. It can be difficult to meet deadlines because sometimes there is a waiting list to get a client in to see a doctor/psychologist.”*

*(Legal Practitioner)*

*“If the trial is over for the alleged offender and the victim is seeing a counselor then it is quite easy for an application to be completed in 4 months.”*

*(Legal Practitioner)*

Of the thirty-two legal practitioners who responded to questions regarding timelines the majority said the four month timeline for filing documentation is adequate and realistic only if the Tribunal’s flexibility in giving extensions to legal practitioners who are unable to file within the prescribed time limit is taken into account.

The majority of legal practitioners consulted for the research reported that the Tribunal is extremely flexible when considering applications for an extension of time from legal practitioners and will usually grant an extension.

Even so, given the number of legal practitioners who regularly seek extensions to the timeline, it may be advisable for the Tribunal to increase the length of time for filing documentation or to vary the timeline depending on the type of offence, the number of counselling sessions that have been used by the victim, etc.

On the other hand, there are advantages to a shorter timeline including the fact that it may encourage the Tribunal, victims and legal practitioners to expedite the process as far as

possible with positive benefits for the victim in terms of the overall length of time it takes to run an application.

### *Discussion*

*Should the Tribunal increase the timeline for filing documentation for all applications?*

*Should the Tribunal introduce variable timelines for filing documentation?*

*If the Tribunal were to introduce variable timelines, on what basis should it make the variation?*

## DISCUSSION: SUGGESTIONS FOR REFORM

The Chief Magistrate of the Tribunal, Ian Gray, in the 2009/2010 Annual Report notes that increasing numbers of VOCAT applications are placing a strain on the Tribunal's resources with the timeliness of the Tribunal's response to applicants maintained but not improved.<sup>145</sup>

As has been suggested from the research and is acknowledged by the Tribunal, delay is detrimental to the victim:

*"Delay discourages victims of crime, and diminishes the impact of the financial assistance and acknowledgment ultimately made available to them"*<sup>146</sup>

The research identifies a need to introduce measures to reduce the timeline for processing VOCAT applications.

### Streamline the VOCAT Process

#### **S.33 vs Hearings**

Victims of crime in Victoria have the option of electing to have their application resolved "on the papers" (under **s.33**) or to attend a Hearing. Although victims are able to elect which method they prefer, the Tribunal has the discretion to require a victim to attend a Hearing.

Even where a victim has elected to attend a Hearing, the Tribunal will make a **s.33** offer to the victim who can either elect to accept the offer or proceed to a Hearing.

<sup>145</sup> Victims of Crime Assistance Tribunal, above n7, p.4. In fact there has been a slight increase in the number of applications pending for both 9 or more months (39.7% to 40.6%) and 12 or more months (27.8% to 30.2%) between 2007/08 and 2009/10.

<sup>146</sup> Ibid.

In NSW, awards are determined by a ‘compensation assessor’ who either makes an award or dismisses the application and provides written notice to the applicant providing reasons for the decision.<sup>147</sup>

Even on appeal, most awards in NSW are determined “on the papers” by materials and evidence put before the compensation assessor or in chambers. It is unusual for an applicant to be given leave to appeal a decision of the Tribunal by way of an oral hearing unless there is a real issue as to credibility or there is a significant conflict of evidence.<sup>148</sup>

One legal practitioner who regularly represents clients in the NSW crimes compensation jurisdiction suggested that one way to streamline the Victorian application process would be to abolish the victim’s right to attend a Hearing in relation to the initial application in favour of a system where all applications are determined “on the papers” but a victim has an expanded right of appeal.

It was noted that many of the suggestions that were made in submissions to the Department of Justice Crimes Compensation Review related to changes that would make the experience of appearing at a hearing easier for victims such as specialised Magistrates to deal with VOCAT matters, the gender of Magistrates to be a factor when hearing VOCAT matters of sexual violence<sup>149</sup> and VOCAT to establish processes to enable homeless victims to attend a hearing by telephone or video conference etc.<sup>150</sup> Rather than making changes to the way hearings are conducted it was suggested that it would be better to do away with hearings altogether.

Not all legal practitioners consulted for the research regularly attend hearings. According to those legal practitioners consulted for the research the majority of VOCAT applications are resolved “on the papers” and most victims express a preference for not attending a hearing. For the majority of legal practitioners consulted the **s.33** process works extremely well and they are satisfied with the way in which the Tribunal deals with **s.33** offers.

