

**Joint submission to the Victorian Law Reform Commission
Review of the Victims of Crime Assistance Act 1996
OCTOBER 2017**

Victorian Law Reform Commission
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October 2017,

To whom it may concern,

Re: the Review of the Victims of Crime Assistance Act 1996

In December 2016, the Victorian Law Reform Commission (VLRC) received terms of reference seeking a review of the *Victims of Crime Assistance Act 1996* ("the Act") as it applies to family violence. This request arose from recommendation 106 of the Victorian Royal Commission into Family Violence.

In July 2017, the VLRC received supplementary terms of reference seeking a review of the Act as to its effectiveness relating to all victims ¹ of crime, including family violence victims. Inter alia, the VLRC has been asked to consider whether the Victims of Crime Assistance Tribunal (VOCAT) is the right model or if there scope to implement a new model, such as an administrative model.

¹ We note that some people who have been subjected to violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission we use the term 'victim' as reference to both victims and survivors, in keeping with the terminology of the legislation.

This is a joint submission by Springvale Monash Legal Service, on behalf of the following services:

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With regard to the Victims of Crime Assistance Act, Community legal Centres (CLCs) predominantly assist victims of family violence and/or sexual assault including childhood sexual abuse as well as child abuse. Many CLCs have specialist knowledge in relation to assisting victims of crime. Most CLC clients are complex, many have been very seriously impacted by their experience of violence. We often work with clients experiencing multiple levels of disadvantage, as do many private practitioners working in this field.

Thank you for the opportunity to provide a submission to the Victorian Law Reform Commission's (VLRC) Review of the Victims of Crime Assistance Act. We have confined this joint submission to three particular issues under consideration by the VLRC.

- Proposed alternatives to the VOCAT model
- The importance of legal representation
- Specialisation of VOCAT members

PROPOSED ALTERNATIVES TO THE VOCAT MODEL

In the context of this review, an administrative system is one where applications are determined by a government agency or service as opposed to a judicial or quasi-judicial system where applications are determined by a court or Tribunal. It has been mooted that, in Victoria, an administrative system may operate under the umbrella of the Victorian Government Solicitors (VGS) if introduced. Administrative systems are in place in other Australian jurisdictions including Queensland, Western Australia and New South Wales (NSW). In determining whether an administrative system will increase benefits to victims of crime, it is helpful to analyse these similar service models.

NEW SOUTH WALES

In 2013, NSW enacted the *Victims' Rights and Support Act 2013* (The NSW Act) which established the Victims Support Scheme. This is an administrative scheme which provides for applications for financial assistance to be determined by "Victims Services" (VS) – a Government agency rather than by a court or Tribunal. The scheme requires that a paper application be lodged with VS and that documentary evidence be filed in support. Ordinarily, an authority is signed by the applicant that authorises VS to subpoena medical and police records on the applicant's behalf. Once the documentation has been obtained, the application is determined "on the papers" by an assessor. No hearing is held. Applicants are notified of the result by letter.

The nature of the required documentation varies depending upon the nature of the expenses to be claimed.

The victim may choose to claim:

- Counselling;
- Financial assistance for immediate needs;
- Financial assistance for economic loss;

- Recognition payment

To satisfy the VS scheme, multiple pages of proof are required. These requirements are complex and convoluted. The NSW Act can be 'complex to interpret and apply. An application must adequately address Section 44 factors in order to ensure that the claim is not refused or entitlements reduced'.² Despite the confusing and complicated nature of the varying requirements of proof (depending on the assistance sought) applicants are expected to navigate the scheme without legal representation.

We note with concern the appeal to the United Nations Special Rapporteur on Violence against Women signed by thirty-four Community Legal Services and support agencies on the introduction of the *Victims Rights and Support Bill 2013* in 2013.³ Concerns included failure of the new scheme to adequately address the trauma suffered by victims of domestic violence; unfair time limits and harsh documentary evidence requirements, including concerns on the reduction in overall amount of compensation awarded to victims.

