

**Submission by:**  
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**To: Victorian Law Reform Commission Reference on  
Victims of Crime  
October, 2017**

### **Our qualifications and expertise**

**Dr Kate Seear** is a Senior Lecturer in Law in the Faculty of Law, Monash University. She is a practising solicitor and Academic Director of Springvale Monash Legal Service. She also holds a competitive research fellowship from the Australian Research Council in the form of a Discovery Early Career Researcher Award (DECRA) Fellowship. This fellowship was awarded in 2016 and runs until 2019. It funds Dr Seear to undertake a major international comparative study on alcohol and other drug issues/‘addiction’ in Australian and Canadian law. Dr Seear is also an Adjunct Research Fellow at the National Drug Research Institute, Curtin University. She was previously employed there as a postdoctoral research fellow. She is a member of the editorial board of the international specialist journal *Contemporary Drug Problems*, and regularly peer reviews papers, by invitation from other experts around the world, on alcohol and other drug law and policy, including for prestigious international journals such as the *International Journal of Drug Policy*. Dr Seear is the Corresponding Author for this submission.

**Professor Suzanne Fraser** is the Program Leader of the Social Studies of Addiction Concepts Research Program at the National Drug Research Institute, Curtin University ([addictionconcepts.com](http://addictionconcepts.com)). The National Drug Research Institute is one of the three major alcohol and other drug research centres in Australia, and receives Commonwealth funding. Professor Fraser is one of Australia’s foremost experts on alcohol and other drugs. She has received nearly \$3.5 million in funding from major research bodies, to conduct research into a range of drug-related issues. She is the previous recipient of the highly competitive and prestigious Australian Research Council Future Fellowship. She is the author of numerous books, technical reports and journal articles in the field. She is the Associate Editor of the international journal *Contemporary Drug Problems*, and an Assistant Editor of the journal *Addiction*. She is a board member of three other major international drug journals: the *International Journal of Drug Policy*; *Drugs: Education, Prevention, Policy*; and *Addiction Research and Theory*.

**Professor David Moore** is the Program Leader of the Ethnographic Program at the National Drug Research Institute, Curtin University. As noted above, the National Drug Research Institute is one of the three major alcohol and other drug research centres in Australia, and receives Commonwealth funding. Professor Moore is one of Australia’s leading experts on alcohol and other drug use. He has written extensively on the social and cultural contexts of alcohol and other drug use; drug policy; alcohol and other drugs

and violence; alcohol and other drugs and gender. He is the Editor of the international journal *Contemporary Drug Problems*, and a member of the editorial board of the *International Journal of Drug Policy*.

**Associate Professor Helen Keane** is Head of the School of Sociology in the Research School of Social Sciences, Australian National University. The Research School of Social Sciences is Australia's major institution for theoretical and empirical research in the social sciences. Associate Professor Keane has published extensively on concepts of addiction, social and cultural aspects of drug and alcohol use and gender and health. She is a former associate editor of the *International Journal of Drug Poliy* and a member of the editorial boards of *Contemporary Drug Problems* and *Australian Feminist Studies*.

**Associate Professor kylie valentine** is Deputy Director of the Social Policy Research Centre, UNSW Sydney (The University of New South Wales). The Social Policy Research Centre was established in 1980 as Australia's first national research centre dedicated to shaping awareness of social welfare issues. Associate Professor valentine has received more than \$7 million in funding to conduct research on social disadvantage and policy responses.

## Our submission

Thank you for the opportunity to provide a submission to the Victorian Law Reform Commission's (VLRC) reference. The initial terms of reference focussed on family violence and the *Victims of Crime Assistance Act 1996* (Vic) (VOCAA). These were later updated and expanded, through supplementary terms of reference and a supplementary consultation paper, with a broader focus. The original terms of reference required the Commission to consider:

1. The eligibility test and whether this should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury;
2. Within the total financial assistance currently available, have regard to the categories and quantum of awards with regard to the cumulative impact of family violence behaviour on victims;
3. The requirement to notify a perpetrator, especially where the matter has not been reported to police, or no charges have been laid, or the prosecution is discontinued or the person is acquitted;
4. The matters giving rise to refusal of an application except in special circumstances; and
5. Procedural matters to expedite the making of an award.

In the supplementary terms of reference the Commission was asked to consider whether:

1. the VOCA Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support;
2. the VOCA Act recognises the appropriate people as victims;
3. the tests for eligibility for assistance and the evidence required to meet those tests can be simplified to avoid unnecessary or disproportionate costs being incurred;

4. the definition of ‘act of violence’, the time limits, categories of assistance and structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime;
5. the basis of the formula in section 8A of the VOCA Act used to quantify special financial assistance is the most appropriate way to calculate the amount payable by the state for harm arising from crime;
6. it is appropriate and fair to award assistance to aid recovery in exceptional circumstances (as allowed by section 8 of the VOCA Act) and whether there are other ways to promote the recovery of victims from the effects of crime;
7. it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or to be called to give evidence; and
8. any processes, procedures or requirements under the VOCA Act cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model.

We have confined our submission to two particular issues under consideration by the VLRC, being: the use and operation of sections 34 and 54 of the *Victims of Crime Assistance Act 1996* (Vic) (hereinafter ‘*VOCAA*’). (These relate to supplementary terms of reference 2, 3 and 7 and the original term of reference number 3). We also briefly address supplementary term of reference 8. While our submission does not focus in detail on that term of reference, we would like to emphasise that we believe the existing model – and legal representation – should be retained. One reason for this is that the nature and range of the issues at stake are such that victim’s rights might be jeopardised without adequate legal advice and representation.

Our submission draws heavily upon the submission made by Dr Kate Seear to the 2017 Victorian Parliamentary Inquiry on Drug Law Reform and upon research we have conducted separately and together over the last decade. Some of this work is referred to in the VLRC’s Consultation Paper and referenced in the submission that follows.

For reasons we explain below, we make the following recommendations:

- 1. That Section 1(2)(b) of the *VOCAA* be amended to remove reference to awards of compensation being a ‘symbolic expression’ of ‘sympathy’, or alternatively to repeal the subsection altogether;**
- 2. That Tribunal members be required to participate in professional development workshops, provided by the Judicial College of Victoria or other appropriate body, and developed in consultation with relevant experts, on issues covered in this submission, including: the complexities of family violence, sexual assault, addiction, alcoholism, intoxication, and alcohol and other drug issues;**
- 3. That rather than moving to an administrative or quasi-administrative scheme, the existing model be retained;**

4. That Section 34 of the *VOCAA* be amended so as to substantially limit the circumstances in which: (1) the discretion to notify offenders can be exercised; (2) the offender can be permitted to introduce or elicit evidence about the victim's character, behaviour or attitude;
5. That Section 54(a) of the *VOCAA* be repealed;
6. That Section 54(c) of the *VOCAA* be repealed;
7. That Section 54(d) of the *VOCAA* be repealed;
8. That Section 54(f) of the *VOCAA* be repealed (so as to not allow character, attitude and conduct assessments to be made);
9. That a new Section 54(a) be introduced, to read as follows:

The Tribunal may refuse to grant assistance to a primary victim of an act of violence if the Tribunal is satisfied, on the balance of probabilities, that the only reason, or the main reason, the act of violence was committed against the primary victim was—

- i. because the victim was involved in a criminal activity when the act of violence happened; or
- ii. because of the victim's previous involvement in a criminal activity, whether or not the victim is currently involved in the criminal activity.

In making a decision under section 54(a), the Tribunal must consider whether the act of violence was proportionate to the victim's criminal activity.

In making a decision under section 54(a), the Tribunal must not refuse an application in accordance with subsection (a) on the basis that the 'criminal activity' was that the applicant was under the influence of alcohol or other drugs, or because the applicant was experiencing 'alcoholism' or 'addiction'.

10. That Section 54(b)(i) be repealed;
11. That a new Section 54(b)(i) should be introduced. This provision should mirror the language of the new section 54(a), described above, but should pertain only to applications by related victims.

