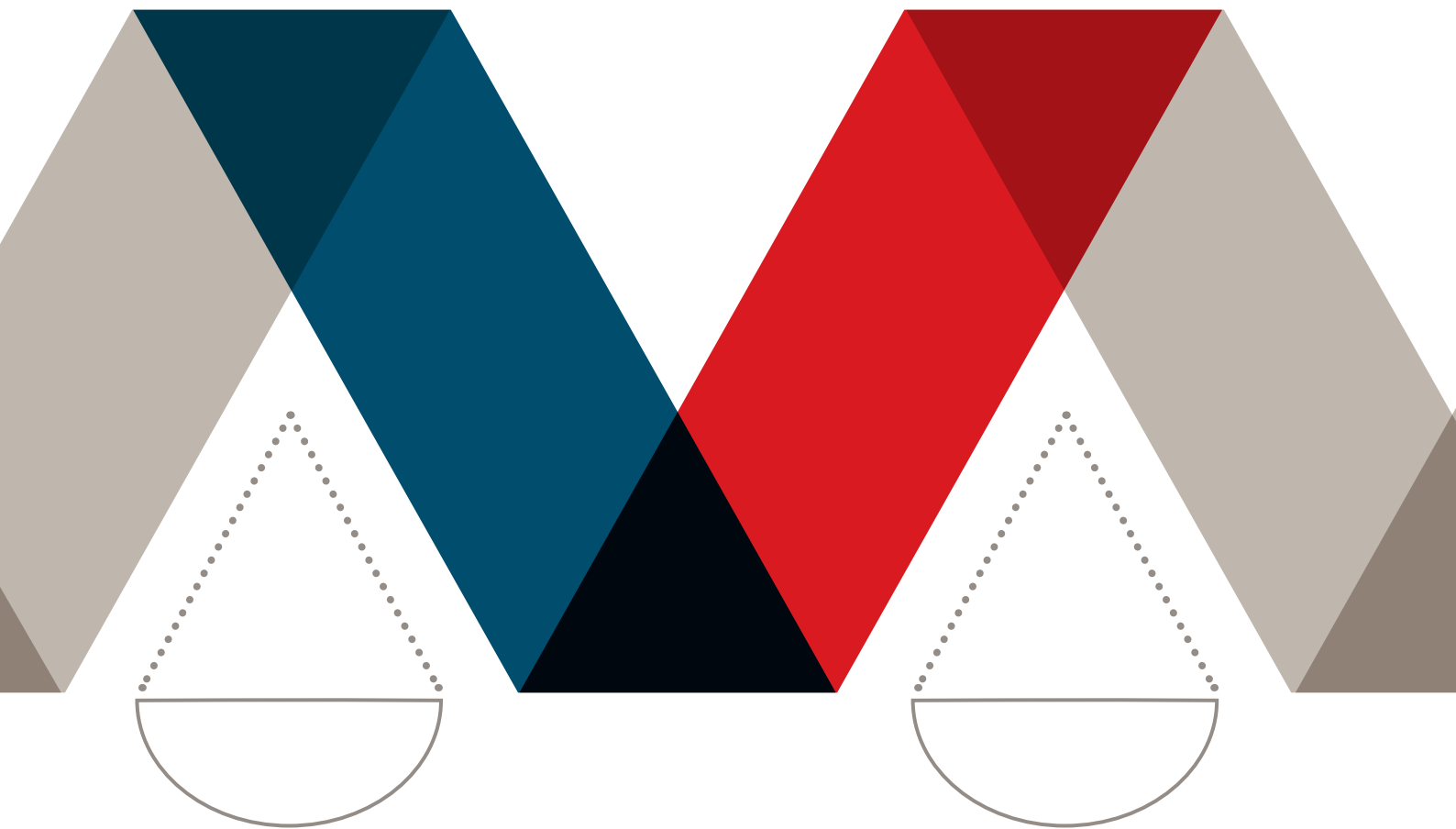


# The Role of Victims of Crime in the Criminal Trial Process

REPORT AUGUST 2016





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# The Role of Victims of Crime in the Criminal Trial Process

**REPORT**

AUGUST 2016



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# Contents

<b>Preface</b> .....	<b>vi</b>
<b>Terms of reference</b> .....	<b>viii</b>
<b>Glossary</b> .....	<b>ix</b>
<b>Executive summary</b> .....	<b>xii</b>
<b>Recommendations</b> .....	<b>xxi</b>
<b>1 Introduction</b> .....	<b>2</b>
Terms of reference .....	2
Scope of the reference .....	2
'Victim' .....	2
The 'criminal trial process' .....	3
<b>The incidence and impact of crime</b> .....	<b>4</b>
Statistical data .....	4
The impact of crime on victims .....	6
<b>The Commission's process</b> .....	<b>7</b>
Victims of Crime Division.....	7
Reference framework: theory and practice .....	7
Information papers .....	8
Consultation paper .....	8
Submissions .....	8
Consultations.....	8
<b>Concurrent developments</b> .....	<b>9</b>
Victorian Royal Commission into Family Violence.....	9
Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse ...	9
<b>Structure of this report</b> .....	<b>9</b>
<b>2 The evolution of the victim's role</b> .....	<b>12</b>
Introduction .....	12
The adversarial criminal trial.....	12
Drivers of reform.....	14
Law and policy reform in Victoria .....	15

Recognition of the victim’s interest in the criminal trial process.....	15
Enabling and supporting the victim’s participation in the criminal trial process.....	17
Reforms to evidence law and court procedure.....	18
Expansion of opportunities to participate.....	19
Financial reparation for harm.....	19
<b>3 The victim as a participant in the criminal trial process.....</b>	<b>22</b>
<b>Introduction.....</b>	<b>22</b>
<b>The need to reassess the victim’s role.....</b>	<b>22</b>
Driving cultural change.....	23
Clarifying expectations and entitlements.....	24
Guiding future reform.....	24
<b>Recognising the victim’s interest.....</b>	<b>24</b>
The victim’s inherent interest.....	24
Recognising the victim’s interest within a fair trial.....	25
<b>The victim as a participant.....</b>	<b>29</b>
Describing the role in law and practice.....	29
Nature of the role.....	30
<b>The role in practice.....</b>	<b>31</b>
Victims’ expectations of what their role should be.....	31
Victims’ rights and entitlements.....	32
Respect.....	33
Information and support.....	33
Participation.....	33
Protection.....	34
Financial reparation.....	34
<b>Articulating the role in statute.....</b>	<b>34</b>
Victims’ Charter Act.....	34
Charter of Human Rights and Responsibilities Act.....	35
<b>4 Consolidating the role in practice.....</b>	<b>44</b>
<b>Introduction.....</b>	<b>44</b>
<b>Cultural change.....</b>	<b>45</b>
The gap between law and practice.....	45
Achieving cultural change.....	47
<b>Education and training.....</b>	<b>48</b>
A shared vision of the victim’s role.....	48
Topics and themes.....	48
Delivery.....	49

<b>Compliance with Victims' Charter principles</b>	<b>56</b>
Existing mechanisms	56
Proposals for reform	58
A legal right to enforce?	59
Complaints processes	61
Review of complaints about compliance with Victims' Charter principles	65
Review of prosecutorial decisions	67
Complaints about lawyers' conduct	77
<b>System-wide monitoring and review</b>	<b>78</b>
Reporting requirements	78
Data collection	79
<b>A coherent legislative and policy framework</b>	<b>81</b>
<b>5 Respect</b>	<b>86</b>
Introduction	86
<b>The Victims' Charter principle</b>	<b>86</b>
Respecting victims in law and practice	86
Respecting the needs of diverse victims	89
<b>Respect in the courtroom</b>	<b>90</b>
Acknowledgment and respect	90
Victims as witnesses	93
Improper questions	94
Questions about sexual history	95
The need for reform	96
<b>Respect in the court process</b>	<b>99</b>
Victims' experiences of delay	99
Reducing delays	100
<b>6 Information and support</b>	<b>104</b>
Introduction	104
<b>Information and support throughout the criminal trial process</b>	<b>104</b>
Law and policy framework	104
Expectation and experience	107
<b>Relationship between victims and the prosecution</b>	<b>112</b>
Information obligations and the Victims' Charter Act	113
Conferences and compliance with obligations	114
Regional circuit court challenges	116
<b>Legal advice and assistance for victims</b>	<b>118</b>
The perceived need for independent legal assistance for procedural matters	119
Legal assistance for substantive legal entitlements	122
<b>Referral, coordination and accessibility</b>	<b>127</b>
Early referral to support	127
Accessible and responsive services	128

<b>7 Participation</b>	<b>132</b>
Introduction	132
Victim participation and the adversarial criminal trial	132
Consultation throughout the criminal trial process	134
Law and policy framework	134
Expanding prosecutorial consultation obligations	136
Participation and substantive rights in court	142
Confidential communications	142
Victim impact statements	147
Expanding participation in court	158
Equal participation in the court process	165
Participation for people with disabilities	165
Intermediaries	167
Participation in restorative processes	174
What is restorative justice?	175
Restorative justice for more serious offences	177
Restorative justice conferencing for indictable offences in Victoria	181
<b>8 Protection</b>	<b>196</b>
Introduction	196
Victims as witnesses: reducing trauma and intimidation	196
Special protections	197
Alternative arrangements	205
Limits on giving evidence at committal for other victims	207
Protection and a fair trial	210
Achieving the purpose of reforms	214
Protection measures addressed by the Victorian Royal Commission into Family Violence	215
Victims' privacy: protection from unjustified interference	219
The meaning of privacy	220
Access to the victim's records	220
Publication of criminal proceedings	225
<b>9 Financial reparation</b>	<b>228</b>
Introduction	228
Financial reparation for victims	228
Expectation and experience	228
Legal framework	229
Restitution and compensation orders against offenders	230
The Sentencing Act process for making orders	230
A more accessible process for victims	232
Appeals and enforcement	239
State-funded financial assistance	243
Victims of Crime Assistance Tribunal (VOCAT)	243
<b>10 Conclusion</b>	<b>250</b>
<b>Appendices</b>	<b>254</b>
<b>Bibliography</b>	<b>268</b>

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## Preface

Long judicial experience, and this inquiry by the Commission, reveal that victims, because they are victims, have an inherent interest in the criminal trial. This report addresses that interest.

Victims of crime seek—and are entitled to—acknowledgement and respect; information and support; participation; and protection. Acknowledgment and respect involve victims being treated properly as persons affected, often grievously, by what has occurred. Information and support involve victims being provided with appropriate and relevant material about the process they are to experience and the means to negotiate that process with minimum trauma. Participation involves allowing victims to have their views considered and the ability to make their concerns known. For those victims who give evidence, protection involves ensuring that they are treated properly as witnesses.

Victims, and the community, are also entitled to a just outcome. The sentencing outcome of the criminal trial where the accused is convicted was not within the Commission's terms of reference. It has therefore not been considered in the inquiry or reviewed in this report.

The epicentre of the inquiry was the role of victims in the criminal trial itself.

The judiciary applies itself assiduously and conscientiously to the demanding task of ensuring that every trial is fair. And yet the overwhelming—not universal—response of victims to the Commission's inquiry was dismay at how poorly they were treated in the trial process: how they were not acknowledged or respected; how they were demeaned; how they were re-traumatised; and how they were not participants.

Why is this so?

Victims generally understand and accept that, if they are a witness, their evidence is entitled to be tested. The testing of evidence of victims is a necessary and proper part of the criminal trial. But it is never necessary or proper for witnesses in the criminal trial to be demeaned, humiliated, abused, or treated with derision or contempt.

Victims generally understand and accept that, in the criminal trial, the accused properly is presumed innocent of the crime charged and that the burden of proof beyond reasonable doubt is on the prosecution.

Victims, as this inquiry revealed, generally do not seek a prosecutorial role in the criminal trial. They accept that that is a State responsibility. This report does not propose that victims become a party to the criminal trial. The report does propose substantial legislative and cultural change to secure the proper rights of victims—whether a witness or not—as participants in the modern criminal trial.

I think that the foundational reason that there is such a clear divergence between the responsible work of the courts and the legitimate expectations of victims and of the community is that the courts have remained confined by the binary interests of the prosecution and defence, whereas jurisprudence has evolved to a broader understanding of the criminal trial, and legitimate public expectation has likewise evolved. While the courts have secured the responsibilities of the prosecution and the rights of the accused, the rights of the victim have not been addressed.

During the twentieth century, the law developed a suite of protections for the accused in the criminal trial. Properly so. In a striking passage, the distinguished Lord Bingham of Cornhill stated on behalf of the Appellate Committee of the House of Lords:



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Fairness is a constantly evolving concept. Hawkins J (*Reminiscences* (1904) vol I, chap IV, p 34) recalled a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted 2 minutes 53 seconds, including a terse jury direction: ‘Gentlemen, I suppose you have no doubt? I have none’. Until 1898 a defendant could not generally testify on his own behalf. Such practices could not bear scrutiny today. But it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.<sup>1</sup>

In the late twentieth and early twenty-first centuries, the proper rights of victims in the trial process have come to be articulated. In 1989 Justice (later Chief Justice) Brennan of the High Court of Australia stated that, as victims of crime are not parties to prosecution, their ‘interests have generally gone unacknowledged until recent times’.<sup>2</sup> In 2001 Lord Steyn stated, with the approval of the other members of the House of Lords:

The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.<sup>3</sup>

The time has come for the proper interests of the victim as a participant—whether a witness or not—in the criminal trial process to be recognised. This is part of the evolution of the criminal law. While securing the proper rights of the State and of the accused, this report shows a way forward for securing the rights of victims as participants in the modern criminal trial.

The Commission was greatly assisted by the many agencies that deliver information and support to victims. The Victims Support Agency of the Victorian Department of Justice and Regulation, which provides professional and community education about victims and has an overarching responsibility for the funding and coordination of services through the Victims Assistance Program and the Victims of Crime Helpline, provided substantial material and assistance. Valuable contributions were also made by Victims Assistance Program providers, the Child Witness Service of the Department of Justice and Regulation, the Witness Assistance Service of the Office of Public Prosecutions, Centres Against Sexual Assault, and Court Network Inc. I commend those agencies for their important work.

In February 2013, the then Attorney-General, the Hon. Robert Clark MP, established the Victims of Crime Consultative Committee. The present Attorney-General, the Hon. Martin Pakula MP, secured the continuation and development of that Committee by Part 3 of the *Victims of Crime Commissioner Act 2015* (Vic). I commend both Attorneys-General upon those initiatives. The Victims of Crime Consultative Committee is an independent, high level, inclusive entity constituted by members of the judiciary, government, relevant bodies, service providers and, importantly, victims. It is chaired by a retired Supreme Court judge, the Hon. Bernard Teague AO. I had the honour of being the inaugural Chair of the Committee.

I express my warm thanks to the judiciary, the legal profession, the academics, the many government and other agencies, and the community for their contribution to this major inquiry. I express my gratitude to my fellow Commissioners and to Lindy Smith, team leader, her predecessor as team leader Peta Murphy, research and policy officers Adrienne Walters and Megan Pearce, and others at the Commission for their commitment and the high quality of their work on this reference. Finally I thank the many victims who have contributed to this inquiry and for whom I have profound respect.

I commend the report to you.



**The Hon. P.D. Cummins AM**  
Chair, Victorian Law Reform Commission  
August 2016

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1 *R v H* [2004] 2 AC 134, 145-146.

2 *Jago v District Court of New South Wales* (1989) 168 CLR 23, 50.

3 *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, [118] (cited with approval by the House of Lords in *R v H* [2004] 2 AC 134, 145-6).

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## Terms of reference

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 27 October 2014.]

The Victorian Law Reform Commission is asked to review and report on the role of victims of crime in the criminal trial process.

In conducting the review, the Commission should consider:

- the historical development of the criminal trial process in England and other common law jurisdictions;
- a comparative analysis of the criminal trial process, particularly in civil law jurisdictions;
- recent innovations in relation to the role of victims in the criminal trial process in Victoria and in other jurisdictions;
- the role of victims in the decision to prosecute;
- the role of victims in the criminal trial itself;
- the role of victims in the sentencing process and other trial outcomes;
- the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process; and
- support for victims in relation to the criminal trial process.

The Commission is to report by 1 September 2016.

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# Glossary

<b>Acquitted</b>	Found not guilty of the charge or charges on the <b>indictment</b> .
<b>Accused</b>	Person charged with a <b>criminal offence</b> or offences but who has not been found guilty or pleaded guilty.
<b>Alternative arrangements for giving evidence</b>	Measures which modify the usual procedure in which a witness gives oral evidence from the witness box in the courtroom.
<b>Civil jurisdiction</b>	In this report, the use of the term civil jurisdiction when referring to Australian courts means the procedures for hearing legal disputes other than criminal cases.
<b>Committal for trial or sentence</b>	The process of transferring a case against an accused from the Magistrates' Court to the Supreme Court or County Court.
<b>Common law</b>	Law that derives its authority from decisions of the courts rather than from legislation.
<b>Complainant</b>	Term used in the <i>Criminal Procedure Act 2009 (Vic)</i> and other legislation to describe the person against whom a sexual offence is alleged to have been perpetrated.
<b>Compensation</b>	Monetary payment by an offender intended to compensate in part or in whole for an injury suffered as a result of the commission of a crime.
<b>Criminal offence</b>	A crime against the state. Most criminal offences are specified in the <i>Crimes Act 1958 (Vic)</i> . The main categories of criminal offences are <b>indictable offences</b> , <b>indictable offences triable summarily</b> and <b>summary offences</b> .
<b>Defence</b>	The legal team representing the <b>accused</b> (in the lead-up to and before a determination of guilt), or the <b>offender</b> (after a determination of guilt).
<b>Director of Public Prosecutions (DPP)</b>	An independent officer responsible for making decisions about whether to prosecute, and prosecuting, <b>indictable offences</b> in the Supreme and County Courts of Victoria on behalf of the state.
<b>Discharge</b>	In this report, used to describe the situation where a magistrate determines that there is not enough evidence to justify sending an accused person to trial, thereby ending the prosecution.
<b>Financial assistance</b>	In this report, refers to money that a victim may be eligible to receive under the <i>Victims of Crime Assistance Act 1996 (Vic)</i> .

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<b>Indictable offences</b>	Serious crimes which attract higher maximum penalties. Usually triable before a judge and a jury.
<b>Indictable offences triable summarily</b>	Less serious indictable offences which can be heard before a magistrate.
<b>Indictment</b>	The charge or charges against the <b>accused</b> that the <b>Director of Public Prosecutions</b> has filed in the Supreme or County Court.
<b>Intermediary</b>	A person appointed to provide communication assistance during criminal proceedings to a child or a person with a disability.
<b>Judicial officer</b>	A judge or a magistrate.
<b>Leave</b>	The permission of the judge or magistrate.
<b>Lawyer</b>	Includes barristers (sometimes referred to as counsel) and solicitors.
<b>Offender</b>	Used to refer to a person who has been found guilty or has pleaded guilty to a crime.
<b>Office of Public Prosecutions (OPP)</b>	The Office of Public Prosecutions is the independent statutory authority that institutes, prepares and conducts criminal prosecutions in Victoria on behalf of the <b>Director of Public Prosecutions</b> .
<b>Order</b>	A direction by a court or tribunal that is binding unless overturned on appeal.
<b>Plea</b>	An answer by the accused to a charge of an offence which usually takes the form of 'guilty' or 'not guilty'.
<b>Police informant</b>	The police officer responsible for filing charges against the <b>accused</b> .
<b>Prosecutor</b>	A lawyer who appears in court on behalf of the DPP against an accused person or an offender.
<b>Public prosecutions service</b>	Defined in the <i>Public Prosecutions Act 1994</i> (Vic) as the service consisting of the <b>Director of Public Prosecutions</b> , the Chief Crown Prosecutor, Crown Prosecutors, Associate Crown Prosecutors, the Solicitor for Public Prosecutions and the <b>Office of Public Prosecutions</b> .
<b>Reparation</b>	An action, which might be financial, practical or symbolic, directed towards making amends for wrongdoing. Sometimes referred to as 'restoration'.
<b>Restitution</b>	In this report, restitution is used only when referring to restitution orders made under the <i>Sentencing Act 1991</i> (Vic). Restitution orders require an <b>offender</b> to restore or return something lost or stolen, or its equivalent, to its rightful owner.
<b>Restorative justice</b>	Procedures that operate as an alternative or in addition to the criminal trial process, and which focus on repairing harm, encouraging offenders to take responsibility for their actions and increasing the involvement of victims, families and communities in the criminal justice system.

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**Sentencing hearing**

Sometimes referred to as a plea hearing. Matters relevant to imposing sentence, including matters personal to the **accused** and the victim impact statement, are presented to the judge.

**Summary offences**

Less serious offences heard by a magistrate without a jury.

**Victim**

In this report, victim generally refers to a person who has directly suffered harm at the action of the offender and includes a parent of a child victim or a family member of a homicide victim. It applies a person alleged by the prosecution to be a victim prior to a determination of guilt as well as a victim of an offence for which an offender has been found guilty. See [1.3]–[1.9] for exposition of the term ‘victim’ as used in this report.

**Victoria Legal Aid**

An organisation that provides legal advice and assistance to people in accordance with the *Legal Aid Act 1978* (Vic).

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# Executive summary

## Introduction

- 1 This report completes the Victorian Law Reform Commission's review of the role of victims of crime in the criminal trial process, referred to the Commission by the then Attorney-General, the Honourable Robert Clark MP, on 27 October 2014.
- 2 For the purposes of the review, 'victim' generally refers to a person who has directly suffered harm at the action of the offender and includes a parent of a child victim or a family member of a homicide victim. It applies to a person alleged by the prosecution to be a victim prior to a determination of guilt as well as a victim of an offence for which an offender has been found guilty.
- 3 The 'criminal trial process' refers to proceedings involving the prosecution of indictable offences, from the point when the Director of Public Prosecutions Victoria commences or takes over a prosecution. It includes committal proceedings in the Magistrates' Court, trials and sentencing proceedings in the Supreme or County Courts and related applications for compensation and restitution orders, and appeals to the Court of Appeal. It does not include criminal offences that are prosecuted summarily within the jurisdiction of the Magistrates' Court and are therefore not tried before a judge and jury, such as many family violence offences.
- 4 Consistent with the terms of reference, the review focused on the criminal trial process itself and not the outcomes of trials, sentencing or appeals. The matter of sentencing levels was not referred to the Commission.
- 5 Reviewing the role of the victim in Victoria's adversarial criminal trial process calls for both a theoretical and practical understanding of how and why the criminal justice system has evolved as it has, how effectively it serves the needs of the community today, and the nature of pressure for change.
- 6 The Commission published four information papers that discussed victims' needs and rights, examined the development and fundamental principles of Victoria's adversarial criminal trial process, and considered, as a case study, the role of victims in the International Criminal Court. The Commission's consultation paper set out each step of the criminal trial process and compared current law and practice in Victoria with other common law jurisdictions, civil law jurisdictions in Europe and the International Criminal Court. It posed an extensive range of questions which guided the consultation process.
- 7 Consultations were held in Melbourne and across regional Victoria with individual victims of crime, lawyers, judicial officers, academics, and victim support and therapeutic professionals. The Commission convened 57 individual meetings and 18 roundtable discussions with victims and professionals. In addition, 43 written submissions were received.

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- 8 The Commission's conclusions are summarised below. The 51 recommendations are listed on page xxi–xxviii.
  - 9 Many of the recommendations are relevant and adaptable to criminal cases that are dealt with summarily in the Magistrates' Court, where the vast majority of criminal matters start and end. If the recommendations are applied to the Magistrates' Court's jurisdiction, further consideration of the resourcing, cost and time implications would be required.

## The victim's role

### The adversarial criminal trial

- 10 The adversarial criminal trial is an essential feature of Australia's common law legal system. It is a contest between the prosecution, acting as the state's representative, and the accused, who is usually represented by a defence lawyer. The victim is not a party to the proceeding.
- 11 The prosecution and defence decide how their respective cases will be conducted and define the issues for the jury to consider. The case is presented primarily by witnesses giving oral evidence in court. The judge ensures that the rules of evidence and procedure are followed and instructs the jury about the law to be applied. The jury then decides whether the prosecution has proved beyond reasonable doubt that the accused committed the crimes charged.
- 12 Principles and rules to ensure fairness for the accused against the power and resources of the state are entrenched in Victoria's criminal trial processes. The prosecution must act impartially and in the public interest. The accused, who faces serious consequences upon conviction, has a number of rights, including the right to be presumed innocent until proven guilty, to be subject to a fair and impartial prosecution, and to test the evidence against them.

### An evolving role for victims

- 13 The fact that the victim is not a party traditionally meant that the victim had no formal role in the criminal trial process, unless as a witness for the prosecution.
- 14 Over the past three decades, law and policy reforms in Victoria and other common law jurisdictions have progressively created opportunities for victims to engage with the criminal trial process in a variety of capacities. Victims are now entitled to be supported during the criminal trial process and to be kept informed about its progress; they are empowered to present a victim impact statement to the court at sentencing; and they may apply for compensation or restitution to be paid directly by the offender. For those who appear as witnesses, procedures have been introduced for victims of sexual offences and family violence to reduce the trauma of giving evidence. In a profound and significant sense, there is now a place for victims.
- 15 While victims' experience of the criminal justice system, and their confidence in it, appear to have improved, there is a significant disparity between the victim's role as conveyed in legislation and the victim's experience in practice. The Commission heard that many victims are marginalised and offended by the attitude conveyed by prosecution and defence lawyers, and by their treatment in the courtroom generally, including by some judicial officers. There are also lapses in the continuity and consistency of information and services provided to victims across Victoria.

- 16 The promise of reforms will not be fully realised without cultural change within the criminal justice system. Changes have been made to the victim's role as a result of the cumulative effect of these reforms but the reforms have not been driven by a vision of what the role should be. The ambiguity this has created has fostered inconsistencies in how victims are perceived, how they see themselves, their expectations and how they are treated. This has, in part, undermined a coherent approach to victim-oriented reform and has meant that changes in the practices and attitudes of those who work within the criminal justice system have not met the ambitions of the reforms.
- 17 There is a need to clearly state what the victim's role has become and to embed it in the language and perceptions of criminal justice agencies. A better understanding of the victim's role in our adversarial criminal trial process will assist with driving cultural change, clarifying expectations and entitlements, and guiding future reforms.

### **The victim's inherent interest**

- 18 The role has evolved in a way that recognises the inherent interest that a victim of crime has in how the criminal justice system responds to that crime. This interest arises from the crime and its impact on the victim's life. It is not confined to, nor defined by, the criminal trial process.
- 19 Crime is invasive in nature, and even minor criminal acts can have psychological, physical, financial and other consequences for victims. In all cases, victims are harmed or directly affected.
- 20 By reporting to police, many victims set in train action that leads to a person being prosecuted. In reporting crime and acting as a witness for the prosecution, victims play an integral role in the effective functioning of Victoria's criminal justice system.
- 21 The experience of crime differs from one victim to the next, as do their needs and expectations of the criminal justice system. They have various reasons for engaging in the criminal trial process: to seek justice, healing, offender accountability, public acknowledgment, and to protect themselves and others from future victimisation. Victims may seek emotional or financial restoration. Sometimes they just want the offender to be punished.

### **A triangulation of interests**

- 22 Fair trials are in the public interest, as well as the accused's interest. While it remains crucial that laws and procedures ensure the accused receives a fair trial, fairness to the accused does not preclude recognition of the victim's interest.
- 23 Fairness is a dynamic concept, changing over time alongside changes in community values and expectations. Increasingly, it is recognised that the public interest can be served not only by safeguarding the rights of the accused and the independence of the prosecution but also by taking into account the victim's interest. Procedures and rights that regulate the contest between the prosecution and defence have been supplemented by reforms that allow for the victim's interest to be taken into account, although only to the extent that fairness permits in an adversarial system.
- 24 There may be measures sought by some victims to protect their interests that compromise the independence of the prosecution or a fair trial. Similarly, accused persons may seek protections that go beyond what is required to ensure a fair trial. The legitimate rights of victims, properly understood, do not undermine the legitimate rights of the accused or of the community, properly understood. The true interrelationship of the three—victim, accused and community—is mutual and complementary, not exclusory.



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## Victims as participants

- 25 The Commission has characterised the role of the victim as that of a participant, but not a party, with an inherent interest in the criminal trial process. The victim's interest arises from the person's victimhood, and is given effect through rights and entitlements. Understanding the role of victims in this way reflects the reality of victims' inherent interest in the criminal trial process and the various capacities in which they may be involved. It also accords with comments that victims made in response to the consultation paper.
- 26 The recommendations made in this report flow from the Commission's conceptualisation of the victim's role and are consistent with modern standards of fairness in criminal trials.
- 27 The role of the victim does not require prescriptive definition. The role will differ based on the circumstances of the individual and the prosecution. It will also evolve with changes in the administration of justice. The Commission's report looks at specific aspects of the role in terms of five overarching rights and entitlements arising from the victim's inherent interest:
- to be treated with respect and dignity
  - to be provided with information and support
  - to be able to participate in processes and decision making, without carrying the burden of prosecutorial decision making
  - to be protected from trauma, intimidation and unjustified interference with privacy during the criminal trial process
  - to be able to seek reparation.
- 28 These rights and entitlements are consistent with how individuals and organisations consulted by the Commission said they expect victims to be treated by those working in the criminal justice system. They align with the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the foundational international instrument on victims' entitlements. They are reflected in victim-oriented laws, including the *Victims' Charter Act 2006* (Vic), the *Sentencing Act 1991* (Vic), the *Criminal Procedure Act 2009* (Vic) and the *Evidence Act 2008* (Vic).

## Conveying the role in statute

- 29 The Victims' Charter Act governs the response of investigatory, prosecuting and victims' services agencies to victims of crime in Victoria. Accordingly, it is appropriate that this Act explicitly recognises the inherent interest of victims. The Commission recommends that the recognition of the victim's inherent interest, as reflected in their role as a participant with corresponding entitlements, be included in the objects of the Act.
- 30 The transformation of the criminal trial process into one in which the victim has a role as a participant should also be reflected in Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter). The Human Rights Charter applies to all criminal proceedings in Victoria. Expressly recognising the interests of victims in the Human Rights Charter makes it clear that these interests must be protected and promoted in the criminal trial process. It ensures that legislation is drafted and interpreted in a manner consistent with victims' interests, and that all public authorities, including the courts, act in a manner that is consistent with them. It would also bolster existing obligations on investigatory, prosecuting and victims' services agencies contained in the Victims' Charter Act.

## Consolidating the role in practice

- 31 Re-conceptualising the role of the victim as a participant in the criminal trial process and clearly stating it in legislation would complement recent law and policy reforms and provide a robust foundation for the role in practice.
- 32 Cultural change is ongoing, and past reforms have already been transformational, but progress has been at times slow and limited. The Commission proposes three broad strategies to strengthen the existing foundation of law and practice and support the implementation of recommendations made throughout this report:
1. Build understanding and acceptance of victims' perspectives, needs and challenges, as well as their rights and entitlements, through further education and training programs for lawyers and judicial officers.
  2. Improve compliance with victim-oriented law and policy by strengthening complaint processes and accountability mechanisms and giving the Victims of Crime Commissioner responsibility for monitoring and reporting on the implementation of the Victims' Charter principles.
  3. Create a coherent legislative and policy framework by amending the Victims' Charter Act to more accurately reflect victims' entitlements and criminal justice agencies' obligations.

## Respect for the dignity of victims

- 33 Treating victims with respect for their dignity is a multifaceted concept. At its core, it is about the personal interactions that victims have with the criminal justice system. Victims seek honesty and respect from these interactions. Ultimately, victims navigating the criminal justice system should consistently experience respectful encounters with those in authority.
- 34 Treating victims with respect is closely connected to the victim's role as a participant and is about meeting victims' other expectations. Victims feel respected when they are provided with information and support, have the option of participating in decision making, are protected from unnecessary trauma, intimidation and unjustified interference with their privacy, and are given a means to claim compensation or restitution from the offender.
- 35 Respectful treatment also requires criminal justice system authorities to respond to the diverse needs of all victims. The Victims' Charter Act expressly recognises that victims' needs may vary according to their race, gender or sexual orientation, cultural or linguistic background, disability, religious views, age or Indigenous background. However, the particular needs of victims living in rural and regional Victoria, who experience a number of barriers to accessing justice, are not explicitly recognised.
- 36 The Commission recommends amending the Victims' Charter Act to ensure that the multifaceted nature of treating all victims with respect is properly reflected in the principles set out in the Act.

## Respect in the courtroom

- 37 Attending court is the focal point of most victims' experience of the criminal trial process. In discussions with the Commission, victims consistently linked the way they were treated during court proceedings by judicial officers, the prosecutor and the defence lawyer to their assessment of whether they were treated with respect.

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- 38 Respectful treatment by judicial officers and lawyers shows victims that they are valued as participants in the criminal trial process. The Commission's recommendations are designed to ensure that judicial officers and lawyers are provided with practical guidance about responding to the particular needs and interests of victims in the courtroom environment.
- 39 Victims who gave evidence as a witness linked the nature and manner in which cross-examination was conducted to whether they were treated respectfully. Cross-examination was often perceived by victims as aggressive, insensitive, offensive, patronising, confusing, misleading and ultimately disrespectful. In Victoria, the law prohibits improper questions being asked of certain vulnerable victims. There are no circumstances in which an improper question is appropriate and should be allowed. The Commission's recommendation requires judicial officers to intervene when any victim is asked an improper question.

## Information and support

- 40 Victims' experiences of the criminal trial process depend in large part on how well they are prepared and supported. This is influenced by when, how and by whom information is communicated to victims and the type of support they receive. Victims need information that is specific to the various stages of the criminal trial process and responsive to their communication needs and capabilities.
- 41 Victims receive information and support from a range of sources. The Victims Support Agency of the Victorian Department of Justice and Regulation has an overarching function to provide support services to victims, primarily through funding and coordinating the Victims Assistance Program, which is delivered by six community organisations. Support for victims in preparing for and attending criminal proceedings, is also provided by the Child Witness Service of the Department of Justice and Regulation, the Witness Assistance Service of the Office of Public Prosecutions, Centres Against Sexual Assault, and Court Network Inc.
- 42 Most obligations to provide information and support in connection with the criminal trial process itself fall on the public prosecutions service, particularly the solicitor in charge of a prosecution. While they are comprehensively detailed in policies issued by the Director of Public Prosecutions, those in the Victims' Charter Act are typically expressed in more general terms. The Commission has made recommendations throughout this report that expand the information obligations in the Victims' Charter Act, and in some cases reflect obligations that already exist in policy. The Victims' Charter Act is the most visible statutory reference point for victims in terms of their rights and entitlements during the criminal trial process, and it is the instrument against which compliance with obligations can be monitored.
- 43 The time, resources, attitude and communication skills of prosecution lawyers are vital to ensuring that victims are properly informed. Increasingly, prosecution lawyers are taking seriously their obligations to inform, support and consult with victims. The Commission's recommendations aim to ensure that conferencing with victims before and after key court dates becomes integral to the prosecution process, including for victims living in regional locations.
- 44 Victims have substantive legal entitlements connected with the criminal trial process and should have access to legal advice and assistance in exercising them. They include entitlements to:
- appear in court in response to applications to subpoena, access and use confidential counselling and medical records
  - object to giving evidence where the accused person is their spouse, de facto partner, parent or child and they believe giving evidence will cause them harm

- object to giving evidence if it may prove that they committed an offence or are liable to a civil penalty.
  - provide a victim impact statement and read it out in court
  - apply for a compensation or restitution order against the offender as an ancillary order to sentencing.
- 45 The prosecution is unable to assist victims in asserting substantive entitlements if doing so conflicts with its duty to act impartially and independently. There is no designated legal service for victims to access. The Commission therefore recommends that a legal service for victims of violent indictable crimes be established to advise and, where appropriate, represent victims about substantive entitlements connected to the criminal trial process.
- 46 The Victims' Charter Act requires investigatory, prosecuting and victims' services agencies to be responsive to the diverse needs of victims, including those marginalised by the criminal justice system. Shortcomings in the referral and coordination of services can disproportionately affect Aboriginal people, culturally and linguistically diverse communities, people with disabilities, regional communities and victims of non-violent and property crimes. These are important matters that go beyond the Commission's terms of reference. They should be monitored by the Victims of Crime Commissioner and included in a comprehensive review of the Victims' Charter Act in five years.

## Participation

- 47 Many victims seek opportunities to participate in the criminal trial process. Participation is often equated with giving victims a voice in proceedings—the opportunity to tell their story and to feel that they have been heard. Participation can mean interacting with criminal justice agencies that are required to seek and consider the views or preferences of victims. Where the interaction is meaningful, it can provide victims with a sense of empowerment and convey official acknowledgment of their interest.
- 48 The Commission does not make recommendations that would see victims have power over prosecutorial decisions or give them a role similar to the prosecution. Such proposals would fundamentally alter Victoria's criminal justice system. Moreover, many victims do not seek the responsibilities that come with prosecutorial decision making.

## Consultation

- 49 Consultation with the prosecution is an important form of participation. Victims want prosecution lawyers to seek out their views and consider them when making decisions that will significantly affect their interests. The Commission's recommendations expand and clarify the circumstances in which prosecuting agencies are obliged to consult with victims, and call for those obligations to be incorporated into the Victims' Charter Act.

## Participation in court

- 50 The adversarial criminal trial process has been reformed to accommodate some limited participation by victims in court proceedings. Notably, victims of sexual offences may seek leave to appear in court when the accused applies to subpoena, access or use their confidential counselling and medical records, and all victims have the right to submit and read out a victim impact statement in sentencing hearings. The Commission's recommendations aim to ensure that these existing entitlements provide an effective and meaningful form of participation for victims in practice, without undermining the accused's rights.

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- 51 The Commission considered whether existing opportunities for victims to participate in court should be expanded. Greater direct participation by victims in court proceedings risks undermining the accused's right to a fair trial and the conduct of an independent and impartial prosecution. It is also likely to create delay, and add costs and complexity to the trial process.
- 52 The Commission considers that the expectation of some victims that they be able to participate in court can be achieved in ways that are more compatible with the adversarial trial process. The Commission does not consider it necessary or appropriate that the victim have a statutory right to appear throughout a trial. It recognises, though, that there may be exceptional circumstances in which intervention is necessary to assert a particular interest or human right or to protect a vulnerable victim. This would not mean that the victim becomes a party to the criminal proceedings.

### **Equal participation**

- 53 Some victims face particular barriers to equal participation, including as witnesses. Cross-examination can be particularly challenging for children and individuals who have a disability that affects their capacity to communicate or comprehend. Victims with disabilities face multifaceted barriers in the criminal trial process: their disability may not be identified, they may not be perceived as credible or competent, and there may be inadequate or no adjustments made to accommodate their disability.
- 54 The Commission recommends that an intermediary scheme be established for child victims and for victims who have a disability which is likely to diminish the quality of their evidence, modelled on an existing scheme in England and Wales.

### **Restorative justice**

- 55 Restorative justice conferencing offers a more supportive and flexible forum for active participation. For indictable offences, the Commission considers that restorative justice conferencing should only operate as a supplementary process. It should not replace the criminal trial process where there is a viable prosecution.
- 56 Studies have reported high levels of satisfaction among victims who elect to participate in restorative justice conferencing, including victims of serious crimes. However, restorative justice is not a process in which every victim or offender would want to participate and it is not appropriate in all cases.
- 57 The Commission recommends a phased introduction of restorative justice conferencing for indictable offences in Victoria. The critical elements of a successful restorative justice process include:
- voluntary and informed consent by victims and offenders
  - full acceptance by offenders of responsibility for the crimes charged
  - rigorous processes to assess the suitability of restorative justice based on the individuals involved and the circumstances of each case
  - skilled and impartial facilitators
  - safeguards to protect the interests and integrity of victims and offenders.

## Protection

- 58 Victims find that giving evidence in court, and cross-examination in particular, can be traumatic and intimidating. To address this, reforms have been introduced to reduce the number of times certain victims are required to give evidence, as well as to protect victims' safety in and around courthouses. Many of these reforms have been directed towards victims who are considered the most vulnerable, such as children and individuals with a cognitive impairment in sexual offence cases.
- 59 Many contributors to the Commission's reference proposed that protective measures be expanded to other victims who are likely to be traumatised by the criminal trial process. The Commission's recommendations aim to ensure a consistent approach to protecting victims when they give evidence.
- 60 It can be particularly traumatic for victims of sexual offences when sensitive information is made public during a criminal trial. The Commission considers that restrictions on access to the personal records of sexual assault victims should be expanded.
- 61 Accused persons have a right to cross-examine witnesses, test the case against them and access relevant material in order to make a full and proper defence. These are significant elements of a fair trial and should be protected. However, these rights do not mean that victims should not also be treated fairly and with appropriate respect for their dignity, humanity and human rights.

## Financial reparation

- 62 Victims have an interest in how harm can be repaired as part of the criminal justice system's response to offending. Harm may be repaired in a variety of ways, such as through the payment of compensation, the performance of work or an apology. The Commission's terms of reference focus its review on financial reparations and the victim's role in the making of restitution and compensation orders against offenders for the benefit of individual victims. These orders can be made as ancillary non-punitive orders through the *Sentencing Act 1991* (Vic). Victims rarely use these provisions and, when they do, the process is difficult to navigate without a lawyer. The Commission's recommendations aim to make the process more accessible and to ensure victims are aware of, and can seek legal advice about, their entitlements.
- 63 Victims who obtain restitution or compensation orders often struggle to enforce them. As the orders do not form part of an offender's punishment, they cannot be enforced by the state like a court-ordered fine. Victims must instead commence separate legal proceedings to enforce the order as a judgment debt.
- 64 Allowing restitution and compensation orders to be enforced by the state gives rise to questions beyond the scope of the Commission's review, such as whether the orders should become a sentencing option. The Commission recommends that these questions are best considered through a separate review by the Sentencing Advisory Council.
- 65 For some victims, state-funded financial assistance through the Victims of Crime Assistance Tribunal (VOCAT) will be the only means of obtaining a degree of financial reparation. While the Commission's terms of reference did not allow for a thorough review, recommendations are made to limit access to and use of VOCAT records for the purposes of criminal proceedings.

# Recommendations

[In these recommendations, ‘victim’ includes a person alleged by the prosecution to be a victim prior to a determination of guilt as well as a victim of an offence for which an offender has been found guilty.]

## Chapter 3. The victim as a participant in the criminal trial process

### Articulating the role in statute

- 1 The objects of the *Victims’ Charter Act 2006* (Vic) should be amended to include recognition that a victim of crime has an inherent interest in the response by the criminal justice system to that crime, which gives rise to the rights and entitlements that are conveyed in the Act and shape the victim’s role as a participant in the criminal trial process.
- 2 Part 2 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) should be amended to include a right for a victim of a criminal offence that contains the following minimum guarantees:
  - (a) to be acknowledged as a participant (but not a party) with an interest in the proceedings
  - (b) to be treated with respect at all times
  - (c) to be protected from unnecessary trauma, intimidation and distress when giving evidence.

## Chapter 4. Consolidating the role in practice

### Education and training

- 3 The Victorian Legal Admissions Board, through its membership of the Law Admissions Consultative Committee, should advocate for the education and training requirements for admission to the legal profession to include the study of law and procedures relevant to victims, and the causes and effects of victimisation.
- 4 The Legal Services Board should take a lead role in encouraging barristers practising in criminal law to receive victim-related professional development training including, if necessary, exercising its power under the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* to specify that they must complete such training within their first three years of practice.
- 5 Victoria Legal Aid and the Office of Public Prosecutions should encourage the Law Institute of Victoria and the Victorian Bar to require candidates for accreditation as specialists in criminal law or indictable crime to be competent in victim-related laws and the role of the victim as a participant in the criminal trial process.



- 6 Victoria Legal Aid and the Office of Public Prosecutions should lead, in consultation with stakeholders, the development and delivery of a training program to foster cultural change in how victims are perceived and treated during the criminal trial process, based on the Sexual Offences Interactive Legal Education Project.

### **Compliance with the Victims' Charter principles**

- 7 The *Victims' Charter Act 2006* (Vic) should:
  - (a) provide victims of crime with a right to make a complaint to the relevant investigatory, prosecuting or victims' services agency about a breach of a Victims' Charter principle and
  - (b) impose an obligation on investigatory, prosecuting and victims' services agencies to provide accessible and transparent complaint-handling systems and offer fair and reasonable remedies.
- 8 The Victims of Crime Commissioner should be empowered to review the outcome of complaints regarding compliance by investigatory, prosecuting and victims' services agencies with the *Victims' Charter Act 2006* (Vic) principles, on application by the complainant, if the complainant is not satisfied with the agency's response to the complaint.
- 9 Section 9 of the *Victims' Charter Act 2006* (Vic) should be amended to require the Director of Public Prosecutions to give victims written reasons for the decisions listed at paragraph (c) of that section, unless the victim has expressed a wish not to be so informed.
- 10 The *Victims' Charter Act 2006* (Vic) should be amended to:
  - (a) establish a right for victims to seek internal review of a decision by the Director of Public Prosecutions to discontinue a prosecution or to proceed with a guilty plea to lesser charges
  - (b) require the Director of Public Prosecutions, when informing the victim of these decisions, and the reasons for these decisions, to notify the victim of their right to seek internal review and the procedure for doing so.
- 11 Section 27(1) of the *Victims of Crime Commissioner Act 2015* (Vic) should be amended to empower the Victims of Crime Commissioner to refer a matter to the Victorian Legal Services Commissioner.

### **System-wide monitoring and review**

- 12 The Victims of Crime Commissioner should be required to report annually to Parliament on the implementation of the *Victims' Charter Act 2006* (Vic) by all investigatory, prosecuting and victims' services agencies, including information about the number of complaints made and processed about compliance with the Victims' Charter principles.
- 13 The Victims of Crime Commissioner should establish arrangements with the Supreme Court, County Court, Magistrates' Court, Office of Public Prosecutions, Victoria Police and Department of Justice and Regulation to collect data about implementation of the *Victims' Charter Act 2006* (Vic) to enable the preparation of annual reports to Parliament.

### **A coherent legislative and policy framework**

- 14 The Victims of Crime Commissioner should lead a comprehensive review of the *Victims' Charter Act 2006* (Vic) not later than five years after the commencement of reforms recommended in this report.



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## Chapter 5. Respect

### The Victims' Charter principle

- 15 Section 6(2) of the *Victims' Charter Act 2006* (Vic) should be amended to require investigatory, prosecuting and victims' services agencies to treat victims with courtesy and to respect their dignity and their rights and entitlements as participants in the criminal trial process.
- 16 Section 6(2) of the *Victims' Charter Act 2006* (Vic) should be amended to include 'living in a regional or rural location' as a need that investigatory, prosecuting and victims' services agencies must take into account and be responsive to.

### Respect in the courtroom

- 17 The Judicial College of Victoria, in consultation with the heads of jurisdictions, should include in its practical guides for judicial officers information and guidance about responding to the needs and interests of victims in the courtroom, including preferred practices in acknowledging victims in the courtroom and referring to deceased victims by name rather than as 'the deceased'.
- 18 Section 41 of the *Evidence Act 2008* (Vic) should be amended to require a judicial officer to disallow improper questioning in relation to all victims, in accordance with the Uniform Evidence Act provisions adopted by New South Wales, Tasmania and the Australian Capital Territory insofar as they relate to victims.
- 19 Subsection (2) of section 336A of the *Criminal Procedure Act 2009* (Vic) should be repealed.

## Chapter 6. Information and support

### Relationship between victims and the prosecution

- 20 The *Victims' Charter Act 2006* (Vic) should be amended to require prosecuting agencies to:
  - (a) ensure that victims know the date, time and location of a contested committal, trial, plea hearing, sentencing hearing, and appeal hearing
  - (b) advise victims about the progress of the prosecution and the outcome of committal proceedings, a trial, plea hearing, sentencing hearing and appeal hearing
  - (c) inform victims that they have a right to make a victim impact statement at sentencing.
- 21 The *Victims' Charter Act 2006* (Vic) should be amended to require prosecuting agencies to offer conferences before and after important court dates, including committal hearings, trials and retrials, sentencing hearings in the Supreme Court and County Court and appeals to the Court of Appeal, to the following:
  - (a) family members of deceased victims
  - (b) victims of sexual offences
  - (c) all victims of offences involving conduct that falls within the definition of family violence in the *Family Violence Protection Act 2008* (Vic)
  - (d) child victims
  - (e) victims with disabilities
  - (f) Aboriginal and Torres Strait Islander victims
  - (g) victims whose first language is not English
  - (h) on request to other victims of crime.

- 22 The Director of Public Prosecutions should cause a review to be undertaken of the delivery of prosecution and witness assistance services across regional Victoria with the objective of:
- (a) improving the Office of Public Prosecutions' presence and delivery of services in regional Victoria
  - (b) ensuring that Office of Public Prosecutions solicitors are able to consistently meet obligations owed to victims under the *Victims' Charter Act 2006* (Vic) and the Director of Public Prosecutions' policies.

### **Legal advice and assistance for victims**

- 23 Victoria Legal Aid should be funded to establish a service for victims of violent indictable crimes, modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW. It should provide legal advice and assistance, in accordance with the *Legal Aid Act 1978* (Vic), in relation to:
- (a) substantive legal entitlements connected with the criminal trial process
  - (b) asserting a human right, or protecting vulnerable individuals, in exceptional circumstances.

The legal service should be independently evaluated not more than three years after commencement.

## **Chapter 7. Participation**

### **Consultation throughout the criminal trial process**

- 24 The *Victims' Charter Act 2006* (Vic) should be amended to require prosecuting agencies to consult with victims before the prosecution makes a decision to:
- (a) not proceed with some or all charges
  - (b) accept a plea of guilty to a lesser charge
  - (c) apply for, agree to or oppose an application for summary jurisdiction
  - (d) agree to or oppose an application to cross-examine the victim at committal
  - (e) pursue an appeal against a sentence or acquittal.

The Act should provide that the victim's views are not determinative and that consultation must occur except where the victim cannot be located after reasonable attempts or does not wish to be consulted.

### **Participation and substantive rights in court**

- 25 Division 2A of Part 2 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should be amended by:
- (a) requiring the prosecution to notify the victim of their right to appear and the availability of legal assistance in relation to an application to subpoena, access and use their confidential communications (see recommendation 23)
  - (b) requiring the court to be satisfied that the victim is aware of the application and has had an opportunity to obtain legal advice
  - (c) prohibiting the court from waiving the notice requirements except where the victim cannot be located after reasonable attempts or the victim has provided informed consent to the waiver

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- (d) providing victims with standing to appear
  - (e) permitting victims to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted.
- 26 Section 8L of the *Sentencing Act 1991* (Vic) should be amended to provide the following guidance to courts when determining the admissibility of material contained in victim impact statements:
- (a) the purpose of a victim impact statement is to allow the victim to tell the court about the crime's impact on them and the probative value of the evidence and any potential unfairness must be assessed in light of this purpose.
  - (b) a victim impact statement will not be inadmissible because it contains subjective or emotive material.
- 27 The *Victims' Charter Act 2006* (Vic) should be amended to require the prosecution to inform the victim about any material in a victim impact statement that the court may rule inadmissible, before the statement is given to the court and the offender or their lawyer. The Act should provide that the prosecution is not responsible for the contents of a victim impact statement.
- 28 Section 8N of the *Sentencing Act 1991* (Vic) should be amended to require the prosecutor to file with the court and serve on the offender, or their lawyer, a copy of any victim impact statement.
- 29 The *Sentencing Act 1991* (Vic) should be amended to provide that only victim impact statements that have been declared in accordance with Division 4 of Part IV of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) are admissible in criminal proceedings to which the victim impact statement relates.

### **Equal participation in the court process**

- 30 The Department of Justice and Regulation, in consultation with the Office of the Public Advocate, should establish a scheme for the appointment of professional intermediaries, modelled on the Witness Intermediary Scheme in England and Wales. The intermediaries would assist in obtaining evidence from child victims and victims who have a disability, as defined by the *Equal Opportunity Act 2010* (Vic), that is likely to diminish the quality of their evidence.
- 31 The intermediary scheme should be underpinned by legislation that:
- (a) requires that an intermediary will be appointed for a child victim under 16 years of age, unless the child requests that an intermediary not be appointed and is assessed as not needing one
  - (b) empowers the court to appoint an intermediary, either upon application or by the court's own initiative, for a child victim 16 years or over
  - (c) empowers the court to appoint an intermediary, either upon application or by the court's own initiative, for a victim with a disability, as defined by the *Equal Opportunity Act 2010* (Vic), that is likely to diminish the quality of their evidence.

## Participation in restorative processes

- 32 The Victorian Government should establish a statutory scheme for restorative justice conferencing for indictable offences in Victoria that is supplementary to the criminal trial process and available in the following contexts:
- (a) where a decision is made by the Director of Public Prosecutions to discontinue a prosecution
  - (b) after a guilty plea and before sentencing
  - (c) after a guilty plea and in connection with an application for restitution or compensation orders by a victim.
- 33 The restorative justice conferencing scheme for indictable offences in Victoria should be based on:
- (a) voluntary and informed victim consent and participation
  - (b) voluntary and informed offender consent and participation
  - (c) full acceptance by the offender of responsibility for the crimes charged
  - (d) rigorous processes to assess the suitability of restorative justice based on the individuals involved and the circumstances of each case.
- 34 The restorative justice conferencing scheme should apply initially to offences that do not involve sexual violence and family violence and be extended to sexual violence and family violence offences at a later stage.
- 35 The *Victims' Charter Act 2006* (Vic) should require prosecuting agencies to inform victims about their entitlement to request restorative justice conferencing and refer them to legal advice.
- 36 The Department of Justice and Regulation should be responsible for implementing the restorative justice conferencing scheme.

## Chapter 8. Protection

### Victims as witnesses: reducing trauma and intimidation

- 37 The *Criminal Procedure Act 2009* (Vic) should be amended to include a definition of protected victim. A protected victim should be defined as a victim who is likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or give evidence fairly.
- Factors relevant to determining whether a victim is a protected victim should include:
- (a) the nature of the offending perpetrated against the victim
  - (b) the victim's relationship with the accused
  - (c) the subject matter of the evidence the victim is expected to give
  - (d) the victim's views
  - (e) and any other factor the court considers relevant.
- 38 Eligibility for protective procedures under section 123 and Divisions 5 and 6 of Part 8.2 of the *Criminal Procedure Act 2009* (Vic) should be extended to also apply to protected victims. All child victims other than child victims of sexual offences should be considered protected victims unless the court is satisfied that the child victim is aware that the protective procedures are available and does not wish to use them.

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- 39 Section 124 of the *Criminal Procedure Act 2009* (Vic) should be amended to provide that the Magistrates' Court must not grant leave to cross-examine a victim at a committal hearing except on a matter that relates directly and substantially to the decision to commit for trial. The test for granting leave should include reference to whether the victim is able to and wishes to be cross-examined at a committal hearing.
- 40 The *Criminal Procedure Act 2009* (Vic) should be amended so that the court must order the use of alternative arrangements set out in section 360 of the Act for:
- (a) child victims and victims with a cognitive impairment
  - (b) victims determined to be protected victims in accordance with recommendation 37, unless the court is satisfied that the victim is aware of their right to use those arrangements and is able and wishes to give evidence without them.
- 41 The *Criminal Procedure Act 2009* (Vic) should be amended to include a guiding principle that, in interpreting and applying Part 8.2, courts are to have regard to the fact that measures should be taken that limit, to the fullest practical extent, the trauma, intimidation and distress suffered by victims when giving evidence.
- 42 The *Victims' Charter Act 2006* (Vic) should be amended to require prosecuting agencies to inform victims about special protections and alternative arrangements for giving evidence and to state the victim's preferences about the use of such procedures to the court.
- 43 Court Services Victoria, in consultation with investigatory, prosecuting and victims' services agencies, should implement measures to protect victims attending court proceedings on indictable criminal matters, including by:
- (a) ensuring that victims can enter and leave courthouses safely, including, where possible, allowing them to use a separate entrance and exit
  - (b) making available separate rooms for victims to wait in at court and ensuring victims know where they are
  - (c) establishing remote witness facilities that are off-site or accessed via a separate entry to that used by other court users
  - (d) using more appropriate means to screen victims from the accused when giving evidence in the courtroom.

### **Victims privacy: protection from unjustified interference**

- 44 Division 2A of Part 2 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should apply to the victim's health information as defined by the *Health Records Act 2001* (Vic).

## **Chapter 9. Financial reparation**

### **Restitution and compensation orders against offenders**

- 45 Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic) should be consolidated to provide a consistent set of procedures for restitution and compensation orders in the Supreme Court and County Court, and include the following elements:
- (a) The court may make restitution and compensation orders on its own motion.
  - (b) The court must make inquiries as to whether an application for restitution or compensation orders will be made.
  - (c) A simple form prescribed in the *Sentencing Regulations 2011* (Vic) to assist victims and their representatives in making an application for restitution or compensation orders.

- 46 Sections 85H and 86(2) of the *Sentencing Act 1991* (Vic) should be repealed to the extent that they apply to applications made by individuals in the Supreme Court and County Court under Division 2 of Part 4 of that Act.
- 47 The *Victims' Charter Act 2006* (Vic) should be amended to require investigatory and prosecuting agencies to inform victims of their possible entitlements under Part 4 of the *Sentencing Act 1991* (Vic) and refer them to available legal assistance.
- 48 The *Criminal Procedure Act 2009* (Vic) should be amended to enable victims to seek leave to appeal, independently of the Director of Public Prosecutions:
  - (a) a refusal by the Supreme Court or County Court to make an order pursuant to Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic)
  - (b) orders made by the Supreme Court or County Court pursuant to Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic).
- 49 The Attorney-General should ask the Sentencing Advisory Council to review whether orders made under Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic) should become a sentencing option. The review should consider:
  - (a) whether the purposes of sentencing should include the financial reparation of victims
  - (b) whether there should be a presumption in favour of courts making such orders
  - (c) whether such orders should be enforced by the state in the manner of a fine.

### **State-funded financial assistance**

- 50 Applications, supporting documentation and documents provided to or prepared for, or on behalf of, the Victims of Crime Assistance Tribunal at any time in connection with an application for financial assistance under the *Victims of Crime Assistance Act 1996* (Vic) should be inadmissible as evidence in any criminal legal proceedings except:
  - (a) in criminal proceedings in which the applicant is the accused
  - (b) in or arising out of proceedings before the Victims of Crime Assistance Tribunal
  - (c) with the applicant's consent.
- 51 A person should not be required by subpoena or any other procedure to produce any application or document that would be inadmissible following the implementation of recommendation 50.

# Introduction

- 2** Terms of reference
- 2** Scope of the reference
- 4** The incidence and impact of crime
- 7** The Commission's process
- 9** Concurrent developments
- 9** Structure of this report

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# 1 Introduction

## Terms of reference

- 1.1 On 27 October 2014, the then Attorney-General for Victoria, the Honourable Robert Clark MP, asked the Victorian Law Reform Commission under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) to review and report by 1 September 2016 on the role of victims of crime in the criminal trial process.
- 1.2 The terms of reference are set out on page viii.

## Scope of the reference

### ‘Victim’

- 1.3 The word ‘victim’ is used in Victorian laws dealing with prosecution, punishment and financial reparation and is defined in different ways in different contexts. In this report, it generally refers to a person who has directly suffered harm at the action of the offender, and includes a parent of a child victim or a family member of a homicide victim. It includes persons alleged by the prosecution to be victims prior to a determination of guilt.
- 1.4 The term ‘victim’ is used in the terms of reference to denote a person who has suffered injury or trauma unlawfully inflicted. The term does not assume that the accused charged with doing so is guilty of the crime charged or has been convicted. So much is recognised in section 336A of the *Criminal Procedure Act 2009* (Vic) which states:
  - 336 A Victim who is a witness entitled to be present in court
  - (1) In a criminal proceeding where a victim of the offence is a witness in the proceeding, the court may order the victim to leave the courtroom until required to give evidence only if the court considers it appropriate to do so.
  - (2) Nothing in this section prevents the court from ordering a victim who is a witness to leave the courtroom at any time after giving evidence.
- 1.5 In a criminal trial, the accused is presumed innocent of the crime charged. Rightly so. The prosecution bears the burden of proving the guilt of the accused on the crime charged. Rightly so.
- 1.6 In most criminal trials, there is no dispute that the victim is truly a victim—that is, that the victim was killed or suffered injury, trauma or loss, unlawfully inflicted. What is in dispute is whether it was the accused who committed the crime, or did so with the necessary intent or mental element, or was acting in lawful self-defence. In some cases, the issue is whether a criminal offence occurred. In sexual offence cases involving a victim capable in law of giving consent, the issue may be whether the alleged victim is a victim or a voluntary consenting party.



- 1.7 The report uses the term ‘victim’ consistently with the terms of reference and the Criminal Procedure Act. It acknowledges that there are cases where there is an issue whether the person is a victim. However, in the majority of cases there is no issue that the person is a victim, whoever inflicted death, harm or trauma or with what intent.
- 1.8 Not all victims are affected the same way. The Commission recognises that the experience of the criminal trial process by each victim is unique. At the same time, it is aware that certain groups of victims, such as child and young victims, victims of family violence, victims of sexual offences and victims from disadvantaged and marginalised communities may share some concerns. This report refers to specific groups of victims where the context requires it.
- 1.9 The word ‘victim’ can convey different meanings. It can connote strength, fortitude, resilience and dignity, yet its use is commonly avoided on the basis that it can reduce a person to their experience of victimisation and connote weakness rather than the attributes of a survivor. The terms ‘complainant’ or ‘alleged victim’ are sometimes used to refer to victims prior to a determination of guilt. While acknowledging these limitations and concerns, ‘victim’ is used exclusively in this report because it is consistent with the terms of reference and Victorian law.

### The ‘criminal trial process’

- 1.10 The terms of reference encompass:
- the prosecution of indictable offences from the decision to prosecute, through the committal proceedings in the Magistrates’ Court, to the trial and sentencing proceedings in the Supreme or County Court
  - related applications for compensation and restitution orders
  - appeals to the Court of Appeal.

### Proceedings within scope

- 1.11 The ‘criminal trial process’ does not refer to criminal matters that are dealt with entirely by the Magistrates’ Court or the Children’s Court.
- 1.12 The Criminal Procedure Act distinguishes between ‘trials’ and ‘hearings’. Trials occur in the Supreme and County Courts and hearings occur in the Magistrates’ Court. Almost every criminal prosecution starts in the Magistrates’ Court, but only the more serious criminal offences that attract higher maximum penalties proceed to trial before a judge and jury in the Supreme and County Courts.
- 1.13 The County Court’s jurisdiction covers all indictable offences (offences tried by judge and jury) except treason, murder and related offences. The Supreme Court deals with cases of treason, murder, attempted murder and other major criminal matters. The Court of Appeal hears appeals on criminal matters from both the County Court and the Supreme Court.
- 1.14 Victims encounter a criminal trial process that can be protracted and complex, and may take many courses. The Commission’s consultation paper discusses in detail the criminal trial process and the victim’s role at each stage.<sup>1</sup> For a summary of the process, see Appendix A.
- 1.15 The Commission has also been asked to consider ‘the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process’.<sup>2</sup> Part 4 of the *Sentencing Act 1991* (Vic) provides victims with a right to apply for an order for compensation or restitution against the offender

1 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015).  
 2 Terms of reference (g).

as part of the sentencing process but separate to the offender's punishment.

- 1.16 In addition, the *Victims of Crime Assistance Act 1996* (Vic) establishes a government-funded scheme that provides financial assistance to victims of violent crime when adequate compensation cannot be obtained from the offender. This scheme is independent of the trial process and orders are not made against the offender. However, the criminal trial process and applications for financial assistance can affect each other. The Victims of Crime Assistance Act has been addressed in this review only to the extent that it affects the victim's involvement in the criminal trial process.

### Proceedings beyond scope

- 1.17 The terms of reference do not encompass:
- bail hearings
  - appeals from the Magistrates' Court to the County Court
  - sentencing outcomes
  - amounts awarded as compensation, restitution and financial assistance
  - the law of appeals
  - parole hearings.
- 1.18 These processes and outcomes are integral to our justice system and can be an important part of a victim's experience but are outside the scope of the Commission's review.

## The incidence and impact of crime

### Statistical data

- 1.19 During the year to 31 March 2016, 310,827 people in Victoria reported to the police that they had been the victim of one or more crimes.<sup>3</sup> Of these, 58,917 reported a crime against the person, 251,335 reported a property or deception crime, and 575 reported other offences.<sup>4</sup>
- 1.20 Most victims of crime against the person were female, while males were more prevalent among the victims of property and deception offences.<sup>5</sup>
- 1.21 The most prevalent crime against the person was non-sexual assault, of which there were 38,642 reports and almost equal numbers of male and female victims.<sup>6</sup> Of the 6948 reported sexual offences, 79 per cent of the victims (5512) were female. Females also outnumbered males among victims of abduction, stalking, harassment and intimidation offences, while males outnumbered females among victims of robbery.<sup>7</sup>

3 Crime Statistics Agency, *Key Figures: Year to 31 March 2016, Victim Reports*, Table 1 <<http://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/victim-reports>>.

4 Ibid. The Crime Statistics Agency defines crimes against the person as: homicide, assault, sexual offences, abduction, robbery, blackmail, extortion, stalking, harassment, threatening behaviour, and dangerous and negligent acts endangering people. Property and deception crime is defined as: arson, burglary, break and enter, theft, deception and property damage. The 'other offences' category includes: 'drug offences, public order and security offences, bribery offences, justice procedures offences and other offences'.

5 Ibid Table 7. This was also reflected in the statistics for offences against children aged 0 to 14 years (see Table 8).

6 Ibid Table 7. The victim was male in 18,664 cases and female in 19,241 cases.

7 Ibid.

- 1.22 Australian Bureau of Statistics data indicate that male victims of non-sexual assault are less likely to know their assailant than are female assault victims. Of the females physically assaulted in 2014–15, 74 per cent were assaulted by someone they knew, most commonly an intimate partner or family member.<sup>8</sup> Similar statistics exist in relation to face-to-face threatened assault,<sup>9</sup> homicide<sup>10</sup> and sexual offences.<sup>11</sup> This reflects the fact that women are disproportionately victims of family violence offences.<sup>12</sup> The majority of sexual and family violence offenders are male.<sup>13</sup>
- 1.23 Individuals from disadvantaged or marginalised communities may have an increased likelihood of being offended against and be vulnerable to certain types of offending.<sup>14</sup> They can also face greater barriers than others when seeking to access the criminal justice system. Research into the victimisation of particular groups has been limited in Australia. Studies show that the risks of becoming a victim of crime and of encountering barriers to justice are greater among the homeless, Aboriginal or Torres Strait Islander people, people from a culturally or linguistically diverse background, people who have a mental illness and people with disabilities.<sup>15</sup> Children and young people also experience special difficulties in the criminal justice system because of their age and related vulnerability.
- 1.24 Risk of criminal victimisation is usually dependent upon a ‘confluence of several risk factors’.<sup>16</sup> For example, in 2005 the Australian Institute of Criminology published a report analysing key results of the 2004 International Crime Victimisation Survey, which identified people with one or more of the following characteristics as being at higher risk of being a victim of personal crime:
- not married
  - earning a higher income than average
  - residing at a postcode for less than one year
  - unemployed
  - leading an active lifestyle outside home in the evenings.<sup>17</sup>

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8 Australian Bureau of Statistics, *Physical Assault*, 4530.0—*Crime Victimisation, Australia, 2014–15* (17 February 2016), Table 14 <<http://www.abs.gov.au/ausstats/>>.

9 Australian Bureau of Statistics, *Threatened Assault*, 4530.0—*Crime Victimisation, Australia, 2014–15* (17 February 2016), Table 15 <<http://www.abs.gov.au/ausstats/>>.