Victims of Crime Assistance (VOCAT)

Currently in Victoria, applications are heard by VOCAT. Hearings take approximately half an hour and are informal. Many Tribunal members verbally acknowledge and recognise the suffering of the victim and often, apologise on behalf of the state for the crime having occurred. A large proportion of cases heard by VOCAT relate to sexual offences. It is well known that only a small proportion of sexual assaults enter the criminal justice system, and those that do face a range of barriers, and few result in prosecution or conviction.⁴ In New South Wales only 10 to 30 percent of adult female sexual assault victims report their victimisation to police, and only 20 percent of those result in the initiation of criminal proceedings.⁵ It has been estimated that fewer than 1 in 100 cases of sexual assault result in a conviction.⁶

Hence, in many cases the VOCAT hearing represents the only opportunity for a victim to have their 'day in court' and to tell their story. The Federal Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission") and the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations ("the Victorian Parliamentary Inquiry") taught us that for victims, an opportunity to be heard and tell their story an important step towards healing, especially for victims of childhood sexual abuse.

² Legal Aid NSW, 2016, Statutory review of the Victims Rights and Support Act 2013, Submission to NSW Department of Justice NSW Department of Justice
http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/25335/Stat-review-of-Victims-Act-July-final-to-Justice-29-July-2016.pdf

³ Urgent appeal to the United Nations Special Rapporteur on Violence against Women on the introduction of the Victims Rights and Support Bill 2013 NSW Australia, 17 May 2013.

⁴ Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW), 2005, Responding to Sexual Assault: The Way Forward p8, Criminal Law Review Division, Attorney General's Department NSW

⁵ Australian Bureau of Statistics 2004, Crime and Safety, April 2004, Cat No. 4509.1, Australian Bureau of Statistics, Sydney

⁶ Hulls, Rob, 2017, Restorative Justice for Survivors of Sexual Assault, RMIT University
<https://www.rmit.edu.au/news/all-news/2017/jul/restorative-justice-for-survivors-of-sexual-assault>

Case Study #1: John's story ⁷

John was raped by his father from the age of 3 to 14 years. His father was physically violent and often drugged John before the sexual assaults occurred. John was also present on one occasion when his father raped John's little sister.

John's parents separated when he was a teenager and he became estranged from his father. John struggled with significant psychological issues as a result of the childhood abuse and sought treatment when he was in his 30s. After years of treatment, John garnered the strength to report the abuse to the police. The police interviewed the offender and were preparing to lay charges when the offender took his life. In his suicide note, the offender made reference to John's allegations of sexual abuse.

There was a coronial inquest into the death of John's father and, despite the police investigation that was occurring at the time of the suicide and that the sexual abuse was specifically referenced in the deceased's suicide note, no references to John nor the accusations of abuse were made in the Coroner's findings.

John was left feeling invisible and unheard by the coronial inquest.

Due to the death of his father, no criminal prosecution ensued despite the police view that the prosecution case had appeared strong and likely to result in a conviction. John was therefore denied any recognition through the criminal justice system.

John's father died intestate and John's step-mother inherited the entirety of the estate. John and his two siblings were not acknowledged in the distribution of the estate.

With support from a lawyer, John lodged a VOCAT application. The Tribunal offered to resolve John's application by way of section 33 determination (i.e. without a hearing) on the basis that all expenses claimed would be paid. However, John felt very strongly that he wished to appear before the Tribunal to "tell his story". Having a chance to be heard was important to him as he felt he had been denied this opportunity through every other legal process he had encountered. Correspondence was sent to the Tribunal explaining that John desired the hearing for therapeutic reasons and to feel that finally, he had been heard and the impact of the crimes upon him had been recognised. He finally was to get his "day in court" which meant more to him than the monetary award he had been offered.

John's case illustrates the strength of our current judicial system in providing an avenue for emotional healing that could not be equalled by an impersonal, administrative process.

As The Honourable Justice Peter McClellan AM states 'For some survivors telling their story to a Commissioner in a private session is the first time they have disclosed their abuse. For others it is the first time in their life they have been believed. For many survivors, private

⁷ Please note in all case studies, names have been changed for confidentiality purposes

sessions can be a powerful and healing experience.’⁸ Or as a survivor of childhood sexual abuse stated ‘I have waited 30 years to tell this story.’⁹

For victims of sexual assault, especially those who have not been through the criminal justice system, the therapeutic value of the VOCAT hearing itself cannot be over-stated. So many of our clients report that the hearing itself is the most beneficial part of the process. The fact that Victoria has retained hearings is a **strength in our system**. Through our long-standing work with victims of sexual assault, we believe it would be a disservice to Victorian victims if we were to do away with the face-to-face nature of VOCAT. The human acknowledgement and recognition that comes with a hearing can be a powerful and life-changing experience for many survivors.