However, some legal practitioners, particularly those representing clients in a category of particular vulnerability such as homeless clients or clients who are more likely to have a criminal history, regularly or always encourage clients to attend hearings.

The Submission made to the DOJ Crimes Compensation Review by the PILCH Homeless Persons’ Legal Clinic highlights the benefits of attending a hearing both for the victims recovery, with the opportunity for a victim to tell their story in an official forum, and for the outcome, with the victim able to educate the court and decision-maker regarding the crime and gain the expertise of a Magistrate where the case is complex.<sup>151</sup>

<sup>147</sup> *Victims Support and Rehabilitation Act 1996* (Vic), s.29

<sup>148</sup> *Ibid*, s.36 and s.38; *Practice Note Number 1* (2 February 2005).

<sup>149</sup> Fitzroy Legal Service, Submission to the Department of Justice Review (February 2010), p.3.

<sup>150</sup> PILCH Homeless Persons’ Legal Clinic, Submission to the Department of Justice Review (February 2010), p.20.

<sup>151</sup> *Ibid*, p.19.

*“In one case I represented two teenage girls who had been sexually abused by their parents. Despite an investigation by police and criminal charges being laid the girls still felt that they had not been listened to and that no-one had believed their allegation. I recommended that the girls attend a hearing. At the hearing the Magistrate chatted to the girls and they felt that they had finally been listened to so they really got something out of attending the hearing.”*

*(legal practitioner)*

*“I always advise clients to attend a hearing. This is mainly because of the nature of my clients, many are drug/alcohol users who have criminal histories and have been involved in the sex trade. Many members would tend to judge such clients on the papers if they did not appear to give a fuller explanation of their circumstances.”*

*(legal practitioner)*

It is suggested that more research be conducted to determine whether the potential benefits of greater efficiency and fewer costs that may flow from abolishing a victims’ option to attend a hearing would outweigh the benefits that flow to a victim from attending a hearing.

It was suggested in the submission made to the Department of Justice Crimes Compensation Review by Victoria Legal Aid, (at 6.2) that the utility of **section 33** offers would be improved by changing the format of these offers to make them easier for applicants’ to understand and also to include written reasons outlining why the Tribunal has reached their decision.

### **Medical Reports provided direct to the Tribunal**

It was suggested by one legal practitioner consulted for the research that the provision of medical or psychological reports direct to the Tribunal after the application has been filed would expedite the VOCAT process.

The reaction to this suggestion amongst other legal practitioners was mixed with some expressing support for the idea while others were strongly against it on the basis that they would prefer to see any medical or psychological report themselves, prior to the report

being sent to the Tribunal, in case there was anything contained in the report that was adverse to the client.

### *Discussion*

*Should medical/psychological reports be provided direct to the Tribunal upon filing of the application?*

### **More court staff**

VOCAT registrars provide advice and support to applicants and their legal representatives throughout the VOCAT process. The principal registry in Melbourne is staffed by the Principal Registrar, a Standards and Compliance Officer, a Registry Manager, seven registrars, two trainee registrars and one finance officer.<sup>152</sup>

The Tribunal also funds a full-time registrar at Ballarat, Bendigo, Broadmeadows, Dandenong, Frankston, Geelong, Heidelberg, Latrobe Valley, Moorabin, Ringwood, Shepparton and Sunshine with additional support provided by registrars funded by the Magistrates' Court. At venues where there is no full-time VOCAT registrar the administration of the Tribunal is supported by registrars and finance officers of the Magistrates' Court. The Koori VOCAT list also has one dedicated Registrar based at Melbourne.<sup>153</sup>

The majority of legal practitioners consulted for the research reported that VOCAT court staff and Registrars were generally extremely knowledgeable about the VOCAT process and provided useful assistance to legal practitioners. For example, the researcher was informed by one legal practitioner that when a matter is listed for a Directions Hearing often the only information the applicant's legal representative will receive is a pro forma letter from the Tribunal. In this instance, making contact with the Registrar can provide the applicant's legal representative with vital information regarding the reasons why the matter has been listed.

However, it was reported that it is not always possible for legal practitioners to gain access to court staff, presumably because of the case workload.

<sup>152</sup> Victims of Crime Assistance Tribunal.

<sup>153</sup> Victims of Crime Assistance Tribunal.