10 Willow Bryant and Tracy Cussen, ‘Homicide in Australia: 2010–11 to 2011–12: National Homicide Monitoring Program Report’ (AIC Reports: Monitoring Reports 23, Australian Institute of Criminology, 2015) 16.

11 Australian Bureau of Statistics, 4510.0—*Recorded Crime—Victims, Australia, 2014* (22 July 2015) Table 12 <<http://www.abs.gov.au/ausstats/>>.

12 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol I, 57. The Royal Commission into Family Violence commissioned statistical research from the Crime Statistics Agency about the incidence and prevalence of family violence: vol VII, 18–9. See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children 2009–2021* (March 2009) 29.

13 Ibid.

14 Pascoe Pleasance and Hugh McDonald, ‘Crime in Context: Criminal Victimisation, Offending, Multiple Disadvantage and the Experience of Civil Legal Problems’ (Updating Justice No. 33, Law and Justice Foundation of New South Wales, November 2013); Lorana Bartels, ‘Crime Prevention Programs for CALD Communities in Australia’ (Research in Practice, Report No 18, Australian Institute of Criminology, 2011), 3; John McDonald et al, *Mapping Access and Referral Pathways for Marginalised Victims of Violent Crime in Rural and Regional Victoria* (University of Ballarat, 2010).

15 John McDonald et al, *Mapping Access and Referral Pathways for Marginalised Victims of Violent Crime in Rural and Regional Victoria* (University of Ballarat, 2010) 14; Matthew Willis, ‘Non-disclosure of Violence in Australian Indigenous Communities’ (Trends & Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, 2011) 1; Australian Bureau of Statistics, ‘Aboriginal and Torres Strait Islander Peoples’, 1370.0—*Measures of Australia’s Progress, 2010* (15 September 2010) <<http://www.abs.gov.au/ausstats/>>; Lorana Bartels, ‘Crime Prevention Programs for CALD Communities in Australia’ (Research in Practice, Report No 18, Australian Institute of Criminology, June 2011) 3; A McFarlane et al, *The Prevalence of Victimization and Violent Behaviour in the Seriously Mentally Ill* (project funded by the Criminology Research Council, University of Adelaide, 2004) 3; C Wilson et al, ‘Intellectual Disability and Criminal Victimisation’ (AIC Trends and Issues in Crime and Criminal Justice No 60, Australian Institute of Criminology, 1996).

16 Colleen Bryant and Matthew Willis, ‘Risk Factors in Indigenous Violent Victimisation’ (AIC Reports: Technical and Background Paper 30, Australian Institute of Criminology, 2008) 27.

17 Holly Johnson, ‘Crime Victimisation in Australia: Key Results of the 2004 International Crime Victimisation Survey’ (Research and Public Policy Series No 64, Australian Institute of Criminology, 2005) x. Personal crime is defined in the report to include assault, threats, robbery and personal theft.

## The impact of crime on victims

1.25 The impact of crime on victims varies from person to person. Each victim reacts differently according to the nature of the offence and their life experience.<sup>18</sup> However the 'effects of crime are pervasive and deleterious to the victim's emotional health'.<sup>19</sup> The most common effects of crime on victims include:

- shock
- a loss of trust in society
- guilt
- physical injury
- financial loss
- psychological injury
- behavioural change
- responses related to a perceived risk of future victimisation.<sup>20</sup>

1.26 Research indicates that:

- An emotional reaction to being victimised occurs in the majority of victims.<sup>21</sup>
- Longer-term impacts are experienced by victims of severe sexual assaults and, to a lesser extent, physical assaults.<sup>22</sup>
- Serious or violent offences are more likely to cause higher levels of emotional stress and long-lasting psychological, social and physical effects.<sup>23</sup>
- Although the effects of property crimes (particularly non-violent property crimes) are typically not as severe and long-lasting as those of violent personal crimes, victims of property crime do suffer emotional, psychological and physical health effects—sometimes severely so.<sup>24</sup>
- Sexual assault can lead to feelings of guilt, self-blame and unworthiness, which contribute to low reporting of sexual offences to police.<sup>25</sup>
- Victims of physical or threatened violence and/or attempted break-in tend to have poorer social wellbeing outcomes than people who have not experienced those crimes; for example, they may feel less safe at home.<sup>26</sup>

1.27 Research shows that the effects of crime may compound, and be compounded by, the vulnerability of individuals who are already experiencing disadvantage or marginalisation. For example:

- The impact on individuals who arrived in Australia as refugees may be more complex

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18 Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No 19, Australian Institute of Criminology, 1999) x.

19 Diane Green and Naelys Diaz, 'Predictors of Emotional Stress in Crime Victims: Implications for Treatment' (2007) 7(3) *Brief Treatment and Crisis Intervention* 194, 194.

20 Joanne Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims?' (2007) 14 *International Review of Victimology* 175, 178; Diane Green and Naelys Diaz, 'Predictors of Emotional Stress in Crime Victims: Implications for Treatment' (2007) 7(3) *Brief Treatment and Crisis Intervention* 194.

21 Joanne Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims?' (2007) 14 *International Review of Victimology* 175.

22 Ibid 196.

23 Ibid; Diane Green and Naelys Diaz, 'Predictors of Emotional Stress in Crime Victims: Implications for Treatment' (2007) 7(3) *Brief Treatment and Crisis Intervention* 194, 195.

24 Joanne Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims?' (2007) 14 *International Review of Victimology* 175, 186; David Baker, 'Feeling Safe Again: Recovering from Property Crime' (Policy Brief No 66, The Australia Institute, September 2014); Cassandra Cross et al, 'Challenges of Responding to Online Fraud Victimization in Australia' (Trends and Issues in Crime and Criminal Justice No 474, Australian Institute of Criminology, May 2014) 3. Note that there is relatively little research on the experiences and needs of victims of property crime: see Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No 19, Australian Institute of Criminology, 1999) x.

25 Malini Laxminarayan, 'Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type' (2012) 25 *Social Justice Research* 390, 393; Liz Wall, 'The Many Facets of Shame in Intimate Partner Sexual Violence' (ACSSA Research Summary, Australian Centre for the Study of Sexual Assault, January 2012) 2; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) 81.

26 This study did not consider whether the poorer outcomes for victims were already present prior to their experience of victimisation: Australian Bureau of Statistics, *Analysis of Crime Victimization and Social Wellbeing, 4524.0—In Focus: Crime and Justice Statistics, July 2012* (25 July 2012) <<http://www.abs.gov.au/ausstats/>>.

by reason of their earlier traumatic experiences.<sup>27</sup>

- For women, family violence is a leading cause of homelessness, which in turn increases the risk of becoming a victim of crime.<sup>28</sup>
- The impact of, and response to, crime by many Aboriginal people will be affected by a distrust of the state and the ongoing impacts of colonialisation, dispossession and the forced removal of children.<sup>29</sup>
- Perceptions of people with disabilities as unreliable, not credible or incompetent makes it harder to report crime and contributes to their heightened risk of victimisation.<sup>30</sup>

1.28 Statistical data and research reports are vital to planning the response by the criminal justice system to crime because they reveal patterns and trends of behaviour, yet equally they show that people are victimised for different reasons and everyone's experience of victimisation is unique. Throughout this review, the Commission has sought to explore issues across the criminal justice system while recognising that reforms must allow agencies to accommodate the different needs and expectations of individual victims.

## The Commission's process

### Victims of Crime Division

- 1.29 The Chair of the Commission, the Hon. Philip Cummins AM, exercised his powers under section 13(1)(b) of the Victorian Law Reform Commission Act to constitute a Division, which he chaired, to oversee the conduct of the reference.
- 1.30 Liana Buchanan, Helen Fatouros, Bruce Gardner PSM and the Hon. Frank Vincent AO QC joined the Chair on the Division during the research and consultation stages. Membership was later extended to the remaining Commissioners (listed on the inside front cover) to guide the preparation of this report.

### Reference framework: theory and practice

- 1.31 The terms of reference raise the fundamental question of what the role of the victim in the criminal trial process should be. This is both a theoretical and practical question that calls for an understanding of how and why the criminal justice system has evolved, how effectively it serves the needs of the community, and the source and nature of pressure for change.
- 1.32 Many academics and researchers approach the question by examining the fundamental purposes of the criminal justice system and the relationship between the victim, the accused and the state. The lessons of history, developments in human rights law, empirical research and a broad cross-section of academic thought (ranging across law, sociology, philosophy, political theory and psychology) enrich our understanding of the criminal justice system and how it can best serve the community.
- 1.33 Of course, the criminal justice system is not just a theoretical construct. Every year in Victoria, thousands of criminal cases come before the courts, and all have a direct impact on the lives of victims, accused, witnesses and families. Listening to and understanding their experiences—and those of the people who work in the criminal justice system—is crucial to identifying issues and proposals for reform.

27 Annabelle Allimant and Beata Ostapiej-Piatkowski, 'Supporting Women from CALD backgrounds Who Are Victims/Survivors of Sexual Assault: Challenges and Opportunities for Practitioners' (ACSSA Wrap No 9, Australian Centre for the Study of Sexual Assault/Australian Institute of Family Studies, 2011) 6.

28 See generally Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2006–07* (2008) 33; Commonwealth of Australia, *The Road Home: A National Approach to Reducing Homelessness* (2008) 7; Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008) 8.

29 See, eg, Matthew Willis, 'Non-disclosure of Violence in Australian Indigenous Communities' (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, 2011); National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home* (Human Rights and Equal Opportunity Commission, 1997)

30 Submission 17 (Office of the Public Advocate). See also Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 16.

- 1.34 The response of the criminal justice system to victims has long been the subject of public debate in Victoria, which has led to a succession of reforms to law, procedure and support structures. These reforms have generated valuable information about victims' views and needs. We are now able to reflect on the impact of the reforms, and where weaknesses lie. The Commission's review has been conducted in the context of ongoing advocacy, research, evaluations and other analyses that overlap and supplement the terms of reference and help to illuminate the issues.

### Information papers

- 1.35 To reinforce an approach informed by theory and practice and an awareness of how they are interrelated, the Commission published four information papers in May 2015 before formal consultations began:
1. *History, Concepts and Theory*
  2. *Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?*
  3. *The International Criminal Court: A Case Study of Victim Participation in an Adversarial Trial Process*
  4. *Victims' Rights and Human Rights: The International and Domestic Landscape.*
- 1.36 The papers are descriptive and do not contain any reform proposals. They are available on the Commission's website.

### Consultation paper

- 1.37 The Commission published a consultation paper in August 2015, following extensive research and preliminary consultations with victims and people who work in the criminal justice system.
- 1.38 The consultation paper described current law and practice relating to the criminal trial process in Victoria, alternative approaches in other Australian jurisdictions and internationally, and options for reform. It posed a series of questions to guide consultations, and invited written submissions by 30 September 2015.

### Submissions

- 1.39 A total of 43 written submissions were received, which are listed at Appendix B. Those which may be made public are published on the Commission's website.

### Consultations

- 1.40 The Commission has consulted with individuals who have personal experience of the criminal trial process, providers of victim support services, lawyers, judicial officers and academics. All contributors have been generous with their time and ideas.
- 1.41 The consultations took the form of meetings with victims, family members of victims, academics, and representatives of the key stakeholder organisations in the criminal justice system. The meetings were held in Ballarat, Bendigo, Geelong, Melbourne, Mildura, Morwell, Shepparton, Warrnambool and Wodonga. The Commission also consulted with academics and legal and victim support experts in other jurisdictions. Most of the consultations were individual interviews, though a number of group—or roundtable—discussions were also held.
- 1.42 Two series of consultations were held. The first consisted of preliminary meetings to assist the Commission in gathering information for the consultation paper. The second series, after the consultation paper was published, involved hearing and discussing responses to the questions the paper raised.
- 1.43 The second series of consultations comprised 57 individual interviews and 18 roundtable discussions. They are listed at Appendix C.

## Concurrent developments

- 1.44 At the same time as the Commission was conducting its review, other important inquiries were taking place which the Commission has taken into account in this report.

### Victorian Royal Commission into Family Violence

- 1.45 The Victorian Royal Commission into Family Violence presented a comprehensive report to the Victorian Government on 29 March 2016, which was tabled in Parliament the next day. The Royal Commission's task was to identify the most effective ways to:
- prevent family violence
  - improve early intervention so as to identify and protect those at risk
  - support victims—particularly women and children—and address the impacts of violence on them
  - make perpetrators accountable
  - develop and refine systemic responses to family violence—including in the legal system and by police, corrections, child protection, legal and family violence support services
  - better coordinate community and government responses to family violence
  - evaluate and measure the success of strategies, frameworks, policies, programs and services introduced to put a stop to family violence.<sup>31</sup>
- 1.46 The Government accepted all 227 recommendations, some of which address issues that were also raised with the Commission during the course of this reference. Where possible, the Commission has made recommendations that align with or supplement those that the Government has already accepted.

### Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse

- 1.47 The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, established in January 2013, has been examining the criminal justice system response to child sexual abuse in institutions. In particular, it has inquired into the police investigation of allegations, decision-making processes regarding prosecution, evidence given by victims, the management of multiple allegations against the same accused person, and sentencing.
- 1.48 The Royal Commission has published reports on aspects of its terms of reference, but its final report and recommendations are not due until 15 December 2017.

## Structure of this report

- 1.49 Chapter 2 provides a summary of how the role of the victim has evolved. The adversarial criminal trial process does not recognise a distinct role for victims. Traditionally, the only way in which a victim is directly involved in the process is as a witness for the prosecution. However, law and policy reforms in Victoria and other common law jurisdictions have progressively created opportunities for victims to engage with the criminal trial process in a variety of capacities.
- 1.50 Chapter 3 discusses what the victim's role has become and proposes that it be characterised as that of a participant. A victim who does not appear as a witness at the trial is no less entitled to be recognised and respected within the criminal justice system than one who does. In homicide cases, the members of the family of the deceased are victims but might not be called as witnesses. If an accused person pleads guilty, there is no trial.
- 1.51 In all cases, victims have been harmed or directly affected by the crime; they provide



the impetus for prosecution when they report to police; and they are at risk of further harm as a result of the trial process and outcome. These realities underpin victims' inherent interest in the criminal trial process. This interest is the source of the rights and entitlements that are conveyed in legislation, court procedures and obligations imposed on criminal justice agencies.

- 1.52 The Commission calls for the victim's interest to be considered, alongside those of the accused and the community, in the criminal trial process. The overriding requirement to uphold the principles of a fair trial should be maintained. This requirement is not limited to safeguarding the interests of the accused. It is well established that it includes the interests of the community. This report concludes that it should also include the interests of the victim.
- 1.53 In practice, it means recognising victims' rights and entitlements, as established in law and policy, and meeting their legitimate expectations of the role. Drawing from legislation and practice, as well as from comments made by victims, the Commission identifies five groups of rights and entitlements: respect; information and support; protection; participation; and reparation.
- 1.54 Chapter 4 turns to the need to embed the concept of the victim as a participant into the operation of the criminal trial process and the wider criminal justice system. Recommendations are made to foster cultural change through education and training and stronger accountability mechanisms to improve compliance with the *Victims' Charter Act 2006* (Vic).
- 1.55 Chapters 5–9 examine the five groups of victim entitlements and expectations in turn. The chapters assess how well they are being met, and set out recommendations to strengthen the role of victims in the criminal trial process.
- 1.56 Chapter 10 concludes the report.



# The evolution of the victim's role

- 12** Introduction
- 12** The adversarial criminal trial
- 14** Drivers of reform
- 15** Law and policy reform in Victoria

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## 2 The evolution of the victim's role

### Introduction

- 2.1 Over the past three decades, a series of victim-oriented reforms have changed the role of the victim from that of simply a witness for the prosecution. The criminal justice system has evolved. In a profound and significant sense, there is now a place for victims.
- 2.2 This chapter outlines the major reforms that have modified the interaction between victims and key actors in the criminal trial process. Today, whether or not the victim appears as a witness for the prosecution, they are entitled to be supported in recovering from the harm caused by the crime, kept informed about the progress of the trial, and empowered to present a statement on the impact of the crime to the court at the time of sentencing. In essence, victims are entitled to be respected, to be informed, and to be heard.
- 2.3 The changes in the victim's role are the cumulative result of separate law and policy reforms that lacked a vision of what the victim's role would become. The Commission's conclusions on how the role should now be conceptualised are discussed in Chapter 3.

### The adversarial criminal trial

- 2.4 The paradigm within which the victim's role has developed in Victoria is the adversarial criminal trial. The adversarial criminal trial is a central feature of Australia's common law legal system. The rules of evidence and procedure that govern it reflect the traditional legal sense of what is fair. It is a contest between the prosecution, acting as the state's representative, and the accused, usually represented by a defence lawyer. The victim is not a party to the proceeding.
- 2.5 The prosecution and defence decide how their respective cases will be conducted and define the issues for the jury to consider. The case is presented primarily by witness evidence, and may include the victim as a witness. Witnesses usually give oral evidence in person in the courtroom and are subject to cross-examination. The judge ensures that the rules of evidence and procedure are followed and, after the prosecution and the defence have presented their cases, instructs the jury about the law to be applied. The jury then determines whether the prosecution has proved beyond reasonable doubt that the accused committed the crimes charged.

- 2.6 The accused is entitled to a fair trial. Importantly, this means being presumed innocent until proven guilty beyond reasonable doubt. Technically, a person's status as a victim is uncertain until the accused's guilt has been determined. However, in most cases, the fact that a person is a victim is not in contest. Usually, the contest is whether the accused committed the crime, or whether the accused had the requisite mental intent. Sometimes—for example, where consent is in issue—the question is whether the alleged victim is or is not a victim of crime as defined in law.
- 2.7 The principles that underpin a fair trial are well established. In Victoria, the accused person's rights in criminal proceedings are set out in section 25 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, which includes the following minimum guarantees:
- to be informed promptly and in detail of the nature and reason for the charge in a way the accused understands
  - to have adequate time and facilities to prepare the defence and communicate with a lawyer or advisor of the accused's choosing
  - to be tried without unreasonable delay
  - to be tried in person, and to be defended through legal assistance
  - to be informed about and receive legal aid if eligible
  - to examine witnesses for the prosecution, unless not permitted by law
  - to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution
  - to have the free assistance of an interpreter if unable to understand or speak English
  - to have assistants and specialised communication tools and technology if needed to assist communication, at no charge
  - not to be compelled to testify against himself or herself or to confess guilt.
- 2.8 The prosecution is obliged to act independently and impartially and to conduct the case fairly.<sup>1</sup> It must disclose all evidence relevant to the charges against the accused, even if it might undermine the prosecution case or assist the defence.<sup>2</sup> The prosecution must also act in the public interest, which may not always align with the victim's interest. Legally and operationally, the prosecution represents the state—not the victim.
- 2.9 Within this system, the traditional role of the victim is limited to that of a witness who gives evidence on behalf of the prosecution. A victim who is not a witness has no role at all. Observing that victims are viewed as outsiders to criminal proceedings, Jonathan Doak has commented on how poorly their interests have been recognised:
- Although many victims may feel as though they are 'owed' a right to exercise a voice in decision-making processes, such as prosecution, reparation and sentencing, the criminal justice system places such rights or interests in a firmly subservient position to the collective interests of society in prosecuting the crime and imposing a denunciatory punishment.<sup>3</sup>
- 2.10 The law and procedures of the criminal trial process are constantly changing, as is the nature of a common law system guided by custom and precedent. However, modifying the adversarial system in the interests of victims requires a major shift that can be achieved only by the intervention of Parliament.

1 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 379, 486–92.

2 Ibid 489–90.

3 Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 *Journal of Law and Society* 294, 300.

- 2.11 Numerous reforms to the law have been introduced in Victoria to enhance the victim's role. These reforms have been accompanied by government programs designed to support victims during the criminal trial process and help them cope with the aftermath of the crime.

## Drivers of reform

- 2.12 The 1960s saw the emergence of a 'victims' movement' and the expansion of academic interest in victim rights, led by feminists who challenged notions that victims were to blame for crimes such as rape, child abuse and family violence. These commentators also raised awareness of hidden and overlooked victimisation in the community. Over the next two decades, researchers studied the experiences of victims, government agencies and structures were critically examined, and legal reform followed.<sup>4</sup>
- 2.13 In recent times governments, commentators and media have paid more attention to family violence, child abuse and sexual offences. There has been increased and widespread concern with human rights. These factors have fuelled the victims' movement and the evolution of victims' lobby groups.<sup>5</sup>
- 2.14 It was not until the 1980s that the interests of victims began to play a prominent role in the formulation of criminal policy.<sup>6</sup> The concept of consumerism in particular, which encouraged government agencies to focus on the needs of citizens as consumers of their services, fostered greater awareness within the criminal justice system of the specific needs of victims of crime.<sup>7</sup>
- 2.15 Early reforms focused on the creation of support services for victims, such as rape crisis centres and counselling services. These reforms left the foundations of the adversarial criminal trial process largely untouched.
- 2.16 There are now numerous entitlements and obligations in law and policy concerning victims and the criminal trial process. The main sources of law are to be found in the *Victims' Charter Act 2006* (Vic), *Criminal Procedure Act 2009* (Vic), *Evidence (Miscellaneous Provisions) Act 1958* (Vic), *Evidence Act 2008* (Vic), *Sentencing Act 1991* (Vic), *Public Prosecutions Act 1994* (Vic), *Judicial Proceedings Reports Act 1958* (Vic), and *Open Courts Act 2013* (Vic). There are also relevant practice notes issued by the courts and policy obligations created by the Director of Public Prosecutions (DPP) and Victoria Police.
- 2.17 Today, the victim is recognised as a stakeholder in the criminal justice system. Victims and victim advocacy groups in Victoria can directly influence government decisions about their rights and the services they receive, and can influence the direction of future initiatives through the Victims of Crime Consultative Committee and the Victims of Crime Commissioner. With regard to the criminal trial process, victims' needs and interests are better acknowledged and accommodated although, in practice, gaps and inconsistencies remain.

4 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No 19, Australian Institute of Criminology, 1999) 81–4.

5 Ibid 86.

6 Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 *Journal of Law and Society* 294.

7 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No 19, 1999) 85.

## Law and policy reform in Victoria

- 2.18 Law and policy reform over the past 30 years has afforded victims a greater presence in the criminal trial process. Victims are entitled to be kept informed about the progress of the proceedings and assisted when participating directly in them. They may contribute to decision making about the sentencing of the offender and, if a custodial sentence is imposed, are entitled to be informed of the release of the offender at its conclusion.
- 2.19 These reform initiatives are largely uncontroversial. They are widely accepted among the individuals and organisations who contributed to this review. However, their introduction has been piecemeal. The victim's role in the criminal trial process has been modified as a cumulative effect of these reforms, rather than as the realisation of a goal.
- 2.20 The key reforms are summarised in the following passages to illustrate their focus and breadth.<sup>8</sup> They are discussed in closer detail in the remaining chapters of this report, in the context of the need for further reform.

### Recognition of the victim's interest in the criminal trial process

- 2.21 Several legislative reforms have validated the victim's place in the criminal trial process. They manifest the principle that the victim has an interest in the process that is not confined to the role of witness.

#### *Public Prosecutions Act 1994 (Vic)*

- 2.22 In 1994, the *Public Prosecutions Act 1994* (Vic) established the DPP and the Office of Public Prosecutions (OPP) as independent statutory offices.
- 2.23 The Public Prosecutions Act states that, in performing their functions, the DPP, Crown Prosecutors, Associate Crown Prosecutors, the Solicitor of Public Prosecutions and staff of the OPP must have regard to 'the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of victims of crime'.<sup>9</sup>
- 2.24 The obligation is broadly expressed and allows significant latitude in determining how the victim's concerns are identified and when they will be taken into account. It is not contingent on the victim being a witness for the prosecution.
- 2.25 The DPP has issued a detailed policy on the treatment of victims that reinforces and clarifies, and in some cases exceeds, the obligations to victims arising under the Victims' Charter Act and other relevant legislation.<sup>10</sup>

#### *Victims' Charter Act 2006 (Vic)*

- 2.26 The Victims' Charter Act sets out principles that govern the response by criminal justice and government agencies to victims of crime. The Act did not create any new entitlements for victims. Rather, it brought together those that already existed and put in place mechanisms for improved policy coordination, accountability and service delivery.

<sup>8</sup> This report does not attempt to give a full account of the many and far-reaching initiatives that have been introduced to protect, inform and empower victims of crime throughout the broader criminal justice system as it would take discussion beyond the terms of reference. It is nevertheless important to note that there have been extensive reforms to police procedures, court processes, sentencing law, family violence law, the detention and supervision of offenders and the delivery and availability of support services that have transformed the criminal justice system's response to crime in Victoria.

<sup>9</sup> *Public Prosecutions Act 1994* (Vic) ss 24(c), 36(3), 38(2), 41(2), 43(3).

<sup>10</sup> Director of Public Policy, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015). As enacted, section 42 of the *Public Prosecutions Act 1994* (Vic) established a Committee for Public Prosecutions comprising the Director of Public Prosecutions, Chief Crown Prosecutor, the Solicitor for Public Prosecutions and a person appointed by the Governor-in-Council. Its functions included 'to establish guidelines on the treatment of victims of crime by the prosecutorial system having regard to the duties of the Director, the Crown Prosecutors, the Solicitor for Public Prosecutions and the Office of Public Prosecutions'. It issued such guidelines in 1998 and rescinded them 10 years later, in view of the passage of the *Victims' Charter Act 2006* (Vic) and the production of *Director's Policy: Victims and Persons Adversely Affected by Crime*. The Committee did not meet again after 2008–2009 and was abolished in 2012 by the *Public Prosecutions (Amendment) Act 2012* (Vic).

- 2.27 The Victims' Charter Act was intended to create 'a framework for system-wide reforms that recognise and promote the rights of victims of crime'.<sup>11</sup> Importantly, it focused on the victim as a key participant in the criminal justice system, with legitimate expectations that agencies have a responsibility to meet.
- 2.28 The objects of the Victims' Charter Act are based on the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.<sup>12</sup> They show that the victim has an interest, born of the experience of being harmed by the crime, that criminal justice agencies should recognise and respect. The objects are:
- to recognise the impact of crime on the victims of that crime, including the impact on members of victims' families, witnesses to the crime and in some cases, the broader community
  - to recognise that all persons adversely affected by crime, regardless of whether they report the offence, should be treated with respect by all investigatory, prosecuting and victims' services agencies and should be offered information to enable them to access appropriate services to help with the recovery process
  - to help reduce the likelihood of secondary victimisation by the criminal system.<sup>13</sup>
- 2.29 The Victims' Charter Act also gave statutory force to the policy and strategic role of the Department of Justice and Regulation in changing how victims are treated by the criminal justice system. It requires the Secretary to:
- develop policies and plans to promote the Victims' Charter principles
  - monitor, evaluate and review the operation of the Victims' Charter Act and its benefits for victims
  - ensure that appropriate processes are established for complaints to be made by persons adversely affected by crime if the Victims' Charter principles are not upheld.<sup>14</sup>
- 2.30 In this way, the Victims' Charter Act has reinforced a shift in the way in which victims of crime are perceived in Victoria, from consumers of support services to stakeholders in the criminal justice system. The Attorney-General acknowledged the need for a shift in perceptions when presenting the Bill to Parliament. He said that the legislation was intended to enable a 'phased and closely monitored approach to implementation' that would bring about cultural change:

Implementing the victims' charter in this way will mean that criminal justice, investigating, prosecuting and victim services agencies will be developing consistent and systemic approaches to responding to victims. This will facilitate the ongoing cultural change within the criminal justice system which is necessary to ensure they are adequately and consistently responding to victims of crime.<sup>15</sup>

### ***Victims of Crime Commissioner Act 2015 (Vic)***

- 2.31 The *Victims of Crime Commissioner Act 2015 (Vic)* came into effect on 3 February 2016. It created the statutory office of Victims of Crime Commissioner and legislatively established the Victims of Crime Consultative Committee. The legislation has given the role of victims greater prominence and provides a means of identifying and addressing systemic issues.

11 Victoria, *Parliamentary Debates*, Legislative Assembly, 14 June 2006, 2047 (Rob Hulls).

12 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, UN Doc A/RES/40/34 (29 November 1985). The Commonwealth of Australia is a signatory to the Declaration and the *Victims' Charter Act 2006 (Vic)* gives effect to this in Victoria.

13 *Victims' Charter Act 2006 (Vic)* s 4(1).

14 *Ibid* s 20.

15 Victoria, *Parliamentary Debates*, Legislative Assembly, 14 June 2006, 2047 (Rob Hulls).

- 2.32 The Victims of Crime Commissioner is independent of government. The functions of the position are:
- (a) to advocate for the recognition, inclusion, participation and respect of victims of crime by government departments, bodies responsible for conducting public prosecutions and Victoria Police;
  - (b) to carry out inquiries on systemic victim of crime matters;
  - (c) to report to the Attorney-General on any systemic victim of crime matter;
  - (d) to provide advice to the Attorney-General and government departments and agencies regarding improvements to the justice system to meet the needs of victims of crime.<sup>16</sup>
- 2.33 The Victims of Crime Consultative Committee provides advice to the Attorney-General on policies, practices and service delivery and on any other matter that the Attorney-General refers to it. The Committee also promotes the interests of victims of crime in the administration of the justice system.<sup>17</sup> The membership comprises a chairperson, the Commissioner, victims of crime and representatives from courts, police, the Adult Parole Board, the OPP and victims' support services.<sup>18</sup>
- 2.34 In effect, the Victims of Crime Commissioner Act has formalised the role performed by a Victims of Crime Commissioner since October 2014 and the operation of a Victims of Crime Consultative Committee that was first appointed in February 2013.

### **Enabling and supporting the victim's participation in the criminal trial process**

- 2.35 The DPP has primary responsibility for helping victims of serious crime to understand, cope with and participate in the criminal trial process. Support services that are less directly related to the conduct of criminal proceedings are provided by the Department of Justice and Regulation through the Victims Support Agency. The Victims Support Agency coordinates the delivery of support and programs for victims, by funding and providing training to services that provide practical assistance, counselling and support to victims.<sup>19</sup> It also conducts research, raises awareness and develops policy in relation to victims, monitors compliance with the Victims' Charter Act and gives secretariat support to the Victims of Crime Consultative Committee.<sup>20</sup>
- 2.36 Perceiving a distinction between services that are directly related to criminal proceedings, and those that are not, can be difficult. In practice, responsibilities often overlap. Further, in regional areas where resources are more thinly spread, the demarcation of responsibilities can create disruption and gaps in the services provided. This issue is explored in Chapter 6.
- 2.37 With regard to initiatives that directly connect the victim with the criminal trial process, the DPP has a number of specific statutory obligations to provide information to victims, either in all cases or on request, at all key points of the process.<sup>21</sup> The obligations are owed to any victim and do not depend on the victim being a witness for the prosecution. They are discussed in Chapter 6.
- 2.38 Responsibility for complying with these obligations is shared between the OPP solicitors who conduct the prosecution and the social workers on staff who provide the OPP's Witness Assistance Service.<sup>22</sup>
- 2.39 Established in 1995, the Witness Assistance Service provides victims with information

16 *Victims of Crime Commissioner Act 2015* (Vic) s 13(1).

17 *Ibid* s 32.

18 *Ibid* ss 38–41.

19 Consultation 47 (Victims Support Agency); Department of Justice and Regulation, *Annual Report 2014–15* (2015) 25; Victims Support Agency, *About Us* (1 August 2015) <<http://www.victimsofcrime.vic.gov.au/utility/about+us/victims+support+agency/>>.

20 Consultation 47 (Victims Support Agency); Department of Justice and Regulation, *Annual Report 2014–15* (2015) 25. See also Chapter 4.

21 *Victims' Charter Act 2006* (Vic) s 9–11.

22 Director of Public Policy, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015).

and supports and assists them throughout the court process.<sup>23</sup> In allocating its resources, the Witness Assistance Service gives priority to:

- individuals who have lost family members
- victims and witnesses in sexual offence matters
- family violence matters
- matters involving vulnerable victims.<sup>24</sup>

2.40 A further initiative that assists victims in dealing with the trial process is the Child Witness Service. It was established within the Department of Justice and Regulation in 2007 to provide support and court education to children who have been victims of, or witnesses to, violent crimes.<sup>25</sup>

## Reforms to evidence law and court procedure

2.41 There have been extensive reforms to law and procedure to reduce the trauma of participating in the criminal trial process for victims of sexual offences and family violence, child victims and victims with cognitive impairment. They are discussed in detail in Chapter 8. While not expanding the role of the victim from that of a witness, these reforms underscored the need to recognise and respond to the distinct interests of victims that set them apart from other witnesses.

2.42 Many of the reforms to evidence law and court procedure arose from a report in 2004 by the Victorian Law Reform Commission on the response of the criminal justice system to the needs of victims in sexual offence cases.<sup>26</sup> Most of the Commission's recommendations for legislative reform were implemented by the *Crimes (Sexual Offences) Act 2006* (Vic). They have directly affected how criminal trials are conducted:

- In sexual offence cases, child victims and victims with a cognitive impairment have their evidence-in-chief audiovisually recorded. These victims cannot be cross-examined during committal proceedings. During the trial, they give their evidence in a special hearing.<sup>27</sup>
- In cases involving sexual offending or family violence, victims can use alternative arrangements while giving evidence (for example, using a screen to hide the victim from the offender, or using a remote witness facility).<sup>28</sup> They are protected from being cross-examined directly by an unrepresented accused person.<sup>29</sup>
- There is a prohibition on asking victims questions about their sexual reputation, and restrictions on questions about sexual history.<sup>30</sup>
- In sexual offence cases, a victim's evidence is recorded so that it can be replayed in any subsequent proceedings, such as a retrial or related civil proceeding.<sup>31</sup>
- Suppression and closed court orders are available in proceedings involving sexual offences or family violence offences to prevent undue distress or embarrassment.<sup>32</sup>
- In sexual offence cases, there are restrictions on accessing and using a victim's confidential counselling and medical records.<sup>33</sup>

23 Office of Public Prosecutions, *Witness Assistance Service: We Can Help You* <<http://www.opp.vic.gov.au/Witnesses-and-Victims>>. See further Chapter 6.

24 Director of Public Prosecutions and Office of Public Prosecutions, *Annual Report 14/15* (2015).

25 Victims of Crime, *Child Witness Service* (27 January 2016). <<http://www.victimsofcrime.vic.gov.au/home/going+to+court/giving+evidence/child+witness+service>>. The Child Witness Service was established in response to recommendations made in the Victorian Law Reform Commission's *Sexual Offences: Law and Procedure*, Final Report (2004) [5.10]–[5.22] (recommendations 105–111).

26 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004).

27 *Criminal Procedure Act 2009* (Vic) ss 123, 369–370, 372–374, 376.

28 *Ibid* ss 360, 363–365. Sections 363–365 set out the presumptions that apply for victims of sexual offences. Section 133(2) restricts who can be in court for cross-examination of a victim of a sexual offence in a committal. Alternative arrangements are also available to victims when reading out their victim impact statement; or when giving evidence at sentencing: *Sentencing Act 1991* (Vic) ss 8R–8S.

29 *Criminal Procedure Act 2009* (Vic) ss 353–355.

30 *Ibid* ss 339, 341, 342, 349.

31 *Ibid* ss 378–379.

32 *Open Courts Act 2013* (Vic) ss 18(1)(d), 30(2)(d).

33 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C.



## Expansion of opportunities to participate

- 2.43 Other reforms have provided additional capacities in which victims can participate in criminal proceedings. They are discussed in Chapter 7.
- 2.44 A significant initiative was introduced in 1994, when victims were given the right to submit a victim impact statement to the court at sentencing hearings, and the court was required to have regard to the victim's personal circumstances in sentencing the offender.<sup>34</sup> The *Sentencing Act 1991* (Vic) was further amended in 2005 to require the court to take account of the impact of the crime on any victim when sentencing.<sup>35</sup> The right to make a victim impact statement was reinforced in 2011 when victims were granted the right to read it out in court or have a nominated representative do so on their behalf.<sup>36</sup> The right to make an impact statement is reiterated as a principle in the Victims' Charter Act.<sup>37</sup>
- 2.45 Another provision allows victims to seek leave to appear in court when an application is made to subpoena, access or use their confidential counselling and medical records.<sup>38</sup>
- 2.46 Finally, victims are entitled to have input into prosecutorial decisions. As a matter of policy, the OPP solicitor with conduct of the prosecution is required to ensure that victims are consulted about decisions to:
- substantially modify charges
  - not proceed with some or all charges
  - accept a plea to a lesser charge.<sup>39</sup>
- 2.47 The victim's views are taken into account in making the decision but they do not determine the outcome.

## Financial reparation for harm

- 2.48 Victims are able to apply for state-funded financial assistance from the Victims of Crime Assistance Tribunal (VOCAT) to pay for certain expenses arising as a result of a violent crime. Limited entitlements to payments for pain and suffering are available in the form of special financial assistance.<sup>40</sup> VOCAT was established in 1997 and replaced the Crimes Compensation Tribunal, which had been operating since 1983.<sup>41</sup>
- 2.49 Since 2000, victims have been able to seek compensation for injury, pain and suffering as orders against an offender at the end of the criminal trial process.<sup>42</sup> This supplemented an existing right to seek compensation for property loss, damage and destruction.
- 2.50 The introduction of these reforms recognised that, although the offender is answerable to the community for committing the crime, the victim has a personal interest in holding the offender to account for the harm caused. Financial reparation for victims is discussed in Chapter 9.

34 *Sentencing (Victim Impact Statement) Act 1994* (Vic) (now repealed). See *Sentencing Act 1991* (Vic) ss 5(2)(sa), 8K.

35 *Sentencing Act 1991* (Vic) s 5(2)(daa).

36 *Ibid* ss 8Q, 8R.

37 *Victims' Charter Act 2006* (Vic) s 13.

38 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C.

39 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [25]; *Director's Policy: Prosecutorial Discretion* (24 November 2014) [12]; *Director's Policy: Resolution* (24 November 2014) [7].

40 *Victims of Crime Assistance Act 1996* (Vic).

41 *Criminal Injuries Compensation Act 1983* (Vic) (repealed).

42 *Sentencing Act 1991* (Vic) pt 4.



# The victim as a participant in the criminal trial process

- 22** Introduction
- 22** The need to reassess the victim's role
- 24** Recognising the victim's interest
- 29** The victim as a participant
- 31** The role in practice
- 34** Articulating the role in statute

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## 3 The victim as a participant in the criminal trial process

### Introduction

- 3.1 Chapter 2 described the legislative and procedural reforms that have been most influential in changing the role of victims in the criminal trial process over the past 30 years. These reforms have been accompanied by significant changes to the information and support available to victims to help them contribute to the process while reducing the risk of being traumatised as a result.
- 3.2 Victims' expectations and perceptions of the criminal trial process differ and their needs are complex and variable. Many express satisfaction with their interaction with investigatory, prosecuting and victims' services agencies, and it appears that victims' confidence in the justice system has increased.<sup>1</sup> Levels of satisfaction are highest when agencies have actively provided information and support.<sup>2</sup> In contrast, many more victims express profound dismay in the way they were treated by the criminal justice system, including the courts.
- 3.3 A common theme raised in submissions and consultations is the disparity between the victim's role as conveyed in legislation and the victim's experience in practice. Despite the introduction of legislation and programs to protect, include and support them during the criminal trial process, many victims report not being treated the way they expect to be.
- 3.4 A fundamental reason for the disparity is that the introduction of reforms to improve the experiences of victims, and their incorporation into the criminal trial process, have not been underpinned by a proper consideration of the victim's role.
- 3.5 This chapter explores the need to articulate what the victim's role has become and to embed it in the language and perceptions of criminal justice agencies and the courts. The role is characterised as that of a participant with an inherent interest in the criminal trial process that arises from their victimhood. This inherent interest is recognised in the victim's rights and entitlements. The role can be acknowledged without diminishing the primacy given to ensuring that the trial is fair for the community and the accused as well as for the victim.

### The need to reassess the victim's role

- 3.6 The victim's role in the criminal trial process is no longer confined to that of a witness for the prosecution. Reforms to the practice of cross-examination, the process for giving evidence, the relationship between the victim and the prosecution, and the victim's involvement in sentencing proceedings represent a shift to a criminal justice system that is increasingly responsive to victims' interests.

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1 Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (2015) 36. See also Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) i.

2 Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (2015) 5.

- 3.7 These initiatives have also recognised that people other than primary victims are adversely affected by the crime and have a significant interest in the criminal trial process. Family members—particularly the families of victims who have died as a result of the crime—are now also perceived as victims and are entitled to receive information and assistance in the recovery process.<sup>3</sup>
- 3.8 The victim’s role in the criminal trial process, and the wider criminal justice system, needs to be characterised in a new way. Changes to the role made by the cumulative effect of the reforms have not been driven by a vision of what it should be; nor is there an adequate description of what it has become. The ambiguity this has created causes inconsistencies in how victims are perceived, how they see themselves, their expectations and how they are treated. Tyrone Kirchengast has observed that it has also been a source of controversy:
- The twenty-first century criminal trial is increasingly reconceived in form and substance, yet victims remain controversial and contested participants of justice, despite being increasingly connected to the criminal trial.<sup>4</sup>
- 3.9 Adopting a new conception of the victim’s role in the twenty-first century criminal trial should not be simply an intellectual exercise. It should change perceptions of the victim’s contribution to the criminal trial process and their place in the criminal justice system. Victims should be seen as insiders, rather than as outsiders unless invited in. In practical terms, it will:
- drive cultural change
  - clarify expectations and entitlements
  - guide future reform.

### Driving cultural change

- 3.10 The comment was frequently made in submissions and consultations that cultural change is needed. Victims are excluded, or do not consistently receive the information and support to which they are entitled. Views about the extent of the problem differ, but there is general agreement that solutions can be found in holding criminal justice agencies, including the legal profession and the courts, to account and by shaping attitudes and perceptions through training and education.
- 3.11 The cultural change required has been long in arriving. For 22 years, the *Public Prosecutions Act 1994* (Vic) has required each element of the public prosecutions service to take the concerns of victims into account in performing its functions. For 10 years, investigatory, prosecuting and victims’ services agencies have had statutory obligations under the *Victims’ Charter Act 2006* (Vic) to treat all persons adversely affected by crime with courtesy, respect and dignity. The Victims’ Charter Act also contains principles that impose specific responsibilities on the prosecuting agency to keep victims informed of the progress of the criminal trial, the court process and, if applicable, the role of a witness.<sup>5</sup>
- 3.12 Both statutes were intended to improve the way victims are treated by the criminal justice system. Victims were identified as important, and entitled to be paid greater regard, but the implications for their role in the criminal trial process were not addressed.
- 3.13 Had there been an articulated description of the victim’s role and how it would interact with other roles within the criminal justice system, the response may have been more consistent and the cultural change more advanced. It might have also assisted the implementation of other, more targeted, reforms that have affected the victim’s role.

3 *Victims’ Charter Act 2005* (Vic) ss 6–7. See, eg, Office of Public Prosecutions Victoria, *Taking the Next Step: A Guide to the Victorian Court System for Bereaved Families* (2012).

4 Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Macmillan, 2016) 2.

5 *Victims’ Charter Act 2006* (Vic) ss 9–11.

## Clarifying expectations and entitlements

- 3.14 Professor Edna Erez put the view in her submission that ‘while defining the victim’s role might be important to legal professionals, the critical issue for victims is to feel included (informed, consulted and heard)’.<sup>6</sup>
- 3.15 This is a valid point, yet victims are unlikely to feel informed, consulted and heard by criminal justice agencies if their expectations are not considered legitimate. This in turn depends upon how the victim is perceived by the agency and whether the victim holds the same view. Ian Edwards has observed that most of the controversies surrounding the involvement of victims in the criminal justice system stem from a lack of clarity about the role that victims do and should perform.<sup>7</sup>
- 3.16 Any characterisation of how the victim’s role has developed should reflect the victim’s rights to be kept informed and consulted, to be treated respectfully in court, and to participate in court proceedings at various stages. In practice it would create the parameters of the victim’s legitimate expectations. It would also provide a basis for the victim’s rights and the obligations that criminal justice agencies hold.

## Guiding future reform

- 3.17 The role of the victim in the criminal justice system will continue to evolve, as will the criminal justice system itself.
- 3.18 The report of the Victorian Royal Commission into Family Violence, for example, has proposed reforms that will have extensive ramifications for family violence victims. There is a growing body of knowledge about the impact of reforms to the criminal justice system, and the role of the victim, which may lead to more fundamental changes to the criminal trial process in the future.
- 3.19 Having a modern concept of the victim’s role will assist in identifying and assessing future reform. It would describe the model against which amendments and alternatives could be assessed.

## Recognising the victim’s interest

### The victim’s inherent interest

- 3.20 All victims of crime have an interest in the criminal justice system’s response to the crime committed against them. Crime is inherently invasive in nature and even minor criminal acts can have psychological, physical, financial and other consequences for victims.<sup>8</sup> As Sandra Betts observed in her submission, victims are ‘intimately involved from the moment of the offence, right through all processes, and beyond them into their future life’.<sup>9</sup>
- 3.21 A victim’s interest in how the criminal justice system responds arises from the crime and its impact on the victim’s life. This inherent interest is not confined to, or defined by, the criminal trial process. It is evident from the decision to report the crime, and can continue after the offender has completed their sentence or any post-sentence monitoring.
- 3.22 Victims often provide the impetus for a public prosecution by reporting crime, assisting police with investigations and appearing as a witness for the prosecution. In doing so, they make a significant contribution to ensuring that offenders are held accountable for the harm crime causes to the community and the harm done to the victim themselves.

6 Submission 32 (Professor Edna Erez, University of Illinois at Chicago).

7 Ian Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44 *British Journal of Criminology* 967, 979.

8 Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC Information Services, 2001) 89.

9 Submission 11 (Sandra Betts). Other victims referred to the fact of the offending remaining a part of their lives forever: Consultations 3 (Parent of a victim), 53 (Parent of a victim).

- 3.23 Victims enter the criminal justice system seeking justice, healing, offender accountability, public acknowledgment, and to protect themselves and others from future victimisation.<sup>10</sup> They may seek emotional or financial restoration, or may just want the offender to be punished.<sup>11</sup> A strong theme emerging from consultations is that victims do not want the harm caused to them to be visited upon others. Revenge or retribution was largely absent from victims' responses to the Commission.
- 3.24 The subsequent criminal trial process can be harrowing and disempowering. Victims can be affected in myriad ways. Those who are witnesses can be distressed by the prospect and experience of giving evidence. Lives may be disrupted for years by delays and appeals.<sup>12</sup> Private details about a victim's life may be made public and scrutinised. Decisions by the prosecution about how to manage the case may appear to minimise the offending. The process of preparing a victim impact statement can be emotionally confronting.
- 3.25 Importantly, the intensity and impact of the trial process are not measures of the victim's inherent interest. A victim who appears as a witness or is traumatised by the experience does not have a greater interest in the process than a victim who does not attend the trial or is less affected by their involvement in it. Nevertheless, the circumstances of the individual victim, including their involvement in the criminal trial, will have a direct bearing on their expectations. These will often be common among victims, such as the expectation that they will be kept informed and listened to, and protected from re-traumatisation. However, each victim is different, and the response by the criminal justice system needs to allow for flexibility and individual choice.
- 3.26 The role of the victim in the criminal trial process has evolved through the greater recognition of the victim's inherent interest and the introduction of support services and legal rights that accommodate differences in individual needs. As victimology expert Jonathan Doak observed in 2008, there is a 'genuine and deeply rooted realisation that victims have a legitimate interest in the way that criminal justice is administered, in terms of substance, processes and outcomes'.<sup>13</sup> He added that policymakers were 'beginning to acknowledge the fact that victims merit a more prominent role in criminal justice as opposed to their historically subservient status as informants and witnesses'.<sup>14</sup>

## Recognising the victim's interest within a fair trial

### The contest between the state and the accused

- 3.27 As noted in Chapter 2, the adversarial criminal trial process is a contest between the state, represented by the prosecution, and the accused, usually represented by defence counsel. This trial must be fair. The right of an accused not to be convicted except after a fair trial has long been a fundamental aspect of criminal justice in Australia.<sup>15</sup>
- 3.28 The traditional concept of a fair trial conceives fairness in terms of ensuring a suitable legal environment for the accused to meet the power of the state.<sup>16</sup> It has been described in a High Court decision in the following way:

A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept

10 Consultations 13 (Parents of a victim), 14 (Victim), 20 (Parent of victims).

11 Diverse factors motivate victims to report crime and participate in the prosecution process. See discussion and references in Victoria Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Who Are the Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* Information Paper 2 (2015) 22–5.

12 Consultations 3 (Parent of a victim), 10 (Victim), 13 (Parents of a victim).

13 Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 243.

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*Dietrich v the Queen* (1992) 77 CLR 292, 299–300 (Mason CJ and McHugh J).

Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 380.

‘that it is better that ten guilty persons escape, than that one innocent suffer’ may find its roots in these considerations.<sup>17</sup>

- 3.29 This concept of a fair trial evolved in England from the middle of the 12th century. Before then, trials were essentially private matters and the role of the state was very limited. The following centuries saw the emergence of the criminal law, distinguished by a focus on public interests and the maintenance of a stable society. A centralised system for the administration of justice gradually evolved, alongside the creation of a state-run police force and the rise of the legal profession. The ultimate result was the highly adversarial criminal trial—prosecuted by the state and with a limited role for the victim—that is familiar today.<sup>18</sup>
- 3.30 The state now controls the investigation, prosecution and punishment of crime. It does so in the interests of the community, which include vindication for the victim, but the overriding element of state control inevitably pits the power of the state against the accused. The focus on protecting the accused’s interests within this power imbalance, to ensure that there is ‘equality of arms’, has eclipsed the recognition of the victim’s inherent interest in the response by the criminal justice system to the crime. The challenge addressed in recent reforms and in this report is how to reinforce the victim’s interest within this context.
- 3.31 What is required for a trial to be fair will depend on the circumstances of the case. Whether a trial is unfair is ‘judged by reference to accepted standards of justice’.<sup>19</sup> Furthermore, precisely what is considered necessary in practice for a criminal trial to be fair ‘may vary with changing social standards and circumstances’.<sup>20</sup>
- 3.32 Some elements have been recognised as essential to ensuring that accused persons receive a fair trial. These include rights to be presumed innocent until proven guilty, tried without unreasonable delay, and provided with a lawyer where charges are serious and the accused lacks financial means, to examine witnesses and test evidence, to have a conviction or sentence reviewed by a higher court and not to be compelled to testify against oneself.<sup>21</sup> These are significant and legitimate rights, reinforced by the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which should not be diminished nor deflected. However, a mere forensic advantage is not of itself a legitimate right and an unfair forensic advantage is not a legitimate right.
- 3.33 The community expects those charged with criminal offences to be brought to trial and tried fairly.<sup>22</sup> It has an interest in the criminal justice system functioning effectively to ensure ‘peace and order in society’.<sup>23</sup> Prosecutors must act fairly, impartially and in the public interest and must conduct trials in a manner that allows the accused to make a full and proper defence.<sup>24</sup> The interests of the victim are taken into account in making some prosecutorial decisions, but the prosecution is not required to act in the victim’s interests.<sup>25</sup>
- 3.34 If fairness is conceived as being more than ensuring, as far as possible, equality of arms between the state and the accused, it is easier to discern and accommodate a greater role for victims.

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17 *R v Carrol* (2002) 213 CLR 635, 643 (Gleeson CJ, Hayne J) citing Blackstone W, *Commentaries* (1769, 1966 reprint) Bk 4, c 27, 352.  
18 For an historical account of the evolution of the criminal trial process, and the victim’s role, see: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory*, Information Paper 1 (2015).  
19 *Barton v R* (1980) 147 CLR 75, 97 (referring to the inherent jurisdiction of the court to grant a permanent stay of a prosecution).  
20 *Dietrich v the Queen* (1992) 177 CLR 292, 328 (Deane J). See also *The State (Healy) v Donoghue* [1976] IR 325, 350 (O’Higgins CJ).  
21 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011). Section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) sets out ‘rights in criminal proceedings’, which have been identified as forming part of the a right to a fair hearing, which forms a fundamental principle at common law: *Re Application Under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 427 (Warren CJ).  
22 *Jago v District Court of New South Wales* (1989) 168 CLR 23, 33 (Mason CJ).  
23 *Ibid*, 49–50 (Brennan J).  
24 Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 288–9, 291–2; Director of Public Prosecutions Victoria, Director’s Policy: *Prosecutorial Ethics* (24 November 2014) [4], [6].  
25 See, eg, Director of Public Prosecutions Victoria, *Director’s Policy: Prosecutorial Discretion* (24 November 2014) [5].



## A triangulation of interests

- 3.35 The relationship between the interests of the victim, the accused and the community has evolved with the introduction of victim-oriented reforms. This has been recognised by academic commentators and the courts, who have characterised the victim's interest as part of a modern conception of fairness and a fair trial, alongside the interests of the accused and the community.
- 3.36 Among the commentators, Jeremy Gans and others have maintained that the traditional 'legal world view of justice' was disturbed by legislative changes from the 1990s that 'spread fairness rights to victims'.<sup>26</sup> These reforms were driven by concern to prevent rape victims from being traumatised by abusive and degrading cross-examination:

This movement requires some reconceptualising and rethinking of trial fairness. Important considerations apply to preserving all trial participants' rights. These are that everyone in the criminal justice process (not just the defendant) should be protected from degrading treatment and from arbitrary interference with their privacy—including reputational issues as well.<sup>27</sup>

- 3.37 To some extent, the re-conceptualisation that Gans et al seek has already occurred within the judiciary. In 1989, Justice Brennan of the High Court of Australia observed that, as victims of crime are not parties to the prosecution, their 'interests have generally gone unacknowledged until recent times'.<sup>28</sup> He indicated that justice is better served when the victim's inherent interest is taken into account in court proceedings:

In the onward march to the unattainable end of perfect justice, the court must not forget those who, though not represented, have a legitimate interest in the court's exercise of its jurisdiction.<sup>29</sup>

- 3.38 The House of Lords in the United Kingdom has also stated that a fair trial requires the court to consider the interests of the victim alongside those of the accused and the public. This perspective has been characterised by Lord Steyn as a 'triangulation of interests':

The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case, this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.<sup>30</sup>

- 3.39 As stated by Lord Steyn, paying due regard to the interest of victims throughout the criminal trial process is both a matter of fairness and consistent with the purposes of the criminal justice system. He developed this analysis when considering what a fair trial entails in *R v A (No. 2)*, referring to 'the familiar triangulation of interests of the accused, the victim and society'.<sup>31</sup> This line of analysis departs from the idea that a simple equality of arms between the accused and the community is sufficient to ensure fairness in criminal proceedings.

## The primacy of a fair trial

- 3.40 Some commentators have raised concerns about the impact that giving greater recognition to victims' interests may have on the rights of the accused. They argue that, rather than making the criminal trial process fairer, the reforms may come at the expense of fairness, by diminishing the accused person's rights or eclipsing the public interest.

<sup>26</sup> Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 381 (citation omitted).

<sup>27</sup> *Ibid* (citation omitted).

<sup>28</sup> *Jago v District Court of New South Wales* (1989) 168 CLR 23, 49–50.

<sup>29</sup> *Ibid* 54.

<sup>30</sup> *Attorney-General's Reference (No. 3 of 1999)* [2001] 2 AC 91 [118] (cited with approval by the House of Lords in *R v H* [2004] 2 AC 134, 145–46). See also *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300, where Justice Bell referred to Lord Steyn's statement concerning the triangulation of interests, but did not go on to refer to the interests of victims specifically.

<sup>31</sup> *R v A (No. 2)* [2002] 1 AC 45 [33].

The equality of arms, and the objective and public nature of the criminal justice system, are threatened.<sup>32</sup>

- 3.41 The submission from the Victorian Bar and Criminal Bar Association emphasised that reforms which affect the victim's capacity to participate in the trial process need to be balanced against the impact on the fairness of the trial:

Any reforms designed to provide improved protection and support to victims of crime, or to enhance their involvement in the prosecution process, must be carefully balanced against the need to ensure that prosecutorial decisions are made by independent legal experts and the fundamental rights of accused persons to a fair trial are preserved.<sup>33</sup>

- 3.42 Conversely, some arguments in support of victim-oriented reforms point to a dichotomy between the victim's interests and those of the accused and identify an imbalance of power that needs to be redressed. The extensive rights and entitlements of the accused are compared with those of the victim and are characterised as proof that the process is unfair. Victim-oriented reforms are justified on the basis that they will redress the imbalance.<sup>34</sup>

- 3.43 Other commentators derive victims' interests from the relationship between the victim and the state. Robyn Holder, academic and former Victims Services Coordinator in the Australian Capital Territory, has argued that victims' interests are not always the same as those of the state and there is a power imbalance when they conflict. It follows that victims' rights should be understood as mitigating this imbalance. Victims should have rights to dignity, respect, privacy and security of person, by virtue of being 'situated as civilians before the state'.<sup>35</sup>

- 3.44 Kent Roach advances a similar analysis, arguing that the state's conduct may encroach on a victim's human rights throughout the trial process.<sup>36</sup> For example, the issuing of a subpoena encroaches on a victim's right to privacy.<sup>37</sup> According to Roach, where such conflicts arise, the victim's intervention in the criminal trial process is justified.<sup>38</sup>

- 3.45 Arguments that a 'balance' must be found between the interests of the victim, the accused and the community can suggest a zero-sum conception of fairness, where the rights of one actor may be upheld only at the expense of the rights of another. Ian Edwards has criticised this line of reasoning:

We cannot justify granting participation rights to victims simply because they are rights enjoyed by defendants; the justification for granting certain rights to defendants may be inapplicable to victims. For example, legal representation for the defendant is crucial to ensure that he receives a fair trial, and is not subject to the unrestrained power and resources of the state. However, legal representation for a victim cannot be justified on these grounds, as the victim is not in a position of inequality vis-à-vis the state. The victim may seek compensation, or the refutation of assertions by the defence, but according legal representation to facilitate these would have to be justified on some other basis, such as ensuring that decision-makers always have regard to his interests.<sup>39</sup>

32 Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 *Journal of Law and Society* 294, 294.

33 Submission 29 (Victorian Bar Council and Criminal Bar Association).

34 For a critique of this argument, see Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *British Journal of Criminology* 967. See also Submissions 14 (Victims of Crime Commissioner, Victoria), 36 (Centre for Innovative Justice); Consultation 30 (Dr Tyrone Kirchengast, University of New South Wales).

35 Robyn Holder, 'Working Paper: Are Human Rights Owed Victims of Crime' (Paper presented at the 15th International Symposium on Victimology, Victimization, Justice and Healing: Challenging Orthodoxies, Perth, 5–9 July 2015) 9; Consultation 17 (Dr Robyn Holder, Griffith University). See also Jo-Anne Wemmers, 'Victims' Rights are Human Rights: The Importance of Recognizing Victims as Persons' (2012) *Temida* 71; Submission 11 (Sandra Betts).

36 Kent Roach, 'Victims' Rights and the Charter' (2005) 49 *Criminal Law Quarterly* 474, 479–81.

37 *Ibid* 479.

38 *Ibid* 480–1.

39 Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *British Journal of Criminology* 967, 972.

- 3.46 The Commission agrees. The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community. The legitimate rights of victims, properly understood, do not undermine those of the accused or of the community. The true interrelationship of the three is complementary.
- 3.47 There is a public interest in ensuring that trials are fair. This interest can be served not only by safeguarding the rights of the accused and the objectivity of the prosecution but also by acknowledging the victim's interest. As Justice Howie of the New South Wales Supreme Court stated:

The 'accepted standards of justice' take into account other interests and considerations that arise in respect of a prosecution of serious criminal offence, including the interests of the public generally, and witnesses and victims in particular.<sup>40</sup>

- 3.48 The combination of procedures and rights that regulate the contest between the prosecution and defence should be preserved as essential to a fair adversarial criminal trial. They can be, and have been, supplemented by reforms that allow for the victim's interest to be taken into account, to the extent that fairness permits. Doing so is consistent with recognising, as Justice Deane did in *Dietrich v R*, that community standards and perceptions of fairness change over time and inform the practical content of a fair trial.<sup>41</sup> The Commission concurs with comments made by Lord Bingham of Cornhill, on behalf of other members of the House of Lords, in *R v H*:

Fairness is a constantly evolving concept. Hawkins J (*Reminiscences* (1904) Vol 1, chap IV, p.34) recalled a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted 2 minutes 53 seconds, including a terse jury direction: 'Gentlemen, I suppose you have no doubt? I have none'. Until 1898 a defendant could not generally testify on his own behalf. Such practices could not bear scrutiny today. But it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.<sup>42</sup>

## The victim as a participant

### Describing the role in law and practice

- 3.49 Existing laws and policies demonstrate that victims can be accommodated in the criminal trial process and that they have certain rights and entitlements. Kirchengast has observed that victims are already included in, and protected during, the adversarial criminal trial process:

few turn their minds to the fact that the victim actually participates—in a range of ways—throughout the criminal trial process and that a substantial rights framework is already in existence.<sup>43</sup>

- 3.50 However, the language and conceptual basis of the victim's role has not evolved in line with the changes to the role itself. This has contributed to the fragmented development of victim-oriented laws and policies, and a related lack of compliance.<sup>44</sup> Without a properly articulated role, victims are not always respected as having a legitimate interest in criminal proceedings.<sup>45</sup>

40 *R v Wilkie* [2005] NSWSC 794 [54]. This case involved New South Wales legislation. Cited with approval by Justice Whealy in *R v Lodhi* [2006] NSWSC 587 [53].

41 *Dietrich v the Queen* (1992) 177 CLR 292, 328 (Deane J).

42 *R v H* [2004] 2 AC 134, 145–46. Lord Bingham's statement was cited in *R v Lodhi* [2006] NSWSC 587 (Whealy J). See also James Spiegelman, 'The Truth Can Cost Too Much: The Principles of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 43.

43 Submission 19 (Dr Tyrone Kirchengast, University of New South Wales).

44 *Ibid.*

45 Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 245; Consultation 57 (Victorian Legal Services Commissioner and CEO Victorian Legal Services Board).

- 3.51 Writing in 1985, Joanna Shapland, Jon Willmore and Peter Duff highlighted the ‘need for a respected and acknowledged role’ for victims.<sup>46</sup> Their research found that victims sought ‘recognition as an important and necessary participant in the criminal justice system.’<sup>47</sup> Too often, this recognition is still not experienced by victims.
- 3.52 The word ‘victim’ does not describe the victim’s role in the criminal trial process. It identifies a person who has been harmed by a criminal act, and who therefore has an inherent interest in the response by the criminal justice system, but does not convey their integral part in the response. The description of the role as ‘witness’ is insufficient. It does not apply to all victims; it does not distinguish between victim witnesses and other witnesses, whose interests are quite different; it does not encompass the victim’s participation in other aspects of the trial; and it indicates that the victim’s interest arises from and is defined by the role of witness. In her submission, Professor Erez recommended that reforms communicate to victims and actors within the criminal justice system that victims are no longer outsiders and are more than simply witnesses.<sup>48</sup> Similarly, the Victorian Legal Services Commissioner identified a need for a term that properly conveys to the legal profession the interest and role of victims.<sup>49</sup>
- 3.53 The Commission does not propose that victims should be made a party to criminal proceedings. To do so would significantly alter the adversarial system and would have very significant cost and resource implications. Also, nearly all victims the Commission consulted did not seek such a role.
- 3.54 Rather, the Commission proposes, in consonance with modern jurisprudence, that the role of the victim as a participant in criminal proceedings be legislatively and operationally recognised. The victim is neither a bystander nor a party, but is a participant whose role is essential to the effective functioning of the criminal justice system.<sup>50</sup> This approach is consistent with modern jurisprudence on the triangulation of interests in the criminal trial: those of the state, the victim and the accused.
- 3.55 The recognition of victims as participants reflects the reality of victims’ inherent interest in the criminal trial process and the various capacities in which they may be involved in that process. It gives proper regard to the hardship experienced by victims as a result of crime, their special interest in the criminal trial process, and their contribution to the detection and prosecution of crime in society.<sup>51</sup>
- 3.56 This characterisation does not deflect from, or diminish, the legitimate rights of accused persons.

### Nature of the role

- 3.57 The Commission approached the conceptually complex task of considering what the victim’s role in the criminal trial should be by putting forward three options in its consultation paper:
- a protected witness, protected by policies and procedures that aim to reduce the risk of unnecessary trauma and ensure that the victim is treated with fairness, respect and dignity
  - a participating witness, whose interests, views and concerns are taken into account, and who has opportunities to be heard, during the criminal trial process
  - a prosecuting witness, with some or all of the functions, rights and obligations associated with the role of the prosecutor.<sup>52</sup>

46 Joanne Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) 176.

47 Ibid.

48 Submission 32 (Professor Edna Erez, University of Illinois at Chicago).

49 Consultation 57 (Victorian Legal Services Commissioner and CEO Victorian Legal Services Board).

50 Joanne Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) 176.

51 Submission 34 (Northern Centre Against Sexual Assault); Consultation 5 (Sue and Don Scales, Mildura).

52 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015) 36–40.

- 3.58 This typology provided a way of characterising the types of reform that have been introduced and the direction of possible future reforms. It assisted in explaining the issues and distinguishing between different criminal justice systems, but does not encompass victims who do not appear as witnesses at trial.
- 3.59 In submissions and consultations, almost unanimous support was expressed for the victim having a ‘participating’ role, although views differed about what this would mean in practice. It was recognised that perceiving the victim as only having a ‘protected’ involvement was inadequate. There was no support for perceiving the victim’s role as that of a ‘prosecuting’ party.
- 3.60 The Commission conceives of a victim as a person who was directly harmed by the perpetrator’s criminal act, including a parent of a child victim or a family member of a homicide victim. As such, the person has an inherent interest in the criminal justice system’s response to the crime, from the investigation phase until the offender has completed their sentence or any period of post-sentence monitoring or supervision.
- 3.61 The person’s interest in the criminal trial process is recognised by rules and procedures that protect them from unnecessary trauma and enable their participation. They include opportunities to participate in proceedings to protect or assert certain rights and interests, inform the court of the impact of the criminal act, and seek reparation. To enable victims to perform the role of participant, the prosecution has obligations to:
- take their concerns into account
  - keep them informed of the progress of court proceedings
  - consult them in making a decision about discontinuing charges and in plea negotiations
  - provide information and support to them as witnesses.
- 3.62 The role of the victim as a participant encompasses the categories of protected and participating witnesses as set out in the consultation paper, but extends to all victims regardless of whether they appear in court as witnesses for the prosecution.
- 3.63 This report does not give a more prescriptive and detailed description of the role itself—as distinct from specific aspects of it—because it will differ according to the individual’s circumstances. Moreover, the role should be able to accommodate further legislative and procedural reforms in the future.

## The role in practice

### **Victims’ expectations of what their role should be**

- 3.64 The Commission’s conceptualisation of the role of the victim as a participant accords with comments that victims and victim support specialists made in response to the consultation paper.