If the scheme is going to contribute to the healing of victims, it is imperative that the right to a hearing is maintained and that those hearing the application are motivated to make the experience a therapeutic one for a victim.

It is argued that an administrative system is appealing in that it reduces delay and, by doing away with hearings, is more efficient. However, the Victorian scheme provides for increased efficiencies. Section 33 provides the mechanism by which a hearing may be avoided in appropriate cases. The strength of our scheme is that it allows for efficiency with section 33 determinations however, it also allows flexibility. Most importantly, it allows a victim a hearing where it is important to a victim’s healing to have one. The recovery of the victim ought to be of paramount importance to any scheme which aims to assist.

The interim application mechanism provided for under section 56 of the Act allows for urgent assistance where needed. If efficacy in cases requiring urgent assistance is the focus, this section is the key. Resources should be injected into the scheme to ensure interim applications are heard in a timely manner. In this way, our scheme can enjoy the benefit of increased efficiencies it is presumed that an administrative system would deliver whilst maintaining the best aspects of a judicial system.

We recommend retaining the human-centred approach to victims of crime, in particular victims of sexual assault, of maintaining a private, somewhat informal tribunal hearing. At least, hearings should remain an available option, based on recommendations of victims, and the decision maker. It should be determined early on if a hearing will take place.

THE IMPORTANCE OF LEGAL REPRESENTATION

Community Legal Centres (CLCs) work with clients experiencing varying degrees of vulnerability and multiple layers of disadvantage. On a daily basis, we witness the struggle that our clients face attempting to navigate various Australian legal systems. Many, if not all of our clients do not have the capacity to self-advocate. This experience is echoed by the private practitioners working in this field.

⁸ The Honourable Justice Peter McClellan AM, speech addressing the International Society for the Study of Trauma and Dissociation, 2015, "Broken Structures, Broken Selves: Complex Trauma in the 21st Century". International Society for the Study of Trauma and Dissociation, New South Wales

⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, What We Are Learning About Responding to Child Sexual Abuse Interim Report Volume 1, <http://www.childabuseroyalcommission.gov.au/about-us/our-reports/interim-report.html>

In our experience, victims of crime are often severely traumatised and frequently suffer from debilitating mental health issues. Many suffer suicidal thoughts, self-harming tendencies, are unable to work or have trouble functioning on a day-to-day basis. Navigating even the simplest administrative system in order to obtain assistance (which is often desperately needed) is well beyond the capabilities of many of our clients.

Case study 2– Cassie’s story

Cassie was raped, on almost a daily basis by her father from the ages of 3 to 17. The abuse often took place in her parents’ bed when her mother was present. Cassie’s mother did not approve of the abuse but took no action to stop it or to protect Cassie. Out of jealousy, Cassie’s mother would often assault her viciously. When Cassie was 8 years of age she was tied to a chair and stabbed in the eye by her mother. Her mother told her this was “an eye for an eye for stealing her husband”.

When Cassie was a teenager, her father started to “sell” her sexual services to his friends and acquaintances. She ran away from home regularly and reports were made to the Department of Human Services (DHS) but despite regular respite in foster care, Cassie was usually returned to her father’s care.

By the age of 17, her father had sold her into sexual servitude at a brothel and although Cassie worked 7 days a week, her earnings were taken by her father.

Cassie fled overseas when she turned 18 and worked abroad for many years before her mental health started to deteriorate and she was forced to return to Australia as she could no longer work.

Cassie is now in her 40s and suffers serious mental health issues. She lives alone, has never married nor had children – she does not have any friendships or personal relationships. She is agoraphobic and rarely leaves the safe confines of her home. She struggles with hygiene and rarely washes as showering and bathing remind her of her time working in the brothel. She suffers complex post-traumatic stress symptoms and self-harms. She has made countless attempts to take her life. Reminders of her abuse often trigger a suicide attempt.

When she was in her thirties, Cassie reported the abuse to the police. An investigation ensued however, no charges were laid against Cassie’s parents. The investigating officer believed Cassie however, given her complex mental health issues, felt that taking part in a criminal prosecution would be beyond Cassie’s emotional capabilities.

