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**Victorian Aboriginal Legal Service Co-operative Limited submission to the Department of  
Justice Victoria in response to the *Reviewing Victims of Crime Compensation:  
Sentencing Orders and State-funded Awards.***

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## INTRODUCTION

It is not a new observation that Aboriginal and Torres Strait Islander people experience violence at a rate well above their non-Aboriginal and Torres Strait counterparts. Based on police statistics, rates of assault-related violence towards the Aboriginal and Torres Strait Islander population are typically three to four times those of the non-Aboriginal and Torres Strait Islander population (Steering Committee for the Review of Government Service Provision, SCRGSP 2009).<sup>1</sup> Rates of (reported) Aboriginal and Torres Strait Islander sexual violence victimisation are also higher than the non-Aboriginal and Torres Strait Islander population (SCRGSP 2009).<sup>2</sup>

With rates of violence and victimisation increasing and worsening in some communities, accessible, appropriate and effective compensation and access to assistance services is highly critical. For these reasons and more, VALS welcomes the opportunity to respond to the *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards: Discussion Paper December 2009*.

This submission is presented in two sections. Part one will respond to selected questions from the suggested submission template, and part two will address some other issues relevant to VOCAT operations and the unique and distinct needs of the Aboriginal and Torres Strait Islander population.

VALS would like to stress that throughout this submission the term “victim” is used when referring to people that have experienced violent crime. VALS recognises the importance of terminology and acknowledges the implications of using the term “victim” in place of what many regard is the more appropriate term: “survivor”. The utilisation of the former throughout this submission is purely for clarity and consistency when discussing systems and operations that use congruent terminology.

## PART ONE: SELECTED SUBMISSION TEMPLATE QUESTIONS

### Introduction and guiding principles

*In your view, what is the key purpose of providing compensation to victims?*

Underpinning victim of crime compensation schemes is the notion that it is the government’s responsibility to not only protect citizens from crime, but failing to do so, is obliged to provide some measure of redress. Monetary compensation is one way that the Government can contribute to the restoration of a victim’s life. Compensation should not exist solely as a vehicle for the expression of a government’s responsibility, but should focus on addressing the complex short and long-term impacts of violent crime on the individual and those around them.

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<sup>1</sup> However much higher rates are recorded for assaults causing severe injury or death where Aboriginal and Torres Strait Islander people are 11 times more likely than non-Aboriginal and Torres Strait Islander people to be hospitalised with assault-related injuries (SCRGSP 2009).

<sup>2</sup> While rates in this category are higher for the Aboriginal and Torres Strait Islander population, the difference is not as pronounced as other categories. Based on police data the difference is 1.5 to 3.5 times. This decreased disparity is arguably a result of lower rates of reporting to police by Aboriginal and Torres Strait Islander people (Bryant 2009).

*Do you think these principles are appropriate? Are there other principles that should be considered when reviewing Victoria's victim compensation scheme?*

The principles below are found in the suggested submission template. Each of them will be commented on and additional principles to be considered will follow.

- a) *Fair to victims - The system should be equitable between victims who have suffered similar forms of harm. For example, ensuring equity between victims where offenders have differing financial means.*

VALS agrees with the above principle, however argues that the unique and distinct complex needs of Aboriginal and Torres Strait Islander victims of crime must always be taken into consideration.

- b) *Effective - The system is accessible and should ensure that compensation assists to the greatest extent possible with recovery from the consequences of the crime. For example, ensuring the victim can easily access assistance and, once obtained, the award meets their needs.*

VALS believes that in order to be effective in terms of access and needs, critical research into how the system engages Aboriginal and Torres Strait Islanders, especially victims of domestic violence, children and young people, and the mentally ill/impaired, is required. Such research also needs to consider the access to assistance and award issues as they apply in the long-term.

- c) *Balanced approach to offenders - The system should take a balanced approach to offenders, taking into account the nature of the crime, the need to hold offenders accountable, the public interest in offender rehabilitation and the offender's financial means. For example, balancing appropriate compensation to a victim with circumstances of the offender and the needs of any dependants.*

VALS is pleased to see an increased consideration of offender rehabilitation as potentially being in the public interest.

- d) *Non-traumatising - The system should avoid re-traumatisation of victims. For example, ensuring the process is clear and is not distressing.*

VALS is supportive of principles that aim to protect victims from unnecessary harm brought about by justice systems. Traumatisation of members of the Aboriginal and Torres Strait Islander community at the hands of any arm of the justice system should be actively prevented.

- e) *Specific - The system should have the capacity to respond to specific forms of victimisation. For example, providing assistance for additional home security measures where the offender previously lived with the victim.*

VALS argues that the capacity to respond appropriately to specific forms of victimisation relies on the ability of VOCAT to retain a measured level of flexibility in addition to a thorough understanding and appreciation of the victim's (and offender's) familial, social, cultural and economical circumstances (past and present). While aiming

to be specific, the system should simultaneously and symbiotically operate as holistic in its dealings and understandings.

- f) *Financially viable - The system should be financially sustainable and provide assistance that is both specific to being a victim of crime and otherwise unavailable through other means. For example, ensuring eligibility for the scheme is sufficiently broad without making the scheme financially prohibitive.*

VALS believes that the current system's eligibility criteria should maintain its current breadth. Victoria is fortunate to have a compensation scheme that has trended towards a wider eligibility criteria. For example, the Victorian system has compensation available to secondary victims, whereas other jurisdictions such as the Australian Capital Territory, South Australia and Western Australia do not.