#### Relevant background

The state of Victoria offers a comprehensive system designed to support victims of crime, established under the *Victims of Crime Assistance Act 1996* (*VOCAA*/'the Act') and administered by the Victims of Crime Assistance Tribunal (VOCAT). As prominent professor of law Ian Freckleton explains:

The payment of financial compensation for the non-pecuniary effects of crime, such as the pain and suffering engendered by criminal acts of violence, is a phenomenon of comparatively recent experience. It accompanied the dawning of awareness of the impact of criminal offences of violence upon victims during the 1960s and into the 1970s.<sup>1</sup>

These schemes, including the VOCAT scheme, are generally known as ‘therapeutic’, ‘beneficial’ or ‘remedial’ schemes, in that they are intended to remedy wrongs, benefit victims and assist them in their recovery from crimes perpetrated against them. The stated purpose of *VOCA4* is to assist victims of crime (as per Section 1(1) of the Act), and there are three main objectives, as per Section 1(2) of the Act:

- (a) to assist victims of crime to recover from the crime by paying them financial assistance for expenses incurred, or reasonably likely to be incurred, by them as a direct result of the crime; and
- (b) to pay certain victims of crime financial assistance (including special financial assistance) as a symbolic expression by the State of the community’s sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime; and
- (c) to allow victims of crime to have recourse to financial assistance under this Act where compensation for the injury cannot be obtained from the offender or other sources.

By virtue of section 38(1)(a) of the Act, VOCAT is not required to conduct itself in a formal manner. Section 38(2) of the Act further establishes that the Tribunal is not bound by the rules of evidence. The significance of this will become clearer as we progress.

Importantly, and appropriately, *VOCA4* established a number of eligibility criteria and other hurdles that must be satisfied before a person might receive an award of compensation from VOCAT. Our submission focuses on two aspects of relevance, being ss34 and 54.

Section 34(2) of the Act states that:

The Tribunal may give notice of the time and place for the hearing to any other person whom the Tribunal considers to have a *legitimate interest* in the matter.  
(emphasis added)

Section 54 of *VOCA4* sets out a series of matters to which VOCAT must have regard when considering an application for an award of compensation. That section reads as follows:

In determining whether or not to make an award of assistance or the amount of assistance to award, the Tribunal must have regard to the following:

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<sup>1</sup> Freckleton, I. (2004). Compensation for victims of crime. In H. Kaptein, & M. Malsch (Eds.), *Crime, victims and justice: Essays on principles and practice*. Aldershot: Ashgate at p. 31.

<sup>2</sup> See, for example: Whitney, K. (1997). The Criminal Injuries Compensation Acts: do they discriminate against female victims of violence?. *Southern Cross University Law Review*, vol. 1, September issue, pp. 92-119;

- (a) the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence;
- (b) in the case of an application by a related victim—
  - (i) the character or behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) of the deceased primary victim of the act of violence;
  - (ii) any obligations owed to the applicant and any other related victim applicants by the deceased primary victim of the act of violence;
  - (iii) the financial resources (including earning capacity) and financial needs of the applicant and any other related victim applicants;
  - (iv) if the related victim is a close family member of, or had an intimate personal relationship with, the deceased primary victim of the act of violence, the nature of the relationship between them;
- (c) 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;
- (d) any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death;
- (e) whether the person by whom the act of violence was committed or alleged to have been committed will benefit directly or indirectly from the award;
- (f) any other circumstances that it considers relevant.

In what follows, we make a series of recommendations pertaining to these sections. The recommendations are based upon our own research and expertise on alcohol and other drug issues, crimes compensation, alcohol and violence, gendered violence, social policy, drug policy, drug law, lawyering and legal practice. Our submission raises a series of concerns about the fairness of existing approaches. Although many of these concerns are not issues specific to either men or women, many of them pertain to typically gendered forms of violence and to gendered forms of governance, including of women's alcohol and other drug consumption. Our submission thus shares and reiterates concerns raised by other experts over several decades about the potential for victims of crime compensation processes to entrench discriminations against women.<sup>2</sup>

### **Important preliminary points**

Before we proceed, it is important to make two preliminary points as context for the analysis that follows. The first relates to our focus on alcohol and other drug use, intoxication, 'addiction' and 'alcoholism' and the second relates to the *VOCA4*'s focus on 'sympathy'.

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<sup>2</sup> See, for example: Whitney, K. (1997). The Criminal Injuries Compensation Acts: do they discriminate against female victims of violence?. *Southern Cross University Law Review*, vol. 1, September issue, pp. 92-119; O'Connell, K. (1997). A question of compensation. *Refractory Girl*, vol. 52, summer/winter, pp. 11-12; Jurevic, L. (1996). Between a rock and a hard place: women victims of domestic violence and the Western Australian Criminal Injuries Compensation Act. *Murdoch University Electronic Journal of Law*, vol. 3, issue 2.

**1. Alcohol and other drug issues:** As we explain below, alcohol and other drug issues surface in VOCAT proceedings in a range of ways and for a variety of reasons. It might be the alleged victim who consumes or has consumed alcohol or other drugs, or it might be the alleged perpetrator. This consumption might be thought to be relevant to whether the crime was committed, whether the memory of either party is reliable, whether a crime was provoked, and much more. Sometimes, VOCAT members are exploring questions about alcohol or other drug 'use', sometimes 'intoxication', sometimes 'addiction' or 'alcoholism' and sometimes alcohol and other drug-related 'harms' and 'effects'. It is a popular misconception that experts are in agreement about issues pertaining to use, effects, harms, intoxication, addiction and alcoholism or that relevant mechanisms are straightforward. Indeed, key concepts around all of these are complex and contested. For example:

- There is a substantial body of literature to suggest that the nature and meaning of both 'alcoholism' and 'addiction' are complex, contested and by no means settled.<sup>3</sup> For example, there is significant debate about what addiction 'is', how it 'works' and whether certain kinds of behaviours (such as sexual conduct associated with indecent exposure, sexual harassment, public masturbation or other sex crimes) should be characterised as addictions.<sup>4</sup> There are also competing views among experts on the value and reliability of different models of addiction, including the brain disease model of addiction.<sup>5</sup> For instance, in 2014, 94 experts were signatories to an open letter to the prestigious journal *Nature*, in which they challenged claims by other experts about addiction, thus highlighting the complexity and contestation in the field.<sup>6</sup> Key concepts of addiction such as agency, responsibility, rationality and choice are contested.
- The field of alcohol and other drug research is also characterised by a lack of consensus about the nature and origins of alcohol and other drug 'effects' and 'harms'.<sup>7</sup> All of the authors of this submission have written on these issues.<sup>8</sup>

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<sup>3</sup> See, for example: Fraser, S., Moore, D. & Keane, H. (2014). *Habits: Remaking Addiction*. Basingstoke: Palgrave Macmillan; Fraser, S., & Seear, K. (2011). *Making disease, making citizens: The politics of hepatitis C*. Aldershot: Ashgate; Karasaki, M., Fraser, S., Moore, D. & Dietze, P. (2013). The place of volition in addiction: Differing approaches and their implications for policy and service provision. *Drug and Alcohol Review*, 32, (2), pp. 195-204; Keane, H. (2002). *What's wrong with addiction?* Melbourne: Melbourne University Press (an imprint of Melbourne University Publishing).

<sup>4</sup> Keane, H. (2016). Technological change and sexual disorder. *Addiction*, 111, pp. 2108-2109.

<sup>5</sup> Fraser, S. (2016). Articulating addiction in alcohol and other drug policy: A multiverse of habits. *International Journal of Drug Policy*, 31, pp. 6-14; Carter, A. et al. (2014). Control and responsibility in addicted individuals: What do addiction neuroscientists and clinicians think? *Neuroethics*, 7(2), pp. 205-214; Hall, W., Carter, A., & Forlini, C. (2015). The brain disease model of addiction: Is it supported by the evidence and has it delivered on its promises? *The Lancet Psychiatry*, 2, pp. 105-110.