Cassie requires a great deal of assistance. As a result of the injury to her eye, Cassie is visually impaired. It is hoped that the VOCAT will assist her in modifying her home to take into account her visual limitations. Her needs in terms of psychiatric and psychological support are extensive.

Cassie withdraws from the process regularly as, her self-worth is so fragmented, she does not feel she is worthy of any assistance and she sabotages her application.

Her lawyer reports that she is uncontactable for months on end. She desperately wants acknowledgement and assistance from VOCAT but she needs a lawyer who will support her to obtain the documentation she is not capable of obtaining herself. She also needs a persistent and loyal advocate, who will continue to support her despite her disengagement and inability to self-advocate.

Cassie would be unable to bring a claim without assistance from a lawyer.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹⁰ recognises the profound impact crime has on victims and calls on member states to provide assistance to victims of crime, to provide financial compensation to victims when restitution is not possible from the offender and to provide fair and accessible criminal legal and judicial processes.

A key term in this statement is ‘accessible’. Even the simplest of administrative processes are too complex for the majority of our clients and therefore would be inaccessible. The only fair system is one which allows for advocacy for victims. We have serious concerns regarding any scheme in which the equivalent of “representation” for victims is provided by the same body responsible for deciding the financial assistance to be provided. When vulnerable people are required to collect evidentiary materials to prove that they are the victim of a crime, we recommend that this must be under the guidance of an independent, legally trained advocate. An administrative scheme without legal support is likely to disproportionately affect the most vulnerable victims such as those in regional or remote areas, clients from a culturally and linguistically diverse (CALD) background, and clients with a disability. In their statutory review of the NSW Act, Legal Aid NSW made a submission to NSW Department of Justice that states ‘the burden of writing submissions in support of sexual assault victims is often falling to clinicians. This is inappropriate, as the task is neither clinical nor therapeutic. As clinicians are not legally trained, this can also result in the victim receiving a lower category of recognition payment than that to which they are entitled.’¹¹ Currently, in NSW, victims can be allocated a support coordinator, however, we submit that it is inappropriate to have staff from the same organisation deciding the outcome of an application in addition to providing “advice” to victims. There are also concerns expressed that Support Coordinators have given incorrect information to victims regarding technical aspects of the legislation.¹² Coordinators are not independent from VS, giving rise to conflict issues.¹³

¹⁰ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 of 29 November 1985, available at <http://www2.ohchr.org/english/law/victims.htm>

¹¹ Legal Aid NSW, 2016, Statutory review of the Victims Rights and Support Act 2013, Submission to NSW Department of Justice NSW Department of Justice http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/25335/Stat-review-of-Victims-Act-July-final-to-Justice-29-July-2016.pdf

¹² McEwin, Alastair, 2014, First 12 Months of Victims’ Rights and Support Act 2013, Community Legal Centres NSW, p6, <http://www.wlsnsw.org.au/wp-content/uploads/CLCNSW-submission-to-12mth-review-of-VSR-Act-160614.pdf>

¹³ See for example: Legal Aid NSW, 2016, Statutory review of the Victims Rights and Support Act 2013, Submission to NSW Department of Justice NSW Department of Justice http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/25335/Stat-review-of-Victims-Act-July-final-to-Justice-29-July-2016.pdf

Since the introduction of the VS scheme in NSW, Community Legal Centres have been required to assist victims in making applications.¹⁴ By excluding clients from accessing legal advice, we are essentially increasing the workload of CLCs to provide the assistance without providing them with resources needed to fill the vacuum.

We recommend that continued funding be provided to enable victims to access independent legal advice and assistance. Access to justice cannot be fair and accessible without this provision. If funding cannot be provided to all victims, then vulnerable victims, including victims of domestic violence, sexual assault, childhood sexual and physical abuse survivors, and clients with various indicators of disadvantage should be given priority.