VALS is aware that the Koori VOCAT List is resource intensive, however there is good reason for this. Time, money and resources to address Aboriginal and Torres Strait Islander victims of crime issues are required and deserving due of the complex needs inherent in many of their situations. This is discussed further in later sections of this submission.

- g) *Timely and responsive - The victim compensation system should provide a timely response. In particular, it should have the capacity to respond quickly where urgent assistance is necessary. For example, an urgent award may be needed for safety reasons, and early access to medical and other services may aid rehabilitation.*

The timely response of the victim compensation scheme is the fundamental to its effectiveness in reducing or redressing harm. A timely response for many victims of crime is dependent on the system's accessibility.

Other principles underpinning the operation of VOCAT should be aligned with:

- Convention on the Elimination of All Forms of Discrimination;
- Declaration on the Rights of Indigenous Peoples;
- Convention on the Rights of the Child;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social, and Cultural Rights;
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- Declaration on the Elimination of Violence Against Women; and
- Convention on the Elimination of All forms of Discrimination against Women.

## State funded victim assistance

*Apart from hearings, are there other ways of acknowledging a victim's experience of crime?*

VALS' Civil Law Solicitor recognises that the role of the State in acknowledging what has happened to victims is naturally limited. Furthermore, Aboriginal and Torres Strait Islander people are, in his experience, often reeling from the horror of crime and its obvious effects on families. Simply acknowledging that a crime has happened does not always go far to assist the victim and their families. This is often so in VOCAT cases where clients have been the victim of rape, kidnapping and serious assault and they need a great deal of assistance to see an impact on their quality of life. Therefore, other ways of acknowledging victim's experience of crime may exist in the services and assistance attached to the hearings process.

While there may be symbolic benefit through the compensation scheme for some, for others it simply addresses the *financial* impacts of crime. Of course financial assistance is crucial to restoration, basic needs, empowerment, and safety. What follows however, in terms of services and ongoing support, is where there is further opportunity for acknowledgement and healing.

*If an offender is notified of a hearing and wishes to attend, how can their right to a fair hearing be respected while avoiding trauma to the victim?*

It was made very clear by VALS' Civil Law Solicitor that it should be ensured that no interference be made in regards to the offender's right to attend a hearing. In the criminal courts, the offender rarely gets to actively participate, so it can be a good thing for justice, in theory, to have the offender present in a VOCAT setting. In reality, however, offenders rarely attend VOCAT hearings.

It is noted that a key tenant of victims of crime compensation schemes is that they operate in a way that is victim centred (Dawson & Zanda 1999 in Barrett Meyering 2010). This principle needs to be kept in focus when considering any reform to the compensation scheme. Barrett Meyering (2010) highlights, for example, how debt recovery policies may result in greater offender involvement in compensation proceedings and in turn jeopardise the victim centeredness of VOCAT.

Protecting offenders' rights to attend the hearing whilst simultaneously avoiding trauma to the victim can be attempted through measures such as the following:

- Utilising facilities available to the Victorian compensation scheme, such as video link/closed circuit television. In order to preserve the victim centred nature of proceedings, which party to the matter attends the Tribunal and which party appears via closed circuit television should remain the victim's decision to some degree.

Some victims may prefer to be physically present at the hearing and have the alleged offender appearing via closed circuit television, therefore preserving the hearing as a place for the victim to be heard. Alternatively, the facility of the victim to appear via closed circuit television should be considered, for example where a victim does not want the alleged perpetrator of the violent crime to have acute knowledge of their whereabouts. Ultimately, the victim should reserve some measure of decision making in relation to this.

VALS notes that it remains to be seen in research data whether these measures are adequate in addressing the concerns of victims.

- Fully informing victims of the alleged offender's right to attend the hearing, the likelihood that they will attend, and their (the victim's) available options in the hearing process to protect their safety.
- The Tribunal's ongoing commitment to ensuring that the presence of the alleged offender at a hearing, in whatever form, has the greatest success of *not* becoming adversarial in nature.

*Given VOCAT's focus on the needs of victims, do Magistrates sitting as VOCAT Tribunal members require particular training when conducting hearings?*

VALS argues that ongoing cultural awareness and competency training should be part of any training for magistrates sitting as a VOCAT Tribunal member. This is critical in the light of the fact that risk factors for victimisation are heavily related to systemic disadvantages and that Aboriginal and Torres Strait Islanders have been recorded as being three times more likely to become victims of crime as non-Aboriginal and Torres Strait Islanders.<sup>3</sup> This level of victimisation needs to be appropriately addressed in the knowledge that Aboriginal and Torres Strait Islander people (especially young Aboriginal and Torres Strait Islander people) often experience repeat victimisation and are at risk of becoming offenders themselves.<sup>4</sup>

### **Offender funded compensation orders**

*Should the court consider ordering the offender to pay the VOCAT amount to the state?*

In the simplest of terms, a victim should not be disadvantaged in the award available to them by the State as a product of the offender's means. If the offender has substantial means, it is reasonable that these means remain available to the victim through the avenue of a civil claim. Similarly it is reasonable that if the offender is of substantial means, the state consider seeking repayment of awards made to victims. However, VALS' Civil Solicitor is cautious of any measure that ties the VOCAT process to court orders.