<sup>6</sup> Heim, D. et al. (2014). Addiction: not just brain malfunction. *Nature*, 507, 40. Available at:

<http://www.nature.com/nature/journal/v507/n7490/full/507040e.html> (accessed 16th October, 2017).

<sup>7</sup> Duff, C. (2013). The social life of drugs. *International Journal of Drug Policy*, 24(3), pp. 167-172 at p. 169.

<sup>8</sup> Barratt, M. J., Seear, K., & Lancaster, K. (2017). A critical examination of the definition of 'psychoactive effect' in Australian drug legislation. *International Journal of Drug Policy*, 40, pp. 16-25; Fraser, S., Moore, D. & Keane, H. (2014). *Habits: Remaking Addiction*. Basingstoke: Palgrave Macmillan; Seear, K. & Moore, D. (eds.) (2014). Complexity: Researching Alcohol and Other Drugs in a Multiple World. (Conference Special Issue). *Contemporary Drug Problems*, 41, (3), pp. 293-484.

Seear, K. (2013). What do we really know about doping 'effects'? An argument for doping effects as co-constituted 'phenomena'. *Performance Enhancement and Health*, 2, (4), 201-209; Seear, K. (2013). Beyond the Boundary: Drugs, the body and sport. *Contemporary Drug Problems*. Vol. 40, Issue 2; Fraser, S. & Moore, D.

Popular understandings of drug ‘effects’ and ‘harms’ understand them as effects of the properties of drugs ‘themselves’. A number of scholars, including the authors to this submission, have pointed out that in fact the ‘effects’ of alcohol and other drugs are not consistent, stable, predictable or singular, and that they are inconsistent, plural, unpredictable, multiple and ‘emergent’ in action.<sup>9</sup> The complexity of these issues has been recognised, to some extent, by an important decision of the Victorian Supreme Court of Appeal: *R v Pidoto & O'Dea* [2006] VSCA 185. That decision was concerned with the question of whether the ‘harmfulness’ of a drug could or should be taken into account when fixing a sentence for a person found guilty of drug trafficking. The court determined that the legislative scheme did not permit or require ‘harmfulness’ to be taken into account but also – of more importance for present purposes – that determining the ‘relative harmfulness’ of different drugs was a ‘practically impossible task’. In reaching this conclusion, the court said:

[...] we think it wholly impracticable — and undesirable — for any sentencing judge to attempt to form views about the (relative) harmfulness of the particular drug of dependence the subject of the trafficking charge. This is so whether or not expert evidence is led. The practical impossibility of the task reinforces our conclusion that Parliament did not intend that it be undertaken. The difficulties involved in a judge assessing the seriousness of trafficking in a particular drug of addiction, based upon the characteristics of the substance involved, are numerous. It is necessary to draw attention to only a few.

It is important to note that despite this seemingly unequivocal statement about the difficulties associated with assessing harm, one passage in *Pidoto & O'Dea* does imply that assessing harmfulness might be possible. In particular, the Court stated that this task would require ‘specialist expertise, involve detailed investigation and must be based on extensive information on a range of issues’. As we have noted already, however, even if the law did require or permit an assessment of the ‘relative harmfulness’ of different drugs, there is considerable disagreement among experts on these issues, including whether such an assessment is possible.

The findings in *Pidoto & O'Dea* have been cited with approval in subsequent Victorian cases and by the High Court of Australia.<sup>10</sup>

- Intoxication is relevant to many areas of law, including the criminal law. Although it is often assumed that the ‘meaning’ and relevance of intoxication to the criminal law is consistent and clear, recent research involving the first author found that Australian criminal law is in fact plagued by inconsistent approaches

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(2011). *The drug effect: Health, crime and society*. Melbourne: Cambridge University; Fraser, S., & valentine, k. (2008). *Substance and substitution: Methadone subjects in liberal societies*. Basingstoke: Palgrave.

<sup>9</sup> See, for example: Demant, J. (2013). Affected in the nightclub. A case study of regular clubbers’ conflictual practices in nightclubs. *International Journal of Drug Policy*, 24(3), 196–202; Hart, A.C. and Moore, D. (2014). Alcohol and alcohol effects: Constituting causality in alcohol epidemiology. *Contemporary Drug Problems*, 41, (3), pp. 393-416; Dwyer, R. and Moore, D. (2013). Enacting multiple methamphetamines: The ontological politics of public discourse and consumer accounts of a drug and its effects. *International Journal of Drug Policy*, 24, (3), pp. 203-211.

<sup>10</sup> *Haddara v The Queen* [2016] VSCA 168; *Adams v The Queen* (2008) 234 CLR 143.

to a range of important issues, both in legislation and in the case law.<sup>11</sup> These include differing approaches by courts, for example, to whether a victim, witness or offender is intoxicated; to whether and in what circumstances intoxication would be relevant (e.g. whether it is relevant to a victim's credibility or to a witness' memory); and to how it is relevant (e.g. to whether it aggravates or mitigates a sentence). In more recent research conducted collaboratively by the authors of this submission, we found a tendency in some research, policy and legal responses to violence, to reproduce simplistic assumptions about the relationship between alcohol and other drugs and violence.<sup>12</sup> We found that alcohol was often treated as the 'fuel' for violence, the key contributing element that causes it. These approaches erase the complex range of factors that produce and shape violent crime, including the role of specific masculinities in the production of violence.

Tensions and debates about 'intoxication', 'addiction', 'alcoholism', drug 'effects' and 'harms' are highly relevant to VOCAT matters but also fraught. As there is a lack of consensus on these key questions even among experts, the role of VOCAT members in making decisions about them must be questioned. Similarly, while it is not clear whether the finding in *Pidoto & O'Dea* applies to VOCAT matters, the Court of Appeal's comments in that case clearly signal that even in criminal matters where drugs are a central concern, it is 'practically impossible' to make decisions about the 'relative harmfulness' of a drug. As we will explain, VOCAT members make decisions about all of these issues, however, in circumstances that we consider to be highly problematic.

**2. Compensation as a symbolic expression of sympathy:** The second contextual point that we offer by way of background involves the importance of the *VOCAA*'s focus on 'sympathy'. As we noted earlier, sympathy is centrally relevant to one of the three stated objectives of the Act, appearing in section 1(2)(b). That section states that compensation will be paid:

as a symbolic expression by the State of the community's sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime.

While this statement is doubtless well-intentioned, it does not take into account the higher historically and politically specific conditions under which sympathy is experienced and considered legitimate. As such it creates a set of problems for applicant victims. By tying awards of compensation to the articulation and experience of 'sympathy' in this way, the Act introduces a set of political and moral considerations about who evokes and 'deserves' sympathy. As we explain in the sections that follow, there is clear evidence of VOCAT members reading key provisions of the Act through a moral lens, and grappling with questions about sympathy and morality in some of the cases we have examined. For example, VOCAT members, like other members of the

<sup>11</sup> McNamara, L., Quilter, J., Seear, K. and Room, R. (2017). Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects. *Monash University Law Review*, 43(1), pp. 148-194; Quilter, J., McNamara, L., Seear, K. and Room, R. (2016). The definition and significance of 'intoxication' in Australian criminal law: a case study of Queensland's 'Safe night out' legislation. *QUT Law Review*, 16(2), pp. 42-58; Quilter, J., McNamara, L., Seear, K. and Room, R. (2016). Alcohol and drug use and criminal law: a national study of the significance of 'Intoxication' under Australian legislation. *UNSW Law Journal*, 39(3), pp. 913-949.

<sup>12</sup> Moore, D., Fraser, S., Keane, H., Seear, K. and valentine, k. (In press). Missing masculinities: Gendering practices in Australian alcohol research and policy. *Australian Feminist Studies*.

community, sometimes struggle to view people with a past history of alcohol and other drug use (or ‘addiction’) as subjects deserving of sympathy. This struggle is a common feature of contemporary Western liberal societies. The same can be said for applicant victims with a criminal record (a matter taken up by the VLRC itself in its supplementary consultation paper).

