

SVENSON
BARRISTERS



VOCAT

A BRIEF OVERVIEW

VOCAT

- Established by Part 3 of the Victims of Crime Assistance Act ('the Act').
- Consists of the Chief Magistrate and all other persons who hold the position of Magistrate, including reserve Magistrates (s 14)
- Constituted by a single member (s 21).
- Chief Magistrate responsible for the arrangement of the business of VOCAT and gave can give directions for its' business.
- Powers of delegation (s 24)

Purpose

- The purpose of the Act is to provide assistance to victims of crime (s 1).
- To achieve this purpose its objectives include assisting victims recover from the crime by paying for expenses incurred because of it, paying financial assistance to some victims as a symbolic expression of the community's sympathy and condolence for them experiencing or suffering significant adverse effects of the crime and to provide financial assistance where compensation for injury is not available from the offender or other sources (see s 2).
- The Act is to be considered as beneficial or remedial legislation. As Macaulay J said in *BFK v VOCAT* [2017] VSC 736 at [23]:

“I think there is little doubt the VOCA Act is to be seen as beneficial or remedial legislation. It would therefore attract the operation of the principle that beneficial legislation is to be construed liberally, as put by Brennan CJ and McHugh J in *IW v City of Perth*:

- ...beneficial and remedial legislation ...is to be given a liberal construction. It is to be given ‘a fair, large and liberal’ interpretation rather than one which is ‘literal or technical’. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural...”

Who can apply?

- Applications can be made by a primary victim, secondary victim or a related victim of an act of violence (s 25).
- It is important to identify the category of victim as can only apply under one category (s 18). (Note *NF v VOCAT* [2012] VCAT 1740)
- Ultimately an award of assistance will only be made if VOCAT is satisfied:
 - “ (a) that an **act of violence** has occurred; and
 - (b) that the applicant is a primary victim, secondary victim or related victim of that act of violence or a person who has incurred funeral expenses as a direct result of the death of such a primary victim; and
 - (c) that the applicant is eligible to receive the assistance.” (s 50)

Who can apply?

- **Primary victim (s 7):** Includes a person who is injured or dies as a direct result of an act of violence committed against him or her.
- **Secondary victim (s 9):** Includes a person who is present at the scene of an act of violence and who is injured as a direct result of witnessing that act.
- **A related victim (s 11):** A related victim of an act of violence is a person who, at the time of the occurrence of the act of violence was a close family member of; or was dependent of; or had an intimate personal relationship with a primary victim of that act who died as a direct result of that act.
- A person who pays funeral expenses may make a claim for these expenses (s 15).
- See *Ross-Miller v VOCAT* [2014] VCAT 923; *NF v VOCAT* [2012] VCAT 1740; *Monks v VOCAT* [2012] VCAT 1607; *Will v VOCAT* [2011] VCAT 1739.

Who can apply?

Other categories of applicants

- Children may apply through a parent or guardian or another person VOCAT considers appropriate (s 25(3)).
- If a person is a represented person within the meaning of the *Guardianship and Administration Act* 1986 the application can be made by their guardian or administrator (s 25)
- If in any other case VOCAT considers a person entitled to make an application needs assistance the application can be made by someone who VOCAT considers is appropriate (s 25)

“Act of Violence”

“**Act of violence**” means a **criminal act** or a series of related criminal acts, whether committed by one or more persons, that has—

(a) occurred in Victoria; and

(b) directly resulted in **injury** or death to one or more persons, irrespective of where the injury or death occurs. (s 3).

“**Criminal act**” means an act or omission constituting a **relevant offence** or that would constitute a **relevant offence** if the person had not been incapable of being criminally responsible for it on account of

(a) age, mental impairment or other legal incapacity preventing him or her from having the required fault element; or

(b) the existence of any other lawful defence (s 3).

“**Related criminal acts**” is defined at s 4 of the Act

See *Stone v VOCAT* [2015] VCAT 1102; *Mathews v VOCAT* [2012] VCAT 1099; *BVB v VOCAT* [2010] VSC 57.

“Relevant Offence”

“Relevant offence” means -

- (a) an offence, punishable on conviction by imprisonment, that involves an assault on, or injury or a threat of injury to, a person; or
- (b) an offence against Subdivision (8A), (8B), (8C), (8D) or (8E) of Division 1 of Part I of the *Crimes Act 1958* or any corresponding previous enactment (sexual offences) or an offence at common law of rape or assault with intent to rape; or
- (c) an offence against Section 21A(1) of the *Crimes Act 1958* (stalking), Section 63 of that Act (child stealing) or Section 63A of that Act (kidnapping) or any corresponding previous enactment;
- (d) an offence of conspiracy to commit, incitement to commit or attempting to commit an offence referred to in paragraph (a), (b) or (c). (s 3).