- 3.65 The Northern Centre Against Sexual Assault told the Commission that victims feel marginalised to hear their role described as merely a ‘witness’ to the crime, when clearly they have been the subject of it.<sup>53</sup> They want to be able to participate to different degrees at different stages of the trial, while being protected from further harm if called as a witness.<sup>54</sup> Some victims want to be involved in every stage of the trial, while others do not want to be involved at all.<sup>55</sup> Most supported the roles of ‘protected’ and ‘participating’ witness as described in the consultation paper.<sup>56</sup> The role described as a ‘prosecuting’ witness was not favoured because it would require expertise that victims do not have.<sup>57</sup>

## Victims’ rights and entitlements

- 3.66 The principles set out in sections 6 to 17 of the Victims’ Charter Act replicate a number of rights established by other legislation and impose obligations on criminal justice agencies to provide information and support. They are based on the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the foundational international instrument on victims’ entitlements.<sup>58</sup>
- 3.67 Combined with other statutory rights and entitlements, the Charter principles reflect and foster victims’ legitimate expectations about their experience of the criminal trial process. They also give substance to the victim’s role as a participant.
- 3.68 Victims’ rights and entitlements can be summarised as follows:
- to be treated with respect
  - to be provided with information and support
  - to be able to participate in processes and decision making, without carrying the burden of prosecutorial decision making
  - to be protected from unnecessary trauma, intimidation and distress, and unjustified interference with privacy during the criminal trial process
  - to be able to seek reparation.
- 3.69 These overarching rights and entitlements are consistent with research findings about victims’ expectations.<sup>59</sup> They also correspond with what many individuals and organisations have told the Commission. They are reflected in victim-oriented provisions in Victorian legislation such as the *Evidence Act 2008* (Vic), the *Sentencing Act 1991* (Vic), the *Criminal Procedure Act 2009* (Vic) and the Victims’ Charter Act, and are supported by policies established by the Director of Public Prosecutions.
- 3.70 Nevertheless, the list above is not exhaustive. The expectations listed are those that are most relevant to the victim’s role in criminal trial processes and interactions with others involved. They are not directed at the victim’s expectations about influencing outcomes, such as the offender’s punishment and rehabilitation. This is in keeping with the scope of this review.

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53 Submission 34 (Northern Centre Against Sexual Assault).

54 Ibid.

55 Consultations 21 (Victoria Police), 42 (Relative of a victim; a victim); Roundtables 9 (Victim support and therapeutic specialists, Shepparton), 12 (Victim support specialists, Wodonga).

56 Submissions 16 (Name withheld), 34 (Northern Centre Against Sexual Assault), 38 (Name withheld), 40 (Former VOCCC victim representatives); Consultations 32 (Legal Aid NSW), 42 (Relative of a victim; victim); Roundtables 9 (Victim support and therapeutic specialists, Shepparton), 12 (Victims support specialists, Wodonga).

57 Submission 16 (Name withheld); Consultation 42 (Relative of a victim; a victim).

58 United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, UN Doc A/RES/40/34 (29 November 1985); *Victoria, Parliamentary Debates, Legislative Assembly*, 14 June 2006 (Rob Hulls).

59 See, eg, Victims Support Agency, *Building the Confidence of Victims in the Criminal Justice System—Final Report* (Department of Justice and Regulation, 2014); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002); Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985).



- 3.71 Processes are experienced before outcomes. Whether a victim perceives an outcome as fair is likely to be shaped by their assessment of how fair the procedures leading to it were.<sup>60</sup> The following section describes in brief terms the procedural rights and entitlements identified above.

## Respect

- 3.72 Victims expect to be treated with respect in the criminal trial process. This means that they are acknowledged, particularly by the two decision-making institutions that they deal with: the prosecution and the court. The prosecution, courts, defence lawyers and providers of victim support services must be fair and respectful in their interpersonal dealings with victims at all stages of the criminal trial process.<sup>61</sup> Respectful and dignified treatment is particularly critical in relation to the manner in which victims are cross-examined and the way in which judicial officers acknowledge victims in the court. These issues are discussed in Chapter 5.

## Information and support

- 3.73 Victims expect to be informed about the progress of their case, court processes and their role at different stages of the criminal trial process. Information was described by victims as 'key' and 'crucial',<sup>62</sup> and 'empowering'.<sup>63</sup> Support in the form of counselling and practical assistance is also paramount.
- 3.74 Prosecution lawyers are the most authoritative source of information for victims about the criminal trial process. Police and victim support services also provide information. In Victoria, support with the criminal trial process is provided primarily by the Office of Public Prosecutions' Witness Assistance Service, the Child Witness Service, Victims Assistance Program providers, and Centres Against Sexual Assault. Chapter 6 considers how the provision of information and support to victims can be improved throughout the criminal trial process.

## Participation

- 3.75 Victims told the Commission that they felt disempowered or excluded from the criminal trial process,<sup>64</sup> and described their relationship with the prosecution as that of a 'passive receiver of information',<sup>65</sup> an 'observer',<sup>66</sup> and an 'outsider'.<sup>67</sup> Many victims seek greater input into decisions by the prosecution and the court that affect them, but do not necessarily want the burden and responsibility of decision-making power.<sup>68</sup>
- 3.76 The nature of participation can vary. It may take the form of input into prosecution decisions or making representations to court. Some victims, in particular children and individuals with a cognitive impairment, may require additional assistance to participate equally in the criminal trial process.<sup>69</sup> Restorative justice, as a voluntary process that is supplementary to a traditional criminal trial, also opens up a forum for victim participation.

60 Tom Tyler, 'Social Justice: Outcome and Procedure (2000) 35(2) *International Journal of Psychology* 117. See also Stuart Ross et al, *Fairness and Equity for Victims of Crime: What Do They Want and Why Don't They Get It? Final Report* (ARC Discovery Project DP0665417, December 2009) 144. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Who Are the Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* Information Paper 2 (2015) 14.

61 Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985); Stuart Ross et al, *Fairness and Equity for Victims of Crime: What Do They Want and Why Don't They Get It? Final Report* (ARC Discovery Project DP0665417, December 2009); Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systemic Review' (2013) 8(2) *Victims and Offenders* 119; Victims Support Agency, *Building the Confidence of Victims in the Criminal Justice System* (2014).

62 Consultation 11 (Parent of a victim).

63 Submission 41 (Colleen Murphy (Kelly)).

64 Submission 16 (Name withheld); Consultations 3 (Parent of a victim), 4 (Parents of victims), 20 (Parent of victims), 40 (A victim).

65 Consultation 11 (Parent of a victim).

66 Consultation 40 (A victim).

67 Submission 38 (Name withheld).

68 Submission 16 (Name withheld); Jo-Anne Wemmers and Katie Cyr, 'Victims' Perspective on Restorative Justice: How Much Involvement Are Victims Looking For?' (2004) 11 *International Review of Victimology* 259, 270; Jo-Anne Wemmers, 'Where do they Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395, 412; Julian Roberts and Edna Erez, 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 *International Review of Victimology* 223.

69 See, eg, Submissions 4 (Victorian Equal Opportunity and Human Rights Commission), 7 (Youthlaw), 17 (Office of the Public Advocate).

- 3.77 The appropriateness of existing participatory measures and the need for reforms are considered in Chapter 7.

### Protection

- 3.78 Giving evidence and being cross-examined about a traumatic event can be distressing for victims. Even where court processes are conducted properly, the experience of giving evidence can be traumatic. That is a consequence of having a public trial and of the legitimate testing of evidence. Some victims acknowledged this reality to the Commission.<sup>70</sup> However, others said that the court process went far beyond that legitimate character, and was unjustifiably demeaning, disrespectful, intimidating and re-traumatising.<sup>71</sup> Some victims also told the Commission that the judicial officer presiding over the case did nothing, or too little, to protect their legitimate interests.<sup>72</sup>
- 3.79 In addition, victims often encounter the accused and the accused's family and supporters, in courtrooms and court precincts, which can expose them to intimidating behaviour.
- 3.80 Measures are in place to protect victims from some of the adverse impacts of the criminal trial process. Whether they are operating effectively is discussed in Chapter 8.

### Financial reparation

- 3.81 Victims of crime often experience psychological injury, emotional harm, physical injury and financial loss. Victims may have to pay for psychological and/or medical treatment and incur costs related to lost or damaged goods, security or relocation. They may need to take time off work and therefore lose earnings or leave entitlements.
- 3.82 Victims may seek financial and other forms of reparation. Victoria's criminal justice system has mechanisms for victims to seek restitution and compensation orders against offenders in addition to sentencing. Chapter 9 explores the process for making and enforcing these orders, and makes recommendations for reform.

### Articulating the role in statute

- 3.83 Providing statutory recognition of the victim's interest in the criminal justice system's response to the crime, and the rights and entitlements that arise from that interest, would support the necessary shift in how the victim is perceived and treated by criminal justice agencies and the courts. It would bring together conceptually the disparate legislative and procedural measures that have been introduced over the past 30 years and provide a common basis for understanding the victim's role as a participant in the criminal trial process.
- 3.84 The Commission considers that such recognition should be given in the Victims' Charter Act and the Human Rights Charter.

### Victims' Charter Act

- 3.85 As discussed in Chapter 2, the Victims' Charter Act governs the response of investigatory, prosecuting and victims' services agencies to victims of crime in Victoria.<sup>73</sup> It is the central repository of victims' entitlements and the obligations owed to them during the criminal trial process. For this reason, the Act should clearly acknowledge the victim's role as a participant.
- 3.86 This could be achieved by recognising the inherent interest of victims and their role in the objects of the Act. The role would then be given practical meaning through the principles set out in the Act.<sup>74</sup>

70 Submission 38 (Name withheld); Consultation 11 (Parent of a victim).

71 Submission 15 (Kristy McKellar); Consultations 1 (A victim), 10 (A victim), 41 (A victim), 42 (Relative of a victim; victim), 46 (A victim).

72 Consultations 3 (Parent of a victim), 10 (A victim), 20 (Parent of victims), 42 (Relative of a victim; victim).

73 *Victims' Charter Act 2006* (Vic) s 1.

74 *Victims' Charter Act 2006* (Vic) ss 6–17.



- 3.87 Currently, the objects of the Act are set out in section 4. They, and the principles, are based on the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (UN Declaration), adopted in 1985 by the General Assembly of the United Nations.<sup>75</sup> As the UN Declaration does not extend to recognising the victim's role as a participant in the criminal trial process, a new object would be a separate provision that relies solely on the intent of the Parliament of Victoria.

## Recommendation

- 1 The objects of the *Victims' Charter Act 2006* (Vic) should be amended to include recognition that a victim of crime has an inherent interest in the response by the criminal justice system to that crime, which gives rise to the rights and entitlements that are conveyed in the Act and shape the victim's role as a participant in the criminal trial process.

## Charter of Human Rights and Responsibilities Act

- 3.88 The Commission considers that the transformation of the criminal trial process into one in which the victim has a role as a participant should be reflected in Victoria's Human Rights Charter.<sup>76</sup> The Human Rights Charter, unlike the Victims' Charter Act, creates obligations for courts as well as for criminal justice agencies. It is important that victims' rights and interests are recognised throughout the criminal justice system.

### Application of the Human Rights Charter

- 3.89 The Human Rights Charter contains a set of 20 human rights that apply to all people in Victoria.<sup>77</sup> All of the rights are contained in Part 2 of the Charter. Although none of the rights refers specifically to victims of crime, they apply to victims as individual persons regardless of their status as victims of crime.
- 3.90 The rights are not absolute and must be balanced against each other and against other public and private interests.<sup>78</sup> This is recognised by section 7(2), a general limitations provision which applies to all rights in the Charter. A human right may be subject only to 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Consideration must be given to 'all relevant factors', including the nature of the right being limited, the purpose, nature and extent of the limitation, and whether less restrictive means that would achieve the purpose of the limitation are available.<sup>79</sup>
- 3.91 The Human Rights Charter also guides the drafting of legislation and its interpretation. Section 28 of the Human Rights Charter provides that all legislation introduced into the Victorian Parliament must be accompanied by a statement of compatibility that considers whether the proposed legislation complies with the Human Rights Charter.<sup>80</sup> Those making laws must therefore consider whether they are compatible with human rights and explain the nature and extent of any incompatibility.

75 *Victims' Charter Act 2006* (Vic) s 4(2).

76 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25.

77 *Ibid* s 6(1).

78 Judicial College of Victoria, *Charter of Human Rights Bench Book* (10 May 2016) [5.2.1(3)] <<http://www.judicialcollege.vic.edu.au-eManuals/CHRBB/index.htm#57244.htm>>.

79 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). Some human rights in the Charter also have a specific internal limitation provision that applies only to that right.

80 *Ibid* s 28(1). This section does not affect the valid operation or enforcement of laws in Victoria. Statutory rules must also be accompanied by a human rights certificate. See *Subordinate Legislation Act 1994* (Vic) s 12A.

- 3.92 In addition, section 32(1) requires all laws in Victoria to be interpreted in accordance with the human rights listed in the Charter 'so far as it is possible to do so consistently with their purpose'.<sup>81</sup> What this means in practice has been the subject of extensive debate. In the leading High Court case, *Momcilovic v The Queen*, six separate judgments were delivered about the interpretative process under the Human Rights Charter.<sup>82</sup> The effect of these judgments was described in a recent review of the Human Rights Charter as 'not easy to understand or apply'.<sup>83</sup> In particular, whether section 7(2) forms part of the interpretive process remains unclear.
- 3.93 The criterion stated by the Victorian Court of Appeal is that, if the meaning of a law is 'clear and unequivocal', the court cannot depart from that clear meaning, even if the law in question limits a Charter right.<sup>84</sup> Where a statutory provision has more than one possible meaning, section 32(1) requires the court to select that which is most compatible with the Human Rights Charter, so long as that meaning can be discerned using ordinary principles of statutory interpretation.<sup>85</sup>

### Application to criminal justice agencies

- 3.94 Public authorities must act compatibly with the rights listed in the Human Rights Charter and give proper consideration to relevant human rights when making decisions.<sup>86</sup> The meaning of 'public authority' is defined in section 4 of the Human Rights Charter and encompasses:
- Victoria Police
  - the Director of Public Prosecutions, Crown Prosecutors and the Office of Public Prosecutions
  - organisations exercising functions of a public nature on behalf of government, such as the Victims Assistance Program providers.<sup>87</sup>

### Application to the courts

- 3.95 In addition to their responsibility to interpret statutes in accordance with the rights listed in the Human Rights Charter, section 6(2)(b) requires courts to directly enforce Charter rights that relate to court proceedings, such as the right to a fair hearing (section 24) and rights in criminal proceedings (section 25).<sup>88</sup>
- 3.96 Courts are also considered public authorities when 'acting in an administrative capacity' and must comply with the obligations imposed on public authorities when acting in that capacity.<sup>89</sup> Examples of courts acting in an administrative capacity are noted to include: committal proceedings, issuing warrants, listing cases and adopting practices and procedures.<sup>90</sup>

81 Ibid s 32(1).

82 See generally *Momcilovic v The Queen* (2011) 245 CLR 1.

83 Michael Brett Young, *From Commitment to Compliance: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 141. Recommendation 28 proposes amendment of s 32(1) of the Charter. The Victorian Government has indicated that it supports in principle the amendment of s 32(1) to provide legislative clarity and is considering how best to achieve this: Department of Justice and Regulation, Government of Victoria, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* (2016) <<http://www.justice.vic.gov.au/>>.

84 *Nigro v Secretary of the Department of Justice* (2013) 41 VR 359, 383; *Momcilovic v The Queen* (2011) 245 CLR 1; 26 (French CJ); 206, 226, 231 (Crennan and Kiefel JJ). See also Judicial College of Victoria, *Charter of Human Rights Bench Book* (10 May 2016), 2.2 [18]–[24] <<http://www.judicialcollege.vic.edu.au/eManuals/CHRB/index.htm#57264.htm>>.

85 *Slaveski v Smith* (2012) 34 VR 206; 214–215.

86 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1)

87 Ibid s 4.

88 See *De Simone v Bevnol Constructions and Developments Pty Ltd* (2009) 25 VR 237; *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221.

89 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(j).

90 Ibid (note). The Victorian Government has indicated that it supports the removal of references to 'listing cases' and 'adopting practices and procedures' from the note in s 4(1)(j), as recommended in Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) (recommendation 19). See Department of Justice and Regulation, Government of Victoria, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* (2016) <<http://www.justice.vic.gov.au/>>.

## Charter rights and criminal proceedings

- 3.97 Section 24 of the Human Rights Charter provides for a right to a fair hearing for those charged with a criminal offence and parties to civil proceedings. Section 25 sets out the rights relevant to criminal proceedings, including a set of minimum guarantees. The rights and minimum guarantees relate exclusively to people charged with criminal offences.
- 3.98 The parts of the Human Rights Charter considered here relate to ‘criminal proceedings’, which includes proceedings in the Magistrates’ Court. In accordance with the terms of reference, the Commission’s consideration in this section is confined to criminal proceedings in connection with a criminal trial in the Supreme or County Court.

## Human rights and victims’ rights

- 3.99 There is no reference in section 24 or 25 to victims. The absence of victims from human rights statutes is not unique to Victoria. No equivalent human rights instrument, in either international or domestic jurisdictions, refers to the rights or interests of victims. This reflects the traditional view that people accused of crimes, whose liberty is at stake, need protection from the exercise of state power in the prosecution of crimes against them.<sup>91</sup> In contrast, victims were not viewed as requiring specific protection during criminal proceedings because they are not at risk of losing their freedom.<sup>92</sup>
- 3.100 The Human Rights Charter, now a decade old, derives from the *International Covenant on Civil and Political Rights* 1966 (ICCPR).<sup>93</sup> Section 24 of the Charter is modelled on article 14(1) and section 25 is modelled on article 14(2)-(5). The ICCPR, like the Human Rights Charter, addresses the role of the state and the rights of accused. It thus is binary. Similarly, the fair trial provision in the 1953 *European Convention on Human Rights (European Convention)*, which mirrors article 14 of the ICCPR and sections 24 and 25 of the Human Rights Charter, is also binary.<sup>94</sup>
- 3.101 This binary conception of the fair trial does not reflect modern analysis of the role of the victim participant in the criminal trial, including the triangulation of interests described in [3.35]–[3.39]. It fails to recognise the victim’s interest. While the Commission does not propose that a victim be a party to criminal proceedings, it does consider that the victim’s legitimate legal interest as a participant in proceedings should be legislatively stated and secured.
- 3.102 Victorian courts have not considered the interest of victims when interpreting sections 24 or 25 of the Human Rights Charter. However, the European Court of Human Rights, the House of Lords in England and the Supreme Court of Canada have considered the interest of victims and the meaning of a fair trial.<sup>95</sup>

## Victims’ rights case law

- 3.103 In *Doorson v The Netherlands*<sup>96</sup> the European Court of Human Rights considered whether it was consistent with the accused’s right to a fair trial for a witness, who held real fears of reprisal upon testifying against the accused, to give evidence anonymously. The court noted that, although the right to a fair trial does not explicitly require the interests of witnesses in general, or victims in particular, to be taken into account:

91 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 380. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory*, Information Paper 1 (2015).

92 See Jo-Anne Wemmers, ‘Victims Rights are Human Rights: The Importance of Recognizing Victims as Persons’ (2012) *Temida* 71.

93 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) pt 2; Victoria, *Parliamentary Debates, Legislative Assembly*, 4 May 2006, 1291 (Rob Hulls); Judicial College of Victoria, *Human Rights Bench Book* (10 May 2016), 1.1 [12] <<http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57244.htm>>.

94 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6 (European Convention).

95 For further information about the application of human rights law to victims of crime, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Victims’ Rights and Human Rights: The International and Domestic Landscape*, Information Paper 4 (2015).

96 (Eu Court HR, Chamber, Application No 20524/92, 26 March 1996).

... their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 ... States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.<sup>97</sup>

- 3.104 Keir Starmer, the former Director of Public Prosecutions for England and Wales, has suggested that the *Doorson* decision effectively reads ‘freestanding’ rights for victims as witnesses into the fair trial provisions of article 6, which are ‘capable of practical application in the courtroom’.<sup>98</sup> An alternative view is that the decision requires the interests of victims and witnesses to be built into fair trial principles, rather than creating a freestanding right.<sup>99</sup>
- 3.105 Similarly, in *SN v Sweden*, the European Court of Human Rights stated:
- In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim ... in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.<sup>100</sup>
- 3.106 Both *Doorson* and *SN* involved balancing the right of an accused to examine witnesses, including victims, against the interest of a witness in being provided with special protections when giving evidence. The European Court of Human Rights ruled that, although the right to a fair trial provides an accused with the right to examine witnesses, it does not guarantee an unlimited right to challenge witnesses in person in court.<sup>101</sup> Similarly, courts in the United Kingdom have found that an accused’s right to a fair trial is not imperilled by measures designed to protect vulnerable witnesses when giving evidence or promote equal participation by child witnesses or witnesses with disabilities.<sup>102</sup>
- 3.107 The Supreme Court of Canada has also recognised that there needs to be a ‘just and proportionate balance’ between an accused’s rights and the competing rights of a victim, such as:
- freedom of expression<sup>103</sup>
  - rights of victims to privacy and equality in the context of access to a victim’s medical records<sup>104</sup>
  - rules of evidence designed to protect vulnerable victims, such as children.<sup>105</sup>
- 3.108 The cases described above consider victims as witnesses and whether their interests can be protected while also ensuring a fair trial takes place.

97 *Doorson v Netherlands* (Eu Court HR, Chamber, Application No 20524/92, 26 March 1996) [70].

98 Keir Starmer, ‘Human Rights, Victims and the Prosecution of Crime in the 21st Century’ (2014) 11 *Criminal Law Review* 777, 785.

99 John Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?’ (2005) 68 *Modern Law Review* 737, 760.

100 *SN v Sweden* (Eu Court HR, First Section, Application No 34209/96, 2 July 2002) [47].

101 See *Doorson v Netherlands* (Eu Court HR, Chamber, Application No 20524/92, 26 March 1996); *SN v Sweden* (Eu Court HR, First Section, Application No 34209/96, 2 July 2002); *Bocos Cuesta v The Netherlands* (Eu Court HR, Third Section, Application No 54789/00, 10 November 2005).

102 *R v Camberwell Green Youth Court* [2005] 1 All ER 999, [49]; *R v Pipe* [2014] EWCA Crime 2570; *R v Christian* [2015] EWCA Crime 1582.

103 *R v NS* [2012] 3 SCR 726, [31] (as expressed by wearing a hijab when giving evidence). For further discussion of application of human rights to victims, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Victims’ Rights and Human Rights: The International and Domestic Landscape*, Information Paper 4 (2015).

104 *R v Mills* [1999] 3 SCR 668.

105 See, eg, *R v L (DO)* [1993] 4 SCR 419; *R v F (WJ)* [1999] 3 SCR 569.

- 3.109 There is also a growing body of case law that draws on human rights to justify the obligations of the state to victims, beyond the specific context of the criminal trial. The European Court of Human Rights and courts in the United Kingdom<sup>106</sup> have drawn on the European Convention to uphold obligations on states to have in place and apply effective criminal laws and to prevent offending and victimisation.<sup>107</sup>
- 3.110 This case law illustrates how traditional human rights laws create enforceable rights for victims and could provide a source of guidance for Victorian courts when considering the victim's interest under the Human Rights Charter.
- 3.111 In addition, laws focused specifically on the rights of victims have been enacted in some countries, and at a regional level the European Parliament issued a Directive on the rights of victims in 2012, which is binding on all member countries.<sup>108</sup> Some countries require courts to take the rights of victims into account in criminal proceedings. For example, in Canada, the recently enacted Victims' Bill of Rights requires that, to the extent possible, legislation 'must be construed and applied in a manner that is compatible' with the Victims' Bill of Rights.<sup>109</sup> In the United States, the federal *Crime Victims' Rights Act*<sup>110</sup> provides that a victim or their representative may assert in court the rights contained in the Act and, if a right is denied, may apply to a higher court for a review.<sup>111</sup> The victims are not parties, and in practice they must rely on prosecutors and judges to uphold their obligations to inform and afford victims their rights.<sup>112</sup>

### Should the Human Rights Charter contain a right for victims?

- 3.112 The Commission considers that a modern criminal trial process that is fair is one that recognises and accommodates the interest of victims. This chapter has described the substance of this interest in terms of the rights and entitlements that attach to the interest, including being acknowledged and treated with respect, provided with information and support, afforded a measure of participation, being protected from unnecessary trauma, intimidation and distress and unjustified interference with privacy, and being able to seek reparation.
- 3.113 The Commission considers that the interest of victims, and the rights and entitlements that arise as a result of that interest, should be explicitly recognised in Victoria's Human Rights Charter. Giving express recognition to this is the next step in the evolution of the criminal trial process.

<sup>106</sup> Courts in the United Kingdom are obliged to apply the European Convention: *Human Rights Act 1998* (UK) s 2(1).

<sup>107</sup> Courts have drawn on the right to life, the prohibition against torture or cruel, inhuman or degrading treatment, and the right to respect for privacy and family life in finding that states have obligations to: have effective criminal laws in place to deter offending (see eg *X and Y v Netherlands* (Eu Court HR, Chamber, Application No. 8978/80, 26 March 1985) [22], [27]); ensure that criminal laws are effectively implemented, through prompt, serious and effective investigations and, where there is sufficient evidence, prosecution (see eg *Osman v United Kingdom* (Eu Court HR, Grand Chamber, Application No. 87/1997/871/1083, 28 October 1998) [115]); and do 'all that could be reasonably expected of them' to circumvent a clear and immediate risk to a victim's life (see eg *Osman v United Kingdom* (Eu Court HR, Grand Chamber, Application No. 87/1997/871/1083, 28 October 1998) [115]; *Opuz v Turkey* (Eu Court HR, Third Section, Application No.33401/02, 9 June 2009) [160]-[176]).

<sup>108</sup> *Directive 2012/29EU of the European Parliament and of the Council of the 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA* (2012) OJ L 315/57.

<sup>109</sup> *Victims Bill of Rights Act*, SC 2015, c 13, s 22(1). The following legislation is excluded from the application of this section: *Canadian Bill of Rights*, *Canadian Human Rights Act*, *Official Languages Act*, *Access to Information Act* and the *Privacy Act*. The rights must be applied in a manner not likely to interfere with police or prosecutorial discretion, cause excessive delay, compromise an investigation or prosecution, or otherwise interfere with the administration of justice: s 20.

<sup>110</sup> *Crime Victims' Rights Act* 18 USC § 3771 (2004).

<sup>111</sup> *Ibid* § 3771 (d)(1), d(3) (however, 'in no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter'). A victim may seek to reopen a plea or sentencing hearing in accordance with § 3771 (d)(5).

<sup>112</sup> Erin Blondel, 'Victims' Rights in an Adversary System' (2009) 58 *Duke Law Journal* 237, 259 (the *Crime Victims' Rights Act* does not confer party status on victims. It places obligations on prosecutors and trial courts to vindicate victims' rights, often in ways which sit uncomfortably with the principles and obligations of the parties and the court in an adversarial trial).

- 3.114 Victoria's Human Rights Charter does not provide an exhaustive description of the features of a fair trial. As noted earlier in this chapter, the common law right of an accused person not to be convicted other than after a fair trial is an overarching principle of fundamental importance in criminal proceedings.<sup>113</sup> The right to a fair hearing in the Human Rights Charter reflects, and reinforces, this common law right.<sup>114</sup> The minimum guarantees of accused persons contained in section 25 of the Charter represent elements of the right to a fair trial<sup>115</sup> but do not expressly limit it.
- 3.115 The Commission considers that incorporating the interest of victims into section 25 of the Human Rights Charter would add to the integrity of a fair trial. The Commission envisages that this would be achieved through a separate provision, modelled on section 25, recognising a right for victims in criminal proceedings, supplemented by a series of minimum guarantees.
- 3.116 Expressly recognising a right of victims in the Human Rights Charter would make it clear that their interest must be protected and secured in the criminal trial process. This would place obligations on the courts, which are not required to comply with the Victims' Charter Act. It would also bring the rights of victims into consideration in statutory drafting and interpretation processes and the decision making of public authorities. The Commission acknowledges that care needs to be taken in framing the right to contain it to the context of criminal proceedings and distinguish it from the other Charter rights.

#### Enforcement of Human Rights Charter rights by victims

- 3.117 The Human Rights Charter does not create a freestanding right for an individual to pursue legal action for breach of a Charter right.<sup>116</sup> At present, a person can bring proceedings for a breach of a Charter right only if they have an existing right to bring a claim on other grounds (commonly referred to as 'piggy-backing').<sup>117</sup> This aspect of the Human Rights Charter is difficult to apply in practice, and has been widely criticised.<sup>118</sup>
- 3.118 If a right for victims were included in Part 2 of the Human Rights Charter, it would allow victims to add an alleged breach of this right to an existing cause of action. As discussed in Chapter 4, the Victims' Charter Act does not create a legal right or cause of action and does not provide grounds for judicial review.<sup>119</sup>
- 3.119 A review of the Human Rights Charter by Michael Brett Young, *From Commitment to Compliance: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (the Brett Young Review), called for the creation of a separate cause of action for breach of a Human Rights Charter right. It recommended amending the Human Rights Charter to:

enable a person who claims a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, to either apply to the Victorian Civil and Administrative Tribunal for a remedy, or rely on the Charter in any legal proceedings...

If the Tribunal finds that a public authority has acted incompatibly with a Charter right, it should have the power to grant any relief or remedy that is considers just and appropriate, excluding the power to award damages.<sup>120</sup>

113 *DPP v Mokbel* [2010] VSC 331 (5 August 2010) [161]–[163].

114 *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 [38] (Warren CJ); *R v Falcone* (2008) 190 A Crim R 440 [60].

115 *Ibid* [40] (Warren CJ).

116 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39.

117 *Ibid* s 39(1). See also Michael Brett Young, *From Commitment to Compliance: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 119.

118 Michael Brett Young, *From Commitment to Compliance: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 119.

119 *Victims' Charter Act 2006* (Vic) s 22.

120 The awarding of damages was not recommended. See Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 133 (recommendation 27(a)).



- 3.120 The Brett Young Review also recommended that an individual who claims that a decision of a public authority is incompatible with human rights, or has been made without proper consideration of human rights, be explicitly permitted to seek judicial review of that decision. In its response to the review, released on 22 July 2016, the Government stated that this and related recommendations remain under further consideration.<sup>121</sup>
- 3.121 If these recommendations become law, and a right for victims is inserted into Part 2 of the Human Rights Charter, victims would be able to assert their right in criminal proceedings that have already started. Alternatively, they could commence proceedings for an alleged breach of their right by a public authority in the Victorian Civil and Administrative Tribunal. Victims who perceive a failure by a public authority to take their right into account in decision making would be able to seek judicial review of the decision in the Supreme Court.
- 3.122 Careful consideration would need to be given to how this might affect ongoing criminal proceedings. Any amendment must be workable and consistent with the right to a fair trial. The Commission envisages that a right secured to victims by an amendment to the Human Rights Charter should be a matter for the trial judge to apply. It must not undermine the finality of decisions made by courts in criminal proceedings, or otherwise lead to a collateral or separate process or fractured proceedings. It should be capable of being pursued within the trial. It is not in the interests of victims, the accused or the community to require victims to commence proceedings in the Victorian Civil and Administrative Tribunal and delay criminal proceedings.
- 3.123 If the above recommendations of the Brett Young review do not become law, section 6(2) of the Human Rights Charter would still require judicial officers to enforce the victim's Charter right in the course of any criminal proceedings, alongside those of the accused.<sup>122</sup>
- 3.124 In addition, the Commission considers that including a right for victims in the Human Rights Charter clearly signals the importance of the victim's role as a participant in the criminal trial process.
- 3.125 The Brett Young Review was a general review of the Charter, not specifically directed to criminal proceedings, and the Commission makes no comment on it or its recommendations, as it is beyond the Commission's terms of reference.

## Recommendation

- 2 Part 2 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* should be amended to include a right for a victim of a criminal offence that contains the following minimum guarantees:
- (a) to be acknowledged as a participant (but not a party) with an interest in the proceedings
  - (b) to be treated with respect at all times
  - (c) to be protected from unnecessary trauma, intimidation and distress when giving evidence.

121 Department of Justice and Regulation, Government of Victoria, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act (2016)* <<http://www.justice.vic.gov.au/>>.

122 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 6(2)(b).





# Consolidating the role in practice

- 44** Introduction
- 45** Cultural change
- 48** Education and training
- 56** Compliance with Victims' Charter principles
- 78** System-wide monitoring and review
- 81** A coherent legislative and policy framework

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## 4 Consolidating the role in practice

### Introduction

- 4.1 Considerable law and policy reform has been directed towards improving the criminal trial process for victims. The cumulative effect is that the victim's role has been enhanced from, at most, that of a witness at the trial to that of a participant at all stages of the process.
- 4.2 There have been significant improvements as a result of the reforms. Survey results have charted growing levels of satisfaction among victims with their experience of the criminal trial process in recent years.<sup>1</sup> A number of victims told the Commission that they had been greatly assisted by the work of a particular social worker, informant or lawyer.
- 4.3 In many cases, however, the promise of the reforms conveyed in legislation and official policies is not being realised. Concerns raised by victims have overwhelmingly been directed at the conduct of lawyers and judicial officers. Too often, victims feel marginalised and offended by the attitude conveyed by prosecution or defence lawyers, and by their treatment in the courtroom generally. Their accounts of disrespectful conduct—whether it is inadvertent or deliberate—are consistent with comments made by support workers who have observed the impact on their clients.
- 4.4 There are also lapses in the continuity and consistency of services provided to victims across Victoria. Some are due to a failure to implement legislation or official policy. Others show that the legislation or policy itself should be revised.
- 4.5 Most often, the Commission was told that there is a need for cultural change. Criminal justice agencies, the legal profession and judges need to see victims differently and treat them accordingly.
- 4.6 This chapter discusses initiatives to foster cultural change across the criminal justice system in order to instil greater respect for victims and wider recognition of their rights and entitlements.
- 4.7 These initiatives will strengthen the existing foundation of law and practice and build a base for the future development of the victim's role in the criminal trial process.
- 4.8 Considerations and recommendations concerning specific rights and entitlements are discussed in Chapters 5–9.

## Cultural change

### The gap between law and practice

- 4.9 The Commission has been told by many of the victims who have contributed to this review about the contrast between the promise of the reforms and victims' actual experiences of the criminal trial process.
- 4.10 Parents of a murder victim attending the trial of the accused were spoken to by a police officer in a way that made them feel like they had 'stepped out of kinder'.<sup>2</sup> In another case, a victim of sexual offences as a child was asked by a defence barrister about her sexual history, about when she stopped loving her father (the accused), and about when she started menstruating.<sup>3</sup> A prosecution lawyer yelled at the victim, who had asked after her health during a break in the trial, telling the victim not to talk to her because it could cause a mistrial.<sup>4</sup> A victim was distressed to hear a sentencing judge tell an offender, who had pleaded guilty to one sexual offence but had originally been charged with three more serious offences, that 'one indiscretion has brought you here'.<sup>5</sup> These are just a few of the stories that the Commission heard from people whose feelings, needs and interests were disregarded or overlooked in the criminal trial process.
- 4.11 Victim support specialists frequently observe the trauma that victims experience upon being marginalised in this way. They recounted more examples of poor treatment, particularly as experienced by victims in the witness box.
- 4.12 Loddon Campaspe Centre Against Sexual Assault referred in its submission to a nine-year-old victim who, despite having access to support services and being able to give evidence at a special hearing, was 'unlikely to have received such cold and offensive treatment as she experienced from the defence lawyer, at any other time in her life, apart from during the child sexual offences'.<sup>6</sup> Another example, mentioned in consultations with victim support specialists, was of a barrister who remarked that he could see why the victim's husband left her.<sup>7</sup>
- 4.13 The Commission was also told that judges do not always intervene to protect witnesses from unfair, unreasonable and offensive lines of questioning.<sup>8</sup> They have permitted practices that further humiliate and traumatise victims, as well as wasting time.<sup>9</sup>
- 4.14 The comments made in submissions and during consultations echo those recorded in a recent report by the Australian Institute of Family Studies on *Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice*:
- participants consistently identified a disjuncture between reforms as they are written, and as they occur in practice, in addition to a lack of uniformity in the adoption of reforms across various institutions.<sup>10</sup>
- 4.15 The report by the Australian Institute of Family Studies drew on earlier findings by the Australian Law Reform Commission. In its 2010 report on family violence, the Australian Law Reform Commission said that:

2 Submission 22 (Joy and Roger Membrey).

3 Consultation 10 (A victim).

4 Ibid.

5 Consultation 28 (Laurie Krause).

6 Submission 30 (Loddon Campaspe Centre Against Sexual Assault).

7 Consultation 50 (Witness Assistance Service, OPP Victoria).

8 Submission 30 (Loddon Campaspe Centre Against Sexual Assault).

9 Submission 34 (Northern Centre Against Sexual Assault).

10 Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice—Implementation, Current Practice and Future Directions' (Research Report No 27, Australian Institute of Family Studies, 2014) 57. The participants were counsellor/advocates, police officers, prosecutors, defence counsel, members of the judiciary and other professionals across three Australian jurisdictions.

Despite extensive changes to law and procedure, research continues to highlight a gap between written law and its practice—referred to as an ‘implementation gap’ ... Some commentators question the over-reliance on, or confidence in, legislative change alone to bring about substantive changes for women and children as complainants in sexual offences.<sup>11</sup>

- 4.16 Victims feel marginalised today, a decade after the *Victims’ Charter Act 2006* (Vic) first stated in statute that criminal justice agencies should treat them with courtesy, respect and dignity, be responsive to their needs, and keep them informed about the investigation, prosecution and the court process. That said, there are significant variations in victims’ experience of the criminal justice system and it is important to recognise and respond to them.
- 4.17 A survey of victims in 2014, for example, revealed that almost half of the respondents (47 per cent) had no contact with the prosecutor at all, but that the proportion was much less for those whose case was prosecuted by the Office of Public Prosecutions (20 per cent) or who were victims of sexual assault (31 per cent) and rape (25 per cent). It also showed that sexual assault and rape victims ‘overwhelmingly’ felt the prosecutor met their needs.<sup>12</sup> Victims of these crimes have been targeted by sweeping reforms to reduce the risk of being traumatised by the criminal trial process<sup>13</sup> and also have access to the Office of Public Prosecutions’ Witness Assistance Service, which supports victims and witnesses of serious crime through the court process.
- 4.18 Whether a victim’s expectations are met often depends on the attitude and skills of individuals in the criminal justice system, including the police informant, members of the prosecution team, the defence lawyer, the judicial officers hearing the case and the victim support workers.<sup>14</sup> Proposals to address the inconsistent implementation of laws and policies should be directed towards the behaviour and attitudes of individuals and the values of the organisations that employ them, or with which they are connected. To be effective, law reforms must be accompanied by cultural change—the process of changing attitudes and practices.
- 4.19 This is not a novel conclusion. In 1985, Judith Shapland, Jon Willmore and Peter Duff recognised that achieving a victim-oriented system depends more on changing attitudes than structural changes in the criminal justice system.<sup>15</sup> More recently, Professor Matthew Hall has argued that practical reforms will fail without changing ‘occupational cultures’ in individual courts, the legal profession and the legal community in general.<sup>16</sup>
- 4.20 Although views differed about the extent of the problem, there was broad acknowledgment in submissions and during consultations that cultural change is at least part of the answer.
- 4.21 The Victorian Bar and Criminal Bar Association observed that reforms designed to reduce the trauma and distress experienced by child victims, victims with a cognitive impairment, and victims of sexual offences and family violence, have been accompanied by a level of cultural change that has ‘dramatically changed the way that criminal trials in Victoria are conducted’.<sup>17</sup> This position is supported by the Child Witness Service, which stated that there has been cultural change in relation to cross-examination of child witnesses and intervention by the judiciary, but there is still some way to go.<sup>18</sup>

11 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1125.

12 Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (2015), 26–8. 73 per cent of victims whose case was prosecuted by the OPP felt that the prosecutor met their needs: 27.

13 *Crimes (Sexual Offences) Act 2006* (Vic). See also Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011).

14 Nicole Bluett-Boyd and Bianca Fileborn, ‘Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice—Implementation, Current Practice and Future Directions’ (Research Report No 27, Australian Institute of Family Studies, 2014) 50; Consultation 23 (Court Network staff and a Court Networker—County Court).

15 Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower Publishing 1985) 181.

16 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 197.

17 Submission 29 (Victorian Bar and Criminal Bar Association).

18 Consultation 18 (Child Witness Service, Department of Justice and Regulation).

- 4.22 The Director of Public Prosecutions (DPP) observed that there has been ‘considerable cultural change in the way the legal profession interacts with victims’ and said that this process should continue through educational programs.<sup>19</sup>
- 4.23 Workers from community-based organisations were not as positive in their assessments of how much cultural change has already occurred. An experienced Court Network volunteer said there had been little change over the past 20 years, notwithstanding legislative efforts to improve the criminal trial process for victims, and for victims of sexual offences in particular.<sup>20</sup> Similar views were expressed by support workers from Centres Against Sexual Assault and Victims Assistance Program providers.<sup>21</sup>
- 4.24 Staff of the Office of Public Prosecutions (OPP) doubted that any cultural change is evident from the manner in which defence lawyers—particularly those lacking in experience and skills—cross-examine witnesses.<sup>22</sup> Support for this observation is found in the many comments made to the Commission about inappropriate questions being asked of victim witnesses in the courtroom.

### Achieving cultural change

- 4.25 Cultural change is achieved by a combination of means. No single method will be effective. For the most part, this is an operational matter for each criminal justice agency and requires strong leadership and systems, processes and plans to ensure that expectations are clear and that the philosophy is embedded in every aspect of the workplace. Victoria Police, for example, is implementing a strategic framework for enhancing service delivery to victims, including:
- new customer service standards
  - better referral pathways
  - victim-centred thinking and practice
  - new reporting and accountability measures.<sup>23</sup>
- 4.26 This report focuses on system-wide approaches to achieving cultural change in the expectation that they may spearhead appropriate strategies within individual organisations. The Commission proposes three system-wide strategies, which are explained in the remainder of this chapter:
- *Education and training*—Delivering education and training programs that give lawyers and judicial officers a deeper understanding about victims’ needs, entitlements and perspectives; why cultural change is necessary; and what it should look like in practice.
  - *Compliance with the Victims’ Charter principles*—Building up incentives for criminal justice agencies to comply with victim-oriented law and policy through stronger accountability mechanisms that introduce closer monitoring, increased transparency, upgraded complaint-handling processes, and a scheme to review key prosecutorial decisions.
  - *A coherent legislative and policy framework*—Conveying the substance of the victim’s role as a participant and the obligations on criminal justice agencies to inform, consult and include victims in the criminal trial process.

19 Submission 23 (DPP).

20 Consultation 23 (Court Network staff and a Court Networker—County Court).

21 Roundtables 1 (Victim support specialists, Mildura), 7 (Victim support specialists, Melbourne), 8 (Metropolitan Centres Against Sexual Assault).

22 Consultation 39 (OPP).

23 Victoria Police, *Future Directions for Victim-Centric Policing* (August 2015); *Corporate Plan 2015–18* (September 2015).

## Education and training

4.27 The importance of achieving cultural change through education and training was stressed by a number of contributors to the review<sup>24</sup> and was underscored by the following comment from the Centre for Innovative Justice:

if a concerted education and training program were the only outcome of the VLRC's review, this alone could have a significant and tangible effect.<sup>25</sup>

4.28 Training and education about victims should be directed towards everyone within the criminal justice system, in particular judicial officers, defence and prosecution lawyers, police and victim support workers. Information about victim-oriented laws, and the impacts and contexts of victimisation should be widely publicised to police, lawyers and judicial officers.<sup>26</sup>

### A shared vision of the victim's role

4.29 For cultural change to be realised it is crucial that providers of education and training programs, and those who work in the criminal justice system, have a shared vision of the victim's role in the criminal trial process.

4.30 The introduction of the Victims' Charter Act was a significant milestone in bringing about cultural change. It enunciated principles with which criminal justice agencies must comply, brought together victims' rights and entitlements in the form of agency obligations, raised the status of victims in the criminal justice system, and legitimised changes to their role in the criminal trial process.

4.31 In Chapter 3, the Commission has recommended that the evolution of the victim's role be acknowledged in the objects of the Victims Charter Act and reinforced by recognising a right for victims in criminal proceedings in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter). This statutory recognition of the victim's role should guide education and training programs as well as sending a signal to the legal profession that victims have a legitimate place in the criminal trial process and should be treated accordingly. .

### Topics and themes

4.32 The Commission received numerous suggestions about the content of education and training programs to foster cultural change. Broadly, they should cover the nature and purposes of victim-oriented law reforms and related practice and procedures, and the impacts of victimisation and the criminal trial process on victims.

4.33 It has been proposed that material on the nature and purposes of victim-oriented reforms should give particular attention to:

- evidence-related provisions designed to protect victims, to ensure such measures are enforced consistently<sup>27</sup>
- questioning victims, including how to test victims' evidence in an appropriate manner, how to determine whether questioning is improper or inappropriate and how to intervene when this occurs<sup>28</sup>
- how to be respectful towards victims.<sup>29</sup>

24 Submissions 19 (Dr Tyrone Kirchengast, University of New South Wales), 32 (Professor Edna Erez, University of Illinois at Chicago), 34 (Northern Centre Against Sexual Assault).

25 Submission 36 (Centre for Innovative Justice).

26 Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice—Implementation, Current Practice and Future Directions, (Research Report No 27, Australian Institute of Family Studies, 2014) 39; Submission 19 (Dr Tyrone Kirchengast, University of New South Wales).

27 Submission 34 (Northern Centre Against Sexual Assault). See also Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice—Implementation, Current Practice and Future Directions' (Research Report No 27, Australian Institute of Family Studies, 2014) 39, 40–1, 57, 58.

28 Consultations 15 (DPP), 16 (Judges of the Country Court of Victoria), 44 (Kristy McKellar), 57 (Victorian Legal Services Commissioner and CEO Victorian Legal Services Board); Roundtable 14 (Legal practitioners, Ballarat); Submission 14 (Victims of Crime Commissioner, Victoria).

29 Consultation 39 (OPP); Roundtable 3 (Victim support specialists, Geelong).

- 4.34 Education and training activities about victimisation and the criminal trial process could encompass:
- having a trauma-informed approach to dealing with victims<sup>30</sup>
  - the causes and effects of victimisation, and in particular family violence and sexual assault, and how it relates to a victim's presentation during the criminal trial process<sup>31</sup>
  - understanding the origins of, and addressing, problematic attitudes towards victims of sexual assault and family violence<sup>32</sup>
  - the needs, circumstances and barriers faced by victims from specific groups in the community, including Victorian Aboriginal communities, people with disabilities or mental illness, children and young people and people from culturally and linguistically diverse backgrounds.<sup>33</sup>
- 4.35 Victims should be able to easily access information about the obligations owed to them and their entitlements.<sup>34</sup> This information should be promoted by a public awareness campaign.

## Delivery

- 4.36 Training and education about victims should be directed towards everyone within the criminal justice system. However, the following discussion concerns the legal profession and the judiciary. There are two reasons for this:
- the actions of lawyers and judges directly affect the conduct of criminal proceedings and, therefore, the victim's role in the criminal trial process
  - almost all of the comments made to the Commission about the need for cultural change through education and training were directed at lawyers, judges and magistrates.
- 4.37 That said, the Commission recognises that programs should be interdisciplinary where possible. Lawyers, judges and magistrates should understand the psychological impacts of victimisation; victim support workers need to know about the criminal justice process. There might also be scope to involve victims in delivering training and education about the experience of victimisation and their needs and expectations of the criminal trial process.<sup>35</sup>
- 4.38 Not all training and education activities need be delivered formally. Information resources should be widely available, to police, lawyers and judicial officers, for independent learning and to provide guidance for these professionals in the course of their work.<sup>36</sup>
- 4.39 On-the-job training that broadens the perspectives of lawyers could occur by encouraging them to maintain varied legal practices. The South Australian Commissioner for Victims' Rights, and lawyers consulted by the Commission, observed that acting for both accused people and victims encourages a more informed approach to dealing with victims.<sup>37</sup>

30 Consultations 18 (Child Witness Service, Department of Justice and Regulation), 49 (Commissioner of Victims Rights, New South Wales); Roundtable 8 (Metropolitan Centres Against Sexual Assault).

31 Submissions 15 (Kristy McKellar), 36 (Centre for Innovative Justice); Consultation 48 (Victoria Police SOCIT, Wodonga); Roundtable 8 (Metropolitan Centres Against Sexual Assault).

32 Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice—Implementation, Current Practice and Future Directions' (Research Report No 27, Australian Institute of Family Studies, 2014) 51; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1214, recommendation 26–3; Roundtable 8 (Metropolitan Centres Against Sexual Assault).

33 Submissions 18 (Women with Disabilities Victoria), 26 (Victoria Police).

34 Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice—Implementation, Current Practice and Future Directions' (Research Report No 27, Australian Institute of Family Studies, 2014) 39; Submissions 19 (Dr Tyrone Kirchengast, University of New South Wales), 34 (Northern Centre Against Sexual Assault).

35 Submission 15 (Kristy McKellar).

36 Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice—Implementation, Current Practice and Future Directions' (Research Report No 27, Australian Institute of Family Studies, 2014) 39; Submission 19 (Dr Tyrone Kirchengast, University of New South Wales).

37 Consultations 2 (Commissioner for Victims' Rights, South Australia), 51 (Criminal Law Section, Law Institute of Victoria); Roundtable 2 (Legal practitioners, Mildura).



- 4.40 The Law Institute of Victoria suggested that peer observation and feedback could promote cultural change and ensure consistent practices, particularly among legal professionals. Peer observation and training could be:
- between lawyers
  - between judicial officers
  - between judicial officers and lawyers.<sup>38</sup>
- 4.41 Although education and training can be delivered in a variety of ways, knowledge and skills regarding the role of victims in the criminal trial process should be core requirements for legal and other professionals working in the criminal justice system. This can be achieved only with the support of the legal profession and education and training providers.
- 4.42 Several individuals and organisations consulted by the Commission argued that education about the needs of victims and victim-oriented laws should start in university and be maintained throughout a legal career.<sup>39</sup> They have pointed to the need to actively encourage legal professionals to undertake victim-centred training, and create an incentive for training providers to deliver it.
- 4.43 One approach would be to incorporate victim studies into university law courses and entry-level training. Another would be to incorporate information about victims, and laws about victims, into continuing legal education for professionals.<sup>40</sup> These approaches are discussed below.

### Academic courses and entry-level training

- 4.44 Professionals should learn about the perspectives and rights of victims of crime at university. A person who wishes to practise law in Victoria must complete a course of study that complies with the requirements of the *Legal Profession Uniform Admission Rules 2015* and is delivered by one of the eight universities approved by the Victorian Legal Admissions Board to provide academic law courses.<sup>41</sup> The course must include 11 compulsory subjects, among which are units on evidence and criminal law and procedure.<sup>42</sup>
- 4.45 After an approved academic course, the person must then complete practical legal training, either as supervised legal training or by completing a practical legal training course delivered by an approved provider.<sup>43</sup> In doing so, they have a choice of practice areas in which to develop competencies, including criminal law practice.<sup>44</sup>
- 4.46 The Commission suggests that there is scope for the study of victim-oriented laws to be incorporated into evidence and criminal law subjects. Most of the eight approved universities offer at least one unit on victims, though not as part of the core law curriculum.<sup>45</sup> Law students who do not, or cannot, select such units as electives may not be exposed to victims' interests and perspectives until they encounter them in practice.

38 Consultation 51 (Criminal Law Section, Law Institute of Victoria).

39 Consultations 18 (Child Witness Service, Department of Justice and Regulation), 21 (Victoria Police), 45 (Victims Support Agency, Department of Justice and Regulation), 49 (Commissioner of Victims Rights, New South Wales), 55 (Edna Erez, University of Illinois at Chicago).

40 Consultation 26 (Magistrate Stella Stuthridge).

41 The University of Melbourne, Monash University, Deakin University, La Trobe University, RMIT University, Australian Catholic University and the Swinburne University of Technology.

42 *Legal Profession Uniform Admission Rules 2015* (Vic) sch 1.

43 At present there are four approved providers: Leo Cussen Institute, The College of Law, Australian National University and Monash University.

44 *Legal Profession Uniform Admission Rules 2015* (Vic) sch 2.

45 See, eg, 'Crime, Victims and Justice' at Deakin University; 'Victimology: Victims, Justice and the Law' at La Trobe University; 'Victims, Justice and the Law' at Monash University. These subjects are offered as electives within social science disciplines and are usually taken as part of a degree in Criminology, Arts, or a double degree with Laws: information provided on 27–28 May 2016 by Dr Clare Farmer (Deakin University); Dr Tarryn Phillips and Dr Susanne Davies (La Trobe University); and Mary Iliadis (Monash University).



- 4.47 Bringing about cultural change requires leadership. The Victorian Legal Admissions Board has responsibility for accrediting law courses and providers of practical legal training in Victoria. As such, it is well placed to encourage the greater integration of the study of victims' interests, rights and entitlements and the experience of victimisation into legal education and training.
- 4.48 The Board has established an Academic Course Appraisal Committee to accredit, monitor and review academic law courses, and a Practical Legal Training Committee to accredit, monitor and review practical legal training providers. In performing these delegated functions, the committees must take into account any appraisal criteria endorsed for use in other Australian jurisdictions and may have regard to any matter they consider material.<sup>46</sup>
- 4.49 In practice, Victoria would be unlikely to depart from existing appraisal criteria and other legal training requirements if doing so would create inconsistencies with other jurisdictions. A nationally consistent approach to the academic and practical legal training requirements for admission to the legal profession, the accreditation and appraisal of academic and practical legal training institutions and courses, and other matters related to admission to the legal profession, is fostered by the Law Admissions Consultative Committee (LACC).
- 4.50 The Victorian Legal Admissions Board is a member of the LACC, along with other representatives of law admitting bodies, the Committee of Australian Law Deans, the Australasian Professional Legal Education Council and the Law Council of Australia. It reports to the Australian and New Zealand Council of Chief Justices.<sup>47</sup> Through its membership of the LACC, the Victorian Legal Admissions Board could advocate for the study of victims' interests, rights and entitlements, and their role in the criminal trial process, to be required of all candidates for admission to the profession.

## Recommendation

- 3** The Victorian Legal Admissions Board, through its membership of the Law Admissions Consultative Committee, should advocate for the education and training requirements for admission to the legal profession to include the study of law and procedures relevant to victims, and the causes and effects of victimisation.

## Post-admission development and training

### Lawyers

- 4.51 Presently, few—if any—professional development courses for criminal lawyers in Victoria specifically address the experience and rights of victims in the criminal justice system.<sup>48</sup> The discussion below considers ways of generating demand for training in victim-related matters through regulation and by increasing the value of this training to lawyers working in the criminal justice system.

<sup>46</sup> *Legal Profession Uniform Admission Rules 2015* (Vic) rr 7(2)(b), 8(3)(b). The Victorian Legal Admissions Board has delegated its powers under rr 7 and 8 to the two committees: <<http://www.lawadmissions.vic.gov.au/find/about+the+victimian+legal+admissions+board>>.

<sup>47</sup> Law Council of Australia. *Law Admissions Consultative Committee* <<http://www.lawcouncil.asn.au/LACC/>>.

<sup>48</sup> A search of professional development courses offered to lawyers at the time of writing did not identify any that highlighted victim-related topics in the context of criminal proceedings.

### Regulatory requirements

- 4.52 A lawyer who engages in legal practice must hold a current practising certificate. With the certificate comes an obligation to complete 10 continuing professional development (CPD) activities during each year of practice. The number and type of activities are determined by the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* and the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (the CPD Rules). The CPD Rules confer on the Legal Services Board powers regarding certification and verification that the CPD requirements have been met, rectification when they have not been met, and exemptions.
- 4.53 The Board has delegated its powers under the CPD Rules to the Law Institute of Victoria (for solicitors) and the Victorian Bar (for barristers). The delegated powers must be exercised in accordance with the Board's Continuing Professional Development Policy.
- 4.54 Both the CPD Rules and the Board's Continuing Professional Development Policy are directed to professional development in general areas of knowledge and expertise across the profession and do not specify particular subjects that must be completed. As such, these instruments may be unsuitable as a means of encouraging victim-related training for lawyers working in the criminal justice system.
- 4.55 Nevertheless, the Legal Services Board can appropriately influence the content of professional development training for newly qualified barristers. The CPD Rules for barristers state that the Board may specify that barristers undertake particular CPD activities within the first three years of practice.<sup>49</sup> The Board could exercise its power to require barristers practising in criminal law to complete such training within their first three years of practice. The Board could encourage the Victorian Bar to require that all newly admitted barristers have knowledge and skills in:
- victims' rights
  - the experience of victimisation
  - evidentiary provisions designed to protect victims from trauma
  - how to question victims and test their evidence in an appropriate, respectful manner.

## Recommendation

- 4 The Legal Services Board should take a lead role in encouraging barristers practising in criminal law to receive victim-related professional development training including, if necessary, exercising its power under the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* to specify that they must complete such training within their first three years of practice.

### Action by professional associations

- 4.56 There is limited scope to use regulatory mechanisms to bring about cultural change through education and training. It requires action by the profession itself. The challenge is to give lawyers incentives to undertake professional development activities that develop their awareness and skills in dealing with victims.

- 4.57 Those who are employed by investigatory, prosecuting and victims' services agencies, and are therefore required to comply with the Victims' Charter in the course of their professional responsibilities, should receive the necessary professional development from their employers. Defence lawyers currently have no such legal obligations to victims and less incentive to acknowledge the victim's role in the criminal trial process as being more than that of a witness for the prosecution.
- 4.58 The Commission considers that the Law Institute of Victoria and the Victorian Bar should encourage lawyers practising in criminal law to develop their competencies in victim-oriented laws and dealing with victims. This could be achieved by making these competencies a requirement of accreditation as a criminal law specialist.
- 4.59 The Law Institute of Victoria is a training provider and also operates an Accredited Specialisation scheme in criminal law. The scheme is open to solicitors and barristers who have at least three years experience in criminal law and five years practising experience in total. Candidates are assessed on their knowledge of:
- the procedure and practice of the Supreme, County, Magistrates', Children's and Coroner's Courts
  - substantive criminal law
  - elements of crime
  - crime defences.<sup>50</sup>
- 4.60 Candidates may be examined on aspects of the law that apply to victims, such as victim impact statements and the *Victims of Crime Assistance Act 1996* (Vic).<sup>51</sup> A requirement to demonstrate knowledge and skills in victim-related law and in dealing with victims could build on the competencies that are already specified.
- 4.61 The Victorian Bar has introduced an accreditation scheme for criminal barristers, known as the Indictable Crime Certificate. Launched in October 2014, and the first of its kind in Australia, the Indictable Crime Certificate requires barristers seeking certification to 'undertake education, professional experience and assessment components, as well as an ongoing quality maintenance process'.<sup>52</sup>
- 4.62 An Indictable Crime Certificate Committee oversees the content and administration of the certificate and administers rules about granting, reviewing, suspending or revoking certificates. It also performs a complaints function that allows people to give feedback about the behaviour of barristers. The Victorian Bar and Criminal Bar Association said the Indictable Crime Certificate scheme was introduced in part as a quality assurance mechanism to alleviate concerns raised by victims and others about the professional standards of some barristers appearing in criminal trials.<sup>53</sup>
- 4.63 As suggested above regarding the Law Institute of Victoria's criminal law accreditation scheme, the education and professional experience required of candidates for the Indictable Crime Certificate could specifically require the candidate to have skills and knowledge in victim-related law and in dealing with victims.

50 Law Institute of Victoria, *Accreditation Specialisation Application Guidelines—Criminal Law* (2016) <<http://www.liv.asn.au/Professional-Development/Accredited-Specialisation/Areas-of-Specialist-Accreditation/Criminal-Law.aspx>>.

51 Ibid.

52 Victorian Bar, *Annual Report 2014* (2014) 5.

53 Consultation 54 (Victorian Bar and Criminal Bar Association).

### *Incentives through access to public funding*

- 4.64 Victoria Legal Aid and the OPP could also lead cultural change through education and training.
- 4.65 Being accredited as a criminal law specialist or obtaining an Indictable Crime Certificate can have direct consequences for criminal lawyers who wish to work on matters funded by Victoria Legal Aid or be briefed by the OPP.
- 4.66 In 2014–15, 62 per cent of grants of legal assistance in criminal law cases under the *Legal Aid Act 1978* (Vic) were assigned to private lawyers.<sup>54</sup> These lawyers must meet entry requirements set by Victoria Legal Aid and be employed by a firm that is a member of the Indictable Crime Panel, established under section 29A of the Legal Aid Act. Every firm on the panel must employ at least one approved lawyer who has demonstrated strength in the experience, skill and capacity required, and is an Accredited Specialist in criminal law.<sup>55</sup>
- 4.67 The OPP briefs external barristers for most trials. In 2014–15, external barristers were briefed by the OPP in 95 per cent of County Court trials and 52 per cent of Supreme Court trials.<sup>56</sup> External barristers are required to abide by the OPP’s framework for key advocacy competencies which sets out expectations regarding behaviour and ethics, knowledge of the law, preparation, advocacy skills, and adherence to the DPP’s policies and directions.<sup>57</sup> The competencies listed under ‘professional behaviours and ethics’ include specific requirements to respect victims and ensure that they are kept informed and understand the criminal process, in compliance with the Victims’ Charter Act.<sup>58</sup>
- 4.68 When the Indictable Crime Certificate was established, the Victorian Bar expected that the OPP and Victoria Legal Aid would take it into account when deciding whether to brief a barrister or include them on a panel of approved barristers who may appear in publicly funded trials.<sup>59</sup>
- 4.69 As they assess whether a lawyer is suitable to provide publicly funded legal services, Victoria Legal Aid and the OPP are in a position to encourage the Law Institute of Victoria and the Victorian Bar to include competency in victim-oriented law and dealings with victims in their accreditation schemes as suggested above. For example, in selecting lawyers to work on matters funded by Victoria Legal Aid or to conduct prosecutions for the OPP, they could give weight to those who have completed victim-related training.

## Recommendation

- 5 Victoria Legal Aid and the Office of Public Prosecutions should encourage the Law Institute of Victoria and the Victorian Bar to require candidates for accreditation as specialists in criminal law or indictable crime to be competent in victim-related laws and the role of the victim as a participant in the criminal trial process.

54 Victoria Legal Aid, *Annual Report 2014–15* (2015) 79.

55 Law Institute of Victoria, *Accreditation Specialisation Application Guidelines—Criminal Law* (2016) <<http://www.liv.asn.au/Professional-Development/Accredited-Specialisation/Areas-of-Specialist-Accreditation/Criminal-Law.aspx>>

56 Director of Public Prosecutions, Office of Public Prosecutions, *Annual Report 14/15* (2015) 11.

57 Office of Public Prosecutions, *OPP Advocacy: Key Competencies* (undated) <<http://www.opp.vic.gov.au/Home/Resources/Advocacy-Key-Competencies>>.

58 Ibid.

59 Victorian Bar, *Annual Report 2014* (2014) 16.

### Proposed training initiative

- 4.70 Because the purpose of the proposed education and training is to bring about cultural change, lawyers and judicial officers should have access to information that provides clear messages about the victim's role as a participant in the criminal trial process and in the wider criminal justice system.
- 4.71 As Victoria Legal Aid and the OPP have an interest in the cultural change taking place and expertise in victim-oriented laws, they could collaborate in producing a training program based on the Sexual Offences Interactive Legal Education Program.
- 4.72 The Sexual Offences Interactive Legal Education Program was a pilot program of professional development and training designed to improve the way sex offence cases are handled by training lawyers to address complex legal and procedural issues. The program was led by the OPP with funding provided by the Legal Services Board from the Victorian Public Purpose Fund.<sup>60</sup> It was developed with intensive stakeholder engagement, received strong support from participants and produced positive outcomes.<sup>61</sup>

## Recommendation

- 6 Victoria Legal Aid and the Office of Public Prosecutions should lead, in consultation with stakeholders, the development and delivery of a training program to foster cultural change in how victims are perceived and treated during the criminal trial process, based on the Sexual Offences Interactive Legal Education Project.

### Judicial officers

- 4.73 The Judicial College of Victoria was established in 2002 by the *Judicial College of Victoria Act 2001* (Vic) to assist the professional development of judicial officers and provide continuing education and training.<sup>62</sup> The College Board is chaired by the Chief Justice and comprises heads of the four main courts and two Governor-in-Council appointees.<sup>63</sup> Its education programs and resources are developed in collaboration with judicial officers.
- 4.74 The College has adopted a *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* that identifies the knowledge, skills, behaviour and attitudes expected of Victorian judges. The attributes it sets out are comprehensive and consistent with victims' expectations of being treated fairly and with respect.

<sup>60</sup> The Public Purpose Fund is a statutory fund initially established by the *Legal Practice Act 1996* (Vic) and continued by the *Legal Profession Act 2004* (Vic) and now the *Legal Profession Uniform Law Application Act 2014* (Vic). The money in the fund comes from interest on funds held by lawyers and approved barrister's clerks in trust for their clients, investment returns, annual licensing fees paid by lawyers and any fines imposed on lawyers as a result of disciplinary action. The Public Purpose Fund pays for the regulation of the legal profession and supports a range of legal bodies and programs. Grants are available, with the Attorney-General's approval, for law reform, legal and judicial education, legal research and any other purpose relating to the legal profession or the law that the Board considers appropriate: Victorian Legal Services Board and Commissioner *Grants* <<http://www.lsb.vic.gov.au>>.

<sup>61</sup> Synergistiq Pty Ltd, *Evaluation of the Interactive Legal Education Program (ILEP): Final Report* (2012) 4–5.

<sup>62</sup> *Judicial College of Victoria Act 2001* (Vic) s 1.

<sup>63</sup> Judicial College of Victoria, *2014/15 Annual Report* (2015) 9.

- 4.75 No courses specifically on victims are currently being offered. Sessions on communicating with victims have been included in judicial orientation programs for newly appointed judicial officers and as part of specialist training in the treatment of young people in the courtroom and victims and their relatives in historical sexual offence cases. A session on the treatment of crime is planned as part of a Supreme Court conference in 2016.<sup>64</sup> In addition, information about victims is included in the *Victorian Sentencing Manual*<sup>65</sup> and *Sexual Assault Manual*<sup>66</sup> published by the College.

## Compliance with Victims' Charter principles

### Existing mechanisms

- 4.76 The Victims' Charter Act was designed to facilitate cultural change by setting out victims' rights and entitlements and by requiring criminal justice agencies to implement them. The language of the Act makes it clear that criminal justice agencies have obligations to victims and that compliance is mandatory.
- 4.77 The Act is less clear about how compliance with the principles can be achieved where cultural change has not occurred. However, it does provide for mechanisms that can be used to hold criminal justice agencies to account if they do not comply. These include:
- annual reports to Parliament, and through it the community, on how effectively the principles are being implemented
  - processes for victims to make a complaint if a criminal justice agency has not implemented a Victims' Charter principle.

### Monitoring and review

- 4.78 The Act gives the Secretary of the Department of Justice and Regulation a role in promoting the principles; monitoring, evaluating and reviewing the operation of the Act; and ensuring that complaints processes are in place.<sup>67</sup> In addition, the Attorney-General must ensure that the Department of Justice and Regulation reports annually on:
- the steps taken to promote the Victims' Charter principles
  - the operation of the Act.<sup>68</sup>
- 4.79 The Department is required to provide the information in its annual reports, prepared under Part 7 of the *Financial Management Act 1994* (Vic)<sup>69</sup> for tabling in Parliament. This enables public scrutiny of how well the objectives of the legislation are being met. The prospect that public attention could be drawn to any poor performance in implementing the principles provides an incentive for the criminal justice agencies to comply.

### Complaints processes

- 4.80 Agencies can be held accountable to individual victims by means of complaints processes. The Act requires that appropriate complaints processes are established and that victims are informed of them.<sup>70</sup>

64 Information from Matthew Weatherson, Director Research and Publications, Judicial College of Victoria, 6 June 2016.

65 Judicial College of Victoria, *Victorian Sentencing Manual*, ch 4.5.4 and following.

66 Judicial College of Victoria, *Sexual Assault Manual*, ch 20.8 (Victim Impact Statements), 23 (*Victims of Crime Assistance Act 1996*), 25 (Treatment of Victims of Crime by Agencies), 26 (Victims' Register).

67 *Victims' Charter Act 2006* (Vic) s 20.