### *The Koori VOCAT List*

In 2009 VOCAT published a Review of the Koori VOCAT List Pilot Project. The Koori VOCAT List was initially set up as a two-year pilot but, due to its success, has now been made a permanent feature of VOCAT. The Pilot Project, was initially established to “...direct the Tribunal to promote flexible practices in relation to applications by Koori applicants.”<sup>154</sup>

Some initiatives were specifically introduced to combat the longer case processing times for Koori applicants that have been attributed to a number of factors including:

- acts of violence reported to but not prosecuted by police resulting in the Tribunal having to make its own investigations;
- Koori victims are more often the victim of multiple traumatic events or have pre-existing or subsequent mental health issues that impact on their ability to engage with the Tribunal process;
- literacy and mobility issues interfering with Koori victims’ ability to respond to written correspondence from the Tribunal.<sup>155</sup>

In order to tackle these issues a “case management” approach was instituted in the Koori VOCAT list and all applications were centralised to the Melbourne Magistrates Court to be handled by a single Registrar. The “case management” approach enables the Registrar to develop a relationship with the applicant or the applicant’s legal representative with regular email and phone contact made between the Registrar and legal representatives, rather than written correspondence, to identify the legal issues surrounding the application.<sup>156</sup>

The changes that were made to the handling of Koori VOCAT applications has led to reduced case processing times which, although higher than for the general list, are now lower than before the changes were instituted.<sup>157</sup>

It is suggested that the adoption of a similar approach for all VOCAT applications, including increasing the applicants’ and the applicants’ legal representatives’ access to Registrars and court staff, be explored as a means to reduce case processing times.

The implementation of this approach would obviously entail considerable costs. However, if the outcome is to enhance the efficiency of the VOCAT process, the savings made by a more efficient system have the potential to off-set some or all of the added costs.

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<sup>154</sup> Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot Review and Recommendations*, (February 2010), p.3.

<sup>155</sup> *Ibid*, p.13.

<sup>156</sup> *Ibid*, p.15-16.

<sup>157</sup> *Ibid*, p.17.



# Offender notification

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.

Of the thirty-two legal practitioners consulted, thirteen (40%) had represented a client in a matter where the alleged offender was notified of the hearing. *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 (two of the six victims' support agencies consulted stated that where the offender is notified, victims will often withdraw their application).

The overwhelming evidence from legal practitioners is that even where the alleged offender is notified they rarely choose to attend a hearing and this evidence was confirmed by the Tribunal itself.

## BACKGROUND

The Tribunal may give notice of the time and place of the hearing to anyone the Tribunal considers has a "legitimate interest in the matter,"<sup>158</sup> including the alleged offender. *Practice Direction Number 4 of 2008* sets out the procedure where the Tribunal is considering notifying the alleged offender of the hearing. This procedure takes into account the requirement under the Act that the alleged offender is *not* to be notified of the time and place of the hearing unless the applicant is first given an opportunity to be heard on the issue of whether or not the alleged offender ought to be notified.<sup>159</sup> There are a number of intervening steps before the Tribunal will proceed with notification of the offender:

- firstly the applicant or applicant's legal representative is contacted by the Tribunal and given 21 days to object to the alleged offender being notified;
- any objections/submissions received are then considered by the Tribunal when making its decision;
- once the Tribunal has made its decision, if they choose to proceed with notification, the applicant is given the opportunity to either continue with the application or withdraw;
- if the applicant chooses to continue with the application or the Tribunal does not receive any correspondence from the applicant the offender will be notified of the application;
- if the offender does not choose to participate or no response is received the Tribunal will list the matter for hearing and the applicant will be notified that the offender will not be attending;

<sup>158</sup> *Victims of Crime Assistance Act 1996* (Vic), s.34(2).

<sup>159</sup> *Victims of Crime Assistance Act 1996* (Vic), s.34(3).

- if the offender chooses to be notified of the hearing the matter will invariably be listed for a Directions Hearing and the applicant will be notified of the time, date and place;
- pursuant to any directions given at the Directions Hearing, the matter will be listed for a final hearing and both the applicant and the alleged offender will be notified of the time, date and place.

The researcher only encountered *four* cases in which an alleged offender was notified and expressed an interest in attending a hearing. In two cases the alleged offender attended the Directions Hearing but didn't attend the final hearing. Of the other cases, in both instances the victim had or has an Intervention Order against the offender. In one case, the applicant's legal representatives were successful in convincing the Tribunal that the alleged offender should not be notified of the final hearing. The other case is still pending.