See *Mustafovski v VOCAT* [2017] VCAT 1288

“Injury”

“Injury” means—

(a) actual physical bodily harm; or

(b) mental illness or disorder or an exacerbation of a mental illness or disorder, whether or not flowing from nervous shock; or

(c) pregnancy; or

(d) any combination of matters referred to in paragraphs (a), (b) and (c) arising from an **act of violence**—

but does not include injury arising from loss of or damage to property

(s 3)

See *AVA and GAR v VOCAT* [2010] VCAT 2078

The Application

- Standard form exists (*Victims of Crime Assistance Rules 2010*, VOCAT website)
- The application must contain specified information, including details of the alleged criminal act and the circumstances in which the injury occurred; the nature of the injury suffered; whether a report was made to police and whether criminal proceedings ensued; and the type of assistance sought (s 27)
- Application to have supporting documentation and an election whether to have the application determined with or without a hearing (ss 25 and 26)
- Due to the nature of supporting evidence required, need to consider whether Freedom of Information requests are required for certain medical reports/information.
- Statements made to police.

Award Thresholds

Primary victims (ss 8 and 8A)

- May be awarded assistance of up to \$60,000 plus any Special Financial Assistance.
- Amount awarded may be made up of amounts including reasonable counselling services, medical expenses, safety related expenses and up to \$20,000 for loss of earnings suffered, or reasonably likely to be suffered as a direct result of the act violence.
- In exceptional circumstances, other expenses to assist in his or her recovery that are actually and reasonably incurred or reasonably likely to be incurred can be awarded.
- See *Ractliffe v VOCAT* [2015] VCAT 205; *Gatto v VOCAT* [2010] VCAT 966.

Award Thresholds

Secondary Victims (ss 10 and 10A)

- May be awarded assistance of up to \$50,000 and may be made up of amounts including reasonable counselling services and medical expenses.
- In exceptional circumstances up to \$20,000 for loss of earnings.
- In exceptional circumstances other expenses to assist in his or her recovery that are actually and reasonably incurred or reasonably likely to be incurred can be awarded.

Related Victims (ss 12 and 13)

- The maximum cumulative amount that may be awarded to all the related victims of any one primary victim is \$100,000. Within that limit a related victim may be awarded up to \$50,000.
- May be made up of amounts including reasonable counselling services, for distress experienced and for loss of money that, but for the death of the primary victim the related victim would have been reasonably likely to have received from the primary victim during a period of up to 2 years after that death.
- See *Tighe v VOCAT* [2014] VCAT 1386; *Krasauskas v VOCAT (No. 2)* [2008] VCAT 1284;

Special Financial Assistance

- A primary victim may be awarded special financial assistance if VOCAT is satisfied that an act of violence was committed against the person; and the person has experienced or suffered a significant adverse effect as a direct result of that act of violence; and that act of violence is a category A, B, C or D act of violence for the purposes of this section (s 8A).

“Significant adverse effect” in relation to a victim of an act of violence, includes any grief, trauma or injury experienced or suffered by the victim as a direct result of the act of violence but does not include any loss of, or damage to, property (s 3).

- The amount that may be awarded is the minimum amount if VOCAT is satisfied that the applicant has experienced or suffered any significant adverse effect as a direct result of the act of violence; and an increased amount up to the maximum amount if the Tribunal is satisfied the applicant has suffered any injury as a direct result of the act of violence ((ss 8A(4) and (5)).
- See *Pham v VOCAT* [2016] VCAT 298; *Rattray v VOCAT* [2012] VCAT 1981

Special Financial Assistance



Special Financial Assistance Minimum/Maximum Awards by Act of Violence

(from 1 July 2007)