Relevantly, there is a large and diverse literature about the relationship between justice and emotions, including sympathy. As Professor Sara Ahmed has argued, emotions can be productive when connected to justice, but there are also:

[...] risks of justice defined in terms of sympathy or compassion: justice then becomes a sign of what I can give to others, and works to elevate some subjects over others [...] But we must also challenge the view that justice is about [...] being the right kind of subject. Justice is not about ‘good character’. Not only does this model work to conceal the power relations at stake in defining what is good-in-itself, but it also works to individuate, personalise and privatise the social relation of (in)justice.<sup>13</sup>

Despite this, there are reasons why we should value an explicit reference to emotions in legislation. As feminist scholars have long argued, law too often relies on and instantiates the importance of ‘reason’ and ‘rationality’, such as in ‘the reasonable person test’,<sup>14</sup> in ways that seek to separate the ‘proper’ exercise of law from feeling. As Sara Ahmed argues, this tradition ‘constructs emotions as not only irrelevant to judgement and justice, but also as unreasonable, and as an obstacle to good judgement’.<sup>15</sup> In other words, although it would not do to dispense with articulations of emotion altogether, it is vital that we interrogate what they ‘do’ in legal processes, and that we bear in mind that emotions are politically shaped. Helpfully, Ahmed argues that legal articulations of emotion reference an ‘involvement in social norms’.<sup>16</sup> For example, in previous years, men were convicted of sodomy or other ‘indecency’ offences in many countries around the world, including Australia. These offences were often underpinned by articulations of emotion including disgust. Affected individuals and their consensual adult relationships were not considered to be deserving of sympathy, although in recent years, parliaments have begun to pass laws to quash historic convictions on the basis that they were unjust.<sup>17</sup> In our analysis and discussion of VOCAT cases that follow, similar important connections between social norms and emotions can be clearly detected, as the flow-through effect of s1(2)(b) is clearly felt in cases involving alcohol, drugs, gendered violence and ‘addiction’. This occurs wherever VOCAT members are dealing with questions about drug use, past criminal offending, and other behaviours (such as unprotected sex, ‘risky’ practices and sex work) that are often the subject of moral judgement.

In allowing VOCAT members to consider whether victims are ‘worthy’ of state sympathies, the scheme allows for both the *politicisation of suffering* and the *making of moral judgments* about ‘appropriate’/‘worthy’ victims; this is a significant problem with the

<sup>13</sup> Ahmed, S. (2015). *The cultural politics of emotion*. (2<sup>nd</sup> Ed.) Routledge: New York, p. 195.

<sup>14</sup> See for example: Cahn, N. (1992). The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice. 77(6) *Cornell Law Review* 1398.

<sup>15</sup> Ahmed, S. (2015). *The cultural politics of emotion*. (2<sup>nd</sup> Ed.) Routledge: New York, p. 195.

<sup>16</sup> Ahmed, S. (2015). *The cultural politics of emotion*. (2<sup>nd</sup> Ed.) Routledge: New York, p. 195.

<sup>17</sup> For a discussion see, for example: Gerber, P. (2014). Expunging convictions for gay sex: an old wrong is finally righted. *The Conversation*. <https://theconversation.com/expunging-convictions-for-gay-sex-an-old-wrong-is-finally-righted-33013> (accessed 16th October, 2017).

scheme and one that we argue needs to be addressed. We thus encourage the VLRC to consider whether s1(2)(b) of the *VOCAA* needs to be retained or whether it can be amended to remove the specific emphasis on sympathy.

### Preliminary recommendations

Accordingly, and for the reasons we have outlined above, our first three recommendations relate to preliminary matters of fundamental importance to the operation of the scheme, the decision-making process and access to justice.

We recommend:

#### Recommendation 1

**That Section 1(2)(b) of the *VOCAA* be amended to remove reference to awards of compensation being a ‘symbolic expression’ of ‘sympathy’, or alternatively to repeal the subsection altogether.**

#### Recommendation 2

**That Tribunal members be required to participate in professional development workshops, provided by the Judicial College of Victoria or other appropriate body, and developed in consultation with relevant experts, on issues covered in this submission, including: the complexities of family violence, sexual assault, addiction, alcoholism, intoxication, and alcohol and other drug issues.**

#### Recommendation 3

**That rather than moving to an administrative or quasi-administrative scheme, the existing model be retained.**

### Our research on VOCAT’s engagement with ‘addiction’

Over the last five years, we have conducted research into how alcohol and other drug use, ‘addiction’ and ‘alcoholism’ are dealt with across a range of areas of the law.<sup>18</sup> This work is not confined to crimes compensation although some of our research has dealt with it.

In 2013-14, the first two authors conducted research into the nature and operation of section 54 of VOCAA, including how the ‘character’ and ‘behavioural’ elements of the section had been interpreted and applied.<sup>19</sup>

<sup>18</sup> Seear, K. and Fraser, S. (2014). Beyond criminal law: The multiple constitution of addiction in Australian legislation. *Addiction Research & Theory*.

<sup>19</sup> Seear, K. and Fraser, S. (2014). The addict as victim: Producing the ‘problem’ of addiction in Australian victims of crime compensation. *International Journal of Drug Policy*, 25(5), pp. 826–835.

We found a number of cases where a victim of crime's past history of drug use (including their 'addiction') was found to be relevant to the question of whether they should be compensated. We also noted that:

[...] section 54 offers no guidance as to what might be a relevant consideration, what weight should be given to relevant considerations in deciding whether or not to make an award, and how those considerations impact on decisions about the kind or size of award to make. The upshot of this is that judges have considerable scope for determining what is both 'relevant' and 'problematic', notions that have the potential to be taken up in subsequent case law as self-evidently relevant and problematic [...] It is telling, therefore, that drug use and 'addiction' were understood to be [...] a potential obstacle to the provision of compensation [...], although the apparent relevance of drug use and addiction varied.<sup>20</sup>

We found significant inconsistency in understanding and application of these issues. Approaches to these questions were highly variable.

While in general there are sound public policy grounds for permitting Tribunal members to retain a broad discretion in regards to eligibility, our research suggests the character test in section 54(a) is overly broad. In its present form, it is possible, for instance, that a victim of a very serious crime (such as attempted murder, rape or other form of family violence) might be denied victims of crime compensation, including vital financial, social and medical supports, by virtue of having a history of illicit drug use. This may be the case, as we have previously argued,<sup>21</sup> regardless of whether the crime perpetrated upon the victim was related in any way to past drug use (i.e. section 54(a) does not presently require a nexus between the act of violence perpetrated against the victim and the victim's drug use). We will return to a more detailed discussion of s54 shortly.

### How might VOCAT discover a victim's alcohol or other drug use?

The Tribunal may become aware of a victim's past/present alcohol or other drug use through a variety of means. In research by the first and second authors, we noted that it is not always clear where that evidence comes from. It might be elicited in connection with earlier criminal proceedings (as we posited was the situation in the case of *Hassell v VOCAT* [2011]), or it might emerge from a medical or psychological report prepared on behalf of the applicant victim. The informant may also produce this information, where they are asked to disclose potentially relevant information about the applicant to the Tribunal. This is one way in which the looseness around rules of evidence starts to become relevant and apparent: individual informants may take different views, for instance, on what kind of information about an applicant is 'relevant' and worth disclosing. This allows for political and moral judgments to be made of the kind we described earlier in our discussion on sympathy and the politicisation of suffering, and to potentially influence the way VOCAT members will approach the task ahead.

<sup>20</sup> Seear, K. and Fraser, S. (2014). The addict as victim: Producing the 'problem' of addiction in Australian victims of crime compensation. *International Journal of Drug Policy*, 25(5), pp. 826–835 at 830.