VALS recognises, as does the Discussion Paper, that the offender typically has very little or no money and therefore the success of any enforcement action against offenders is unlikely. Furthermore, if amounts were recoverable, not only it is likely that the amount would be insufficient to recover a significant measure of the costs, but there is always the danger that the offender may not be the only one that becomes affected. The offender may have dependents, child payments, or may seek the money from another party and therefore victimisation of more people occurs. There may also be detrimental effects on the offender's ability to access rehabilitative services.

VALS would be interested in an investigation into the option of the State instituting proceedings to recover amounts from the offender *after* a victim has received payment from the State-funded system *if* there is likelihood that the offender could pay back to the State any significant amount. This operation should always be weighed against the likelihood of offender rehabilitation efforts and if further people (ie: dependents/relations) may be negatively affected or victimised themselves. However, it is highly questionable whether the financial resources needed to set up such an

<sup>3</sup> Australian Bureau of Statistics (2002) *Australian Bureau of Statistics National Aboriginal and Torres Strait Islander Social Survey 2002* [online] [www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0](http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0) [accessed 10 Feb 09].

<sup>4</sup> Victoria Department of Justice (2009) *Young Victims Strategy: Helping young victims of crime get justice, get help, and get on with their lives*. Melbourne: Victims Support Agency, Victoria Department of Justice.

operation, man and execute its function, would be justified by the amount of the repayment obtained as a result (if any). In this case, the seeking of repayment from the offender would only act as a double punishment to the offender, and would unlikely operate to financially benefit the State.

### **Some ideas for reform**

*What are the main advantages of the VOCAT system? What are the main disadvantages?*

There are two main advantages of the VOCAT system that aim to address Aboriginal and Torres Strait Islander access to justice. These are the Koori VOCAT List and the Aboriginal Liaison Officer (registrar) as the central intake person in the VOCAT registry to liaise between the Tribunal and Aboriginal and Torres Strait Islander applicants.

The VOCAT Coordinating Committee of the Magistrates' Court's consideration back in 2004 of the adequacy of the Tribunal's response to Aboriginal and Torres Strait Islander applicants marked an important turning point. The Koori VOCAT List is a product of Tribunal's strong recognition of the historically fractured relationship between Aboriginal and Torres Strait Islander people and their experiences with all aspects of the justice system.

It is encouraging to see that the consistent use of less formal and more inclusive procedures, as seen and acknowledged in the Koori Court, were decided to be utilised. There is room for the Tribunal to respond with flexibility to the particular circumstances of the Aboriginal and Torres Strait Islander applicant.

It is also noted that the Victims Support Agency (VSA) created a position for a Koori worker that expanded into two positions as part of an 'Indigenous Victims of Crime Support Strategy'. There is a lack of readily available public information on the Indigenous Victims of Crime Support Strategy itself, or its progress.

In terms of getting compensation into the hands of victims of crime, VALS' Civil Law Solicitor experiences VOCAT as being in many ways more effective than civil action. This is mostly because the victim does not have to rely on the offender's income.

A common disadvantage to VOCAT is time delays. Another serious disadvantage mainly for women, especially Aboriginal and Torres Strait Islander women, is the potential for having to face their perpetrator at a hearing. This not only has the potential to undermine any therapeutic benefit the Tribunal may have to offer, but the victim can also be traumatised by an increased likelihood of an adversarial encounter. In the case of domestic violence victims, their perpetrator of violence is known to them and there may still be in contact with them (for example if they have children together). Therefore there exists the potential for retaliation and/or harassment. Women may be concerned that a recovery order will result in a new incident or an escalation of violence, or that retribution in other forms may occur, such as the withdrawal of child support (Barrett Meyering 2010).

*What improvements might be made to Victoria's model for state-funded victim compensation?*

VALS' Civil Law Solicitor has suggested that one potential improvement could be to change the location of some VOCAT hearings. For example, what would essentially change if a hearing was held in Mildura at an Aboriginal Co-operative (or equivalent) if it suited the victim and was in the

victim's best interests? Essentially, in terms of the operation hearing, simply the venue would change.

Having a VOCAT hearing at a nearby and familiar location may be just as disadvantageous for one person as advantageous for another. For some, issues around stigmatisation (especially in smaller towns) and increased fear from engaging with VOCAT in a local area that may be near to, or associated with, the violent crime against them could be a significant concern. Others might be more inclined to attend a place that is what they know and are comfortable with. In addition, a co-operative would be useful in terms of services and assistance as many are already linked in and connected with local supports and can provide culturally appropriate referrals etc.

*Should Victoria consider payments to victims based on the offence done rather than requiring proof of injury or other adverse effects?*

VALS is concerned with victim compensation being limited to the context of the existing criminal law frameworks in Victoria. While it is recognised that compensation for victims of crime is limited to criminal acts of violence against the person, VALS sees dangers in the capacity for the system to compensate victims being restrained by what is considered as a criminal act from one State's legislation to the next.

For example, Isobelle Barrett Meyering (2010) provides the example that the capacity of schemes to compensate victims of domestic violence varies according to what forms of abuse are recognised as criminal acts under various State and Territory legislation. Therefore, in practice this means that compensation in these circumstances is primarily available to women who experience physical and sexual violence or stalking, rather than verbal, emotional or financial abuse.

