



## Homeless Persons and Crime Compensation

### Submission of the PILCH Homeless Persons' Legal Clinic to the Review of the Victims of Crime Compensation Scheme

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# Executive summary and recommendations

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## Overview of submission

This submission is made by the PILCH Homeless Persons' Legal Clinic (the **HPLC**) in response to the Department of Justice Victims of Crime Compensation Review (**Review**).

The Review seeks to examine existing victim compensation schemes in Victoria, in particular the assistance scheme under the *Victims of Crime Assistance Act 1996* (**VOCA Act**) and the compensation order provisions under the *Sentencing Act 1991*, to determine whether legislative, administrative or procedural changes are necessary to create a fairer, clearer, more responsive and more accessible compensation regime for victims of crime.

This submission considers the '*Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded awards Discussion Paper*' issued by the Department of Justice in December 2009 (**Discussion Paper**) and assumes that the reader is familiar with the current Victorian victims of crime compensation scheme as set out in the Discussion Paper.

Save for a review of the Prisoner Compensation Quarantine Fund from a human rights perspective, this submission is limited to issues that affect people who are experiencing homelessness, both victims and offenders, an area which the HPLC is uniquely positioned to comment on.

While people experiencing homelessness may resort to crime to survive, many more are victims of violence and criminal activity on the streets. Homelessness increases their vulnerability to acts of violence on the street, in hostels, refuges and squats, and through links with drug use and prostitution. Violence against people experiencing homelessness is a problem in itself and a factor in perpetuating homelessness.

A victims of crime compensation scheme is an important system for people experiencing homelessness. However, they may be limited in their ability to receive compensation due to practical and psychological barriers inherent in the current system, which does not acknowledge homelessness as an issue warranting alternative methods of assessment and award.

As stated in the Discussion Paper there are three possible avenues for obtaining compensation for victims of crime in Victoria:

- ▶ assistance awards made by the Victims of Crime Assistance Tribunal (**VOCAT**) under the VOCA Act to victims of acts of violence and paid by the State;
- ▶ compensation and restitution orders made by the courts after a finding of guilt in criminal proceedings under the *Sentencing Act 1991* (Vic) and paid by the offender; and
- ▶ civil action taken by the victim against the offender.

This submission, like the Discussion Paper, focuses on the first two avenues for obtaining compensation. In particular, this submission:

- ▶ considers the current victims of crime compensation scheme from the perspective of people experiencing homelessness;
- ▶ suggests reforms to improve the operation of the scheme for people experiencing homelessness; and

- ▶ addresses the effect on people experiencing homelessness of relevant reforms raised in the Discussion Paper.

A summary of recommendations is set out below.

## Recommendations

### VOCAT and the experience of homeless victims

#### Recommendation 1

The Department of Justice should increase funding to enable VOCAT members to undertake training about the nature of homelessness, causes of homelessness, pathways out of homelessness and effective communication with people experiencing homelessness.

#### Recommendation 2

Section 52 of the VOCA Act should be amended to clarify that homelessness may constitute a 'special circumstance' under that section.

#### Recommendation 3

Section 53 of the VOCA Act should be amended so that homelessness is included as a factor in that section which may be considered when determining whether a report was made to police within a 'reasonable time'.

#### Recommendation 4

Section 7 of the VOCA Act should be amended so that a victim of certain acts of violence may receive an award without the need to establish an injury or other adverse affect.

#### Recommendation 5

The VOCA Act should be amended to provide a choice for victims regarding whether to be compensated for the mere commission of the act without the need to prove injury or alternatively to be compensated for the injuries suffered by providing evidence.

#### Recommendation 6

In assessing the behaviour of the victim under section 54 of the VOCA Act, VOCAT should have regard to the impact homelessness has had on any past criminal activity.

#### Recommendation 7

VOCAT should consider a victim's homelessness and financial means before making an order for repayment under section 56(3) of the VOCA Act.

### **Recommendation 8**

Section 56 of the VOCA Act should be amended to prohibit deductions being made from social security payments in order to repay an order of interim assistance.

### **Recommendation 9**

The current system of providing victims with a choice between attending a hearing or having their claim determined 'on the papers' should be retained.

### **Recommendation 10**

A decentralised system should be used for hearings to increase access and facilitate attendance. A centralised system should be used for applications that are determined on the papers to enhance consistency in decision making.

### **Recommendation 11**

VOCAT should establish processes to enable homeless victims to attend a hearing by telephone or video conference.

### **Recommendation 12**

VOCAT should provide public transport or taxi vouchers to assist victims to attend a hearing if they are unable to afford public transport.

### **Recommendation 13**

VOCAT should hold hearings at other locations such as community legal centres and homelessness support agencies to facilitate attendance at a hearing by those who do not have the practical or financial means to travel to VOCAT.

### **Recommendation 14**

Regulations 6 and 7 of the Victims of Crime Assistance (Special Financial Assistance) Regulations 2000 (Vic) should be amended so that:

- a victim of a category B, C or D act of violence may be awarded the range prescribed for category A where the victim is homeless or otherwise disadvantaged; and
- a victim of a category C or D act of violence may be awarded the range prescribed for category B where the victim is homeless or otherwise disadvantaged.

### **Recommendation 15**

Section 8(3) of the VOCA Act should be amended so that homeless or disadvantaged victims are eligible to receive assistance for other items which will assist their recovery.

### **Recommendation 16**

In making an award for assistance, VOCAT should develop referral protocols to services such as health, welfare, education and community support services.

### Recommendation 17

Special financial assistance should simply be called 'Assistance for pain and suffering'.

## Specialist VOCAT list for people experiencing homelessness

### Recommendation 18

A review of VOCAT's website, publications, practice directions and guidelines should be undertaken. Where possible, clearer information which is easy to locate and understand should be provided.

### Recommendation 19

A Practice Direction should be issued pursuant to section 58 of the VOCA Act to establish a specialist list as part of VOCAT for homeless/disadvantaged persons, which could:

- have greater regard to the circumstances and particular needs of homeless persons and take a flexible, problem-solving approach to dealing with victims' compensation matters involving one or more homeless persons;
- outreach to appropriate welfare agencies and crisis accommodation facilities in order to facilitate ease of access and a less intimidating atmosphere for victims; and
- be administered by appropriately trained judicial officers and court staff, who could conduct hearings on an informal, participatory basis.

## Compensation orders and VOCAT

### Recommendation 20

The victims of crime compensation scheme in Victoria, for injury and pain and suffering, should be an entirely State-funded system.

### Recommendation 21

Part 4, Division 2, Subdivision (1) – Compensation for pain and suffering, etc. (heading and subsections 85A to 85M inclusive) of the Sentencing Act 1991 (Vic) should be repealed.

### Recommendation 23

That the objective of the *Sentencing Act 1991*, 'to ensure that victims of crime receive adequate compensation and restitution' be removed from the *Sentencing Act 1991*.

## Funding the system

### Recommendation 23

Offenders should not be required to fund any award of assistance made under the VOCA Act as this would constitute a form of ‘double punishment’ contrary to the human right ‘not to be punished more than once’.

### Recommendation 24

An offender levy should not be introduced to fund victim compensation as it would constitute a form of ‘double punishment’ contrary to the human right ‘not to be punished more than once’.

### Recommendation 25

Any offender levy introduced should not apply to summary and expiated offences, in particular public space offences and ‘street offences’.

### Recommendation 26

Any offender levy introduced should be means tested so that an offender’s financial circumstances and the nature of the burden that repayment of compensation will impose on them can be taken into account.

### Recommendation 27

If an offender levy is introduced recovery of the levy should not be made from Centrelink payments, disability support pensions and/or other social security payments.

### Recommendation 28

The Prisoner Compensation Quarantine Fund should be abolished by repealing Part 9C of the Corrections Act 1986 (Vic).

## Background and context

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### PILCH Homeless Persons’ Legal Clinic

The HPLC is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.<sup>1</sup> PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. The HPLC is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund, administered by Victoria

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<sup>1</sup> See <http://www.pilch.org.au>.

Legal Aid. This funding is supplemented by fundraising and donations. While the HPLC recently received a one-off funding boost from the Federal Government, it does not currently receive recurrent funding from the Federal Government.

The HPLC has the following aims and objectives:

- ▶ to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- ▶ to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- ▶ to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- ▶ to reduce the degree and extent to which people experiencing homelessness are disadvantaged or marginalised by the law; and
- ▶ to use the law to construct viable and sustainable pathways out of homelessness.

Free legal services are offered by the HPLC on a weekly basis at 14 outreach locations that are already accessed by people experiencing homelessness for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.<sup>2</sup> Since its establishment in 2001, the HPLC has assisted over 4000 people at risk of, or experiencing, homelessness in Victoria.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the HPLC received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights. In 2009 it received a Melbourne Award for contribution to community in the City of Melbourne.

The HPLC operates and provides its services within a human rights framework. Central to the human rights framework is the right to participate, including individual and community participation and consultation, which creates an empowering environment for individuals to assert their rights and contribute to the democratic process. The HPLC recognises the right to participate by working and consulting directly with a range of key stakeholders, the most important of which is the Consumer Advisory Group (**CAG**). The CAG was established by the HPLC in 2006 and is comprised of people who have experienced homelessness or who are currently homeless. The role of the CAG is to provide guidance and advice, and make recommendations to the HPLC with a view to enhancing and improving the quality of the HPLC's service delivery, policy, advocacy, law reform and community development activities. The CAG not only provides feedback and guidance to the HPLC but also gives people who have experienced homelessness a voice to actively represent their interests and build the participation and engagement of the general community around the issue of homelessness.

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<sup>2</sup> Host agencies include Melbourne Citymission, Café Credo The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre, Homeground Housing Service and St Kilda Crisis Centre. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Arnold Dallas McPherson, Baker & McKenzie, Blake Dawson, Clayton Utz, Corrs Chambers Westgarth, DLA Phillips Fox, Freehills, Mallesons Stephen Jaques, Minter Ellison and Stella Sutcliffe & Associates.