Evidence from legal practitioners and the Tribunal indicated that the offender is most likely to be notified of a hearing in circumstances where the very fact of the occurrence of the act of violence is in issue, for example where the offender has been acquitted or the police material is equivocal.

## Effect on the Victim

The "mere possibility" that the alleged offender will attend the hearing, no matter how remote, has a negative effect on the victim according to legal practitioners and victims support agencies. Some victims persevered with their claim despite the anxiety and distress that the possibility of the alleged offender being present at the hearing caused them while others abandoned their VOCAT claim altogether.

The Australian Domestic and Family Violence Clearinghouse reports that the impact of greater offender involvement in compensation proceedings on victims of domestic violence is twofold; firstly, the victim may be discouraged from applying for compensation and secondly, "*...where women choose to continue with the application process there is a risk that they will have less control over the process and that the therapeutic potential of compensation will be undermined.*"<sup>160</sup>

*"The mere possibility that the offender could turn up can be terrifying and also re-traumatising for the victim"*

*(victims' support agency)*

<sup>160</sup> Isobelle Barrett Meyering, Australian Domestic & Family Violence Clearinghouse, *Victim Compensation and Domestic Violence: A National Overview*, (Stakeholder Paper No. 8 2010), p.12.

Some legal practitioners reported that they don't necessarily raise the possibility that the alleged offender could be notified with the client at the outset because it is not likely to occur in the majority of cases and it is extremely off putting for the victim.

VOCAT reports that in only a small number of matters will the applicant elect not to proceed with the application where the alleged offender is notified of the hearing. VOCAT does not record statistics on the number of applications that are abandoned by the applicant where the alleged offender has been notified.

Legal practitioners also cited instances where the notification of the offender by the Tribunal seemed quite inappropriate. For example, one legal practitioner was involved in a case where the daughter of a step-father who was accused of abusing her during childhood was notified of and chose to attend the hearing. Not only did the alleged offender choose to attend the hearing but he sought legal representation and wished to cross-examine the victim. The alleged offender's attendance at the hearing in this instance seemed wholly inappropriate due to the fact that the victim had been granted an Intervention Order against him. The legal practitioner is currently in the process of objecting to the offender being present at the hearing.

Where the offender is notified it is the opinion of legal practitioners that there is little advantage to pursuing a claim through VOCAT in comparison to other avenues for assistance. One of the great advantages of VOCAT over other avenues is that although the victim is likely to recover less financial assistance the process itself is generally less daunting for the victim and this benefit is potentially undermined by the offender's presence at the hearing.

### **Measures to minimise victim distress**

Where an offender is notified and does choose to attend a hearing the Tribunal indicated that it is mindful of the potential discomfort and distress that may be caused to applicants and can make arrangements to limit the distress of the victim at the hearing including arranging for a support person to attend the hearing with the victim or for the victim to attend via video link.

### **DISCUSSION: SUGGESTIONS FOR REFORM**

Given that the provision for notification of the alleged offender is rarely utilised by the Tribunal and even where it is utilised by the Tribunal it is extremely unusual for the alleged offender to actually attend a hearing, it is arguable whether the provision is a necessary part of the VOCAT process, especially when balanced against the distress that may be caused to the victim.

## Amendments to offender notification

As has been referred to, the victim is likely to experience distress even when the chances of the alleged offender being present at the hearing are remote. There is an argument to be made for removing the provisions for notification of the alleged offender from the Act altogether.

However, there is also a case to be made for retaining a mechanism whereby the alleged offender has the opportunity to put their case to the Tribunal, especially where there is a dispute as to the occurrence of the act of violence.

It is recommended that modifications to the process for offender notification be considered to minimise victim distress:

- It is recommended that the circumstances in which the Tribunal should consider notification be restricted and the Tribunal's discretion only exercised in 'exceptional circumstances,' for example where there is genuine doubt as to whether the act of violence occurred. (e.g. no exercise of the discretion where the applicant has an IVO against the alleged offender and no exercise of the discretion where the alleged offender has been charged or convicted).
- It is recommended that once the offender is notified of the application, the onus should then shift onto the offender to provide reasons why they *should* be given the opportunity to attend the hearing.



