Victorian Aboriginal Legal Service

Victorian Law Reform Commission
Victims of Crime and Assistance Tribunal

Submission of the Victorian Aboriginal Legal Service

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Background to the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service ('**VALS**') is an Aboriginal Community Controlled Organisation, providing holistic legal and justice services to Aboriginal people in Victoria. It was established in 1972 by committee, and incorporated in 1975. VALS is committed to caring for the safety and psychological well-being of clients, their families and communities, and to respecting the cultural diversity, values and beliefs of clients. VALS' vision is to ensure Aboriginal and Torres Strait Islander people in Victoria are treated with true justice before the law, their human rights are respected, and that they have the choice to live a life of the quality they wish.

VALS operates in a number of strategic forums that help to inform and drive initiatives that support Aboriginal and Torres Strait Islander people in their engagement with the justice system in Victoria. VALS has strong working relationships with the other five peak Aboriginal Community Controlled Organisations in Victoria and regularly supports clients to engage in services delivered by its sister organisations. VALS' legal practice spans across Victoria, and operates in the areas of criminal, civil and family law (including child protection and family violence).

VALS' 24 hour support service is strengthened by the community-based role our client service officers play as the first point of contact when an Aboriginal or Torres Strait Islander person is taken into custody, through to the finalisation of legal proceedings. VALS' legal education program supports the building of knowledge and capacity within the community, enabling people to identify and seek help on personal issues before they become significant legal challenges.

VALS seeks to represent women, men and children who request assistance in their legal matters. In circumstances where VALS is unable to assist, we provide warm referrals to other suitable legal organisations, including Victoria Legal Aid, the Aboriginal Family Violence Prevention Legal Service, community legal centres and private practitioners, as appropriate.

Family violence as a barrier to VOCAT engagement

Domestic and family violence is a significant factor in the engagement of the victims of crime assistance regime by Aboriginal people. There are a variety of reasons as to why Aboriginal people are particularly vulnerable to the damage caused by domestic and family violence. The Aboriginal community is therefore particularly interested in any amendments to the victims of crime assistance regime that are intended to facilitate assistance to victims of domestic and family violence.

Reluctance to report

The continuing impact of the Stolen Generation means the reporting of family violence is particularly difficult for many victims of, or witnesses to, domestic and family violence. Aboriginal communities are acutely aware of the historically catastrophic impact Government policies have had on their families. This knowledge gives rise to a reluctance to disclose information that might put another

Aboriginal person in jail, break up a family unit, or put either the victim or perpetrator into conflict with their community. There is a significant lack of confidence in Aboriginal communities that the police and/or government welfare departments will respond to issues in a culturally sensitive and supportive manner. In particular, there is deep concern as to the ability of these agencies to keep children safe. As such, it is understandable that Aboriginal people are wary of making reports that, though they may decrease the risk of immediate harm, have the longer term effect of breaking up a family, putting children into out-of-home care, send someone into custody or render them homeless.

Culturally insensitive responses

Holistic and culturally sensitive support programs recognise that some domestic and family violence victims will not leave their family. There are reasons for this, particularly in relation to sibling, elder and intimate partner violence. Some of these factors are impacted by culturally specific issues, which can include the fear of exclusion, and isolation from family and community. Organisations that work with family violence victims must have an understanding of the cultural and historical issues that impact on Aboriginal families today.

It must be acknowledged that it may take a victim of domestic and family violence many attempts to leave a violent relationship, and that victims will not always act on the legal or other advice that is given to them. Similarly, it must be acknowledged that once an allegation of domestic or family violence is made, many victims will be reluctant to assist authorities in continuing investigations into the allegation. Alternatively, victims may allege an incident of domestic or family violence, and then later recant the allegation, depending on the response of the agency to which the report was made. As such, the cultural sensitivity and understanding of the victims of crime regime has a significant impact on whether Aboriginal victims will engage.

Child Protection

Family violence, often coupled with substance misuse, is one of the key contributors to the 1067 reports of child abuse or neglect in relation to Aboriginal children between 2012 and 2013. Often these reports of child abuse or neglect are substantiated at higher rates for Aboriginal children, leading to the child being removed from the home. For example, a 2014 inquiry conducted by the Commission for Children and Young People found that 88% of children reviewed were impacted by family violence and 87% were affected by a parent with alcohol or substance abuse issues.[1]

Aboriginal child removal is increasing at an alarming rate and Victoria's removal rate is now increasing faster than any other State or Territory in Australia. In Victoria, the number of Aboriginal children removed from their families and placed in out-of-home care increased by 98% between 2007-08 and 2013-14.[2] By contrast, the rate of increase for non-Aboriginal children over the same period was 45%. In twelve months, from June 2013 to June 2014, there was a 42% increase in

[1] Commission For Children And Young People, *Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria*, October 2016, page 10.
[2] Productivity Commission, *Report on government services: Volume F Community Services*, 2015, Table 15A.20 available at http://www.pc.gov.au/research/recurring/report-on-government-services/2015/community- services/child-protection/government-services-2015-volumef-chapter15.pdf

Victorian Aboriginal children taken into statutory care, the highest increase in the country for that period.[3]

The alarming rates of governmental intervention within Aboriginal families, and in particular the removal of children, act as a significant deterrent to disclosing family violence to Victoria Police or seeking the assistance of support services, such as the victims of crime assistance regime.