68 Ibid s 21.

69 Ibid.

70 Ibid ss 19, 20(c) respectively.

## Disciplinary proceedings

4.81 The Act also allows for disciplinary proceedings to be taken against an official for contravening the Act.<sup>71</sup> These proceedings are initiated by the relevant criminal justice agency rather than by an individual victim. An agency could initiate proceedings of this type if, for example, it considered that the conduct of one of its employees was inconsistent with the requirements of the Act and amounted to unsatisfactory performance or misconduct. A disciplinary proceeding does not hold the official directly accountable to a victim who reports the problem to the agency, and nor does it give the victim an avenue for redress.

## Enforceability under other legislation

4.82 Apart from the measures created by the Act to reinforce or compel compliance, five of the 12 principles can be asserted or enforced independently of the operation of the Act. These principles are in the nature of rights conferred on the victim by other legislation.

- The right to make a victim impact statement is established by the *Sentencing Act 1991 (Vic)*.<sup>72</sup> It is exercised by submitting the statement to the court.
- Protection of the victim's personal information against unauthorised disclosure is required by the *Privacy and Data Protection Act 2014 (Vic)*. A victim who believes an agency has interfered with their privacy has a right to complain to the Commissioner for Privacy and Data Protection.<sup>73</sup> Non-interference with privacy is also a right in Victoria's Human Rights Charter.<sup>74</sup>
- The victim's right to apply to a court for compensation from an offender is provided by the *Sentencing Act 1991 (Vic)*.<sup>75</sup> It is exercised by making an application to the court.
- The right to apply to the Victims of Crime Assistance Tribunal for financial assistance is established by the *Victims of Crime Assistance Act 1996 (Vic)*. It is exercised by making an application to the Tribunal.
- Access by a victim of a criminal act of violence to information about the offender's sentence, likely date of release and any supervision or detention orders is provided by the *Corrections Act 1986 (Vic)*, which also establishes the right to make submissions to the Adult Parole Board.<sup>76</sup> The victim obtains access by applying to the Secretary of the Department of Justice and Regulation.<sup>77</sup>

4.83 In all other circumstances where an agency fails to comply with the requirements of the Victims' Charter Act, section 22(1) precludes the victim from using the Act to claim a right to seek review or redress through the court.

## Section 22(1)

4.84 Section 22(1) ensures that the Victims' Charter Act does not extend or modify the principles that had already been given effect by other legislation, and that it does not create a right to take legal action if any of the principles are not followed. Failing to comply with the principles does not provide grounds for a decision or action to be reviewed nor make the decision or action invalid. The text of the section is as follows:

71 Ibid s 22(2).

72 *Sentencing Act 1991 (Vic)* s 8K.

73 *Privacy and Data Protection Act 2014 (Vic)* s 57.

74 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 13. The Human Rights Charter does not create a freestanding right to bring legal proceedings for breach of a Charter right: s 39. See further Chapter 3.

75 *Sentencing Act 1991 (Vic)* pt 4 div 2.

76 *Corrections Act 1986 (Vic)* ss 74A–74B.

77 Ibid ss 30A–30C.



Legal rights not affected

- (1) The Parliament does not intend by this Act—
  - (a) to create in any person any legal right or give rise to any civil cause of action; or
  - (b) to affect in any way the interpretation of any law in force in Victoria; or
  - (c) to affect the validity, or provide grounds for review, of any judicial or administrative act or omission.<sup>78</sup>

### Limitations of the Victims' Charter Act

- 4.85 As the preceding discussion shows, the Victims' Charter Act does not create robust compliance mechanisms. While some of the Charter principles contain rights that are established by other legislation and can be asserted or enforced under that legislation, those that impose obligations on criminal justice agencies to provide information to victims, treat them with respect, courtesy and dignity, and be responsive to their needs, are established by the Victims' Charter Act and are not enforceable.
- 4.86 Concerns were raised in many submissions and during consultations about the lack of sanctions and enforcement provisions. The Victims' Charter Act was described as tokenistic and frequently ignored.<sup>79</sup> The observation was made that unenforceable rights can raise expectations and agitate victims by promising too much and delivering too little.<sup>80</sup>
- 4.87 One contributor noted that a charter, especially a non-binding charter, is 'seldom an effective regulatory instrument':
- It can give false comfort to those it purports to protect. It can also provide a shield for policy makers and the Director of Public Prosecutions Victoria to rebut valid criticism.<sup>81</sup>
- 4.88 Victoria Police suggested that the legislation should clearly set out what is expected of criminal justice agencies and remove discretion, and said that there must be consequences for failing to comply to ensure that victims' rights are taken seriously.<sup>82</sup> Jo-Anne Wemmers also stressed that, without such consequences, victims' rights will not be respected.<sup>83</sup>
- 4.89 These comments are consistent with those made in academic literature, where it has been argued that effective oversight or enforcement mechanisms can drive change, and the threat of sanction encourages a culture of compliance.<sup>84</sup> An absence of procedures for enforcement, and remedies for non-compliance, has been described as rendering victims' rights 'illusory'<sup>85</sup> and unlikely to lead to change.<sup>86</sup>

### Proposals for reform

- 4.90 The consultation paper asked whether victims should have a legal right to enforce some or all of the principles contained in the Victims' Charter Act and, if so, in which circumstances.<sup>87</sup>

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78 *Victims' Charter Act 2006* (Vic) s 22(1).

79 Submission 11 (Sandra Betts).

80 Consultation 30 (Dr Tyrone Kirchengast, University of New South Wales).

81 Submission 16 (Name withheld).

82 Consultation 21 (Victoria Police).

83 Submission 33 (Professor Jo-Anne Wemmers).

84 Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264, 281.

85 Douglas Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' (2005) 2 *Brigham Young University Law Review* 255, 257.

86 Marc Groenhuijsen, 'The Development of International Policy in relation to Victims of Crime' (2014) 20(1) *International Review of Victimology* 31.

87 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015), 164.



- 4.91 Although there was general consensus—but not unanimity—that victims should have rights that are enforceable, there were divergent views about what enforcement would mean in practice. For some contributors, it meant having a compliance watchdog that could also manage complaints.<sup>88</sup> Another view was that victims should be able to enforce compliance or seek remedies through legal action.<sup>89</sup> A call was also made for prosecutorial decisions to be subject to review.<sup>90</sup> A theme common to all of these comments is that victims and the community need to be able to hold criminal justice agencies to account.
- 4.92 No single solution will be applicable to all circumstances or able to address all concerns raised. The Commission has considered in detail a number of proposals that were raised in the consultation paper and explored in submissions and meetings. They are discussed below and include:
- establishing a right for victims to take legal action against a criminal justice agency for not complying with a Victims' Charter principle
  - strengthening and enhancing the processes for victims to make a complaint against a criminal justice agency for not complying with a Victims' Charter principle
  - providing for review of certain key decisions made by or on behalf of the DPP.
  - improving system-wide monitoring and review of the operation of the Victims' Charter Act.

### A legal right to enforce?

- 4.93 Section 22(1)(a) of the Victims' Charter Act, which states that the Act does not create in any person any legal right or give rise to any civil cause of action, could be amended or removed. A victim who considers that a criminal justice agency has failed to implement a Victims' Charter principle could take legal action to require it to do so, or to seek compensation or some other remedy.
- 4.94 It is argued in academic literature that actors in the criminal justice system would be more likely to give legitimacy to victims' rights and interests if those rights were enforced within the system rather than by a complaints procedure outside it.<sup>91</sup> Jonathan Doak observed in his submission that external complaints procedures are unsatisfactory for victims because, if a complaint is upheld, it will often be too late for remedial action to be taken in the criminal trial process.<sup>92</sup> While noting that it could interfere with the efficiency of the criminal process and could be costly, he maintains that a right to take legal action is the most legitimate and effective means of realising victims' rights.<sup>93</sup>
- 4.95 Granting a right to pursue a legal cause of action for a breach of a Victims' Charter principle could give victims greater leverage when first lodging a complaint and provide a path for remedying breaches that are not satisfactorily resolved by way of complaint.<sup>94</sup> The threat of potential legal action may deter criminal justice agencies from unjustifiably violating a victim's right in the first place. This in turn could create a greater culture of compliance.<sup>95</sup>
- 4.96 The proposal was supported in general terms as a response to current conditions that are seen as unfair. Mary Iliadis put the view that, at present, section 22(1)(a) essentially safeguards the prosecution from being held accountable:

88 Submissions 7 (Youthlaw), 25 (Law Institute of Victoria), 33 (Professor Jo-Anne Wemmers).

89 Submission 31 (Professor Jonathan Doak, Nottingham Trent University); Roundtable 18 (victims of crime).

90 Submission 40 (Former VOCCC victim representatives).

91 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009), 210. Hall advocates for effective enforcement mechanisms during the criminal trial process and not through a subsequent complaints procedure.

92 Submission 31 (Professor Jonathan Doak, Nottingham Trent University).

93 Ibid.

94 See Simon Evans and Caroline Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264, 281.

95 See *ibid.*

This means that victims' rights can be, to some extent, disregarded—for example, if the prosecution fails to inform the victim about their right to a [Victim Impact Statement], the victim is precluded from pursuing a civil action despite this diminishing the victim's right to participate in proceedings. Consequently, it poses a major barrier for victims' justice needs being met.<sup>96</sup>

- 4.97 The Commission was told that an enforcement process would be better if it were part of the court process, because it would ensure that lawyers are more accountable and are directly involved in resolving the problem.<sup>97</sup>
- 4.98 Victoria Police suggested that including enforceable rights in the Charter may seem appropriate in principle, but careful consideration must be given to the potential issues concerning delays in criminal proceedings and conflict between the victim's private interest and the public interest.<sup>98</sup> Noting similar concerns, the Office of the Public Advocate argued that the primacy of a fair trial justifies any necessary delays and also accommodates the victim's interests as well as those of the accused and the community.<sup>99</sup>
- 4.99 The Victorian Bar and the Criminal Bar Association do not support any amendment to the Victims' Charter Act that would create enforceable legal rights.<sup>100</sup> The submission from the DPP maintained that creating a right to pursue a legal course of action would not necessarily increase compliance with the Act and could be detrimental to the relationship between victims and the prosecution. It added that:
- The OPP's experience is that there is a high degree of satisfaction experienced by victims in their interactions with the OPP and there is a satisfactory complaint process in place.<sup>101</sup>
- 4.100 The Commission is not persuaded that the Victims' Charter principles should be enforceable legal rights. Victims have expressed greater interest in robust and accessible complaint-handling processes, and in achieving some acknowledgment and an apology, than in taking legal action to compel criminal justice agencies to implement the principles. Legal action is expensive, emotionally taxing and not an efficient or effective way of achieving outcomes of this type.
- 4.101 If victims were granted a right to pursue a legal cause of action, the Charter principles would first need to be revised. Many of the principles are not well suited to being enforced because they are worded like service standards, not discrete rights, and are narrow in scope. For example, with reference to the scenario given by Mary Illiadis above, none of the principles requires the prosecuting agency to inform the victim about their right to make a victim impact statement. The prosecuting agency is required only to refer a victim who expresses a wish to make a victim impact statement to an appropriate victims' service for assistance.<sup>102</sup>
- 4.102 In conclusion, the Commission does not consider there is a need for a legal right to enforce a breach of a Victims' Charter principle that would enable victims to take legal action or have consequences for the conduct of a criminal trial. A proposal such as this may need to be revisited as the role of the victim continues to evolve and victim-oriented law develops—including by amending the Victims' Charter Act as recommended in this report.

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96 Submission 8 (Mary Illiadis).  
97 Roundtable 1 (Victim support specialists, Mildura).  
98 Submission 26 (Victoria Police).  
99 Submission 17 (Office of the Public Advocate).  
100 Submission 29 (Victorian Bar and Criminal Bar Association).  
101 Submission 23 (DPP).  
102 *Victims' Charter Act 2006* (Vic) s 13(2).

4.103 At this time, as discussed in Chapter 3, the Commission considers it more appropriate to recognise a right for victims in the Human Rights Charter. The Human Rights Charter would specify that victims have the right to be acknowledged as participants, treated with respect and afforded protection during the court process. This would be a right that courts must enforce during criminal proceedings.<sup>103</sup> In addition, the proposals discussed below offer more accessible and appropriate avenues for encouraging compliance with the Victims' Charter principles.

### Complaints processes

4.104 Common law adversarial criminal justice systems in Australia and overseas have tended to provide victims with complaints resolution processes, rather than a right to pursue legal action, to ventilate their grievances. Robust complaints processes, especially where they are reviewed independently, can provide victims with fairness, transparency and accountability.

4.105 The Victims' Charter Act does not include a specific right to make a complaint, although it does require appropriate processes to be established for complaints and victims to be informed of these processes.<sup>104</sup> The Act does not prescribe a specific complaints process or designate a body to complain to.

4.106 Comments made to the Commission about the existing complaints processes reveal that they are not well understood or highly regarded. There was widespread support for the processes to be robust, coordinated, backed by legislation, and overseen by an independent body with investigative powers. These features are encompassed by the proposals that the Commission has considered, and which are discussed below:

- a centralised complaint-handling process
- a firmer legislative foundation
- remedies.

### A centralised process

#### Victims' Charter Enquiries and Complaints Line

4.107 It was proposed that complaint handling should be centralised to make the process easier for victims. This would provide a 'one-stop shop' and the complainant could be assisted in dealing with the relevant agency.<sup>105</sup>

4.108 Elements of a centralised system already exist. The Victims Support Agency within the Department of Justice and Regulation offers victims of violent crime a complaint handling service through its Victims' Charter Enquiries and Complaints Line. It mediates between the victim and the agency or person complained about to resolve complaints concerning standards of service or a failure to follow the Charter principles.<sup>106</sup>

4.109 The service receives fewer than 30 complaints a year.<sup>107</sup> Most are about the police and concern communication issues. These are managed in accordance with a protocol between Victoria Police and the Department of Justice and Regulation.<sup>108</sup> Complaints about court proceedings tend to be about cases heard in the Magistrates' Court, where the majority of criminal cases are heard.<sup>109</sup>

4.110 The volume and type of complaints that the Victims' Charter Enquiries and Complaints Line receives do not indicate how uniformly and effectively the Charter principles are being followed. Not all victim complaints are directed to this service.

103 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(2)(b).

104 *Victims' Charter Act 2006* (Vic) ss 19, 20(c) respectively.

105 Roundtables 8 (Metropolitan Centres Against Sexual Assault), 9 (Victim support and therapeutic specialists, Shepparton).

106 Department of Justice, *A Victim's Guide to Support Services and the Criminal Justice System* (Victorian Government, May 2014) 37.

107 Information provided by Suzanne Whiting, Manager, Policy and Strategic Projects, Community Operations and Victims Support Agency, Department of Justice and Regulation, 31 March 2016.

108 Consultation 45 (Victims Support Agency, Department of Justice and Regulation).

109 Ibid.

- 4.111 The DPP and OPP invite direct contact from people who have a complaint about the outcome of a particular matter or the conduct of:
- OPP staff
  - the DPP
  - members of the Victorian Bar briefed on behalf of the Solicitor for Public Prosecutions.<sup>110</sup>
- 4.112 The DPP's *Complaints Policy* states that a complaint will be dealt with 'consistently, expeditiously and fairly'. A complaint will be investigated thoroughly if it cannot be resolved immediately. A victim is to be kept informed and notified of an outcome, and can expect their privacy to be protected.<sup>111</sup> No further process for handling the complaint is articulated in the policy.
- 4.113 As noted above, victims' complaints about the police are handled by the Victims' Charter Enquiries and Complaints Line under a protocol. Victoria Police also generally encourages members of the community who have a complaint of a minor nature to contact the station commander at their local police station. Those who have a more serious complaint can write to the Police Conduct Unit.
- 4.114 In addition, the Victims' Charter Enquiries and Complaints Line does not appear to be well known. Many people who work with victims told the Commission that they had not heard of it,<sup>112</sup> and victims may also be unaware that it exists.<sup>113</sup> Some believed that the service was not a formal process. They were unsure about whether it is able to resolve complaints, and whether there are any consequences of not complying with a Charter principle.<sup>114</sup>
- 4.115 To promote the Victims' Charter Enquiries and Complaints Line, the Victims Support Agency relies principally on referrals of individual victims from the police, health professionals, community-based organisations and others with whom the victim makes contact. The OPP and Victoria Police promote the service on their websites and in publications. There is no budget within the Victims Support Agency for promotional campaigns and it expects that the visibility of the Agency and its services will improve over time as a result of its persistent presence.<sup>115</sup>

#### Should complaints be processed by an independent body?

- 4.116 It was proposed that an independent body should perform the function of receiving and handling complaints. The Commission was told that such a body would have the legal powers to investigate, compel the provision of information, recommend that an agency or official issue a written apology, and report to Parliament. There would be a standard process, set out in legislation, for managing complaints and a single point of access for all victims' complaints concerning criminal justice agencies.

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110 Office of Public Prosecutions, *Complaints* (undated) <<http://www.opp.vic.gov.au/Resources/Complaints>>.

111 Director of Public Prosecutions Victoria, *Complaints Policy* (9 February 2016).

112 Submission 7 (Youthlaw); Consultation 47 (Victoria Legal Aid); Roundtables 1 (Victim support specialists, Mildura), 3 (Victim support specialists, Geelong), 9 (Victim support and therapeutic specialists, Shepparton).

113 Submission 34 (Northern Centre Against Sexual Assault).

114 Roundtable 1 (Victim support specialists, Mildura).

115 Consultation 45 (Victims Support Agency, Department of Justice and Regulation).

- 4.117 A number of advantages were identified. A standard statutory process could increase victims' confidence that their complaints will be taken seriously, resolved and not become lost in the system. Victims need to know that their complaints have been recorded and that a resolution process has been put in place.<sup>116</sup> A single complaint body that receives and refers complaints could generate more accurate data about the nature and number of complaints made by victims and how they were resolved.
- 4.118 A new entity need not be created for this purpose. Indeed, there is insufficient evidence, and little support, to warrant the creation of a new body to process and resolve complaints from victims. The view was put during consultations and in written submissions that the Victims of Crime Commissioner should be given a role in handling complaints.<sup>117</sup>
- 4.119 As a body that was established to identify and work on systemic issues, it would be inappropriate for the Victims of Crime Commissioner to take on the complaint resolution role currently performed by the Victims' Charter Enquiries and Complaints Line. However, a scheme could be established whereby all complaints were directed to the Victims of Crime Commissioner, who would refer them to the relevant agency for resolution. The *Victims of Crime Commissioner Act 2015* (Vic) already provides for the Commissioner to refer complaints as appropriate to the Ombudsman, Chief Commissioner of Police or the DPP.<sup>118</sup> Evidence of corrupt conduct must be referred to the Independent Broad-based Anti-corruption Commission.<sup>119</sup>
- 4.120 However, giving the Victims of Crime Commissioner a gateway role such as this would have significant drawbacks. In particular, directing all complaints to the Commissioner for referral-direction to the relevant agency for resolution would add a layer of administration without affecting the outcome.
- 4.121 The process may be standardised and monitored but could also be much longer. A centralised process could entrench the positions of the victim and the agency in circumstances where an early, direct and less formal interaction could have solved the problem. Similarly, a legislated process for handling complaints would be inflexible, and would not help to provide an individualised response.
- 4.122 The Commission notes that the proposal would not broaden the capacity for victims to make a complaint. Victim support workers pointed out to the Commission that many victims have complaints about judges and defence counsel, who are not required to comply with the Victims' Charter Act and are subject to profession-based complaints processes under other legislation.<sup>120</sup>
- 4.123 Finally, the Victims of Crime Commissioner does not need to take on a role in processing complaints in order for better system-wide data about them to be compiled. Having the power to inquire into any systemic victim of crime matter and require access to records, the Commissioner could gather data about the number and nature of complaints, how long they took to resolve and their outcome. The Commissioner could use this data to monitor agencies' performance in implementing the Victims' Charter principles and responding to victims' complaints. This would assist in measuring the progress of cultural change.

116 Roundtable 13 (Victim support specialists, Ballarat).  
 117 Submissions 7 (Youthlaw), 21 (Dianne Hadden), 25 (Law Institute of Victoria), 34 (Northern Centre Against Sexual Assault), 37 (Dr Margaret Camilleri); Consultation 47 (Victoria Legal Aid); Roundtable 12 (Victim support specialists, Wodonga).  
 118 *Victims of Crime Commissioner Act 2015* (Vic) s 27.  
 119 *Ibid* s 26(2).  
 120 Consultations 23 (Court Network staff and a Court Networker—County Court), 45 (Victims Support Agency, Department of Justice and Regulation).

- 4.124 On balance, the Commission considers that a centralised complaint-handling process, administered by the Victims of Crime Commissioner or another independent body, is unnecessary and undesirable. Overall, it would not be advantageous to victims and there are better means of encouraging agencies to improve how they interact with victims and respond to complaints.
- 4.125 The Commission recommends below that the Victims of Crime Commissioner's responsibilities be expanded in other ways that will improve complaint handling: by providing a review function for victims who are not satisfied with the outcome of an agency's complaint-handling process, and by reporting to Parliament, through the Attorney-General, on the implementation of the Victims' Charter Act. The report to Parliament should include information about the number of complaints made and processed about compliance with the Charter principles, and their outcomes.

### A firmer legislative foundation

- 4.126 Unless there are consequences for failing to implement the principles, the cultural change that the Victims' Charter Act was intended to bring about will not occur. In practice, whether a victim is treated in accordance with the Charter principles will depend on chance.
- 4.127 The requirement that criminal justice agencies implement the Victims' Charter principles needs to be underpinned by robust processes for handling complaints. In the Commission's view, these processes should meet the standards expected of public sector agencies.
- 4.128 According to guidelines issued by the Victorian Ombudsman, complaint-handling systems should be open to scrutiny by clients, the responsible minister and relevant review bodies. They should offer fair and reasonable remedies, provide for internal review and evaluation, and contribute to business improvement. Information on trends or aggregated data should be publicly available and released regularly.<sup>121</sup>
- 4.129 The processes that have emerged for complaints under the Victims' Charter Act do not align with the Ombudsman's guidelines<sup>122</sup> and do not seem to be widely known or well used. The Commission considers that the Act should be amended to augment the existing obligations on agencies and provide rights for victims to make a complaint and have the outcome reviewed. These proposals are discussed in the next section.

### A right to make a complaint

- 4.130 If a person believes that an agency has not upheld the Charter principles, the agency is only expressly required to inform them about the processes available for making a complaint. Although the Secretary of the Department of Justice and Regulation must ensure that appropriate processes are established, no obligation is placed on the other agencies to participate in those processes or establish their own.
- 4.131 In New South Wales, the *Victims Right and Support Act 2013* (NSW) provides that a victim may make a complaint about a breach of the Charter of Victims' Rights.<sup>123</sup> The Commission considers that Victoria's Victims' Charter Act should be strengthened in similar terms, to empower the victim to complain and require the agency to investigate and respond. This would be largely a symbolic gesture, as complaints processes are in place, but it would underscore the significance of the victim's role in the criminal trial process. Similar reasoning appears to have applied when the Charter principles were enacted, even though some reflected existing statutory rights or agency practices.

121 Victorian Ombudsman, *Good Practice Guide: Victorian Ombudsman's Guide to Complaint Handling for Public Sector Agencies* (2007) (2014 revision).

122 Submission 14 (Victims of Crime Commissioner, Victoria).

123 *Victims Rights and Support Act 2013* (NSW) s 6.18.



## Recommendation

- 7 The *Victims' Charter Act 2006* (Vic) should:
- (a) provide victims of crime with a right to make a complaint to the relevant investigatory, prosecuting or victims' services agency about a breach of a Victims' Charter principle and
  - (b) impose an obligation on investigatory, prosecuting and victims' services agencies to provide accessible and transparent complaint-handling systems and offer fair and reasonable remedies.

### Remedies

- 4.132 The consultation paper invited comments on the remedies that should be available for a breach of a victim's rights.<sup>124</sup> The responses revealed consensus that the remedies should include an apology or acknowledgment from the agency concerned and that monetary sanctions are not needed.<sup>125</sup> It was suggested that, in extreme cases, compensation could be considered.<sup>126</sup>
- 4.133 The outcomes of complaints processes will, and should, vary according to the nature and circumstances of the complaint. For this reason it is prudent not to limit the options available by law. However, the complainant should receive a response, and if the agency has failed to comply with a Victims' Charter principle, an acknowledgment and apology are the least the complainant should receive.
- 4.134 As noted above, the Commission considers that the Victims of Crime Commissioner should monitor complaint outcomes. This may produce evidence that the process and available remedies should be prescribed in legislation. On the basis of information about the complaints being made, the Commission has concluded that reform of this nature is not presently necessary.

### Review of complaints about compliance with Victims' Charter principles

- 4.135 A victim who is not satisfied with the outcome of a complaints process, or where there has been no response at all, has few options. In limited circumstances the Ombudsman can review whether the administrative actions of a criminal justice agency are legal, reasonable and fair in the circumstances, and compatible with the Human Rights Charter<sup>127</sup> and may also initiate their own investigations.<sup>128</sup>
- 4.136 If the complaint concerns the actions of the Victims Support Agency, the Ombudsman is likely to have jurisdiction. However, Victoria Police, the DPP, all Crown Prosecutors and Associate Crown Prosecutors, and any other person acting as legal adviser to the Crown or counsel for the Crown, are exempt from the operation of the *Ombudsman Act 1973* (Vic)—as are the courts and judicial officers.<sup>129</sup> The Solicitor for Public Prosecutions and the OPP are not exempt, but the extent to which their actions may be reviewed is limited because the Ombudsman's powers cannot be exercised in a manner that would

124 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015) 164.  
 125 Submissions 25 (Law Institute of Victoria), 34 (Northern Centre Against Sexual Assault), 40 (Former VOCCC victim representatives); Consultation 45 (Victims Support Agency, Department of Justice).

126 Submission 25 (Law Institute of Victoria); Consultation 21 (Victoria Police).

127 *Ombudsman Act 1973* (Vic) ss13(2), 13AA(1)(2).

128 *Ibid* s 16A.

129 *Ibid* s 2(1) (definition of 'exempt person or body'), sch 2. Court Services Victoria is not exempt, though the Ombudsman must not interfere with the exercise of the jurisdiction of a court or Victorian Civil and Administrative Tribunal, or the exercise a judicial or quasi-judicial function by a judicial officer or VCAT member: s 13AC.

- prejudice any criminal proceedings or investigations<sup>130</sup> or interfere with the exercise of the jurisdiction of a court.<sup>131</sup>
- 4.137 As noted above, section 22(1)(c) of the Victims' Charter Act states that the Act does not provide grounds for review of any judicial or administrative act or omission.
- 4.138 Consequently, in most cases, not only do victims have no legal right to enforce a Victims' Charter principle, they have no recourse to a review process if they make a complaint and the agency concerned does not resolve it satisfactorily. The Commission considers it anomalous for the victim's right to review to depend on which criminal justice agency breaches the Charter principle.
- 4.139 Although the available data about the complaints made each year regarding the Victims' Charter Act is incomplete, it appears that they are few in number. It is reasonable to expect that fewer still are not resolved to the complainant's satisfaction.
- 4.140 It is difficult to gauge the unmet need for a review process for complaints about compliance with the Victims' Charter Act. An analysis of data held by the Ombudsman's Office indicates that the Ombudsman has received 86 complaints about the treatment of victims of crime since the Victims' Charter Act came into effect. Of these, 61 were against the Victims of Crime Assistance Tribunal (including general administrative complaints, such as about delay, as well as complaints about decisions made). It is not known how many of the remaining 25 complaints were about an agency's compliance with the Victims' Charter principles, but only two complaints were specifically against the Victims Support Agency.<sup>132</sup>
- 4.141 The number of complaints that the Ombudsman has received about the treatment of victims of crime has remained consistent from year to year and no trends are discernible from the available data. The Ombudsman's Office has advised that:
- It is likely that there would be additional complaints. However, without a manual audit of the more than 200,000 complaints that the Ombudsman has received since the Charter Act came into effect, it is not possible to determine the exact number. This is owed to several reasons including changes to policies, procedures and how complaints are recorded internally; as well as the level of detail provided by complainants when they contact the office.<sup>133</sup>
- 4.142 At this stage, the data does not suggest that an elaborate review process is necessary. However, a review process that applies to all the criminal justice agencies that implement the Victims' Charter principles would strengthen the force of the principles and underscore the need for the agencies to have robust processes for responding to victims' complaints.
- 4.143 Currently, the Victims' Charter principles set out service obligations regarding how the victim is treated and the information and type of assistance they should receive. They are administrative in nature. A complaint that they have not been implemented, or a review of the outcome of any such complaint, is unlikely to prejudice criminal proceedings or investigations, or interfere with the exercise of the jurisdiction of a court.
- 4.144 Should the Victims' Charter principles be expanded to include obligations that are not administrative, those obligations could be excluded from the complaints review process as necessary and appropriate.
- 4.145 The Commission considers that the Victims of Crime Commissioner should be empowered to review the outcomes of complaints from victims regarding a criminal justice agency's implementation of the Victims' Charter principles where a victim is dissatisfied with the agency's response to their initial complaint. This responsibility is consistent with the Commissioner's role in monitoring system-wide issues.



- 4.146 Complaints that can be resolved by the agency are unlikely to reveal systemic problems. Those that are more difficult to resolve are likely to provide useful information about the operation of the Victims' Charter Act. They may reveal ambiguities in interpreting the Victims' Charter principles, inconsistencies in implementation, weaknesses in complaint management systems, problems in coordinating functions shared across agencies, or other system-wide issues.
- 4.147 The role of the Victims of Crime Commissioner would be confined to reviewing the outcome of victims' complaints regarding an agency's compliance with the Victims' Charter principles. The Commissioner would not be empowered to review prosecutorial decisions or intervene in a way that prejudices criminal proceedings or investigations, or interferes with the exercise of the jurisdiction of a court.

## Recommendation

- 8** The Victims of Crime Commissioner should be empowered to review the outcome of complaints regarding compliance by investigatory, prosecuting and victims' services agencies with the *Victims' Charter Act 2006* (Vic) principles, on application by the complainant, if the complainant is not satisfied with the agency's response to the complaint.

## Review of prosecutorial decisions

- 4.148 As discussed above, decisions by the DPP are not subject to review by the Ombudsman. In addition, they are not reviewable by a court and nor is there a structured internal review procedure within the public prosecutions service. Exemption from the review processes that apply to other public agencies is regarded as vital to the DPP's independence.<sup>134</sup>
- 4.149 However, the Commission considers that decisions by the DPP to discontinue a prosecution or accept a guilty plea to lesser charges should be open to internal review at the victim's request. These decisions are of particular significance to victims.
- 4.150 A decision to discontinue a prosecution can cause distress and compromise future legal interests because of its finality: there may be no further response by the criminal justice system to the crime. A decision to accept a guilty plea to lesser charges can appear to trivialise the impact of the crime by enabling the offender to minimise their offending. It also limits the victim's ability to have a voice at sentencing as the victim impact statement will be confined to the offence or offences to which the offender has pleaded guilty.<sup>135</sup> A review process can help the victim understand the rationale for these decisions and provide a means of having them reconsidered.<sup>136</sup>
- 4.151 Importantly, a review process would make the operation of Victoria's public prosecutions service more transparent and accountable.<sup>137</sup> Independence does not guarantee infallibility, and there is a public interest in establishing systems that will test the reasoning employed in decisions not to prosecute the accused as charged.
- 4.152 The DPP maintains that current procedures provide a sufficient degree of transparency and victim participation while at the same time protecting the Director's independence.<sup>138</sup> As a matter of policy, the solicitor with conduct of the prosecution ensures that the victim is consulted before a decision is made to substantially modify charges, accept a plea

134 Submission 23 (DPP).  
 135 Submission 40 (Former VOCCC victim representatives).  
 136 Consultation 51 (Criminal Law Section, Law Institute of Victoria).  
 137 Consultation 17 (Dr Robyn Holder, Griffith University).  
 138 Submission 23 (DPP).

of guilty to lesser charges or not proceed with some or all charges.<sup>139</sup> Victims who are dissatisfied with the decision may request the reasons. In the Director's experience, 'very few victims are dissatisfied with the DPP's decisions after the reasons have been explained to them'.<sup>140</sup>

- 4.153 Even so, a number of proposals to improve the transparency and accountability of the DPP were put to the Commission. They included:
- a right for victims to be given reasons for these decisions
  - internal review
  - external review.

### Reasons for decisions

4.154 For the victim, knowing the reasons for a decision is the first step in deciding whether to seek to have it reviewed. For the agency, providing reasons is a means of improving the transparency of its operations.

4.155 The DPP is willing, in appropriate circumstances, to provide reasons for discretionary decisions that the Director has made, or which have been made on the Director's behalf.<sup>141</sup> Whether the circumstances are appropriate is determined on a case-by-case basis in accordance with the Director's Policy on the giving of reasons for discretionary decisions. A victim's request for information about the reasons for making a decision to discontinue, or to proceed with a guilty plea to lesser charges, would be managed under this policy.

4.156 When introduced, the policy was groundbreaking. The DPP in Victoria was one of the first prosecuting agencies in the world to instigate a policy of giving reasons for discretionary decisions.<sup>142</sup> The policy applies to a wide variety of discretionary prosecutorial decisions made since 1 January 2009 and requests may be made by any person in various ways:

A request for reasons may come to the Director in the form of a verbal request from a victim, a Freedom of Information application, a written request from an academic researcher, a subpoena issued by a solicitor involved in civil litigation, a government agency responsible for the regulation of a particular profession or activity, a verbal request from the media, and so on.

It is intended that, as far as practicable, this Policy should apply consistently, regardless of the precise format of the request for decisions.<sup>143</sup>

4.157 An estimated 30 letters are prepared each year in response to requests for reasons.<sup>144</sup> The policy also allows for other forms of response where appropriate, for example, a response could be given in person in a meeting with a victim or a victim's family.<sup>145</sup>

139 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected By Crime* (11 August 2015) [25]. This obligation is repeated in the *Director's Policy: Resolution* (24 November 2014) [7]–[8], but not in *Director's Policy: Prosecutorial Discretion* (24 November 2014).

140 Submission 23 (DPP).

141 Director of Public Prosecutions Victoria, *Director's Policy: The Giving of Reasons for Discretionary Decisions* (17 April 2015).

142 Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 29 April 2016, 13 (John Champion SC, Director of Public Prosecutions Victoria).

143 Director of Public Prosecutions Victoria, *Director's Policy: The Giving of Reasons for Discretionary Decisions* (17 April 2015) [15].

144 Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 29 April 2016, 13 (John Champion SC, Director of Public Prosecutions Victoria).

145 Director of Public Prosecutions Victoria, *Director's Policy: The Giving of Reasons for Discretionary Decisions* (17 April 2015) [13]–[14].

- 4.158 The policy basis is that a careful balancing of competing interests will allow reasons to be given in many cases, and that doing so is 'consistent with the desirable goal of the criminal justice system being as open and transparent as possible'.<sup>146</sup> However, the policy has not provided the degree of transparency and accountability that should be given to requests from victims for reasons for decisions to discontinue a prosecution or agree to a guilty plea to lesser charges. Not all prosecutorial decisions are of equal significance to the applicants who request reasons, and not all applicants have the same vested interest in the response.
- 4.159 The submission from the former victim representatives on the inaugural Victims of Crime Consultative Committee put the view that the current system is not sufficient because it is at the discretion of the DPP and on request:
- We believe that a requirement to give reasons is essential to a transparent and accountable prosecutorial service. For victims, a more transparent system will (1) allow us to better understand the facts and basis for the decision not to prosecute, (2) reassure us that the decision was not made arbitrarily, (3) allow us to identify the extent to which our concerns were taken into consideration and (4) reassures us that we have been dealt with fairly.
- The requirement to give reasons will make the DPP, OPP and Crown Prosecutors more accountable as they have a greater incentive to rigorously and carefully identify and assess the relevant issues and properly justify their decisions.<sup>147</sup>
- 4.160 Similar comments were made in another submission and during consultations, where it was proposed that the DPP should be required to give reasons for these decisions to the victim.<sup>148</sup>
- 4.161 The opposing view was also argued. The Victorian Bar and Criminal Bar Association acknowledged that providing victims with reasons would help them understand how the decisions were reached, and added that the DPP had provided an excellent service in the past, but said that it is difficult and time-consuming. They stated that it is important to avoid a situation where the prosecution runs cases because it is easier than having to explain why it does not want to proceed.<sup>149</sup> Views both supporting and opposing a mandatory requirement to give victims reasons were expressed in a meeting with the Criminal Law Section of the Law Institute of Victoria.<sup>150</sup>
- 4.162 On balance, the Commission considers that victims should have a right to be given reasons for decisions to discontinue a prosecution or to proceed with a guilty plea to lesser charges. Symbolically, it would recognise the victim's inherent interest in the criminal trial process, underscore the victim's role as a participant and contribute to cultural change by reinforcing the need to treat victims with respect. In practice, victims will be better able to make decisions about the consequences for them of decisions by the Director.
- 4.163 The Commission notes that providing written reasons for decisions can be time-consuming and require careful consideration. Regard has to be given not only to the sensitivities of the case and the need to avoid making the negative impact of the decision even worse, but also to external factors such as the possible effect on a related case. However, as the victim will have been consulted before, and informed after, the decision is made,<sup>151</sup> the Commission does not expect that routinely informing the victim of the reasons would be onerous.

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146 Director of Public Prosecutions Victoria, *Director's Policy: The Giving of Reasons for Discretionary Decisions* (17 April 2015) [22].  
 147 Submission 40 (Former VOCCC victim representatives).  
 148 Ibid; Consultation 22 (Professor Jonathan Doak, Nottingham Trent University); Roundtable 14 (Legal practitioners, Ballarat).  
 149 Consultation 54 (Victorian Bar and Criminal Bar Association).  
 150 Consultation 51 (Criminal Law Section, Law Institute of Victoria).  
 151 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected By Crime* (11 August 2015) [25]; *Victims' Charter Act 2006* (Vic) s 9(c).

- 4.164 The procedure for giving reasons to victims is a matter for the DPP. The Commission considers that they should be given in writing, though it may be easier and more appropriate in the circumstances to inform the victim in person first and follow up with a letter. The requirement could be established by amending section 9 of the Victims' Charter Act, which requires the prosecuting agency to give the victim information about any decision to modify or not proceed with some or all charges or to accept a plea of guilty to a lesser charge.<sup>152</sup>

## Recommendation

- 9 Section 9 of the *Victims' Charter Act 2006* (Vic) should be amended to require the Director of Public Prosecutions to give victims written reasons for the decisions listed at paragraph (c) of that section, unless the victim has expressed a wish not to be so informed.

### Internal review

- 4.165 A victim who is not satisfied with a decision to discontinue a matter or to proceed with a guilty plea to lesser charges currently has no right to have the decision reviewed by the DPP. In practice, it may be reviewed, but there is no structured process of internal review.
- 4.166 The DPP has indicated that it is unnecessary to establish an internal review process for these decisions because they are made centrally with input from various areas of the public prosecutions service and after consultation with the victim:
- All our decision making is written and when I get to see a decision that I have to make, there's supporting memoranda that filter up from case officers, who are appointed early in the case, through to supervisors and then to a Crown Prosecutor who might make a recommendation about various aspects of the case, either a discontinuance or the settlement of a case, negotiated plea settlements and so on. That would be in writing by a Crown Prosecutor, or a Senior Crown Prosecutor if it is a bigger decision, and that will come to me to make a final decision. ... All victims are consulted ... I won't make a decision of discontinuance in a case, for instance, without the victim having been consulted about that decision; that's very clear.<sup>153</sup>
- 4.167 Although there is no formal internal review process, the DPP has recalled occasions when 'people have made their displeasure very clear and I've re-looked at cases'.<sup>154</sup> He added that this does not happen very often.<sup>155</sup>
- 4.168 The Commission has not formed a view about the adequacy of the internal procedures for decision making within Victoria's public prosecutions service. However, it does consider that a structured, transparent process should be established for the internal review of decisions, including to review, as a minimum, decisions to discontinue a matter or to proceed with a guilty plea to lesser charges. In reaching this conclusion, the Commission has had particular regard to the fact that these decisions cannot be reviewed by any other government entity or the courts.

152 Note that this section applies also to Victoria Police. The Commission would support a similar obligation being imposed where cases are prosecuted by Victoria Police.

153 Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 29 April 2016, 38 (John Champion SC, Director of Public Prosecutions Victoria).

154 Ibid.

155 Ibid.

- 4.169 Many comments were made in submissions and during consultations about the need for a system of internal review. Jonathan Doak associated a right to seek review with recognition of the special role of victims in the criminal justice system.<sup>156</sup> The Law Institute of Victoria said that there should be transparency around why some trials settle and others do not.<sup>157</sup> Robyn Holder maintained that, because there is no review, there is no accountability,<sup>158</sup> and an internal complaints and feedback process is also important in promoting change from within.<sup>159</sup> The Victims of Crime Commissioner said that there should be a system of review for reasons to discontinue.
- 4.170 A well-documented and accessible complaints-handling process which clearly identifies how to seek review of a decision to discontinue a prosecution or proceed with a guilty plea to lesser charges would provide transparency. It would also clarify the position of the prosecution when in conflict with the victim.<sup>160</sup>
- 4.171 The focus of most comments that the Commission received on this issue was not on whether victims should be able to seek internal review of prosecutorial decisions, but on what the mechanism for review should be. In particular, there was marked support for introducing a system of internal review that is based on the Victims' Right to Review Scheme for England and Wales.<sup>161</sup>

#### Victims' Right to Review Scheme (England and Wales)

- 4.172 The Victims Right to Review Scheme is the internal review process established by the Crown Prosecution Service (CPS) in 2014. It was created after CPS internal review processes were criticised in *R v Christopher Killick*.<sup>162</sup> It also gives effect to principles in a binding European Union Directive which requires member states to have a mechanism in place that allows victims to seek review of a decision not to prosecute.<sup>163</sup>
- 4.173 The scheme is intended to strike a balance between providing certainty to the public and not allowing wrong decisions to stand. The review process is considered to be a means of maintaining public confidence in the criminal justice system.<sup>164</sup>
- 4.174 Only certain prosecutorial decisions, known as 'qualifying decisions', are subject to review. They are restricted to decisions not to lay charges and decisions that effectively end a prosecution.<sup>165</sup>
- 4.175 The scheme is accessible and transparent. Victims are made aware of their right to review and how to exercise it by the following means:
- Victims are notified of the prosecution decision not to bring proceedings, or to discontinue them.
  - The notification includes information about whether the decision was made on evidential or public interest grounds.
  - The notification also confirms that the victim is eligible to seek a review and provides sufficient information to enable the victim to decide whether or not they wish a review to take place and, if they do, what steps to take.
  - A request for review is ordinarily made within five days of receipt of the notification, but victims can have up to three months to do so.

156 Consultation 22 (Professor Jonathan Doak, Nottingham Trent University).

157 Submission 25 (Law Institute of Victoria).

158 Consultation 17 (Dr Robyn Holder, Griffith University).

159 Ibid.

160 Submission 14 (Victims of Crime Commissioner, Victoria); Consultation 19 (Victims of Crime Commissioner, Victoria).

161 Submissions 8 (Mary Iliadis), 14 (Victims of Crime Commissioner, Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University);

Consultation 30 (Dr Tyrone Kirchengast, University of New South Wales).

162 [2011] EWCA Crim 1608.

163 *Directive 2012/29/EU of the European Parliament and of the Council of the 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA (2012) OJ L 315/57 (EU Directive).* Article 11 of the EU Directive requires EU member states to have a mechanism in place that allows victims to seek review of a decision not to prosecute.

164 Crown Prosecution Service, *Victims' Right to Review Guidance: Issued by the Director of Public Prosecutions (July 2014)* [32].

165 Ibid [9].

- Additional information about how to exercise the Victims' Right to Review is on the CPS website.<sup>166</sup>
- 4.176 The review process is conducted in two stages. The first is local resolution, where an attempt is made to resolve the issue at a local level by assigning a new prosecutor to review the decision and ensure that the victim is given a proper explanation if one has not already been provided. The local resolution stage should be completed within 10 days of receipt of the request for review. If this is not possible, the victim is told of the reason for the delay and when the response will be provided.<sup>167</sup>
- 4.177 A victim whose concerns are not resolved at the local level may initiate the second stage, which is an independent review by an Appeal and Review Unit within the CPS or by a Chief Crown Prosecutor, as appropriate. This review considers the case afresh, using only the information that was available to the original decision maker.<sup>168</sup>
- 4.178 If it is considered, on review, that a different decision should be taken, and it is possible and appropriate to do so, action will be taken to commence or recommence criminal proceedings and the victim will be notified. If this is not possible, then the victim is given an explanation and, where appropriate, an apology.
- 4.179 In the United Kingdom, unlike Australia, victims can apply to the High Court for judicial review of a decision to prosecute or not to prosecute. Those who are dissatisfied with the CPS decision after an internal review can still avail themselves of this option.

#### Is this a model for Victoria?

- 4.180 The Victims' Right to Review Scheme represents a modern approach to the way in which a public prosecutions service can interact with victims. Tyrone Kirchengast has suggested that the scheme, the decision in *R v Christopher Killick*, and the European Union Directive on the rights, support and protection of victims of crime, show how victims' rights may appropriately be considered against the state's obligation to continue to prosecute offences in the public interest:

While the views of victims are considered, those views do not determine the outcome and must be weighed against the public interest at all times. As such, although the victim is given substantive rights of participation that may be enforced against the state, those rights never become determinative of an outcome nor usurp the state's right to prosecute. The removal of the process of review from the courts also ensures that the rights of the victim are not conflated with the rights of the accused in the trial context. The accused retains the right to challenge the Crown case without the victim acting as a third party to proceedings, should the matter be brought to court.<sup>169</sup>

- 4.181 In her submission, Mary Iliadis identified a number of features of the scheme that benefit both the victim and the criminal justice system:
- It provides a greater sense of transparency and accountability in decision-making processes.
  - It enables the public prosecutions service to measure where failures are made and to rectify incorrect decisions.
  - It provides victims with a mechanism to challenge prosecutorial decisions.
  - It could increase victims' understanding and confidence in the validity, transparency and accountability of the criminal trial process.
  - Even where decisions are not overturned, the scheme can provide victims with an explanation and better understanding as to why the case cannot proceed.<sup>170</sup>

166 Ibid [17]–[21].

167 Ibid [22]–[28].

168 Ibid [29]–[31].

169 Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Macmillan, in press) 82.

170 Submission 8 (Mary Iliadis).

- 4.182 In principle, the Commission would support the introduction of a Victorian scheme that drew from the Victims' Right to Review Scheme. However, the scheme could not simply be adopted in Victoria. The Commission is aware that the Royal Commission into Institutional Responses to Child Sexual Abuse has been looking closely at this scheme, among other options, in exploring complaints and oversight mechanisms employed by directors of public prosecutions across Australia.<sup>171</sup>
- 4.183 The DPP has told the Commission and the Royal Commission into Institutional Responses to Child Sexual Abuse about some practical limitations and legal issues that would need to be taken into consideration.
- 4.184 Perhaps the most significant practical limitation is the relative size and structure of the public prosecutions services in Victoria and England and Wales. In 2014–15, Victoria's public prosecutions service comprised about 350 personnel across offices in two locations, and handled approximately 6000 prosecutions.<sup>172</sup> Its counterpart in England and Wales has about 6100 staff, in 13 locations, and handles around 664,500 prosecutions a year.<sup>173</sup>
- 4.185 The Victims' Right to Review Scheme is designed for a large organisation, where decisions to prosecute or to discontinue a prosecution are devolved to local offices. The two-stage approach to internal review, which focuses first on local resolution and then an independent review within the organisation at a higher level, is not appropriate for the Victorian public prosecutions service.
- 4.186 As noted above, decisions of this type made by and on behalf of the DPP are centralised and made at the highest level. It is neither feasible nor desirable to introduce an internal review scheme that reviews the decisions of the statutory office holders who made them. The DPP conveyed this concern in his evidence to the Royal Commission on Institutional Responses to Child Sexual Abuse:
- I hold a position that sits in the Victorian Constitution, it is a statutory position. Effectively I do what I get paid to do, and that is make difficult decisions at my level at the top end of a highly structured set of processes that take place.<sup>174</sup>
- 4.187 The DPP acknowledged in discussions with the Commission that the decision-making processes within the Victorian public prosecutions service could be revised. For example, a Senior Crown Prosecutor could make a decision, which could be reviewable by the Chief Crown Prosecutor, and then the DPP if there is further complaint. This echoes the structure at the CPS, where more substantive decisions are made by crown prosecutors who are a level below the Director.<sup>175</sup> The Victims of Crime Commissioner also suggested this as an option.<sup>176</sup>
- 4.188 The DPP also noted that some decisions, such as the decision to directly indict, must be made by committee. He suggested that this process could be used for a wider range of difficult decisions.<sup>177</sup>

171 Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 29 April 2016.

172 Director of Public Prosecutions, Office of Public Prosecutions, *Annual Report 14–15 (2015)* 2, 10.

173 Crown Prosecution Service, *Annual Report and Accounts 2014–15 (2015)* 4, 76.

174 Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 29 April 2016 (John Champion SC, Director of Public Prosecutions Victoria) 23.

175 Consultation 15 (DPP).

176 Consultation 19 (Victims of Crime Commissioner, Victoria).

177 Consultation 15 (DPP).



- 4.189 Any internal review scheme introduced for the Victorian public prosecutions service would also significantly depart from the Victims' Right to Review Scheme with regard to the scope of decisions reviewed. The majority of reviews in the Victims' Right to Review Scheme have been of decisions not to file charges in the first instance. In Victoria the DPP is not responsible for those decisions; they are made by Victoria Police.<sup>178</sup>
- 4.190 These and other distinctions between the two public prosecutions services do not diminish the need to introduce a structured internal review process for victims in Victoria. The Commission considers that the time has come for the Victorian public prosecutions service to be more transparent and accountable. This is not a reflection on the performance of the service itself but an affirmation of victims' inherent interest in the criminal trial process and their legitimate place in that process.

## Recommendation

- 10 The *Victims' Charter Act 2006* (Vic) should be amended to:
- (a) establish a right for victims to seek internal review of a decision by the Director of Public Prosecutions to discontinue a prosecution or to proceed with a guilty plea to lesser charges
  - (b) require the Director of Public Prosecutions, when informing the victim of these decisions, and the reasons for these decisions, to notify the victim of their right to seek internal review and the procedure for doing so.

### External review

#### Judicial review

- 4.191 Judicial review refers to review by a court of an action taken by the executive government or the legislature. In reviewing a decision, the court considers whether it is validly made but does not review the merits of the decision itself. If an application for judicial review of a decision is successful, the court can direct the decision maker to make the decision afresh by following the required processes.
- 4.192 The Victims' Charter Act does not provide grounds for review of any judicial or administrative act or omission,<sup>179</sup> and victims have no clear right at common law to seek judicial review of discretionary decisions by the DPP.
- 4.193 In *Maxwell v The Queen*,<sup>180</sup> Justices Gaudron and Gummow of the High Court of Australia confirmed that certain decisions by the DPP are unable to be challenged through the courts, including decisions to proceed or not proceed with a prosecution. They stated:
- The integrity of the judicial process—particularly, its independence and impartiality and the public perception thereof—would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.<sup>181</sup>

178 Submission 23 (DPP).

179 *Victims' Charter Act 2006* (Vic) s 22(1)(c).  
180 (1996) 184 CLR 501.

181 *Ibid* 534 (Gaudron and Gummow JJ) (citations omitted). See also joint judgement of Dawson and McHugh JJ, in which they note that while a court has an inherent power to prevent abuses of its processes, it should rarely, if ever, need to do so on the basis of the exercise of prosecutorial discretion.



- 4.194 This passage was cited with approval in the joint judgment of Justices Gummow, Hayne, Crennan, Kiefel and Bell in *Likiardopoulos v The Queen*,<sup>182</sup> which confirms that:
- sanctions available to enforce well established standards of prosecutorial fairness are to be found mainly in the powers of a trial judge and are not directly enforceable at the suit of the accused or anyone else by prerogative writ, judicial order or an action for damages.<sup>183</sup>
- 4.195 In *Maxwell v The Queen*, Justices Gaudron and Gummow noted that the line of authority on which they were relying was based on the view that the discretion of the DPP was part of the prerogative of the Crown, and ‘may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all States and Territories and in the Commonwealth. Similarly, it may pay insufficient regard to the fact that some discretions are conferred by statute.’<sup>184</sup> This point was picked up in *Likiardopoulos v The Queen* by Chief Justice French, who raised the possibility that the exercise of statutory power by a Director of Public Prosecutions may be open to judicial review.<sup>185</sup>
- 4.196 In England and Wales, victims can apply to the courts for judicial review of a decision by the CPS to prosecute or not to prosecute. Victims have been successful where they have been able to show that the law has not been properly applied, that evidence has not been properly considered, that CPS policy has not been applied, or that a previous court or coronial decision has not been carefully considered.<sup>186</sup>
- 4.197 There is little support for making judicial review an option in Victoria for victims who are dissatisfied by a decision to discontinue a prosecution or proceed with a guilty plea to lesser charges; none has come from victims. It was suggested that, if adequate and independent internal review processes were followed by the public prosecutions service and victims were provided with information and reasons, judicial review would not be needed in most cases.<sup>187</sup> However, it was also said that the right to seek judicial review of decisions after an internal review could be useful for a victim who remains unsatisfied.<sup>188</sup>
- 4.198 In contrast to comments in support, opposition to judicial review was unequivocal. The DPP argued that it is unnecessary to introduce a system of judicial review and that to do so would have unwelcome consequences because:
- It would compromise the Director’s independence.
  - The courts are not best placed to weigh the factors that need to be considered in making a decision to prosecute or to discontinue a prosecution.
  - A system of judicial review would add an additional layer of costs from satellite proceedings and cause delays in the justice system.
  - There is no demonstrated need for such a reform and it would be unfair to victims with fewer financial resources than others to pay for lawyers to conduct a judicial review. If applications for review were funded by Victoria Legal Aid, it would be an additional impost on the taxpayer.
  - It could create expectations in victims that cannot be realised. Where a judicial review application is successful, the matter is referred back to the original decision maker to reconsider. The court does not substitute the original decision with a decision of its own.<sup>189</sup>

182 (2012) 247 CLR 265.

183 Ibid 280.

184 *Maxwell v The Queen* (1996) 184 CLR 501, 534 (Gaudron and Gummow JJ).

185 *Likiardopoulos v The Queen* (2012) 247 CLR 265, 269.

186 See Crown Prosecution Service, *Appeals: Judicial Review of Prosecutorial Decisions* (21 May 2009) <[http://www.cps.gov.uk/legal/a\\_to\\_c/appeals\\_judicial\\_review\\_of\\_prosecution\\_decisions/](http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/)>.

187 Consultation 19 (Victims of Crime Commissioner, Victoria).

188 Consultation 30 (Dr Tyrone Kirchengast, University of New South Wales).

189 Submission 23 (DPP).

- 4.199 The Victorian Bar and Criminal Bar Association are strongly of the view that the decisions of the DPP to file or withdraw charges should not be judicially reviewable.<sup>190</sup>
- 4.200 In view of the limited and muted support for the idea, and the cogent reasons put forward in opposition, the Commission does not recommend that judicial review be made an option for victims seeking review of prosecutorial decisions.

### Independent review

- 4.201 Several submissions and consultations presented the view that the public prosecutions service should be subject to review by an independent entity other than a court. Views differed about the form and function of this entity.
- 4.202 One submission suggested external review of prosecutorial decisions by an independent senior barrister nominated by the victim from a panel.<sup>191</sup> Another proposed a hierarchy of second opinions. A decision with which the victim is not satisfied could be reviewed by the DPP and then by an independent barrister who has had extensive experience prosecuting similar cases.<sup>192</sup>
- 4.203 The idea of involving an independent expert in reviewing decisions is not without precedent. The *Legal Aid Act 1978 (Vic)*, for example, provides for the review of decisions by an independent reviewer.<sup>193</sup>
- 4.204 Other submissions expressed, as a general principle, that an external and independent body should oversee the operation of the public prosecutions service to ensure that it fulfils its obligations. The example commonly given is the Crown Prosecution Inspectorate for England and Wales.<sup>194</sup> The Crown Prosecution Inspectorate reviews CPS processes, not individual cases. It can also conduct own-motion reviews.<sup>195</sup>
- 4.205 It was also proposed that a body modelled on the Crown Prosecution Inspectorate could review decisions to prosecute, discontinue and accept pleas of guilty to lesser charges, and monitor compliance with the Victims' Charter. It would not have power to overturn the prosecutor's decision but would simply refer the matter back for reconsideration.<sup>196</sup>
- 4.206 Some of the oversight functions proposed for an external body now fall within the responsibilities of the Victims of Crime Commissioner. In addition, responsibilities to review processes are held by the Victorian Auditor-General. The Auditor-General conducts financial and performance audits of government departments, public bodies and other entities under government control. In February 2011, for example, the Auditor-General reported to Parliament on a performance audit of the effectiveness of victims of crime programs.<sup>197</sup>
- 4.207 The Commission considers that the need for a scheme for independent review of decisions to discontinue a prosecution or proceed with a plea of guilty to lesser charges should be revisited in five years. By this time, the proposed internal review process for victims should have been established within the public prosecutions service and operational for a number of years. If the internal review scheme has not been established, or an evaluation has revealed that it is not operating effectively, a statutory review process that provides for independent review should be created.

190 Submission 29 (Victorian Bar and Criminal Bar Association).

191 Submission 21 (Dianne Hadden).

192 Submission 38 (Name withheld).

193 *Legal Aid Act 1978 (Vic)* pt IV.

194 Submissions 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault).

195 Consultation 17 (Dr Robyn Holder, Griffith University).

196 Submission 40 (Former VOCCC victim representatives); Consultation 45 (Victims Support Agency, Department of Justice and Regulation).

197 Auditor General, *Effectiveness of Victims of Crime Programs* (2011).

## Complaints about lawyers' conduct

- 4.208 The legal profession in Victoria is regulated by the Victorian Legal Services Board. Complaints about lawyers are handled by the Victorian Legal Services Commissioner, who also has the power to initiate an investigation in the absence of a complaint. Both the Board and the Commissioner are independent statutory authorities that operate under the *Legal Profession Uniform Application Act 2014 (Vic)*.<sup>198</sup>
- 4.209 The complaints about lawyers that the Legal Services Commissioner receives are generally made by their clients, but anyone may make a complaint.<sup>199</sup> Accordingly, a victim may make a complaint about the conduct of a lawyer in connection with a criminal trial even if the victim has not engaged that lawyer. If the lawyer is found to have exhibited unsatisfactory professional conduct or professional misconduct, the Legal Services Commissioner—or, in more serious cases, the Victorian Civil and Administrative Tribunal—may impose sanctions.<sup>200</sup>
- 4.210 Although victims can make complaints to the Legal Services Commissioner about legal practitioners, there is little scope for them to be investigated until the conclusion of the criminal trial process. If a complaint is made about the conduct of a lawyer during the course of a trial, the complainant is told to raise the matter with the trial judge. Complainants are expected to try to resolve the complaint with the lawyer before making a complaint to the Legal Services Commissioner.
- 4.211 Over the past five years the Commissioner has received five complaints from victims about the conduct of lawyers in prosecuting or defending cases in criminal trials—on average, one a year. In contrast, about 5000 inquiries, and 2000 complaints in total, are processed each year.<sup>201</sup>
- 4.212 Two of the complaints from victims were about conduct during court proceedings; most concerned behaviour in the court precincts. The behaviour tended to convey insensitivity toward the victim, for example, inappropriate jokes between barristers at the bar table and unwanted contact with a victim's parents on behalf of the offender. None of the complaints were about a failure to adhere to the principles in the Victims' Charter Act. No complaints have been referred from the Victims Support Agency.<sup>202</sup>
- 4.213 Although the Victims of Crime Commissioner does not have a complaint-handling role, it is likely that matters raised with the Commissioner will include complaints about the conduct of lawyers. Accordingly, the Victims of Crime Commissioner should have the power to refer such matters to the Legal Services Commissioner.

## Recommendation

- 11 Section 27(1) of the *Victims of Crime Commissioner Act 2015 (Vic)* should be amended to empower the Victims of Crime Commissioner to refer a matter to the Victorian Legal Services Commissioner.

198 The Victorian Legal Services Board and Legal Services Commissioner were established in 2005 pursuant to the *Legal Profession Act 2004 (Vic)*.

199 *Legal Profession Uniform Law 2014 (Vic)* s 266(a).

200 Ibid ss 299, 302.

201 Consultation 57 (Victorian Legal Services Commissioner and CEO Victorian Legal Services Board).

202 Ibid.

## System-wide monitoring and review

### Reporting requirements

- 4.214 The Victims' Charter Act requires the Secretary of the Department of Justice and Regulation to 'monitor, review and evaluate the operation of this Act and its benefits for victims'.<sup>203</sup> The Department must report annually on the steps taken to promote the Victims' Charter principles and the operation of the Act.<sup>204</sup> The information should be included in the Department's annual report, which is tabled in Parliament.<sup>205</sup> This would enable public scrutiny of how well the objectives of the legislation are being met.
- 4.215 In practice, this does not occur. Although the Department 'coordinates responses across the justice system to the Victims' Charter Act',<sup>206</sup> its annual reports provide information only about its own activities in delivering support services.<sup>207</sup> The information does not include an account of the operation of the Act generally or the activities of investigatory and prosecuting agencies. Consequently, the monitoring and review requirements established by the Act do not generate information on how the principles are being implemented.
- 4.216 This is not the fault of the Department. When it was assigned responsibility to report on the operation of the Act, it was not empowered to obtain information for this purpose from investigatory and prosecuting agencies; nor were these agencies required to provide it. This is appropriate, given the separate and independent status of Victoria Police and the DPP, but it is an impediment to achieving the systemic cultural change that the Victims' Charter Act was intended to foster.
- 4.217 A better approach would be to assign the responsibility to another independent body. According to the former victim representatives on the inaugural Victims of Crime Consultative Committee, the Victims of Crime Commissioner should be required to report to the Attorney-General on compliance with the principles in the Victims' Charter Act, and for the report to be tabled in Parliament.<sup>208</sup>
- 4.218 The Commission agrees. It would be consistent with the Victims of Crime Commissioner's existing functions and powers. The Commissioner has the power to inquire into 'any systemic victim of crime matter', either at the request of any person or on the Commissioner's own motion,<sup>209</sup> and may provide a report on the inquiry to the Attorney-General for tabling in the Victorian Parliament.<sup>210</sup>
- 4.219 In support of this function, the Commissioner has powers to require access to records held by the Department of Justice and Regulation, Victoria Police and the DPP.<sup>211</sup> The records must be provided unless doing so would be reasonably likely to prejudice an investigation or trial, disclose a confidential source of information or endanger a person.<sup>212</sup>
- 4.220 The Commissioner may also report to the Attorney-General on any matter relating to the performance of the Commissioner's functions,<sup>213</sup> and is required to report annually on the operation of the Victims of Crime Commissioner Act.<sup>214</sup>

203 *Victims' Charter Act 2006* (Vic) s 20(b).

204 *Ibid* s 21.

205 *Ibid*.

206 Department of Justice and Regulation, *Annual Report 2014–15* (2015) 25.

207 See, eg, Department of Justice, *Annual Report 2013–14* (2014) 21; *Annual Report 2014–15* (2015) 25.

208 Submission 40 (Former VOCCC victim representatives).

209 *Victims of Crime Commissioner Act 2015* (Vic) s 23. The person requesting the inquiry does not need to be a victim.

210 *Ibid* s 25(1).

211 *Ibid* ss 18–20.

212 *Ibid* ss 19(2)–(3), 20(2)–(3).

213 *Ibid* s 29(1).

214 *Ibid* s 28(1).

- 4.221 Given the systemic focus of the office of the Victims of Crime Commissioner, the Commission considers this office is well placed to take over the monitoring and reporting function previously assigned to the Department of Justice and Regulation. Such a function would be in line with the Commissioner's capacity to bring systemic problems and possible solutions to the Government's attention.

## Recommendation

- 12 The Victims of Crime Commissioner should be required to report annually to Parliament on the implementation of the *Victims' Charter Act 2006 (Vic)* by all investigatory, prosecuting and victims' services agencies, including information about the number of complaints made and processed about compliance with the Victims' Charter principles.

## Data collection

- 4.222 The systematic collection of data, as well as regular monitoring and evaluation, are critical to ensuring that victims are properly recognised in our criminal justice system.<sup>215</sup> Reliable data can be used to assess whether law reforms are being properly implemented, to conduct research and to inform the development of education and training programs and the allocation of funding.<sup>216</sup> The Victims of Crime Commissioner suggested that there could be benefit in introducing performance monitoring of key players in the criminal justice system, to measure compliance with agreed and relevant performance targets.<sup>217</sup>
- 4.223 A number of comprehensive studies and reports have highlighted the lack of data specific to victims (including victims of certain offences or victims from certain groups).<sup>218</sup> Similarly, the Victims of Crime Commissioner has criticised the lack of data about the experiences of victims who come into contact with the criminal justice system.<sup>219</sup>
- 4.224 The Victims Support Agency periodically conducts surveys of victims' experiences in the criminal justice system. A 2014 survey sought victims' perceptions of information they received and their satisfaction levels in relation to police, prosecutors and court staff. It also asked about victims' feelings of safety, victim impact statements, and the Victims of Crime Assistance Tribunal.<sup>220</sup> The 2014 survey resembled a similar survey conducted in 2008 that 'assisted in the evaluation of the implementation of the Victims' Charter'.<sup>221</sup> Data gathered by the Victims Support Agency has also been used to evaluate the effectiveness of victim impact statements in Victoria,<sup>222</sup> and identify the information and support needs of victims in the Magistrates' Court.<sup>223</sup>
- 4.225 These and other surveys of victims are enriching knowledge and expertise in Victoria about their needs and expectations. In addition, the courts and criminal justice agencies generate and use data about their own activities for internal purposes.

215 Submission 14 (Victims of Crime Commissioner, Victoria), Consultation 19 (Victims of Crime Commissioner, Victoria).

216 Nicole Bluett-Boyd and Bianca Fileborn, 'Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice—Implementation, Current Practice and Future Directions' (Research Report No 27, Australian Institute of Family Studies, 2014), 42. See also Submission 31 (Professor Jonathan Doak, Nottingham Trent University); Consultation 1 (A victim), 21 (Victoria Police), 22 (Professor Jonathan Doak, Nottingham Trent University).

217 Submission 14 (Victims of Crime Commissioner, Victoria).

218 Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) 96–7; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1479–81 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers—Final Report* (2013), 30–1.

219 Submission 14 (Victims of Crime Commissioner, Victoria).

220 Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (2015).

221 Ibid 3.

222 Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria* (Department of Justice, 2009).

223 Victims Support Agency, *Information and Support Needs of Victims and Witnesses in the Magistrates' Court of Victoria* (Department of Justice, 2013).