VALS argues that the payment to the victim should not be inextricably tied to the criminal offence alone. VALS is concerned that this will create artificial barriers around assessors and Tribunal judiciary's decision making process. VOCAT should remain victim oriented and victim focused, and as such should preserve a measure of flexibility in order to consider the circumstance and need of each applicant.

With that being said, VALS is equally mindful of the burden on victims through requirements to provide proof of injury or other adverse effects. However, we suggest that payments to victims need not be considered in terms of the either/or nature of this submission template's question, i.e. payments to victims should be considered on the basis of the offence done *or/in place of* requiring proof of injury or other adverse effects. VALS advocates that VOCAT ensure the flexibility to consider the offence done and the adverse effects on a case-by-case basis and remains cautious of payments being tied to any blanket, one-size-fits-all application of justice.

*What are your comments on the current category caps and global caps in relation to the different categories of victims?*

It is the experience of VALS' Civil Law Solicitor that the category caps are quite low, for example \$1,300 for grievous bodily harm. While the caps are low, it is acknowledged that the Tribunal has the discretion to be a little flexible in the use of the exceptional circumstances payments.

*Would changes to the organisational structure of VOCAT, such as centralised administration of applications, enhance its operation and service to victims? How could this system be improved or expanded?*

VALS' Civil Law Solicitor presently has mainly positive experiences with the current organisational arrangements for the Koori VOCAT List. This is especially the case of the registrar dedicated solely to matters involving Aboriginal and Torres Strait Islander victims. It is envisaged that further changes along the same lines of specialisation and enhancement of operation and service, such as dedicated registrars for other groups that may have difficulty in accessing VOCAT be considered.

*How can the system be improved or expanded?*

One of the major criticisms VALS' Civil Law Solicitor has in regards to current dealings with VOCAT is that the process can often take too long. A current client has to wait 6 months for resolution of their VOCAT matter. In this particular case, the client has mental health issues that are being exacerbated by this waiting time.

*Could a database of compensation order cases assist judges with these applications and promote consistency?*

There is concern that a database of is not the best way to promote consistency. VALS' Civil Law Solicitor feels it could potentially complicate things. Furthermore, it is felt that Judges must be allowed to continue to exercise their discretion in making orders. VALS suggests the answer to consistency may rest with research into the reasons for inconsistency, education based on these findings of such research, and the availability guidelines or the like.

*Would it be reasonable for a person who pleads guilty or is found guilty or convicted to be required to lodge with the court a sworn statement of financial circumstances including assets and financial obligations?*

Demanding the offender supply such a statement is a difficult proposition. The merging of criminal and civil jurisdictions is not a good idea in this instance. It also has serious practical implications such as presenting a weighty burden on lawyers and increasing the likelihood of individuals being liable for perjury.

*Do you think that VOCAT material should be used by the court to assist in the consideration of a compensation order at the time of conviction?*

No, the material should not be used in this way.

*Should therapeutic and restorative justice processes play a greater role within the victim compensation system?*

Any further services available under VOCAT are welcomed. If VOCAT was tied in a more meaningful way to other services, it can only help victims. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Article 7: Access to justice and fair treatment) states:

*Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary practice or indigenous practices, should be utilised where appropriate to facilitate conciliation and redress for victims.<sup>5</sup>*

Drawing on VALS' submission to the Victim Support Agency in response to the 'Victims' Charter Community Consultation Paper' (sent 7 December 2005) it is argued, inter alia, that restorative justice has the potential to benefit the victim, and in turn the community, by:

- giving victims the opportunity to have a say, as a space is created for victims to voice their opinion, such as in the Koori Court. Empowerment means listening to a victim, not just giving them information.
- having the potential to be a healing experience which ultimately enables a victim to get on with their lives (or in rare cases reconcile with the offender, although it should not be an expectation that this will occur).
- having the potential to prevent victims in turn becoming offenders. Within the Aboriginal and Torres Strait Islander community there is a high rate of victims becoming offenders, such as the rate of sexual abuse among young girls involved with the criminal justice system is between 70%-80%.<sup>6</sup> Given the rate at which victims go on to be offenders themselves, if victims are satisfied by a restorative justice approach and their needs are met the possibility that they will go on to reoffend is potentially reduced
- having the potential to avoid re-victimisation by the process. This contrasts with the criminal justice approach which is criticised as having a re-victimising effect. For instance, the fact that the Koori Court is more flexible than a mainstream court reduces the potential of re-victimisation. Having said this, there are risks of revictimisation via a restorative justice approach and this risk needs to be monitored.
- empowering the Aboriginal and Torres Strait Islander community, such as Aboriginal Elders and Respected Persons who are involved in the Koori Court. The involvement of the community in turn makes the process more meaningful or relevant for the Aboriginal and Torres Strait Islanders than a mainstream process.
- being a model that, whilst not providing a panacea for all social problems facing Aboriginal and Torres Strait Islander communities, has highly encouraging early signs
- Having the potential to address the concern of Tom Calma that we need to take a broad approach to victimization and address systemic issues. Calma stressed the importance of recognition that:
  - crime victimisation feeds a vicious cycle in communities. The problems in the community are as much a result of exposure to violence and crime, as drivers of it. Crime victimization feeds into a broader pattern of trauma experienced by many Aboriginal and Torres Strait Islander people