<sup>21</sup> Seear, K. and Fraser, S. (2014). The addict as victim: Producing the 'problem' of addiction in Australian victims of crime compensation. *International Journal of Drug Policy*, 25(5), pp. 826–835.

An important issue that has not, as far as we are aware, been fully studied as yet, is the effect of the offender notification process on these issues. As we noted earlier, the Tribunal has the discretion under section 34(2) of the Act to notify anyone with a 'legitimate interest' in the case that an application for compensation has been made. This can include the alleged offender. For this reason, this process is known colloquially as 'offender notification', and is dealt with under Practice Direction No. 4 of 2008.<sup>22</sup>

Although both the Act and the Practice Direction set out relevant safeguards for the applicant in the event that the Tribunal is contemplating an offender notification (such as giving the applicant the opportunity to be heard on whether an offender notification should be made under section 34(3) of the Act), anecdotal evidence suggests that offender notification processes are open to abuse and present unique challenges for applicants. For instance, even though the VOCAT website states that offender notification 'rarely occurs',<sup>23</sup> anecdotal evidence from the profession suggests that it is becoming increasingly common, and in some registries, almost the norm. (For more on the offender notification process, see the submission of Springvale Monash Legal Service. We endorse their submissions on offender notification.)

We also know from experience that where an offender is notified of an application and elects to attend, the alleged offender:

- May choose to simply observe the process;
- May hire a lawyer and cross-examine the applicant;
- Is not required to give evidence or themselves be submitted to cross-examination.

All of this is made possible because VOCAT is not bound by the rules of evidence, as we noted earlier.

We are aware of cases where victims of sexual assault, sexual abuse and/or family violence have been subjected to extensive and often gruelling cross-examination by counsel representing the alleged offender. As the rules of evidence do not apply, cross-examination may involve exploration of any number of issues, including the applicant's past (or current) use of alcohol or illicit drugs. There is a perverse incentive for the alleged offender to introduce evidence of past alcohol and other drug use, addiction or alcoholism in circumstances where they know VOCAT might take these matters into account to reduce or refuse an award. There is always the possibility, moreover, that such allegations will be untrue; the probability of detecting this might be complicated in circumstances where the ordinary rules of evidence do not apply.

In these cases, the alleged offender's lawyers will be eliciting evidence designed to damage the reputation, credibility or trustworthiness of applicants, either to cast doubt on the veracity of their claims about the crimes they allege were committed against them, or to raise material of potential relevance under section 54. In this sense, there is an important overlap between ss34 and 54 that raises serious questions about the ability of

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<sup>22</sup> [https://www.vocat.vic.gov.au/sites/default/files/publication/2016-09/PD4-2008\\_Notification\\_of\\_alleged\\_offender\\_and\\_3rd\\_parties.pdf](https://www.vocat.vic.gov.au/sites/default/files/publication/2016-09/PD4-2008_Notification_of_alleged_offender_and_3rd_parties.pdf) (accessed 18/07/2017).

<sup>23</sup> <https://www.vocat.vic.gov.au/determining-application/notifying-offender> (accessed 18/07/2017).

the scheme to protect and support victims, and its potential to create anti-therapeutic effects.

### **Alcohol, other drugs and victim blaming**

We know that lawyers strategically use alcohol and other drug issues in family violence cases to discredit victims if they believe it will advance their clients' cases. On occasion the strategic use of this information can constitute a form of what is often referred to as 'victim blaming'. Victim blaming is defined as:

a devaluing act that occurs when the victim(s) of a crime or an accident is held responsible — in whole or in part — for the crimes that have been committed against them.<sup>24</sup>

We have recently examined these issues in further research and set out some of our findings, below.

In recent research we have undertaken separately and together on family violence cases<sup>25</sup> and legal practice,<sup>26</sup> for example, we found that alcohol and other drug use, 'alcoholism' and 'addiction' often features prominently – according to lawyers – in family violence cases. We identified a perverse set of arguments being used by lawyers to try and justify or mitigate (typically gendered forms of) violent behaviour. When acting for alleged victims of family violence, for example, lawyers for the alleged perpetrator will often try to explain away or excuse their clients' violent behaviour on the basis that: (1) the (typically female) victim is an 'alcoholic' or 'addict', chaotic and disordered; and (2) the victim's erratic or disordered behaviour caused such frustration in the perpetrator that he was unable to control himself, and assaulted her.<sup>27</sup> There are also cases, on the other hand, where the alleged perpetrator may be the one that consumes alcohol or other drugs; in these cases, lawyers may argue that the offender's substance use drove them to perpetrate family violence and that they were unable to control their own behaviour.<sup>28</sup>

In each instance, we argued, claims about the effects of alcohol and other drug use are used against the victims of family violence: in furtherance of victim-blaming, on the one hand, or to excuse or mitigate an offender's violent behaviour, on the other. They are also used to shed doubt on the trustworthiness or veracity of a victim's claims. Evidence of this kind could be theoretically relevant under s54 of the Act. We discuss our concerns about s54 factors in the next section.

Our findings echo concerns raised in other research about the potential for victims of crime compensation processes to exacerbate or perpetuate processes of victim blaming.<sup>29</sup>

<sup>24</sup> The Canadian Resource Centre for Victims of Crime (2009) *Victim Blaming*.

[https://crcvc.ca/docs/victim\\_blaming.pdf](https://crcvc.ca/docs/victim_blaming.pdf) (accessed 13th October 2017), at p. 2.

<sup>25</sup> Seear, K. and Fraser, S. (2016). Addiction veridiction: Gendering agency in legal mobilisations of addiction discourse. *Griffith Law Review*, 25(1), pp. 13-29.

<sup>26</sup> Seear, K. (2017). The emerging role of lawyers as addiction 'quasi-experts'. *International Journal of Drug Policy*, 44, pp. 183-191.

<sup>27</sup> Seear, K. and Fraser, S. (2016). Addiction veridiction: Gendering agency in legal mobilisations of addiction discourse. *Griffith Law Review*, 25(1), pp. 13-29.

<sup>28</sup> Seear, K. and Fraser, S. (2016). Addiction veridiction: Gendering agency in legal mobilisations of addiction discourse. *Griffith Law Review*, 25(1), pp. 13-29.

<sup>29</sup> Meyering, I.B. (2010). *Victim Compensation and Domestic Violence: A National Overview, Stakeholder Paper No 8*

Indeed, section 54(c) of the Act specifically allows for provocation arguments to be taken into account (in fact, the Act requires it). Based on our research, we have concluded that in the absence of specific guidelines about these issues, Tribunal members may be invited to entertain spurious and antiquated arguments about the role of applicants (particularly women) in bringing violence upon themselves. This includes but is not limited to family violence matters; it might extend to sexual assault or sexual abuse cases, or to other scenarios where gendered understandings of responsibility, vulnerability, agency and blame might shape decision-making.

While we have concerns about the process of offender notification in and of itself, we see special challenges in relation to the field of alcohol and other drug use. As offender notifications appear to be on the increase and are made *without sufficient safeguards for victims*, alleged offenders have a perverse incentive to raise questions about the character or conduct of the victim (including their past drug use). In many instances where the parties are known to one another (through, for example, a previous intimate relationship), the alleged offender is likely to have information about the applicant's past (including but not limited to illicit drug use). This evidence may be elicited in circumstances where the alleged offender also has a history of illicit drug use (or other unlawful activities) but no mechanism exists to compel the offender to reveal that information. This is because such information is not strictly relevant to the questions before the Tribunal (i.e. the offender's past conduct, character and attitude is not under examination, except in relation to the alleged offence itself), and also because no mechanism exists to compel the offender to testify. These issues would not be resolved, we suggest, by simply extending the nature and range of matters that the Tribunal might take into account. In other words, we do not think that matters would be resolved by allowing the Tribunal to inquire into the past drug use of both the applicant and the alleged offender. The problem, instead, is with the central relevance given to illicit drug use in these proceedings.