Homelessness

Aboriginal people are overrepresented as users of specialised homelessness services for all domestic and family violence clients, with around 24% identifying as Indigenous. Aboriginal domestic and family violence clients were more likely than non-Aboriginal clients to be female and living in a sole-parent household. Aboriginal clients experiencing domestic and family violence were also more likely to be children than non-Aboriginal clients, with 38% being under the age of 15[4].

Health

Violence has immediate effects on the physical, mental and behavioural health of families. The health consequences of violence can be immediate and acute, as well as long-lasting and chronic, and can include depression, self-harm, smoking, obesity and substance misuse. A 2004 study by VicHealth, which examined the health impacts of domestic violence, found that:

> *"Intimidate partner violence is all too common, has sever and persistent effects on women's physical and mental health and carries with it an enormous cost in terms of premature death and disability. Indeed, it is responsible for more preventable ill-health and premature death in Victorian women under the age of 45 that nay other of the well-known risk factors, including high blood pressure, obesity and smoking"*[5]

Other barriers to engagement with VOCAT

A number of factors beyond domestic and family violence impact the access and use by Aboriginal people of the victims of crime assistance regime.

Incarceration and criminalisation

The 1991 Report of the Royal Commission into Aboriginal Deaths in Custody ('**RCIADIC'**) acknowledged the long history of inequality and disadvantage experienced by Aboriginal peoples. It found that disadvantage in areas such as health, housing, education, employment and income were intrinsically linked to the overrepresentation of Aboriginal people in the criminal justice system.

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[3] Productivity Commission, *Report on government services: Volume F Community Services*, 2015, Table 15A.20 available at http://www.pc.gov.au/research/recurring/report-on-government-services/2015/community- services/child-protection/government-services-2015-volumef-chapter15.pdf

[4] http://www.aihw.gov.au/homelessness/domestic-violence-and-homelessness/intersection/

[5] VicHealth, *The health costs of violence: measuring the burden of disease caused by intimate partner violence. A summary of findings*, 2004, p. 8, available at: www.vichealth.vic.gov.au/media-andresources/publications/the-health-costs-of-violence (accessed 12 January 2015).

RCIADIC handed down 339 recommendations including increasing self-determination, access to education, access to economic opportunities as well as improving health and housing.[6]

In Victoria, in both youth justice and adult prisons, Aboriginal people are incarcerated at far higher rates than non-Aboriginal people. From 2005 to 2016, the Aboriginal imprisonment rate increased from 957 to 1,541 prisoners per 100,000 people[7], an increase of 70%, compared to a 34% increase in the non-Aboriginal population. Aboriginal Victorians are now well over ten times more likely to be imprisoned than the general population.[8] Aboriginal un-sentenced prisoners account for 27% of all un-sentenced prisoners nationally and they are likely to spend 2.4 months on remand.[9] Similarly, 79 of the 520[10] youths incarcerated in Youth Justice Centres identifying as Aboriginal, with the vast majority being held on remand. Aboriginal women are 23 times more likely to be imprisoned that non-Aboriginal women.

Effect of a criminal record

Having a criminal record and being in prison can also result in significant levels of poverty and socio-economic disadvantage. Incarceration inevitably reduces employment opportunities, and data has indicated that Aboriginal people who have been arrested within the past 5 years are more than twice as likely to be unemployed than employed.[11] The stigma of a criminal record has a higher impact for Aboriginal communities in Victoria, as Victoria does not have a spent conviction scheme.

Response to specific consultation paper issues

The following recommendations consider various sections of *Victims of Crime Assistance Act 1996* (Vic) (the '***Act***') and the *Supplementary Terms of Reference* ('***TORs***') published by the Victorian Law Reform Commission ('***VLRC***') on 7 July 2017. This submission provides targeted feedback on sections of the Act that VALS' believes most directly impact on its clients, and the Aboriginal community in Victoria more broadly.