Legal fees are modest under the Act. However, they have been increased since the Act came into effect in 1997. In contrast, loss of earnings entitlements (\$20,000.00) have not been increased since 1997. Similarly, the statutory maximums under the Act have not increased since its inception, nor has the related victim 'pool' which remains at \$100,000.00. It makes sense that legal fees proportionately account for more in a scheme where most entitlements of claimants have remained stagnant for two decades. The answer to this issue should not be to cut lawyers out of the process but rather, to increase victim entitlements so that they have meaning in 2017. Any economic rationale to change the system is based on a false economy premise, given the complexities outlined in this submission, which would lead to more support being required from CLCs.

We support a service model that retains reliance upon lawyers as advocates. A scheme that excludes legal advice and assistance is not in the best interests of victims of crime.

SPECIALISATION OF VOCAT MEMBERS

Currently, there is an inconsistency of approaches towards victims and financial awards at VOCAT. We have experienced a vastly different approaches from tribunal members assessing victims and their claims. We observe that occasionally tribunal members may not be operating from a trauma-informed perspective. This may lead victims to feel as though they are 'on trial' rather than taking part in a therapeutic process intended to benefit them.

Case Study 3: Leonie's story

Leonie was sexually assaulted by her step-father between the ages of 12-17. When Leonie was 19, she moved out of the home she shared with her mother, step-father and siblings (including one young half-brother who was the offender's child) as she could no longer bear to live under the same roof as the offender. When Leonie was 22, her mother separated from the offender. A year later, she reported to abuse to the police. The offender was charged with several counts of incest and sexual penetration of a child under 16 years of age.

McEwin, Alastair, 2014, First 12 Months of Victims' Rights and Support Act 2013, Community Legal Centres NSW, p6, <http://www.wlsnsw.org.au/wp-content/uploads/CLCNSW-submission-to-12mth-review-of-VSR-Act-160614.pdf>

¹⁴ McEwin, Alastair, 2014, First 12 Months of Victims' Rights and Support Act 2013, Community Legal Centres NSW, <http://www.wlsnsw.org.au/wp-content/uploads/CLCNSW-submission-to-12mth-review-of-VSR-Act-160614.pdf>

Leonie gave evidence at the contested committal proceeding, following which, her step-father was committed to stand trial in the County Court.

A two-week County court trial ensued in which Leonie gave evidence. However, as is often the case in trials involving sexual offences against children, the offender was acquitted. The acquittal was the result of the onerous standard of proof of “beyond reasonable doubt” which must be met by the prosecution.

Leonie applied to VOCAT for assistance. The main expenses she claimed was counselling so that she could attend a psychologist fortnightly to help her work through the various issues brought on by the abuse.

Leonie’s matter was presided over by a Tribunal member who appeared to have a limited understanding of the complex nature of childhood sexual abuse and its sequelae. The Tribunal member questioned Leonie as to why she had not disclosed the abuse and reported it to police earlier. She was told that her application may not succeed because she had taken too long after she turned 18 to report to the police and to apply to VOCAT for assistance. It was indicated that she had not fulfilled her obligations under sections 29 and 52 of the Act. Sections of the Act were quoted to her and she was asked systematically why she had not complied with each section and how the sections related to her case.

The Royal Commission taught us that the average delay in disclosing childhood sexual abuse is 22 years,¹⁵ and a trauma-informed approach would be able to recognise that disclosure of childhood sexual abuse is not an event, rather it is a process. In our experience, it is rare that section 29 and 52 of the Act have been used to question clients in this manner.

Article 16 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that training should be provided for ‘police, justice, health, social service and other personnel concerned to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid’.

We recommend a special list of Tribunal members for VOCAT determinations. This special list would include members who are;

- Trauma-informed; undergo specialised training on the complex considerations in sexual abuse and family violence cases;
- Specialised in the purpose and application of the Act,
- Specialised in the treatment of vulnerable witnesses in a judicial and/or quasi-judicial context.

¹⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, *What We Are Learning About Responding to Child Sexual Abuse Interim Report Volume 1*, <http://www.childabuseroyalcommission.gov.au/about-us/our-reports/interim-report.html>

Providing sufficient resources to the process and selecting specialised arbiters, rather than overhauling an effective system, will increase efficiency and ensure the ongoing commitment to recognising and assisting applicants. The mechanisms under sections 33 and 56 of the Act lend themselves to enable increased efficiencies, and urgent interim orders can be made on spot by magistrates under the current system. In conclusion, it is our view that the current Act can be retrofitted to effectively and sustainably cater for the needs of victims of crime.

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