## Nature of homelessness

The definition of homelessness under section 4 of the Supported Accommodation Assistance Act 1994 (Cth) (**SAA Act**) is adopted for the purposes of this submission:

A person is considered to be homeless if she or he has inadequate access to safe and secure housing; and

A person is considered to have inadequate access to safe and secure housing if the only housing to which the person has access:

- ▶ damages, or is likely to damage, the person's health; or
- ▶ threatens the person's safety; or
- ▶ marginalises the person through failing to provide access to:
  - adequate personal amenities; or
  - the economic and social supports that a home normally affords; or
  - places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.

This definition of homelessness under the SAA Act is consistent with the definition enunciated by the United Nations Committee on Economic, Social and Cultural Rights, which provides in effect that a person is homeless unless he or she has adequate housing that affords the right to live in security, peace and dignity. The definition is also consistent with the 'cultural definition' of homelessness developed by Chamberlain and MacKenzie<sup>3</sup> which proposes that the concept of homelessness be defined by reference 'to shared community standards about the minimum accommodation that people have the right to expect in order to live according to the conventions of contemporary life'.<sup>4</sup> In Australia, the accepted minimum community standard is understood to be 'a small rented flat', with the minimum required amenities, such as a bedroom, living room, bathroom and kitchen.<sup>5</sup> This minimum standard provides a benchmark for measuring and monitoring homelessness in the Australian context.

In broad terms, the 'cultural definition' of homelessness has led to the identification of three categories within the homeless population:<sup>6</sup>

1. **primary homelessness** – refers to people without conventional accommodation living on the streets, in deserted buildings, railway carriages, under bridges, in parks, etc (i.e. 'rough sleepers');
2. **secondary homelessness** – refers to people moving between various forms of temporary shelter including friends, emergency accommodation, refuges and hostels; and

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<sup>3</sup> Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 Australian Journal of Social Issues 274; and Chris Chamberlain and Guy Johnson, 'The Debate about Homelessness' (2001) 36(1) Australian Journal of Social Issues 35, 39.

<sup>4</sup> Chris Chamberlain, Counting the Homeless: Implications for Policy Development, Australian Bureau of Statistics (2 December 1999), 49.

<sup>5</sup> Ibid.

<sup>6</sup> Australian Bureau of Statistics, *Counting the Homeless: Implications for Policy Development*, (1999).

3. **tertiary homelessness** – refers to people living permanently in single rooms in private boarding houses without their own bathroom or kitchen and without security of tenure. They are homeless because their accommodation does not satisfy the requisite conditions of the minimum community standard.<sup>7</sup> Medium to long-term residents of caravan parks would, in most circumstances, be considered to be experiencing tertiary homelessness.

The causes of homelessness are complex and varied.<sup>8</sup> Generally, they include:

- ▶ **structural factors**, for example: poverty, severe financial hardship and lack of access to adequate income support, unemployment, lack of affordable housing etc;
- ▶ **economic and social policy causes**, for example: economic and housing strategies that focus on homeownership models and housing as a commodity, lack of access to education opportunities and resource allocation to the welfare sector; and
- ▶ **individual causes**, for example: domestic and family violence, mental illness, lack of access to appropriate health care and support, drug and alcohol dependency, gambling and legal problems.

In many cases, these causes are intersectional and interrelated.<sup>9</sup>

### Extent of homelessness

On any given night in Australia approximately 105,000 people are experiencing homelessness, with over 20,500 of those people in Victoria.<sup>10</sup> The national figure includes over 16,300 people sleeping rough or in squats, almost 20,000 in crisis accommodation and refuges (up from approximately 14,000 in 2001), almost 21,600 in boarding houses, and nearly 47,000 people staying temporarily with friends or relatives.<sup>11</sup> A further 17,500 people across Australia live temporarily in caravan parks.<sup>12</sup>

Between 2001 and 2006 there was an increase in homelessness of almost 5%.<sup>13</sup> That five-year period also saw an increase in the number of people sleeping rough, the number of homeless family households and the extent of homelessness in the indigenous population.<sup>14</sup> In 2006, 68% of

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<sup>7</sup> Chris Chamberlain, Guy Johnson and Jacqui Theobald, *Homelessness in Melbourne: Confronting the Challenge* (February 2007), Centre for Applied Social Research, RMIT University, 13 – 14.

<sup>8</sup> Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 142. See also Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Economic, Social and Cultural Rights (3 March 2005) E/CN.4/2005/48, [22].

<sup>9</sup> *Ibid*, 14.

<sup>10</sup> Australian Bureau of Statistics (ABS), *Counting the Homeless 2006* (2008), 3-4.

<sup>11</sup> *Ibid*, 21.

<sup>12</sup> *Ibid*, *Counting the Homeless 2006* (2008), chapter 7. It is important to note that Census data only captures those people who respond to the Census survey and identify as homeless. Research shows that, for example, while many young people and indigenous people may fall within the above definition of homeless in that they have no fixed address and seek transitory accommodation from friends and extended family, they may not identify as homeless. It is therefore reasonable to assume that the actual number of people experiencing homelessness exceeds the official figure.

<sup>13</sup> Compare ABS 2001 data (99,900) with ABS 2006 data (104,676) and shows an increase of approximately 4.78% in the homeless population in Australia.

<sup>14</sup> Australian Bureau of Statistics, *Counting the Homeless 2006* (2008), viii - xii; see also Australian Bureau of Statistics, *Counting the Homeless 2001* (2003).

the homeless population were under the age of 35 with 33% being 18 or younger. Women made up 44% of the homeless population and men accounted for 56%.<sup>15</sup>

Between 2004 and 2008 the number of people accessing homelessness specific services, under the Supported Accommodation Assistance Program (**SAAP**), increased by almost 30%.<sup>16</sup> Approximately 202,500 people are now accessing such services each year.<sup>17</sup> The growing rate of homelessness has placed significant strain on social services, resulting in 57% of people requiring new accommodation being turned away.<sup>18</sup> In other words, more than one in two people experiencing homelessness who seek accommodation from relevant services are turned away *every day*, due to lack of beds.<sup>19</sup>

Between March and May 2009, the HPLC held 18 workshops at homelessness specific service providers in Victoria and consulted with over 140 individuals experiencing or at risk of homelessness about human rights in Australia, as part of its response to the National Human Rights Consultation (**HPLC Human Rights Workshops**). These workshops identified that 35% of participants were experiencing chronic homelessness (i.e. they had experienced homelessness for more than 5 years).<sup>20</sup>

Whilst not the direct subject of this submission, the continuing disproportionate impact of homelessness and its growth in recent years requires urgent action to ensure an adequate standard of living for all Australians.<sup>21</sup>

### Homeless victims of crime

International research has established that people experiencing homelessness experience higher levels of violent victimisation than housed populations.<sup>22</sup> In a UK study, over half of the adults experiencing homelessness that were interviewed reported having experienced violence in the past year, compared to 4% of the general population.<sup>23</sup> A US study found that in the previous two

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<sup>15</sup> Chris Chamberlain and David MacKenzie, Australian Census Analytic Program *Counting the Homeless, Australia* (ABS 2006).

<sup>16</sup> The 2004 – 2005 SAAP National Data Collection Annual Report indicated that 157,200 people had accessed SAAP services in that financial year. By 2007 – 2008 the number of people accessing SAAP services had risen to 202,500. These figures reveal an increase of 28.8% in the number of people accessing SAAP services since 2004 – 2005. Further information available at <http://www.aihw.gov.au/publications>.

<sup>17</sup> Australian Institute of Health and Welfare, *Women, children and teens, heavy users of SAAP*, Media Release (24 April 2009), available at <http://www.aihw.gov.au/mediacentre/2009/mr20090403.cfm>. See also Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2007 – 2008*, April 2009.

<sup>18</sup> Australian Institute of Health and Welfare, *Demand for SAAP Accommodation by homeless people 2006 – 2007: Summary*, Bulletin 64, October 2008, 2.

<sup>19</sup> Ibid.

<sup>20</sup> PILCH HPLC, *Promoting and Protecting the Human Rights of People Experiencing Homelessness in Australia*, National Human Rights Consultation Submission setting out the views and comments of people experiencing homelessness about human rights in Australia (15 June 2009), page 4.

<sup>21</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (22 May 2009) E/C.12/AUS/CO/4.

<sup>22</sup> Larney S, E Conroy, K Mills, L Burns and M Teeson, *Factors associated with violent victimisation among homeless adults in Sydney, Australia* (2009), 33 Aust N Z Public Health, 2009 no. 4, 347.

<sup>23</sup> Ibid.

months, 18% of a homeless sample had been threatened with a weapon, 16% had been beaten and 6% had been sexually assaulted.<sup>24</sup>

In a 2009 study conducted in relation to homelessness and violent victimisation, the National Drug and Alcohol Research Centre found that over half of their sample of people experiencing homelessness in NSW reported violent victimisation in the last year. This can be compared to the NSW recorded assault rate for 2007 of around 1 per 1000 persons, in 2007.<sup>25</sup>

The study found that risk factors for people experiencing homelessness include gender in the case of sexual assault, and with respect to physical victimisation, mental health issues, substance use and alcohol dependence.<sup>26</sup>

In particular, the study found that participants with a psychotic disorder were 3.1 times more likely to be victimised than those without such a history. The authors theorised that the relationship between psychosis and victimisation is a result of the symptoms of psychosis; for instance, impaired judgment may affect the ability to identify risk. Symptoms such as talking to oneself and disordered behaviour may also lead to victimisation as they draw attention to people with psychotic behaviour. The authors concluded that given that people experiencing homelessness spend large amounts of time in public spaces, the risk of violent victimisation may be magnified.<sup>27</sup>

Across Australia, one of the main causes of homelessness among women is domestic or family violence.<sup>28</sup> One in five women seeking supported accommodation is escaping violence at home.<sup>29</sup> Sexual assault is also directly aligned with homelessness. It is the primary reason that young women become homeless initially, and homelessness in turn, increases their vulnerability to further sexual assault – on the street, in hostels, refuges and squats, and through links with drug use and prostitution.<sup>30</sup>

Children and young people also experience homelessness as a result of sexual abuse and family violence.<sup>31</sup> Young people's risk of physical and sexual violence is increased dramatically as a result of being homeless. Alder's interview survey of 51 homeless young people in Melbourne revealed that 76% of female and 29% of male respondents had been sexually assaulted since becoming

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid, 349.