Section 52 – mandatory refusal of applications

Section 52 considers circumstances in which the Victims of Crime Assistance Tribunal (the '***Tribunal***') 'must refuse to make an award of assistance'. Of particular focus are ss 52(a)(i)-(ii), which respectively require that:

- victims to report the act of violence to police within a 'reasonable' time; and

[6] Australia. Royal Commission into Aboriginal Deaths in Custody & Johnston, Elliott, 1918-2011 (1991). National report. Australian Government Publishing Service, Canberra
[7] ABS, Prisoners in Australia 2016, Catalogue 4517.0
[8] Darby et al, *Victoria's Prison Population 2005 to 2016*, Sentencing Advisory Council (2016), 13.
[9] Ibid.
[10] Department of Health and Human Services, Youth Justice Data Report, 31 December 2016
[11] ABS, Crime and Justice 2005 (2005) Catalogue No.4102.0

- victims assist any 'person or body duly engaged in the investigation' of the act of violence, or the arrest or prosecution of the alleged perpetrator.[12]

VALS' position is that the overarching requirement at s 52 of the Act for victims to report an act of violence to police negatively and disproportionally affects Aboriginal applicants, and ought to be abandoned.

Significant numbers of VALS' clients experience trepidation when dealing with police, including in relation to matters where they are the victim. This is due to a range of factors, including:

- negative personal interactions between the applicant and police or the broader justice system;
- negative associations due to engagements between family and friends and the police; and
- negative associations based on the history of police interactions with Aboriginal people since colonisation.

An Aboriginal person who has experienced such associations is significantly less likely to report the act of violence to police, because of a belief ranging from a fear that the police will not assist them, to concern that the police will use the event of the report to pursue the individual on separate or unrelated matters (e.g. outstanding warrants for criminal matters).

The high level of unwillingness to report to police is significantly increased for victims of domestic or family violence, most often women and children. Already amongst the most vulnerable in the wider community, many such victims of domestic or family violence experience a range of complex pressures that reduces the likelihood of reporting those acts of violence, including:

- fear of reprisal from a perpetrator;
- shame;
- community expectations not to involve police;
- the belief that their claims will not be taken seriously; and
- the lack of culturally or socially appropriate supports during the reporting process.

Whilst the value of a requirement to report matters to policy is understandable from a policy perspective, in the context of VALS' clients, particularly those who have experienced family violence, the requirement acts as a disincentive to many vulnerable victims. To the extent that this requirement assists the Tribunal by ensuring there is some evidence upon which to found an assumption that the act of violence has occurred (i.e. a police statement), VALS submits that this advantage does not justify the existence of this mandatory requirement given the deterrent effect outlined above, as the act of violence could be proven by reference to separate material (e.g. the client's sworn evidence, hospital records, etc.)

12 Note, Section 52(a) also provides an exception to the disqualifying subsections by empowering the Tribunal to award assistance if the lack of reporting or lack of assistance was brought about by 'special circumstances'. For the purposes of this submission, the exception provision is dealt with separately.

RECOMMENDATION 1

The requirement at s 52 for mandatory refusal of applications where the act of violence was not reported to police should be removed from the Act.

Section 52 - exceptions to mandatory refusal of applications

Section 52(a) provides an exception to mandatory refusal where the victim's lack of reporting or lack of assistance with an investigation was brought about by 'special circumstances'.

In VALS' submission, this exception against mandatory refusal of an application that exists in s 52(a) does not sufficiently protect Aboriginal victims so as to resolve the issues created by the reporting requirement. In addition, from a practical point of view, the exception is apt to confuse, and ought to be removed along with the over-arching mandatory reporting obligation.

As discussed at length in Chapter 8 of the VLRC Victims of Crime Assistance Act: Supplementary Consultation Paper ('Supplementary Consultation Paper'), 'special circumstances' are left undefined by the Act. As such, there is no guidance as to the types of acts of violence that may not require the victim to report to the police, or assist in any subsequent investigation or prosecution. Particularly in the context of domestic and family violence, the case law concerning the definition of 'special circumstances' does not adequately engage with the particular types of reasons that Aboriginal people have for not reporting such acts of violence to the police. Neither the legislation nor the case law engage with the impacts of historical police contact with the Aboriginal community, nor do they engage with the particular cultural and community pressures and expectations that victims of crime may face, including in a family violence context.

As has been bought to light by the *Royal Commission into Family Violence*, incidents of domestic and family violence are unfortunately common occurrence across all sections of society. In the context of s 52(a), the fact that family violence is such a wide-reaching and unfortunately common issue in contemporary Australian society seems to mitigate against such violence meeting the definition of 'special circumstance'.

Unfortunately, the structure of an exception based on 'special circumstances' means that victims who are unable or unwilling to report to police will always have to justify why their particular experience with violence is different and 'special'. This is incompatible with the purposes of a regime designed to assist those victims in their recover from violence. For incidents of violence that are considered 'common place', such as domestic and family violence, the exception is inapposite, as it does not adequately consider the particular circumstances that are unique to every occurrence of such violence.