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<sup>5</sup> Adopted by General Assembly resolution 40/34 of 29 November 1985 [online] [www2.ohchr.org/english/law/pdf/victims.pdf](http://www2.ohchr.org/english/law/pdf/victims.pdf) accessed 17 February 2010

<sup>6</sup> Thorpe L, Solomon R, Dimopoulos M (2004) 'From Shame to Pride: Access to Sexual Assault Services for Indigenous People' Elizabeth Hoffman House and CASA house [online] [www.aifs.gov.au/acssa/docs/FromShameToPride.pdf](http://www.aifs.gov.au/acssa/docs/FromShameToPride.pdf)

- the high levels of victimisation of Aboriginal and Torres Strait Islanders by Aboriginal and Torres Strait Islanders reflect a real crisis - a breakdown of community and family structures and a deterioration of traditional, customary law and practices<sup>7</sup>

The same VALS submission suggested a Koori friendly VOCAT might be more equipped to deal with the following issues associated with Aboriginal and Torres Strait Islander victimization by addressing the following issues:

- The number of Aboriginal and Torres Strait Islander applications to the VOCAT is relatively low and this is inconsistent with what we know about the incidence of family violence in the Aboriginal and Torres Strait Islander community. This suggests there are barriers in the way for Aboriginal and Torres Strait Islanders to access VOCAT
- a barrier arises for Aboriginal and Torres Strait Islanders to receive compensation due to their reluctance to report their victim status to police or seek assistance, such as with a mainstream service provider.
- a barrier arises for Aboriginal and Torres Strait Islanders, who have criminal records to receive compensation. This issues relates to the trend of victimization leading to offending. In the Aboriginal and Torres Strait Islander community sometimes the separation between 'victim' and 'offender' is not clear at all. In reality many Aboriginal and Torres Strait Islander people, both men and women, in the criminal justice system are both offenders and victims.<sup>8</sup> VALS notes that the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sections on Compensation (12-13) does not limit who compensation is available to.

*Should a victim compensation levy be imposed on offenders to assist with funding victim compensation? Of so, for what categories or types of offences?*

If it replaces a fine that would otherwise be imposed, then it could be applied effectively.

*If compensation is considered in all cases or as part of the sentencing process, could this discourage early pleas of guilt?*

Yes, this is a strong possibility.

*Can compensation form an integral part of the sentencing process without appearing to be a double punishment?*

No. Compensation will most likely always be seen as a form of double punishment.

<sup>7</sup> Calma T (2005) 'Addressing the needs of Aboriginal and Torres Strait Islander peoples as the victims of crime' presented at the *A Peaceful Coexistence - Victims Rights in a Human Rights Framework Conference* Canberra, 16 November 2005 [online] [www.humanrights.gov.au/about/media/speeches/social\\_justice/victims\\_of\\_crime\\_speech.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/victims_of_crime_speech.html) [accessed 17 February 2010].

<sup>8</sup> *ibid*

## PART TWO: FURTHER CONSIDERATIONS

### Aboriginal and Torres Strait Islander access to justice as victims of crime

#### Data

Estimates of victimisation are usually determined via reports to police and self-report victimisation survey data. Due to many crimes not being reported to police estimates of victimisation based on police data are likely to represent lower levels of victimisation within the community than what in fact exist.

There is also the common problem of police data failing to capture in any consistent manner the mapping of Aboriginal and Torres Strait Islander status of victims. This can stem not only from a failure of systems of data collection to require this information, but may also result from Aboriginal and Torres Strait Islander people being reluctant to give up certain personal information. This could be due to a large variety of factors commonly resulting from some form of alienation from the justice system and fear of stigmatisation. Estimates on the rates of victimisation also vary depending on the type of violence and the manner in which the information about the violence is collected.

Although the statistics available to us are imperfect (as presented in the introduction and the paragraphs to follow), they are sufficient to demonstrate the disproportionate experience of violence in Aboriginal and Torres Strait Islander communities and the traumatic impact on Aboriginal and Torres Strait Islander people.

#### The unique and distinct experience of Aboriginal and Torres Strait Islander People

It is important to underscore the unique and distinct elements of the Aboriginal and Torres Strait Islander experience as a victim of crime. In order to adequately understand the nature of violent victimisation of Aboriginal and Torres Strait Islander people, a myriad of factors must be taken into account that reveal an often blurred line between victim and offender.

*Violence both perpetrated and experienced by Indigenous people cannot be dissociated from broader contributing social, cultural, historical and economic factors. These include the experience of colonisation, the disintegration of traditional laws and community norms, disruption of family and kinship ties, poverty, unemployment, personal stressors and multiple disadvantage, the experience of forced removal from families and substance abuse (Holder 2009:11).*

For example, risk factors for violent victimisation of members of the Aboriginal and Torres Strait Islander community are<sup>9</sup>:

- **Sociodemographic** (age, gender, relationship to the offender)
  - The risks of violent victimisation are greatest among young people in their mid-teens to mid-twenties, with the risk of victimisation decreasing with age. For Aboriginal and Torres Strait Islander females, peak rates for hospitalisation for assault-related injuries occur at ages 25 to 34, while for Aboriginal and Torres Strait Islander males

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<sup>9</sup> List content derived from Bryant (2009:2)

the peak is 30 to 39 (Helps and Harrison 2006 in Bryant 2009). The differences in the above statistics (as well as those relating to rates relating to victims of homicide) reflects a much younger age profile of the Aboriginal and Torres Strait Islander population who are at risk compared to the non Aboriginal and Torres Strait Islander population.