Victims of Crime Assistance Tribunal

| CATEGORY | Act of violence committed prior 1 July 2007 | | Act of violence committed on / after 1 July 2007 | | ACTS OF VIOLENCE AND CLASSES OF ACTS OF VIOLENCE | INCLUDING (BUT NOT LIMITED TO) THE FOLLOWING OFFENCES |
|----------|---|---------------|--|---------------|---|--|
| | MINIMUM AWARD | MAXIMUM AWARD | MINIMUM AWARD | MAXIMUM AWARD | | |
| A | \$3,500 | \$7,500 | \$4,667 | \$10,000 | Any offence that involves: <ul style="list-style-type: none"> ▪ The sexual penetration of a person; or ▪ Attempted murder | <i>Crimes Act 1958</i> Sections 38, 38A, 44, 45, 48, 51(1), 52(1), 59 |
| B | \$1000 | \$2,500 | \$1,300 | \$3,250 | Any offence that involves: <ul style="list-style-type: none"> ▪ Attempted sexual penetration of a person; or ▪ An indecent act with, or indecent assault against, a person; or ▪ Armed robbery; or ▪ Aggravated burglary; or ▪ The deprivation of liberty of a person for the purposes of sexual penetration or demanding any ransom for their release. | <i>Crimes Act 1958</i> Sections 39, 40, 47, 49, 51(2), 52(2), 55, 56, 63A, 75A, 77 <i>Common law offences</i> Kidnapping |
| C | \$500 | \$1000 | \$650 | \$1,300 | Any offence that involves: <ul style="list-style-type: none"> ▪ An attempt to commit a Category B act of violence; or ▪ A threat of death; or ▪ Conduct endangering life; or ▪ Inflicting serious injury; or ▪ Robbery | <i>Crimes Act 1958</i> Sections 16, 17, 20, 22, 24, 27, 75 |
| D | \$100 | \$500 | \$130 | \$650 | Any offence that involves: <ul style="list-style-type: none"> ▪ An attempt to commit a Category C act of violence; or ▪ A threat of injury; or ▪ An assault against a person; or ▪ An attempted assault; or ▪ The deprivation of the liberty of a person, excluding a category B act of violence; or ▪ An act of violence not otherwise specified as a category A, B, C or D act of violence. | <i>Crimes Act 1958</i> Sections 18, 21, 21A, 30 <i>Common law offences</i> False imprisonment Common assault Riot Affray |

Section 8A(5) of the *Victims of Crime Assistance Act 1996* sets out minimum and maximum amounts of special financial assistance that may be awarded by the Victims of Crime Assistance Tribunal by act of violence. The *Victims of Crime (Special Financial Assistance) Regulations 2011* specifies the acts of violence / classes of acts of violence that are categorised as category A, B, C or D. www.vocat.vic.gov.au

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Special Financial Assistance



Provisions to Uplift Category

Victims of Crime Assistance Tribunal

Victims of Crime Assistance (Special Financial Assistance) Regulations 2011

| | | |
|--------|--|---|
| Rule 7 | When category A maximum amount is available for category B, C or D acts of violence | The maximum amount in relation to a category A act of violence is prescribed as the maximum amount in relation to a category B, C or D act of violence where as a direct result of the act of violence the victim has— (a) suffered a very serious physical injury; or (b) been infected with a very serious disease; or (c) been the victim of a series of related criminal acts being acts of indecent assault or sexual penetration. |
| Rule 8 | When category B maximum amount is available for category C or D acts of violence | The maximum amount in relation to a category B act of violence (apart from regulation 7) is prescribed as the maximum amount in relation to a category C or D act of violence where, as a result of the act of violence, the victim has— (a) suffered a serious injury; or (b) been the victim of related criminal acts of violence; or (c) suffered a deprivation of their liberty— and at the date of the occurrence of the act of violence or, in the case of related criminal acts of violence, any of those acts, the victim was a child under the age of 18, elderly or impaired. |
| Rule 9 | When category C maximum amount is available for category D acts of violence | The maximum amount in relation to a category C act of violence (apart from regulation 7 or 8) is prescribed as the maximum amount in relation to a category D act of violence where— (a) as a result of the act of violence, the victim has been the victim of related criminal acts of violence; or (b) at the date of the occurrence of the act of violence or, in the case of related criminal acts of violence, any of those acts, the victim was a child under the age of 18, elderly or impaired. |

very serious physical injury means actual physical bodily harm to the body of a permanent or long term duration that involves—

- (a) loss of a body function; or
- (b) disfigurement of a part of the body; or
- (c) total or partial loss of a part of the body; or
- (d) loss of a foetus; or
- (e) loss of fertility.

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Time to apply (s 29)

Section 29 (1) and (2) provide:

“(1) An application must be made within 2 years after the occurrence of the act of violence or, in the case of an application by a related victim or a person who has incurred funeral expenses, within 2 years after the death of the primary victim.

(2) The Tribunal must strike out an application made out of time unless it considers that, in the particular circumstances, the application ought not to be struck out...”