It would be difficult to construct a fixed legislative definition of 'special circumstances' within the context intended by s 52 of the Act, and ideally, the entire mandatory reporting regime under section 52 of the Act would be repealed.

However, in the event a mandatory police reporting obligation remains in the legislation, a detailed and plain-English practice note should be created to provide guidance to applicants as to when they might rely on the exception under of 'special circumstances'. Importantly, this practice note should specifically address the barriers many Aboriginal and/or Torres Strait Islander people can face when required to interact with police.

RECOMMENDATION 2

If the mandatory reporting obligation at section 52 remains, a detailed practice note outlining the criteria to be taken into account when determining if an applicant meets the definition of 'special circumstances' at section 52 should be created.

This practice note should aim to specifically address the issues many Aboriginal people have in reporting acts of violence to police, so as not to unnecessarily exclude them from accessing the Tribunal.

Section 54 - applicant's behaviour and criminal history

Section 54 requires the Tribunal to have regard to a number of factors when determining the quantum of the award. Section 54(a) specifies the applicant's character, behaviour, past criminal history, and attitude, as factors to be considered.

In summary, it is VALS' position that the requirement in s 54 ought to be removed entirely from the Act. Should full removal not occur, then the section should be significantly amended so that consideration of criminal activity should only be made in the context of contributory liability, as is the case in the ACT.

In the context of VALS' VOCAT work, we find that s 54 negatively affects many victims of violence by allowing matters not linked to the act of violence to reduce the quantum of the assistance provided. Actions that occurred well in the past can determine whether the award is reduced, including where there is no link between that action and the act of violence. For example, offences like public drunkenness, which may have absolutely nothing to do with the act of violence suffered, are often considered. Similarly, drug and alcohol offences, which are common across vulnerable and at-risk groups within society, may be used to reduce the award.

The Tribunal is required to consider these factors in their totality, which can in turn lead to over-emphasis being accorded to an applicant's prior criminal history. As Bob and Charlotte's case studies below highlight, responding to the s 54 considerations is something many lay people can find upsetting and technically confusing.

Case study – '*Bob*'[13]

The relevant act of violence occurred after Bob's partner was cut-off by a driver on a free-way. Bob's partner 'beeped' at the other driver, and continued driving. Bob and his partner were then followed for close to three hours, until they exited the highway in a regional town. The other driver followed them to a traffic light, exited their vehicle, approached, and then punched Bob three times through the passenger-side window, before fleeing the scene. Witnesses to the incident followed Bob and his partner to the local police station, and a report and investigation clearly found that Bob did not provoke the violence in any manner.

Bob contacted VALS in relation to his assistance claim when the Tribunal requested further submission be made relating to s 54 requirements. Bob had a significant history of imprisonment. Bob had been released from prison some 18 months prior to the act of violence, and had been very engaged in trying to turn his life around.

The offences were unrelated to the incident of violence. Furthermore, Bob's claim was very minimal; assistance relating to particular circumstances surrounding the treatment of his injuries as a result of the act of violence, and travel from his regional home to the closest medical specialist. However, the submissions required to address the Tribunal's s 54 concerns took considerable legal research, the application of analogous Tribunal and Victorian Civil and Administrative Tribunal matters, and statutory interpretation. While VALS was ultimately successful in having an award made, it is clear that Bob was in no position to have produced these submissions by himself, despite have lodged the original application, compiled a statement of claim, evidence, police reports, etc.

Case study – '*Charlotte*'

Charlotte was a victim of a serious act of violence, in which an unknown assailant held a knife to her throat. After completing and submitting Charlotte's application, a directions hearing was called. During the hearing, the Member requested that oral submissions be made concerning Charlotte's criminal history, as these needed to be considered under s 54.

Charlotte's criminal history consisted of offences such as swearing in public when a minor, and shopping-lifting shortly after she turned 18. They were in no way connected to the act of violence the subject of the claim, having occurred some 20-25 years earlier. Nonetheless, submissions were put forward, as the existence of the history could have been used to reduce the quantum of assistance provided.

The above case studies highlight several common issues with the application of s 54:

[13] All names of case studies provided in this report have been changed to protect client confidentiality.

- the requirement for s 54 submissions often go beyond a common applicant's skill-set, thus creating a need for expert legal assistance, and reducing the therapeutic outcomes that can be reached by a victim single-handedly taking ownership of their VOCAT application;

- an applicant's prior criminal actions being deemed relevant to the potential award, despite the fact that these that were in no way connected to the particular act of violence an applicant is claiming for; and

- Re-traumatisation of applicants by forcing them to re-live historic offences arising from conduct they are attempting to distance themselves from.