- 4.226 Nevertheless, the Commission found it difficult to ascertain whether past reforms that were introduced to change aspects of the criminal trial for the benefit of victims have achieved their purpose. Even though the Commission was greatly assisted by the courts, it was unable to obtain data in relation to a number of victim-related laws and procedures, including:
- the number of applications made to cross-examine the victim at a committal hearing and the number of applications granted
  - the number of applications made to access and use confidential communications, the number of victims seeking leave to appear in response, and the number of applications granted
  - how consistently alternative arrangements are being put in place for vulnerable victims
  - how many special hearings are occurring.
- 4.227 A system-wide approach to implementing victim-centred reforms to law and procedure should be supported by a system-wide approach to collecting data in order to monitor and evaluate the outcomes. This does not necessarily mean that a database must be established specifically for this purpose. It is possible that much of the necessary data is already being collected.
- 4.228 The Commission’s sexual offences report, published in 2004, recommended that the Department of Justice convene a working group, with representatives from the courts, Victoria Police, the OPP and other relevant stakeholders, to set up an integrated process for gathering reliable statistics about sexual offences ‘from the time of report until the matter is concluded.’<sup>224</sup> Similarly, the Victorian Parliament Law Reform Committee’s *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* recommended that a centralised database be established by the Department of Justice, with input from Victoria Police, the OPP, courts and the Department of Human Services, to gather statistics on people with disabilities who come into contact with the justice system.<sup>225</sup> A report provided by Women with Disabilities Victoria echoes this recommendation.<sup>226</sup>
- 4.229 In 2016, the Victorian Royal Commission into Family Violence also made a number of recommendations for the collection of data about family violence prevention and response.<sup>227</sup> This important work may provide opportunities to improve the collection of data about victims of crime generally.
- 4.230 The recommendations of these previous inquiries are important. The Commission considers that key criminal justice system stakeholders, including the OPP, Victoria Police, Victims Support Agency and the Victims of Crime Commissioner should work together to establish a system for gathering data on victims who come into contact with the criminal justice system. This system should track offences from reporting to the conclusion of the case, and should be able to disaggregate data, including in relation to gender, disability, ethnicity, Aboriginal or Torres Strait Islander background and age.
- 4.231 The Commission expects that the Victims of Crime Commissioner will be making arrangements with criminal justice agencies to obtain data that will assist inquiries into systemic victims of crime matters. If the recommendation above that the Commissioner report annually on the operation of the Victims’ Charter Act is accepted, the Commissioner will need to establish new arrangements, or use existing ones, to obtain the necessary data, including:

224 Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004), xlv (recommendations 4–5).

225 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers—Final Report* (2013), 31 (recommendation 1).

226 Submission 18 (Women with Disabilities Victoria) 102.

227 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) recommendations 47, 81, 152, 219.



- whether and to what extent victims are cross-examined at committal hearings
- the implementation of the confidential communications scheme
- the use of special hearings and alternative arrangements for giving evidence and whether they are achieving their purpose
- applications in relation to cross-examination about a victim's sexual history, and other pre-trial applications that affect how a victim gives evidence
- the implementation of provisions relating to victim impact statements
- the operation and effectiveness of Part 4 of the *Sentencing Act 1991* (Vic).

4.232 In addition, recommendations that the Commission makes later in this report would give rise to additional data collection requirements.

## Recommendation

- 13 The Victims of Crime Commissioner should establish arrangements with the Supreme Court, County Court, Magistrates' Court, Office of Public Prosecutions, Victoria Police and Department of Justice and Regulation to collect data about implementation of the *Victims' Charter Act 2006* (Vic) to enable the preparation of annual reports to Parliament.

## A coherent legislative and policy framework

4.233 The Victims' Charter Act was introduced as a 'coherent framework' for 'all the existing rights and entitlements for victims of crime'.<sup>228</sup> It was intended to bring about cultural change through compliance with the Charter principles.

4.234 When debating the legislation in Parliament, the then-Attorney-General said that giving effect to victims' rights often requires a major cultural shift by justice agencies, and that this would be brought about by a phased-in and closely monitored approach to implementation:

Implementing the victims' charter in this way will mean that criminal justice, investigating, prosecuting and victim services agencies will be developing consistent and systemic approaches to responding to victims. This will facilitate the ongoing cultural change within the criminal justice system which is necessary to ensure they are adequately and consistently responding to victims of crime.<sup>229</sup>

4.235 Although many of the entitlements and obligations owed to victims are still reflected in Victims' Charter principles, other laws and policies that provide entitlements or create obligations towards victims have since been introduced. Victim-oriented laws and policies have become fragmented and scattered across a number of pieces of legislation in Victoria.<sup>230</sup>

4.236 The Commission considers that the Victims' Charter Act should be revised to restore its relevance as a coherent framework of victims' rights and entitlements. Just as it was originally intended to do, the revised Act would spearhead cultural change.

228 Victoria, *Parliamentary Debates*, Legislative Assembly, 14 June 2006, 2046 (Rob Hulls).  
 229 Ibid 2047.  
 230 Submission 19 (Dr Tyrone Kirchengast, University of New South Wales).



- 4.237 In practical terms, the updated framework would:
- support awareness-raising initiatives by providing a single reference point for victims to see the range of rights and entitlements they have and the obligations owed to them
  - provide a resource for education and training programs
  - increase transparency and improve accountability by incorporating into legislation practices that are currently spread among various statutes and policies.
- 4.238 The Commission’s consultation paper invited comments on whether the Victims’ Charter Act should be amended to include other rights or broaden existing rights.<sup>231</sup> The responses showed a clear consensus that the Act should be amended, not only to supplement and amend existing rights but to clarify them as well.
- 4.239 Two Australian academics in the field of victimology, Tyrone Kirchengast and Robyn Holder, told the Commission that greater clarity could be brought to the role of victims of crime by identifying and consolidating existing entitlements and obligations owed to victims.<sup>232</sup> Kirchengast suggests the production of a single guidance document, ‘that sets out the rights, powers and obligations owed to victims’.<sup>233</sup> Margaret Camilleri maintained that the Victims’ Charter Act should be clearer about the content of the principles, the obligations of different agencies and the consequences of a failure to adhere to the principles.<sup>234</sup> Jonathan Doak noted that the Victims’ Charter principles lack definition.<sup>235</sup>
- 4.240 The Victims Support Agency suggested that the Victims’ Charter Act could benefit from a thorough and separate review.<sup>236</sup> The Commission agrees that a full review is desirable in the future but believes that it should not delay the implementation of specific measures set out in this report.
- 4.241 The Commission’s review of the victim’s role in the criminal trial process has generated useful reform ideas over the past 18 months that have informed recommendations for specific amendments to the Victims’ Charter Act. These should not be disregarded or delayed while awaiting the outcome of a review of the Act itself. In addition, the data currently collected about compliance with the Act is insufficient for a complete review to be conducted.
- 4.242 In this report the Commission makes specific recommendations to amend the Victims’ Charter Act and give the Victims of Crime Commissioner the responsibility to collect implementation data. The Commission considers that the Act should be reviewed fully in five years, by which time the effect of reforms introduced as a result of the present review could be evaluated.
- 4.243 The review would be comprehensive and would include the following areas of inquiry within its scope:
- the effectiveness of reforms in ensuring that investigatory, prosecuting and victims’ services agencies respect the entitlements of, and obligations owed to, victims
  - whether victims should have a right to enforce through legal action some or all of the principles in the Victims’ Charter Act

231 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015), 164.

232 Submission 19 (Dr Tyrone Kirchengast, University of New South Wales); Consultation 17 (Dr Robyn Holder, Griffith University). Holder notes that victims have rights both as citizens and victims of crime. This is further discussed in Chapter 3.

233 Submission 19 (Dr Tyrone Kirchengast, University of New South Wales). Kirchengast’s submission recommends as a first step a legal guidance to be used as an educative tool for the legal profession and the community. Alternatively, he suggests repealing or replacing the Victims’ Charter Act with ‘a comprehensive Charter of protective, participatory and enforceable trial and other rights for victims’.

234 Submission 37 (Dr Margaret Camilleri).

235 Consultation 22 (Professor Jonathan Doak, Nottingham Trent University).

236 Consultation 45 (Victims Support Agency, Department of Justice and Regulation).

- whether victims have equal access to services regardless of race or Indigenous background, sex or gender identity, cultural or linguistic background, sexual orientation, disability, religion, age, or whether they live in a regional, rural or metropolitan location
- the responsiveness of agencies to complaints about non-compliance with the Victims' Charter principles and requests for review of decisions
- whether there are gaps in the collection of data by investigatory, prosecuting and victims' services agencies that impede the ability of the Commissioner to monitor the implementation of the Victims' Charter Act.

## Recommendation

- 14 The Victims of Crime Commissioner should lead a comprehensive review of the *Victims' Charter Act 2006* (Vic) not later than five years after the commencement of reforms recommended in this report.



# Respect

- 86** Introduction
- 86** The Victims' Charter principle
- 90** Respect in the courtroom
- 99** Respect in the court process

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## 5 Respect

### Introduction

- 5.1 Victims want to be treated with respect by professionals in the criminal justice system, including the police, prosecution and defence lawyers, judges, magistrates and victim support workers.<sup>1</sup> Treating victims with respect has more potential than other factors to significantly influence whether victims are satisfied with the criminal justice system.<sup>2</sup>
- 5.2 Treating victims with respect for their dignity means different things in different contexts. Respectful treatment manifests in the day-to-day personal interactions victims have with the professionals they encounter in the criminal justice system. It also overlaps with ensuring victims' expectations are met and that those working in the criminal justice system comply with their obligations towards victims. Victims feel respected when they are provided with information, given opportunities to participate, protected from trauma and intimidation and able to seek reparation. This chapter recommends reforms that ensure that the concepts underlying respectful treatment for victims are properly reflected in the *Victims' Charter Act 2006* (Vic).
- 5.3 This chapter also discusses respectful treatment of victims in the courtroom, as the focal point of many victims' experiences of the criminal trial process. While victims seek respectful treatment at all stages of the process, their experiences in the courtroom contribute significantly to their overall experience.

### The Victims' Charter principle

#### Respecting victims in law and practice

- 5.4 Recognising that all victims should be treated with respect is an object of the Victims' Charter Act.<sup>3</sup> In addition, the Victims' Charter principle states that:

All persons adversely affected by crime are to be treated with courtesy, respect and dignity by investigatory agencies, prosecuting agencies and victims' services agencies.<sup>4</sup>
- 5.5 Treating victims with courtesy and respecting their dignity should be simple, and yet it is difficult to describe how this principle should operate in practice.

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1 Submissions 11 (Sandra Betts), 22 (Joy and Roger Membrey), 38 (Name withheld), 40 (Former VOCCC victim representatives); Consultations 5 (Sue and Don Scales, Mildura), 10 (A victim), 11 (Parent of a victim), 42 (Relative of a victim; victim); Roundtable 18 (victims of crime). See also Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 9 *Victims and Offenders* 119, 122.

2 Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 9 *Victims and Offenders* 119, 121, 131, concluding that respectful treatment has a greater influence on victims' satisfaction levels than other procedural justice factors, such as participation and information.

3 *Victims Charter Act 2006* (Vic) s 4(1)(b).

4 *Ibid* s 6(1).

- 5.6 Courtesy is synonymous with politeness, kindness and also with respectful treatment.<sup>5</sup> Dignity is a more complex concept. Dignity is inherent to an individual; victims possess it, they are not treated with it. The Victims' Charter principle that victims be treated with respect and dignity is more logically expressed as an obligation to treat victims with respect for their dignity. This expression is used in the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,<sup>6</sup> as well as victims' instruments in other Australian and overseas jurisdictions.<sup>7</sup>
- 5.7 Dignity is recognised in numerous national constitutions and international instruments that protect human rights and victims' rights.<sup>8</sup> It often carries different meanings in different contexts.<sup>9</sup> The former victim representatives on the inaugural Victims of Crime Consultative Committee described dignity as being 'about recognising and respecting our intrinsic worth as human beings, and being treated in a manner that is consistent with this respect'.<sup>10</sup>
- 5.8 Treating victims with respect for their dignity is about victims' interpersonal interactions with those in the criminal justice system. Malini Laxminarayan describes this as 'interpersonal justice'.<sup>11</sup> Ultimately, victims navigating the criminal justice system seek respectful and positive personal encounters with those in authority.<sup>12</sup>
- 5.9 Victims feel respected when they are listened to, believed and not judged or dismissed by those in authority.<sup>13</sup> Respectful treatment is about being interested and polite, showing concern and offering reassurance. Honesty, empathy and friendliness are also signs of respect.<sup>14</sup>
- 5.10 However, treating victims with respect is about more than politeness, sensitivity and kindness. Victims referred to respect when describing their need for information and support and to be consulted and included in decision making, and when recounting their experiences of cross-examination and the way they were treated by judges and lawyers in the courtroom.
- 5.11 As outlined in Chapter 3, victims have a number of expectations and entitlements throughout the criminal trial process. Whether victims feel respected depends on whether professionals working in the criminal justice system meet these expectations and comply with their obligations towards victims. For example:
- Providing victims with information and support conveys to them that they are being

5 *Macquarie Dictionary* (6th edition 2013) 345; *Macquarie Thesaurus* (Macquarie, 1999) 310.1, 362.1.

6 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, A/RES/40/34 (29 November 1985) annex [4].

7 *Victims of Crime Act 1994* (WA) sch 1, s 1; *Victims of Crime Act 1994* (ACT) s 4(a); *Victims Rights and Support Act 2013* (NSW) s 6.1; *Charter of Rights for Victims of Crime* (Tasmanian Department of Justice, undated) 1; *Victims Bill of Rights* SC 2015, c 13, s 2, preamble; *Victims' Rights Act 2002* (NZ) s 7(b). Queensland and the Northern Territory use the construction 'respect and dignity': *Victims of Crime Assistance Act 2009* (Qld) s 8; *Charter for Victims of Crime* (Northern Territory Government, undated) issued pursuant to *Victims of Crime Rights and Services Act* (NT) s 30.

8 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN doc A/810 (10 December 1948) art 1; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) preamble, arts 23, 28, 37, 39, 40; *International Convention on the Rights and Dignity of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, sup no 49, preamble, arts 1, 3, 8, 16, 24, 25; *Convention on the Elimination of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) preamble. See also Submission 40 (Former VOCCC victim representatives); Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 664–74.

9 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 664–75.

10 Submission 40 (Former VOCCC victim representatives). See also *ibid* 679, stating that, at a minimum, dignity means that every human has an intrinsic worth that should be recognised and respected by others, and that 'some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth'.

11 Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 9 *Victims and Offenders* 119, 122.

12 Malini Laxminarayan, 'Procedural and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type' (2012) 25 *Social Justice Research* 390, 392; Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221, 223.

13 Submission 30 (Loddon Campaspe Centre Against Sexual Assault); Consultations 12 (Parent of a victim), 25 (Aboriginal Family Violence Prevention & Legal Service Victoria), 37 (Centacare, Barwon South West Region), 43 (Victoria Police SOCIT, Wodonga); Roundtable 12 (Victim support specialists, Wodonga).

14 Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 9 *Victims and Offenders* 119, 128, 131.

listened to and that their needs and interests are valid.<sup>15</sup> In Chapter 6, the Commission makes recommendations to ensure that information and support are provided to victims regularly, equitably and effectively.

- Respecting the dignity of victims is about treating them as autonomous individuals with control over their lives.<sup>16</sup> Including victims in decision making conveys to victims that their views matter.<sup>17</sup> In Chapter 7, the Commission makes recommendations about the ways that victims can participate in the criminal trial process.
- Using measures such as remote facilities and limits on cross-examination to prevent trauma and intimidation also protects victims from disrespectful treatment, both real and perceived, throughout the criminal trial process. Recommendations about protective procedures are made in Chapter 8.
- There is a close connection between showing respect to the victim and protecting their privacy. In particular, ensuring that victims have some control over the use and disclosure of their personal information helps them retain their dignity. Some aspects of the criminal trial process expose victims' private lives to scrutiny, and the extent to which this occurs should be limited to what is justified. Protecting victims' privacy through measures that limit access to victims' personal information are discussed in detail in Chapter 8.
- Crime interferes with victims' lives and harms them financially, psychologically, physically and in other ways. Providing victims with a means to access financial reparation seeks to repair some harm and restore dignity.<sup>18</sup> In *RK v Mirik and Mirik*, Justice Bell described respect for the dignity of victims as having 'found expression in legislation allowing criminal courts to order offenders to pay civil compensation to victims of crime'.<sup>19</sup> Reforms about financial reparation are canvassed in Chapter 9.

5.12 Clearly, respectful treatment is a necessary precondition to, and an essential component of, recognising victims' status as participants in the criminal trial process.

5.13 The Commission considers that the Victims' Charter principle fails to capture the ideas central to respecting victims' dignity. In Chapter 3, the Commission recommends that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognise the victim's right to be acknowledged as a participant, treated with respect and protected from unnecessary trauma in criminal proceedings. Section 6(2) of the Victims' Charter Act should reinforce this right by requiring that victims be treated with respect as participants in the criminal trial process. This would be a more meaningful construction than the existing principle, and would provide additional guidance to investigatory, prosecuting and victims' services agencies.

## Recommendation

**15 Section 6(2) of the *Victims' Charter Act 2006* (Vic) should be amended to require investigatory, prosecuting and victims' services agencies to treat victims with courtesy and to respect their dignity and their rights and entitlements as participants in the criminal trial process.**

15 See, eg, Ben Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System' (2011) 11(4) *Criminology and Criminal Justice* 345; Jo-Anne Wemmers, Rien van der Leeden and Herman Steensma, 'What is Procedural Justice: Criteria Used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures' (1991) 8(4) *Social Justice Research* 329, 334.

16 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 688–9.

17 Submission 11 (Sandra Betts). See also Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 9 *Victims and Offenders* 119, 122.

18 Jonathan Doak, *Human Rights, Victims' Rights and Criminal Justice: Reconciling the Role of Third Parties* (Hart Publishing, 2008) 207.

19 *RK v Mirik and Mirik* (2009) 21 VR 623, 625 [5].



## Respecting the needs of diverse victims

- 5.14 As outlined in Chapter 2, victims are affected by crime in different ways. Respectful treatment means responding to the diverse needs of victims. The Victims' Charter principle recognises this, and obliges investigatory, prosecuting and victims' services agencies to 'take into account and be responsive to' the diverse needs of victims,<sup>20</sup> in particular needs relating to:
- race or Indigenous background
  - gender or sexual orientation
  - cultural or linguistic background
  - disability
  - religious views
  - age.<sup>21</sup>
- 5.15 In framing its recommendations, both those that apply generally and those that address specific issues, the Commission has been cognisant of the particular needs of victims with disabilities, Aboriginal victims, victims from culturally and linguistically diverse communities, and victims of gender-based offences involving sexual violence and family violence.<sup>22</sup>

### Victims in rural and regional locations

- 5.16 The Centre for Rural Regional Law and Justice at Deakin University proposed in its submission that the Victims' Charter Act expressly address the needs of victims in regional and rural locations. Such a reform would provide:
- a basis for arguing for more service development for people in regional and rural areas and, more broadly, for more consideration of how any reforms to the criminal trial process impacts on victims with particular needs arising from their rurality or other attributes as currently listed in the Act.<sup>23</sup>
- 5.17 There is merit in this proposal. Compared to victims living in metropolitan Victoria, victims in rural and regional Victoria often receive less support and information, face greater barriers to effective participation, have more limited access to protective procedures during the criminal trial process, and experience difficulty in obtaining legal assistance to help with claims for compensation or financial assistance.<sup>24</sup> The Victorian Royal Commission into Family Violence has also recognised the particular challenges faced by family violence victims living in rural and regional Victoria.<sup>25</sup>
- 5.18 An express reference to victims living in rural and regional Victoria in section 6(2) of the Victims' Charter Act would draw attention to the fact that they have different needs and face unique barriers to support, protection and participation throughout the criminal trial process.

20 *Victims' Charter 2006* (Vic) s 6(2)

21 *Ibid.*

22 These needs are outlined principally in the following submissions, consultations and reports: Submissions 1 (Australian Law Reform Commission), 4 (Victorian Equal Opportunity and Human Rights Commission), 7 (Youthlaw), 17 (Office of the Public Advocate), 18 (Women with Disabilities Victoria), 30 (Loddon Campaspe Centre Against Sexual Assault), 34 (Northern Centre Against Sexual Assault), 37 (Dr Margaret Camilleri), 39 (Safe Steps), 42 (Vixen Collective); Consultations 18 (Child Witness Service, Department of Justice and Regulation), 25 (Aboriginal Family Violence Prevention & Legal Service Victoria), 27 (Loddon Campaspe Centre Against Sexual Assault), 33 (Women's Legal Service NSW), 38 (Executive Officer, Barwon South West RAJAC), 43 (Victoria Police SOCIT, Wodonga); Roundtables 5 (Victim support specialists, Morwell), 8 (Metropolitan Centres Against Sexual Assault).

23 Submission 5 (Centre for Rural Regional Law and Justice).

24 Submissions 5 (Centre for Rural Regional Law and Justice), 21 (Dianne Hadden); Consultations 16 (Judges of the County Court of Victoria), 26 (Magistrate Stella Stuthridge), 31 (Judge of the County Court of Victoria), 36 (Magistrate John Lesser), 37 (Centacare, Barwon South West Region), 39 (OPP), 50 (Witness Assistance Service, OPP Victoria); Roundtables 1 (Victim support specialists, Mildura), 3 (Victim support specialists, Geelong), 5 (Victim support specialists, Morwell), 6 (Legal practitioners, Morwell), 9 (Victim support and therapeutic specialists, Shepparton), 13 (Victim support specialists, Ballarat).

25 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol V 215–31, recommendation 182.

- 5.19 A key function of the Victims' Charter Act is to act as an accountability tool. This is discussed in more detail in Chapter 4. Expressly recognising the particular needs of victims in rural and regional areas requires agencies to be accountable for identifying and addressing disparities in the provision of their services between metropolitan and rural and regional locations.

## Recommendation

- 16 Section 6(2) of the *Victims' Charter Act 2006* (Vic) should be amended to include 'living in a regional or rural location' as a need that investigatory, prosecuting and victims' services agencies must take into account and be responsive to.

## Respect in the courtroom

- 5.20 Attending court is the focal point of most victims' experience of the criminal trial process. In submissions and consultations, victims' views about whether they were treated with respect were coloured by how they were treated by the judicial officer, the prosecution and the defence lawyer during court proceedings. For victims who were also witnesses, their treatment during cross-examination was also seen as a measure of the respect in which they were held.

## Acknowledgment and respect

- 5.21 While some victims expressed satisfaction with the criminal justice process, many more expressed profound dismay at their treatment, including by the courts. This includes not being acknowledged, not being respected or protected, and not being provided with relevant information. The lack of protection was said to be especially marked in cross-examination of victim-witnesses, as discussed below at [5.36]–[5.37].
- 5.22 For many victims, respectful or disrespectful treatment by judges or magistrates carries weight and is remembered long after the finalisation of criminal proceedings. Victims told the Commission of occasions when they were not properly acknowledged by judges or magistrates,<sup>26</sup> and how they made remarks that victims considered minimised the offending.<sup>27</sup> Such comments may be received as upsetting and disrespectful.
- 5.23 The attitudes and demeanour of lawyers and judicial officers as they interact with one another in the courtroom also matter. Lawyers were described as 'flippant',<sup>28</sup> and as treating court proceedings of considerable significance in a routine and mechanical fashion.<sup>29</sup>
- 5.24 Many victims viewed appeal proceedings as particularly unconcerned with their interests. They described appeal proceedings as 'cold'<sup>30</sup> and 'detached',<sup>31</sup> with one victim observing that the lawyers and judge treated the matter like 'just another day at the office'.<sup>32</sup> Other victims said they felt entirely excluded from and unacknowledged in the appeal process.<sup>33</sup>
- 5.25 Respecting a victim's dignity requires judicial officers and lawyers to conduct themselves in a way that recognises that court is not a workplace for victims, and that coming to court may be a momentous and highly distressing experience. This means demonstrating

26 Submissions 15 (Kristy McKellar), 41 (Colleen Murphy (Kelly)); Consultations 29 (Parent of victims), 44 (Kristy McKellar), 56 (Colleen Murphy (Kelly)); Roundtable 7 (Victim support specialists, Melbourne: metropolitan Victims Assistance Program workers).

27 Submission 41 (Colleen Murphy (Kelly)); Consultations 1 (A victim), 28 (Laurie Krause), 44 (Kristy McKellar), 56 (Colleen Murphy (Kelly)).

28 Consultation 56 (Colleen Murphy (Kelly)).

29 Consultations 1 (A victim), 10 (A victim).

30 Consultation 1 (A victim).

31 Consultations 13 (Parents of a victim), 20 (Parent of victims).

32 Consultation 1 (A victim).

33 Consultations 13 (Parents of a victim), 20 (Parent of victims), 29 (Parent of victims).

some empathy for victims' emotions. Victims consulted by the Commission described being discouraged from or reprimanded for showing emotion in the courtroom.<sup>34</sup> They considered this to be disrespectful of the harm they have suffered.<sup>35</sup>

- 5.26 For the family of victims who have been killed, disrespect was also manifested in hearing their loved one described as 'the deceased' by the judge, prosecutor and defence lawyer.<sup>36</sup> Repeated references to a loved one as 'the deceased' is distressing and rendered them invisible.<sup>37</sup> Family victims emphasised to the Commission the importance of their loved one being acknowledged in the courtroom.<sup>38</sup>

### The need for reform

- 5.27 Judicial officers are a symbol of the authority of the court and criminal justice system.<sup>39</sup> Respectful treatment by judicial officers is evidence to victims that they have a status in the criminal trial process and that they are valued as members of the community.<sup>40</sup> The centrality of the courtroom experience to victims is reflected in research published by the Victims Support Agency in 2014, which highlights the importance for victims of having their interests acknowledged by those in authority in the courtroom.<sup>41</sup>
- 5.28 More could be done to ensure that victims' interactions with judicial officers and lawyers in the courtroom are respectful. In part, this is a matter of educating and training judges, magistrates, prosecutors and defence lawyers to understand victims' experiences and to behave in a way that takes their needs into account. Recommendations are made in Chapter 4 about professional education.
- 5.29 Given the importance to victims of courtroom conduct, specific guidance tailored to the court environment is warranted. Such guidance could be included in bench books, to guide judges and magistrates in their interactions with victims in the courtroom.<sup>42</sup> Bench books are regularly referred to by judges and magistrates in the course of administering criminal proceedings, and provide a useful source of practical education.<sup>43</sup>
- 5.30 In Victoria, practical guidance for judicial officers conducting criminal trials or sentencing hearings can be found in a number of resources, including the *Uniform Evidence Manual*,<sup>44</sup> the *Victorian Criminal Charge Book*,<sup>45</sup> the *Victorian Sentencing Manual*,<sup>46</sup> and the *Criminal Proceedings Manual*.<sup>47</sup> The *Criminal Charge Book* is 'used extensively by Victorian judges', and is an 'invaluable resource' providing 'detailed guidance'.<sup>48</sup>
- 5.31 Bench books may also provide practical guidance about responding to the needs of people who come before the court. The Judicial College of Victoria is currently working with the Victorian Equal Opportunity and Human Rights Commission to develop a Disability Access Bench Book that aims to 'assist judicial officers to meet the diverse needs of people with disabilities in court'.<sup>49</sup>

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34 Submissions 22 (Joy and Roger Membrey), 40 (Former VOCCC victim representatives); Consultations 29 (Parent of victims), 35 (Parent of a victim).

35 Submissions 22 (Joy and Roger Membrey), 40 (Former VOCCC victim representatives); Consultation 29 (Parent of victims), 35 (Parent of a victim).

36 Submission 41 (Colleen Murphy (Kelly)); Roundtable 7 (Victim support specialists, Melbourne).

37 Submission 41 (Colleen Murphy (Kelly)); Consultation 56 (Colleen Murphy (Kelly)); Roundtable 7 (Victim support specialists, Melbourne).

38 Submission 41 (Colleen Murphy (Kelly)); Consultation 56 (Colleen Murphy (Kelly)); Roundtable 7 (Victim support specialists, Melbourne).

39 Victims Support Agency, *Building the Confidence of Victims in the Criminal Justice System* (2014) 50.

40 Tom Tyler and Justin Sevier, 'How do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures' (2013) 77(2) *Albany Law Review* 101, 135–36.

41 Victims Support Agency, *Building the Confidence of Victims in the Criminal Justice System* (2014) 50.

42 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: the Experiences of People with Disabilities Reporting Crime—Research Findings* (2014) 115.

43 Judicial College of Victoria, *Victorian Criminal Charge Book* (4 May 2016) <<http://www.judicialcollege.vic.edu.au/-publications>>; *R v Hendy* 191 A Crim R 81, 89 [18] (an 'invaluable resource' providing 'detailed guidance for judges').

44 Judicial College of Victoria, *Uniform Evidence Manual* (18 August 2015) <<http://www.judicialcollege.vic.edu.au/publications>>.

45 Judicial College of Victoria, *Criminal Charge Book* (4 May 2016) <<http://www.judicialcollege.vic.edu.au/-publications>>.

46 Judicial College of Victoria, *Victorian Sentencing Manual* (2 May 2016) <<http://www.judicialcollege.vic.edu.au/-publications>>.

47 Judicial College of Victoria, *Criminal Proceedings Manual* (9 April 2016) <<http://www.judicialcollege.vic.edu.au/-publications>>.

48 Judicial College of Victoria, *Criminal Charge Book* (4 May 2016) <<http://www.judicialcollege.vic.edu.au/-publications>>; *R v Hendy* 191 A Crim R 81, 89 [18].

49 Submission 4 (Victorian Equal Opportunity and Human Rights Commission). See also Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (1 June 2015) <<http://www.judcom.nsw.gov.au/-publications/benchbks/equality>>.

- 5.32 Practical guidance about responding to the needs and interests of victims could be included in these resources, or a separate and tailored resource could be developed. That is a matter for the Judicial College of Victoria to determine, in consultation with Victorian judges and magistrates.
- 5.33 A number of contributors addressed the question of how victims could be properly acknowledged in the courtroom.<sup>50</sup> Based on those submissions, and on comments made by victims and victim support workers, the Commission considers the following matters could be included in guidance material:
- How to refer appropriately to victims who have been killed as a result of a crime, and specifically, avoiding the practice of referring to them as ‘the deceased’.
  - Acknowledging the victim’s presence in the courtroom.<sup>51</sup>
  - Explicitly ensuring victims are aware of what is happening in the proceedings.<sup>52</sup>
  - Using sensitive and compassionate language.<sup>53</sup>
  - Allowing victims to express emotions in the courtroom (where doing so does not prejudice the jury against the accused).<sup>54</sup>
  - In the context of sentencing proceedings, confirming that victims understand the full circumstances of the offending and taking the time to clarify the principles of sentencing.<sup>55</sup>
  - In the context of appeals, an explanation by the court to victims that appellate proceedings focus on matters of law rather than a review of the evidence.
- 5.34 The list above aims to ensure victims are treated humanely and with respect for their dignity. While care must be taken not to undermine the presumption of innocence or prejudice the jury against the accused, victims can be treated respectfully and with greater sensitivity without infringing on the accused’s right to a fair trial.
- 5.35 The Commission does not consider the practice of referring to victims who have been killed as ‘the deceased’ to be necessary. Referring to an individual by their name humanises them. Humanising a victim who cannot be physically present in the courtroom should not be considered as prejudicing the jury against the accused or undermining the presumption of innocence.

## Recommendation

- 17 The Judicial College of Victoria, in consultation with the heads of jurisdictions, should include in its practical guides for judicial officers information and guidance about responding to the needs and interests of victims in the courtroom, including preferred practices in acknowledging victims in the courtroom and referring to deceased victims by name rather than as ‘the deceased’.**

50 Submissions 9 (Associate Professor Tracey Booth), 26 (Victoria Police).  
51 Consultations 3 (Parent of a victim), 5 (Sue and Don Scales, Mildura).  
52 Submission 22 (Joy and Roger Membrey).  
53 Consultation 44 (Kristy McKellar).  
54 Submissions 9 (Associate Professor Tracey Booth), 15 (Kristy McKellar).  
55 Submission 9 (Associate Professor Tracey Booth); Consultation 35 (Parent of a victim).

## Victims as witnesses

### Manner and content of questioning

- 5.36 Giving evidence, and in particular being cross-examined, can be one of the most challenging aspects of the criminal trial process for victims. Many victims consulted by the Commission felt disrespected by the way they were treated during cross-examination and the type of questions they were asked. Cross-examination was described as:
- humiliating<sup>56</sup>
  - distressing<sup>57</sup>
  - brutal, abrupt and traumatising<sup>58</sup>
  - intense, offensive, ruthless and terrible<sup>59</sup>
  - aggressive and insensitive<sup>60</sup>
  - repetitive<sup>61</sup>
  - confusing<sup>62</sup>
  - damaging and gruelling<sup>63</sup>
  - horrid and intimidating<sup>64</sup>
  - bullying<sup>65</sup>
  - persistent, distracting, patronising, hectoring and badgering<sup>66</sup>
  - stressful<sup>67</sup>
  - awful, attacking and designed to unravel [the victim]<sup>68</sup>
  - harassing<sup>69</sup>
  - bad, frustrating, inappropriate, and embarrassing<sup>70</sup>
  - like being on trial.<sup>71</sup>
- 5.37 Not all victims found cross-examination difficult, with some describing it as not too difficult,<sup>72</sup> easy,<sup>73</sup> and not overly disrespectful.<sup>74</sup>
- 5.38 While the language used by victims varies, it is clear that the experiences of cross-examination described above are related to treating victims with respect for their dignity. The following section discusses reforms designed to ensure that cross-examination is conducted respectfully and appropriately.

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56 Submission 30 (Loddon Campaspe Centre Against Sexual Assault).  
 57 Consultation 11 (Parent of a victim).  
 58 Consultation 42 (Relative of a victim; a victim).  
 59 Consultation 10 (A victim).  
 60 Consultation 11 (Parent of a victim).  
 61 Consultations 13 (Parents of a victim), 28 (Laurie Krause), 29 (Parent of victims).  
 62 Consultations 28 (Laurie Krause), 29 (Parent of victims), 46 (A victim).  
 63 Submission 15 (Kristy McKellar).  
 64 Consultation 1 (A victim).  
 65 Consultations 1 (A victim), 13 (Parents of a victim), 44 (Kristy McKellar).  
 66 Consultation 13 (Parents of a victim).  
 67 Consultation 29 (Parent of victims).  
 68 Consultation 41 (A victim).  
 69 Consultation 44 (Kristy McKellar).  
 70 Consultation 46 (A victim).  
 71 Submission 30 (Loddon Campaspe Centre Against Sexual Assault); Consultation 43 (Victoria Police SOCIT, Wodonga).  
 72 Consultation 20 (Parent of victims).  
 73 Consultation 13 (Parents of a victim).  
 74 Consultation 13 (Parents of a victim).

## Legislative and policy framework

5.39 Cross-examination has been described as the ‘cornerstone of the adversarial system’.<sup>75</sup> Cross-examination aims to test the accuracy of the witness’s version of events and his or her credibility.<sup>76</sup> All jurisdictions with adversarial criminal justice systems have laws that prohibit witnesses, including victims, being asked improper questions during cross-examination. In sexual offence cases, there are additional restrictions on asking victims about their sexual history.

## Improper questions

5.40 In Victoria, the rules against improper questioning are in the *Evidence Act 2008* (Vic). Section 41 of the Act gives judicial officers the discretion to ‘disallow an improper question or improper questioning put to a witness in cross-examination, or inform the witness that it need not be answered’.<sup>77</sup>

5.41 An improper question or improper questioning is defined as:

a question or sequence of questions put to a witness that—

- (a) is misleading or confusing; or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
- (c) is put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- (d) has no basis other than a stereotype (for example a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability).<sup>78</sup>

5.42 Judges and magistrates have no choice but to disallow an improper question if the witness is a vulnerable witness.<sup>79</sup> This is in contrast to the discretion afforded in relation to witnesses not deemed vulnerable. A vulnerable witness, which includes a victim, is defined as a witness:

- under the age of 18; or
- with a cognitive impairment or intellectual disability; or
- whom the court considers to be vulnerable having regard to:
  - a condition or characteristic of the witness such as age, level of education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and mental or physical disability; and
  - the context in which the question is put, including the nature of the offence to which the proceeding relates and whether there is a relationship between the witness and the accused.<sup>80</sup>

75 Jonathan Doak, *Human Rights, Victims Right and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 246; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 141 [5.70]; David Ross, *Ross on Crime* (Thompson Reuters, 5th edition, 204) 304, [3.7105]. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(g), which gives accused persons in criminal proceedings the right to examine, or have examined, witnesses against him or her.

76 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 498; David Ross, *Ross on Crime* (Thompson Reuters, 5th edition, 204) 304, [3.7105].

77 *Evidence Act 2008* (Vic) s 41(1).

78 *Ibid* s 41(3).

79 *Ibid* s 41(2).

80 *Ibid* s 41(4).

- 5.43 The manner of questioning in court is also guided by professional standards that regulate the conduct of barristers and solicitors. These standards state that barristers must not ask improper questions in cases involving allegations of sexual assault, indecent assault or some other form of indecency.<sup>81</sup> This obligation differs from that imposed by the Evidence Act, which requires judicial officers to disallow improper questions in cases involving vulnerable witnesses, and is not limited to certain types of offences.<sup>82</sup>

### Questions about sexual history

- 5.44 In sexual offence cases there are limits on the subject matter of the questions. In Victoria, and across all Australian jurisdictions, questions about ‘the general reputation of the victim with respect to chastity’ are prohibited.<sup>83</sup> In addition, questions or evidence about the victim’s sexual activities can only be asked with permission from the judge.<sup>84</sup>
- 5.45 These restrictions recognise that evidence of a victim’s sexual history has historically relied upon discriminatory gender stereotypes to undermine the credibility of the victim or suggest the accused was reasonable in believing the victim consented.<sup>85</sup> For victims, questioning about their sexual history is distressing, embarrassing, humiliating and invasive.
- 5.46 The Victorian provisions provide that judicial officers can only allow questions or evidence about a victim’s sexual activities (other than those to which the charge relates) if they are substantially relevant to a fact in issue and are in the interests of justice.<sup>86</sup> When considering whether to allow the question or the the evidence, the judge or magistrate must have regard to:
- whether the value of the evidence outweighs the potential distress, humiliation and embarrassment allowing the questioning or admitting the evidence will cause the victim (taking into account the victim’s age and the number and nature of the questions)
  - the risk that it might arouse in the jury a discriminatory belief or bias, prejudice, sympathy or hostility
  - the need to respect the victim’s personal dignity and privacy
  - the right of the accused to fully answer and defend the charge.<sup>87</sup>
- 5.47 In Victoria, the *Charter of Advocacy for Prosecuting or Defending Sexual Offence Cases* was developed by the Department of Justice Sexual Assault Advisory Committee and is intended to provide guidance to prosecutors and defence lawyers about ‘good conduct’ in court proceedings for sexual offence cases.<sup>88</sup>

81 *Western Australian Barristers’ Rules 2012* (WA) r 61; *Barristers’ Conduct Rules 2011* (Qld) r 61; *Legal Professional Uniform Conduct (Barristers) Rules 2015* (NSW) r 62; *Legal Professional Uniform Conduct (Barristers) Rules 2015* (Vic) r 62; *Barristers’ Conduct Rules 2013* (SA) r 61. The professional standards do not refer specifically to improper questioning, but describe prohibited questions in similar terms as the definition of improper questioning in the *Evidence Act 2008* (Vic) s 41(3).

82 In all other respects, the professional standards impose lower standards of conduct on barristers than the Evidence Act. In particular, all Australian jurisdictions except for the Northern Territory and the Australian Capital Territory have professional standards that oblige barristers not to ask questions designed principally in order to harass or embarrass a person: *Western Australian Barristers’ Rules 2012* (WA) r 60(c); *Barristers’ Conduct Rules 2011* (Qld) r 60(c); *Legal Professional Uniform Conduct (Barristers) Rules 2015* (NSW) r 61(c); *Legal Professional Uniform Conduct (Barristers) Rules 2015* (Vic) r 61(c); *Barristers’ Conduct Rules 2014* (SA) r 60(c).

83 *Criminal Procedure Act 2009* (Vic) ss 339, 341. The precise terminology varies between jurisdictions. *Criminal Procedure Act 1986* (NSW) s 293(2); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1906* (WA) s 36B; *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(b).

84 *Ibid* s 342.

85 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 198; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) [27.39].

86 *Criminal Procedure Act 2009* (Vic) ss 342, 349.

87 *Ibid* s 349.

88 Victorian Government, *Charter of Advocacy for Prosecuting and Defending Sexual Offence Cases*, (Department of Justice, June 2010) 1. The Charter of Advocacy was developed by the Department of Justice Sexual Assault Advisory Committee with input from the Supreme Court of Victoria, the County Court of Victoria, the Magistrates’ Court of Victoria, the Office of Public Prosecutions, Victoria Police, the Victorian Bar Council, the Criminal Bar Association, the Law Institute of Victoria, Victoria Legal Aid and the Judicial College of Victoria.



- 5.48 In relation to the manner and content of questioning, the Charter of Advocacy stipulates that prosecutors should 'Actively object to unwarranted and irrelevant cross-examination by a defence barrister and seek the court's intervention where cross-examination is considered to be inappropriate or oppressive' and 'Proactively challenge myths and stereotypes about sexual offending and victims of sexual offences that arise in court'.<sup>89</sup>

## The need for reform

### Improper questions

- 5.49 The extent and nature of improper questioning are more difficult to evaluate in practice. Cross-examination involves challenging the accuracy or truthfulness of a victim's evidence and drawing out inconsistencies and inaccuracies in their version of events. Therefore, cross-examination that is not improper may still make a victim feel offended, humiliated, or distressed.<sup>90</sup>
- 5.50 This difficulty is illustrated by the conflicting information received by the Commission about the extent to which improper questioning occurs in practice. Victims, victim support workers, legal professionals and some members of the judiciary told the Commission that judicial intervention is not always adequate and improper questioning still occurs.<sup>91</sup>
- 5.51 In contrast, the Law Institute of Victoria and the Victorian Bar and Criminal Bar Association stated that improper questioning is rare and that judicial officers are adequately enforcing existing protections.<sup>92</sup> Many members of the legal profession described how the nature of cross-examination has changed: aggressive cross-examination is no longer the norm and only a small number of defence lawyers ask inappropriate questions.<sup>93</sup>
- 5.52 A strong theme in submissions and consultations was that there is clearly a gap between what victims and the legal profession consider appropriate questioning. Bridging the divide requires a number of measures.

### Information and education

- 5.53 To an extent, the problem is one of perception and a lack of information. The Law Institute of Victoria, the Victorian Bar and Criminal Bar Association, victim support workers and victims readily agreed that victims' experiences of cross-examination can be improved by providing them with more information about what to expect, as well as the purpose of cross-examination and the key role it plays in adversarial criminal justice systems. The provision of information to victims by the prosecution is discussed in Chapter 6.
- 5.54 Prosecutors, judges and magistrates should be consistent about what constitutes improper questioning and when to intervene to stop it. Defence lawyers should possess the knowledge and expertise to fairly and appropriately cross-examine victims. Ensuring consistent understanding and application of the existing prohibition on improper questioning is closely linked with cultural change in the legal profession (discussed in Chapter 4).

89 Ibid 8.

90 Consultations 51 (Law Institute of Victoria); Roundtable 6 (Legal practitioners, Morwell).

91 Submissions 21 (Dianne Hadden), 23 (DPP), 30 (Loddon Campaspe Centre Against Sexual Assault), 34 (Northern Centre Against Sexual Assault), 38 (Name withheld); Consultations 10 (A victim), 11 (Parent of a victim), 16 (Judges of the County Court of Victoria), 23 (Court Network staff and a Court Networker—County Court), 26 (Loddon Campaspe Centre Against Sexual Assault), 46 (A victim); Roundtables 3 (Victim support specialists, Geelong), 13 (Victim support specialists, Ballarat), 14 (Legal practitioners, Ballarat). See also Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 147 [5.91].

92 Submissions 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association).

93 Consultations 51 (Criminal Law Section, Law Institute of Victoria), 54 (Victorian Bar and Criminal Bar Association).

## Expanding the prohibition

- 5.55 There is also a role for legislative reform. The Evidence Act imposes a duty on judges to intervene when vulnerable victims are subjected to improper questions. The Commission considered whether this duty should be expanded to some or all victim-witnesses, as a measure to reduce or eliminate improper questions.
- 5.56 Members of the judiciary consulted by the Commission, lawyers at the Office of Public Prosecutions (OPP), as well as victims and victim support workers, expressed support for this proposal.<sup>94</sup> The Law Institute of Victoria and the Victorian Bar and Criminal Bar Association were not in favour.<sup>95</sup>
- 5.57 The Commission's consultations, previous research and academic commentary indicate that some judicial officers can be reluctant to intervene in questioning. Their reluctance is based on concern about appearing partial, prejudicing the accused's fair trial and attracting criticism from the Court of Appeal.<sup>96</sup> Some judges suggested to the Commission that expanding the duty to intervene in improper questioning would address this reluctance.<sup>97</sup>
- 5.58 The scope of the prohibition on improper questions was considered by the Australian Law Reform Commission (ALRC), the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission in their joint report on the Uniform Evidence Act in 2006.<sup>98</sup> In that report, the ALRC and the NSWLRC recommended that the duty imposed on judicial officers to intervene in improper questioning should apply to all witnesses, not just vulnerable witnesses.<sup>99</sup> The current Evidence Acts of New South Wales, the Australian Capital Territory and Tasmania reflect the ALRC's recommendation.<sup>100</sup> South Australia's equivalent provision imposes a duty to intervene in relation to all witnesses.<sup>101</sup>
- 5.59 In contrast, the Commission at that time stated that 'a separate provision to deal with questioning of vulnerable witnesses is likely to be a more effective means of protecting people who fall in this category'.<sup>102</sup> It was concerned that the broader approach might lead to judicial officers interfering inappropriately and therefore compromising the fact-finding process.<sup>103</sup>
- 5.60 The Commission no longer supports this earlier position. During this reference, submissions and consultations have indicated that judicial intervention into improper questioning remains inconsistent. The Commission is therefore persuaded that improper questions should be disallowed in all circumstances. Further and significantly, no reason was advanced to justify any question which is improper being asked during court proceedings.

94 Consultations 23 (Court Network staff and a Court Networker—County Court), 39 (OPP); Roundtables 11 (Judges of the County Court of Victoria), 18 (Victims of crime).

95 Submission 25 (Law Institute of Victoria); Consultations 51 (Law Institute of Victoria), 54 (Victorian Bar and Criminal Bar Association).

96 Consultation 15 (DPP), 16 (Judges of the County Court of Victoria); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 152–153 [5.111]; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) [28.107]; Jonathan Doak, *Human Rights, Victims' Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 95.

97 Roundtable 11 (Judges of the County Court of Victoria).

98 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 141–157.

99 Ibid 154, recommendation 5–2.

100 See *Evidence Act 2011* (ACT) s 41(1); *Evidence Act 1995* (NSW) s 41(1); *Evidence Act 2001* (Tas) s 41(1).

101 'If an improper question is put to a witness in cross-examination, the court must—(a) disallow the question...': *Evidence Act 1929* (SA) s 25(3).

102 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 155 [5.124].

103 Ibid 154 [5.120].

- 5.61 Expanding the prohibition on improper questions avoids the possibility of a vulnerable victim being deprived of the protection they require because their vulnerability has not been identified. The Victorian Equal Opportunity and Human Rights Commission observed that people with communication difficulties may not always be identified as vulnerable, despite facing significant barriers to giving evidence.<sup>104</sup> This reasoning could be extended to other vulnerabilities that are not easily identified. Requiring judges to intervene when any witness is asked an improper question avoids the need to assess a witness's vulnerability.
- 5.62 Disallowing improper questions does not deflect or diminish the important right of the accused to properly cross-examine or challenge the evidence against them.<sup>105</sup> The community has an interest in trials being conducted fairly and verdicts being reached without victims being cross-examined improperly. Concerns held by the Commission in 2006 that a blanket duty to disallow improper questions might lead to inappropriate judicial intervention have not materialised elsewhere.
- 5.63 The Commission considers that the Victorian Evidence Act should be brought into line with the Evidence Acts of New South Wales, Tasmania, Australian Capital Territory and South Australia.<sup>106</sup> The Commission's terms of reference restrict it to making recommendations in relation to the role of the victim. The Commission recommends below that section 41 of the Evidence Act should be amended to ensure judicial intervention when victims are improperly questioned. Further consideration should be given to whether the prohibition is expanded to all witnesses generally.

## Recommendation

- 18 Section 41 of the *Evidence Act 2008* (Vic) should be amended to require a judicial officer to disallow improper questioning in relation to all victims, in accordance with the Uniform Evidence Act provisions adopted by New South Wales, Tasmania and the Australian Capital Territory insofar as they relate to victims.**

### Questions about sexual history

- 5.64 The Supreme Court and County Court do not keep data about how many applications to cross-examine a victim about their sexual activities are made or granted. Material gathered by the Commission suggests that these applications are rarely made, and cross-examination in relation to sexual activities occurs infrequently.<sup>107</sup>
- 5.65 This assessment is supported by findings made in the 2011 *Final Evaluation Report of the Sexual Assault Reform Strategy*, which noted that applications were made and 'granted on occasion', and that the provisions were 'generally regarded as working as intended'.<sup>108</sup> The Commission therefore considers there is no need to make a recommendation for reform.

104 Submission 4 (Victorian Equal Opportunity and Human Rights Commission); Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime* (2014) 115–116. See also Australian Human Rights Commission, *Equality Before the Law: Towards Disability Justice Strategies* (2014) 5.

105 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 153 [5.115]: this was the position of the Australian Law Reform Commission and the New South Wales Law Reform Commission.

106 *Evidence Act 1995* (NSW) s 41(1); *Evidence Act 2011* (ACT) s 41(1); *Evidence Act 2001* (Tas) s 41(1); *Evidence Act 1929* (SA) s 29(3). The provisions in New South Wales, the Australian Capital Territory and Tasmania are based on the Uniform Evidence Act. The South Australian provision differs slightly from the Uniform Evidence Act, but still imposes an obligation on the court to disallow all improper questions.

107 Submission 34 (Northern Centre Against Sexual Assault); Consultations 10 (A victim), 51 (Criminal Law Section, Law Institute of Victoria).

108 Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) 110.

## Victims' presence in court

- 5.66 Acknowledging and respecting victims in the courtroom requires victims to have a place in the courtroom. For the most part, victims are permitted to be present during the criminal proceedings that relate to the crime committed against them. However, this is limited by section 336A of the Criminal Procedure Act.
- 5.67 Section 336A(1) gives the court the power to order victims who are witnesses 'to leave the courtroom until required to give evidence'.<sup>109</sup> The court may make this order 'only if the court considers it appropriate to do so'.<sup>110</sup> Section 336A(1) ensures that the judge or magistrate can prevent victims who are witnesses from having their evidence influenced by what is said by other witnesses, the judge, prosecutor or the accused's lawyer
- 5.68 Subsection (2) of section 336A also provides:
- Nothing in this section prevents the court from ordering a victim who is a witness to leave the courtroom at any time after giving evidence.
- 5.69 The Commission considers this part of the provision is unnecessary. Once their evidence is given, victims should be entitled to be present in the courtroom. The Commission acknowledges that there may be circumstances in which a victim's behaviour warrants their removal from the courtroom, such as when their conduct risks prejudicing the jury against the accused or disrupts the orderly conduct of proceedings. The court's inherent power to control the conduct of proceedings and ensure a fair trial is adequate to address this.

## Recommendation

- 19 Subsection (2) of section 336A of the *Criminal Procedure Act 2009 (Vic)* should be repealed.

## Respect in the court process

### Victims' experiences of delay

- 5.70 Unnecessary delay can have significant adverse effects on victims. Victims spend considerable time and emotional energy preparing for important court dates, such as committals, trials and sentencing. Some victims have mental illnesses which require management in the lead-up to hearings.<sup>111</sup> When these hearings are delayed, especially at the last minute, it can be traumatising, distressing and frustrating.<sup>112</sup>
- 5.71 Delays impede victims' ability to recover and get on with their lives.<sup>113</sup> They also have practical consequences. Victims may need to take time off work or study, and put in place arrangements for the care of children and businesses.<sup>114</sup> The impact of delays may be more acute in regional Victoria, where adjournments may be for longer.<sup>115</sup> Delays create uncertainty for victims; knowing that a case will be finalised within a certain timeframe can be as important as how long it takes to resolve.

109 *Criminal Procedure Act 2009 (Vic)* s 336A(1).

110 *Ibid.*

111 Consultation 43 (Victoria Police SOCIT, Wodonga).

112 Submission 15 (Kristy McKellar); Consultations 5 (Sue and Don Scales, Mildura), 10 (A victim), 13 (Parents of a victim), 41 (A victim), 42 (Relative of a victim; a victim), 46 (A victim).

113 Roundtables 5 (Victim support specialists, Morwell), 8 (Metropolitan Centres Against Sexual Assault), 12 (Victim support specialists, Wodonga), 13 (Victim support specialists, Ballarat).

114 Consultations 10 (A victim), 13 (Parents of a victim).

115 Roundtable 2 (Legal practitioners, Mildura).

- 5.72 Delays occur for a large number of reasons. They may be related to system-wide problems, such as insufficient court staff, judges or courtrooms, an increase in the number of proceedings, or inadequate technology.<sup>116</sup>
- 5.73 Delays may also be related to a specific case. The defence or prosecution may need more time to prepare.<sup>117</sup> Delays can be the result of the need for legal argument in the lead-up to a trial. Last-minute discussions between the defence and prosecution about decisions to accept a plea of guilty to lesser charges or other issues can also cause delays.<sup>118</sup> Problems might arise with the availability of witnesses or the listing of other matters.<sup>119</sup>
- 5.74 Not all delays are avoidable or unnecessary. For example, delay caused by an adjournment to allow a victim time to prepare their victim impact statement may be considered necessary, and will benefit the victim.
- 5.75 The Commission is concerned with avoidable and unnecessary delay. Efforts to reduce avoidable and unnecessary delays are part of showing respect for victims. It indicates to victims that their time and input is valued and acknowledges their status in the criminal trial process. Accused persons and the community also benefit from reductions in delays and the more efficient administration of justice.

## Reducing delays

- 5.76 Reducing avoidable delays requires a range of initiatives. These initiatives may be system-wide, such as resourcing and effective technology for case management.<sup>120</sup> Prosecution and defence lawyers also need to prepare their cases well in advance of significant court dates and courts must be willing to undertake robust case management. Ultimately, there must be a determination by all criminal justice professionals to avoid delays.<sup>121</sup>
- 5.77 Efforts to reduce delays are hampered by a lack of data about the exact causes of delay and the timeliness of trials and other criminal processes. This is partly because of ageing information technology systems, from which only high-level information can be extracted.<sup>122</sup> The Supreme Court and County Court have recently improved the technology underpinning their case-management processes, which should contribute to efforts to reduce delays and capture data about what causes them.<sup>123</sup>
- 5.78 In addition, the Supreme Court and County Court have implemented measures aimed at reducing delays. These measures have primarily involved earlier directions hearings following committal for trial from the Magistrates' Court, closer case management of proceedings and improvements to listings procedures.<sup>124</sup> For the most part, these measures have been directed towards ensuring parties prepare early and listing cases so as to optimise the use of court resources.

116 Australian Centre for Justice Innovation, *The Timeliness Project*, Background Paper (October 2013) 36–7.

117 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 130–5.

118 Ibid.

119 Ibid.

120 See generally Australian Centre for Justice Innovation, *The Timeliness Project*, Background Paper (October 2013) 38–9.

121 Submission 16 (Name withheld); Consultation 13 (Parents of a victim); Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 198.

122 County Court of Victoria, *2014–15 Annual Report* (2015) 21.

123 Supreme Court of Victoria, *2013–14 Annual Report* (2015) 2, describing the transition to RedCrest case management system, which the Commission notes is being used only for the commercial list at present; County Court of Victoria, *2014–15 Annual Report* (2015) 20, describing the establishment of the Trial Management Table, which 'captures every matter committed for Initial Directions Hearing, from 2014 onwards, and tracks each case to finalisation ... The Trial Management Table is designed to enable a judge managing a List Court or a Division to have near instant access to reliable and detailed data, helping identify trends and emerging issues'.

124 Supreme Court of Victoria, *2010–11 Annual Report* (2011) 2, 48–9, 79; *2013–14 Annual Report* (2015) 2, 54; County Court of Victoria, *2012–13 Annual Report* (2013) 8; *2013–14 Annual Report* (2014) 12, 14; *2014–15 Annual Report* (2015) 17–8.

## Outcomes

- 5.79 These initiatives have led to some reduction in delays. In the County Court, the time that elapses between the committal hearing and the trial is consistently reducing.<sup>125</sup> This has been particularly pronounced in regional areas.<sup>126</sup> In the last five financial years, between 83 and 87 per cent of cases were disposed of within 12 months of the committal hearing.<sup>127</sup> There has also been a substantial reduction in the number of trials that do not start as scheduled, but which must be adjourned to another date.<sup>128</sup>
- 5.80 Gains have also been achieved in the Supreme Court, although less information is publicly available. Within the criminal trial division of the Supreme Court, the number of cases pending for more than 12 months, and the number pending for more than 24 months, have decreased since 2010–11, although they increased somewhat in the 2013–14 financial year.<sup>129</sup> The Supreme Court attributed this increase to a range of factors, including fewer judges, longer trials and a number of large trials being adjourned or collapsing altogether.<sup>130</sup> Case management in the Supreme Court is complicated by the nature of the cases it deals with: there are fewer cases but they tend to be more complex. In addition, a greater proportion of cases are trials, because fewer people plead guilty in the Supreme Court.<sup>131</sup>
- 5.81 In both the Supreme Court and the County Court, the average length of trials has increased in recent years.<sup>132</sup> Longer and more complex trials present greater scheduling challenges, which can delay a trial starting. Once the trial starts, victims may face longer periods of uncertainty about the day and time at which they are expected to give evidence. Undoubtedly, the increasing complexity of criminal trials is adding to trial lengths, creating challenges in managing delay. Victim-oriented reforms, including some of those recommended in this report, can further contribute to this complexity.

## The future

- 5.82 The Supreme Court and the County Court acknowledge the positive impact that reducing delays has on victims.<sup>133</sup> The County Court has made reducing delay from charge to finalisation a major project for 2015–16.<sup>134</sup> The recent efforts of the courts to reduce delays are commendable and should continue.
- 5.83 In light of existing measures to reduce delays, the Commission does not consider it necessary to make further recommendations. However, the importance of reducing delays for victims should continue to be an express justification for ongoing efforts by courts. As a systemic issue that affects victims, the Commission considers delays to be within the remit of the functions of the Victims of Crime Commissioner, who should monitor the effectiveness of the courts' efforts to reduce delays.<sup>135</sup>

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125 County Court of Victoria, *2012–2013 Annual Report* (2013) 8; *2014–15 Annual Report* (2015) 16. This is true for trials of all lengths.

126 County Court of Victoria, *2014–2015 Annual Report* (2015) 42. In 2014–15, the County Court reported that most regional cases were listed within five to six months of being committed to the County Court, with some reached as quickly as two to three months post-committal.

127 County Court of Victoria, *2011–2012 Annual Report* (2012) 3; *2012–2013 Annual Report* (2013) 3; *2013–2014 Annual Report* (2014) 5; *2014–2015 Annual Report* (2015) 7.

128 County Court of Victoria, *2013–2014 Annual Report* (2014) 12; County Court of Victoria, *2014–2015 Annual Report* (2015) 20. In the 2014–2015 financial year, 'a record low number' of 11 trials were adjourned without starting.

129 Supreme Court of Victoria, *2012–2013 Annual Report* (2013) 7; *2013–2014 Annual Report* (2015) 13.

130 Supreme Court of Victoria, *2013–14 Annual Report* (2015) 45.

131 Supreme Court of Victoria, *2012–2013 Annual Report* (2013) 36; *2013–2014 Annual Report* (2015) 45.

132 Supreme Court of Victoria, *2013–2014 Annual Report* (2015) 45; County Court of Victoria, *2014–15 Annual Report* (2015) 19.

133 Supreme Court of Victoria, *2013–2014 Annual Report* (2015) 54; County Court of Victoria, *2014–15 Annual Report* (2015) 18.

134 County Court of Victoria, *2014–2015 Annual Report* (2015) 18.

135 *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(b)–(d).





# Information and support

**104** Introduction

**104** Information and support throughout the criminal trial process

**112** Relationship between victims and the prosecution

**118** Legal advice and assistance for victims

**127** Referral, coordination and accessibility

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## 6 Information and support

### Introduction

- 6.1 The criminal trial process can be daunting for victims, so it is essential that they receive appropriate information and support. Whether victims experience the process as fair will depend in part on how well they are prepared and supported.<sup>1</sup> It matters what information they receive, who gives it to them, and under what circumstances. Their experience is affected by their capacity to process and respond to this information.
- 6.2 The Director of Public Prosecutions (DPP) and Office of Public Prosecutions (OPP) in Victoria bear most responsibility for ensuring that victims are informed and referred to support during the criminal trial process. This chapter examines the relationship between victims and the prosecution before turning to examine whether victims need access to legal advice and assistance that is independent of the prosecution.
- 6.3 In accordance with the Commission's terms of reference, this chapter focuses on information and support provided in connection with the criminal trial process. The Commission appreciates that victims need to be informed of their options for practical and emotional support whether or not criminal proceedings are commenced. They should be referred early by police to the Victims of Crime Helpline or directly to a support service. From the Helpline, referrals can be made to a Victims Assistance Program provider or to specialist services such as Centres Against Sexual Assault or family violence services. Thus, by the time the DPP takes responsibility for a prosecution and court proceedings commence, victims should have been linked to the support they need. There are, however, some gaps which were brought to the Commission's attention and they are discussed briefly at the end of this chapter.

### Information and support throughout the criminal trial process

#### Law and policy framework

- 6.4 The *Victims' Charter Act 2006* (Vic) requires investigatory, prosecuting and victims' services agencies to provide victims with information about support services, possible entitlements and legal assistance, and to make referrals where appropriate.<sup>2</sup> It also requires prosecuting agencies to provide certain information about the prosecution to victims.<sup>3</sup>

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1 Ben Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System' (2011) 11(4) *Criminology & Criminal Justice* 345; Victims Support Agency, *Building the Confidence of Victims in the Criminal Justice System: Final Report* (August 2014) 46, 51–2, 63.

2 *Victims' Charter Act 2006* (Vic) ss 7, 13(2).

3 *Ibid* s 9.

## Prosecutorial obligations towards victims

- 6.5 Victoria's public prosecutions service comprises the DPP, who is the head of the service; the Chief Crown Prosecutor; Crown Prosecutors; Associate Crown Prosecutors; the Solicitor for Public Prosecutions; and the OPP.<sup>4</sup> Each component has a statutory obligation to give 'appropriate consideration to the concerns' of victims.<sup>5</sup>
- 6.6 Generally, the DPP has responsibility for instituting, preparing and conducting the prosecution of indictable offences in the Supreme and County Courts.<sup>6</sup> The DPP must ensure that prosecutions are conducted in an 'efficient, economic and effective manner'.<sup>7</sup> Crown Prosecutors, Associate Crown Prosecutors and barristers from the Victorian Bar are briefed to appear in court for the prosecution and in doing so, they act on behalf of the DPP.<sup>8</sup> They are typically instructed by an OPP solicitor, who has responsibility for managing the prosecution case. Together, they form the prosecution team.
- 6.7 The DPP is a 'prosecuting agency' for the purposes of the Victims' Charter Act.<sup>9</sup> The DPP's obligations under this Act and other legislation are the basis of internal policies that guide day-to-day processes and decision making by the DPP and OPP. Principally, the *Director's Policy: Victims and Persons Adversely Affected by Crime* (Victims Policy), outlines the vast majority of obligations that OPP staff and solicitors have towards victims.<sup>10</sup>
- 6.8 The DPP's Victims Policy is comprehensive. It identifies the information and referrals to support that OPP solicitors and staff are required to provide to victims at different stages of the criminal trial process. These obligations guide the DPP's and OPP's relationship with victims. The OPP's booklet for victims, *Pathways to Justice*, includes options for support and information relevant to the criminal process.<sup>11</sup>
- 6.9 When responsible for a prosecution, OPP solicitors have specific obligations towards the victims. These include:
- to refer victims to support services as early as possible, including the OPP's Witness Assistance Service when a prosecution involves a death, a child victim, a victim with a disability or cognitive impairment, a sexual offence, or family violence
  - to inform victims about the progress and outcome of cases
  - to inform victims about court processes and, where applicable, their role as a witness for the prosecution
  - to inform and consult victims about decisions to accept a plea of guilty to lesser charges or to modify charges (plea resolution decisions) and decisions to discontinue a prosecution (decisions to discontinue)
  - to inform victims about their right to provide a victim impact statement and possible entitlements to compensation, restitution and financial assistance.<sup>12</sup>

4 *Public Prosecutions Act 1994* (Vic) s 3(1) (definition of 'public prosecutions service'). The Solicitor for Public Prosecutions manages the OPP on behalf of the DPP: s 43(1)(a).

5 *Ibid* ss 24(c), 36(3), 38(2), 41(2), 43(3).

6 *Public Prosecutions Act 1994* (Vic) s 22 sets out the various circumstances in which the DPP has the power to institute or takeover prosecutions on behalf of the state.

7 *Ibid* (Vic) ss 23(a), (b).

8 Crown Prosecutors and Associate Crown Prosecutors are managed by the Chief Crown Prosecutor, who is responsible to the DPP: *ibid* ss 14, 20.

9 *Victims' Charter Act 2006* (Vic) s 3 (definition of 'prosecuting agency'). A police officer or a person authorised to bring proceedings for a criminal offence against an enactment are also included in the definition of 'prosecuting agency'.

10 See Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015). Obligations towards victims can also be found in: *Director's Policy: Prosecutorial Discretion* (24 November 2014) [12]; *Director's Policy: Resolution* (24 November 2014) [7]–[9]; *Director's Policy 37: Retrials and Reinvestigations after Acquittals* (29 November 2012) [68]; *Director's Policy: Family Violence* (10 March 2015) [26]–[31].

11 Office of Public Prosecutions Victoria, *Pathways to Justice: A Guide to the Victorian Court System for Victims and Witnesses of Serious Crime* (2013).

12 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015).

- 6.10 The prosecution team is the most authoritative source of information about the criminal trial process for victims. It is vital that prosecution lawyers understand and comply with their obligations.

## Court support services

### Witness assistance services

- 6.11 Two specialist services provide victims with direct support and information in connection with their involvement with the court process. The Witness Assistance Service sits within the OPP. The Child Witness Service sits within the Department of Justice and Regulation and provides a specialist service for child witnesses.
- 6.12 The OPP Witness Assistance Service prioritises support for those who have lost family members, victims and witnesses in sexual offence and family violence cases, and vulnerable victims.<sup>13</sup> It is staffed by social workers who help OPP solicitors meet their information obligations. Support and assistance include:
- meetings before and after major court dates
  - familiarisation tours of the court
  - answering questions about court processes
  - referral to other victim support services.<sup>14</sup>
- 6.13 The Child Witness Service provides support and education to child witnesses, including victims, and prepares them for their role.<sup>15</sup> The service is staffed by specialist caseworkers who assess each child's needs, including their developmental stage and communication capacity. The independence of the Child Witness Service from the OPP means it can advocate for the child's needs and provide a service to judges and defence lawyers, as well as the prosecution.<sup>16</sup> Where the child is a witness for the prosecution, the assessment is conveyed to the OPP. In court, the Child Witness Service worker may inform both the prosecution and the court about the child's physical or emotional needs while giving evidence. However, its role is not to advise the judge, prosecutor or defence about how to communicate effectively with a particular child.<sup>17</sup>

### Other sources of support and information at court

- 6.14 The relationship built between the police informant and a victim does not end when a prosecution is taken over by the DPP. Victoria Police told the Commission that it aims to support victims from point of first contact until the finalisation of their matter.<sup>18</sup> For some victims, the police informant remains their first and most trusted point of contact. Victims generally spoke positively about the consistency and accessibility of the services they received from the police informant.<sup>19</sup>
- 6.15 Court Network Inc is an independent service that is available to victims, accused persons and their families on a non-partisan basis. Trained Court Network volunteers provide information, support and referral within court precincts across Melbourne and regional Victoria and also across Queensland.<sup>20</sup> Court Network does not provide legal advice.

13 Office of Public Prosecutions Victoria, *Witness Assistance Service: We Can Help You* (undated) <<http://www.opp.vic.gov.au/Witnesses-and-Victims/Getting-Help-from-the-Witness-Assistance-Service>>.