<sup>26</sup> Ibid, 349

<sup>27</sup> Ibid, 349.

<sup>28</sup> Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021 (March 2009), 45; Australian Institute of Health and Welfare, 'Homeless people in SAAP: SAAP National Data Collection annual report 2006-07' *SAAP NDCA report series 12*, cat. no. HOU 185, Commonwealth of Australia, Canberra, 2008, p.31, viewed January 2010 <http://www.aihw.gov.au/publications/hou/hpissndcar06-07au/hpissndcar06-07au.pdf>

<sup>29</sup> Ibid.

<sup>30</sup> Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021 (March 2009), 45; A Neame & M Heenan, *What lies behind the figure of sexual assault? Issues of prevalence and disclosure*, Australian Centre for the Study of Sexual Assault, Briefing no.1, September 2003, viewed January 2010 [http://www.aifs.gov.au/acssa/pubs/briefing/acssa\\_briefing1.pdf](http://www.aifs.gov.au/acssa/pubs/briefing/acssa_briefing1.pdf)

<sup>31</sup> Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021 (March 2009), 45.

homeless.<sup>32</sup> It appears that violent victimisation may prolong homelessness, even more so than factors such as an individual's level of social support.<sup>33</sup>

Alder observed that 92% of the young people experiencing homelessness that were interviewed in her research claimed they were scared or frightened for their personal safety and feared violent acts, speaking of their vulnerability to violence as a major source of fear.<sup>34</sup>

In an article about violence against people experiencing homelessness, Skidmore refers to the incident of a 23 year old man being bludgeoned to death in December 2006 as he slept near Sydney's Town Hall.<sup>35</sup> He also comments, 'for people who are homeless, violence is an integral part of their lives. The average person who is experiencing homelessness lives in environments where he or she is frequently vulnerable to violence and resulting injury or death.'<sup>36</sup>

The major source of violence reported by the participants in Alder's research was strangers, with 40% of all violent incidents involving a stranger as the assaulter and 72% of participants recounting at least one incident involving assault by a stranger.<sup>37</sup> Incidents of violence described by the participants in Alder's study included:

Just when I was on the street one day .. and some guys were coming out the door of the pub .. and they asked me what I was doing .. and I said "nothing" .. and he said "don't get smart with me" and he jabbed me straight in the mouth .. and he kept laying into me and I kept getting up and I had a blood nose, a fat lip, two black eyes and my cheek was all puffed up and my arm was swollen from kicking. (Austin)<sup>38</sup>

I was living at a hostel and I got bashed there .. I was going out and two other kids from the hostel .. [who] had been drinking just came up and bashed me up .. I was in hospital for three days. (Hamish)<sup>39</sup>

I was at Hawthorn railway station .. I was drinking a lot at the time .. and about seven or eight wogs came up and starting belting into me for fun. I was pretty scared but I was drunk .. I was asleep, about four in the morning .. they were just looking for trouble and they were drunk too .. I was hurt .. two black eyes .. my nose is all stuffed and sore lips .. they kept me in hospital for about three days .. my ribs were bruised and sore .. I didn't tell police – they'd just laugh at me. (Elliot)<sup>40</sup>

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<sup>32</sup> Christine Alder, *Homeless Youth as Victims of Violence*, Department of Criminology, The University of Melbourne, (1990) page 18.

<sup>33</sup> Larney S, E Conroy, K Mills, L Burns and M Teeson, *Factors associated with violent victimisation among homeless adults in Sydney, Australia* (2009), 33 Aust N Z Public Health, 2009 no. 4, 347.

<sup>34</sup> Christine Alder, *Homeless Youth as Victims of Violence*, Department of Criminology, The University of Melbourne, (1990) pages 16 and 50; See also National Crime Prevention (1999) *Living Rough: Preventing Crime and Victimisation Among Homeless Young People*. National Crime Prevention: Canberra, page 24.

<sup>35</sup> David Skidmore, *Violence against the homeless*, On Line Opinion, 7 December 2009, viewed February 2010:

<http://www.onlineopinion.com.au/view.asp?article=9774>.

<sup>36</sup> Ibid.

<sup>37</sup> Christine Alder, *Homeless Youth as Victims of Violence*, Department of Criminology, The University of Melbourne, (1990).

<sup>38</sup> Ibid, 21.

<sup>39</sup> Ibid, 21.

<sup>40</sup> Ibid, 22.

At Flinders Street I got bashed by five guys – they were after my brother – I was in hospital for five weeks with cracked ribs and coughing blood .. they left me laying bleeding (on the street). In hospital for three days I didn't know where I was – I had cracked ribs, a punctured liver, concussion and a badly chipped nose . they kicked me in the face and left me laying there. (Ian)<sup>41</sup>

I've gotten a broken nose, stabbed, broken ribs, concussion; it was done by other street kids, drunks, coppers. (Claudia)<sup>42</sup>

I was in hospital for three weeks .. I was found in the street where five wogs forced me into a car and raped me and dumped me at St Kilda. I was in a nervous state where I nearly went mental. (Kate)<sup>43</sup>

I was in a park in Geelong and this man comes up to me and starts talking to me and I thought "here's some money" and all that. And then he tried to rape me and I ran away and he got in a car and he chased me and caught up with me and raped me. I didn't tell anyone – I was too scared cos they'd ask me my address and I didn't have nowhere and they'd put me in Turana. (Phillip)<sup>44</sup>

Some participants in the HPLC Human Rights Workshops in 2009 had experienced unfair, discriminatory and degrading treatment by members of the public, commenting as follows:<sup>45</sup>

"[I was] spat on, bashed..."

"I was set on fire and pissed on by some kids..."

"...I was touched by older men..."

In fact, 80% of participants in the workshops stated that they had been treated in a cruel and degrading way whilst experiencing homelessness.<sup>46</sup>

## Homeless offenders

People experiencing homelessness are no more likely than members of the general population to be perpetrators of serious crime, rather they are generally arrested for minor, victim-less crimes.<sup>47</sup>

Crimes committed by people experiencing homelessness are often the result of the adversity of street life (e.g. hunger, lack of shelter, and unemployment). McCarthy found that the street

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<sup>41</sup> Ibid, 22.

<sup>42</sup> Ibid, 25.

<sup>43</sup> Ibid, 25.

<sup>44</sup> Ibid, 28.

<sup>45</sup> PILCH HPLC, *Promoting and Protecting the Human Rights of People Experiencing Homelessness in Australia*, National Human Rights Consultation Submission setting out the views and comments of people experiencing homelessness about human rights in Australia (15 June 2009), page 30.

<sup>46</sup> Ibid.

<sup>47</sup> Foscarinis, 'Downward spiral: Homelessness and its criminalisation' (1996) 14 *Yale Law and Policy Review* 1, 57; DE Baker, 'Anti-Homeless Legislation: Unconstitutional Efforts to Punish the Homeless' (1990/91) 45 *University of Miami Law Review* 417.

environment often places young homeless people in a 'crisis situation', a condition which often encourages association with criminals and exposure to potential tutelage relationships.<sup>48</sup>

## VOCAT – experience of homeless victims

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### Assistance awards generally

While assistance awards are currently the best form of compensation for victims who are experiencing homelessness, they are not as accessible as they could be and do not always provide fair and effective compensation. The key issues experienced by victims who are experiencing homelessness seeking assistance awards are outlined below.

While specific reforms have been suggested, many of the issues identified would be overcome in part by targeted education programs for VOCAT members so that the homelessness of the victim is taken into consideration when making an award. Enhanced understanding by Tribunal members of the nature of homelessness is also likely to result in more consistent awards being made.

Such programs should focus on the nature of homelessness, causes of homelessness, pathways out of homelessness and effective communication with people experiencing homelessness.

#### Recommendation 1

**The Department of Justice should increase funding to enable VOCAT members to undertake training about the nature of homelessness, causes of homelessness, pathways out of homelessness and effective communication with people experiencing homelessness.**

There are a number of key issues experienced by victims seeking assistance through VOCAT which are set out below. A specialist list for people who are experiencing homelessness would significantly help overcome all of these issues and is discussed below.

### Requirement to report to police within a reasonable time

Under section 52 of the VOCA Act the Tribunal must refuse an application for compensation where the relevant act of violence was not reported to police within a reasonable time, unless the Tribunal considers that special circumstances brought about that result.

Pursuant to section 53, in considering whether an act of violence was reported to police within a reasonable time, the Tribunal may have regard to any matter it considers relevant including:

- ▶ the age of the victim;
- ▶ if the victim is intellectually disabled;
- ▶ whether the person who committed or is alleged to have committed the act of violence was in a position of power, influence or trust in relation to the victim;

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<sup>48</sup> McCarthy (1996:139) as cited in National Crime Prevention (1999) *Living Rough: Preventing Crime and Victimization Among Homeless Young People*. National Crime Prevention: Canberra, page 23.

- ▶ whether the victim was threatened or intimidated by the person who committed or is alleged to have committed the act of violence; or
- ▶ the nature of the injury alleged to have been suffered.