The absence of spent convictions legislation in Victoria means that victims of crime of have successfully turned their lives around, or had a single or brief period of engaging in criminal activity, face disproportionate hurdles to accessing assistance through the victims of crime assistance regime. The impact that the lack of spent convictions legislation has on the Aboriginal community is currently the subject of the Criminal Record Discrimination Project, undertaken by *Woor-Dungin*.[14] The requirement by s 54 of the consideration of the applicant's criminal history both reduces the likelihood of Aboriginal victims from receiving the full extent of assistance claimed for, and acts as a barrier to entry, by dis-incentivising Aboriginal victims to engage. The trauma and embarrassment that discussing such history causes becomes a reason for victims not to access the regime, preventing resources from being allocated to them to assist in recovery.

This is particularly relevant for victims of domestic and family violence, given that many of Victoria's female criminal offenders have experienced family violence.[15] In VALS' experience, many female VOCAT clients' own criminal activity is linked to the violence they experienced previously, or are continuing to experience. The purposes of the victims of crime assistance regime, both as a forum in which to provide financial assistance for victims to recover from violence, and as a therapeutic jurisdiction, are not served by then penalising those victims for events that have happened often as a result of that violence.

RECOMMENDATION 3

VALS recommends that the requirement in s 54 be removed entirely from the Act.

Should removal not occur, then the section should be significantly amended so that consideration of criminal activity should only be made in the context of contributory liability, where there is a direct link between previous criminal history and the act of violence the subject of the claim.

In this regard, VALS recommends the Act be amended to largely reflect the regime in the *Victims of Crime (Financial Assistance) Act 2016* (ACT) (the '***ACT Act***'), which provides that financial assistance 'must not be given' where:

- the applicant is not eligible for the assistance[16]

[14] http://www.woor-dungin.com.au/criminal-record-discrimination/
[15] *Royal Commission into Family Violence Report and Recommendations* (2016) vol 5, 239.
[16] *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 45(1)(a)

- the applicant has conspired with the person responsible for the act of violence that is the subject of the application for assistance;[17] and
- the applicant was involved in a serious crime when the act of violence that is the subject of the application occurred and the serious crime was the main reason that the act of violence occurred.[18]

Similarly, the Victorian Act could be amended in line with s 47 of the ACT Act to provide the Tribunal with a power to reduce the amount of financial assistance where the applicant has been involved in 'contributory conduct'.[19]

Section 34(2) - alleged perpetrator notification

Section 34(2) of the Act grants the Tribunal a discretion to 'give notice of the time and place for the hearing' to any person considered to have a 'legitimate interest' in the matter. In VALS' experience, this section is most commonly considered in relation to the notification of the alleged perpetrator of the violence.

To the extent that s 34(2) can be used to enable perpetrators of acts of violence to attend hearings and be heard, VALS' submission is that the provision should be repealed, or at least amended to ensure perpetrators of violence are not able to participate in these hearings.

In our view, alleged perpetrator notification represents a significant barrier to entry for many victims of crime. The possibility of the perpetrator of the act of violence confronting the victim and/or denying the victim's story in Court is a factor that can deter victims of violence from applying to the Tribunal, as well as contribute to the withdrawal of an application before an award is finalised.

In VALS' experience, this is particularly the case in relation to victims of family violence, as was noted in chapter 9 of the VLRC's *Family Violence and the Victims of Crime Assistance Act 1996: First Consultation Paper* ('***First Consultation Paper***'), where it was correctly stated that the effects of alleged perpetrator notification are significantly increased for victims of domestic or family violence.[20]

In addition, it should also be noted that the risks and deterrent effects associated with alleged perpetrator notification are magnified for many Aboriginal victims because of the interconnectedness of the Aboriginal community, particularly in rural and regional settings. In these communities, alleged perpetrator notification can lead to confrontations between the alleged perpetrator and family members of the victim, or confrontations between the victim and family members of the alleged perpetrator. Fear of such confrontation acts as a barrier to entry into the assistance regime for many Aboriginal victims, creating further marginalisation for people who are already some of the most vulnerable within society.

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[17] Ibid, s 45(1)(b).
[18] Ibid, s 45(1)(d)
[19] Ibid, s 47(1)(d).
[20] Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996: First Consultation Paper* (2017) 88-9 [9.38]-[9.46].

From a technical perspective, the mechanism by which the Tribunal assesses whether to exercise the s 34(2) discretion can also cause significant harm to victims. In VALS' experience, the standard method by which the Tribunal decides whether to inform an alleged perpetrator is through a harm analysis: will greater harm be caused to the victim by having the perpetrator informed, compared to the harm caused by denying the alleged perpetrator the knowledge of the allegations? This analysis is undertaken by asking the victim to provide information as to the harm that they would suffer, should the alleged perpetrator be informed. Whether achieved via in-person questioning, or through reports from counsellors, this line of questioning forces the victim to relive the act of violence and their experience(s) with the alleged perpetrator, often resulting in re-traumatisation.