14 Ibid.

15 State Government of Victoria, *Child Witness Service* (11 August 2015) Victims of Crime <<http://www.victimsofcrime.vic.gov.au/home/going-to-court/giving-evidence/child-witness-service/>>.

16 Consultation 18 (Child Witness Service, Department of Justice and Regulation).

17 Ibid. The Child Witness Service told the Commission that 40 per cent of its work is in regional Victoria.

18 Submission 26 (Victoria Police); Consultation 43 (Victoria Police SOGIT, Wodonga). See also Victoria Police, *Future Directions for Victim-Centric Policing* (August 2015) 4.

19 Consultations 3 (Parent of a victim), 10 (A victim), 28 (Laurie Krause), 29 (Parent of victims), 53 (Parent of a victim), 56 (Colleen Murphy (Kelly)). Complaints about communication with police generally arose in the context of Magistrates' Court prosecutions by a police prosecutor: Consultations 41 (A victim), 44 (Kristy McKellar).

20 Court Network, *We Can Help* (July 2006); Consultation 23 (Court Network staff and a Court Networker—County Court).

- 6.16 In addition to receiving court-focussed assistance from the above services, victims may also receive practical and emotional support from one of six community-based Victims Assistance Program providers funded by the Victims Support Agency, or from a Centre Against Sexual Assault, family violence service, or other service. The Victims Assistance Program and Centres Against Sexual Assault are key sources of assistance for victim impact statements, which are discussed in Chapter 7.<sup>21</sup>

### Expectation and experience

- 6.17 The timely provision of support and accurate and accessible information can improve victims' experience of the court process, their perceptions of fairness and ultimately their confidence in the legal system.<sup>22</sup> It helps to manage expectations about their role in the criminal trial process and allows them to engage in an informed manner. Victims of crime who spoke to the Commission emphasised the importance of information and support to their journey through the criminal justice system. One victim described information as 'key' and 'crucial' in terms of helping her and her child understand, and prepare for, being witnesses.<sup>23</sup> Colleen Murphy (Kelly) stated that 'Knowledge and being informed is empowering.'<sup>24</sup>
- 6.18 Consultations and submissions tended to discuss victims' expectations and experiences of information and support in the context of particular stages of the trial process.<sup>25</sup> This informs the structure of the discussion below.

### Progress and outcomes

- 6.19 The DPP's Victims Policy demonstrates a commitment to ensuring that victims are kept informed. Victims are to be kept updated about the progress of a prosecution, including guilty pleas, and the outcomes of committal mentions, contested committals, initial directions hearings, trials, pleas, sentencing and appeals.<sup>26</sup> In addition, OPP solicitors should ensure that victims know the date, time and location of a contested committal, trial, plea hearing, sentencing hearing and appeal hearing.<sup>27</sup>
- 6.20 Victims generally appear to be kept informed about the progress of prosecutions conducted in the Supreme and County Courts in Melbourne.<sup>28</sup> The experience of victims in regional areas, and those living interstate, is more variable. The Commission was told, for example, by a parent whose child had been killed, that she was not informed of sentencing hearing dates and was therefore not able to attend.<sup>29</sup> The challenges for regional prosecutions are discussed below.

### Prosecutorial decisions about charges

- 6.21 Decisions to discontinue and plea resolution decisions can be made at any time except during a trial.<sup>30</sup> The impact of these decisions is not only emotional. They can also affect whether a victim impact statement can be provided to the court and what that statement can contain, potential claims for compensation or financial assistance, and whether a victim will be required to give evidence at a committal hearing or trial.
- 6.22 The Victims' Charter Act and the DPP's policies require prosecution lawyers to ensure

21 Information from Victims Support Agency, Department of Justice and Regulation, 24 June 2016.  
 22 Victims Support Agency, *Building the Confidence of Victims in the Criminal Justice System* (2014) 62–3; Ben Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System' (2011) 11(4) *Criminology and Criminal Justice* 345.  
 23 Consultation 11 (Parent of a victim).  
 24 Submission 41 (Colleen Murphy (Kelly)).  
 25 That victims evaluate the criminal justice system and their needs and expectations in terms of stages rather than as a whole is noted in Victims Support Agency, *Building the Confidence of Victims in the Criminal Justice System* (2014) 16; Stuart Ross et al, *Fairness and Equity for Victims of Crime: What Do They Want and Why Don't They Get It: Final Report* (ARC Discovery Project DP066541, December 2009) 133.  
 26 Director of Public Prosecutions Victoria, *Director's Policy: Resolution* (24 November 2014) [9]; *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [30]–[31].  
 27 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [29], [31].  
 28 This is consistent with survey results about OPP prosecutions: Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (2015) 17–18.  
 29 Consultation 53 (Parent of a victim).  
 30 *Criminal Procedure Act 2009* (Vic) s 177(2).

that victims are informed about decisions to:

- file new charges
- substantially modify charges
- not proceed with some or all charges
- accept a plea of guilty to lesser charges.<sup>31</sup>

6.23 A survey of victims in 2014 found that most were informed about plea resolution decisions and decisions to discontinue by the OPP.<sup>32</sup> The Commission's submissions and consultations suggest some inconsistency in practice.<sup>33</sup> For example, one victim told the Commission that she was not directly contacted by the OPP about decisions to accept guilty pleas to lesser charges against a number of offenders in relation to the death of her child.<sup>34</sup>

6.24 Prosecution lawyers must be able to explain the considerations relevant to plea resolution decisions and decisions to discontinue effectively.<sup>35</sup> As part of this, it is critical that victims understand that prosecution lawyers do not represent them and that the prosecution must act fairly, impartially and in the public interest. A few victims who spoke to the Commission did not appreciate this.<sup>36</sup>

### Pre-trial matters

6.25 In the lead-up to the trial, the parties identify matters about the conduct of the trial that require resolution or a decision by the judge before the trial starts.<sup>37</sup> Matters that directly concern the entitlements of victims, and affect the victim's subsequent experience of giving evidence, include:

- applications to subpoena, access or use confidential communications
- the use of special hearings and alternative arrangements for giving evidence.<sup>38</sup>

### Confidential communications

6.26 The defence will sometimes seek to access a victim's personal records during criminal proceedings. In sexual offence cases, victims have a statutory right to seek leave to appear in court in response to an application to subpoena, access or use confidential medical or counselling records.<sup>39</sup> The obligation to inform the victim that an application has been made lies with the police.<sup>40</sup> An internal DPP policy states that prosecution lawyers should inform the victim that they are entitled to be represented by their own lawyer and seek leave to make submissions. They may also refer the victim to legal assistance.<sup>41</sup>

31 *Victims' Charter Act 2006* (Vic) ss 9(a), (c); Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [18], [27]. Consultation as victim participation is discussed in Chapter 7.

32 Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (Victorian Government, 2015) 18.

33 Consultations 40 (A victim), 53 (Parent of a victim), 56 (Colleen Murphy (Kelly)). Roundtable 15 (Magistrates of the Magistrates' Court of Victoria) indicated a need for victims to be better informed about plea negotiations.

34 Consultation 53 (Parent of a victim).

35 Consultation 29 (Parent of victims).

36 Consultations 20 (Parent of victims), 35 (Parent of a victim), 42 (Relative of a victim; a victim), 56 (Colleen Murphy (Kelly)). The OPP's *Pathways to Justice: A Guide to the Victorian Court System for Victims and Witnesses of Serious Crime*, explains the DPP's and OPP's role.

37 Such issues are dealt with at directions hearings in court: *Criminal Procedure Act 2009* (Vic) s 181. The County Court and Supreme Court each have practice notes which set out the way in which the court will conduct direction hearings: County Court of Victoria, *County Court Criminal Division Practice Note—PNCR 1–2015* (21 October 2015); Supreme Court of Victoria, *Practice Note No 6 of 2014—Criminal Division: Case Management by Post-Committal Directions Hearings* (26 September 2014).

38 Other evidentiary matters are dealt with in the pre-trial phase but victims generally have little ability to influence these.

39 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C(5).

40 *Ibid* s 32C(4). In Chapter 7, the Commission recommends that this obligation lie with the prosecution.

41 Director of Public Prosecutions Victoria, *Director's Policy: Evidence (Confidential Communications) Act 1998* (9 January 2015) [20] (provided to the Commission on 17 May 2016).

- 6.27 It is important that victims are informed about this legal entitlement by the prosecution and can access legal assistance. The Commission was told by victims, Victoria Police and victim support specialists that this is not occurring regularly.<sup>42</sup>

### Alternative arrangements for giving evidence

- 6.28 Alternative arrangements can be made for victims of sexual offences and family violence who are required to give evidence. Where a victim of a sexual offence seeks to give evidence in the courtroom and without the use of a screen or a support person, their wishes must be considered by the court.<sup>43</sup>
- 6.29 While comprehensive information for victims is provided in the OPP's *Pathways to Justice* booklet, prosecution lawyers are not subject to any obligation to inform victims about alternative arrangements or that the court will consider the victim's views.<sup>44</sup> The County Court has forms that must be filed by the prosecution in sexual offence cases involving child victims and victims with a cognitive impairment and in family violence cases.<sup>45</sup> These forms require the prosecution to address arrangements for evidence and indicate whether the victim has been referred to support.
- 6.30 During consultations, several participants expressed concern about the adequacy and timing of the information provided to victims about alternative arrangements for giving evidence, particularly in regional Victoria. This issue is discussed in Chapter 8.

### Committal and trial

- 6.31 Many victims give evidence at a committal or trial. The prospect of appearing in court, giving evidence and being cross-examined can be terrifying. Disability, youth, and cultural and language issues can create additional challenges when giving evidence because of the justice system's traditions, the adversarial approach and the emphasis on oral evidence.
- 6.32 Information and support can help victims give their best evidence and reduce the potential for trauma by:
- helping victims understand their role as a witness and prepare themselves emotionally
  - ensuring that victims are able to give their evidence without preventable disadvantage<sup>46</sup>
  - addressing their wellbeing before, during and after giving evidence.
- 6.33 Providing tailored information to victims who are witnesses can create challenges for prosecution lawyers for two main reasons. First, the prosecution has broad and ongoing disclosure obligations towards the defence throughout the trial process. All relevant, and possibly relevant, material must be disclosed to ensure a fair and impartial trial for the accused.<sup>47</sup>

42 Submission 34 (Northern Centre Against Sexual Assault); Consultations 10 (A victim), 11 (Parent of a victim), 12 (Parent of a victim), 21 (Victoria Police), 27 (Loddon Campaspe Centre Against Sexual Assault); Roundtables 3 (Victim support specialists, Geelong), 7 (Victim support specialists, Melbourne), 8 (Metropolitan Centres Against Sexual Assault), 9 (Victim support and therapeutic specialists, Shepparton), 12 (Victim support specialists, Wodonga). See further Chapter 7.

43 *Criminal Procedure Act 2009* (Vic) ss 363–365.

44 See Chapter 8, in which the Commission recommends that an obligation be inserted into the Victims' Charter Act to require prosecuting agencies to inform victims about special protections and alternative arrangements for giving evidence.

45 These forms are 'Prosecution Witness Information Sheet' and 'Family Violence Checklist'. See County Court of Victoria, *County Court Criminal Division Practice Note—PNCR 1–2015* (21 October 2015), attachments 1, 4.

46 This might include communication assistance through an interpreter or intermediary. See Chapter 7.

47 See Director of Public Prosecutions Victoria, *Director's Policy: Disclosure* (24 November 2014); *Criminal Procedure Act 2009* (Vic) ss 110, 111, 185, 416.



- 6.34 Secondly, like all lawyers, prosecution lawyers are prohibited from rehearsing or coaching a witness's evidence.<sup>48</sup> However, coaching refers to the provision of advice about what answers a witness should give. A lawyer will not breach the prohibition against coaching by 'expressing a general admonition to tell the truth', 'questioning or testing in conference the version of evidence to be given' or drawing 'attention to inconsistencies or other difficulties with the evidence', so long as they do not encourage the witness to give evidence different to what the witness believes to be true.<sup>49</sup> Prosecutors can assist witnesses to prepare for giving evidence 'by providing the witness with information about the issues in the case and suggesting that the witness read their statement prior to giving evidence'.<sup>50</sup>
- 6.35 Prosecution lawyers are required to inform victims about the trial process and their role as a witness for the prosecution.<sup>51</sup> The DPP's Victims Policy states that OPP solicitors must offer a pre-committal or pre-trial conference with the Witness Assistance Service to any person appearing as a witness, including victims, where that person:
- is a child under 16 years
  - is a sexual offence victim
  - has a disability or cognitive impairment.<sup>52</sup>
- 6.36 A separate policy obligation states that OPP solicitors should ensure that a conference with the Witness Assistance Service is offered to 'all victims who are to give evidence for the prosecution'.<sup>53</sup>
- 6.37 In cases involving death, OPP solicitors should offer family victims a pre-committal or pre-trial conference with the Witness Assistance Service, regardless of whether those victims are witnesses.<sup>54</sup> Victims who are not witnesses can be provided with more information about the facts of the case which can help them prepare for what they will hear during court proceedings.<sup>55</sup> In family violence cases, OPP solicitors should consult the Witness Assistance Service to determine whether a conference is appropriate.<sup>56</sup>
- 6.38 The Commission was told that victims are not always given enough information or guidance, or time to ask questions about giving evidence.<sup>57</sup> This appears to be a more acute problem for trials held in regional areas because prosecution lawyers have less time to meet with victims.
- 6.39 Victims also need an opportunity to meet with prosecution lawyers at the conclusion of a committal or trial or after giving evidence, to ask questions and gain a better understanding of what has taken place in court. There is no express requirement in law or policy for prosecution lawyers to do this. Some victims leave court feeling shaken and distressed after giving evidence.<sup>58</sup>

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48 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Ethics* (24 November 2014) [17]. See also *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 24.1.2; *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Vic) r 69(b).

49 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 24.1–24.2; *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Vic) r 69–70.

50 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Ethics* (24 November 2014) [17].

51 *Victims' Charter Act 2006* (Vic) s 11(2); Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [23]. See also Office of Public Prosecutions Victoria, *Pathways to Justice: A Guide to the Victorian Court System for Victims and Witnesses of Serious Crime* (2013); Office of Public Prosecutions Victoria, *Now You Are a Witness: Information for Witnesses Giving Evidence at a Criminal Trial* (2014).

52 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [13].

53 *Ibid* [24].

54 *Ibid* [14].

55 Consultation 50 (Witness Assistance Service, OPP Victoria).

56 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [15]. In all other cases, the OPP solicitor should consider whether a referral is appropriate.

57 Submission 38 (Name withheld); Consultations 11 (Parent of a victim), 16 (Judges of the County Court of Victoria), 28 (Laurie Krause), 42 (Relative of a victim; a victim); Roundtables 7 (Victim support specialists, Melbourne), 9 (Victim support and therapeutic specialists, Shepparton), 12 (Victim support specialists, Wodonga). The parent of a child who chose to give evidence-in-chief in court, rather than through a pre-recorded statement, said that they were not informed of the importance of referring in evidence-in-chief to all incidents that charges related to (Consultation 11).

58 Consultations 23 (Court Network staff and a Court Networker—County Court), 28 (Laurie Krause).

## Sentencing

- 6.40 A number of victims told the Commission that they found it difficult to understand why information about the offender dominates sentencing hearings, while the victim's life and experience of the crime are barely mentioned.<sup>59</sup> This can be addressed in part by preparing victims for the sentencing process. Based on comments during consultations and in submissions, the Commission identified that victims need to know:
- the purposes of, and factors relevant to, sentencing and how these relate to the offender's circumstances and defence submissions
  - the duties of the prosecutor at a sentencing hearing
  - the purposes and use of maximum sentences, cumulative sentencing and concurrent sentencing
  - the role of victim impact statements, what content is permitted and alternative arrangements for reading out a statement<sup>60</sup>
  - the option of applying for compensation or restitution as an additional order against the offender.<sup>61</sup>
- 6.41 Pre-sentence conferences with the prosecution team, including a Witness Assistance Service representative or another support service worker, can be useful in preparing victims for the language of a sentencing hearing.<sup>62</sup>
- 6.42 Post-sentence conferences can help victims understand sentencing outcomes. One victim told the Commission that having a conference with the prosecution team after the sentencing hearing helped her understand the outcome and allowed her to ask questions about the judge's reception of her victim impact statement.<sup>63</sup> Another said she would have liked time to sit with the prosecutor a few days after sentencing to discuss the outcome.<sup>64</sup>
- 6.43 In Chapter 7, the Commission recommends establishing a statutory scheme that would allow for matters to be adjourned for pre-sentence restorative justice conferencing. If this recommendation is adopted, victims would need to be informed about this option and about where they can obtain legal advice.

## Compensation, restitution and financial assistance

- 6.44 Victims may be entitled to apply for restitution or compensation orders under the *Sentencing Act 1991* (Vic) if an offender is found guilty.<sup>65</sup> They may also be eligible for financial assistance from the Victims of Crime Assistance Tribunal (VOCAT).<sup>66</sup>

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59 Consultations 3 (Parent of a victim), 5 (Sue and Don Scales, Mildura), 20 (Parent of victims), 28 (Laurie Krause), 56 (Colleen Murphy (Kelly)).

60 Prosecution lawyers should ensure that victims are informed of their entitlement to make a victim impact statement: Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [42]–[43], and refer them to a victim services agency for assistance: *Victims' Charter Act 2006* (Vic) s 13(2). See further Chapter 7.

61 OPP solicitors are required to inform victims about possible entitlements to restitution or compensation orders: Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [61].

62 Information about sentencing can also be found on the OPP's website and in *Pathways to Justice: A Guide to the Victorian Court System for Victims and Witnesses of Serious Crime* (2013). More comprehensive information is provided in Sentencing Advisory Council, *A Quick Guide to Sentencing* (2016).

63 Consultation 14 (A victim).

64 Consultation 28 (Laurie Krause).

65 *Sentencing Act 1991* (Vic) pt 4 dv 1–2. The entitlement to claim compensation for injury is also a principle in the *Victims' Charter Act 2006* (Vic): s 16(1).

66 *Victims of Crime Assistance Act 1996* (Vic). This is also a principle in the *Victims' Charter Act 2006* (Vic): s 16(2).

- 6.45 In accordance with Victims' Charter principles, victims should be informed about 'possible entitlements' and referred to legal assistance.<sup>67</sup> The DPP's Victims Policy requires OPP solicitors to inform victims that they may have an entitlement to apply for compensation or restitution orders or to seek financial assistance from VOCAT.<sup>68</sup> The OPP's *Financial Assistance, Compensation and Restitution for Victims of Crime* booklet explains the options and assistance available.<sup>69</sup>
- 6.46 Some victims were not informed until some time into the criminal trial process, or not at all, about their right to seek an order for compensation or restitution as an additional order to sentencing.<sup>70</sup> One victim told the Commission that by the time the police informant spoke to her, the offender had transferred assets that could have been used to pay compensation.<sup>71</sup>

## Appeals

- 6.47 Victims who went through an appeal told the Commission that appeal proceedings were particularly alienating.<sup>72</sup> Appeals often involve technical and complex considerations of law. Victims have no role, unless a conviction is being set aside by the Court of Appeal and a compensation or restitution order was made in connection with the conviction. In such cases, victims may be heard by the court.<sup>73</sup>
- 6.48 The Victims' Charter Act entitles victims to be informed when an appeal is commenced, the grounds of the appeal and the outcome.<sup>74</sup> The DPP's Victims Policy further requires that victims are told:
- about the appeal process
  - how to request a copy of the grounds of appeal
  - the appeal hearing date
  - that, if the appeal is against conviction, any restitution or compensation orders are suspended and will be ineffective if the conviction is set aside.<sup>75</sup>
- 6.49 A 2014 report by Victoria Legal Aid noted the need for victims to be notified of appeals early and to be updated about the appeal's progress.<sup>76</sup> Victoria Legal Aid is currently working with the OPP and the Court of Appeal to develop a process that ensures victims are notified of an appeal before it is reported in the media.

## Relationship between victims and the prosecution

- 6.50 The time spent by the prosecution team with a victim, together with the attitude and communication skills of the individuals involved, will have a significant impact on whether victims feel adequately informed and supported. This in turn affects their confidence in the criminal justice system.
- 6.51 The OPP solicitor and the prosecutor briefed to appear in court are central actors in the criminal trial process and are in a position of authority relative to victims. Understandably, difficulties communicating with the prosecutor or OPP solicitor can cause frustration or distress, even where the police or a support service are providing assistance.<sup>77</sup>

67 *Victims' Charter Act 2006* (Vic) s 7.

68 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [61]. Financial reparation is the subject of Chapter 9 of this report.

69 Office of Public Prosecutions Victoria, *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (2013). Information is also provided in *Pathways to Justice: A Guide to the Victorian Court System for Victims and Witnesses of Serious Crime* (2013). Consultations 1 (A victim), 12 (Parent of a victim), 13 (Parents of a victim), 14 (A victim), 28 (Laurie Krause), 40 (A victim), 42 (Relative of a victim; a victim).

71 Consultation 42 (Relative of a victim; a victim).

72 Consultations 8 (Parent of a victim), 13 (Parents of a victim), 20 (Parent of victims), 29 (Parent of victims).

73 *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 2.47. See further Chapter 9.

74 *Victims' Charter Act 2006* (Vic) s 9(f).

75 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [31], [70]–[71].

76 Victoria Legal Aid, *Criminal Appeals Review* (2014) 5; Submission 10 (Victoria Legal Aid). See also Submission 14 (Victims of Crime Commissioner, Victoria).

77 Consultations 4 (Parent of victims), 10 (A victim), 20 (Parent of victims), 28 (Laurie Krause), 35 (Parent of a victim), 40 (A victim), 42 (Relative of a victim; a victim), 53 (Parent of a victim), 56 (Colleen Murphy (Kelly)).

6.52 Victims spoke about seeking honesty and empathy in their dealings with the OPP. They acknowledged that some conversations are hard, but stated that they still want to have them.<sup>78</sup> Proactive efforts by the OPP to ensure that victims were informed and supported, and its openness to being contacted with questions or concerns, were viewed favourably by victims.<sup>79</sup> Information needs to be reiterated throughout the course of a prosecution as it becomes relevant to each stage of the trial process.<sup>80</sup>

### Information obligations and the Victims' Charter Act

6.53 Most obligations to ensure victims are informed and supported fall on the DPP and OPP, particularly the solicitor in charge of a prosecution. These obligations inform the relationship between victims and the prosecution.

6.54 The DPP's policies are fairly comprehensive. In contrast the Victims' Charter principles are broadly worded. For example:

- The DPP's Victims Policy requires OPP solicitors to ensure that victims know the date, time and location of a contested committal, trial, plea hearing, sentencing hearing, and appeal hearing.<sup>81</sup> The Victims' Charter Act principle requires only that prosecuting agencies tell victims how they can find out these details.<sup>82</sup>
- The Victims' Charter Act states that the prosecution should advise victims of the outcome of criminal proceedings and appeals.<sup>83</sup> The DPP's Victims Policy goes further and states that OPP solicitors should update victims about the progress of the prosecution and the outcomes of a committal mention, contested committal, initial directions hearing, trial, plea, sentencing and appeal.<sup>84</sup>
- A Victims' Charter principle requires prosecuting agencies to refer victims to a victims' services agency for help with a victim impact statement where a victim first expresses 'a wish to make a victim impact statement'.<sup>85</sup> The DPP's Victims Policy also refers to this but additionally requires OPP solicitors to inform victims that they have a right to make a victim impact statement at sentencing.<sup>86</sup>

6.55 There is no suggestion that prosecution lawyers are failing to act compatibly with DPP policies simply because those policy obligations have not been directly transferred to the Victims' Charter Act. However, the Victims' Charter Act is the most visible reference point for the community in terms of what victims are entitled to in their dealings with investigatory, prosecuting and victims' services agencies. It is also the instrument through which compliance with obligations to victims is monitored.

6.56 Victoria Police and the former victim representatives of the inaugural Victims of Crime Consultative Committee supported incorporating some aspects of DPP policies into the Victims' Charter Act.<sup>87</sup> The Law Institute of Victoria considered compatibility between the Victims' Charter Act and DPP policy to be important.<sup>88</sup>

6.57 The Commission can see no reason why the above three DPP policy obligations should not be replicated in the Victims' Charter Act. The DPP has considered them important enough to set down in policy, and they appear to be regularly complied with by OPP staff and solicitors.

78 Consultations 11 (Parent of a victim), 13 (Parents of a victim), 20 (Parent of victims), 40 (A victim).

79 Submission 3 (Melville Miranda); Consultations 11 (Parent of a victim), 13 (Parents of a victim), 14 (A victim), 20 (Parent of victims), 40 (A victim), 44 (Kristy McKellar), 46 (A victim), 56 (Colleen Murphy (Kelly)).

80 Consultations 29 (Parent of victims), 45 (Victims Support Agency, Department of Justice and Regulation); Roundtable 17 (Criminal justice agencies and stakeholder organisations).

81 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [29], [31].

82 *Victims' Charter Act 2006* (Vic) s 9(d).

83 *Ibid* s 9(e)-(f).

84 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [30]-[31].

85 *Victims' Charter Act 2006* (Vic) s 13(2).

86 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [42]. This matter was raised at Roundtable 15 (Magistrates of the Magistrates' Court of Victoria).

87 Submissions 26 (Victoria Police), 40 (Former VOCCC victim representatives). See also Submission 21 (Dianne Hadden). The former VOCCC victim representatives submission noted that this would still not provide a remedy for violation of rights. Compliance and remedies are discussed in Chapter 4.

88 Submission 25 (Law Institute of Victoria).

- 6.58 OPP solicitors are required, by DPP policy, to inform victims that they can apply for compensation or restitution orders and for financial assistance, and can be referred to legal assistance.<sup>89</sup> In Chapter 9, the Commission recommends that this obligation also be reflected in the Victims' Charter.
- 6.59 Victims will need information about certain matters that are not contained in the Victims' Charter or in the publicly available DPP policies. In Chapter 7, the Commission recommends that the prosecution have statutory responsibility for informing victims about confidential communications applications and their rights. The Commission also recommends that victims be informed of the availability of restorative justice options. In Chapter 8, the Commission recommends that OPP solicitors inform victims of alternative arrangements for giving evidence, and that the Victims' Charter Act be amended to include these information obligations.

## Recommendation

- 20 The *Victims' Charter Act 2006 (Vic)* should be amended to require prosecuting agencies to:
- (a) ensure that victims know the date, time and location of a contested committal, trial, plea hearing, sentencing hearing, and appeal hearing
  - (b) advise victims about the progress of the prosecution and the outcome of committal proceedings, a trial, plea hearing, sentencing hearing and appeal hearing
  - (c) inform victims that they have a right to make a victim impact statement at sentencing.

## Conferences and compliance with obligations

- 6.60 Having obligations in the Victims' Charter Act does not automatically lead to compliance.<sup>90</sup> Time, resources, attitude and communication skills are vital. Prosecution lawyers need to establish good relationships early and maintain them.<sup>91</sup> Evidence suggests that obligations to inform, support and consult with victims, especially victims of sexual offences, are increasingly being taken more seriously by prosecution lawyers than they used to be.<sup>92</sup>
- 6.61 The DPP informed the Commission that there is 'a high degree of satisfaction experienced by victims in their interactions with the OPP'.<sup>93</sup> Indeed, a number of victims told the Commission that they were adequately informed and updated, or felt able to approach the OPP solicitor or prosecutor when needed.<sup>94</sup> However, the experience is not the same for everyone.<sup>95</sup>

89 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [61].

90 The Victims' Charter Act and compliance measures are addressed in Chapter 4.

91 Consultation 50 (Witness Assistance Service, OPP Victoria).

92 Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (2015) 27; Consultations 18 (Child Witness Service, Department of Justice and Regulation), 39 (OPP). See also Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) 64 (in relation to the OPP's Specialist Sexual Offences Unit).

93 Submission 23 (DPP).

94 Consultations 1 (A victim), 8 (Parent of a victim), 12 (Parent of a victim), 20 (Parent of victims), 46 (A victim).

95 Consultations 3 (Parent of a victim), 4 (Parent of victims), 10 (A victim), 20 (parent of victims), 28 (Laurie Krause), 35 (Parent of a victim), 40 (A victim), 42 (Relative of a victim; a victim), 53 (Parent of a victim), 56 (Colleen Murphy (Kelly)). The Victims Support Agency reported that a survey of prosecutorial attitudes towards victims revealed that some prosecutors do not see victims as having a role (Consultation 45). See also Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) 65-8.

- 6.62 Overall, the evidence collected by the Commission indicated that prosecutors and OPP solicitors could do better, more consistently, especially for victims in regional Victoria, Aboriginal victims, victims with disabilities, victims facing barriers related to culture or language and victims not able to access the Witness Assistance Service.
- 6.63 The DPP and OPP do not act legally on behalf of victims. However, as participants in the criminal trial process, victims must be understood as relevant to the DPP and OPP's operations. The Commission considers that conferencing with victims before and after key court dates should be an integral part of the prosecution process.
- 6.64 The Commission was told that conferencing enhances the risk of victims revealing information that the prosecution is obliged to disclose to the defence, which could damage the prosecution.<sup>96</sup> While this is a legitimate concern, it can be managed, for example, by ensuring that victims understand the purpose and limits of the meeting before it starts, and reminding them about the prosecution's disclosure obligations. It is also helpful for the prosecution to learn information that may assist or hinder the prosecution early, rather than having something arise for the first time in cross-examination. If information does come to light that is relevant, it is consistent with a central tenet of the criminal justice system that an accused know the case against them to properly defend charges.<sup>97</sup> Prosecution lawyers already manage such risks in the context of their obligations to offer pre-committal and pre-trial conferences to certain victims (see [6.35]).<sup>98</sup>
- 6.65 Participation in conferences with the prosecution before and after important court dates, such as the committal, trial or sentencing hearing, is positive and useful for victims.<sup>99</sup> Conferences at least a few days prior to court can help victims prepare themselves for the language and process of the court and possible outcomes. Conferences on the day or a few days after court provide a space for victims to ask questions and better understand what happened, have their contribution and experience acknowledged, and ensure that they have access to appropriate support. Regular conferences with prosecution lawyers convey to victims what they know to be true—that they have an interest and are integral to the prosecution process.
- 6.66 The Commission considers that victims should be offered the opportunity to attend a conference with the prosecution before and after key court dates. Conferences should involve the OPP solicitor, an appropriate support person (based on a victim's particular needs), the police informant and, if possible, the prosecutor. The OPP has limited resources and the Commission acknowledges that court timeframes and individual schedules will affect the length and timing of a conference and who can attend, particularly on regional circuits. The Commission's recommendation prioritises victims who face greater barriers to participation and victims who are more invested in the criminal justice system's response to offending. This recommendation should be read as a companion to recommendation 24 in Chapter 7.

96 Submission 29 (Victorian Bar and Criminal Bar Association).

97 Director of Public Prosecutions Victoria, *Director's Policy: Disclosure* (24 November 2014) [5].

98 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [13]–[15], [24].

99 Submissions 15 (Kristy McKellar), 37 (Dr Margaret Camilleri), 40 (Former VOCCC victim representatives); Consultations 3 (Parent of a victim), 14 (A victim), 18 (Child Witness Service, Department of Justice and Regulation), 29 (Parent of victims), 46 (A victim), 50 (Witness Assistance Service, OPP Victoria), 56 (Colleen Murphy (Kelly)); Roundtables 10 (Legal practitioners, Shepparton), 12 (Victim support specialists, Wodonga), 13 (Victim support specialists, Ballarat), 18 (Victims of crime). Some victims indicated that they would have liked to be offered a conference with the prosecution, or a conference earlier than on the day of court: Consultations 4 (Parent of victims), 28 (Laurie Krause), 29 (Parent of victims), 40 (A victim), 53 (Parent of a victim).



## Recommendation

- 21 The *Victims' Charter Act 2006 (Vic)* should be amended to require prosecuting agencies to offer conferences before and after important court dates, including committal hearings, trials and retrials, sentencing hearings in the Supreme Court and County Court and appeals to the Court of Appeal, to the following:
- (a) family members of deceased victims
  - (b) victims of sexual offences
  - (c) all victims of offences involving conduct that falls within the definition of family violence in the *Family Violence Protection Act 2008 (Vic)*
  - (d) child victims
  - (e) victims with disabilities
  - (f) Aboriginal and Torres Strait Islander victims
  - (g) victims whose first language is not English
  - (h) on request to other victims of crime.

### Regional circuit court challenges

- 6.67 Victims of crime in rural and regional Victoria face particular challenges related to geographical and social isolation and a lack of access to services. Some victims have to depend on the police informant for information that the OPP should normally provide because of difficulties communicating with the OPP solicitor.<sup>100</sup> The Commission heard that greater reliance is also placed on local Victims Assistance Program providers, and sometimes Centres Against Sexual Assault, to provide support to victims when the OPP's Witness Assistance Service does not have the capacity to travel.<sup>101</sup>
- 6.68 This is in large part because of the nature of circuit courts in regional areas. The Supreme and County Courts sit in certain regional cities and towns at different times throughout each year. The Commission was told that the County Court regional circuit lists are now managed more effectively and take into account the interests of victims, and that matters progress much faster from committal through to trial and sentencing than they used to.<sup>102</sup> However, a trial listed for a particular circuit will not always start before the circuit ends. This means adjourning the trial to the next circuit, which may be months away.
- 6.69 The OPP has offices in Melbourne and Geelong. The OPP established a regional office in Geelong in 2009 to improve the delivery of prosecution services to western Victoria.<sup>103</sup> An internal review resulted in services being strengthened in Geelong, including the appointment of a Geelong-based Crown Prosecutor in 2014.<sup>104</sup> For all other regions, the OPP travels to the location of the circuit court. This can mean preparing for a number of sentencing hearings and trials, all of which may occur over three or four weeks.

100 Consultations 28 (Laurie Krause), 35 (Parent of a victim), 40 (A victim), 53 (Parent of a victim). OPP staff also told the Commission that greater reliance is placed on police to inform and support victims in regional Victoria (Consultation 39).

101 Consultations 28 (Laurie Krause), 50 (Witness Assistance Service, OPP Victoria); Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

102 Consultation 31 (Judge of the County Court of Victoria); County Court of Victoria, *2014–2015 Annual Report* (2015) 4.

103 Office of Public Prosecutions Victoria, *The Prosecutor* (July 2013) <<http://www.opp.vic.gov.au/News-and-Media/Newsletters/5-July-2013/>>.

104 Office of Public Prosecutions Victoria, *Geelong Crown Prosecutor Appointed* (28 January 2014) <<http://www.opp.vic.gov.au/News-and-Media/Media-release-archive/Geelong-Crown-Prosecutor-appointed>>.



## Meeting obligations to regional victims

- 6.70 Regional victims often meet the OPP solicitor or the prosecutor in person for the first time during a rushed meeting on the morning of a significant court date.<sup>105</sup> For those stressed about giving evidence in particular, a short meeting in the court precinct before court starts is insufficient. Two judges of the County Court and a regional magistrate expressed concern about conferencing not occurring consistently and regional victims not being sufficiently supported or informed.<sup>106</sup>
- 6.71 Victims living in regional areas also have less consistent access to the OPP Witness Assistance Service than those in metropolitan Melbourne. The Commission was told that workers from Victims Assistance Programs, and sometimes Centres Against Sexual Assault, provide court support where Witness Assistance Service staff are not available, and sometimes with limited notice.<sup>107</sup> This highlights the importance of regional victims being linked to a Victims Assistance Program, Centre Against Sexual Assault or other support service, so that court support can be smoothly coordinated if necessary.<sup>108</sup>
- 6.72 OPP Witness Assistance Service workers play a critical role in liaising with prosecutors and OPP solicitors, ensuring victims are provided with the information they need and coordinating support. Several consultation participants told the Commission that victim support services, including the Witness Assistance Service, are under-resourced.<sup>109</sup> Resource constraints appear to be having a disproportionate impact on victims from regional Victoria.

## Conclusion

- 6.73 The obligations to inform, refer, consult and conference with victims in regional Victoria pose challenges for the OPP in terms of timing, logistics and resources. These challenges are significant, but not insurmountable.
- 6.74 Greater resources may be required and circuit court listing practices may need to be adjusted to give OPP solicitors enough time to fulfil their obligations to victims. It may also be possible to reallocate existing resources within the OPP in a way that provides regional victims with greater access to the OPP's prosecution and witness support services earlier in the prosecution process. For example, it may be feasible to have an ongoing OPP presence in regions with the busiest court lists. Data for matters finalised in 2015 in the County Court of Victoria reveals that in the Gippsland region (La Trobe Valley, Sale and Bairnsdale) there were 51 pleas and 20 trials, in the Loddon Mallee region (Bendigo and Mildura), there were 61 pleas and eight trials, and in Hume (Shepparton, Wangaratta and Wodonga) there were 47 pleas and 13 trials. In contrast, there were 46 pleas and seven trials over the same period in the Barwon South West region, which is a part of the area covered by the OPP's Geelong office.<sup>110</sup>

105 Consultations 5 (Sue and Don Scales, Mildura), 27 (Loddon Campaspe Centre Against Sexual Assault), 28 (Laurie Krause), 35 (Parent of a victim), 40 (A victim), 42 (Relative of a victim; a victim); Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

106 Consultations 16 (Judges of the County Court of Victoria), 36 (Magistrate John Lesser). The OPP described face-to-face conferences between the prosecutor, instructing solicitor, Witness Assistance Service worker and victim as the biggest logistical challenge on regional circuits. Video-link conferencing is another option but is not preferred (Consultation 39).

107 Consultations 28 (Laurie Krause), 37 (Centacare, Barwon South West Region); Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

108 Referrals by police to the Victims of Crime Helpline appear to have become more consistent but do not always occur: Consultations 35 (Parent of a victim), 53 (Parent of a victim). Early referral to support is a priority in Victoria Police, *Future Directions for Victim-centric Policing* (2015) 8–9. See also Submission 26 (Victoria Police).

109 Submissions 29 (Victorian Bar and Criminal Bar Association), 38 (Name withheld); Consultations 13 (Parents of a victim), 19 (Victims of Crime Commissioner, Victoria), 45 (Victims Support Agency, Department of Justice and Regulation), 56 (Colleen Murphy (Kelly)); Roundtable 13. (Victim support specialists, Ballarat), 15 (Magistrates of the Magistrates' Court of Victoria).

110 Data provided by County Court of Victoria (18 February 2016). Data obtained from the Magistrates' Court of Victoria on 11 February 2016 showed similar numbers of contested committals recorded for the Barwon South West (41), Gippsland (38), Grampians (38) and Loddon Mallee (35) regions in 2015. Bendigo, Ballarat, Shepparton and the La Trobe Valley-Gippsland region also have growing populations: Australian Bureau of Statistics, *3218.0—Regional Population Growth, Australia, 2014–15* (30 March 2016) <<http://www.abs.gov.au/ausstats/>>; Regional Development Victoria, *Victorian Regions and Regional Cities* (15 April 2016) <<http://www.rdv.vic.gov.au/victorian-regions>>.

- 6.75 The Commission's function is not to review the efficiency, effectiveness or allocation of resources within the OPP. However, the Commission considers that the OPP should have a greater presence in regional Victoria so that it can meet the obligations it owes to victims, including offering consultations and conferences, and not just on the day of court. To that end, a review of the OPP's delivery of both prosecution and witness assistance services in regional Victoria is warranted. Ideally this review would be undertaken by an independent entity or person.

## Recommendation

- 22 The Director of Public Prosecutions should cause a review to be undertaken of the delivery of prosecution and witness assistance services across regional Victoria with the objective of:
- (a) improving the Office of Public Prosecutions' presence and delivery of services in regional Victoria
  - (b) ensuring that Office of Public Prosecutions solicitors are able to consistently meet obligations owed to victims under the *Victims' Charter Act 2006* (Vic) and the Director of Public Prosecutions' policies.

## Legal advice and assistance for victims

- 6.76 In addition to information about law, policy and procedure relevant to their case, victims will sometimes need legal advice and assistance. The ability of victims to access legal advice and assistance during the criminal trial process was a topic on which a wide variety of views were expressed during the Commission's consultations and in submissions.
- 6.77 There is nothing in principle stopping a victim from seeking out legal advice about their role or rights in the criminal trial process. This section therefore considers the extent of the need for legal advice and assistance and whether there should be a specific legal service for victims.
- 6.78 The need for a legal service is a distinct, albeit related, matter to the question of whether victims should have a right to appear in court or have legal representation while giving evidence, both of which are canvassed in Chapter 7. In that chapter, the Commission concludes that victims should not be a party or have a general right to participate in court during the criminal trial process. However, there are particular aspects of the criminal trial process in which victims can or should be able to participate. Access to legal assistance in these circumstances is addressed below in the discussion regarding 'substantive legal entitlements'. Substantive legal entitlements are those about which victims can decide whether to take a particular course of action, such as to provide a victim impact statement, independently of the prosecution.
- 6.79 It was suggested that victims need a service that can provide information and legal advice about criminal processes, such as giving evidence,<sup>111</sup> or entitlements of a procedural nature, such as being consulted by the prosecution about decisions to discontinue or accept a guilty plea to lesser charges.<sup>112</sup> The Commission addresses these matters separately as 'procedural matters'.

111 Consultations 25 (Aboriginal Family Violence Prevention & Legal Service Victoria), 28 (Laurie Krause), 29 (Parent of victims), 35 (Parent of a victim), 42 (Relative of a victim; a victim); Roundtable 14 (Legal practitioners, Ballarat). Victim support specialists in Geelong said victims need assistance before giving evidence, but this need not be legal: Roundtable 3. Victoria Legal Aid referred to a need for information and advice about alternative arrangements for giving evidence: Consultation 47.

112 Submissions 2 (Seppy Pour), 7 (Youthlaw), 11 (Sandra Betts), 14 (Victims of Crime Commissioner, Victoria), 20 (Phil Cleary), 21 (Dianne Hadden), 25 (Law Institute of Victoria), 38 (Name withheld); Consultation 27 (Loddon Campaspe Centre Against Sexual Assault); Roundtable 5 (Victim support specialists, Morwell).

## Legal information, advice and assistance

- 6.80 Throughout this section, the terms legal information, legal advice and legal assistance are used. Legal information is used by the Commission to mean information about law and procedure, which does not involve providing legal advice and can be provided by a non-lawyer. There is already a range of sources and services from which victims can obtain legal information, as noted earlier in this chapter. Of course, those providing information about law and legal procedure need a good understanding of the boundaries between legal information and advice.<sup>113</sup>
- 6.81 In contrast, legal advice and assistance require a lawyer. Legal advice involves the application of law to the person's circumstances. Lawyers can provide legal advice without agreeing to represent the person in court, negotiations or otherwise. The Commission's use of the term legal assistance refers to a lawyer agreeing to provide advice and representing the person, for example, in negotiations or in court, typically with a letter of engagement, costs agreement and/or other agreement.

## The perceived need for independent legal assistance for procedural matters

- 6.82 The question of whether there is a need for victims to access lawyers that are independent of the prosecution for assistance with procedural matters was often discussed in general terms. For example, the DPP's submission stated that a legal advocate 'would provide timely and accurate information about criminal procedures, which would help ensure that victims have realistic expectations about the criminal justice process'.<sup>114</sup>
- 6.83 The Victims of Crime Commissioner, Victorian Legal Services Commissioner, Law Institute of Victoria and Northern Centre Against Sexual Assault supported a court-based service, primarily to provide guidance, referrals and legal information about court processes to victims.<sup>115</sup>
- 6.84 Stakeholder perceptions about whether or not victims need access to an independent lawyer for procedural matters were generally influenced by consideration of the following needs:
- ensuring victims are informed and remedying shortcomings in communication between victims and prosecution lawyers or police<sup>116</sup>
  - including victims and empowering them to participate in the criminal process<sup>117</sup>
  - ensuring victims are linked to support services<sup>118</sup>
  - avoiding placing more obligations on prosecution lawyers<sup>119</sup>
  - ensuring that the interests of victims are appropriately considered by the prosecution.<sup>120</sup>

113 Consultation 51, (Criminal Law Section, Law Institute of Victoria), 54 (Victorian Bar and Criminal Bar Association); Roundtable 10 (Legal practitioners, Shepparton). The Department of Justice and Regulation and the OPP have information for victims on their websites and in pamphlets.

114 Submission 23 (DPP).

115 Submissions 14 (Victims of Crime Commissioner, Victoria), 34 (Northern Centre Against Sexual Assault); Consultations 51 (Criminal Law Section, Law Institute of Victoria), 57 (Victorian Legal Services Commissioner and CEO Victorian Legal Service Board).

116 Submissions 29 (Victorian Bar and Criminal Bar Association), 38 (Name withheld); Consultations 19 (Victims of Crime Commissioner, Victoria), 20 (Parent of victims), 25 (Aboriginal Family Violence Prevention & Legal Service Victoria), 28 (Laurie Krause), 29 (Parent of victims), 31 (Judge of the County Court of Victoria), 35 (Parent of a victim), 37 (Centacare, Barwon South West Region), 41 (A victim), 42 (Relative of a victim; a victim), 44 (Kristy McKellar), 51 (Criminal Law Section, Law Institute of Victoria), 53 (Parent of a victim), 57 (Victorian Legal Services Commissioner and CEO Victorian Legal Services Board); Roundtables 7 (Victim support specialists, Melbourne), 8 (Metropolitan Centres Against Sexual Assault), 10 (Legal practitioners, Shepparton), 13 (Victim support specialists, Ballarat), 14 (Legal practitioners, Ballarat), 16 (Community legal centres), 17 (Criminal justice agencies and stakeholder organisations), 18 (Victims of crime).

117 Submissions 7 (Youthlaw), 11 (Sandra Betts), 20 (Phil Cleary), 26 (Victoria Police), 39 (Safe Steps); Consultations 19 (Victims of Crime Commissioner, Victoria), 20 (Parent of victims), 21 (Victoria Police), 25 (Aboriginal Family Violence Prevention & Legal Service Victoria), 28 (Laurie Krause), 37 (Centacare, Barwon South West Region); Roundtables 3 (Victim support specialists, Geelong), 8 (Metropolitan Centres Against Sexual Assault), 16 (Community legal centres), 18 (Victims of crime).

118 Submission 14 (Victims of Crime Commissioner, Victoria); Consultation 25 (Aboriginal Family Violence Prevention & Legal Service Victoria).

119 Submission 8 (Mary Iliadis).

120 Submissions 5 (Centre for Rural Regional Law and Justice), 14 (Victims of Crime Commissioner, Victoria); Roundtable 18 (Victims of crime).

- 6.85 These contributions reveal a perceived need for victims to be better included, informed and supported. However there was division as to whether another lawyer was required or whether prosecution lawyers and existing support services can meet these needs given adequate resourcing.

### Limitations on what an independent lawyer can do

- 6.86 An independent lawyer would not be subject to the disclosure obligations imposed on the prosecution. This means that victims could speak more freely because the details of their discussions need not be disclosed to the defence.
- 6.87 There are, however, significant limits to the advice a lawyer independent of the prosecution can provide. In particular, as a non-party, the lawyer would not have possession of all relevant evidence, which would constrain their ability to provide comprehensive advice.<sup>121</sup> Contributors to this reference most commonly cited giving evidence and plea negotiations as processes for which victims need access to an independent lawyer. These are discussed in more detail below.

### Giving evidence

- 6.88 Uncertainty about the nature and content of cross-examination is a significant concern for victims. It is also an inherent aspect of cross-examination and there are limits on the extent to which this uncertainty can be addressed—all lawyers, prosecution or otherwise, are prohibited from coaching witnesses about their evidence.<sup>122</sup>
- 6.89 While there will always be some uncertainty for those who have to give evidence, this does not mean a victim cannot be prepared for the experience. However, an independent lawyer is not necessarily in a better position to do this than a prosecution lawyer. An independent lawyer would be less informed than the prosecution about the issues in the case.<sup>123</sup> Prosecution lawyers on the other hand can prepare victims for giving evidence with knowledge of the issues in the case and potentially with a support worker present.

### Plea resolution and discontinuance decisions

- 6.90 Decisions to discontinue a prosecution or to accept a plea to lesser charges can have significant ramifications for victims. Although the making of these decisions may affect a victim's interests, the victim's entitlement is procedural in nature—to be consulted by the prosecution.<sup>124</sup> The DPP holds the decision-making power.
- 6.91 Victims can seek advice and assert their views through an independent lawyer. However, as the DPP observed:
- it is self-evident that those representatives are not and cannot be apprised of all the circumstances of a case and therefore any opinion they may give to the victim or the DPP on the appropriateness of decisions made is of limited value.<sup>125</sup>
- 6.92 In addition, the DPP must act impartially. Prosecutions are only pursued if there is a reasonable prospect of conviction and it is in the public interest.<sup>126</sup> While obtaining independent legal advice may enable victims to participate in consultation in a more informed manner in terms of their personal interests,<sup>127</sup> their views are but one of many of factors that must be considered, alongside an assessment of the evidence. The Commission considers that, in most cases, a victim's legal advice before consultation is unlikely to have a significant bearing on the decision ultimately made.

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121 Submission 23 (DPP); Consultation 57 (Victorian Legal Services Commissioner and CEO Victorian Legal Service Board).  
122 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 24.1.2; *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Vic) r 69(b).  
123 Submission 23 (DPP); Consultation 45 (Victims Support Agency, Department of Justice and Regulation).  
124 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [25]. See further Chapter 7. The Commission does not recommend giving the views of victims any determinative influence over such decisions.  
125 Submission 23 (DPP). This point was also made in Consultation 34 (Office of the Director of Public Prosecutions, NSW).  
126 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014).  
127 Submission 5 (Centre for Rural Regional Law and Justice).

- 6.93 The Commission acknowledges that there will be some cases in which legal advice or assistance might be required, although this need not always be through a lawyer. For example, if a victim has a cognitive impairment and the DPP is considering discontinuing a prosecution because of concerns about the victim’s ability to cope, a disability advocate with a relationship with the victim may be better placed to represent their interests.<sup>128</sup> If legal advice is needed, the Commission’s recommendation below (to establish a legal service for substantive entitlements) contemplates legal assistance being provided in exceptional circumstances.

## Conclusion

- 6.94 On balance, the Commission considers that it is not appropriate or necessary to fund another service to provide legal information, advice or assistance to victims about procedural matters for the following reasons:
- Much of the perceived need relates to victims feeling included, informed and supported. The police, DPP, OPP and victims’ services agencies already have obligations to address these issues. These obligations should be complied with rather than placing the burden on victims to obtain legal assistance.<sup>129</sup>
  - If obligations were consistently met, and victims linked with the support they need, they would rarely need access to an additional lawyer.<sup>130</sup>
  - Establishing another service could remove the incentive for prosecution lawyers to communicate regularly and effectively with victims.<sup>131</sup>
  - A range of agencies already provide general and tailored procedural information effectively.<sup>132</sup> These services include the OPP Witness Assistance Service, Child Witness Service, Victims Assistance Program providers, Centres Against Sexual Assault and Victoria Police. It may be more effective to direct additional funding to these services.
  - Many victims do not want another agency or lawyer to deal with.<sup>133</sup> They want to be informed and supported, and they want the prosecution to communicate properly with them.
  - It would be difficult to resource a service so that all victims who expect to access legal advice and assistance can do so.<sup>134</sup> Resourcing equitable access is difficult to justify when victims are not a party to proceedings.<sup>135</sup>
  - A new legal service might inflate expectations about what independent lawyers can achieve for victims in circumstances where they have no substantive right.<sup>136</sup>

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128 The Child Witness Service and Office of the Director of Public Prosecutions NSW noted the potential need for child victims to have an independent advocate where their views differ from that of their parents, although both stated that they did not consider that this advocate need always be a lawyer: Consultations 18, 34 respectively.

129 Consultations 43 (Victoria Police SOCIT, Wodonga), 45 (Victims Support Agency, Department of Justice and Regulation). See Chapter 4 in relation to compliance with Victims’ Charter Act principles.

130 Consultations 21 (Victoria Police), 45 (Victims Support Agency, Department of Justice and Regulation); Roundtable 10 (Legal practitioners, Shepparton).

131 Submission 5 (Centre for Rural Regional Law and Justice); Consultation 45 (Victims Support Agency, Department of Justice and Regulation).

132 Submissions 14 (Victims of Crime Commissioner, Victoria), 15 (Kristy McKellar), 29 (Victorian Bar and Criminal Bar Association), 38 (Name withheld), 40 (Former VOCCC victim representatives); Consultations 1 (A victim), 3 (Parent of a victim), 4 (Parent of victims), 5 (Sue and Don Scales, Mildura), 8 (Parent of a victim), 11 (Parent of a victim), 12 (Parent of a victim), 13 (Parents of a victim), 14 (A victim), 20 (Parent of victims), 23 (Court Network staff and a Court Networker—County Court), 29 (Parent of victims), 38 (Executive Officer, Barwon South West RAJAC), 43 (Victoria Police SOCIT, Wodonga), 45 (Victims Support Agency, Department of Justice and Regulation), 50 (Witness Assistance Service, OPP Victoria), 51 (Criminal Law Section, Law Institute of Victoria), 56 (Colleen Murphy (Kelly)); Roundtable 10 (Legal practitioners, Shepparton).

133 Submission 5 (Centre for Rural Regional Law and Justice); Consultations 10 (A victim), 46 (A victim), 25 (Aboriginal Family Violence Prevention & Legal Service Victoria); Roundtable 3 (Victim support specialists, Geelong).

134 Submission 27 (Supreme Court of Victoria).

135 Consultations 23 (Court Network staff and a Court Networker—County Court), 37 (Centacare, Barwon South West Region).

136 Consultations 45 (Victims Support Agency, Department of Justice and Regulation), 57 (Victorian Legal Services Commissioner and CEO Victorian Legal Services Board).

## Legal assistance for substantive legal entitlements

- 6.95 At several points during the criminal trial process, victims have the power to make a decision about whether to exercise a legal entitlement independently of the prosecution.<sup>137</sup> The Commission has referred to these as substantive legal entitlements and they include the following:
- A victim may be permitted to respond in court to an application to subpoena, access or use confidential medical or counselling records.<sup>138</sup>
  - A victim who is a spouse, de facto partner, parent or child of the accused person can apply to the court not to give evidence if they believe doing so will cause harm.<sup>139</sup>
  - A victim can object to giving evidence if it may prove that they have committed an offence or are liable to a civil penalty.<sup>140</sup>
  - A victim is entitled to provide a victim impact statement to the court at sentencing and to read it out.<sup>141</sup>
  - A victim is entitled to make a claim for compensation or restitution as an additional order to a sentencing order.<sup>142</sup>
- 6.96 In Chapter 7, the Commission recommends that victims be entitled to request a restorative justice conference as part of the sentencing or compensation and restitution order process. If this recommendation is implemented, it would also give rise to a substantive legal entitlement.
- 6.97 Subject to certain eligibility criteria, victims may be entitled to financial assistance from VOCAT. The criminal trial and the financial assistance are not directly connected. However, victims may need advice about compensation orders during the trial. This is further considered in Chapter 9.
- 6.98 The above list of entitlements is not exhaustive. Victims may assert or be granted other participation rights in the future, for which legal assistance will be required.<sup>143</sup> In addition, the Commission considers that exceptional circumstances might justify legal intervention to assert a human right, or to protect particularly vulnerable victims, where the prosecution cannot or will not do so.<sup>144</sup> This is discussed further in Chapter 7.

## The need for a legal service

- 6.99 Victims must not only be aware of what they are entitled to do; they must also be able to assert their rights. Victims should have access to independent legal advice and, where appropriate, ongoing legal assistance to assert substantive rights connected with their involvement in the criminal trial process—a process over which they otherwise have little control.<sup>145</sup> As the Supreme Court submitted, legal advice is desirable where victims have

137 Tyrone Kirchengast refers to ‘enforceable rights of a substantive character’ to describe some of the rights discussed below: Submission 19 (Dr Tyrone Kirchengast, University of New South Wales).

138 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C. See Chapter 7.

139 *Ibid* s 18. This applies to witnesses generally, not just victims.

140 *Ibid* s 128. This section applies to witnesses generally, not just victims.

141 *Sentencing Act 1991* (Vic) s 8K.

142 *Sentencing Act 1991* (Vic) ss 84, 85B, 86. See further Chapter 9.

143 The Supreme Court of Victoria noted that if victims are given more substantive entitlements, they will need access to legal assistance to realise those on an equitable basis: Submission 27 (Supreme Court of Victoria). See also Submissions 2 (Seppy Pour), 5 (Centre for Rural Regional Law and Justice).

144 The disadvantage experienced by Aboriginal women was noted in Consultation 25 (Aboriginal Family Violence Prevention & Legal Service Victoria). The potential vulnerability of children justifying legal representation was noted by Consultations 20 (Parent of victims) and 34 (Office of the Director of Public Prosecutions, NSW). The Commissioner for Victims’ Rights in South Australia noted examples of his office funding legal assistance for victims in exceptional circumstances (Consultation 2). See also Michael O’Connell, *Victims’ Rights: Integrating Victims in Criminal Proceedings* (2011).

145 Submissions 10 (Victoria Legal Aid), 11 (Sandra Betts), 14 (Victims of Crime Commissioner), 19 (Dr Tyrone Kirchengast, University of New South Wales), Submissions, 23 (DPP), 26 (Victoria Police), 27 (Supreme Court of Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University), 33 (Professor Jo-Anne Wemmers), 39 (Safe Steps); Consultations 2 (Commissioner for Victims’ Rights, South Australia), 20 (Parent of victims), 21 (Victoria Police), 30 (Dr Tyrone Kirchengast, University of New South Wales), 46 (A victim); Roundtable 16 (Community legal centres). Some contributors only referred to privacy interests and/or confidential medical or counselling records when expressing support for legal assistance: Submissions 25 (Law Institute of Victoria), 34 (Northern Centre Against Sexual Assault), 40 (Former VOCCC victim representatives); Consultations 11 (Parent of a victim), 12 (Parent of victims), 18 (Child Witness Service, Department of Justice and Regulation), 23 (Court Network staff and a Court Networker—County Court), 50 (Witness Assistance Service, OPP Victoria); Roundtables 9 (Victim support and therapeutic specialists, Shepparton), 10 (Legal practitioners, Shepparton), 15 (Magistrates’ Court of Victoria).



a legal interest because it assists the court with decision making and ensures that ‘the rights of the victim can be served’.<sup>146</sup>

- 6.100 Of course, not all substantive entitlements will require ongoing legal assistance. For example, victims might seek legal advice about their victim impact statement, especially if considering a compensation claim. However, Victims Assistance Program workers receive training in assisting victims to draft these statements and may be the preferred source of support for this process.
- 6.101 There is no obvious service for victims to turn to for legal advice. It can be sought from a community legal centre, Victoria Legal Aid or a private lawyer.<sup>147</sup> Victoria Legal Aid may provide ongoing legal assistance, primarily for compensation order and VOCAT applications, if the victim is eligible according to means and merits tests. Access to legal assistance from a community legal centre will also be subject to means and merits tests although this varies from centre to centre, and also depends on the centre’s capacity to help. Private lawyers will generally expect to be paid, either on an ongoing basis or at the completion of a case.
- 6.102 Child witnesses, including victims, can object to giving evidence against a parent pursuant to section 18 of the *Evidence Act 2008* (Vic). Where this is an issue, the Victorian Bar will arrange for a child to receive legal advice and representation upon referral from the prosecution.<sup>148</sup> No similar arrangements are in place for other circumstances in which victims may assert a substantive right in court.
- 6.103 It is not appropriate to rely on or require the DPP to provide legal advice and assistance for victims about their substantive entitlements.<sup>149</sup> Conflicts might arise between victims’ interests and the public interest, which the DPP must prioritise.<sup>150</sup> There needs to be a visible service from which victims are able to seek independent legal advice and, where appropriate, ongoing legal assistance.

### Locating a legal service for victims

- 6.104 A number of proposals were made to the Commission about where a legal service for victims could be based:
- the court precinct
  - Victims Assistance Program providers or Centres Against Sexual Assault
  - the Victims of Crime Commissioner
  - community legal centres
  - Victoria Legal Aid.
- 6.105 A court-based service could provide legal information and advice as needed, and access to legal assistance where legal representation is required.<sup>151</sup> This could be an appropriate means of providing information and referrals while a victim is at court, but would generally not be able to provide ongoing assistance for substantive entitlements. It would require the creation of a new legal service, rather than integration into an existing service. In addition, it is not desirable for victims to have to attend courts to access legal assistance.

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146 Submission 27 (Supreme Court of Victoria). A similar point was made in Roundtable 15 (Magistrates of the Magistrates’ Court of Victoria).  
 147 Submission 10 (Victoria Legal Aid); Roundtable 16 (Community legal centres). Some victims sought advice from a private lawyer: Consultations 10 (A victim), 13 (Parents of a victim), 35 (Parent of a victim). See also Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (Victorian Government, 2015) 29.  
 148 See Department of Justice, *Providing Advice to Child Witnesses under Section 18 Evidence Act (2008): Guidance for Legal Practitioners Providing Pro Bono Advice to Children* (2013).  
 149 Sometimes the DPP does this, for example in the limited circumstances in which the DPP will make an application for a compensation order on behalf of a victim: Director of Public Prosecutions Victoria, *Director’s Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [63].  
 150 Submission 23 (DPP).  
 151 Submission 14 and Consultation 19 (Victims of Crime Commissioner, Victoria).



- 6.106 Expanding the services provided under the Victims Assistance Program to include legal assistance was favoured by a number of contributors to the Commission's review.<sup>152</sup> This would allow victims to obtain practical support, therapeutic support and legal assistance from the one service throughout the criminal trial process. However, the option was not supported by the Victims Support Agency which funds and coordinates the Victims Assistance Program across Victoria.<sup>153</sup> Six different community-based organisations are currently contracted to deliver the program, none of which is set up to deliver a legal service. Similarly, while Centres Against Sexual Assault are funded as independent services, and act as non-legal advocates, they are not set up to provide legal assistance. In addition, their services are restricted to individuals who have experienced sexual assault.
- 6.107 Victoria Police suggested that the Victorian Victims of Crime Commissioner could 'provide or fund independent legal advice for victims'.<sup>154</sup> The Victims of Crime Commissioner's role is to advocate, investigate, report and advise in relation to systemic issues for victims of crime.<sup>155</sup> If the Commissioner were to provide legal assistance, or determine eligibility for legal assistance, it might create a perception of conflict with the independence of the office, including any future complaints oversight role.<sup>156</sup>
- 6.108 The most viable options harness the expertise and structures of services that already provide legal advice and assistance. The Commission considers that fair access to legal advice and assistance requires a government-funded service. Ongoing legal assistance should be restricted to matters with merit and where an individual cannot afford private legal representation. This is consistent with the service models of Victorian community legal centres and Victoria Legal Aid.

### Community legal centres

- 6.109 Community legal centres provide free legal advice to disadvantaged and marginalised Victorians in a range of areas, including family violence intervention orders and applications to VOCAT.<sup>157</sup> Some community legal centres also support victims in reporting crimes to police and provide information or advice about aspects of the criminal trial process. One centre told the Commission that it had assisted individuals with victim impact statements.<sup>158</sup>
- 6.110 In 2007, the Federation of Community Legal Centres (Vic) proposed that specialist community legal services be funded to provide advice, assistance and referrals to victims of crime in relation to:
- the Victims' Charter Act
  - Sentencing Act compensation and restitution orders
  - VOCAT applications
  - other victim-related matters.<sup>159</sup>

152 Submissions 7 (Youthlaw), 23 (DPP), 33 (Professor Jo-Anne Wemmers); Consultations, 36 (Magistrate John Lesser), 46 (A victim); Roundtables 7 (Victim support specialists, Melbourne), 13 (Victim support specialists, Ballarat), 14 (Legal practitioners, Ballarat), 16 (Community legal centres).

153 Consultation 45 (Victims Support Agency, Department of Justice and Regulation).

154 Submission 26 (Victoria Police). This comment was made with reference to pre-trial procedures. See also the suggestion put forward in Submission 19 (Dr Tyrone Kirchengast, University of New South Wales).

155 *Victims of Crime Commissioner Act 2015* (Vic) s 13(1).

156 Roundtable 13 (Victim support specialists, Ballarat). See further paragraphs [4.145]–[4.147] in Chapter 4.

157 Community legal centres also provide legal education to communities and assist in and advocate for law reform.

158 Roundtable 16 (Community legal centres). See also Federation of Community Legal Centres (Vic), *Improving Access to Justice for Victims of Crime* (3 October 2007).

159 Federation of Community Legal Centres (Vic), *Improving Access to Justice for Victims of Crime* (3 October 2007). The proposal included funding for community legal education and law reform activities on legal issues relevant to victims.

- 6.111 Community legal centres operate as independent services across Victoria, each with different priorities and varying capacities to represent victims. If they were given responsibility for providing legal assistance to victims it would spread victim legal services across different centres and make it more difficult to identify gaps in services or systemic issues for victims during the criminal trial process. Monitoring the matters for which victims seek assistance will be important in identifying and developing victims' entitlements in the future. However, a unique strength of community legal centres is the strong connections formed with the communities in which they operate. They could enter into partnerships with their local Victims Assistance Program provider, Centre Against Sexual Assault or multidisciplinary centre, or other services, to ensure coordinated support tailored to their region.<sup>160</sup>
- 6.112 Alternatively, a single community legal service similar to Knowmore's model could be established. Knowmore is a specialist community legal centre established in 2013 to assist individuals engaging with the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. While the focus of the service is on the Royal Commission, Knowmore has advised victims about criminal trial processes.<sup>161</sup> Legal assistance is provided within a trauma-informed, multidisciplinary and culturally safe framework that utilises lawyers, counsellors, social workers and Aboriginal and Torres Strait Islander engagement advisors.<sup>162</sup> Adopting this model in providing a legal service for victims would provide a multidisciplinary and trauma-informed service for victims of crime but, unless offices were located across Victoria, access would be more difficult for victims in regional areas.

### Victoria Legal Aid

- 6.113 Victoria Legal Aid provides legal advice and assistance to individuals. Eligibility for ongoing legal assistance is determined in accordance with the *Legal Aid Act 1978* (Vic). Those eligible for ongoing legal assistance are allocated an in-house lawyer or a private lawyer. Clients may have to make a contribution to their legal costs, depending on their income. Victoria Legal Aid already assists victims with VOCAT applications, Sentencing Act compensation claims and family violence intervention orders.
- 6.114 Locating a legal service for victims within Victoria Legal Aid would have the benefit of being a single dedicated service within an organisation that has extensive experience within the criminal justice system and has offices around Victoria. It would create a focal point for legal assistance, make it easier to identify systemic issues, and provide consistency in service delivery. The service could draw from the strengths of Knowmore's service model, including ensuring trauma-informed and culturally safe service delivery.
- 6.115 Legal Aid NSW has established a service for victims of crime within its civil division, which provides legal assistance about the sexual assault communications privilege in New South Wales. It is known as the Sexual Assault Communications Privilege Service. The Commission heard that this service is essential to victims accessing legal representation to assert their legal entitlement during criminal proceedings.<sup>163</sup> The Office of the Director of Public Prosecutions NSW described the ability to refer victims to a specialised legal service as positive.<sup>164</sup>

160 See, eg, the Making Rights Reality project between Springvale Monash Legal Service and the South Eastern Centre Against Sexual Assault: Patsie Frawley, *Making Rights Reality. Final Evaluation Report: A Pilot Project for Sexual Assault Survivors with a Cognitive Impairment* (La Trobe University, 2014).

161 Roundtable 16 (Community legal centres)

162 Knowmore, *Our Second Year: 1 July 2014–30 June 2015* (2015) 4.

163 Consultations 33 (Women's Legal Service NSW), 34 (Office of the Director of Public Prosecutions, NSW).

164 Consultation 34 (Office of the Director of Public Prosecutions, NSW).

- 6.116 The Legal Aid NSW model was viewed positively by the Victims of Crime Commissioner, former victim representatives of the inaugural Victims of Crime Consultative Committee, Court Network and OPP lawyers.<sup>165</sup> The model could be adapted to the Victorian context, and used to provide assistance in relation to a broader range of substantive entitlements connected to the criminal trial process.