The homelessness of the victim is a factor which should be included in section 53 and be considered by the Tribunal. Victims experiencing homelessness are less likely to have made a report to police after the act of violence has occurred, or may only make a report to police after receiving advice from a support agency or community legal centre.

Victims experiencing homelessness may be reluctant to report the act of violence for a number of reasons. People experiencing homelessness tend to have very little trust in authority figures and have often had negative experiences of police as a result of being charged or reprimanded for public space offences, such as drinking in a public place, and street offences, such as begging. One theme emanating strongly from the Homeless Persons' Court Project was that harassment and targeting of homeless people by police and law enforcement officers is widespread and that most people who are experiencing homelessness are intimidated and stressed by police presence.<sup>49</sup>

Alder's interview survey of youth experiencing homelessness in Melbourne found that:

- ▶ 80% of participants had never reported violent incidents of which they were victims; and
- ▶ 76% of participants had not or would not report a violent incident to police.<sup>50</sup>

In that study, attitudes toward the police and an expectation that they would not be sympathetic, were commonly claimed reasons for not reporting violent attacks.<sup>51</sup> Victims experiencing homelessness may also avoid contact with police for fear that other matters, such as outstanding fines and charges, will 'catch up' with them. Additionally, victims experiencing homelessness may be reluctant to report the act of violence to police where they are unable to provide any identification or an address.

Legislative reforms should also be made so that the homelessness of the victim may be considered to be a 'special circumstance' by the Tribunal under section 52. This is particularly important because, for the reasons outlined above, an act of violence may not have been reported to police at all.

'Special circumstances' is not defined in the Act, however on a number of occasions the Tribunal has held such circumstances to mean "out of the ordinary" or "out of the common run".<sup>52</sup> In respect of whether homelessness can be "out of the ordinary" or "out of the common run" it appears from case law that in order for homelessness to amount to special circumstances it would likely need to be one factor in a number including a history of abuse, neglect or mental illness.<sup>53</sup>

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<sup>49</sup> Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project* (August 2004), page 24.

<sup>50</sup> Christine Alder, *Homeless Youth as Victims of Violence*, Department of Criminology, The University of Melbourne, (1990) pages 40-43.

<sup>51</sup> *Ibid*, 43.

<sup>52</sup> *TUN v VOCAT* [2009] VCAT 1599, [11]; *Nichol v VOCAT* (1999) (No. 1999/045619), [18].

<sup>53</sup> See above, 'Requirement to report to police within a reasonable time', page 16.

As currently drafted, section 53 does not expressly recognise homelessness as a factor which may be considered when determining whether a report was made to police within a 'reasonable time'. Further, case law suggests that homelessness itself is unlikely to constitute a 'special circumstance' under section 52 which has caused the act of violence not to be reported to police.

### **Recommendation 2**

**Section 52 of the VOCA Act should be amended to clarify that homelessness may constitute a 'special circumstance' under that section.**

### **Recommendation 3**

**Section 53 of the VOCA Act should be amended so that homelessness is included as a factor in that section which may be considered when determining whether a report was made to police within a 'reasonable time'.**

## **Establishing that there has been an injury**

VOCAT generally requires evidence of injuries from healthcare professionals, such as a doctor or psychologist.

People experiencing homelessness are less likely to have received medical treatment after an act of violence has occurred. Dr Matthew Penn, a doctor for Street Health, a mobile medical service in Melbourne, observed that:

Some people, they don't have the skills or the knowledge or know-how to access primary health care services. It might be because they're very itinerant and moving around all the time and they're moving from accommodation to accommodation and they don't know the area they live in. It might be that the very health problem they have prevents them from seeking access to services, particularly mental health problems or drug and alcohol problems.<sup>54</sup>

Alder's study of youth experiencing homelessness found that 63% of participants had attended hospital as a result of injuries from a violent incident. However, despite serious injuries and/or illness, many did not seek medical assistance.<sup>55</sup>

Legislative reforms should be implemented to enable VOCAT to make an award without the victim needing to prove that an injury has been suffered. As stated in the Discussion Paper, this would minimise the potential for trauma to the victim of having to undergo physical and/or psychological examination and recognises the inherent harm of certain offences such as sexual assault.

Different victims are likely to have different needs and therefore there should be maximum flexibility in the compensation scheme. A system similar to the approach used in the Northern Territory, where victims can choose to be compensated for the mere commission of the act without the need to prove injury or alternatively be compensated for the injuries suffered by providing evidence, is desirable to allow victims maximum choice and flexibility.

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<sup>54</sup> Interview with Dr Matthew Penn, 20 November 2009, viewed February 15 2010

<http://www.abc.net.au/news/video/2009/11/20/2749313.htm>

<sup>55</sup> Christine Alder, *Homeless Youth as Victims of Violence*, Department of Criminology, The University of Melbourne, (1990) page 41.

As indicated above, victims experiencing homelessness in general are likely to prefer a system where they do not have to provide medical or psychological evidence of their injury due to their reluctance to attend medical facilities and the difficulties they experience in getting to appointments. However, other victims, and some victims experiencing homelessness, may want to provide evidence demonstrating the extent of their injuries.

As some victims, including victims experiencing homelessness, are less likely to have received medical treatment immediately after the act of violence, in determining whether there has been an injury, VOCAT should have regard to a range of evidence and not just medical reports and hospital records. Other evidence may include witness statements, statutory declarations and physical evidence that an injury has been sustained (such as scarring or other impairment).

#### **Recommendation 4**

**Section 7 of the VOCA Act should be amended so that a victim of certain acts of violence may receive an award without the need to establish an injury or other adverse affect.**

#### **Recommendation 5**

**The VOCA Act should be amended to provide a choice for victims regarding whether to be compensated for the mere commission of the act without the need to prove injury or alternatively to be compensated for the injuries suffered by providing evidence.**

#### **Requirement to have regard to past criminal activity**

Pursuant to section 54 of the VOCA Act, in determining whether to make an award, VOCAT is obliged to have regard to the behaviour of the applicant at any time, including past criminal activity.

People who are experiencing homelessness are disproportionately represented in the criminal justice system and the rate of recidivism amongst offenders experiencing homelessness is high.<sup>56</sup> As part of the Homeless Persons' Court Project in 2004 (a law reform project of the HPLC), 50 people who were experiencing or had experienced homelessness and who had experience with the court process participated in focus groups or interviews as part of a consultation process.<sup>57</sup> The consultation process found that at least 75% of participants received fines and charges in relation to behaviour that was a direct consequence of their homeless status, including:

- ▶ fines in relation to begging, drinking in public and other public space offences;
- ▶ activities caused by extreme poverty, such as travelling on public transport without a valid ticket or shoplifting food and other necessities; and
- ▶ activities relating to one of the underlying causes of homelessness, such as drug or alcohol addiction.<sup>58</sup>

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<sup>56</sup> Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project* (August 2004), page 4

<sup>57</sup> Ibid.

<sup>58</sup> Ibid, 16.

In assessing the behaviour of the victim under section 54, VOCAT should have regard to the impact homelessness has had on past criminal activity. Failure to take into account a victim's homelessness can result in an unfair and unjust outcome for the victim.

### **Recommendation No. 6**

**In assessing the behaviour of the victim under section 54 of the VOCA Act, VOCAT should have regard to the impact homelessness has had on any past criminal activity.**

### **Interim assistance**

Interim awards are especially important for victims who are experiencing homelessness as they facilitate access to immediate needs such as medical and counselling services prior to the final determination of an award.

However, victims who are experiencing homelessness may be reluctant to seek interim assistance for fear that if their application is ultimately unsuccessful they will be required to repay the amount. In many cases, the victim will be unlikely to have the means to repay the interim award and the debt may be another burden added to pre-existing debts and prolong their experience of homelessness.

### **Recommendation 7**

**VOCAT should consider a victim's homelessness and financial means before making an order for repayment under section 56(3) of the VOCA Act.**

Repayment of interim assistance awards should never be deducted from social security payments. It is counterproductive to pursue homeless and disadvantaged people for a relatively small recovery. Further, recovery from people who are surviving solely on social security perpetuates the cycle of crime and homelessness where the person turns to crime to survive and meet their most basic needs.

### **Recommendation 8**

**Section 56 of the VOCA Act should be amended to prohibit deductions being made from social security payments in order to repay an order of interim assistance.**

### **Time taken to determine an application**

The amount of time between lodging an application and the finalisation of a claim may vary. In the year ending 30 June 2009, 51% of applications were finalised within 9 months of lodgement and 67% of applications were finalised within 12 months of lodgement.<sup>59</sup>

Victims of crime experiencing homelessness in particular are in need of a timely award determination. This is because victims experiencing homelessness generally have greater difficulty accessing counselling, medical and other services needed for recovery due to their financial circumstances.

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<sup>59</sup> VOCAT Annual Report 2008 - 2009

Further, the Homeless Persons' Court Project found that persons experiencing homelessness also experienced difficulties keeping track of court dates, as one participant stated:

when you're on the streets, you can't organise lawyers etc, you don't have time living on a day to day basis. Because of the stress, you forget to go to court.<sup>60</sup>

One participant reported that in the number of months it takes to get to court, everything can change, 'friends, income, jobs, all of your circumstances'.<sup>61</sup>

A specialist list would facilitate fast tracking of claims of victims experiencing homelessness.

### Facilitating attendance at a hearing

For some victims, the opportunity to tell their story and be heard is an important step in their recovery, and aids the judicial officer to understand the circumstances of the claim. Some complex cases also require the expertise of a Magistrate. Other victims may be re-traumatised by the stress of having to appear before a Tribunal member and recount the act of violence and prefer to have their application determined on the papers.

Accordingly, victims should have the right to a hearing but also the right to have a decision made on the papers if that is their preference. VOCAT's current system of an administrative or judicial approach offers the best of both models and greater flexibility for victims and should therefore be retained.