The key question raised in the *Supplementary Consultation Paper* raised in relation to removal of the notification provision concerns whether this would constitute a denial of procedural fairness to the perpetrator. However, the current mechanism, but which the Member is provided a discretion as to whether to notify the alleged perpetrator, already acts to remove procedural fairness. No procedural fairness is accorded in instances where the Member believes that the impact that notification would have on the victim outweighs the impact on the alleged perpetrator. The purposes of the victim assistance regime prioritise the victim, elevating the interests of the applicant, so as to provide assistance in circumstances where the victim would otherwise go without. This elevates the victim's interests above those of the alleged perpetrator; elevating the principle of therapeutic justice and state-based assistance over that of procedural fairness. Given this context, the purposes of the Act are ill-served by having a mechanism in which, on a case-by-case basis, these purposes are restricted by the application of the discretion.

Margaret's case study below highlights the avoidable damage that can be wrought upon an already vulnerable victim as a result of the existing regime for alleged offender notification, and why purported procedural fairness considerations for an alleged offender do not justify the maintenance of this discretion for Tribunal members.

Case study – '*Margaret*'

When Margaret was 15, she was sexually assaulted by her best friend's father.

Margaret was significantly traumatised by the assault. Three years later, and with the support of her family, Margaret contacted VALS to seek assistance in applying to the Tribunal. A police report, including information relating to the ultimately unsuccessful prosecution of the father, a counsellor's report, and various medical reports were provided to the Tribunal. Margaret remained too distressed to engage with the process directly, and instructions were predominantly related to VALS via Margaret's mother.

At the initial hearing, the evidence concerning the act of violence was accepted by the Tribunal. However, the Member refused to make an award until she had heard from Margaret as to why the Tribunal should *not* inform the father of the final hearing. VALS sought time to provide written submissions and a report from Margaret's psychologist as to the specific detriment this would cause. At a further directions hearing these written submissions and report were accepted, however, the Member insisted on a hearing with Margaret present, so as to directly question Margaret concerning the negative affects to such notice.

After considering refusing this request, and simply withdrawing her application, Margaret, along with her mother, agreed to attend the hearing. For over an hour, the Member tried to engage and question Margaret. From prior to the arrival of the Member, Margaret, present via video-link, sobbed into the shoulder of her mother. At virtually no point was Margaret able to provide coherent answers to the Member's questions. Eventually, the Member agreed that notification of the father should not occur.

Despite a report from Margaret's psychologist, a letter from Margaret's mother, and eventually, a letter from Margaret herself, the Member insisted on directly question Margaret, on an event that she says ruined her life. The Member forced Margaret to relive the trauma of the act of violence before ultimately finding that notification was not necessary. So distressed was Margaret by the proceeding that she was left unaware of the outcome of her application. At the conclusion of the hearing, Margaret's lawyer had to twice confirm with Margaret's mother that the award of assistance had been made in full, and that notification would not occur, before Margaret understood the outcome.

In VALS' submission, the above outcome for Margaret is unacceptable and should not have occurred. As an alternative to alleged perpetrator notification, VALS would suggest that there are other safeguards that might be inserted into the Act to protect an alleged perpetrator's rights. For example, the Act could be amended so as to prevent identification of the perpetrator, beyond that necessary in the provision of evidence such as police reports. The alleged perpetrator could not be named during the hearing(s), thus removing concerns about identifying the individual without their knowledge in an open hearing. These changes would serve the purposes of the Act, in that they would elevate the therapeutic aspects of the jurisdiction for the victim, by preventing the victim from having to either directly or indirectly engage with the alleged perpetrator.

This would also alleviate practical concerns for the interaction of the victim and alleged perpetrator in smaller Tribunals. Such venues are often ill-suited to ensuring that the victim and alleged perpetrators, or witnesses for either, do not come into direct contact. The alleviation of such concerns extends to the specific harms caused to Aboriginal victims by notification. Removing alleged perpetrator notification would significantly reduce the threat that such notification provides to the interconnectedness of the Aboriginal community, particularly in rural and regional Victoria, by significantly reducing the likelihood of confrontation of the victim and alleged perpetrator, their family or friends.

RECOMMENDATION 4

VALS recommends that the Act be amended to remove a discretion to notify alleged offenders that a claim has been made in relation to an act of violence.

If the power to notify alleged perpetrators is not removed, then VALS recommends that the Act be amended to ensure these perpetrators are not able to participate in hearings in any way that might

intimidate or deter an applicant from proceeding with the application. For example, alleged offenders should not be entitled to cross-examine applicants, or to attend Tribunal hearings personally.