## Conclusion

- 6.117 The Commission prefers Victoria Legal Aid as the site for a legal service for victims: Victoria Legal Aid is a statutory agency with offices around Victoria, it is deeply familiar with criminal trial processes, and it offers legal services in a range of other areas that victims may need assistance with. Information barriers would need to be put in place to manage conflicts of interest with Victoria Legal Aid's criminal practice. In addition, consideration could be given to funding either the Victorian Aboriginal Legal Service or the Family Violence Prevention and Legal Service to deliver these services to Aboriginal victims.
- 6.118 It was suggested to the Commission that legal advice or assistance was needed for the families of homicide victims,<sup>166</sup> sexual offence victims,<sup>167</sup> child victims,<sup>168</sup> family violence victims<sup>169</sup> or to victims of the most serious cases.<sup>170</sup> The Commission considers that the legal service for victims at Victoria Legal Aid should initially be available to victims of indictable crimes involving violence because of the more acute needs that victims of such crimes often have during the criminal trial process compared to victims of non-violent crimes.<sup>171</sup> Consideration should be given to whether the service should be open to victims of crimes involving violence in cases that are prosecuted summarily in the Magistrates' Court.
- 6.119 The legal service should be evaluated within three years to ensure that it is adequately addressing the legal needs of victims of violent indictable crimes and to determine whether other victims should be able to access the service.

## Recommendation

- 23 Victoria Legal Aid should be funded to establish a service for victims of violent indictable crimes, modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW. It should provide legal advice and assistance, in accordance with the *Legal Aid Act 1978 (Vic)*, in relation to:
- substantive legal entitlements connected with the criminal trial process
  - asserting a human right, or protecting vulnerable individuals, in exceptional circumstances.

The legal service should be independently evaluated not more than three years after commencement.

<sup>165</sup> Submissions 14 (Victims of Crime Commissioner, Victoria), 40 (Former VOCCC victim representatives); Consultations 23 (Court Network staff and a Court Networker—County Court), 39 (OPP). Support for a legal aid model was also expressed in Submission 19 (Dr Tyrone Kirchengast, University of New South Wales); Consultation 2 (Commissioner for Victims' Rights, South Australia); Roundtables 10 (Legal practitioners, Shepparton), 14 (Legal practitioners, Ballarat). The Victims of Crime Commissioner proposed embedding the service in courts or working closely with a victims' liaison office (Consultation 19).

<sup>166</sup> Submission 20 (Phil Cleary); Consultation 31 (Judge of the County Court of Victoria).

<sup>167</sup> Roundtable 5 (Victim support specialists, Morwell), 8 (Metropolitan Centres Against Sexual Assault).

<sup>168</sup> Consultations 20 (Parent of victims), 34 (Office of the Director of Public Prosecutions, NSW).

<sup>169</sup> Submission 39 (Safe Steps), although their preference is for legal advice and advocacy roles to be integrated into the family violence system rather than the criminal justice system. See also Submission 1 (Australian Law Reform Commission).

<sup>170</sup> Consultation 21 (Victoria Police).

<sup>171</sup> While the needs of victims of all crimes will vary depending on personal factors, the nature of the crime, a victim's relationship with the offender and their interaction with authorities, more serious and violent offences typically result in higher levels of emotional stress and longer lasting psychological, social and physical impacts. See, eg, Joanna Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims?' (2007) 14 *International Review of Victimology* 175, 196; Diane Green and Naelys Diaz, 'Predictors of Emotional Stress in Crime Victims: Implications for Treatment' (2007) 7(3) *Brief Treatment and Crisis Intervention* 194, 195.

## Referral, coordination and accessibility

### Early referral to support

- 6.120 Early referral of victims to services is a critical part of the community's response to crime. Individuals may disclose offending behaviour to family, community members, support workers, health professionals and others. Not all victims seek a legal response. Those who do will approach Victoria Police.<sup>172</sup>
- 6.121 The Victoria Police e-referral system allows police, with a victim's consent, to send an electronic referral to the Victims of Crime Helpline (Helpline).<sup>173</sup> For family violence matters, women are referred to a family violence service, and children are referred either to the Department of Health and Human Service's child protection service or a child and family information, referral and support team.<sup>174</sup> The electronic referral system was designed to address a lack of funding to promote the Helpline.<sup>175</sup>
- 6.122 The Helpline is run by the Victims Support Agency, Department of Justice and Regulation, and is the gateway through which most victims receive information and are linked to support.<sup>176</sup> Generally, referrals to the Helpline are made by police, although victims and their families can call the Helpline direct. Once a police referral is received by the Helpline, a support officer contacts the victim to identify their needs and make referrals. Approximately 70 per cent of referrals made by the Helpline are to a Victims Assistance Program provider and 30 per cent to a specialist service such as a Centre Against Sexual Assault or family violence service.<sup>177</sup> The Victims Support Agency funds and coordinates the Victims Assistance Program and, as stated in [2.35], also monitors compliance with the Victims' Charter Act and provides secretariat assistance to the Victims of Crime Consultative Committee, among other activities that are outside the scope of the Commission's review.
- 6.123 When a crime occurs in Victoria but a victim lives interstate, counselling can be accessed through the victims assistance program in the state or territory in which the victim lives. This is funded by Victoria's Victims Support Agency.<sup>178</sup>
- 6.124 Victims Assistance Program providers, Centres Against Sexual Assault and specialist family violence services provide vital ongoing support, regardless of whether a criminal prosecution is commenced or whether an offender is found guilty. The support may be practical or therapeutic.
- 6.125 As noted above, the OPP Witness Assistance Service and the Child Witness Service provide specialist court-related support for victims and witnesses. Generally, their involvement with a victim begins with the start of court proceedings.
- 6.126 The two sets of complementary services appear to be well coordinated, with some variation in regional areas, where victims are less aware of, or less able to access, the services of the Witness Assistance Service.<sup>179</sup> The challenges for regional prosecutions are addressed above at [6.67]–[6.75].

172 Sections 6–8 of the *Victims' Charter Act 2006* (Vic) outline treatment, information and referral obligations for Victoria Police in their interaction with victims of crime as an investigatory agency.

173 Consultation 45 (Victims Support Agency, Department of Justice and Regulation). See also Victoria Police, *Future Directions for Victim-centric Policing* (2015) 8–9.

174 There are currently 19 specialist family violence services that receive referrals for adult women. Male adult victims are referred to the Helpline. The establishment of 17 family violence hubs across Victoria was recommended by the Royal Commission into Family Violence. These hubs will be the entry point to the support system for women and children who have experienced family violence: Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol II 285, recommendation 37.

175 Consultation 45 (Victims Support Agency, Department of Justice and Regulation).

176 State Government of Victoria, *Support Services for Victims of Crime* (21 January 2016) Victims of Crime, <<http://www.victimsofcrime.vic.gov.au>>.

177 Consultation 45 (Victims Support Agency, Department of Justice and Regulation).

178 Victims who live interstate are also eligible for assistance from the OPP Witness Assistance Service in accordance with Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015).

179 Submission 21 (Dianne Hadden); Consultations 28 (Laurie Krause), 35 (Parent of a victim), 41 (A victim). One victim from metropolitan Melbourne described trying to find the right service as 'like dealing with Telstra' (Consultation 20).

## Multidisciplinary centres and co-locations

- 6.127 Significant steps have been taken to improve the coordination and integration of support to victims, especially victims of sexual offences, through the establishment of multidisciplinary centres and co-location of services. Multidisciplinary centres for victims of sexual offences have been established in six locations around Victoria.<sup>180</sup> They operate as 'one-stop shops', bringing together services involved in the response to sexual offending. Multidisciplinary centres have been evaluated positively and are viewed as particularly valuable.<sup>181</sup>
- 6.128 Victims Assistance Program providers are co-located with Victoria Police in 19 locations.<sup>182</sup> Further steps will be taken in response to recommendations by the Victorian Royal Commission into Family Violence.

## Accessible and responsive services

- 6.129 Where victims are supported by the OPP Witness Assistance Service, Child Witness Service, a Victims Assistance Program or a Centre Against Sexual Assault, their experience of that service was described almost universally in positive terms.<sup>183</sup> Certainly, a number of contributors to the Commission's reference raised the need for more resources. However, other shortcomings were also identified, with individuals from certain marginalised or disadvantaged groups disproportionately affected.
- 6.130 The Commission's role is not to investigate the allocation of resources to the victim support service system as a whole, nor the use of resources by those services. A number of parts of the system work well and efforts are being directed towards better integration and coordination, including through the recommendations of the Royal Commission into Family Violence. The Commission has highlighted matters concerning access to, or the responsiveness of, victim support services below. These are matters that the Victims of Crime Commissioner should monitor through the collection of data and should be included in a comprehensive review of the Victims' Charter Act in five years, as recommended in Chapter 4.

## Pathways to support

- 6.131 A particular concern is the reliance on police referrals to raise awareness of, and access to, the Victims of Crime Helpline, the Victorian Government's gateway to information and assistance for victims. The Victoria Police e-referral system has increased early referrals to support by police.<sup>184</sup> However, relying on victims to first make contact with the police renders these services less accessible to those less likely or less able to report offending to police because they distrust or have difficulties communicating with police, in particular Aboriginal people, people from culturally or linguistically diverse communities and people with disabilities.<sup>185</sup> For example, the Commission was told that Koori victims of crime are likely to first seek help from an Aboriginal Community Controlled Health Organisation.<sup>186</sup>

180 These are Dandenong, Geelong, Mildura, Seaford, Bendigo and Morwell. See Minister for Families and Children, 'One-stop Support Centre for Sexual Assault Victims in Gippsland' (Media Release, 18 February 2016) <<http://www.premier.vic.gov.au/one-stop-support-centre-for-sexual-assault-victims-in-gippsland/>>.

181 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol II 225, 259-60. The services involved include Victoria Police Sexual Offence and Child Abuse Investigation Teams (SOCITs), child protection workers, community health nurses and Centre Against Sexual Assault counsellors and advocates.

182 Consultation 21 (Victoria Police). Victoria Police stated that MDCs and co-locations have been positive for victims.

183 Submissions 15 (Kristy McKellar), 38 (Name withheld); Consultations 1 (A victim), 3 (Parent of a victim), 4 (Parent of victims), 5 (Sue and Don Scales, Mildura), 8 (Parent of a victim), 11 (Parent of a victim), 12 (Parent of a victim), 13 (Parents of a victim), 14 (A victim), 20 (Parent of victims), 29 (Parent of victims), 56 (Colleen Murphy (Kelly)).

184 Consultations 21 (Victoria Police), 45 (Victims Support Agency, Department of Justice and Regulation).

185 Matthew Willis, 'Non-disclosure of Violence in Australian Indigenous Communities' (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, 2011); Department of Justice, *Victorian Aboriginal Justice Agreement Phase 2 (AJA2)* (2006) 13; Lorana Bartels, 'Crime Prevention Programs for Culturally and Linguistically Diverse Communities in Australia' (Research in Practice No 18, Australian Institute of Criminology, 2011) 3; Annabelle Allimant and Beata Ostapiej-Piatkowski, 'Supporting Women from CALD Backgrounds Who Are Victims/Survivors of Sexual Violence: Challenges and Opportunities for Practitioners' (ACSSA Wrap No 9, Australian Centre for the Study of Sexual Assault/Australian Institute for Family Studies, 2011); John McDonald et al, *Mapping Access and Referral Pathways for Marginalised Victims of Violent Crime in Rural and Regional Victoria* (University of Ballarat, 2010).

186 Consultation 38 (Executive Officer, Barwon South West RAJAC).

There is scope for improving awareness and referral pathways for marginalised victims of crime in Victoria.

- 6.132 In addition, where a police officer fails to refer a victim to the Helpline, and the victim is not referred to the OPP Witness Assistance Service or Child Witness Service, that victim may never be aware of the services available to them. Two victims who spoke to the Commission arrived at court—one for a committal and one for a sentencing hearing—without any knowledge of the support services funded by the Victorian Government to assist them.<sup>187</sup> One of those individuals told the Commission that throughout the criminal trial process, only the police informant kept in contact with her.
- 6.133 A particular issue for victims with disabilities was noted by the Office of the Public Advocate (OPA). The OPA runs a volunteer Independent Third Person Program. Independent third persons provide communication assistance, information and support during police interviews.<sup>188</sup> The *Victoria Police Manual* requires police to use an independent third person in interviews with people with cognitive or mental health disabilities, including victims.<sup>189</sup> The OPA told the Commission that the program cannot currently advocate on behalf of individuals or refer them to support services.<sup>190</sup>
- 6.134 The Commission has recommended the establishment of an intermediary scheme in Victoria in Chapter 7 and an intermediary's functions may include assistance during police interviews. Regardless of whether independent third persons or intermediaries support victims during police interviews, either the police or the person providing communication assistance should be in a position to refer victims with disabilities to the support and advocacy they need for the criminal trial process.

### Court support

- 6.135 Another concern that emerged from the Commission's consultations related to the capacity of the OPP to provide information and support responsive to the needs of Aboriginal people. The Commission was told that lawyers from the Aboriginal legal services have been approached on an ad hoc basis in court precincts by OPP solicitors to provide information to Aboriginal witnesses.<sup>191</sup> Aboriginal victims of crime should be able to receive culturally competent and consistent support from the OPP and victim support services.<sup>192</sup>
- 6.136 A similar issue arises for victims from culturally and linguistically diverse communities, with the DPP's submission noting that the OPP Witness Assistance Service is unable to provide particular assistance to them without further funding.<sup>193</sup> The DPP should ensure that funding is allocated in a way that ensures that the Witness Assistance Service is equally accessible to all victims of crimes that fall within its priority areas regardless of cultural or linguistic differences.

187 Consultations 35 (Parent of a victim), 53 (Parent of a victim). Submission 38 (Name withheld) indicated a lack of awareness of the Victims Support Agency generally. The lack of visibility of family violence services was an issue addressed in: Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol II 246-7.

188 Submission 17 (Office of the Public Advocate). This includes with video-recorded police interviews that will be used as a victim's evidence-in-chief (see Chapter 8 in relation to video-recorded evidence). Independent third persons are available to offenders, witnesses and victims. Submission 17 (Office of the Public Advocate).

189 Ibid. The Office of Public Advocate's report, *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012), recommends an advocacy and referral scheme within the Independent Third Person Program for clients who have had, or who are clearly at risk of, repeat contact with crime: 7.

191 Consultation 25 (Aboriginal Family Violence Prevention & Legal Service Victoria).

192 The OPP has a Koori Inclusion Action Plan, which includes Koori cultural awareness training as a priority, especially for Witness Assistance Service staff, and data collection to provide an evidence base for creating culturally responsive services: Office of Public Prosecutions Victoria, *Koori Inclusion Action Plan* (2014).

193 Submission 23 (DPP). A brochure about the Witness Assistance Service and an information booklet, *Now You Are a Witness*, are available on the OPP's website in six languages: <<http://www.opp.vic.gov.au/Witnesses-and-Victims>> .



- 6.137 In contrast, the Victorian Equal Opportunity and Human Rights Commission's report, *Beyond Doubt*, describes the OPP Witness Assistance Service as 'a valuable model that assists people with disabilities to understand the court process'.<sup>194</sup> The service conducts needs assessments and 'assists the court identify relevant supports to facilitate their participation in the justice system'.<sup>195</sup> The Commission's recommendation in Chapter 7 to establish an intermediary scheme in Victoria may result in the Witness Assistance Service having increased capacity to provide culturally competent services to Aboriginal victims and victims from culturally and linguistically diverse communities.
- 6.138 The Commission notes that the Victims' Charter Act requires police, the DPP and victim services to 'take into account, and be responsive to' the particular needs of victims relating to Indigenous background, and cultural and linguistic diversity.<sup>196</sup>

### Non-violent and property crimes

- 6.139 The services provided by Victims Assistance Program providers targets victims of violent crimes against the person, including violent attacks, assault, robbery, family violence, sexual assault and the families of those killed by violence or culpable driving.<sup>197</sup> The Witness Assistance Service also prioritises its services to 'victims of sexual offences, offences involving family violence and other violence offences'.<sup>198</sup>
- 6.140 These key victim support services are largely unavailable to victims of non-violent crimes. In exceptional circumstances, such as where the impact of a crime has been particularly serious, Victims Assistance Program providers will provide assistance.<sup>199</sup>
- 6.141 Data from the Crime Statistics Agency indicates that property and deception offences make up the majority of offending in Victoria.<sup>200</sup> The criminal trial process can have a significant impact on victims of these offences.<sup>201</sup> The DPP told the Commission that there is a need for support services for fraud victims.<sup>202</sup>
- 6.142 The Commission did not otherwise receive any feedback in submissions or consultations, nor did it hear from victims of non-violent crimes. It is therefore not in a position to make any specific recommendations. As indicated above, this is a matter that the Victims of Crime Commissioner could explore further.

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194 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Summary Report* (2014) 39.

195 Ibid 11 fn 26 The services of the OPP Witness Assistance Service are not generally available for matters that are prosecuted by police in the Magistrates' Court of Victoria.

196 *Victims' Charter Act 2006* (Vic) ss 6(2)(a), (c).

197 Information provided by the Victims Support Agency, Department of Justice and Regulation, 22 July 2016. See also State Government of Victoria, *Types of Crime*, Victims of Crime (23 December 2013) <<http://www.victimsofcrime.vic.gov.au/home/the+crime/types+of+crime/>>.

198 Submission 23 (DPP).

199 Email from Victims Support Agency, Department of Justice, 24 June 2016.

200 In 2015, 59.5% of offences were recorded as property and deception offences and 14.3% were recorded as crimes against the person: Crime Statistics Agency, *Crime Statistics Victoria: Year Ending 31 December 2015* (2016) <<http://www.crimestatistics.vic.gov.au/crime-statistics/historical-crime-data/year-ending-31-december-2015/recorded-offences>>.

201 Submissions 23 (DPP), 26 (Victoria Police); Consultation 21 (Victoria Police).

202 Submission 23 (DPP). See also Cassandra Cross et al 'Challenges of Responding to Online Fraud Victimisation in Australia' (Trends and Issues in Crime and Criminal Justice No 474, Australian Institute of Criminology, 2014) 3.



# Participation

**132** Introduction

**132** Victim participation and the adversarial criminal trial

**134** Consultation throughout the criminal trial process

**142** Participation and substantive rights in court

**165** Equal participation in the court process

**174** Participation in restorative processes

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## 7 Participation

### Introduction

- 7.1 As participants, victims expect, and are entitled, to be involved throughout the criminal trial process. Laws and policies in Victoria allow them to participate in limited ways. They may provide their views to the prosecution about decisions to discontinue a prosecution or to agree to a plea to less serious charges. Sexual offence victims may appear and make submissions about applications to subpoena, access and use confidential medical or counselling records. Victims may appear as witnesses for the prosecution. At sentencing hearings, victims can read out a victim impact statement.
- 7.2 Participation is a broad concept and takes many forms. This chapter opens with a discussion of how victims can have an input into the adversarial trial process as participants while preserving the prosecution's independence and impartiality and the rights of the accused. It then explores what this means in practice in the following contexts:
- consulting with the prosecution
  - participating in court proceedings
  - giving evidence as a witness
  - restorative justice conferencing.
- 7.3 Victims may also participate as a party in an application for orders for compensation and restitution under the *Sentencing Act 1991* (Vic). These orders are ancillary civil remedies and are dealt with separately in Chapter 9.

### Victim participation and the adversarial criminal trial

- 7.4 Defining participation in the criminal trial process is difficult.<sup>1</sup> For victims, it may include having input into proceedings, having control, being listened to and having opportunities to make their views known.<sup>2</sup> Participation is often equated with giving victims a voice—the opportunity to tell their story and to feel that they have been heard.<sup>3</sup> Participation can mean obliging criminal justice agencies to seek and consider victims' preferences and the information they can provide.<sup>4</sup> More robust forms of participation might allow victims

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1 Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconciling the Role of Third Parties* (Hart Publishing, 2008) 115; Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 973.

2 Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 975; Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) *Victims and Offenders* 119, 122.

3 Malini Laxminarayan, 'Procedural Justice and the Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type' (2012) 25 *Social Justice Research* 390, 396; Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 975.

4 Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 975.

a ‘veto’ over decisions to prosecute, or to appear in court and make submissions or cross-examine witnesses.<sup>5</sup>

- 7.5 Victims feel disempowered during the criminal trial process. They told the Commission that they feel excluded;<sup>6</sup> like passive receivers of information,<sup>7</sup> observers,<sup>8</sup> and outsiders.<sup>9</sup> By allowing them to express themselves and communicate with criminal justice agencies and the courts, opportunities to participate can give victims a sense of empowerment and official acknowledgment.<sup>10</sup>
- 7.6 Understood in this broad sense, participation appears ‘feasible and desirable’.<sup>11</sup> However, it needs to be seen in context. Concerns about victim participation focus on the extent to which victims can and should be accommodated in an adversarial system of criminal justice.<sup>12</sup>
- 7.7 As noted in Chapter 2, the modern adversarial criminal trial hinges on an independent, impartial and fair prosecution. Prosecutorial independence requires the prosecution to act exclusively in the public interest.<sup>13</sup> Prosecutors must prosecute cases impartially and with restraint, and act fairly towards the accused.<sup>14</sup> In practice this means that prosecutors must use ‘temperate and dispassionate language in the performance of their functions’, disclose all relevant evidence to the accused, even that which harms the prosecution’s case, and call all witnesses who are necessary to give a complete account of the events on which the prosecution is based.<sup>15</sup>
- 7.8 In contrast, victims may be motivated only by private interests and are under no obligation to show the restraint and objectivity required of the prosecution.<sup>16</sup> Allowing victims too much influence over prosecutorial decision making could undermine fairness to the accused and the pursuit of the public interest. There is also the risk that trials without reasonable prospects of success would be pursued, which would have financial and other costs for victims, accused persons and the community.<sup>17</sup> In addition, the participation of the victim introduces another actor into a two-party contest and, if not limited, could unfairly disadvantage the accused.<sup>18</sup>
- 7.9 The Commission does not make recommendations that afford victims ultimate decision-making power over prosecutorial decisions or give them a role similar to that of the prosecution. Such proposals would fundamentally alter Victoria’s criminal justice system. In any event, victims overwhelmingly do not seek such a role: they seek opportunities to meaningfully communicate and contribute to decision-making processes, without carrying the burden of responsibility that comes with prosecutorial decision making.<sup>19</sup> This understanding of victim participation underpins the recommendations in this chapter.

5 Ibid 974.

6 Submissions 11 (Sandra Betts), 40 (Former VOCCC victim representatives); Consultations 3 (Parent of a victim), 4 (Parent of victims); 20 (Parent of a victim), 40 (A victim). See also Submissions 10 (Victoria Legal Aid) (regarding appeal proceedings), 32 (Professor Edna Erez, University of Chicago at Illinois); Consultations 47 (Victoria Legal Aid), 55 (Professor Edna Erez, University of Chicago at Illinois).

7 Consultation 11 (Parent of a victim).

8 Consultation 40 (A victim).

9 Submission 38 (Name withheld). See also Submission 32 (Professor Edna Erez, University of Chicago at Illinois).

10 Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconciling the Role of Third Parties* (Hart Publishing, 2008) 117.

11 Ibid 115.

12 Ibid.

13 *Whitehorn v R* (1983) 152 CLR 657, 663; Director of Public Prosecutions Victoria, *Director’s Policy: Prosecutorial Ethics* (24 November 2014) [3]; Christopher Corns, *Public Prosecutions in Australia Law, Policy and Practice* (Thomson Reuters (Professional) Australia Limited, 2014) 153–80.

14 *Whitehorn v R* (1983) 152 CLR 657; *Jago v District Court of NSW* (1989) 168 CLR 23; Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 486; Director of Public Prosecutions Victoria, *Director’s Policy: Prosecutorial Ethics* (24 November 2014) [4]–[6]; Christopher Corns, *Public Prosecutions in Australia Law, Policy and Practice* (Thomson Reuters (Professional) Australia Limited, 2014) 107.

15 Director of Public Prosecutions Victoria, *Director’s Policy: Prosecutorial Ethics* (24 November 2014); *Director’s Policy: Disclosure* (24 November 2014).

16 See, eg, Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconciling the Role of Third Parties* (Hart Publishing, 2008) 118.

17 Submission 23 (DPP).

18 Jonathan Doak, ‘Victims’ Rights in Criminal Trials: Prospects for Participation’ (2005) 32(2) *Journal of Law and Society* 295, 297–8.

19 Jo-Anne Wemmers and Katie Cyr, ‘Victims’ Perspectives on Restorative Justice: How Much Involvement Are Victims Looking For?’ (2004) 11 (2-3) *International Review of Victimology* 259, 270; Jo-Anne Wemmers, ‘Where Do They Belong? Giving Victims a Place in the Criminal Justice Process’ (2009) 20 *Criminal Law Forum* 395, 412. See also Submission 16 (Name withheld); Consultation 20 (Parent of a victim).

## Consultation throughout the criminal trial process

- 7.10 Prosecution decisions affect how the criminal trial is conducted and the future interests of victims.<sup>20</sup> Whether a victim feels appropriately involved in prosecutorial decisions may greatly affect how they feel about the fairness of the process and the ultimate outcome.<sup>21</sup>
- 7.11 Consultation affords victims some input. It requires an active exchange of information, in addition to the prosecutor's obligation to provide information (discussed in Chapter 6). Consultation means seeking and hearing the views of victims and genuinely factoring those views into decision making. Consultation does not require the victim's views to determine the outcome, but is more than simply the provision of information.<sup>22</sup>

### Law and policy framework

- 7.12 In Victoria, Office of Public Prosecutions (OPP) solicitors must ensure that victims are consulted before decisions are made:
- to substantially modify charges, or accept a plea of guilty to a lesser charge (plea resolution decisions), or
  - not to proceed with some or all charges (decision to discontinue).<sup>23</sup>
- 7.13 The victim's views are to be taken into account, but do not determine the decision.<sup>24</sup>
- 7.14 These requirements arise from policies issued by the Director of Public Prosecutions (DPP), rather than from legislation. There is no express obligation on the prosecution to consult victims in the *Victims' Charter Act 2006* (Vic) or in any other legislative provisions relevant to the Commission's reference.

### Plea resolution decisions

- 7.15 Decisions about whether to accept a plea of guilty to lesser charges are governed by the *Director's Policy: Resolution*. Before making a plea resolution decision, the prosecution must balance complex legal and evidentiary considerations, including:
- the strength of the evidence, including whether the accused made admissions
  - the views of the victim
  - the need to minimise inconvenience and distress to witnesses, including victims
  - the accused's personal circumstances and criminal history
  - the likely length of the trial
  - whether the accused will assist the prosecution by giving evidence in another case after pleading guilty.<sup>25</sup>
- 7.16 A plea to lesser charges will only be accepted where the lesser charges are appropriate, meaning that the charges adequately reflect the accused's criminality and allow for an adequate sentence and ancillary orders to be imposed, based on conduct that can be proved beyond reasonable doubt.<sup>26</sup> Victims should be consulted before a plea resolution decision is made.<sup>27</sup>

20 The prosecution will consist of a solicitor from the OPP, who often instructs a prosecutor to present the prosecution to the court. References to 'the prosecution' refer to both.

21 See Michael O'Hear, 'Plea Bargaining and Victims: From Consultation to Guidelines' (2008) 91 *Marquette Law Review* 323, 327 (providing an academic commentary on victims' involvement in prosecutorial decision-making in the United States).

22 Consultation 1 (A victim).

23 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected By Crime* (11 August 2015) [25]. This obligation is repeated in the *Director's Policy: Resolution* (24 November 2014) [7]–[8] (regarding plea resolution decisions), but not in the *Director's Policy: Prosecutorial Discretion* (24 November 2014) (regarding decisions to discontinue).

24 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected By Crime* (11 August 2015) [26].

25 Director of Public Prosecutions Victoria, *Director's Policy: Resolution* (24 November 2014) [5].

26 *Ibid* [3], [13].

27 *Ibid* [7].

## Decision to discontinue

- 7.17 The *Director's Policy: Prosecutorial Discretion* guides decisions about whether to prosecute. A prosecution should proceed only if:
- there are reasonable prospects of a conviction, and
  - the prosecution is required in the public interest.<sup>28</sup>
- 7.18 The question of whether there is a reasonable prospect of conviction depends on a forensic and objective assessment of the evidence, including the credibility and reliability of witnesses.<sup>29</sup> The assessment of whether the prosecution is in the public interest requires a balancing of factors, including:
- the seriousness of the offence
  - the prevalence of the offence and the need for deterrence
  - any mitigating or aggravating circumstances
  - the circumstances of the offender, such as age, intelligence and health.<sup>30</sup>
- 7.19 Factors particular to the victim are also relevant, notably:
- the victim's 'youth, age, intelligence, physical health, mental health or special infirmity'
  - the victim's attitude towards a prosecution.<sup>31</sup>
- 7.20 OPP solicitors have a range of obligations to inform victims about various matters throughout the criminal trial process, but no other obligations to consult.

## Expectation and experience

- 7.21 The factors relevant to plea resolution decisions and decisions to prosecute are complex. Despite this, it is well accepted in Victoria,<sup>32</sup> and other common law jurisdictions,<sup>33</sup> that victims should be consulted about them.
- 7.22 Plea resolution decisions and decisions to discontinue can have an impact on whether, and how many times, the victim gives evidence and the jurisdiction in which the case will be finalised. This can affect victims' substantive interests such as access to compensation, their right to provide a victim impact statement and its contents.<sup>34</sup> Reflecting these impacts, victims consulted by the Commission said they wanted to be involved in decisions to prosecute or plea resolution decisions.<sup>35</sup>
- 7.23 The extent and adequacy of consultation about these decisions vary considerably.<sup>36</sup> Some victims described being adequately consulted and informed.<sup>37</sup> Others were not consulted at all.<sup>38</sup> Some did not learn of the decision until after it was made.<sup>39</sup> Some who were consulted felt that the consultation was inadequate.<sup>40</sup> Police officers and support workers

28 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014) [2].

29 Ibid [3].

30 Ibid [5]. The prosecution should go ahead unless there are public interest factors 'tending against prosecution which outweigh those tending in favour'.

31 Ibid.

32 Submissions 11 (Sandra Betts), 19 (Dr Tyrone Kirchengast, University of New South Wales), 21 (Dianne Hadden), 23 (DPP), 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association), 31 (Professor Jonathan Doak, Nottingham Trent University), 33 (Professor Jo-Anne Wemmers), 38 (Name withheld), 40 (Former VOCCC victim representatives); Consultations 2 (Commissioner for Victims' Rights, South Australia), 9 (Magistrate Ron Saines), 28 (Laurie Krause), 40 (A victim), 41 (A victim), 43 (Victoria Police SOCIT, Wodonga), 47 (Victoria Legal Aid), 50 (Witness Assistance Service, OPP Victoria); Roundtables 1 (Victim support specialists, Mildura), 3 (Victim support specialists, Geelong), 5 (Victim support specialists, Morwell), 9 (Victim support and therapeutic specialists, Shepparton), 13 (Victim support specialists, Ballarat), 14 (Legal practitioners, Ballarat).

33 See, eg, *Victims of Crime Act 2001* (SA) s 9A (victims of serious offences); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A; *Victims Rights and Support Act 2013* (NSW) s 6.5(2) (serious crimes involving sexual violence or violence that results in actual bodily harm or psychological or psychiatric harm); *Crime Victims' Rights Act*, 18 U.S.C. § 3771(a)(5).

34 This is also noted in Director of Public Prosecutions Victoria, *Director's Policy: Resolution* (24 November 2014) [4].

35 Submissions 11 (Sandra Betts); Consultations 14 (A victim), 28 (Laurie Krause), 40 (A victim), 41 (A victim). See also Roundtables 13 (Victim support specialists, Ballarat), 16 (Community legal centres).

36 Submission 40 (Former VOCCC victim representatives); Consultation 50 (Witness Assistance Service, OPP Victoria); Roundtables 7 (Victim support specialists, Melbourne), 9 (Victim support and therapeutic specialists, Shepparton).

37 Consultations 10 (A victim), 11 (Parent of a victim), 29 (Parent of victims).

38 Submission 20 (Phil Cleary); Consultations 1 (A victim), 46 (A victim), 53 (Parent of a victim).

39 Consultation 41 (A victim).

40 Consultations 1 (A victim), 20 (Parent of victims), 44 (Kristy McKellar).

agreed.<sup>41</sup> They told the Commission that the adequacy of the consultation depends on the communication skills of the OPP solicitor and prosecutor.<sup>42</sup>

7.24 Complaints about the adequacy of consultation related to:

- insufficient time being given to victims, with consultation sometimes occurring on the morning of court<sup>43</sup>
- offending being minimised to obtain a more expedient resolution<sup>44</sup>
- being informed about a decision already made, rather than consulted about it<sup>45</sup>
- being told about a decision in a crowded room or prior to establishing a relationship with the prosecutor.<sup>46</sup>

7.25 The problems identified are practical and unrelated to the nature of the consultation. Victims readily acknowledged that the prosecution should make the ultimate decision.<sup>47</sup> Only one submission proposed that the views of victims be determinative.<sup>48</sup>

7.26 The Commission considers that the nature of the victim's existing role as a consultee in plea resolution decisions and decisions to prosecute is appropriate. Giving ultimate weight to victims' views could lead to prosecutions being pursued for private rather than public interests, and with little chance of success. It would also risk placing 'an unjustifiable burden on vulnerable victims to give them the responsibility of deciding whether to proceed with or withdraw charges'.<sup>49</sup> However, the way consultations are conducted needs to be improved. This is discussed at [7.56]–[7.60].

## Expanding prosecutorial consultation obligations

7.27 Effective consultation is a positive experience for victims.<sup>50</sup> In keeping with victims' expectation that they have input into important decisions, the Commission considered whether the obligations on OPP solicitors and prosecutors to consult should be expanded to other decisions that affect victims' interests. Contributors expressed support for such an expansion.<sup>51</sup>

7.28 The Commission was told that consultation is already occurring in relation to some other decisions without there being an express policy or statutory obligation to do so. In some instances, victims' views are sought in relation to:

- applications to have a matter dealt with summarily in the Magistrates' Court<sup>52</sup>
- applications to subpoena, access or use confidential counselling or medical records (known as confidential communications)<sup>53</sup>
- alternative arrangements for giving evidence<sup>54</sup>
- appeals against sentence.<sup>55</sup>

41 Consultations 21 (Victoria Police), 27 (Loddon Campaspe Centre Against Sexual Assault), 43 (Victoria Police SOCIT, Wodonga); Roundtables 3 (Victim support specialists, Geelong), 5 (Victim support specialists, Morwell), 9 (Victim support and therapeutic specialists, Shepparton), 12 (Victim support specialists, Wodonga), 13 (Victim support specialists, Ballarat), 14 (Legal practitioners, Ballarat).

42 Consultations 18 (Child Witness Service, Department of Justice and Regulation), 15 (Witness Assistance Service, OPP Victoria); Roundtables 7 (Victim support specialists, Melbourne), 12 (Victim support specialists, Ballarat).

43 Submission 38 (Name withheld), Consultation 44 (Kristy McKellar), Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

44 Submission 11 (Sandra Betts); Consultations 28 (Laurie Krause), 44 (Kirsty McKellar).

45 Submission 11 (Sandra Betts); Consultations 1 (A victim), 2 (Commissioner for Victims' Rights, South Australia), 40 (A victim); Roundtables 1 (Victim support specialists, Mildura), 3 (Victim support specialists, Geelong).

46 Consultation 28 (Laurie Krause).

47 Submission 38 (Name withheld); Consultations 14 (A victim), 29 (Parent of victims), 46 (A victim).

48 Submission 11 (Sandra Betts).

49 Submission 23 (DPP).

50 Consultations 10 (A victim), 39 (OPP), 50 (Witness Assistance Service, OPP Victoria); Roundtables 4 (Victim support specialists, Geelong), 7 (Victim support specialists, Melbourne), 8 (Metropolitan Centres Against Sexual Assault), 13 (Victim support specialists, Ballarat).

51 Submissions 14 (Victims of Crime Commissioner, Victoria), 16 (Name withheld), 21 (Dianne Hadden), 29 (Victorian Bar and Criminal Bar Association), 38 (Name withheld); Consultations 9 (Magistrate Ron Saines), 13 (Parents of a victim), 20 (Parent of victims), 26 (Magistrate Stella Stuthridge), 32 (Legal Aid NSW), 43 (Victoria Police SOCIT Wodonga), 46 (A victim), 47 (Victoria Legal Aid).

52 Submission 23 (DPP)

53 Submissions 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association); Consultations 50 (Witness Assistance Service, OPP Victoria), 51 (Criminal Law Section, Law Institute of Victoria), 54 (Victorian Bar and Criminal Bar Association); Roundtable 4 (Legal practitioners, Geelong).

54 See paragraphs [8.102]–[8.105] for more detail discussion of consultation with victims about the use of alternative arrangements.

55 Submission 23 (DPP); Consultation 39 (OPP). See also Director of Public Prosecutions Victoria, *Director's Policy: Appeals* (22 August 2014) which provides that following a sentence, the instructing solicitor should file a case completion report, which should indicate the merits of the appeal and the victim's views about the sentence: [21].

- 7.29 The views of the victim are directly relevant to the court’s decisions about applications for confidential communications and the use of alternative arrangements for giving evidence. Confidential communications are addressed at [7.63]–[7.86]. Alternative arrangements for giving evidence are dealt with in Chapter 8.
- 7.30 The following section considers expanding existing consultation obligations to the following prosecutorial decisions:
- applications to have indictable offences dealt with in the Magistrates’ Court
  - applications to cross-examine the victim at committal
  - appeals against sentence and acquittal.

### Applications for summary jurisdiction

#### Law and policy

- 7.31 The vast majority of criminal matters in Victoria commence in the Magistrates’ Court, where they are either finalised or go through committal proceedings before being transferred to the County Court or Supreme Court. Not all indictable offences proceed through a committal hearing.<sup>56</sup> For some indictable offences, the accused or the prosecution can apply to the magistrate for the matter to be heard in the Magistrates’ Court by way of a summary hearing (application for summary jurisdiction).<sup>57</sup>
- 7.32 A magistrate considering an application for summary jurisdiction must have regard to a range of factors, including:
- the seriousness of the offence
  - whether the Magistrates’ Court can impose an adequate sentence
  - whether a co-accused has been charged with the same offence
  - any other relevant factors.<sup>58</sup>
- 7.33 The attitude of the victim is not a factor in the magistrate’s determination of an application for summary jurisdiction.

#### Relevance to the victim

- 7.34 Whether a matter is heard summarily or is transferred to the County or Supreme Court can have a significant impact on the interests and experience of victims.
- 7.35 Matters resolved summarily are dealt with by a magistrate without a jury. If an offender pleads guilty or is found guilty, a more restricted sentencing range applies in the Magistrates’ Court than in the higher courts.<sup>59</sup> The criminal process is likely to be shorter and victims may give evidence fewer times. Access to support services can be more difficult for victims in the Magistrates’ Court. It may be more difficult to submit a victim impact statement because of the speed with which cases can be finalised in the Magistrates’ Court and the volume of cases that jurisdiction handles.<sup>60</sup>

56 *Criminal Procedure Act 2009* (Vic) ss 28, 29, sch 2.

57 *Ibid* ss 28, 30(1), 125.

58 *Ibid* s 29(1), (2).

59 The maximum term of imprisonment that may be imposed is two years for a single offence and five years aggregate for multiple offences, and the maximum term of a community corrections order is two years for a single offence, four years for two offences, and five years for three or more offences. See *Sentencing Act 1991* (Vic) ss 38, 41A, 113, 113A–C.

60 Consultation 36 (Magistrate John Lesser); Victim Support Agency, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (2014) 50.



- 7.36 The Law Institute of Victoria and a Magistrate consulted by the Commission opposed the idea that the prosecution should consult the victim about an application for summary jurisdiction because the victim's views are not relevant to the factors that the magistrate must consider.<sup>61</sup> While this is strictly correct, the victim's views could still inform the position taken by the prosecution in relation to such an application.
- 7.37 The DPP noted that, in practice, the views of victims 'are a factor that is considered by the OPP solicitor or advocate'.<sup>62</sup> The Victorian Bar and Criminal Bar Association had no objections to there being an obligation to consult victims about applications for summary jurisdiction.<sup>63</sup> Similarly, support workers and a number of judicial officers consulted by the Commission supported the victim's views about a summary jurisdiction application being sought and provided to the Magistrate.<sup>64</sup>

## Applications to cross-examine the victim at committal

### Law and policy

- 7.38 The DPP's position on whether an application to cross-examine witnesses, including the victim, at a committal hearing is justified is determined with regard to factors set out in the *Criminal Procedure Act 2009 (Vic)*, including whether:
- the informant consents to or opposes the application
  - adequate disclosure has occurred
  - the issues in the case are adequately defined
  - there is sufficient evidence to support a conviction
  - a fair trial can take place without the cross-examination
  - there is a need to clarify matters relevant to a potential plea of guilty.<sup>65</sup>

### Relevance to the victim

- 7.39 Victims have an interest in applications to cross-examine them at a committal hearing. It is well established that giving evidence can have a considerable impact on a victim, so past reforms have been aimed at reducing the number of times certain vulnerable victims are required to give evidence.<sup>66</sup> Some victims found being cross-examined at the committal hearing particularly distressing. Other victims consulted by the Commission found giving evidence at the committal to be positive—it was an opportunity to 'practise' for the trial and to be heard by a court.
- 7.40 Some support was expressed for victims being consulted about applications to cross-examine the victim at committal.<sup>67</sup> Contributors also expressed support for Magistrates taking into account the victim's attitude towards being cross-examined when considering such applications.<sup>68</sup>
- 7.41 The submission from the DPP opposed the idea, while noting that 'a particular victim's vulnerability or age is a matter that is considered by the OPP solicitor or advocate in making submissions to the Magistrate and objections are made in appropriate cases'.<sup>69</sup>

61 Submission 25 (Law Institute of Victoria); Consultation 9 (Magistrate Ron Saines).

62 Submission 23 (DPP).

63 Submission 29 (Victorian Bar and Criminal Bar Association).

64 Submission 34 (Northern Centre Against Sexual Assault); Consultations 26 (Magistrate Stella Stuthridge), 36 (Magistrate John Lesser); Roundtable 15 (Magistrates of the Magistrates' Court of Victoria).

65 *Criminal Procedure Act 2009 (Vic)* s 124(2), (4).

66 Limits on victims giving evidence are discussed in further detail in Chapter 8.

67 Submissions 21 (Dianne Hadden), 31 (Judge of the County Court of Victoria); Consultations 9 (Magistrate Ron Saines), 32 (Legal Aid NSW), 46 (A victim); Roundtable 12 (Victim support specialists, Wodonga).

68 Submissions 2 (Seppy Pour), 14 (Victims of Crime Commissioner, Victoria); Consultation 26 (Magistrate Stella Stuthridge); Roundtable 5 (Victim support specialists, Morwell). Note however that some Magistrates consulted by the Commission objected to any requirement that the victim's views be taken into account: Roundtable 15 (Magistrates of the Magistrates' Court of Victoria).

69 Submission 23 (DPP).

- 7.42 The Law Institute of Victoria and the Victorian Bar and Criminal Bar Association also objected.<sup>70</sup> The Victorian Bar and Criminal Bar Association, and the DPP, argued that only a legally trained person can usefully assess the considerations relevant to application to cross-examine witnesses at a committal, and that the victim's input is not relevant.<sup>71</sup>
- 7.43 However, the Commission is not proposing that victims be consulted about the substance of the applications. Rather, given victims' interest in whether they are cross-examined at a committal hearing, it will often be appropriate that the prosecution seek their views about doing so and take them into account when considering its position.

## Appeals

### Law and policy

- 7.44 The DPP has a right to commence an appeal against a sentencing decision where the DPP considers:
- that there is an error in the sentence imposed and a different sentence should be imposed; and
  - that an appeal is in the public interest.<sup>72</sup>
- 7.45 The Court of Appeal must allow the appeal if satisfied that there is an error and that a different sentence should be imposed.<sup>73</sup> The Court may impose a more or less severe sentence.<sup>74</sup> Appeals against the adequacy of compensation or restitution orders made in a victim's favour under the *Sentencing Act 1991* (Vic) are commenced as appeals against sentence by the DPP.<sup>75</sup> Thus, whether an appeal is pursued may also have implications for the legal interests of victims.
- 7.46 The DPP can also appeal against an acquittal in a very narrow set of circumstances.<sup>76</sup> While these provisions have never been tested, the DPP may apply to the Court of Appeal for an order setting aside an acquittal and authorising a new trial on the basis that:
- the previous acquittal was tainted
  - there is fresh and compelling evidence
  - the person should be tried for an administration of justice offence, such as perjury, perverting the course or justice or bribing a judge, related to the trial resulting in the acquittal.<sup>77</sup>

### Relevance to the victim

- 7.47 The DPP reviews all sentencing decisions to assess the merits of an appeal.<sup>78</sup> As a matter of policy and practice, the views of the victim or the victim's family about the sentence form part of that assessment.<sup>79</sup> In addition, the Victims' Charter Act and the DPP's policies require victims to be informed when an appeal is launched and the appeal's progress, grounds and outcome, whether it was commenced by the DPP or the defendant.<sup>80</sup>

70 Submissions 23 (DPP), 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association).

71 Submission 23 (DPP), 29 (Victorian Bar and Criminal Bar Association).

72 *Criminal Procedure Act 2009* (Vic) s 287.

73 *Ibid* s 289 (1).

74 *Ibid* s 290.

75 *Ibid* ss 3, 287.

76 *Criminal Procedure Act 2009* (Vic) s 327H. Traditionally, the rule against double jeopardy prevented a person acquitted of an offence being tried again.

77 *Criminal Procedure Act 2009* (Vic) ss 327B–D, 327H. If the DPP's application is successful, a trial will proceed on charges contained in a direct indictment signed and filed by the DPP in the appropriate trial court.

78 Director of Public Prosecutions Victoria, *Director's Policy: Appeals by the DPP to the Court of Appeal* (22 August 2014) [20]–[23]; Consultation 39 (OPP).

79 Director of Public Prosecutions Victoria, *Director's Policy: Appeals by the DPP to the Court of Appeal* (22 August 2014) [21]; Submission 23 (DPP); Consultation 39 (OPP).

80 *Victims' Charter Act 2006* (Vic) s 9(f); Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [31]; *Director's Policy: Appeals by the DPP to the Court of Appeal* (22 August 2014) [53].

- 7.48 Some OPP lawyers observed that there is scope for improved consultation with victims about appeals.<sup>81</sup> However, the DPP suggested that its independence may be compromised if victims are afforded a right to be consulted or to request an appeal.<sup>82</sup> It is difficult to see how the DPP's independence is undermined by formalising what is already a routine practice in relation to sentencing appeals.
- 7.49 Clear support for the proposition that victims should be consulted about decisions to appeal was expressed by the Victorian Bar and Criminal Bar Association, the Victims of Crime Commissioner, Victoria Police, academics and some victims.<sup>83</sup>
- 7.50 In South Australia, victims can request that the prosecution consider appealing a decision about which the victim is unsatisfied.<sup>84</sup> The request must be made within 10 days of the decision and receive 'due consideration' by the prosecution. This entitlement is a 'governing principle'; if the principle is not followed, this does not give the victim a right to commence legal proceedings against the South Australian Director of Public Prosecutions, or to seek damages or otherwise affect the conduct of criminal proceedings.<sup>85</sup> However, the South Australian Commissioner for Victims' Rights is empowered to assist victims to exercise their rights and can compel the Office of the Director of Public Prosecutions to consult with the Commissioner in relation to the interest of a victim.<sup>86</sup>

## Conclusion

### Expanding and formalising obligations to consult

- 7.51 Each prosecutorial decision discussed above has a substantial impact on the conduct or outcome of the case and therefore also has an impact on the victim. It follows that the victim should have the opportunity to be consulted.
- 7.52 Some objections to expanding the existing obligations to consult were based on the view that it is difficult to explain complex legal and evidentiary matters to victims. The Commission does not agree. Lawyers are routinely required to explain complex issues of law and evidence to clients.
- 7.53 While the prosecution does not represent victims, there is nothing to prevent prosecution lawyers from communicating with victims in ways that are comparable to lawyers advising and seeking instructions from their clients. Prosecution lawyers are already expected to ensure that victims are informed about a number of complex matters throughout the criminal trial process.
- 7.54 The Commission is also not persuaded that consulting victims about these decisions would compromise the independence of the DPP. Consultation requires the victim's views to be incorporated into the decision-making process, but the prosecution retains the ultimate decision-making power. Victims must understand the limits of consultation: that the prosecution acts in the public interest, must prosecute impartially and must disclose all material relevant to the charges faced by the accused. Victims who are consulted should understand that their views may ultimately have a limited impact on the conduct of a case.<sup>87</sup>

81 Consultation 39 (OPP).

82 Submission 23 (DPP).

83 Submissions 14 (Victims of Crime Commissioner, Victoria), 21 (Dianne Hadden), 26 (Victoria Police), 29 (Victorian Bar and Criminal Bar Association), 31 (Professor Jonathan Doak, Nottingham Trent University), 33 (Professor Jo-Anne Wemmers), 38 (Name withheld); Consultations 30 (Dr Tyrone Kirchengast, University of New South Wales), 44 (Kristy McKellar), 43 (Victoria Police SOCIT, Wodonga).

84 *Victims of Crime Act 2001 (SA)* s 10A.

85 *Ibid* s 5(3).

86 *Ibid* ss 16(3)(b), 16A(1), 32A.

87 For discussion about ensuring clear aims for participation, see Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 977–79.

- 7.55 The existing obligation on prosecution lawyers to consult with victims about plea resolution decisions and decisions to discontinue demonstrates that victims can, and should, have some input into prosecutorial decisions. Informal practices regarding consultation should be expanded and elevated to formal obligations, to promote consistency, transparency and accountability.

### Consistent and meaningful consultation

- 7.56 Consistent and meaningful consultation requires prosecution lawyers to have the communication skills, time, resources, and willingness to consult with victims and take their views into account.<sup>88</sup>
- 7.57 Prosecution lawyers should inform victims in a suitable manner about the options and issues relevant to a particular decision, and victims should be given the time and support necessary to consider their views. Some prosecution lawyers are equipped to perform this role. Others will require training to ensure a consistent standard of consultation, particularly for those victims who experience barriers to participating in the criminal trial process. Victims who often face barriers when seeking to access and participate in the justice system include those who:
- are young
  - are Aboriginal
  - are from culturally and linguistically diverse communities
  - have a physical disability, cognitive impairment, communication disability or mental illness.<sup>89</sup>
- 7.58 Good consultation is most likely to occur in the context of ongoing and regular communication, in person, between the victim, prosecutor, OPP solicitor and support worker.<sup>90</sup> The Commission recognises that ensuring effective consultation is resource-intensive. Prosecutors and OPP solicitors often have large case loads and are subject to court-imposed timeframes. In addition, prosecutors may not be allocated until shortly before a court date. These constraints are more acute in regional areas.<sup>91</sup>
- 7.59 As with the Commission's recommendation in relation to conferences in Chapter 6, OPP case management practices may need to be revised so that obligations to conference and consult with victims can be met. Courts should be made aware of these obligations when considering timeframes and requests to consult or conference with a victim.<sup>92</sup> This is particularly important for regional prosecutions where there is pressure to keep busy circuit lists moving.<sup>93</sup> In-person consultation is a logistical challenge and can be limited to brief conversations shortly before court.<sup>94</sup> In such contexts, it is difficult for victims to participate meaningfully.
- 7.60 Contributors suggested that the prosecution's consultation obligations should be strengthened in order to promote consistent and meaningful consultation.<sup>95</sup> The Commission agrees. This should be achieved by including clear obligations to consult with victims in the Victims' Charter Act. The Victims' Charter Act is the primary reference point against which those in the criminal justice system are held to account for their obligations.

88 Consultations 2 (Commissioner for Victims' Rights, South Australia), 39 (OPP), 47 (Victoria Legal Aid), 50 (Witness Assistance Service, OPP Victoria).

89 Submissions 4 (Victorian Equal Opportunity and Human Rights Commission), 7 (Youthlaw), 17 (Office of the Public Advocate), 18 (Women with Disabilities Victoria); Consultation 25 (Aboriginal Family Violence Prevention & Legal Service Victoria); Roundtable 5 (Victim support specialists, Morwell); Australian Human Rights Commission, *Equality before the Law: Towards Disability Justice Strategies* (2014) 16–7; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime: Research Findings* (2014).

90 Consultations 39 (OPP), 43 (Victoria Police SOCIT, Wodonga), 50 (Witness Assistance Service, OPP Victoria).

91 Submissions 5 (Centre for Rural Regional Law and Justice), 21 (Dianne Hadden).

92 Consultation 50 (Witness Assistance Service, OPP Victoria).

93 Consultation 31 (Judge of the County Court), 37 (Centacare, Barwon South West Region).

94 Submission 19 (Dr Tyrone Kirchengast, University of New South Wales); Consultation 39 (OPP), 50 (Witness Assistance Service, OPP Victoria); Roundtable 14 (Legal practitioners, Ballarat). Recommendations in relation to regional prosecutions are made in Chapter 6.

95 Submissions 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault), 40 (Former VOCCC victim representatives); Consultation 2 (Commissioner for Victims' Rights, South Australia).

It is also a reference point for victims to identify their entitlements and obligations. Equivalent legislation in South Australia and New South Wales contains obligations to consult regarding plea resolution decisions and decisions to discontinue in the context of serious crimes.<sup>96</sup>

## Recommendation

- 24 The *Victims' Charter Act 2006* (Vic) should be amended to require prosecuting agencies to consult with victims before the prosecution makes a decision to:
- not proceed with some or all charges
  - accept a plea of guilty to a lesser charge
  - apply for, agree to or oppose an application for summary jurisdiction
  - agree to or oppose an application to cross-examine the victim at committal
  - pursue an appeal against a sentence or acquittal.

The Act should provide that the victim's views are not determinative and that consultation must occur except where the victim cannot be located after reasonable attempts or does not wish to be consulted.

## Participation and substantive rights in court

- 7.61 In Victoria, victims are entitled to participate in court proceedings by:
- making representations during pre-trial applications about the harm they are likely to suffer if their confidential counselling and medical records are used as evidence in the trial
  - submitting and reading out a victim impact statement during sentencing proceedings.
- 7.62 These entitlements are referred to as 'substantive rights' to participate. In the following sections, the Commission considers whether these rights require reform and should be extended to other aspects of the criminal trial process.

## Confidential communications

### Expectation and experience

- 7.63 For victims, being involved in decision making about the use of private medical and counselling records is important and empowering.<sup>97</sup> For sexual offence victims in particular, it can be a significant source of control. Many contributors supported victims being able to participate in response to applications to subpoena, access and use their confidential medical and counselling records.<sup>98</sup> These records are referred to in the relevant legislation as 'confidential communications'.<sup>99</sup>

96 *Victims Rights and Support Act 2013* (NSW) s 6.5 (applies to serious crimes involving sexual violence or that caused bodily or psychological harm); *Victims of Crime Act 2001* (SA) s 9A (includes decisions to investigate an offender's 'mental competence to commit an offence or mental fitness to stand trial').

97 Consultation 32 (Legal Aid NSW).

98 Submissions 14 (Victims of Crime Commissioner, Victoria), 21 (Dianne Hadden), 25 (Law Institute of Victoria), 26 (Victoria Police), 27 (Supreme Court of Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault), 39 (Safe Steps), 40 (Former VOCCC victim representatives); Consultations 10 (A victim), 12 (Parent of a victim) 15 (DPP), 21 (Victoria Police), 23 (Court Network staff and a Court Networker—County Court), 27 (Loddon Campaspe Centre Against Sexual Assault), 39 (OPP), 46 (A victim), 50 (Witness Assistance Service, OPP Victoria); Roundtables 9 (Victim support and therapeutic specialists, Shepparton), 10 (Legal practitioners, Shepparton).

99 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32B. Confidential communications include records that are made before and after the alleged offending has occurred.

- 7.64 In practice, not many victims participate in these applications independently of the prosecution.<sup>100</sup> It is more common for medical practitioners and counselling organisations to appear independently in court.<sup>101</sup>

### Legislative and policy framework

- 7.65 Part 2, division 2A of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) governs applications to use confidential communications relating to a victim of a sexual offence.<sup>102</sup> Applications must be made in writing over three stages—to subpoena, access and then use a record of a confidential communication as evidence.<sup>103</sup> The applicant, who is usually the accused, must give at least 14 days notice to the prosecution, the police informant and the medical practitioner or counsellor.<sup>104</sup> The police informant is responsible for giving the victim a copy of the notice within a ‘reasonable time’.<sup>105</sup>
- 7.66 As the recipient of the subpoena to produce the record of the confidential communication, the medical practitioner or counsellor can appear with leave in court and make submissions.<sup>106</sup> The victim can appear with permission from the court.<sup>107</sup> Although the victim may be permitted to appear, the victim is not a party to the proceedings as a whole.

### Ensuring effective participation

#### Notice of the application

##### *Responsibility for notification*

- 7.67 Victims need to be notified about an application being made and their right to seek leave to appear and make submissions. Victoria Police, the Centre for Rural Regional Law and Justice, the DPP and Victoria Legal Aid and some support workers agreed that measures should be taken to ensure that victims are effectively notified about applications to use their confidential communications.<sup>108</sup>
- 7.68 Victoria Police suggests in its submission that ‘there is no obligation to serve the notice on the victim or for the victim to be informed that the application is being made’.<sup>109</sup> However, the *Evidence (Miscellaneous Provisions) Act* obliges the police informant to notify the victim about the application.<sup>110</sup> No victim consulted by the Commission was aware of their entitlement.<sup>111</sup>

100 Submissions 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association), 34 (Northern Centre Against Sexual Assault); Consultations 10 (A victim), 11 (Parent of a victim), 12 (Parent of a victim), 27 (Loddon Campaspe Centre Against Sexual Assault), 42 (Relative of a victim; a victim), 50 (Witness Assistance Service, OPP Victoria), 51 (Criminal Law Section, Law Institute of Victoria); Roundtables 5 (Victim support specialists, Morwell), 6 (Legal practitioners, Morwell), 7 (Victim support specialists, Melbourne), 8 (Metropolitan Centres Against Sexual Assault), 9 (Victim support and therapeutic specialists, Shepparton). The Victorian Bar and Criminal Bar Association and the Law Institute of Victoria noted that the victim’s views are usually conveyed to the court by the prosecution. A participant at Roundtable 4 noted that the County Court often asks the prosecution for the victim’s views.

101 Submissions 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association); Consultation 27 (Loddon Campaspe Centre Against Sexual Assault); Roundtables 3 (Victim support specialists, Geelong), 8 (Metropolitan Centres Against Sexual Assault), 12 (Victim support specialists, Wodonga).

102 Other Australian jurisdictions, except for Queensland and the Commonwealth, have provisions that restrict access to documents equivalent to confidential communications. See *Criminal Procedure Act 1986* (NSW) ss 295–305; *Evidence Act 1929* (SA) ss 67D–67F; *Evidence Act* (NT) ss 56–56G; *Evidence Act 1906* (WA) ss 19A–19M; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 54–67. Canada’s Criminal Code also protects confidential records: *Criminal Code* RSC 1985 C–46, ss 278.1–278.9. Tasmania absolutely prohibits access to confidential communications unless the victim consents: *Evidence Act 2001* (Tas) s 127B.

103 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C.

104 *Ibid* s 32C(2). A judge may waive or shorten the notice requirement: s 32C(3).

105 *Ibid* s 32C(4).

106 *Ibid* s 32C(5).

107 *Ibid*.

108 Submissions 5 (Centre for Rural Regional Law and Justice), 10 (Victoria Legal Aid), 23 (DPP), 26 (Victoria Police); Roundtables 10 (Legal practitioners, Shepparton); 3 (Victim support specialists, Geelong).

109 Submission 26 (Victoria Police).

110 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C(4).

111 Consultations 10 (A victim), 11 (Parent of a victim), 12 (Parent of a victim); Victoria Police told the Commission that victims are not aware of their right to seek leave to appear: Consultation 21. Support and counselling services were also not aware victims have this right: Roundtables 3 (Victim support specialists, Geelong), 7 (Victim support specialists, Melbourne), 8 (Metropolitan Centres Against Sexual Assault); 9 (Victim support and therapeutic specialists, Shepparton).



- 7.69 It appears that an immediate solution would be for Victoria Police to provide training to ensure police informants are aware of their obligation to notify victims about confidential communications applications. This would in any event be prudent, to ensure that victims are informed when applications are made in the course of criminal proceedings prosecuted in the Magistrates' Court by police prosecutors.
- 7.70 A better solution for all cases that are heard in the Supreme or County Courts would be to transfer the responsibility for notification to the prosecution. The DPP takes over the prosecution of indictable offences from the police at the first hearing in the Magistrates' Court after the charge is filed. Confidential communications may be sought by the accused in preparation for, and use in, all stages of a criminal trial, including the committal hearing.
- 7.71 The Commission considers that OPP solicitors and prosecutors are better positioned than the informant to notify the victim in these cases. They are a party to the proceedings to which the confidential communications application relates and better placed to explain to victims the nature of the application, their right to appear (with leave) and to refer them for independent legal advice. Transferring the notice obligation from the informant to the prosecution would bring Victoria into line with New South Wales, where prosecutors are responsible for informing the victim.<sup>112</sup>
- 7.72 The DPP's policy on confidential communications, which is set out in *Director's Policy: Evidence (Confidential Communications) Act 1998 (Vic)*, states that, if the victim wishes to make submissions to the court, the OPP solicitor or prosecutor should inform the victim that they may do so with the leave of the court and be represented by their own lawyer.<sup>113</sup> The OPP solicitor or prosecutor should also refer the victim to legal representation.<sup>114</sup> Notifying the victim about the application should not be a significant additional burden.
- 7.73 In New South Wales, the obligation to notify the victim is overseen by the court. The judge must be satisfied that the victim has been notified and has had an opportunity to obtain legal advice.<sup>115</sup> This expressly recognises the importance of victims being aware of their entitlements and seeks to ensure their participation.<sup>116</sup> The Commission considers that an equivalent role for the court should be introduced in Victoria because the current statutory obligation alone has not served to ensure that the victim has been notified.
- 7.74 A corollary of the requirement to give notice is the ability of the court to waive notice where required. The Victorian legislation provides no guidance about this.<sup>117</sup> In New South Wales, notice can be waived in exceptional circumstances or if the victim consents in writing.<sup>118</sup> Legal Aid NSW and the Women's Legal Service NSW told the Commission that waivers occur relatively frequently, indicating that the term 'exceptional circumstances' is interpreted broadly.<sup>119</sup>
- 7.75 There is little point in having notice requirements if they can be frequently waived. Evidence from New South Wales suggests that it is better to be prescriptive. The court should be able to waive this requirement only if the victim cannot be located or if the victim has provided consent to the waiver in writing.

112 *Criminal Procedure Act 1986 (NSW) s 299C(3)*.

113 Director of Public Prosecutions Victoria, *Director's Policy: Evidence (Confidential Communications) Act 1998 (Vic)* (9 January 2015) [20] (provided to the Commission on 17 May 2016).

114 *Ibid.*

115 *Criminal Procedure Act 1986 (NSW) s 299*.

116 New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2010 (John Hatzistergos) 28070–71.

117 *Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 32C(3)*.

118 *Criminal Procedure Act 1986 (NSW) s 299C(5)*.

119 Consultations 32 (Legal Aid NSW), 33 (Women's Legal Service NSW).



## Standing, legal representation and the form of participation

- 7.76 Simply notifying victims does not enable participation. In the Commission's view, notification needs to be accompanied by:
- removing the requirement that victims seek the court's leave to appear regarding confidential communications applications
  - the availability of legal representation
  - flexibility in the form of participation.

### *The requirement to seek leave*

- 7.77 Requiring victims to seek the leave of the court if they wish to make submissions on an application concerning their confidential communications reflects the fact that they are not a party to the criminal proceedings against the accused. However, apart from creating a procedural step for the victim to overcome, it is at odds with recognising the victim's interest in the criminal proceedings and specifically their interest in protecting their privacy from unjustified interference.
- 7.78 A similar requirement applied in New South Wales<sup>120</sup> but was removed because it hampered the effectiveness of the confidential communications provisions.<sup>121</sup> The legislation now provides for the victim to appear.<sup>122</sup>
- 7.79 Allowing victims automatic standing to appear is consistent with the purpose of the confidential communications provisions. The Supreme Court of Victoria submitted that refusing leave would be inconsistent with the principle of procedural fairness because it denies an individual with a right the ability to make submissions to assert that right.<sup>123</sup> The Supreme Court's observations suggest that automatic standing should be extended to victims who wish to make submissions about confidential communications applications.<sup>124</sup> The Commission agrees.

### *Legal representation*

- 7.80 Strong support was expressed in submissions and during consultations for victims being able to access legal advice and representation regarding confidential communications applications.<sup>125</sup> Access must be available equally to victims in metropolitan and regional areas.<sup>126</sup>
- 7.81 Victims need legal representation, independent of the prosecution, to ensure that they do not lose the right to protect their confidential communications in a situation where their interest conflicts with the prosecution's.<sup>127</sup> Sometimes prosecutors may be reluctant to oppose an application, even where the victim objects. Sexual assault counsellors told the Commission that conflicts between the interests of the prosecution and the victim can arise frequently.<sup>128</sup> According to the Child Witness Service, the problem can be particularly acute when a child victim and their parent do not agree.<sup>129</sup>

120 See *Criminal Procedure Act 1986* (NSW) former s 298, before it was amended by the *Courts and Crimes Legislation Further Amendments Act 2010* (NSW).

121 Alicia Jillard, Janet Loughman and Edwina MacDonald, 'From Pilot Project to Systemic Reform' (2012) 37(4) *Alternative Law Journal* 254, 255–56. See also New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2010 (John Hatzistergos) 28071.

122 *Criminal Procedure Act 1986* (NSW) s 299A.

123 Submission 27 (Supreme Court of Victoria).

124 Ibid. Other contributors expressed support for giving victims standing: Submissions 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault); Consultations 19 (Victims of Crime Commissioner, Victoria), 32 (Legal Aid NSW), 33 (Women's Legal Service NSW); Roundtable 10 (Legal practitioners, Shepparton).

125 Submissions 14 (Victims of Crime Commissioner, Victoria), 21 (Dianne Hadden), 25 (Law Institute of Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault); Consultations 12 (Parent of a victim), 23 (Court Network staff and Court Network—County Court), 39 (OPP), 50 (Witness Assistance Service, OPP Victoria); Roundtables 4 (Legal practitioners, Geelong), 9 (Victim support and therapeutic specialists, Shepparton).

126 Submission 5 (Centre for Rural Regional Law and Justice).

127 Submission 25 (Law Institute of Victoria).

128 Roundtable 8 (Metropolitan Centres Against Sexual Assault).

129 Consultation 18 (Child Witness Service, Department of Justice and Regulation).

- 7.82 New South Wales established a publicly funded legal service in response to low numbers of victims appearing in relation to confidential communications applications.<sup>130</sup> Lawyers from Legal Aid NSW stated that 'in the absence of legal representation, the New South Wales laws limiting the disclosure or use of counselling records were in effect an empty promise'.<sup>131</sup>
- 7.83 The Commission has recommended in Chapter 6 that Victoria Legal Aid should be funded to establish a service for victims of violent indictable crime. This service would be able to provide victims with the legal advice and assistance they require in making submissions on confidential communications applications.