### Recommendation 9

**The current system of providing victims with a choice between attending a hearing or having their claim determined 'on the papers' should be retained.**

In terms of whether there should be a centralised or decentralised system, for applications determined via a hearing, flexibility of location (i.e. a decentralised model) is important for facilitating access by victims experiencing homelessness as they are more likely to be able to attend a location which is closer in proximity. For example, victims in rural areas are extremely unlikely to have the resources to attend a hearing in Melbourne.

For applications decided on the papers a centralised system might be better to improve consistency of decisions.

### Recommendation 10

**A decentralised system should be used for hearings to increase access and facilitate attendance. A centralised system should be used for applications that are determined on the papers to enhance consistency in decision making.**

Tribunal member acknowledgement of crimes committed can be a therapeutic and positive experience for victims. Applicants may feel they achieve a better outcome at hearing as they are able to directly explain to the Tribunal members the effect of the crime on their lives.

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<sup>60</sup> Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project* (August 2004), page 20

<sup>61</sup> *Ibid*, 21.

However, due to the numerous challenges facing people experiencing homelessness on a daily basis, it is not always practical or easy for them to attend a VOCAT hearing. People experiencing homelessness may not have the financial means to travel to attend a hearing.

VOCAT has the power under section 37 of the VOCA Act to make alternative arrangements for witnesses to give evidence, such as closed circuit television and video conferencing. This power should be utilised where an applicant does not have the practical or financial means to attend a hearing. For example, VOCAT could organise to call an applicant at a homelessness service provider in order to conduct the hearing.

### **Recommendation 11**

**VOCAT should establish processes to enable homeless victims to attend a hearing by telephone or video conference.**

Where a victim wishes to attend a hearing at VOCAT but does not have financial means to do so, public transport or taxi vouchers should be provided. Such assistance should not result in the final award being reduced by this amount.

### **Recommendation 12**

**VOCAT should provide public transport or taxi vouchers to assist victims to attend a hearing if they are unable to afford public transport.**

VOCAT should also establish hearings at locations such as community legal centres and homelessness support agencies in order to assist victims experiencing homelessness to attend a hearing if they wish to do so. Attending a hearing in a familiar location, rather than having to appear at a Magistrate's Court (where an applicant may have appeared previously in relation to outstanding fines or criminal charges) is also likely to be a less intimidating and stressful experience for the victim.

Administration of claims, and the registry, could still be operated through the Magistrate's Court.

**VOCAT should hold hearings at other locations such as community legal centres and homelessness support agencies to facilitate attendance at a hearing by those who do not have the practical or financial means to travel to VOCAT.**

### **Amount of compensation which may be awarded**

Pursuant to the Special Financial Assistance provisions of the VOCA Act a primary victim may be eligible for an amount in excess of the statutory cap where they have experienced a significant adverse affect and the act of violence falls within category A, B, C or D. Each category of violence has a prescribed range of amounts which may be awarded.

A higher amount may be awarded than that prescribed in certain circumstances, such as where the victim has suffered a "very serious physical injury" or a "very serious disease".

VOCAT should be conferred with an additional discretion to award the higher amount where the victim is experiencing homelessness or is otherwise disadvantaged, such as a victim who is primarily reliant on social security payments to meet their basic needs.

Such victims are less likely to claim for loss of income (which may be up to \$20,000) and are less likely to have out of pocket medical expenses. For the reasons set out above, victims experiencing

homelessness will be less likely to have received treatment after the act of violence, or if they have received treatment, will likely have accessed the public health system.

Additional compensation should be awarded in these circumstances where the victim has experienced a 'significant adverse affect' and been a victim of a category A, B, C or D act of violence.

### **Recommendation 14**

**Regulations 6 and 7 of the Victims of Crime Assistance (Special Financial Assistance) Regulations 2000 (Vic) should be amended so that:**

**- a victim of a category B, C or D act of violence may be awarded the range prescribed for category A where the victim is homeless or otherwise disadvantaged;**  
**and**

**- a victim of a category C or D act of violence may be awarded the range prescribed for category B where the victim is homeless or otherwise disadvantaged.**

### **The need to establish exceptional circumstances in order to claim other items to assist recovery**

Currently, under section 8(3) of the VOCA Act, assistance may be provided for other items to assist recovery in exceptional circumstances. However, it is not clear whether homelessness qualifies as an exceptional circumstance and case law suggests that it may not.<sup>62</sup>

As set out above, victims experiencing homelessness are less likely to claim for loss of income (which may be up to \$20,000) and are less likely to have out of pocket medical expenses. Further, victims experiencing homelessness may also have more limited access to support networks provided by friends and family. Accordingly, in order to provide awards to victims experiencing homelessness which are fair and on comparable terms to awards provided to other victims, it should be clarified by legislative reform that homeless or disadvantaged victims are eligible to receive assistance for other items to assist recovery, not just medical, counselling, loss of income and damage or loss of clothing.

Such assistance may include health services, counselling, temporary housing, education and practical training. Assistance should be targeted appropriately to enable the victim to recover from the act of violence and prevent them from being a victim of violence again in the future.

### **Recommendation 15**

**Section 8(3) of the VOCA Act should be amended so that homeless or disadvantaged victims are eligible to receive assistance for other items which will assist their recovery.**

### **Recommendation 16**

**In making an award for assistance, VOCAT should develop referral protocols to services such as health, welfare, education and community support services.**

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<sup>62</sup> For example, when considering whether to grant an application that was out of time, a combination of factors over a period of time, including the fact the applicant was homeless was considered in *Hay v VOCAT* [2002] VCAT 45.

## Confusion between special financial assistance and exceptional circumstances

HPLC practitioners have reported that their clients are frequently confused by the difference between special financial assistance and assistance for other items to assist recovery in exceptional circumstances.

### Recommendation 17

**Special financial assistance should simply be called ‘Assistance for pain and suffering’.**

## Clear effective information about the VOCAT process

Practitioners at HPLC have reported the following concerns with the VOCAT process:

- ▶ the process for obtaining a psychologist/counsellor’s report is confusing, particularly payment for pro bono clients before or after a hearing and the interaction with interim awards for assistance;
- ▶ the difference between a treating psychologist/counsellor’s report and an assessment report is confusing;
- ▶ the website is confusing and hard to navigate; and
- ▶ in terms of the steps involved, the practice directions can be difficult to follow. An easy step by step guide (i.e. literally stepping out the process) would be much easier to comprehend.

### Recommendation 18

**A review of VOCAT’s website, publications, practice directions and guidelines should be undertaken. Where possible, clearer information which is easy to locate and understand should be provided.**

## Specialist list for homeless/disadvantaged people

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The establishment of a specialist list for homeless and/or disadvantaged persons as part of VOCAT would likely address all of the issues set out above, and would greatly improve the fairness, effectiveness and accessibility of the existing victims’ compensation scheme for those experiencing homelessness.<sup>63</sup>

### Existing specialist jurisdictions

Specialist lists and courts have been successfully established in a number of jurisdictions in Victoria, interstate and overseas. Specialist lists and courts aim to facilitate improved justice outcomes for particularly disadvantaged persons through informal, participatory, multi-disciplinary

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<sup>63</sup> PILCH Homeless Persons’ Legal Clinic has previously recommended this measure in the *Report of the Homeless Persons’ Court Project: Improving the Administration of Justice for Homeless People in the Court Process* (PILCH, 2004), Recommendation 4.

approaches to problem-solving. Results from specialist court models have indicated a positive impact on access to justice, accountability, community integration and cost reduction. A number of examples are discussed below.

### Specialist lists, VOCAT

The Koori VOCAT List was established by practice direction of the Chief Magistrate on 1 July 2006 as a pilot to develop procedures to ensure that the objectives and purposes of the VOCA Act can be achieved in relation to Koori victims of crime.<sup>64</sup> The List responded to a growing body of evidence which suggested that the Aboriginal community was disproportionately represented as victims of violent crime, but were not accessing the assistance available through VOCAT at a corresponding level.<sup>65</sup>

Since commencement of the Koori List, the number of applications for assistance by Koori victims of crime has increased, the time taken to finalise those applications has decreased, and VOCAT has been able to better assist Koori victims of crime by developing relationships with relevant agencies.<sup>66</sup>

One of the biggest advantages of the Koori List is the flexible practices adopted to facilitate applications which require a hearing, including:

- ▶ use of technology, such as video conferencing from remote locations; and
- ▶ listing applications at a Tribunal venue more convenient to the applicant.<sup>67</sup>

Due to the great success of the pilot the Koori VOCAT List is now an ongoing part of VOCAT's operations.<sup>68</sup>

### Specialist jurisdictions, Magistrates' Court of Victoria

The Victorian Magistrates' Court currently operates several specialist jurisdictions designed for victims and offenders who are disadvantaged. Those lists are as follows:

- ▶ Family Violence Court Division;
- ▶ Koori Court and Children's Koori Court;
- ▶ Drug Court; and
- ▶ Collingwood Neighbourhood Justice Centre.<sup>69</sup>

In addition, the Infringements Court has a Special Circumstances List which deals with applications for revocation of fines from members of the community who have outstanding registered infringements and who are suffering from a mental or intellectual disability, disorder, disease or illness; substance addiction; or homelessness.

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<sup>64</sup> VOCAT Practice Direction No. 2 of 2009

<sup>65</sup> VOCAT 2008-09 Annual Report at page 5

<sup>66</sup> Ibid.

<sup>67</sup> VOCAT Practice Direction No. 2 of 2009

<sup>68</sup> Ibid.

<sup>69</sup> For detailed information about these programs, see Magistrates' Court of Victoria website, available at <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/Magistrates+Court/Home/Specialist+Jurisdictions/> (last visited 15 February 2010).