Exceptional Circumstances – items to assist with recovery

In 'exceptional circumstances', a primary, secondary, and related victim can be awarded assistance for non-specified 'other' expenses incurred in recovering from the act of violence.[21] Importantly, where an applicant cannot meet the definition of 'exceptional circumstances', the items they are entitled to claim through the Tribunal will be more limited in scope.

In VALS' submission, the requirement that an applicant must show 'exceptional circumstances' in order to be awarded items to specifically assist with their recovery ought to be abandoned.

For many victims of violent crime in Victoria, there are a number of negative outcomes related to the 'exceptional circumstances' requirement, and its broad definition. The lack of a legislative or concrete definition provides applicants with no guidance as to what circumstances will be considered 'exceptional'. In the case law, 'exceptional circumstances' has been understood to mean 'unusual, special, out of the ordinary', and requires a consideration of 'all of the circumstances, including the injury and the nature of the offending'.[22]

This technical, case-based definition is commonly adopted by the Tribunal, which disproportionately disadvantages individuals who are trying to access the Tribunal without legal assistance. Such victims will be unlikely to have the skills and access to research materials that would allow them to find matters that are analogous to their own, so as to support their claim of 'exceptional circumstances'.

A further problem is that different categories are available for people who have suffered from analogous acts of violence, or who have suffered analogous injuries. As discussed in the Supplementary Consultation Paper, there are already instances in which the injuries incurred from one rape were determined to be 'depressingly common', whereas those incurred from another rape were considered exceptional.[23] Similarly, one can foresee situations in which very different physical attacks (one by a random stranger, the other by an abusive parent) might lead to the same injuries, yet one is judged to be exceptional whereas the other is not. Such a definitional distinction ignores the particular assistance that is needed by the victim. Where one victim may have access to assistance that allows them to join a gym, thus improving their self-esteem and recovery from an attack, the other is left without.

This potential inconsistency between analogous acts of violence, or analogous injuries, is indicative of a broader problem with the category of 'exceptional circumstances'. By definition, all violence is,

[21] *Victims of Crime Assistance Act 1996* (Vic) s 8(3), 10A, 13(4).
[22] See: *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651 (14 December 2005) [30].
[23] Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996: First Consultation Paper* (2017) 85 [6.111]-[6.112].

or at least should be, exceptional. No-one should be expecting to be the victim of a violent act in any part of their life. That they have suffered such an act is the exception. The inclusion of an additional 'exceptional circumstances' category punishes those for whom this kind of violence is potentially more common, therefore victimising those already victimised. This is clearly the case for people who have suffered from domestic and family violence. As more of this type of violence is reported, it will necessarily, under the current framework, be considered 'less-exceptional'. This in turn will result in victims of such violence having access to fewer categories of assistance. In effect, they are punished for being members of a large group of people suffering unacceptable violence, rather than victims of less common forms of violence.

This proposition is made clear in the case study of Andrew, below.

Case study – '*Andrew*'

Andrew met a group of friends in an inner-city Melbourne suburb in December. After a few hours, Andrew left the venue they'd met at and began walking to his brother's house. On the walk, Andrew was the victim of an unprovoked attack by a group of men unknown to him. Andrew was badly beaten, and required medical assistance. Andrew reported the attack to police on the night. However, the police were unable to identify attackers, and as such, no charges were laid.

Andrew sought assistance from the Tribunal in relation to the attack. One element of the assistance Andrew sought was a gym membership. Prior to the attack, Andrew had been a fit and active member of the local gym and football club. However, the attack had left him both physically and psychologically damaged. By his own admission, Andrew had now stopped looking after his health and fitness.

Given the nature of the assistance requested, Andrew had to demonstrate that his attack, and the injuries suffered, constituted 'exceptional circumstances'. Andrew was able to do largely because the Tribunal accepted that the attack had ultimately led to the dissolution of his relationship, which Andrew was unable to maintain, due to his psychological injuries. Were it not for this fact though, the Tribunal would likely have ruled against this being an 'exceptional circumstance', which would have prohibited them from making an award of gym membership in Andrew's favour.

As the above case study highlights, the 'exceptional circumstances' requirement risks further limiting the range of heads of assistance available for people who have suffered violence that could be considered 'more common' than other forms. An act of violence stemming from random men preying on an unknown victim is hardly an uncommon occurrence. Yet, this was also a deeply shocking, unprovoked attack on an individual, which had significant long-term consequences. Such an attack should never be considered 'un-exceptional', nor should an applicant in Andrew's position be denied items to assist with his recovery due to a technical and in many ways arbitrary legal threshold he may not be able to understand, let alone meet.