Without sufficient safeguards for victims, clearer offender notification procedures and strict rules about the nature of the evidence, if any, that alleged offenders are permitted to introduce or elicit through cross-examination, there is a genuine risk that the character and conduct of the victim will be put on trial. This would be a perverse result at odds with both the remedial nature of the VOCAT scheme and developments in other areas of the criminal law designed to safeguard and protect victims (e.g. processes designed to offer further protection to victims of rape giving evidence in criminal trials and to limit the nature and extent of cross-examination).

For these reasons, we recommend as follows:

#### **Recommendation 4**

**That Section 34 of the *VOCAT* be amended so as to substantially limit the circumstances in which: (1) the discretion to notify offenders can be exercised; (2) the offender can be permitted to introduce or elicit evidence about the victim's character, behaviour or attitude.**

Serious consideration should be given to repealing section 34 of the Act. We recognise that this may offend principles of procedural fairness, however. At the very least, we

recommend that there be clear guidance from parliament about the circumstances in which an offender notification is permissible, and the criteria on which a notification should depend. As noted above, section 34 also interacts with Section 54. This requires further consideration, and to aid this we explore section 54 in more detail below.

### **The origins of alcohol and other drug use and ‘addiction’**

In many of the cases we analysed for our research on Victorian victims of crime processes,<sup>30</sup> the Tribunal/Court decided to compensate a victim of crime in spite of a history of illicit drug use and/or ‘addiction’. We considered some of the reasons for this. What we found, among other things, was that Tribunals or Courts were more sympathetic to VOCAT claims where they could find a way to *explain* or *excuse* an applicant’s illicit drug use. Where, for example, an applicant had experienced past trauma or abuse, including sexual abuse prior to their history of illicit drug use, decision makers appeared more likely to make an award of compensation in their favour. A clear theme of our research was that decision makers were more sympathetic to drug use when it appeared to follow a particular temporal logic (i.e. abuse pre-dating a drug habit) and that suggested the trauma or abuse *caused* such drug use.

Although this appears, on the face of it, to be a more generous approach to victims of crime, it is not without its problems. In particular, we note that:

- Research suggests that people use alcohol or other drugs for a range of reasons including pleasure, experimentation, to deal with stress or trauma and for cultural reasons. People who use or who have used alcohol or other drugs will not always be able to provide a simplistic ‘reason’ or ‘explanation’ for their use (in the form of past abuse, trauma or victimhood). Indeed, in many instances, their alcohol or other drug use may pre-date their status as a victim of violence (see below for a more detailed discussion on these issues and the significance of the pathologisation of alcohol and other drug use, ‘addiction’ and stigma);
- The question of whether alcohol and other drug use relates to or is ‘caused by’ trauma is complex, contingent and variable. It is not clear how courts might respond, for example, to a case where a woman used drugs briefly as a teenager, then did not use them for several decades, was then abused by a partner and recommenced drug use. Would the fact of her earlier drug history be relevant to/exclude her from eligibility? And on what basis? Would the Tribunal be inclined to try and establish a ‘cause’ for her drug use? How is it possible to know the cause of her drug use? And what if she understands there to be a range of different factors implicated in her drug use? If courts and tribunals are to go down the path of seeking to assess the ‘origins’ and ‘nature’ of a person’s drug use, or even a person’s ‘addiction’, how will patterns of drug use over time be understood, and on what basis? Moreover, as we noted earlier in this submission agreement on important questions such as the nature and causes of addiction or alcoholism does not exist even among experts;

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<sup>30</sup> Seear, K. and Fraser, S. (2014). The addict as victim: Producing the ‘problem’ of addiction in Australian victims of crime compensation. *International Journal of Drug Policy*, 25(5), pp. 826–835 at 830.

- In our research, and as noted above, we found evidence of decision makers constructing drug use as ‘causally connected’ to trauma, abuse or violence where there were circumstances that enabled them to do so. In the case of *JM v VOCAT* [2002], for example, the applicant (JM) was a victim of a childhood sexual assault when he was aged 10. The assault was described by the presiding judge as ‘a traumatic and very serious incident which resulted in the conviction and imprisonment of the offender’. JM subsequently used heroin, with that use being characterised in the hearing as a ‘heroin addiction’. In determining whether JM could be compensated, considerable emphasis was placed upon the applicant’s family, upbringing and background, including the fact that he (JM) was one of seven children, and none of the other six had gone on to be ‘substance abusers’ (in the court’s view, this proved that the traumatic event probably caused JM’s drug use). It was considered relevant and important that JM had come from what the judge described as a ‘normal’ family. In relying on external circumstances such as these, courts establish two classes of victims: those who are *more deserving* and come, for instance, from ‘normal’ or more well-to-do families, and *less deserving* victims, such as those who come from less well-to-do families, or families where there is a more entrenched pattern of alcohol and other drug use (especially illicit drug use). We ask: might there have been a different result for JM if he had come from a family where substance use was more common, or even typical? What if all of JM’s siblings had used drugs? Would this be held against him? Are Courts to now engage in an exercise of seeking to establish the nature and origins of illicit drug use amongst familial and other close connections of the applicant victim in order to understand the applicant’s own use? And what of the rights of these more peripheral parties to the proceedings, if so? Where two categories of victim (deserving and undeserving) are established, including by reference to arbitrary, unreliable and – we suggest – irrelevant factors such as the character and conduct of an applicant’s siblings, the court risks discriminating against people on the basis of factors such as class and race. Without proper parliamentary guidance and greater clarity, courts and tribunals run dangerously close to a process through which they might disallow victims of crime appropriate support based on speculative, unreliable and arbitrary interpretations not just of the applicant’s own conduct and character but those of their friends and/or families. Importantly, as noted previously in this submission, consensus does not exist among experts on the origins of drug use, so we do not consider it appropriate that VOCAT would be tasked with trying to make such decisions;
- On occasion, courts appear to take an overly broad approach to assessing an applicant’s drug use. In the case of *Hassell v VOCAT* (2011), for example, the tribunal was concerned not only with drug use but with the applicant’s relationships and networks. These were constituted as ‘poor choices’ and sinister ‘associations’ which – as we have previously argued – the applicant had to account for/explain. We do not see why a person who has been a victim of a crime should be required to account for or explain friendships and other connections (including some which might be longstanding, familial and/or only tangentially related to drug use, if at all) in order to receive the support of the state for a crime to which they were subjected. It also raises the question of how courts and tribunals make decisions about the relevance of these issues in an area of considerable complexity. These additional hurdles are especially important in the context of family violence, when we consider that many victims of family

violence are reluctant to report violence and/or seek help, and blame themselves for the crimes to which they were subjected. Such processes have a strong anti-therapeutic potential and are arguably at odds with the remedial nature of the Act;

- Finally, and in any event, it is not clear why individuals must be able to account for their drug use in such a way and how this requirement either furthers or aligns with the remedial objectives of the Act. Additional problems arise where a person has previously been found guilty of a criminal offence in connection with alcohol or other drug use and has complied with the requirements or conditions of a court order (e.g. alcohol or other drug counselling, community service, or a custodial sentence). If a VOCAT member then subjects this past use to scrutiny and decides to reduce or refuse an award of compensation accordingly (under section 54), VOCAT is punishing that person twice. Arguably this offends on public policy grounds and is, once again, at odds with the remedial nature of the Act.

We argue that all of these readings are made possible in part by the overly broad notion of time that appears in section 54, whereby any aspect of an applicant's life, *at any time*, can be subject to judicial scrutiny.

### **The importance of stigma**

In some cases, especially where section 54 matters are in issue, the applicant victim may not only have a past (or present) history of drug use, but an existing problematic relationship with drugs. On occasion, Tribunals may be dealing with people who either understand themselves to be experiencing 'addiction' (or 'alcoholism') or who have been labelled as experiencing 'addiction' (or 'alcoholism'). In these cases, where tribunals are dealing with questions about 'addiction' and 'alcoholism', the challenges are even greater.