A Victorian government evaluation revealed a reoffending rate of 13-16% at the Shepparton and Broadmeadows Koori Courts, compared to 29% for Indigenous offenders in mainstream courts.<sup>70</sup> A Drug Court evaluation showed that participants committed 23% fewer offences than a comparison group, with unemployment rates dropping by one third.<sup>71</sup> Further, problem-solving court approaches can generate significant cost savings, both within the criminal justice system and in relation to the provision of welfare services.<sup>72</sup>

The Homeless Persons' Court Project found that participants who appeared on specialists lists had a much more positive perception of the court process:

- ▶ James, a homeless man with over \$10,000 worth of unpaid fines, appeared on the Special Circumstances List at the Melbourne Magistrates' Court. James was able to speak directly to the Magistrate on the Special Circumstances List about the positive changes that had occurred in his life since the time of his offences, and he felt that the progress he was making was taken into consideration by the Court.<sup>73</sup>
- ▶ George, an Indigenous Australian homeless man, who has had significant contact with the court system over a number of years, spoke very highly of his experience in the Koori Court as compared with the mainstream Magistrates' Court. He said: 'In a normal court room, a Magistrates' Court, I get nervous. I think I'm going to get locked up and I stress out real bad ... and there's all these charges and I don't even know where they're coming from. When I'm in the Koori court I feel really comfortable 'cos I've got my Elders there and family.'<sup>74</sup>

### A specialist list for homeless/disadvantaged persons at VOCAT

As noted above, people experiencing homelessness are disproportionately represented in the criminal justice system and particularly vulnerable to becoming both perpetrators and victims of violence and other criminal activity. They also confront multi-faceted disadvantage when interacting with the court system.<sup>75</sup>

The arguments for establishing a homelessness/disadvantage list as part of VOCAT are closely analogous to those used to establish the Koori VOCAT List, as well as those used by the Victorian government as grounds for establishing the Koori and Drug Courts, the pilot Neighbourhood Justice Centre, and the Special Circumstances List.<sup>76</sup> These programs have now created a clear precedent of success.

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<sup>70</sup> Victorian Department of Justice, *Attorney General's Justice Statement 2: The next chapter* (October 2008), p 8.

<sup>71</sup> Ibid.

<sup>72</sup> Arie Freiberg, "Problem-Oriented Courts: Innovative Solutions to Intractable Problems?" (Speech delivered at the Australian Institute of Judicial Administration Magistrates' Conference, 20-21 July 2001, Melbourne), pp 13-14, available at <http://www.aija.org.au/Mag01/FREIBERG.pdf> (last visited 15 February 2010).

<sup>73</sup> Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project* (August 2004), page 25.

<sup>74</sup> Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project* (August 2004), page 25.

<sup>75</sup> See the factors set out in *Report of the Homeless Persons' Court Project: Improving the Administration of Justice for Homeless People in the Court Process*, pp 16-29.

<sup>76</sup> See for example Victorian Department of Justice, *Attorney General's Justice Statement: New Directions for the Victorian Justice System: 2004–2014* (May 2004), p 52.

The establishment of a specialist list for those affected by homelessness or disadvantage is aligned with the Victorian Government's justice agenda. In 2008, the Victorian Attorney General released the Government's Justice Statement 2, which emphasised the links between crime and social disadvantage, and included the following key priorities:

- ▶ developing an integrated approach to problem-solving courts, expanding restorative justice programs and using specialist lawyers across a range of problems;
- ▶ taking learnings from established programs to address the causes of criminal behaviour, especially in relation to defendants whose offending is associated with acute disadvantage or marginalisation; and
- ▶ encouraging social inclusion, and ensuring defendants with complex needs are managed holistically.<sup>77</sup>

A specialist VOCAT list could operate in much the same way as the Koori VOCAT List and deal with victims' compensation matters involving one or more people experiencing homelessness. Such a list could also operate at VOCAT in one or more locations, or could outreach to homelessness welfare agencies or crisis accommodation facilities.

Potential benefits of a specialist homelessness/disadvantaged list are:

- ▶ facilitating access to justice by:
  - reducing formality and intimidation in the hearing process;
  - increasing flexibility in relation to the place and time of hearing; and
  - outreaching or providing transport options to homeless people;
- ▶ providing appropriately trained judicial officers and court staff to preside over and administer the list; and
- ▶ applying the principles of therapeutic jurisprudence.

If magistrates and judicial officers were able to take more time to engage with victims experiencing homelessness, listen to their circumstances, and allow their stories to be heard, the fairness of the process would be greatly enhanced.<sup>78</sup> It is crucial that the objectives and purposes of the VOCA Act can be achieved in relation to homeless/disadvantaged victims of crime.

## Recommendation 19

**A Practice Direction should be issued pursuant to section 58 of the VOCA Act to establish a specialist list as part of VOCAT for homeless/disadvantaged persons, which could**

**- have greater regard to the circumstances and particular needs of people experiencing homelessness and take a flexible, problem-solving approach to dealing with victims' compensation matters involving one or more people experiencing homelessness;**

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<sup>77</sup> See Victorian Department of Justice, *Attorney General's Justice Statement 2: The next chapter* (2008), Section 3: Addressing Disadvantage.

- outreach to appropriate welfare agencies and crisis accommodation facilities in order to facilitate ease of access and a less intimidating atmosphere for victims; and
- be administered by appropriately trained judicial officers and court staff, who could conduct hearings on an informal, participatory basis,

## Compensation orders and VOCAT

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### Advantages of VOCAT

As stated in the Discussion Paper, VOCAT is often used as the primary source of assistance for victims and is the logical step for a victim seeking compensation rather than in the sentencing court.<sup>79</sup> There are numerous advantages for victims using the VOCAT process as opposed to seeking compensation from their offender:

- ▶ the offender does not need to be identified, prosecuted or found guilty as VOCAT only needs to be satisfied on the balance of probabilities that a crime has been committed;
- ▶ there is no need to await the outcome of a trial;
- ▶ interim awards are available to meet urgent needs so recovery is not delayed;
- ▶ compensation awards will always be paid as they are funded by the State and an offender's circumstances and ability to pay will not affect the amount awarded to, or received by, the victim (i.e. a victim will receive compensation regardless of whether their offender has sufficient assets to pay);
- ▶ victims will not need to take enforcement action themselves to recover money if their offenders do not pay the compensation. Victims should not be subjected to the added trauma of having to pursue their offenders to receive money to aid their recovery. It is the State that should bear the risk of differences between victim needs and offender means; and
- ▶ a State-funded system provides for both theoretical and practical fairness for victims. Relying on offenders to pay compensation results in some victims being unfairly disadvantaged which leads to inequality between victims. Under a State-funded system, victims are treated more consistently and valued the same by the law.

Unlike the current system where there are multiple overlapping avenues of recovery, victims need an all-inclusive, consistent and easy to navigate process which can only be achieved where there is one simple system. Accordingly, the victims of crime compensation scheme should be State-funded and compensation orders for pain and suffering should be abolished.

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<sup>78</sup> See Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project* (August 2004), page 42.

<sup>79</sup> Discussion Paper, page 22.

## Deficiencies in the making of compensation orders

As stated in the Discussion Paper, a significant problem with compensation orders is that the majority of offenders do not have sufficient, or any, assets with which to pay them. This is certainly the case with offenders experiencing homelessness.

It almost goes without saying that an offender who is homeless is likely to be poor. According to the Australian Bureau of Statistics, on Census night in 2006, 74% of homeless people in boarding houses aged 15 or over had a weekly individual income of below \$400.<sup>80</sup> Amongst unemployed homeless people in improvised dwellings, tents or sleeping out, 87% had a weekly household income of below \$500.<sup>81</sup> Of those who participated in the HPLC Human Rights Workshops in 2009 over 80% stated that the amount of social security they received is inadequate to meet their most basic needs.<sup>82</sup> A compensation order awarded against a homeless offender is unlikely to help the victim if it cannot be paid and is likely to further entrench the offender in the cycle of homelessness.

Failure to take into consideration an offender's homelessness can result in unfair and unjust outcomes for the offender. It is important that an offender's means be taken into account for the following reasons:

- ▶ the prospects of an offender rehabilitating, and in the case of offenders experiencing homelessness breaking the cycle of homelessness, can be greatly decreased by an onerous compensation order. Justice Cummins commented in *DPP v Robert Clive Parsons*<sup>83</sup> that, '[i]t does seem to me that the elements of criminal sentencing, including rehabilitation, in many cases would not sit easily with a substantial order for compensation. That is because a crushing burden upon an offender is likely to be antipathetic to his or her prospects of rehabilitation when he or she comes out of prison';<sup>84</sup>
- ▶ offenders will be treated differently and disproportionately if the nature of the burden which payment of a compensation order would impose is not considered. Payment of a compensation order may not be a problem for someone who is in a strong financial position but may be crippling for a person who has very little money;
- ▶ undesirable consequences could result from offenders being subjected to financial burdens that they cannot meet as they may resort to committing further offences in order to obtain the means to meet the requirements of an order, keeping offenders in the cycle of homelessness, offending and punishment;
- ▶ innocent dependents of the offender need to be considered; and
- ▶ offering false hope, by creating an unrealistic expectation of receiving compensation for victims when an offender simply cannot pay the amount of compensation awarded against

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<sup>80</sup> Chris Chamberlain and David MacKenzie, Australian Census Analytic Program *Counting the Homeless, Australia* (ABS 2006).

<sup>81</sup> Ibid.

<sup>82</sup> PILCH HPLC, *Promoting and Protecting the Human Rights of People Experiencing Homelessness in Australia*, National Human Rights Consultation Submission setting out the views and comments of people experiencing homelessness about human rights in Australia (15 June 2009), page 4.

<sup>83</sup> [2000] VSC 327.

<sup>84</sup> *DPP v Robert Clive Parsons* [2000] VSC 327 at [25].

them, is not helpful for victims. Awards of compensation should be realistic and approximate the amount a victim should expect to receive so victims know where they stand.