- Both the risk of domestic violence and severity of violence may increase with age with the highest rates of serious physical violence victimisation in Aboriginal and Torres Strait Islander populations correlating with age-related peaks in risky alcohol consumption (Australian Institute of Health and Welfare 2008).
- As in the non-Aboriginal and Torres Strait Islander population, violence in Aboriginal and Torres Strait Islander populations is perpetrated by individuals known to the victim.
- **Individual, family and community related** (includes alcohol abuse and housing)
- **Historical** (removal from family and contact with the criminal justice system)
  - Indigenous Australians charged with a criminal offence prior to the age of 17 years are approximately twice as likely to report being a victim of threatened or physical violence as those not charged with a criminal offence in childhood (ABS 2002 in Bryant 2009).
- **Resource related** (education, employment and location)
  - Violent victimisation for Indigenous people is associated with greater housing mobility (Snowball & Weatherburn 2007 in Bryant 2009).
  - Rates of hospitalisation for assault are higher in remote and very remote regions (Helps & Harrison 2006 in Bryant 2009). 'Although it is possible that violence in remote areas is inherently more severe, it cannot be discounted that other factors, such as regional differences in access to, and use of health care services, impact on such statistics. Perceptions of violence also tend to be greater in remote areas' (Bryant 2009:4).

In addition to the considerations above, hurdles that specifically affect Aboriginal and Torres Strait Islanders in translating their rights as victims of violent crime into practice result from:

- fear of reprisal and/or shame (especially for victims of domestic/sexual abuse);
- fear of being disbelieved;
- fear that nothing will be done;
- a lack of access to legal advice/representation; and
- a lack of knowledge about their rights and entitlements and/or absence of knowledge of the existence and availability of a compensation scheme.

With the aforementioned in mind, it is no surprise that Aboriginal and Torres Strait Islander victims are less likely to report crimes to police than non-Aboriginal and Torres Strait Islander victims (Fitzgerald & Weatherburn 2001 in Holding 2009). The table below illustrates some factors that are

generally known to increase or decrease the willingness of victims of violence to report (adapted from Lievore 2003 in Holding 2009).

Reason for reporting	Reason for non-reporting	
	Personal barriers	Legal system
Should be reported – serious offence	Too trivial or inappropriate to report to police	Police would not or could not do anything
To ensure personal safety and future protection from the offender	Dealt with it themselves, a private matter	Police would not think the incident was serious enough
To stop the offence being repeated or the offender harming others	Not a “real” crime	Fear of not being believed by police
To make the offender responsible for his or her actions	Not clear that harm was intended	Fear of being treated hostilely by justice system
Retribution	Shame or embarrassment	Fear/dislike police
To get help	Did not want family or others to know	Lack of proof the incident happened
To regain a sense of control	Fear of reprisal by offender	Did not know how to report
To gain compensation	Self-blame or blamed by others for the attack/incident	Fear of legal process
	Desire to protect offender, relationship or children.	

Barrett Meyering (2010) argues that the greatest impediment to accessing victim compensation falls before women as a result of the legislative requirements of victim compensation schemes themselves. She highlights what critics argue to be a problematic premise of victim compensation schemes, as in criminal law, that is a ‘stranger violence model’.

This model assumes that the victim does not know the assailant and that the violence is a random act and that the victim is not dependent on the assailant (Whitney 1997 in Barrett Meyering 2010). It is also suggested that Aboriginal and Torres Strait Islander women’s help-seeking from the justice system is complicated by their profound feelings of responsibility for their families and communities (Holder 2009).

VALS acknowledges that reforms have taken place in order to make compensation more accessible to domestic violence victims. However legislative requirements such as definitions of violent crime and injury, reporting requirements and time limitations exist as areas for potential barriers.

Back in the early planning stages of the Koori VOCAT List, it was apparent that there was very little awareness of the Tribunal or entitlement of awards of assistance by the Aboriginal and Torres Strait Islander community (Wakeling 2007). In addition, those who were aware may feel a reluctance to engage with a formal court process.

A further disincentive to participate in the VOCAT system is identified broadly as:

- The requirement that the relevant criminal act and offender be reported to the police;
- That there be cooperation with police with any consequent investigation;
- The potential that the Tribunal would notify an alleged offender of a right to participate in the proceedings; and
- The requirement that the Tribunal have regard to the ‘character or behaviour’, including prior criminal offending, of the applicant in determining eligibility (Wakeling 2007).

VOCAT Supervising Magistrate Susan Wakeling (2007) identifies that a significant issue in accessing financial assistance and a symbolic expression by the State of the community’s sympathy and condolence and recognition of their experience as a victim of crime is available subject to their participation and cooperation with a police investigation.

It is also significant that a determination on the eligibility for compensation is subject to past conduct and character to the scrutiny of a judicial officer. ‘It is acknowledged by the Tribunal that the legal system has been experienced by many [I]ndigenous Australians as hostile and to be avoided’ (Wakeling 2007:6).