The 'un-exceptional' nature of some types of violence crystallises when one considers the high rate of domestic and family violence recently considered in the Royal Commission into Family Violence.[24] Given such violence is so common, it fits squarely within the 'depressingly common' characterisation used by the Victorian Civil and Administrative Tribunal. A regime which is designed to assist victims of violence should not act against the interests of those victims by creating a hierarchy of violence, categorising victims as more or less deserving of receiving solely because of the type of violence they have suffered. Rather, targeted, individual-specific assistance should be available to all victims. The finding of fact as to the violence, and evidentiary burden in showing how the claimed item will assist in recovery, are sufficient to ensure that victims only pursue those benefits that will genuinely assist them.

The purpose of the victims of crime regime is to provide targeted, context-specific assistance to victims that have suffered an act of violence. The limitations on this assistance are already significant; other schemes must be used first, as should damages in instances where a civil suit has been resolved. Furthermore, the requirement that payment is made as a grant of 'assistance', rather than as compensation, requires any claim to be supported by evidence demonstrating how the grant will assist the victim.

A further burden, in the form of the 'exceptional circumstances' requirement, is unnecessary, and should be abandoned.

RECOMMENDATION 5

VALS recommends removal of the requirement that an applicant show 'exceptional circumstances' in order to be awarded items to assist with their recovery from an act of violence.

Enhancing the therapeutic nature of the Tribunal

In our experience, there can be a significant variance in the level cultural understanding, engagement and safety provided to VALS' clients by the Tribunal and its Members.

The therapeutic nature of any given matter is largely determined by the behaviour of the relevant Member. Often, Members are diligent in their efforts to try to understand an Aboriginal victims' cultural and family history. Certain Members go further, showing a broad interest and understanding in how to engage Aboriginal victims in a manner that is re-assuring and supportive, so as to provide the greatest level of therapeutic benefit possible.

The case study below provides an example of a Tribunal Member engaging exceptionally well with a vulnerable VALS client.

Case study – '*Matilda*'

[24] *Royal Commission into Family Violence Report and Recommendations* (2016) Commission Research p 12.

Matilda was the victim of a significant domestic violence incident, compounded by an extremely negative engagement with the police that responded to the incident. This left Matilda both physically and mentally scarred.

VALS assisted Matilda in both a series of police complaints, and the Tribunal application. A hearing was organised to resolve the application, to which Matilda and her partner attended.
The Member commenced the hearing by asking Matilda whether Matilda was happy for the Member to sit with her at the Bar table. The Member explained that she had previously scared someone at a hearing, and she wanted to avoid doing something like that in the future. Matilda indicated that this was acceptable. The Member then introduced herself by her full name, and explained, in accessible language, the nature of the Tribunal's Koori List hearings. The Member went on to acknowledge the traditional owners of the land, without notes or stumbling over the names of the people or nation. The Member then mentioned that the Court had had a smoking ceremony, and discussed the Aboriginal, and Torres Straight Island flags that were hanging in the Court.

The Member discussed a map showing Australia divided into along traditional Aboriginal nation lines. The Member finally noted that the above were small tokens, and that the Tribunal was trying to increase its capacity to provide a safe space for Aboriginal people, and Aboriginal victims in particular. The Member then conducted the hearing directly to and with Matilda. Questions and answers were had with very little additional interjection from Matilda's VALS lawyer. The Member repeatedly asked Matilda if the proceeding was making sense, encouraged Matilda to engage, and sought to empower her.

Matilda responded by becoming increasingly expansive in her conversation with the Member, engaging with the process, and indicating both during and after the hearing that the hearing had been a very positive and therapeutic experience for her.

Unfortunately, not all VALS clients report experiences as positive as the one outlined above. In our experience, whilst members are aware that they should engage with an Aboriginal victim's culture and history, they may not be aware of how to do this appropriately. Such engagement often takes the form of questions that are at best confusing, and at worst insulting. It can also create an atmosphere of distrust, where the Aboriginal victim does not believe that the Member has their interests at heart.

A particular area of relevance is the handling of inter-generational trauma, and trauma more broadly. Significant numbers of Aboriginal victims are members of the Stolen Generations. The myriad ways in which this has affected them, or the ways in which the act of violence that they have suffered interplays with this trauma, are often poorly understood by the Tribunal.

Additional and targeted training would empower the Tribunal to function fully as a therapeutic jurisdiction. Matilda's case study demonstrates the therapeutic potential of the Tribunal, where a Member makes a conscious and deliberate effort to engage. Matilda constantly references the positive experience she received at the Tribunal, and it is to the Tribunal and the Members' credit that such a positive

RECOMMENDATION 6

VALS recommends that all Tribunal Members are provided with mandatory cultural-awareness, and trauma training. Trauma training, whilst a general service, should include Aboriginal-specific trauma training, including how to engage with inter-generational trauma.