While the *Sentencing Act 1991* provides that a Court may take into account an offender's financial circumstances in determining the amount and method of payment of a compensation order,<sup>85</sup> judges have adopted varying approaches in determining the impact that an offender's means should have on the amount of compensation awarded. A review of case law indicates that the differing approaches may have come about as a result of judges grappling with a way to balance the rights and interests of the victim and the rights and interests of the offender. It is nearly impossible to do this consistently as the needs of the victim and the needs of the offender will almost always be directly opposed. Justice Cummins in *Gregory v Gregory*<sup>86</sup> identifies the incongruity of the current provisions and states, '[h]ow can one both fulfil the rights of the victim and not financially crush the offender? The sub-section, conspicuous in its vagueness, provides no real solution to what in truth is a contradiction.'<sup>87</sup> Justice Bell in *RK v Mirik and Mirik*<sup>88</sup> cites Miers who asks, 'at what point in the possible discrepancies between the offender's means and the ideal assessment of the victim's injury does the insufficiency become so great that a court should refrain from ordering any compensation at all?'<sup>89</sup>

A trend is certainly emerging in the case law for courts to place greater value on the impact on, and needs of, the victim.<sup>90</sup> Justice Cummins' statement in *Gregory v Gregory* that, 'there should not be a sliding scale of compensation for victims of crime because the offender is rich or poor'<sup>91</sup> recognises that victims should be treated consistently and fairly. However, the practical reality of offender based compensation is that victims with similar pain and suffering often obtain different outcomes even if awarded the same amount, in that they receive different sums of money being all, some or none of the compensation awarded, based on the offender's ability to pay the compensation.

The real value to a victim of being awarded a large compensation order in circumstances where the offender cannot pay is the recognition and acknowledgment of the gravity of the offence and the impact it has had on the victim. Such acknowledgment should occur in the process of sentencing the offender and can also be done through the VOCAT process. A purely symbolic compensation order may provide some small benefit for the victim but as a means of providing adequate compensation and restitution it is futile.

### Abolish compensation orders for pain and suffering

As stated above, the practical reality of offender based compensation is that victims with similar pain and suffering often obtain different outcomes, in terms of amounts awarded and received, as a result of their offender's ability to pay. This does not promote consistency or fairness and gives the undesirable perception that victims with similar suffering are treated differently.

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<sup>85</sup> *Sentencing Act 1991* ss 85H and 86(2).

<sup>86</sup> [2000] VSC 190

<sup>87</sup> [2000] VSC 109 at [29]

<sup>88</sup> [2009] VSC 14

<sup>89</sup> *RK v Mirik and Mirik* [2009] VSC 14 at [111]; David Miers, *Compensation for Criminal Injuries* (1990) at 243, as cited in *RK v Mirik and Mirik* [2009] VSC 14 at [111].

<sup>90</sup> See for example, *RK v Mirik & Mirik* [2009] VSC 14 and *Stevens v Baxter* [2009] VSC 257.

<sup>91</sup> [2000] VSC 109 at [29]

A review of recent case law highlights the inconsistency in compensation order amounts being awarded. For example, in *Ioannu v Catania*<sup>92</sup> the victim was awarded \$32,000 for pain and suffering (post-traumatic stress disorder and chronic depression) as a result of being set on fire by the offender. In *Kaplan v Lee-Archer*<sup>93</sup> the victim was awarded \$40,000 for pain and suffering (post-traumatic stress disorder) as a result of witnessing the offender repeatedly steal money from his employer.

These inconsistencies may be a reflection of the difficulty inherent in criminal courts awarding compensation. As Justice Bell stated in *RK v Mirik and Mirik*,<sup>94</sup> 'the criminal courts are acutely aware that crimes compensation proceedings are not conducted with the full rigour of a civil trial. Nor do the criminal courts always have the time and experience ideally required to conduct a fully contested civil trial of a victim's application, and then make a principled assessment of what the compensation should be.'<sup>95</sup> Justice Bell also states, '[f]or want of the kind of detailed forensic and judicial examination that is available in civil proceedings, there exists a potential for compensation orders to be made against offenders when they shouldn't or in amounts that exceed the victim's correct entitlement. That potential exists in practically every case, and I should guard against it happening here.'<sup>96</sup> To avoid overshooting, Justice Bell in *RK v Mirik and Mirik* reduced the amount of compensation that might have conceivably been ordered by 25%.

It could be argued that it is a waste of court time and resources deliberating on the amount of compensation that should be awarded to a victim in circumstances where the offender has no means to pay any amount awarded. It is also worth noting that some offenders may question whether a judge who has heard the criminal trial and sentenced them can bring an impartial mind to the issue of compensation. It could also be argued that the assessment of the amount of compensation a victim requires is a treatment/medical question and not a legal question at all.

State-based funding is already available under the VOCAT scheme for injury and pain and suffering. State-based awards do not have the problems that victims experience in seeking compensation orders including:

- ▶ a compensation order cannot be made until the offender has been found guilty. This may not occur or may take months or years to occur delaying the making of an application. Victims experiencing homelessness are often unable to identify the offender and, as stated above, are reluctant to engage with police and thus offenders are often not charged or prosecuted. Even if a compensation order is awarded the offender can appeal further delaying the receipt of any money;
- ▶ the victim may fear retribution by the offender if they make an application for a compensation order;

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<sup>92</sup> [2008] VSC 302

<sup>93</sup> [2007] VSCA 42

<sup>94</sup> [2009] VSC 14

<sup>95</sup> *RK v Mirik and Mirik* [2009] VSC 14 at [34]

<sup>96</sup> *Ibid*, at 153.

- ▶ the victim may feel that any money from the offender is tainted. The Discussion Paper mentions that some sexual assault victims describe offender compensation as ‘some meagre payment for services rendered under force, something akin to prostitution’;<sup>97</sup>
- ▶ the victim’s credibility may be attacked by the offender’s lawyers on the basis of the likelihood of a compensation order application being made;
- ▶ the offender may contest the application requiring the victim to give further evidence, be cross-examined and disclose psychological and/or medical reports increasing and prolonging the victim’s suffering;
- ▶ the victim may be offered false hope of receiving a large amount of compensation when the offender simply cannot pay the amount awarded;
- ▶ victims have to take enforcement action themselves if the offender does not pay, which can be expensive, time consuming and ultimately not result in any money being received. Victims experiencing homelessness are extremely unlikely to have the ability, in terms of time commitment, money and resources, to enforce a compensation order where the offender has insufficient funds. As stated in the Discussion Paper, Magistrates’ Court data indicates that on average over the last five years only 10% of the amount of compensation ordered for injury was received, meaning the vast majority of victims must take enforcement action against their offenders. Safety concerns can also result, in that the victim must pursue the offender for money which may place the victim in danger of being subjected to further violence and retaliation from the offender; and
- ▶ an award of compensation under the *Sentencing Act 1991* may actually work against the victim in circumstances where the offender does not pay and the victim then seeks compensation through VOCAT. VOCAT may reduce the amount awarded by the amount of any compensation that the victim is entitled to receive but has not yet received.<sup>98</sup> As such, where a compensation order is made and the victim is entitled to receive this money but does not, the victim may end up receiving less money than they are entitled to if VOCAT reduces their award.

The number and amount of compensation orders being made by the Magistrates’ Court is very low compared with the number and amount of awards being made by VOCAT. It is worth repeating in these submissions a statistic set out in the Discussion Paper: that over the last 5 years, the Magistrates’ Court granted an average of only 16 compensation orders for personal injury suffered.<sup>99</sup> The Discussion Paper also states that each year less than 20 orders are made in the County Court and less than a handful of awards are made in the Supreme Court.<sup>100</sup> It does not appear that the objective of the *Sentencing Act 1991*, ‘to ensure that victims of crime receive adequate compensation and restitution’<sup>101</sup> is being achieved through compensation orders.

As argued above, it is the view of the HPLC that compensation and restitution is best served through awarding compensation through VOCAT than through sentencing. In practice,

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<sup>97</sup> Ian Freckelton, (2001) *Criminal Injuries Compensation: Law, Practice and Policy*. LBC Information Services, Sydney, page 113 as cited in the Discussion Paper at page 32.

<sup>98</sup> *Victims of Crime Assistance Act 1996* (Vic) section 16.

<sup>99</sup> Discussion Paper, page 6.

<sup>100</sup> Discussion Paper, page 7.

<sup>101</sup> *Sentencing Act 1991* (Vic) s 1(i)

compensation and restitution for victims does not occur through the use of sentencing orders. Judges are better placed to focus on sentencing purposes such as deterrence, punishment and rehabilitation when imposing a sentence.

Abolishing compensation orders for pain and suffering would essentially leave Victoria with a similar model, in respect of compensation orders, to New South Wales, Queensland and Western Australia.

### Recommendation 20

Part 4, Division 2, Subdivision (1) – Compensation for pain and suffering, etc. (heading and subsections 85A to 85M inclusive) of the *Sentencing Act 1991 (Vic)* should be repealed.

### Recommendation 21

That the objective of the *Sentencing Act 1991*, ‘to ensure that victims of crime receive adequate compensation and restitution’ be removed from the *Sentencing Act 1991*.

### Recommendation 22

The victims of crime compensation scheme in Victoria, for injury and pain and suffering, should be an entirely State-funded system.

## Funding the system

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### State recovery of compensation from offenders

The HPLC submits that offenders should not be required to fund any award of assistance made under the VOCA Act.

This submission has argued that the objects of sentencing should be deterrence, punishment and rehabilitation, and that victim compensation should be awarded by VOCAT. To ask offenders to fund payment of an award of assistance in addition to any sentence imposed on them through the criminal courts would result in ‘double punishment’.