#### Victim as offender and offender as victim

Aboriginal and Torres Strait Islander people are over-represented in the criminal justice system as both victim *and* offender, and outcomes are getting worse over time (Steering Committee for the Review of Government Service Provision, SCRGSP 2009). In Victoria in 2007-2008 Aboriginal and Torres Strait Islander people were 4.5 times as likely to be a victim of domestic violence related assault as non-Aboriginal and Torres Strait Islander people (Steering Committee for the Review of Government Service Provision 2009). Furthermore, Aboriginal and Torres Strait Islander females experienced a rate of domestic violence related assault five times as high as the rate of non-Aboriginal and Torres Strait Islander females in the same period of time (SCRGSP 2009).

#### **Young victims of crime**

VALS believes the way in which VOCAT engages young victims of crime is an under researched area. It is noted that the Department of Justice has undertaken a *Young Victims Strategy* (2009) that outlines the common fears found for young people engaging VOCAT and some potential for increasing awareness. However VALS believes this is the beginning of the conversation about young victims of crime, and critical access issues need to be further investigated and addressed.

In reforming the way that VOCAT considers the engagement of young victims of crime, the following should form the underlying principles and guide operations. The United Nation’s

Economic and Social Council's (ECOSOC) *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* includes<sup>10</sup>, inter alia:

- *Special considerations*
  - recognition that children are vulnerable and require special protection appropriate to their age, level of maturity and individual special needs (article 7 b);
  - recognition that girls are particularly vulnerable and may face discrimination at all stages of the justice system (article 7 c);
  - that that every effort must be made to prevent victimisation of children, including, among other things, through the implementation of Guidelines for the Prevention of Crime (article 7 d);
  - awareness and understanding that children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses (article 7 e);
  - the Convention on the Rights of the Child that sets forth requirements and principles to secure effective recognition of the rights of children and under the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* sets forth principles to provide victims with the right to information, participation, protection, reparation and assistance (article 7f);
- *Principles*
  - non-discrimination (article 8 b);
  - the best interests of the child, considering protection, harmonious development and the right to participation (article 8 c: i-iii);
- *The right to be protected from discrimination*
  - that the justice process and support for services available to child victims and witnesses and their families should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socio-economic condition etc. Professionals should be trained and educated about such differences (Article 16);
  - claims that age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as capable and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone (as long as his or her maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance (Article 18);

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<sup>10</sup> ECOSOC Resolution 2005/20 of 22 July 2005, as at [www.un.org/en/pseataaskforce/docs/guidelines\\_on\\_justice\\_in\\_matters\\_involving\\_child\\_victims\\_and.pdf](http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf) [accessed 17 February 2010].

- *The right to effective assistance*
  - that child victims should have access to assistance provided by professionals who have received relevant training. Assistance may take the form of financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for a child's reintegration. All such assistance should address the child's needs in enabling them to participate effectively at all stages of the justice system (Article 22);
- *The right to be protected from hardship during the justice process*
  - how professionals should take measures to prevent hardship during the detection, investigation, and prosecution process in order to ensure that the best interests and dignity of child victims are respected (Article 29);
  - that child victims should be provided with certainty about the process, with clear expectations regarding their participation (Article 30b);
  - the adoption of Child-sensitive procedures where interdisciplinary services for child victims are integrated at the same location, modified court environments take child victims into account, and hearings scheduled at times appropriate to the age and maturity of the child (Article 30d);
- *The right to safety*
  - the suggestion that professionals should be trained in recognising and preventing intimidation, threats and harm to child victims. Safeguards to ensure the safety of the child include measure such as avoiding direct contact between child victim and alleged perpetrator at any point of the justice process (Article 34e);
- *The right to reparation*
  - that wherever possible, child victims should receive reparation in order to achieve full redress, reintegration and recovery (Article 35); and
  - the acknowledgement that reparation proceedings should be combined with informal and community justice procedures such as restorative justice (Article 36);

### **Administrative Vs Judicial Model**

In simple terms, the advantages of an administrative model, such as reduced legal cost and faster decisions, are highly appealing. This is especially so for those who may find a Tribunal hearing particularly daunting, or who's matter does not require Tribunal consideration. However, the preservation of judicial hearings is crucial to assessing and determining compensation claims that require experienced decision-makers, and to satisfy the need of some victims of crime for particular purposes. For these reasons, VALS is in the most part supportive of the VOCAT system as it now stands in that it is a mixture of the administrative and judicial models.

Whatever shape and form the future organisation of VOCAT takes, it remains imperative that the victim reserves a *choice* when it comes to how and where their matter is dealt with. The recent

Victims of Crime Compensation Review Stakeholder Meeting (Victoria Department of Justice 5 February 2010) heard a number of parties acknowledge that applications to VOCAT are on the increase and this is resulting in a strain on existing levels of resources. It was suggested that the enhancement of the administrative arm of VOCAT operations, while preserving the choice of the applicant to have their application appear before a Magistrate, could be one way that this current strain could be alleviated.