# Appendices

## APPENDIX 1

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 Darebin Community Legal Centre Inc.  
 Fitzroy Legal Service Inc.  
 The Federation of Community Legal Centres  
 Gippsland Community Legal Service  
 LaTrobe University Legal Service  
 Moreland Community Legal Centre  
 Murray Mallee Community Legal Centre  
 North Melbourne Legal Service  
 Peninsula Community Legal Centre  
 Public Interest Law Clearance House – Homeless Persons’ Legal Clinic  
 Springvale Monash Legal Service  
 St. Kilda Legal Service Co-Op Ltd  
 Victoria Legal Aid  
 Victorian Aboriginal Legal Service  
 Villamanta Disability & Discrimination Legal Service  
 West Heidelberg Community Legal Centre  
 Western Suburbs Legal Service  
 Whittlesea Community Legal Service  
 The Women’s Legal Service  
 Wyndham Legal Service Inc.  
 Youthlaw

### Private Legal Practitioners and Barristers

Allens Arthur Robinson  
 Blake Dawson Waldron  
 Frid & Associates  
 Dr. Vivian Waller of Waller Legal  
 Thracey Vinga of Holmes List  
 Michael Gregurek of Howells List  
 Jessica Fallar of Foley’s List

## **Victims Support Agencies**

Berry Street (Eaglemont)  
CASA House  
Eastern CASA  
Northern CASA  
Melbourne University International Student Services  
Merri Community Health Service  
Windermere Child and Family Services  
Womens Health in the North  
Victims Support Agency

## **Other Contributors**

Victoria Police  
The Victims of Crime Assistance Tribunal  
NSW Victims of Crime Assistance Tribunal  
The Department of Justice



## APPENDIX 3

Whittlesea Community Legal Service VOCAT Project Questionnaire	
<b>1.</b>	<p>How did you discover that you may be eligible to claim compensation from VOCAT?</p> <p>Victoria Police <input type="checkbox"/></p> <p>Counsellor/Social Worker/ <input type="checkbox"/></p> <p>Psychiatrist/Psychologist</p> <p>Medical Practitioner <input type="checkbox"/></p> <p>Victims support group <input type="checkbox"/></p> <p>Community organisation</p> <p>Lawyer (either CLC, Legal Aid or a private practitioner) <input type="checkbox"/></p> <p>Word of mouth/media <input type="checkbox"/></p> <p>Other (please specify) _____</p>
<b>2.</b>	<p>In relation to your VOCAT claim did you elect to have your case decided at a Tribunal hearing?</p> <p>Yes, I elected to attend a Tribunal hearing. <input type="checkbox"/></p> <p>No, I elected to have my case decided without a hearing. <input type="checkbox"/></p> <p>No, the Tribunal required me to attend a hearing. <input type="checkbox"/></p> <p>On what basis did you make your decision?</p> <p>_____</p>
<b>3.</b>	<p>At the beginning of the VOCAT process (for example, when you first made the decision to claim compensation) how long did you expect that it would take for you to receive compensation if you were successful?</p> <p>Less than 6 months <input type="checkbox"/></p> <p>6 months to 1 year <input type="checkbox"/></p> <p>1 year to 18 months <input type="checkbox"/></p> <p>18 months or more <input type="checkbox"/></p>

4.	<p>Was your expectation of the timeline (in Question Three) met?</p> <p>Yes, the VOCAT process took about the same amount of time as I expected. <input type="checkbox"/></p> <p>No, the VOCAT process took longer than I expected. <input type="checkbox"/></p> <p>No, the VOCAT process was shorter than I expected. <input type="checkbox"/></p>
5.	<p>If the VOCAT process took longer than expected, would you still have chosen to pursue a VOCAT claim?</p> <p>Yes <input type="checkbox"/></p> <p>No <input type="checkbox"/></p>
6.	<p>What was your main motivation for making an application to VOCAT? (please select more than one box if applicable)</p> <p>I wanted to achieve closure and move on from the crime. <input type="checkbox"/></p> <p>I wanted my experience as a victim of crime to be acknowledged publicly. <input type="checkbox"/></p> <p>I needed financial assistance in order to cover expenses arising from the crime. <input type="checkbox"/></p> <p>I heard that I could obtain compensation. <input type="checkbox"/></p> <p>Other (please specify) _____</p>
7.	<p>Now that you are able to reflect on your experience, did you achieve what you wanted from the VOCAT process?</p> <p>Yes <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>Please describe what you have gained from your experience of VOCAT:</p> <p>_____</p>
<p><i>Thank-you for your participation!</i></p>	