‘Double punishment’ refers to the principle that a person may not be punished twice for the same offence.<sup>102</sup> The principle has a long history at common law, and has been recognised internationally as a general principle of law ‘recognised by civilised nations’.<sup>103</sup>

For example, Article 14(7) of the *International Covenant on Civil and Political Rights* states that, ‘[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’.

The principle has also been *crystallised* in the Victorian Charter of Human Rights which states

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<sup>102</sup> The Laws of Australia [9.1.3000].

<sup>103</sup> Article 38(1)(c) of the *Statute of the International Court of Justice*.

A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.<sup>104</sup>

It is therefore important to ensure that any amendment to the Victorian victims of crime compensation scheme avoids contravention of this principle. This consideration is particularly significant in light of the impact that multiple ‘punishments’ may have upon offenders experiencing homelessness.

The practical effects of requiring offenders to fund VOCAT compensation could also have ramifications for victims in relation to the therapeutic experience offered by VOCAT. If there was a risk that VOCAT compensation would be reclaimed from an offender, this might result in more offenders wanting to appear and contest VOCAT hearings.

It is also possible that a victim may seek compensation from VOCAT but not press charges against their offender for fear of retribution. If the State pursues the offender for recovery without the offender having been convicted, this may alert the offender to the fact that the victim has obtained compensation. This raises privacy and safety concerns for victims.

### **Recommendation 23**

**Offenders should not be required to fund any award of assistance made under the VOCA Act as this would constitute a form of ‘double punishment’ contrary to the human right ‘not to be punished more than once’.**

### **Victim compensation levies**

The HPLC does not support the imposition of victim compensation levies which it considers a further form of double punishment, as described above.

In the event the government introduces a victim compensation levy, the HPLC submits that people experiencing homelessness should be excluded from any requirement to pay a levy in relation to public order and public space offences where there is a connection between the offence and the offender’s housing status or other special circumstances.

The type of offences that should be excluded include: public space and street offences such as begging, refusing to give name and address, drinking in public, fare evasion on public transport, and shoplifting. The HPLC submits that for consistency, all summary and expiated offences should be excluded. People experiencing homelessness should not be disproportionately impacted by their housing status which will occur if a victim compensation levy applies to public space offences and ‘street offences’.

### **Recommendation 24**

**An offender levy should not be introduced to fund victim compensation as it would constitute a form of ‘double punishment’ contrary to the human right ‘not to be punished more than once’.**

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<sup>104</sup> Section 26 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

## **Recommendation 25**

**Any offender levy introduced should not apply to summary and expiated offences, in particular public space offences and ‘street offences’.**

Any levy introduced also needs to be means tested so that the levy amount is meaningful to the offender. As a participant in the Homeless Persons’ Court Project stated, ‘[n]ot everyone should be punished the same for the same offence. It doesn’t mean the same to everyone.’<sup>105</sup> In particular, recovery from Centrelink, disability pensions and other social security payments should be expressly excluded. The State should not further marginalise homeless and disadvantaged people for the sake of a small recovery. Strict recovery from people who are surviving solely on social security is likely to perpetuate the cycle of crime and homelessness as the person is forced to turn to crime to survive and meet their most basic needs.

## **Recommendation 26**

**Any offender levy introduced should be means tested so that an offender’s financial circumstances and the nature of the burden that repayment of compensation will impose on them can be taken into account.**

## **Recommendation 27**

**If an offender levy is introduced recovery of the levy should not be made from Centrelink payments, disability support pensions and/or other social security payments.**

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<sup>105</sup> Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons’ Court Project* (August 2004), page 18.

## Effect of reform proposals set out in the Discussion Paper

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### Improving the effectiveness of compensation for victims

The table below lists the reforms suggested in Part 6 of the Discussion Paper aimed at improving the effectiveness of compensation for victims and provides a reference to the sections of this submission dealing with those ideas for reform.

Suggested reform	Discussion Paper reference	Effect on homeless victims	Effect on homeless offenders	HPLC position
Administrative versus judicial model	Pages 42-44	See section starting page 21	N/A	See section starting page 21
Removing the need to prove the victim has suffered an injury	Page 44	See section starting page 18	N/A	See section starting page 18
Reviewing award caps	Pages 44-45	See section starting page 23	N/A	See section starting section 23
Centralised or decentralised?	Pages 45-46	See section starting page 21	N/A	See section starting page 21

### Improving offender responsibility for victim compensation

The table below lists the reforms suggested in Part 6 of the Discussion Paper aimed at improving offender responsibility for victim compensation and provides a reference to the sections of this submission dealing with those ideas for reform. Where the reform has not been directly addressed above the effect on victims experiencing homelessness and offenders (if any) is specified in the table.

Suggested reform	Discussion Paper reference	Effect on homeless victims	Effect on homeless offenders	HPLC position
Compensation orders	Pages 46-47	See section starting page 30	See section starting page 30	See section starting page 30
Sharing of information	Page 47	See section starting page 33	See section starting page 33	See section starting page 33
Access to restrained assets	Page 48	N/A	See section starting page 30	See section starting page 30

<b>Suggested reform</b>	<b>Discussion Paper reference</b>	<b>Effect on homeless victims</b>	<b>Effect on homeless offenders</b>	<b>HPLC position</b>
Therapeutic and restorative justice	Pages 48-49	See section starting page 25	See section starting page 25	See section starting page 25
State recovery of assistance awards and compensation order amounts from offenders	Page 49	See sections starting page 30 and 36	See sections starting page 30 and 36	See sections starting page 30 and 36
Requiring offenders to contribute to funding – victim compensation levies	Pages 49-50	N/A	See section starting page 37	See section starting page 37
Compensation as part of sentence	Pages 50-52	See section starting page 30	See section starting page 30	See section starting page 30

## Prisoner Compensation Quarantine Fund

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As previously stated, offenders experiencing homelessness will almost certainly have insufficient assets to meet whatever compensation is awarded against them. The Prisoner Compensation Quarantine Fund (**PCQF**) will therefore operate if the homeless offender in turn becomes a victim due to mistreatment in detention or prison, and any non-medical or legal damages awarded to them will be confiscated<sup>106</sup> for at least 12 months.<sup>107</sup> This appears to be incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter of Human Rights**).

Specifically, the continued operation of the PCQF is considered to be in violation of the following rights protected under the Victorian Charter of Human Rights:

▶ **The right to recognition and equality before the law**<sup>108</sup>

Offenders experiencing homelessness, who become victims themselves as a result of the actions of prison operators, will be deterred against claiming against their offender as, despite the trauma and effort of the trial process, and despite the amount of damages determined by a court of law to be an accurate reflection of their injuries:

- they will be unable to access damages awarded to them for, for example, pain and suffering;<sup>109</sup>
- the court has the discretion to take into account the need to ensure that victims are not deprived of an opportunity to enforce their damages claim<sup>110</sup> and may diminish the medical and legal costs awarded to the homeless person accordingly; and
- the indignity of suffering a wrong at the hands of the State and then having any compensation payable by the State confiscated by that same State.
- Given the above, the PCQF creates a structural barrier to the claiming of compensation by offenders experiencing homelessness against State and private prison operators. This structural barrier discriminates against the homeless person and deprives them of equality before the law.

▶ **The right to privacy and reputation**<sup>111</sup>

The publication of the homeless offender's personal financial information and their claim<sup>112</sup> is unambiguously a violation of their right to privacy. Furthermore, the publication of such

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<sup>106</sup> *Corrections Act 1986* (Vic) s 104V.

<sup>107</sup> *Corrections Act 1986* (Vic) s 104O.

<sup>108</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

<sup>109</sup> *Corrections Act 1986* (Vic) s 104V.

<sup>110</sup> *Corrections Act 1986* (Vic) s 104U(2)(b)(iii).

<sup>111</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

<sup>112</sup> *Corrections Act 1986* (Vic) s 104Y.

information may expose the homeless offender and their families to further harm if the perpetrator or an associate of the perpetrator decides to seek retribution.

▶ **The right to protection of families and children**<sup>113</sup>

The homeless offender, who is now a victim, will be unable to provide money from the damages to their families and children. This is inconsistent with the Victorian Charter of Human Rights, which states that families are entitled to protection by society and the State.

▶ **Property rights**<sup>114</sup>

The seizure of a portion of a person's compensation is clearly a violation of their right 'not to be deprived of property'.<sup>115</sup> And while the Victorian Charter of Human Rights provides for an exception where the violation of property rights is in accordance with law,<sup>116</sup> human rights must only be limited where it is justified given the aim of the limitation.<sup>117</sup> The PCQF is tenuously related to the aim of compensating victims, not in the least because it is inappropriate and tenuous for law to create a situation where compensation for a victim is dependent on the behaviour and treatment of the perpetrator in prison.

▶ **The right to humane treatment when deprived of liberty**<sup>118</sup>

In depriving the homeless offender, who has suffered pain and degradation as a result of a crime committed against them, of compensation awarded fairly in a court of law, the PCQF does not promote treatment of prisoners that is 'with humanity and with respect for the inherent dignity of the human person'.<sup>119</sup>

## Recommendation 28

**The Prisoner Compensation Quarantine Fund should be abolished by repealing Part 9C of the Corrections Act 1986 (Vic).**

## Conclusion

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People experiencing homelessness are one of the most marginalised groups of people within the community.

The recommendations outlined in this submission are aimed at promoting fair and just outcomes for people experiencing homelessness and seek to address the range of challenges and inequities they face (both as victims and as offenders) in relation to the current Victorian victims of crime compensation scheme.

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<sup>113</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 17.

<sup>114</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 20.

<sup>115</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 20.

<sup>116</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 7.

<sup>117</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 7(2).

<sup>118</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 22.

<sup>119</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 22.

Many of the recommendations can be implemented into the existing system immediately, while others will require the commitment of additional resources and/or legislative reform.

The HPLC urges the Department of Justice to respond to the needs of people experiencing homelessness by implementing the recommendations set out in this submission.