In some important cases it may be strategically useful, for all of the reasons we have mentioned, for lawyers to frame an applicant's past drug use as a 'dependency' or 'addiction'. This can be done to explain drug use as a manifestation of a 'disease'. The incentive to characterise drug use as pathological, disordered, problematic or dependent is a perverse one, however.

One reason for this is that this way of framing drug use can be problematic and stigmatising. For some, 'addiction' is a highly stigmatising label, because it implies that one suffers from a disease (or illness) and lacks control. In recent years, a number of researchers, major international stakeholders and organisations have turned their attention to the relationships between law, policy, stigma and discrimination.<sup>31</sup> Stigma can have a range of effects, and can impact for a lifetime.<sup>32</sup> People who have experienced alcohol and other drug-related stigma and/or discrimination may experience poorer health. They may also experience difficulties securing work or housing and accessing vital

<sup>31</sup> Lloyd, C. (2010). *Sinning and sinned against: the stigmatisation of problem drug users*. (London: UK Drug Policy Commission (UKDPC)); Lloyd, C. (2013). The stigmatization of problem drug users: A narrative literature review. *Drugs: Education, Prevention, and Policy*, 20(2), pp. 85-95; UKDPC, (2010). *Getting serious about stigma: the problem with stigmatising drug users*. (London: UK Drug Policy Commission (UKDPC)).

<sup>32</sup> Lloyd, C. (2013). The stigmatization of problem drug users: A narrative literature review". *Drugs: Education, Prevention, and Policy*, 20(2), pp. 85-95.

health care services, or be deemed unworthy of support and care.<sup>33</sup> Because of the adverse dimensions of alcohol and other drug-related stigma, academics, policymakers and advocates are increasingly cognisant of the need to better understand and address it. As Wakeman and Rich recently argued, ‘addressing this stigma will be crucial, and for many may literally be a matter of life or death’.<sup>34</sup>

Stigma was a focus in the UNODC’s 2016 *World Drug Report*,<sup>35</sup> in which it was noted that people who use drugs are frequently subject to stigmatisation and discrimination, that women are often disproportionately stigmatised, and that efforts to address drug issues around the world should include a focus on overcoming stigmatisation. In July 2017, the United Nations and World Health Organisation released a joint statement calling for a reduction in law-related stigma and drug-related discrimination.<sup>36</sup> In our own work, we have also noted the potential for law and policy to generate, exacerbate or magnify drug-related stigma.<sup>37</sup>

In practice, and in order to properly discharge their ethical obligations, lawyers advising victims of crime need to canvass the possibility that the client’s character, behaviour or attitude will be taken into account under s54(a) in a VOCAT proceeding, or that they will be cross-examined on these issues through the offender notification process under s34. However, this may operate to discourage victims from filing an application, since there is a risk that in so doing, aspects of their past conduct will be subjected to scrutiny. This is particularly problematic in relation to alcohol and other drug use, given it is already highly stigmatised and – as noted above – people who use alcohol and other drugs already face many difficulties in accessing health care and other supports.

In addition, where victims have begun using alcohol and other drugs in the aftermath of the crime, a paradox emerges. These victims may want support for a range of things, including, in some cases, their alcohol and other drug use. In some instances, this use may even be associated with their status as a victim (e.g. where they consume alcohol or other drugs in order to cope with stress or trauma related to the crime). Paradoxically, however, this use may become an object of scrutiny and *the very thing that prohibits them from obtaining compensation*. This might happen where, for example, a person is seeking alcohol and other drug treatment – including counselling, or support for residential rehabilitation – but cannot otherwise access or afford it without external support of the kind provided by a VOCAT award. In this sense, the operation of section 54(a) has an anti-therapeutic effect, and is at odds with the remedial nature and aims of the Act.

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<sup>33</sup> Fitzgerald, J.L., McDonald, K. and Klugman, M. (2004). *Unspoken but everpresent. Hepatitis C in a regional setting*. Melbourne: University of Melbourne; Livingston, J. D., Milne, T., Fang, M. L. and Amari, E. (2012). The effectiveness of interventions for reducing stigma related to substance use disorders: a systematic review. *Addiction*, 107, pp. 39-50.

<sup>34</sup> Wakeman, S. and Rich, J. (In press). Barriers to Medications for Addiction Treatment: How Stigma Kills. *Substance use and misuse*.

<sup>35</sup> United Nations Office on Drugs and Crime, *World Drug Report 2016*, (United Nations publication, Sales No. E.16.XI.7). [https://www.unodc.org/doc/wdr2016/WORLD\\_DRUG\\_REPORT\\_2016\\_web.pdf](https://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf) (accessed 24th February 2017).

<sup>36</sup> <http://www.who.int/mediacentre/news/statements/2017/discrimination-in-health-care/en/> (accessed 15th October, 2017).

<sup>37</sup> Seear, K. (2017). The emerging role of lawyers as addiction ‘quasi-experts’. *International Journal of Drug Policy*, 44, pp. 183-191; Seear, K., Lancaster, K. and Ritter, A. (In press). A new framework for evaluating the potential for drug law to produce stigma: Insights from an Australian study, *Journal of Law, Medicine and Ethics*; Fraser, S., Pienaar, K., Dilkes-Frayne, E., Moore, D., Kokanovic, R., Treloar, C. and Dunlop, A. (2017). Addiction stigma and the biopolitics of liberal modernity: A qualitative analysis. *International Journal of Drug Policy*, 44, pp. 192-201.

In short, wherever there are: (1) perverse incentives for applicants to frame their drug use as pathological, or (2) pressures on applicants to disclose (or address) drug use that is of little or no relevance to the crime perpetrated against them, there is a potential for VOCAT proceedings to generate or exacerbate alcohol and other drug-related stigma. This provides further justification for reconsidering existing approaches including those made possible by sections 34 and 54 of the Act.

To summarise: we have raised a series of concerns about existing approaches under section 54. It:

- May discourage people from making an application under the VOCAA where lawyers advise their clients that section 54 permits scrutiny of their alcohol and other drug consumption;
- Risks punishing people twice, as, for example, where a person has been previously sentenced in relation to a drugs offence and is then sanctioned again (through denial of compensation) for having a past drug use history;
- Offends on public policy grounds, including because it establishes two ‘classes’ of victims (“deserving” and ‘less deserving’ victims). The provision in this sense has the potential to stigmatise and/or discriminate against people with a past history of illicit drug use;
- Has the potential to be approached in ways that stigmatise people who use drugs and/or those characterised as ‘addicts’;
- Permits an unnecessary and unjustifiable intrusion into the lives of others, including family members and friends of victims, whose life choices, lifestyles and/or drug use may be the subject of commentary or assessment;
- Is at odds with other approaches to drug use and/or ‘addiction’ in law, including under Victorian law. In other areas of Victorian law, drug use and/or ‘addiction’ is treated as a health problem (e.g. *Severe Substance Dependence Treatment Act 2010*), or a mitigating factor as regards offending (e.g. ss3 and 65 of the *Infringements Act 2006* (Vic), discussed in more detail below); and
- Is at odds with the remedial nature of *VOCAA*, including its focus on supporting and rehabilitating victims.

#### Should section 54 be amended or removed?

We accept that there will be some circumstances in which it is necessary to scrutinise the actions of the applicant victim in association with eligibility. We recognise, therefore, that abolition of s54 in its entirety is neither realistic nor preferable.

Instead, we recommend significant amendment of section 54 of the *Victims of Crime Assistance Act 1996* (Vic) to limit the currently unreasonably broad approach to assessing the applicant’s conduct, character or attitude.

The question is: what kind of reform is warranted? The supplementary consultation paper sets out a range of options, including those that follow approaches in other Australian states and territories.

One option is to retain s54 or elements of s54, but exclude certain kinds of victims (e.g. sexual abuse or family violence victims) from its operation. We do not consider this to be appropriate, since it would not address the continued scrutiny and stigmatisation of people who use alcohol and other drugs but who were victimised in other contexts.