This could be achieved in a number of ways, such as Magistrates passing on/increasing decision making powers to certain judicial registrars for certain on paper applications. For example, it was suggested that there could be increased decision making powers for things such as certain interim orders where urgent assistance is required. While it is acknowledged that Magistrates are likely to have a far better understanding of the victims situation through a face-to-face hearing, their expertise may not always be required in all applications. VALS is supportive of further exploration into the idea of increasing certain decision making powers for particular judicial registrars and would advocate for the appointment of an Aboriginal and Torres Strait Islander position to be made a priority consideration.

That being said, VALS is wary of systems that determine applications ‘on the papers’ using Government assessors or Commissioners (such as utilised in New South Wales, the Northern Territory, Queensland, Tasmania and Western Australia). It could prove problematic where systems evolve to position decision makers for victims of crime compensation applications that simply operate as “administrators”. It is not enough to provide victims the opportunity to appeal a decision in such situations. An appropriate decision must be ensured in all ways possible in the first instance.

It is noted that Tasmanian applicants have the option of attending a private oral hearing, described on the Victims Support Service Website as an ‘opportunity to tell your story’ (Department of Justice 2009 in Barrett Meyering 2010). VALS acknowledges the potential symbolic and healing benefits through this mechanism but questions the practical value in this operation (in terms of having an effect of the kind/amount of assistance granted to an applicant).

We reiterate that encouragement towards certain extensions in the administrative arm of VOCAT is in no way suggesting that the access to a judicial hearing be reduced. On the contrary, many highly complex victims of crime compensation applications made members of the Aboriginal and Torres Strait Islander community can only be appropriately considered and resolved through the availability of the judicial route, specifically the Koori VOCAT list.

## CONCLUSION

Risk factors for violent victimisation of members of the Aboriginal and Torres Strait Islander community are complex and many. And although the statistics are imperfect, they are sufficient to demonstrate the disproportionate experience of violence in Aboriginal and Torres Strait Islander communities. VALS argues that the capacity to respond appropriately to specific forms of victimisation relies on the ability of VOCAT to retain a measured level of flexibility in addition to a thorough understanding and appreciation of the victim’s (and offender’s) familial, social, cultural and economical circumstances (past and present). VALS believes this is being somewhat achieved through the Koori VOCAT List. Some main points this submission wishes the current review to take on board can be summarised as follows:

- Often Aboriginal and Torres Strait Islander people, both men and women, in the criminal justice system are offenders *and* victims;

- There should be no interference made in regards to the offender's right to attend a hearing;
- A victim should not be disadvantaged in the award available to them by the State as a product of the offender's means;
- The offender typically has very little or no money and therefore the success of any enforcement action against offenders is unlikely;
- VALS acknowledges the Koori VOCAT List as a product of the Tribunal's strong recognition of the historically fractured relationship between Aboriginal and Torres Strait Islander people and their experiences with all aspects of the justice system.
- There is a need for publically available information in the Indigenous Victims of Crime Support Strategy and the Koori worker position created by the VSA;
- There is potential for investigation into alternative venues for VOCAT hearings;
- VALS is concerned with victim compensation being limited to the context of the existing criminal law frameworks in Victoria. While it is recognised that compensation for victims of crime is limited to criminal acts of violence against the person, VALS sees dangers in the capacity for the system to compensate victims being restrained by what is considered as a criminal act from one state's legislation to the next;
- VALS acknowledges that while the compensation caps are low, the Tribunal thankfully has the discretion to be a little flexible in the use of the exceptional circumstances payments.
- There is concern that a database of is not the best way to promote consistency. VALS' Civil Law Solicitor feels it could potentially complicate things.
- Demanding the offender supply a sworn statement of financial circumstances is a difficult proposition. The merging of criminal and civil jurisdictions is not a good idea in this instance.
- Restorative justice has the potential to benefit the victim and the community. The use of restorative justice measures in a VOCAT setting would have to be considered very carefully in order to not re-traumatise the victim. It should also be noted that there are many different understandings of what is meant by restorative justice. VALS warns that restorative justice measures are not by their nature culturally appropriate. VALS does, however, encourage the investigation into how some restorative justice measures could be utilised in a VOCAT setting.
- There is a strong possibility that if compensation is considered in the sentencing process, that this could discourage early pleas of guilt;
- It is unlikely that compensation as part of the sentencing process can exist without being seen as a form of double punishment;

- VALS acknowledges that reforms have taken place in order to make compensation more accessible to domestic violence victims. However legislative requirements such as definitions of violent crime and injury, reporting requirements and time limitations exist as areas for potential barriers
- Disincentives to participate in the VOCAT system are identified broadly as:
  - The requirement that the relevant criminal act and offender be reported to the police;
  - That there be cooperation with police with any consequent investigation;
  - The potential that the Tribunal would notify an alleged offender of a right to participate in the proceedings; and
  - The requirement that the Tribunal have regard to the ‘character or behaviour’, including prior criminal offending, of the applicant in determining eligibility (Wakeling 2007);
- The way in which VOCAT engages young victims of crime is an under researched area;
- VALS is in the most part supportive of the VOCAT system as it now stands in that it is a mixture of the administrative and judicial models.
- Whatever shape and form the future organisation of VOCAT takes, it remains imperative that the victim reserves a *choice* when it comes to how and where their matter is dealt with; and
- VALS is supportive of further exploration into the idea of increasing certain decision making powers for particular judicial registrars and would advocate for the appointment of an Aboriginal and Torres Strait Islander position to be made a priority consideration.

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