- There are factors the Tribunal must have regard to in determining whether to further hear and determine an application made out of time including: the age of the applicant at the time of the occurrence of the act of violence; whether the applicant is intellectually disabled or mentally ill; and whether the delay in making the application threatens the capacity of the Tribunal to make a fair decision.
- See *BFK v VOCAT* [2017] VSC 736;

The Hearing

- Any question of fact to be decided by VOCAT on, or in relation to, an application under this Act is to be decided on the balance of probabilities (s 31).
- On the hearing of a matter VOCAT is not required to conduct itself in a formal manner and is not bound by rules or practice as to evidence but may inform itself in relation to the matter in any manner it thinks fit. (s 38)
- The Tribunal may, if it determines it requires further information to enable it to determine an application, authorise a person to make any enquiry or carry out an investigation on behalf of VOCAT to furnish VOCAT with the information it requires. A person authorised may be a member of staff or a legal practitioner engaged by VOCAT to assist it with respect to an application (s 39)
- VOCAT may determine an application, or make a decision in relation to an application without a hearing including in circumstances where the applicant has stated a wish for VOCAT to do so or consents in writing to the Tribunal doing so (s 33)
- If fixing a hearing, reasonable notice must be given to the applicant and VOCAT may give notice of the time and place for the hearing to any other person whom VOCAT considers has a legitimate interest in the matter including an alleged offender. However, VOCAT must not give notice to the offender, alleged offender without first giving the applicant an opportunity to be heard on the issue of whether or not that notice should be given (s 34)
- An applicant may appear personally or by a legal practitioner or by leave of the Tribunal by another representative (s 36).
- See *AB v VOCAT & Ors* [2015] VSC 245;

Determining the Application

- VOCAT may award assistance to an applicant if satisfied that an act of violence has occurred and that the applicant falls into one of the categories of either primary, secondary or related victim and that the applicant is eligible to receive assistance (s 50).
- Section 52 outlines circumstances where VOCAT must refuse to make an award of assistance. This includes where the applicant did not report the act of violence to the police within a reasonable time; or failed to provide reasonable assistance to any person or body duly engaged in the investigation of the act of violence; or in the arrest or prosecution of any person by whom the act of violence was committed or alleged to have been committed unless VOCAT considers that special circumstances brought about that result.
- In considering whether the act of violence was reported to the police within a reasonable time, VOCAT may have regard to any matters it considers relevant including the age of the victim at the time of the occurrence of the act of violence; whether the victim is intellectually disabled or mentally ill (s 53)
- See *Draper v VOCAT* [2015] VCAT 704; *Gray v VOCAT* [2014] VCAT 1002; *Haddara v VOCAT* [2010] VCAT 1133.

Determining the Application

- Section 54 sets out what VOCAT must have regard to when determining whether or not to make an award of assistance.
- This includes the character, behaviour (including past criminal activity and the number and nature of any findings of guilty or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence (s 54(a)).
- It also includes whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation (s 54(c)).
- Also any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death (s 54(d)).
- See *TNX v VOCAT* [2014] VCAT 1234; *Condello v VOCAT* [2013] VCAT 787; *Meinderts v VOCAT* [2011] VCAT 1831;

Determining the Application

- In determining the amount (if any) to be awarded to an applicant VOCAT must take into account and reduce the amount by the total amount of any damages or awards the applicant has received or is eligible to receive (s 16).
- This can include any damages included at common law, compensation under the *Sentencing Act* 1991, assistance or payments of any other kind the applicant has received for the loss, expense or other matter for which assistance is sought from VOCAT e.g. payments under schemes such as the Transport Accident Commission and Victorian Workcover Authority (see s 16)
- There are some exclusions, such as an award of special financial assistance must not take into account payments under any insurance policy or superannuation scheme (s 16(ab)).
- *Pham v VOCAT & Attorney-General* [2016] VSCA 102; *Tanner & Ors v Smart* [2010] VSC 463.

Other matters

- **Legal Costs:** A legal practitioner acting for an applicant is not entitled to recover any costs from the applicant or claim a lien in respect of any costs on any sum payable as assistance, nor can costs be deducted from any award by VOCAT save those allowed at the time of making the award by the Tribunal to the legal practitioner or counsel (s 48).

The costs of, and incidental to, all proceedings at VOCAT are in VOCAT's discretion (s 48). A scale of costs exists (s 46).

- **Review of VOCAT decisions by VCAT :** Applications for review must be made within 28 days after final decision was made by VOCAT, or 28 days after a statement of reasons for VOCAT decision has been received by the Tribunal whichever is later (s 59).
- From VCAT can appeal on a question of law to the Supreme Court (s 148 *Victorian Civil and Administrative Tribunal Act 1998*).