Another option is to simply remove the broad character, conduct and attitude provision in s54(a). If this were to be done, we are still left with the possibility that character-type tests would be permitted under either s54(c) – which deals with provocation – or s54(d) – which deals with the question of whether any condition or disposition of the applicant directly or indirectly contributed to his or her injury or death. Although both of these provisions allow for a more narrow form of inquiry than that under s54(a), there is still a possibility that victim blaming will occur, as where, for instance, a victim's consumption of alcohol or other drugs is deemed to be a 'contributing' factor to a sexual assault committed against her, or where (as with our recent research, noted above<sup>38</sup>), consumption, 'addiction' or 'alcoholism' is claimed to be a relevant factor in 'provoking' an act of violence. Neither of these situations is acceptable.

There are a range of other options, drawing upon provisions in other states and territories, as documented in the VLRC's supplementary consultation paper. The key risks, as we see it, relate to two issues:

- How to deal with the question of **temporality**;
- How to deal with the **victim's conduct**.

### Temporality

The preferred position should be one in which the Tribunal can scrutinise the victim's conduct only *at the time of the offence*. The existing temporal reference under s54(a) ('at any time') should be removed and substituted with a focus on the victim's conduct only at the time of the offence. This leaves us with the question: what about the victim would be able to be subjected to scrutiny?

### The victim's conduct

The preferred position should be one in which the Tribunal can scrutinise the victim's conduct only as it pertains to the commission of the offence against them (and no more broadly). The s54(a) reference to the victim's character, behaviour or attitude of the victim is unreasonably broad (even if it were to be examined within the context of a narrower temporal framing as suggested above). The main reason for this is that it would still permit Tribunal members to refuse applications for reasons that amount to victim blaming (e.g. that a woman was under the influence of marijuana when she was assaulted,

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<sup>38</sup> Seear, K. and Fraser, S. (2016). Addiction veridiction: Gendering agency in legal mobilisations of addiction discourse. *Griffith Law Review*, 25, (1), pp. 13-29; Seear, K. (2017). The emerging role of lawyers as addiction 'quasi-experts'. *International Journal of Drug Policy*, 44, pp. 183-191.

or that an underage/minor was under the influence of alcohol at the time of a sexual assault). These approaches are unacceptable from a public policy perspective.

Thus, a NSW type provision (section 44 of the *Victims Rights and Support Act 2013*) would not suffice, because it allows scrutiny of ‘any behaviour (including past criminal activity), condition, attitude or disposition of the primary victim concerned that *directly or indirectly contributed to the injury or death sustained by the victim*’ (our emphasis).

### **The Queensland option**

We suggest that s80(1) of Queensland’s *Victims of Crime Assistance Act 2009* offers the best alternative among existing Australian approaches, in that it includes a stricter approach to examine both temporality and the victim’s conduct. That section states (emphasis added):

- (1) The government assessor can not grant assistance to a primary victim of an act of violence if the government assessor is satisfied, on the balance of probabilities, **the only reason, or the main reason**, the act of violence was committed against the primary victim was—
  - (a) because the victim was involved in a criminal activity when the act of violence happened; or
  - (b) because of the victim’s previous involvement in a criminal activity, whether or not the victim is currently involved in the criminal activity.

We found three relevant cases dealing with this section.<sup>39</sup> Two of these were decided primarily on the facts and offer little useful information for present purposes. The most relevant case is that of *Doherty v Victim Assist Queensland* [2012] QCATA 137 (27 June 2012), (hereinafter *Doherty*).

In *Doherty*, an offender (Schackow) shot the victim (Doherty) and was convicted of that crime. There was no dispute, on the facts, that a crime had occurred. Despite this, Doherty was refused an award of compensation on the basis that he had been previously involved in the drug trade, and the suggestion was that this is why he had been shot. Doherty denied this past activity was relevant and said that he had been shot because, among other things, he had loaned money to Schackow, wanted that money back, and had threatened Schackow with physical harm if he did not repay him (the exact threat, as recorded in the court’s reasons for decision, was: “well, the next time I see you I will kick your f’n head in”). There was a dispute over the evidence for why Doherty had loaned Schackow that money, but there was some evidence that he might have loaned it to Schackow so that Schackow could buy drugs. In this sense, Doherty may have been aiding and abetting a criminal offence. In reaching a decision about how to interpret section 80(1)(a) of the Act, Justice Wilson said:

The phrase ‘criminal activity’ in s80 is defined in Schedule 3 of the Act to mean ‘... an activity of a criminal nature’. That phrase is not defined but it would be

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<sup>39</sup> *Maddford v The Scheme Manager - Department of Justice and Attorney-General (Victim Assist Queensland)* [2014] QCAT 350 (21 July 2014); *Rosily v Department of Justice and Attorney General (Victims Assist Queensland)* [2016] QCAT 492 (4 December 2016); *Doherty v Victim Assist Queensland* [2012] QCATA 137 (27 June 2012).

surprising if it did not encompass the events Mr Doherty related in his police statement: lending money to Schackow; knowing he would use it to buy drugs; permitting his home to be used for the sale of drugs; and, using drugs provided to him by Schackow. Even if it could be said that Mr Doherty was not involved in criminal activity at the actual time of the act of violence, it is inescapable that his shooting by Schackow was causally connected with the earlier loan, which, itself, involved support for or condoning of the trading of drugs, and their use.

It seems that, although Doherty's conduct was not problematic under s80(1)(a), it was deemed to be relevantly problematic under s80(1)(b). While we are not confident that the Court's interpretation of s80 (specifically the 'reason' test) was correct, the case is a useful example of how both temporality and conduct might be assessed. The issue that was not addressed in Doherty's case was whether the offence perpetrated against him by Schackow (shooting) was proportionate, in light of the relevant criminal activity (lending money for the purchase of illicit drugs for personal use). In our view, the shooting of Doherty should have been viewed as disproportionate and the award of compensation allowed.

It is also important to ensure that s80 – if adopted into Victorian law – cannot be interpreted in a way that is victim blaming and that allows for scrutiny of alcohol and other drug consumption, 'alcoholism' or 'addiction'. To this end we would recommend insertion of a specific subsection to prevent this from occurring.

We thus recommend that an adapted version of s80(1) be incorporated into the Act in place of s54(a) and other subsections of s54 with which it would overlap.

## **Recommendations**

For the reasons outlined above, we make the following recommendations pertaining to Section 54 of the Act:

### **Recommendation 5**

**That Section 54(a) of the VOCAA be repealed.**

### **Recommendation 6**

**That Section 54(c) of the VOCAA be repealed.**

### **Recommendation 7**

**That Section 54(d) of the VOCAA be repealed.**

### **Recommendation 8**

**That Section 54(f) of the VOCAA be repealed (so as to not allow character, attitude and conduct assessments to be made).**

### **Recommendation 9**

That a new Section 54(a) be introduced, to read as follows:

The Tribunal may refuse to grant assistance to a primary victim of an act of violence if the Tribunal is satisfied, on the balance of probabilities, that the only reason, or the main reason, the act of violence was committed against the primary victim was:

- i) because the victim was involved in a criminal activity when the act of violence happened; or
- ii) because of the victim's previous involvement in a criminal activity, whether or not the victim is currently involved in the criminal activity.

In making a decision under section 54(a), the Tribunal must consider whether the act of violence was proportionate to the victim's criminal activity.

In making a decision under section 54(a), the Tribunal must not refuse an application in accordance with subsection (a) on the basis that the 'criminal activity' was that the applicant was under the influence of alcohol or other drugs, or because the applicant was experiencing 'alcoholism' or 'addiction'.

#### Recommendation 10

That Section 54(b)(i) be repealed.

#### Recommendation 11

That a new Section 54(b)(i) should be introduced. This provision should mirror the language of the new section 54(a), described above, but should pertain only to applications by related victims.

### Conclusion

We thank the VLRC for the opportunity to make this submission and for their time and consideration. We would be more than happy to appear before the VLRC to answer any questions or to elaborate on this submission should this be of use.

Yours sincerely,



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