#### *Flexibility in the form of participation*

- 7.84 The Commission was told that victims may decide not to participate in applications for confidential communications because it causes them additional stress.<sup>132</sup> Some victims will be content to let the prosecution convey their views, which is what usually happens.<sup>133</sup> Where this is what the victim wants, this practice should continue. However, victims should still be informed of their legal rights and offered a referral to independent legal advice before they decide.
- 7.85 The Law Institute of Victoria suggested that more victims might participate if they could provide their objections in affidavit form.<sup>134</sup> In New South Wales, victims can provide a sworn confidential statement to the court detailing the harm they will experience if their records are used.<sup>135</sup> These statements are disclosed to the judge only and cannot be the subject of cross-examination. The Commission supports such an option, which allows victims to describe 'the harm they might suffer without divulging the substance of the protected confidence in question'.<sup>136</sup>
- 7.86 It is possible that increased victim participation in confidential communication applications may lengthen the timelines for and increase the cost of pre-trial proceedings, though this will depend on the form of participation chosen. Concerns about timing and costs are discussed in more detail in Chapter 8.

130 Consultation 33 (Women's Legal Service NSW); Alicia Jillard, Janet Loughman and Edwina MacDonald, 'From Pilot Project to Systemic Reform' (2012) 37(4) *Alternative Law Journal* 254, 255.

131 Ibid. See also Consultation 33 (Women's Legal Service NSW).

132 Submission 40 (Former VOCCC victim representatives); Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

133 Submissions 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association); Consultations 42 (A victim and relative), 50 (Witness Assistance Service, OPP Victoria); Roundtable 4 (Legal practitioners, Geelong).

134 Consultation 51 (Law Institute of Victoria).

135 *Criminal Procedure Act 1986* (NSW) s 299D(3). This statement is not available to the defence or prosecution: s 299D(4).

136 Alicia Jillard, Janet Loughman and Edwina MacDonald, 'From Pilot Project to Systemic Reform' (2012) 37(4) *Alternative Law Journal* 254, 257 (noting that detailing the harm through submissions in court opened victims up to cross-examination and undermined the protections the provisions were designed to achieve). See also New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2010 (John Hatzistergos) 28072.

## Recommendation

- 25 Division 2A of Part 2 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should be amended by:
- (a) requiring the prosecution to notify the victim of their right to appear and the availability of legal assistance in relation to an application to subpoena, access and use their confidential communications (see recommendation 23)
  - (b) requiring the court to be satisfied that the victim is aware of the application and has had an opportunity to obtain legal advice
  - (c) prohibiting the court from waiving the notice requirements except where the victim cannot be located after reasonable attempts or the victim has provided informed consent to the waiver
  - (d) providing victims with standing to appear
  - (e) permitting victims to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted.

## Victim impact statements

### Expectation and experience

- 7.87 The vast majority of cases before the Supreme Court and County Court proceed to a sentence. In the 2015 calendar year, 80 per cent of matters that were finalised in the Supreme Court proceeded to a sentence.<sup>137</sup> Similarly, in the 2014–15 financial year 79 per cent of cases finalised in the County Court proceeded to a sentence.<sup>138</sup> In most cases, the accused pleads guilty. Between 2009–10 and 2013–14, 72.4 per cent of cases in the Supreme court, and 84.6 per cent of cases in the County Court, resolved by way of a plea of guilty.<sup>139</sup>
- 7.88 A victim impact statement at sentencing may be a victim’s only opportunity to participate in the criminal trial process. The entitlement to provide a victim impact statement is independent of the prosecution’s role at sentencing. It is a principle of the Victims’ Charter and an entitlement under the *Sentencing Act 1991* (Vic).<sup>140</sup>
- 7.89 Victims consulted by the Commission viewed victim impact statements as an important opportunity to give expression to their suffering and to be heard by the court, the prosecution and the offender.<sup>141</sup> Victims described the process of preparing and delivering a victim impact statement as therapeutic, cathartic and in other positive terms.<sup>142</sup> For some victims, it was also difficult and emotionally challenging.<sup>143</sup> For a few, it caused frustration and disappointment.<sup>144</sup> Where a family member has been killed, a victim

137 Data provided by the Supreme Court of Victoria (26 February 2016). A total of 86 cases were finalised in the 2014–2015 calendar year, 69 of which proceeded to a sentencing hearing.

138 County Court of Victoria, *2014–15 Annual Report* (2015) 6. Of a total of 2236 cases finalised in 2014–2015 (excluding appeals), 1776 resolved into a sentence, either by way of a plea of guilty (1587) or conviction following a trial (189). The remaining 460 were finalised either by acquittal (160), discontinuance order (155), stay of proceedings (4), nolle prosequi (5), other (138).

139 Sentencing Advisory Council, *Guilty Pleas in Higher Courts* (2015) xv, 11. These statistics refer to charges for which the defendant has been sentenced, and do not include withdrawn or unproven charges.

140 *Victims’ Charter Act 2006* (Vic) s 13; *Sentencing Act 1991* (Vic) s 8K.

141 Submissions 15 (Kristy McKellar), 40 (Former VOCCC victim representatives), 41 (Colleen Murphy (Kelly)); Consultations 10 (A victim), 11 (Parent of a victim), 13 (Parents of a victim), 42 (Relative of a victim; a victim).

142 Consultations 5 (Sue and Don Scales, Mildura), 10 (A victim), 11 (Parent of a victim), 13 (Parents of a victim), 14 (A victim), 40 (A victim), 42 (Relative of a victim; a victim).

143 Consultations 3 (Parent of a victim), 4 (Parent of victims), 5 (Sue and Don Scales, Mildura), 13 (Parents of a victim), 56 (Colleen Murphy (Kelly)).

144 Submission 41 (Colleen Murphy (Kelly)).

impact statement may be an important opportunity to make a loved one visible.<sup>145</sup> Contributions to the Commission's review reflect existing research, which shows that victim impact statements allow victims to have a voice in the sentencing process and have the harm they have suffered publicly acknowledged.<sup>146</sup>

### Who can make a victim impact statement?

- 7.90 Individuals who fall within the definition of 'victim' in the Sentencing Act can submit or read out a victim impact statement. A victim is defined as:
- a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender.<sup>147</sup>
- 7.91 The Victorian Court of Appeal has held that witnesses to an offence may be victims if they have suffered injury, loss or damage as a direct result of the offence.<sup>148</sup>
- 7.92 The Commission's consultation paper asked if a broader group of victims should be able to make victim impact statements. Some victims suggested that friends should be permitted to do so.<sup>149</sup> The DPP submitted that the right to make a victim impact statement should be expanded in certain limited circumstances, such as to neighbours of premises where a violent offence occurred, or to first responders to crimes that are committed in public spaces.<sup>150</sup>
- 7.93 The Supreme Court, Victoria Legal Aid and the Law Institute of Victoria rejected expanding the definition of victim.<sup>151</sup> Expanding the definition risks reducing the appropriate focus on the primary victim and those closest to them.<sup>152</sup> The Supreme Court of Victoria submitted that, in cases involving a death, allowing people other than immediate family to read out a victim impact statement can re-traumatise a victim's immediate family and extend the sentencing hearing by days.<sup>153</sup> It may also place pressure on the immediate family to read out their statements when they might not wish to do so.<sup>154</sup> Phil Cleary submitted that where the victim has been killed, no one beyond immediate family should be allowed to read a victim impact statement out in court.<sup>155</sup>
- 7.94 The Commission considers that the definition of victim in the Sentencing Act appropriately prioritises the needs and interests of primary victims and their families. The Commission does not consider there is a need for reform.

145 Submission 41 (Colleen Murphy (Kelly)); Roundtable 18 (Victims of crime). See also Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 64–5.

146 See eg, Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 63–4 (citing numerous studies).

147 *Sentencing Act 1991* (Vic) s 3.

148 *Berichon v The Queen; Houssein v The Queen* (2013) 40 VR 490; *R v Silver* [2006] VSC 154 (21 April 2006) [39]–[40]. See also *R v Miller* (1995) 2 VR 348, 354 (stating that 'victim' should be construed broadly).

149 Submissions 16 (Name withheld), 38 (Name withheld), 41 (Colleen Murphy (Kelly)); Consultation 56 (Colleen Murphy (Kelly)).

150 Submission 23 (DPP).

151 Submission 10 (Victoria Legal Aid), 25 (Law Institute of Victoria), 27 (Supreme Court of Victoria).

152 Submission 27 (Supreme Court of Victoria).

153 *Ibid.*

154 *Ibid.*

155 Submission 20 (Phil Cleary).

## Managing the contents of victim impact statements

### Law and procedure

- 7.95 In Victoria victim impact statements may only contain information about the harm experienced by the victim as a direct result of the crime.<sup>156</sup> Specifically, the information is confined to the ‘impact of the offence on the victim and of any injury, loss or damage suffered by the victim as a direct result of the offence’.<sup>157</sup> This includes ‘grief, distress, trauma or other significant adverse impact’.<sup>158</sup> The offender need not have been able to reasonably foresee the impact.<sup>159</sup>
- 7.96 Victim impact statements are statutory declarations or sworn oral evidence.<sup>160</sup> The victim must prepare the statement and provide it to the court, the prosecutor and the offender (or the offender’s lawyer) within a reasonable time before the sentencing hearing.<sup>161</sup>
- 7.97 Victims can choose how the statement is presented to the court. The victim may read it out, or may request that it be read by another person, or by the prosecutor.<sup>162</sup> The victim impact statement, including any photographs or drawings may be displayed during the sentencing hearing.<sup>163</sup> Medical reports can also be attached.<sup>164</sup>
- 7.98 Alternative arrangements may be made for the presentation of the victim impact statement, including the use of a remote witness facility and allowing a support person to sit with the victim.<sup>165</sup> Victims may be cross-examined about the contents of their victim impact statement, although in practice this occurs very rarely.<sup>166</sup>
- 7.99 The court may rule all or part of the victim impact statement inadmissible, meaning that it cannot be presented at the sentencing hearing or taken into account by the court in making its decision.<sup>167</sup> If a victim impact statement is read out, the court must ensure that the parts that are admissible are read out.<sup>168</sup>

### What should victim impact statements contain?

- 7.100 Since victim impact statements were introduced, their admissibility has been a contentious issue. Victims feel constrained by restrictions on what they can say in their victim impact statement.<sup>169</sup> They often want to, and do, include information in their statement that is not admissible. The next section of this report considers whether victims should be able to include more in their victim impact statements than is currently permitted. It concludes that the current limits on the admissibility of victim impact statements are appropriate, but that the Sentencing Act should provide more guidance. It also outlines reforms to the process for preparing victim impact statements, to ensure victims can properly participate in the sentencing process.

156 *Sentencing Act 1991* (Vic) s 8L(1). This is true for all Australian jurisdictions except for the Northern Territory and South Australia, which also allow the victim to comment on the sentencing outcome: *Criminal Law (Sentencing) Act 1988* (SA) s 7C(2); *Sentencing Act* (NT) s 106B(5A). See also Tracy Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 21–2.

157 *Sentencing Act 1991* (Vic) s 8L(1).

158 *Ibid* s 3 (definition of a victim).

159 *Ibid*.

160 *Ibid* s 8K(2).

161 *Ibid* s 8N.

162 *Ibid* s 8Q(1).

163 *Ibid* s 8N.

164 *Ibid* ss 8M.

165 *Ibid* s 8R.

166 *Ibid* s 8O; Tracy Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 127.

167 *Ibid* s 8L(3).

168 *Ibid* s 8Q(2).

169 Consultations 1 (A victim), 4 (Parent of victims), 5 (Sue and Don Scales, Mildura), 11 (Parent of a victim), 13 (Parents of a victim), 28 (Laurie Krause), 41 (A victim). The experiences of Victorian victims is echoed in other common law jurisdictions: see Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 63–5, 139–41.

### *The sentencing context*

- 7.101 The admissibility of a victim impact statement is largely determined by the point in the criminal trial process at which it is taken into account: the sentencing hearing.
- 7.102 The purposes for which sentences are imposed and the factors relevant to making sentencing decisions are set out in the Sentencing Act and reflect longstanding sentencing principles. The purposes for which sentences may be imposed are restricted to:
- punishing the offender in a way that is just in all the circumstances
  - deterring the offender or other persons from committing the same or similar offences
  - establishing conditions that will rehabilitate the offender
  - denouncing the offender's conduct
  - protecting the community from the offender.<sup>170</sup>
- 7.103 In determining the sentence, the court must have regard to a range of factors, including:
- the nature and gravity of the offence
  - the offender's culpability and degree of responsibility
  - the offender's previous character
  - whether the offender pleaded guilty and other indications of remorse shown by the offender
  - the existence of any mitigating or aggravating factor concerning the offender
  - the impact of the offence on any victim
  - any injury, loss or damage resulting directly from the offence
  - the personal circumstances of any victim.<sup>171</sup>
- 7.104 Victim impact statements are relevant to the last three factors. This means that victims are not allowed to mention:
- the effects of the crime on anyone except the person making the statement<sup>172</sup>
  - information about the offender or their circumstances<sup>173</sup>
  - opinions about what kind of sentence should be imposed or its length<sup>174</sup>
  - anything not directly relevant to the offence for which the offender has been found guilty or has admitted guilt, even if useful for background and context.<sup>175</sup>

### *Past conduct and other offences*

- 7.105 Where offenders have a history of violent behaviour, victims may understandably find it difficult to confine their statement to the offences before the court.<sup>176</sup> This is a particular issue for victims of family violence who want to give context to offending by telling the court about past abusive behaviour.<sup>177</sup>
- 7.106 Similarly, where the prosecution has agreed to a guilty plea to lesser charges, victims are limited to describing the harm caused to them in terms of the lesser charges.<sup>178</sup> However, victims will often include, or want to include, information in their victim impact statement that reflects the more serious offences that were originally charged.<sup>179</sup> In her detailed study of victim impact statements in Australia, Tracey Booth observed:

170 *Sentencing Act 1991* (Vic) s 5(1).

171 *Ibid* s 5(2).

172 *DPP v Q P X* [2014] VSC 133 (17 March 2014).

173 *Ibid*.

174 *Ibid*.

175 *York (a Pseudonym) v The Queen* [2014] VSCA 224 [26] (12 September 2014).

176 Consultations 13 (Parents of a victim), 44 (Kristy McKellar).

177 Submission 20 (Phil Cleary); Consultations 41 (A victim), 44 (Kristy McKellar); Roundtable 7 (Victim support specialists, Melbourne).

178 Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 139.

179 Submission 24 (Fiona Tait); Consultation 3 (Parent of a victim).

it is neither uncommon nor surprising for victims to ... write in their VISs from their own perspective about their own experience of victimisation rather than from the 'legal' picture of the offending that has been constructed for the court.<sup>180</sup>

- 7.107 However, the court sentences an offender for offences for which they have either pleaded guilty or been found guilty. Although the offender's past conduct is relevant—their criminal history is usually taken into account—it is a fundamental principle of sentencing that the court can only take into account harm caused by the offences for which the offender is being sentenced.<sup>181</sup> Allowing victims to make representations about other charges contravenes this principle.

### *Victims' views about sentencing*

- 7.108 Victim impact statements can affect sentencing outcomes: by providing information to the judge about the consequences of the crime, victim impact statements assist judges to determine the seriousness of the offending.<sup>182</sup> Similarly, where a victim indicates forgiveness in their victim impact statement, this may be taken into account as evidence of the offender's remorse, prospects for rehabilitation and the impact of the offending on the victim.<sup>183</sup>
- 7.109 Some victims told the Commission that they wanted to make submissions to the court about the sentence the offender should receive.<sup>184</sup> Expressing a view to the court about an appropriate sentence can be understood as allowing victims to express 'what constitutes justice for them and the perpetrator'.<sup>185</sup>
- 7.110 The Supreme Court, the Law Institute of Victoria, the DPP, the Victorian Bar and Criminal Bar Association and a number of others opposed victims being able to make submissions about sentencing outcomes.<sup>186</sup> The Commission agrees.
- 7.111 The Commission is not persuaded that the long standing principles that underpin sentencing should be disturbed. Whatever a victim's attitude towards sentencing, it is critical that an offender's sentence does not depend on whether the victim is forgiving or punitive.<sup>187</sup> Sentencing decisions, which might deprive an offender of their liberty, must be made by an impartial and objective tribunal.<sup>188</sup> It is the court's duty to weigh the factors relevant to sentencing before deciding the sentence, which is a complicated exercise that demands legal expertise.<sup>189</sup> A victim's views about sentencing are considered to be opinions and are therefore not considered relevant.<sup>190</sup> Similarly, the prosecution's representations about the range of sentences to which the offender could be sentenced is 'a statement of opinion' and not admissible.<sup>191</sup>

180 Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 117.

181 *R v De Simoni* (1981) 147 CLR 383.

182 See Judicial College of Victoria, *Victorian Sentencing Manual* (2 May 2016) 4.6.4.7 <<http://www.judicialcollege.vic.edu.au/publications>>. See also Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 41–2.

183 *R v Skura* [2004] VSCA 53 (17 April 2004); Submission 23 (DPP), stating that it may be appropriate for the victim to give their views in a general sense, such as whether they forgive the offender. See also Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 48–9.

184 Submissions 11 (Sandra Betts), 40 (Former VOCCC victim representatives), 41 (Colleen Murphy (Kelly)); Consultation 3 (Parent of a victim); Roundtables 3 (Victim support specialists, Geelong), 9 (Victim support specialists, Shepparton).

185 Submission 35 (Annalise Roberts and Miranda Escott-Burton).

186 Submission 9 (Associate Professor Tracey Booth), 23 (DPP), 27 (Supreme Court of Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University), 38 (Name withheld); Roundtable 6 (Legal practitioners, Morwell).

187 Andrew Ashworth, *Sentencing and Criminal Justice* (5th edition, Cambridge, 2010) 385; Jonathan Doak, *Human Rights, Victims' Rights and Criminal Justice: Reconciling the Role of Third Parties* (Hart Publishing, 2008) 154–5.

188 Andrew Ashworth, *Sentencing and Criminal Justice* (5th edition, Cambridge, 2010) 75.

189 Submission 27 (Supreme Court of Victoria).

190 *Evidence Act 2008* (Vic) s 76; *R v Skura* [2004] VSCA 53 (7 April 2004) [47]–[48].

191 *Barbaro v The Queen* (2014) 253 CLR 58, 66, 75.



### *Rules of evidence—guidance and clarity*

- 7.112 Generally speaking, evidence is admissible if it is probative to a fact in issue—meaning that it ‘could rationally affect the assessment of...a fact in issue’<sup>192</sup>—and should not be excluded on some other grounds.<sup>193</sup> In the context of victim impact statements, the fact in issue is the impact of the offence on the victim.
- 7.113 The probative value of evidence depends on the nature of the fact in issue and the importance of the evidence in establishing that fact.<sup>194</sup> It should be assessed by reference to the factual and legal context in which it is received.<sup>195</sup>
- 7.114 Whether evidence should be excluded by reason of some unfairness to the offender also depends on the legal and factual context.<sup>196</sup> Unfairness tends to arise where there is a potential for evidence to be misused by the fact-finder.<sup>197</sup> Probative value and unfairness are interdependent: whether it is fair or unfair to admit something into evidence will depend on its probative value.<sup>198</sup>
- 7.115 These considerations are relevant to decisions about the admissibility of victim impact statements. Accordingly, admissibility should be determined by reference the purpose of victim impact statements and the nature of the evidence they contain, as well as the point in the criminal trial process at which they are taken into account.
- 7.116 Victim impact statements provide victims with an opportunity to participate in the criminal trial process by speaking and being heard.<sup>199</sup> This purpose is reflected in the attitude taken by Victorian courts in receiving victim impact statements and determining their admissibility. In *DPP v DJK*, the Victorian Court of Appeal stated that victim impact statements:
- provide an opportunity for those whose lives are often tragically altered by criminal behaviour to draw to the court’s attention the damage and sense of anguish which has been created and which can be of a very long duration ... Obviously, the contents of the statements must be approached with care and understanding.<sup>200</sup>
- 7.117 Similarly, in *The Queen v Swift* the Victorian Court of Appeal stated that:
- it would be destructive of the purpose of victim impact statements if their reception in evidence were surrounded or confined by the sorts of procedural rules which are applicable to the treatment of witness statements in commercial cases.<sup>201</sup>
- 7.118 The nature of the evidence in victim impact statements is highly personal, which sets it apart from other evidence. Tracey Booth’s extensive study on victim impact statements in Australia notes that ‘the content of [victim impact statements] is highly subjective, the language frequently emotive and the oral presentation of those statements allows the expression of strong emotions in the courtroom’.<sup>202</sup>

192 *Evidence Act 2008* (Vic) s 3 (definition of probative value).

193 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 556, [16.14]–[16.15].

194 *Ibid* 87 [3.33]; *R v Lockyer* (1996) 89 A Crim R 457, 459.

195 *Ibid* [3.35].

196 *Ibid* 87, 554–65; *Evidence Act 2008* (Vic) ss 135–137.

197 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 559, [16.26].

198 *Ibid* 89 [3.44].

199 Submission 9 (Associate Professor Tracey Booth); Julian Roberts and Edna Erez, ‘Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements (2004) 10 *International Review of Victimology* 223; Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 5–6, 63–88.

200 *DPP v DJK* [2003] VSCA 109 (20 August 2003) [17], cited with approval in *R v Swift* (2007) 15 VR 497, 498 [6].

201 *R v Swift* (2007) 15 VR 497, 499 [9].

202 Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 6.

- 7.119 In addition, the Commission notes that a key purpose of the laws surrounding the admissibility of evidence is to 'keep from juries evidence that may be misused by them'.<sup>203</sup> Sentencing hearings do not involve juries. This also weighs against taking a strict approach to determining the admissibility of victim impact statements.
- 7.120 These considerations are reflected in the permissive approach taken by courts in some cases. The Commission sees merit in providing statutory backing for this practice by amending section 8L(3) of the Sentencing Act. Section 8L(3) states that:
- The court may rule as inadmissible the whole or any part of a victim impact statement, including the whole or any part of a medical report attached to it.
- 7.121 The Commission considers that this provision should be amended to clearly reflect that when determining admissibility, the court is to have regard to the purposes of the victim impact statement scheme and the context within which victim impact statements are made. Specifically, admissibility is to be determined by reference to these facts:
- The purpose is to allow the victim to tell the court about the impact of the crime on them.
  - The probative value of the evidence and any potential unfairness must be assessed in light of this purpose.
  - A victim impact statement will not be inadmissible because it contains subjective or emotive material.
  - The victim impact statement is received by the court in the absence of the jury.

## Recommendation

- 26 **Section 8L of the *Sentencing Act 1991* (Vic) should be amended to provide the following guidance to courts when determining the admissibility of material contained in victim impact statements:**
- (a) the purpose of a victim impact statement is to allow the victim to tell the court about the crime's impact on them and the probative value of the evidence and any potential unfairness must be assessed in light of this purpose.
  - (b) a victim impact statement will not be inadmissible because it contains subjective or emotive material.

### The response to inadmissible material

- 7.122 When a victim impact statement contains inadmissible material, how the prosecution, defence and court responds is important for victims. A prosecutor who identifies material in a victim impact statement that is clearly inadmissible is obliged to bring it to the sentencing judge's attention.<sup>204</sup> If the defence identifies it, or is informed about it, Supreme Court and County Court practice notes require the defence to raise objections about admissibility with the prosecution as soon as reasonably practicable after receiving the statement.<sup>205</sup>

203 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (jointly), *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 66 [2.59].

204 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Vic) r 83; Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters Professional Australia Limited, 2014) 107, [4.60].

205 Supreme Court of Victoria, *Practice Note No 11 of 2015, Sentencing Hearings* [13]; County Court of Victoria, *County Court Criminal Division Practice Note—PNCR-2015* [7.11].

- 7.123 If objections cannot be resolved before the sentencing hearing, the defence should raise their objections to the inadmissible content in court.<sup>206</sup> Where there is inadmissible material in a victim impact statement, objecting to that material ensures that the offender can raise the admission of this material as a ground of appeal in any later appeal against their sentence.<sup>207</sup>

### *The role of the sentencing judge*

- 7.124 It is distressing for victims to have their statements edited just before the sentencing hearing or objected to in court.<sup>208</sup> One way to address this problem would be to give judges more responsibility for assessing the admissibility of material in victim impact statements. This could avoid the distress and awkwardness caused by the current practice of editing victim impact statements or raising objections in court.<sup>209</sup> This is the approach taken in New South Wales, where the court decides whether a victim impact statement is admissible and how much weight it should be given.<sup>210</sup>

- 7.125 There are some risks associated with relying on the sentencing judge to determine admissibility. It may not be clear whether or not the sentencing decision was affected by inadmissible material, which would undermine transparency in sentencing. Moreover, allowing victims the freedom to include inadmissible material in their victim impact statements could create the false impression that their entire statement will be taken into account.<sup>211</sup> Tracey Booth states:

[I]t is 'tokenistic' to offer victims the chance to express their opinion as to the punishment to be imposed when that opinion cannot change the law that has to be applied by the judge ... it is likely that victims' expectations would be 'dashed', resulting in disappointed, perhaps angry and bitter victims perceiving themselves as victimised by the law as well as by the crime.<sup>212</sup>

- 7.126 Conversely, strict rules about the contents of victim impact statements limit victims' autonomy and voice.<sup>213</sup> Allowing victims more freedom in what they can include in victim impact statements, and then relying on judges to take only admissible content into account, may allow victims to convey the impact of the offending more authentically.<sup>214</sup>
- 7.127 Weighing these competing considerations, the Commission considers that, on balance, the sentencing judge should not have primary responsibility for determining the admissibility of victim impact statements. Rather, victims should be assisted in preparing their victim impact statements so as to ensure their statements principally contain admissible material. Victims' participation is enhanced by ensuring their victim impact statements can be taken into account in the sentencing process. Victims told the Commission that having the judge refer to or read out significant portions of their victim impact statement was an important and validating experience.<sup>215</sup> Prosecutors and defence lawyers also told the Commission that well-prepared victim impact statements can have a powerful impact on the court and the offender.<sup>216</sup>

206 *Luciano v The Queen* [2015] VSCA 173, [10].

207 *Ibid.*

208 Submissions 15 (Kristy McKellar), 24 (Fiona Tait), 41 (Colleen Murphy (Kelly)); Roundtable 3 (Victim support specialists, Geelong).

209 Consultations 51 (Criminal Law Section, Law Institute of Victoria), 54 (Victorian Bar and Criminal Bar Association).

210 *R v Tuala* [2015] NSWCCA 8 (13 February 2015) [78] in which the New South Wales Court of Appeal recently observed that 'it may be unfair to take a lack of objection to [a victim impact statement's] admission into account'. See also Judicial Commission of New South Wales, *Sentencing Bench Book* (July 2016) [12.830] <<http://www.judcom.nsw.gov.au/publications/-benchbks/sentencing>>.

211 Submissions 9 (Associate Professor Tracey Booth), 24 (Fiona Tait), 31 (Professor Jonathan Doak, Nottingham Trent University), 38 (Name withheld), 40 (Former VOCCC victim representatives); Consultation 3 (Parent of a victim); Roundtable 3 (Victim support specialists, Geelong).

212 Submission 9 (Associate Professor Tracey Booth).

213 Submissions 9 (Associate Professor Tracey Booth), 34 (Northern Centre Against Sexual Assault); Consultations 40 (A victim), 50 (Witness Assistance Service, OPP Victoria). See also Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 138–41.

214 Submission 35 (Annalise Roberts and Miranda Escott-Burton).

215 Roundtable 10 (Legal practitioners, Shepparton).

216 Consultation 54 (Victorian Bar and Criminal Bar Association); Roundtable 12 (Victim support specialists, Wodonga).

### *Assisting victims prepare admissible victim impact statements*

- 7.128 Victims should be given the best possible opportunity to prepare a victim impact statement that is admissible. This can be achieved by:
- providing support and assistance when they draft their statement
  - providing an opportunity for the statement to be reviewed by the prosecution.
- 7.129 In submissions and consultations, victims, support workers, academics, lawyers and some members of the judiciary stressed the need for victims to be adequately supported when preparing victim impact statements.<sup>217</sup> A victim who is informed as to the purposes of their victim impact statement, and is assisted in preparing it, is more likely to find the process positive and to produce a powerful statement that is accepted in full by the judge.<sup>218</sup> Assistance particularly makes a difference for individuals who have limited literacy skills or communication difficulties.<sup>219</sup>
- 7.130 The Department of Justice and Regulation has produced a *Guide to Victim Impact Statements* and a booklet, *Victim Impact Statements Made Easy*, including a template, to help people draft their victim impact statements. For some victims, this guidance is useful; others require personal assistance.<sup>220</sup> Personal assistance is not always available. Only some victims consulted by the Commission were helped by a support worker or lawyer in preparing their victim impact statement.<sup>221</sup>
- 7.131 The OPP, including the Witness Assistance Service, has no formal role in preparing victim impact statements, beyond informing victims that they have the right to provide a statement and referring them to information and the Victims of Crime Helpline, which can refer them to a Victims Assistance Program provider.<sup>222</sup>
- 7.132 Victims Assistance Program workers are trained to help victims when preparing a victim impact statement. Centres Against Sexual Assault also provide assistance. If victims are not referred to a Victims Assistance Program provider, or not supported by a Centre Against Sexual Assault, it is unclear who helps them. Assistance should be consistently available to victims across Victoria.<sup>223</sup>
- 7.133 The Supreme Court, some judges of the County Court, the Law Institute of Victoria and Tracey Booth saw merit in giving the prosecution a role in preparing victim impact statements.<sup>224</sup> This proposal would give victims an opportunity to engage with the prosecution. In view of its knowledge of the case, the prosecution would be in a good position to ensure that victims are informed of potentially inadmissible material.
- 7.134 Practice notes of the Supreme Court and County Court require the prosecution to be mindful of its obligation to ensure that only admissible parts of victim impact statements are read out.<sup>225</sup> The Supreme Court submitted that prosecutors should provide information to victims about what is admissible, and resolve issues about admissibility, before the sentencing hearing.<sup>226</sup> Some of the County Court judges who were consulted observed that the prosecution should be more willing to edit victim impact statements.<sup>227</sup>

217 Submissions 9 (Associate Professor Tracey Booth), 24 (Fiona Tait), 35 (Annalise Roberts and Miranda Escott Burton); Consultations 3 (Parent of a victim), 4 (Parent of victims), 53 (Parent of a victim); Roundtables 10 (Legal practitioners, Shepparton), 11 (Judges of the County Court of Victoria), 14 (Legal practitioners, Ballarat).

218 Consultations 5 (Sue and Don Scales, Mildura), 14 (A victim), 35 (Parent of a victim), 40 (A victim); Roundtables 9 (Victim support specialists, Geelong), 10 (Legal practitioners, Shepparton), 12 (Victim support specialists, Wodonga).

219 Submission 24 (Fiona Tait), Consultation 37 (Centacare, Barwon South West Region), 40 (A victim).

220 Consultations 4 (Parent of victims), 5 (Sue and Don Scales, Mildura); 12 (Parent of a victim), 13 (Parents of a victim), 20 (Parent of victims) 28 (Laurie Krause), 42 (Relative of a victim; a victim).

221 Consultations 5 (Sue and Don Scales, Mildura), 12 (Parent of a victim), 35 (Parent of a victim), 40 (A victim), 42 (Relative of a victim; a victim).

222 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (August 2015) [42]–[43]; Consultation 50 (Witness Assistance Service, OPP Victoria). The *Victims' Charter Act 2006* (Vic) also requires prosecuting agencies to refer victims to an 'appropriate victims' services agency' for assistance with victim impact statements: s 13(2).

223 Submissions 27 (Supreme Court of Victoria), 23 (DPP); Roundtable 11 (Judges of the County Court of Victoria).

224 Submissions 9 (Associate Professor Tracey Booth), 25 (Law Institute of Victoria), 27 (Supreme Court of Victoria), 33 (Professor Jo-Anne Wemmers); Roundtable 11 (Judges of the County Court of Victoria).

225 Supreme Court of Victoria, *Practice Note No 11 of 2015—Sentencing Hearings* (27 February 2015) [12]; County Court of Victoria, *County Court Criminal Division Practice Note—PNCR 1–2015* (21 October 2015) [5.8].

226 Submission 27 (Supreme Court of Victoria).

227 Roundtable 11 (Judges of the County Court of Victoria).

However, the DPP considers such a role would undermine the independence of the prosecution.<sup>228</sup>

- 7.135 The Commission considers that the best approach involves a combination of assistance from victim support workers and review by prosecution lawyers. Concerns were expressed that routinely involving lawyers in the preparation of victim impact statements could remove the emotion from such statements and undermine their authenticity.<sup>229</sup> Support workers will often be better equipped to provide the therapeutic support that victims might need when drafting their statement.<sup>230</sup> Support workers consulted by the Commission understood the role of victim impact statements, and did not describe any problems explaining this to victims.<sup>231</sup>
- 7.136 Prosecution lawyers should complement this by reviewing statements as early as possible and informing victims about material that might be inadmissible. This does not make them responsible for the contents of the statement. In this way, prosecutorial independence is maintained. However, to remove doubt about the appropriateness of the prosecution taking on this role, it should be given statutory backing.

## Recommendation

- 27** The *Victims' Charter Act 2006 (Vic)* should be amended to require the prosecution to inform the victim about any material in a victim impact statement that the court may rule inadmissible, before the statement is given to the court and the offender or their lawyer. The Act should provide that the prosecution is not responsible for the contents of a victim impact statement.

### *Providing the victim impact statement to the court*

- 7.137 The Commission also considers that the prosecution should be responsible for providing the victim impact statement to the court and the offender (or the offender's lawyer) once the victim has finalised it.
- 7.138 The Sentencing Act currently places this obligation on victims. Section 8N states that
- If the victim prepares a victim impact statement, the victim must, a reasonable time before sentencing is to take place—
- (a) file a copy with the court; and
  - (b) provide a copy to—
    - (i) the offender or the legal practitioner representing the offender; and
    - (ii) the prosecutor—
- and the copy must include a copy of any medical report attached to the victim impact statement.
- 7.139 This requirement is at odds with the need to minimise the victim's contact with the offender. It also conflicts with existing Supreme Court and County Court practice notes, which oblige the prosecution to file the victim impact statement with the court, and

228 Submission 23 (DPP); Consultations 15 (Director of Public Prosecutions Victoria), 50 (Witness Assistance Service, OPP Victoria).  
229 Submission 24 (Fiona Tait); Consultations 39 (Witness Assistance Service, OPP Victoria), 45 (Victims Support Agency, Department of Justice and Regulation), 54 (Victorian Bar and Criminal Bar Association).  
230 Submission 24 (Fiona Tait); Consultation 54 (Victorian Bar and Criminal Bar Association); Roundtables 4 (Legal practitioners, Geelong), 5 (Victim support specialist, Morwell), 12 (Victim support specialists, Wodonga), 14 (Legal practitioners, Ballarat).  
231 Roundtables 3 (Victim support specialists, Geelong), 5 (Victim support specialists, Morwell), 7 (Victim support specialists, Melbourne), 9 (Victim support and therapeutic specialists, Shepparton). See also Consultation 54 (Victorian Bar and Criminal Bar Association), Roundtable 4 (Legal practitioners, Geelong), 14 (Legal practitioners, Ballarat).

provide a copy to the offender at least five days before the sentencing hearing.<sup>232</sup>

It is more appropriate for the prosecution to communicate with the offender or their lawyer and file documents with the court. This position should be reflected in the Sentencing Act.

## Recommendation

- 28** Section 8N of the *Sentencing Act 1991 (Vic)* should be amended to require the prosecutor to file with the court and serve on the offender, or their lawyer, a copy of any victim impact statement.

### Timing and disclosure

- 7.140 Victims need to prepare their victim impact statement and have it reviewed by the prosecution before it is then provided to the court and the defence.<sup>233</sup> There should also be enough time for the parties to address any admissibility issues before the sentencing hearing.<sup>234</sup> Victims, victim support workers and lawyers have observed that some victims are not given enough time to work on their statements.<sup>235</sup>
- 7.141 Victims are likely to have the least time to prepare their statement where an offender is found guilty after a trial and a sentencing hearing is listed a short time later.<sup>236</sup> This problem arises because victims are instructed not to prepare their victim impact statement until after a guilty verdict.<sup>237</sup> If a victim impact statement is prepared before or during a trial, the prosecution may be required to disclose it to the defence or it could be subpoenaed. The defence may then use it in cross-examination, particularly if it contains details that are inconsistent with other accounts of the offending.<sup>238</sup>
- 7.142 Judicial officers, prosecution lawyers and support workers expressed clear support for restricting the admissibility of victim impact statements until after a finding of guilt.<sup>239</sup> This should ensure victims whose cases proceed through a trial have adequate time to prepare their victim impact statement without it being made available to the defence before the sentencing hearing. The Law Institute of Victoria objected to this proposal. It argued that a victim impact statement that contains material that is relevant, such as an inconsistent statement, should be made available to the defence.<sup>240</sup>
- 7.143 The Commission considers that victim impact statements should not be admissible before a finding or plea of guilty, for the following reasons:
- The Commission has recommended a scheme of assistance and review to help victims prepare statements that primarily contain admissible material. It would undermine the Commission's recommendations if victims whose cases proceed through a trial were precluded from preparing that statement until after a guilty verdict.

232 County Court of Victoria, *County Court Criminal Division Practice Note—PNCR 1–2015* (21 October 2015) 14–5; Supreme Court of Victoria, *Practice Note No 11 of 2015—Sentencing Hearings* (27 February 2015) [10].

233 Consultations 4 (Parent of victims), 10 (A victim), 12 (Parent of a victim), 37 (Centacare, Barwon South West Region), 39 (OPP Victoria), 50 (Witness Assistance Service, OPP Victoria). See also Victims Support Agency, *Victim Impact Statement Reforms In Victoria: Interim Implementation Report* (2014) 67.

234 Consultations 51 (Criminal Law Section, Law Institute of Victoria), 54 (Victorian Bar and Criminal Bar Association); Roundtable 4 (Legal practitioners, Geelong).

235 Consultations 4 (Parent of victims), 10 (A victim), 12 (Parent of a victim), 37 (Centacare, Barwon South West Region), 54 (Victorian Bar and Criminal Bar Association); Roundtable 4 (Legal practitioners, Geelong).

236 Consultations 37 (Centacare Barwon South West Region), 39 (OPP Victoria), 50 (Witness Assistance Service, OPP Victoria) Victims Support Agency, *Victim Impact Statement Reforms In Victoria: Interim Implementation Report* (2014) 67.

237 Consultations 37 (Centacare, Barwon South West Region), 39 (OPP), 50 (Witness Assistance Service, OPP Victoria); Roundtable 5 (Victim support specialists, Morwell).

238 Consultation 51 (Criminal Law Section, Law Institute of Victoria).

239 Consultations 31 (Judge of the County Court of Victoria), 37 (Centacare, Barwon South West Region), 39 (OPP), 50 (Witness Assistance Service, OPP Victoria); Roundtable 5 (Victim support specialists, Morwell), 15 (Magistrates of the Magistrates' Court of Victoria).

240 Submission 25 (Law Institute of Victoria).



- Where victims seek the assistance of a lawyer in the preparation of their victim impact statement, legal professional privilege attaches to that statement so that it cannot be disclosed. This means that victims who seek non-legal assistance are disadvantaged.
  - Requiring victims to delay preparing their statement until after a finding of guilt limits their capacity to exercise a substantive legal entitlement to participate.
- 7.144 Victoria is the only state in Australia in which victim impact statements are statutory declarations.<sup>241</sup> This reflects the important status they have in the Victorian criminal trial process. The Commission considers that they could be prevented from being used during the trial by rendering them inadmissible until they are actually declared in accordance with Division 4 of Part IV of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic). This would allow a statement to be prepared at any time before or during the trial but it would not be admissible until it is declared.
- 7.145 Victims would need to be told not to declare their statement until after the offender has been found guilty or pleaded guilty. This information should be provided by OPP solicitors as part of their information obligations to victims.

## Recommendation

- 29 The *Sentencing Act 1991* (Vic) should be amended to provide that only victim impact statements that have been declared in accordance with Division 4 of Part IV of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) are admissible in criminal proceedings to which the victim impact statement relates.

### Expanding participation in court

- 7.146 One of the most contentious issues raised by the Commission's terms of reference was whether to expand victims' entitlement to participate directly in court proceedings beyond responding to applications regarding confidential communications and providing victim impact statements.
- 7.147 The Commission's consultation paper asked a series of questions about whether victims should be entitled to appear in court at various stages of the criminal trial process, from committals through to appeals.
- 7.148 In response, the Supreme Court, some of the County Court judges consulted by the Commission, the Victorian Bar and Criminal Bar Association, the Law Institute of Victoria, Victoria Legal Aid, Liberty Victoria and other legal practitioners opposed increasing the opportunities for victims to participate directly in court proceedings.<sup>242</sup> They expressed concern that expanding the victim's role in the courtroom would undermine the principles of a fair trial, lead to delays and add complexity. Other mechanisms for victim input, such as meaningful consultation with the prosecution and restorative justice processes (discussed below) were viewed as posing fewer risks to the integrity of the criminal trial process and being more consistent with victims' expectations in relation to participation.

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Tracey Booth, *Accommodating Justice: Victim Impact Statements and the Sentencing Process* (Federation Press, 2016) 19.  
Submissions 10 (Victoria Legal Aid), 23 (DPP), 25 (Law Institute of Victoria), 27 (Supreme Court of Victoria), 29 (Victorian Bar and Criminal Bar Association), 43 (Liberty Victoria); Consultations 31 (Judge of the County Court of Victoria), 52 (Emeritus Professor Arie Freiberg AM); Roundtables 10 (Legal practitioners, Shepparton), 11 (Judges of the County Court of Victoria).



- 7.149 Conversely, victims, support workers, academics, some lawyers, Victoria Police and the Victorian Victims of Crime Commissioner expressed support for victims being permitted to participate in court at certain points of the criminal trial process.<sup>243</sup> Generally speaking, allowing victims to participate in court proceedings was seen as a way to recognise that they are entitled to be included in decision making.<sup>244</sup>
- 7.150 Among those stakeholders in favour of greater victim participation in court proceedings, three primary themes emerged:
- Victims should be able to participate where their personal interests are affected.
  - Victims should be able to participate in proceedings to assert provisions designed to protect them.
  - Victims should be able to participate in proceedings in a manner similar to the prosecutor.
- 7.151 The following sections consider these themes in more detail. The Commission concludes that there may be exceptional and limited circumstances where intervention by a victim is justified and necessary, and does not undermine a fair trial or the integrity of the criminal justice system. However, being prescriptive about those circumstances is not appropriate.

### Participation for personal interests

- 7.152 Greater participation in court proceedings was often justified in submissions and during consultations on the basis that victims have a personal interest in the proceedings before the court.<sup>245</sup> Participation on this basis would see the victim make submissions to the court, through a lawyer, in pre-trial applications that have a bearing on the victim's personal interests. There could also be other instances during the trial process where matters pertinent to the victims' personal interests arise.
- 7.153 Victoria Police, former Victims of Crime Consultative Committee victim representatives, Jonathan Doak and Dianne Hadden maintained that victims should be able to participate in appeals against decisions that affect their personal interests, where the victim appeared in relation to the original decision.<sup>246</sup> The Supreme Court observed:

It may be argued that rulings by the trial court on matters affecting the interests of any witness or third party should be subject to appeal. Decisions not to set aside a subpoena or rejecting a claim of privilege have consequences which cannot be addressed through a later appeal. There are very few examples in Victoria where a decision at first instance is not subject to some form of appeal or review. Whilst there is a clear risk of fragmentation of the criminal trial in permitting such appeals, significant rights can be at stake.<sup>247</sup>

243 Submissions 8 (Mary Illiadis), 11 (Sandra Betts), 19 (Dr Tyrone Kirchengast, University of NSW), 21 (Dianne Hadden), 26 (Victoria Police), 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault); Consultations 13 (Parents of a victim), 19 (Victims of Crime Commissioner, Victoria), 22 (Professor Jonathan Doak, Nottingham Trent University), 30 (Dr Tyrone Kirchengast, University of New South Wales), 32 (Legal Aid NSW); Roundtable 3 (Victim support specialists, Geelong), 7 (Victim support specialists, Melbourne).

244 Submission 31 (Professor Jonathan Doak, Nottingham Trent University); Consultation 23 (Legal Aid NSW); Consultation 21 (Victoria Police); Submissions 36 (Centre for Innovative Justice), 19 (Dr Tyrone Kirchengast, University of NSW).

245 Submissions 26 (Victoria Police), 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault); Consultation 13 (Parents of a victim); Roundtables 3 (Victim support specialists, Geelong), 7 (Victim support specialists, Melbourne).

246 Submissions 21 (Dianne Hadden), 26 (Victoria Police), 31 (Professor Jonathan Doak, Nottingham Trent University), 40 (Former VOCCC victim representatives).

247 Submission 27 (Supreme Court of Victoria).

## Defining personal interests

- 7.154 Not all contributors who expressed support for victims participating in court where their personal interests are affected defined what was meant by ‘personal interests’.<sup>248</sup> Some equated personal interests with privacy interests.<sup>249</sup> Others identified particular proceedings in which victims should be able to participate. These included applications:
- to cross-examine victims about their sexual activities<sup>250</sup>
  - about the use of protective procedures for giving evidence<sup>251</sup>
  - for separate trials<sup>252</sup>
  - regarding the use of tendency or coincidence evidence.<sup>253</sup>
- 7.155 Tyrone Kirchengast advanced a more principled approach. He argued that there will be instances during the criminal trial process where the ‘personal and private interests of the victim, and their right to integrity and personal autonomy, are squarely raised’.<sup>254</sup> In such instances, the question is whether public interest considerations outweigh the private interests of the victim. Kirchengast provides the following example: where a decision is being made to admit certain evidence, the victim’s private interests will outweigh public interests where the evidence is not substantially probative and admitting the evidence will cause significant harm to the victim.<sup>255</sup>
- 7.156 The right of victims to participate in applications to use their confidential communications is an example of these principles operating in practice. Kirchengast argues that allowing victims to participate in court where their personal interests are implicated simply expands the principles underlying confidential communications applications to a broader range of interests.<sup>256</sup>
- 7.157 Expanding victims’ participation where their personal interests are affected raises a number of distinct issues. First, the different approaches taken in contributions to this reference demonstrate that it is difficult to define what ‘personal interests’ means.<sup>257</sup> There will be circumstances where a victim’s personal interest in an aspect of the criminal trial process warrants their participation. However, a meaningful test or definition for those circumstances is elusive.
- 7.158 Secondly, examples provided to the Commission suggest that victims’ personal interests are implicated most commonly in the context of evidentiary applications, such as in applications to cross-examine the victim about their sexual history, or applications to have separate trials where there are related charges against co-accused, or multiple charges against the one accused. The outcome of such applications can have a significant impact on the victim—it may affect the nature of the evidence they give or how many times they must give it. However, there are other public interests at stake. Participation in response to such applications may alert victims who are also witnesses to potential lines of cross-examination, undermining the integrity of their evidence.<sup>258</sup>

248 Submissions 21 (Dianne Hadden), 26 (Victoria Police).

249 Consultation 13 (Parents of a victim); Roundtable 5 (Victim support specialists, Morwell).

250 Submissions 14 (Victims of Crime Commissioner, Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University), 38 (Name withheld); Consultation 13 (Parents of a victim), 19 (Victims of Crime Commissioner, Victoria).

251 Submission 31 (Professor Jonathan Doak, Nottingham Trent University); Consultations 22 (Professor Jonathan Doak, Nottingham Trent University), 30 (Dr Tyrone Kirchengast, University of New South Wales).

252 Submission 38 (Name withheld); Consultation 22 (Professor Jonathan Doak, Nottingham Trent University).

253 Submission 31 (Professor Jonathan Doak, Nottingham Trent University); Consultation 22 (Professor Jonathan Doak, Nottingham Trent University).

254 Submission 19 (Dr Tyrone Kirchengast, University of New South Wales).

255 Ibid.

256 Ibid.

257 Submission 23 (DPP).

258 Consultation 51 (Criminal Law Section, Law Institute of Victoria).

## Participation for protection

- 7.159 Some supporters of greater participation by victims in court perceive it as a way of ensuring that obligations to protect victims are complied with. Participation on this basis would involve a lawyer intervening to ensure that a victim can use a protective procedure, such as a remote witness facility.<sup>259</sup>
- 7.160 More controversially, Jonathan Doak and a number of victim support workers favour victims being permitted to have a lawyer appear in court to protect them from improper questioning during cross-examination by objecting to such questions.<sup>260</sup>
- 7.161 The Commission considers that participatory reforms that see victims appearing (personally or through a lawyer) in front of the jury cannot be accommodated in Victoria's adversarial criminal trial.
- 7.162 Reform proposals that permit lawyers to appear on behalf of victims to object to improper questioning, introduce evidence or cross-examine witnesses would introduce significant complexity into the trial process and risk prejudicing the jury against the accused. It would require the accused's lawyer to respond to objections, legal submissions and evidence introduced by both the prosecution and the victim's lawyer, and therefore undermine the accused's fair trial.

## Participation as prosecution

- 7.163 Very little support was expressed for victims having functions in court that are similar to those of the prosecution. This form of participation would see victims gaining access to the prosecution's evidentiary material, introducing evidence, cross-examining witnesses, making legal submissions during the trial and in sentencing, or appearing in relation to appeals.<sup>261</sup> These functions mirror those afforded to auxiliary prosecutors in inquisitorial jurisdictions in parts of Europe.<sup>262</sup>
- 7.164 Jonathan Doak suggested that the International Criminal Court's (ICC) approach to victim participation could be adapted for Victoria. In the ICC, victims can apply to the court to present their 'views and concerns' at certain stages of the proceedings, where their personal interests are affected.<sup>263</sup> The Rome Statute, which governs the operation of the ICC, states that victim participation must not prejudice the rights of the accused and a fair trial.<sup>264</sup> The court has held that victim participation encompasses victims introducing evidence, cross-examining witnesses and making opening and closing statements.<sup>265</sup> All of these are functions of the prosecution.

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259 Submissions 19 (Dr Tyrone Kirchengast, University of New South Wales), 31 (Professor Jonathan Doak, Nottingham Trent University); Consultations 23 (Court Network staff and a Court Networker—County Court), 44 (Kristy McKellar); Roundtable 12 (Victim support specialists, Wodonga).

260 Submission 31 (Professor Jonathan Doak, Nottingham Trent University) (for vulnerable witnesses only); Consultations 10 (A victim), 11 (Parent of a victim), 23 (Court Network staff and a Court Networker—County Court), 28 (Laurie Krause); Roundtable 12 (Victim support specialists, Wodonga).

261 Submissions 11 (Sandra Betts), 15 (Kristy McKellar), 26 (Victoria Police), 38 (Name withheld).

262 For more information, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015) [3.3]–[3.17], [8.87]–[8.95].

263 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998 2187 UNTS 90 (entered into force 1 July 2002), art 68(3). See also Victorian Law Reform Commission, *The International Criminal Court: A Case Study of Victim Participation in an Adversarial Trial Process*, Information Paper 3 (2015).

264 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998 2187 UNTS 90 (entered into force 1 July 2002), art 68(3).

265 *Prosecutor v Ruto and Sang* (Decision on Victims' Representation and Participation) (International Criminal Court, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [73] affirming the practice of Trial Chambers I, II and III. See also *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [81]; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998 2187 UNTS 90 (entered into force 1 July 2002), art 69(3). See also Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2014) 102.

- 7.165 Jonathan Doak, Tyrone Kirchengast, Victoria Police, Dianne Hadden and two victims urged the Commission to consider greater victim participation in the sentencing phase.<sup>266</sup> Such participation is justified on the basis that, by the time of the sentencing hearing, the accused's guilt has been determined; while the offender is still entitled to fairness in the sentencing hearing, there is no risk that a jury will be prejudiced.<sup>267</sup>
- 7.166 Victims, through a lawyer, could supplement the victim impact statement, lead evidence to support it, make submissions about sentencing or challenge evidence put before the court in support of the offender's plea.<sup>268</sup> A number of victims consulted by the Commission wanted an opportunity to challenge representations made by offenders in sentencing hearings.<sup>269</sup>
- 7.167 The risks to a fair trial and an independent prosecution associated with expanding victims' involvement in sentencing proceedings, beyond the existing victim impact statement scheme, are discussed at [7.101]–[7.111]. Similar concerns arise in appeal proceedings. Although there is no risk of prejudicing the jury, sentences and appeal proceedings must be decided by an impartial and objective tribunal in accordance with relevant evidence and legal principles.
- 7.168 The Commission considers that allowing victims to appear as a matter of course in sentencing or appeal proceedings goes beyond the victim's proper role in a criminal justice system, even one which recognises a triangulation of interests between the accused, the community and the victim. Rather, it elevates victims to the role of secondary prosecutor. In many cases, this would require the offender to respond to two sets of evidence and legal argument, which may be unfair in a two-party adversarial process. In addition, victims may make submissions based on their personal interests, which could conflict with the prosecution's submissions. Taking the victim's submissions into account may mean that decisions about sentencing and appeal proceedings might be determined by reference to factors which are not independent, impartial and fair.
- 7.169 The alternative is to allow victims to appear and make submissions, but not take their contribution into account. This risks falsely suggesting to victims that their input will have a bearing on judicial decision making. The Supreme Court of Victoria drew attention to this risk:

Where the law does not include the interests or views of victims as a relevant factor in the determination of a legal issue, permitting the victim to make separate submissions is unlikely to serve the interests of the victim, or the interests of justice. Obviously, the Court can give no more weight to a legal argument merely because it is put forward by the victim. The only effect would be to create a false expectation that the Court should give greater weight to a victim's submission, which would potentially undermine the confidence of the community and the victim in the justice system. Alternatively a situation may arise in which the victim and the prosecution make contrary legal submissions, potentially undermining the effectiveness of an independent prosecution.<sup>270</sup>

## Conclusion

- 7.170 The Commission does not recommended expanding victims' existing entitlements to participate in court beyond responding to applications regarding their confidential communications and presenting victim impact statements.

266 Submissions 11 (Sandra Betts), 19 (Dr Tyrone Kirchengast, University of New South Wales), 21 (Dianne Hadden), 38 (Name withheld).  
267 Submission 31 (Professor Jonathan Doak, Nottingham Trent University); Consultations 22 (Professor Jonathan Doak, Nottingham Trent University), 30 (Dr Tyrone Kirchengast, University of New South Wales).

268 Submissions 11 (Sandra Betts), 19 (Dr Tyrone Kirchengast, University of NSW); 31 (Professor Jonathan Doak, Nottingham Trent University).  
269 Submission 38 (Name withheld); Consultations 5 (Sue and Don Scales, Mildura), 11 (Parent of a victim), 44 (Kristy McKellar).  
270 Submission 27 (Supreme Court of Victoria).

- 7.171 All forms of participation outlined above contemplate introducing another actor—the victim—into the adversarial criminal trial process, to varying degrees. This is difficult to manage, and in some circumstances impossible, without prejudicing a fair trial. Moreover, adding a victim participant to the court proceedings would mean more court dates and documents to file, creating more delay and complexity. Reforms should be necessary, practical and feasible. Any consequential lengthening of timelines or increase in costs needs to be justified by the benefit to victims, the accused and the community.
- 7.172 Victims’ participation can be enhanced in ways that are compatible with an adversarial criminal trial process. Participation is about ensuring victims feel included, can make their views known and have their concerns heard. This can be achieved through regular, meaningful and effective communication and consultation with victims by OPP solicitors and prosecutors; and respectful treatment by all those involved in the criminal justice system.
- 7.173 Participation can also occur through restorative justice processes, which provide victims with another avenue for input, voice and participation. These processes are discussed in detail at [7.237—7.331].

#### An ad hoc right to participate

- 7.174 While the Commission does not recommend expanding victims’ existing entitlements to appear in court, the court may permit them to appear in other circumstances. It is well recognised that non-parties, including victims, can appear in proceedings where:
- Their interests would be directly affected by a decision in the proceeding, in that they would be bound by the decision.
  - They can show that the parties to the proceedings may not present all factual and legal information necessary for the court to reach a correct decision.
  - The court can be satisfied it will be ‘significantly assisted’ by the information that the non-party can provide, and that costs or delays are not disproportionate to the expected assistance.<sup>271</sup>
- 7.175 Courts considering whether to allow non-parties to appear have refused to outline exhaustively the circumstances in which such intervention should be allowed.<sup>272</sup> Nonetheless, a key factor is whether the non-party is ‘willing to offer the Court a submission on law or relevant fact which will assist the Court in a way which the Court would not otherwise have been assisted’.<sup>273</sup>
- 7.176 The Supreme Court of Victoria observed that it is not uncommon for non-parties, including victims, to seek leave to address the Court.<sup>274</sup> The Court has accepted the interest of non-parties and received submissions on behalf of witnesses where a witness objects to giving evidence on the grounds of a privilege or a potential witness applies to have a subpoena set aside.<sup>275</sup>

271 *R v Chaouk* (2013) 40 VR 356, 376–7 [37], citing with approval *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, 38–9 [2]–[6]. See also *Levy v Victoria* (1997) 189 CLR 579, 601, 604.

272 *United States Tobacco v Minister for Consumer Affairs* (1988) 20 FCR 520, 536..

273 *Karam v Palmone Shoes Pty Ltd* [2010] VSCA 252 (20 September 2010) [3], citing with approval *Levy v Victoria* (1997) 189 CLR 579, 604.

274 Submission 27 (Supreme Court of Victoria).

275 *Ibid.* The *Evidence Act 2008* (Vic) recognises a number of privileges, including a privilege against self-incrimination: s 128); journalist privilege: ss 126J–126K; religious confessions: s 127 (although the privilege excludes communications made for a criminal purpose). The provisions relating to confidential communications were originally in the *Evidence Act* (now repealed) and were characterised as a privilege.

- 7.177 Similarly, section 18 of the Evidence Act permits a child, spouse, de facto partner or parent of an accused to object to giving evidence for the prosecution.<sup>276</sup> These witnesses will not be required to give evidence where:
- (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the accused, if the person gives the evidence; and
  - (b) the nature and extent of that harm outweighs the desirability of having the evidence given.<sup>277</sup>
- 7.178 As noted in Chapter 6, child witnesses facing the prospect of giving evidence against a parent are entitled to independent legal advice and representation, which is provided on a pro bono basis by the Victorian Bar.<sup>278</sup> Whether or not the child objects to giving evidence, the independent lawyer is expected to convey the child's wishes to the court.<sup>279</sup>
- 7.179 These examples are indicative of circumstances where the interests of the prosecution and the victim may diverge and, as a result, the prosecution cannot discharge its obligation to act in the public interest while also furnishing the court with all the information necessary to make a proper decision.
- 7.180 The Commission considers that circumstances will arise, beyond those provided for in legislation, where victims may seek to appear and address the court about a matter affecting them. Interventions of this nature have been contemplated and can be accommodated by the courts. As the Supreme Court submitted:
- [a]s new provisions are introduced to protect victim-witnesses, it would be consistent with existing law and practice to allow a victim-witness to make submissions where the application of those provisions is considered by the Court.<sup>280</sup>
- 7.181 Interventions by the Commissioner for Victims' Rights in South Australia show how this works in practice. The Commissioner has intervened in a limited number of cases, based on the exceptional circumstances of each case. Examples include:
- Funding a barrister to assess and represent a child where the child's capacity and competency to give evidence were in question.<sup>281</sup>
  - Approving legal representation for a victim of a sexual assault in order to protect private and irrelevant information belonging to the victim on a laptop seized from the accused by police.<sup>282</sup>
- 7.182 Similarly, when in her former role as ACT Victims' Services Coordinator, Robyn Holder sought advice from an independent lawyer willing to intervene on behalf of a victim where the DPP would not apply for suppression orders despite serious and obvious safety concerns.<sup>283</sup> The Commissioner for Victims' Rights in South Australia has also provided victims with legal representation for the purposes of seeking the suppression of certain information.<sup>284</sup>
- 7.183 Holder noted that laws which permit victims to appear in relation to confidential communications simply provide expressly for a right that already exists: the right to be heard by the court where this is justified by an individual's interest in a matter.<sup>285</sup> The South Australian Commissioner considers his ad hoc interventions as augmenting

276 *Evidence Act 2008* (Vic) s 18(2).

277 *Ibid* s 18(6).

278 Department of Justice, *Providing Advice to Child Witnesses under Section 18 Evidence Act (2008): Guidance for Legal Practitioners Providing Pro Bono Advice to Children* (2013) ii. No formal arrangements currently exist for adult witnesses who might fall within the ambit of section 18.

279 *Ibid* 3.

280 Submission 27 (Supreme Court of Victoria).

281 Consultation 2 (Commissioner for Victims' Rights, South Australia).

282 Michael O'Connell, *Victims' Rights: Integrating Victims in Criminal Proceedings* (2011) 9.

283 Consultation 17 (Dr Robyn Holder, Griffith University). In this case, the DPP agreed to apply for suppression orders without the lawyer being required to intervene in court proceedings. Nevertheless, the case illustrates that such intervention is possible.

284 Information provided by Michael O'Connell, Commissioner for Victims' Rights, South Australia, 28 July 2016.

285 Consultation 17 (Dr Robyn Holder, Griffith University).



the existing right of victims to appear in relation to confidential communications applications.<sup>286</sup>

- 7.184 In Chapter 3, the Commission recommends that the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) be amended to expressly recognise the interests that victims have in criminal proceedings. If this recommendation is adopted, victims may be able to use this provision to justify their participation in court proceedings. Victims may also be able to appear to assert existing Human Rights Charter rights, such as the right to privacy.<sup>287</sup> In Canada,<sup>288</sup> the United Kingdom,<sup>289</sup> and continental Europe,<sup>290</sup> victims have pointed to human rights, in particular rights to privacy and to security of the person, to assert their interests in the context of criminal proceedings.<sup>291</sup>
- 7.185 As noted in Chapter 6, exceptional circumstances might justify legal assistance being given to victims to assert a particular interest or human right, or to protect particularly vulnerable victims, where the prosecution's obligations to be impartial prevent it from doing so. The Commission considers it impractical to specify when such assistance would be necessary. This is consistent with the reluctance of the courts to create strict rules around when non-parties are entitled to appear and make submissions.<sup>292</sup> However, the occasions when legal assistance is provided to victims should be monitored as part of the evaluation of the recommended legal service.

## Equal participation in the court process

### Participation for people with disabilities

- 7.186 People with disabilities,<sup>293</sup> in particular people with cognitive impairment, are disproportionately represented among victims of crime.<sup>294</sup> However, very few see the offender prosecuted.<sup>295</sup> For those whose case does lead to a prosecution, there are barriers to equal participation. The language and procedures used in court are rigid and complex, and adjustments are not always made to accommodate sensory, physical, learning or communication difficulties.<sup>296</sup> These factors prevent full and effective participation by people with disabilities.<sup>297</sup>
- 7.187 Successful prosecutions where the victim has a disability are described as 'the exception' in the Victorian Equal Opportunity and Human Rights Commission's report, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime*.<sup>298</sup> Prosecutions can

286 Michael O'Connell, *Victims' Rights: Integrating Victims into Criminal Proceedings* (2011) 9.

287 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

288 *R v O'Connor* [1995] 4 SCR 411, where the right to privacy contained in the Canadian *Charter of Rights and Freedoms* was relied on to protect a victim's confidential records. This case led to the introduction of the Canadian legislative framework for confidential communications, which is discussed in detail in Chapter 8.

289 See, eg, *R (On the application of B)* [2009] EWHC 106 [70]; *R v Camberwell Green Youth Court* [2005] 1 All ER 999

290 See, eg, *Doorson v the Netherlands* (Eur Court HR, Chamber, Application No. 2052/92, 26 March 1996) [4]; *SN v Sweden* (Eur Court HR, First Section, Application No. 34209/96, 2 July 2002).

291 See Victorian Law Reform Commission, *Victims' Rights and Human Rights: the International and Domestic Landscape*, Information Paper 4 (2015); Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) 9 *Criminal Law Review* 729, 745, proposing a victims' legal representation model for Scotland based on the right to privacy. Recently, the Supreme Court of New Hampshire in the United States has ordered that a victim can be legally represented in appellate proceedings to determine whether records about her prior sexual history can be made public: *State of New Hampshire v Seth Mazzaglia* (Case No 2014-0592, order dated 15 June 2016), reported in Dave Solomon, 'NH's Lizzi Marriott Case Could Set Precedent for Victims' Rights', *New Hampshire Union Leader* (online), 26 July 2016 <<http://www.unionleader.com/courts/NH-case-could-set-precedent-for-victims-rights-07272016>>.

292 *United States Tobacco v Minister for Consumer Affairs* (1988) 20 FCR 520, 536, noting that 'no strict rules have been developed'; *Levy v Victoria* (1997) 189 CLR 579, 604–5.

293 Disability is defined in section 4 of the *Equal Opportunity Act 2010* (Vic) to include total or partial loss of bodily function or part of the body or a malformation or disfigurement of part of the body, an organism in the body that may cause disease, a mental or psychological disease or disorder or a condition that may cause a person to learn more slowly.

294 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (2014) 6.

295 See generally *ibid*.

296 Submission 37 (Dr Margaret Camilleri); Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers—Final Report* (2013); Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Summary Report* (2014) 12; Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 16–17.

297 United Nations *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008). The Convention recognises that disability 'results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

298 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (2014) 12.



succeed when institutions adjust their practices to address the needs of people with disabilities.<sup>299</sup> Specific measures are required to enable people with disabilities to participate equally in the criminal trial process.<sup>300</sup> Chapter 8 of this report considers a number of protective reforms for victims, including those with disabilities. This section is concerned with measures that facilitate equal participation by victims in court proceedings.

## Reforms recommended by other reviews

- 7.188 Recent reviews by the Australian Human Rights Commission, the Victorian Equal Opportunity and Human Rights Commission, and the Law Reform Committee of the Victorian Parliament, have identified the following major barriers to equal participation by victims with disabilities in the criminal trial process:
- courts and criminal justice agencies not identifying that a person has a disability<sup>301</sup>
  - failures to make adjustments and modifications to court practices and facilities or provide aids to meet the needs of people with disabilities<sup>302</sup>
  - perceptions of people with disabilities as ‘unreliable, not credible or incapable of being a witness’<sup>303</sup>
  - communication techniques and styles of questioning that are not suited to the communication needs of the person, causing confusion and undermining their ability to give accurate and cogent evidence.<sup>304</sup>
- 7.189 In *Beyond Doubt*, the Victorian Equal Opportunity and Human Rights Commission made the following recommendations that, although directed to a wider group of people, are pertinent to victims of crime:
- Court Services Victoria should give priority to improving accessibility for people with disabilities across all courts, with particular priority given to hearing loops and space for mobility aides in courtrooms.<sup>305</sup>
  - A centralised booking system should be established for augmentative and alternative communication for use by Victoria Police, the OPP, Victoria Legal Aid, courts, tribunals, the Victims Support Agency and other justice agencies.<sup>306</sup>
- 7.190 The Commission endorses these recommendations.
- 7.191 Section 31 of the *Evidence Act 2008* (Vic) gives courts the discretion to make adjustments to the way they receive evidence from people who cannot ‘hear adequately’ or ‘speak adequately’. The *Uniform Evidence Manual*, published by the Judicial College of Victoria to assist judges in applying the Evidence Act, states that section 31 permits ‘the use of augmentative and alternative communication to enhance or replace speech’.<sup>307</sup>

299 Ibid.

300 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8; United Nations *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008) arts 5, 13.

301 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 5; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (2014) 41–3.

302 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 5; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (2014) 12.

303 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 5. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers—Final Report* (2013) 269; Georgina Dimopoulos, *Voices Against Violence: Paper 3: A Review of the Legislative Protections Available to Women with Disabilities Who Have Experienced Violence in Victoria* (2013) 121.

304 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 5; Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers—Final Report* (2013), xxiv; Georgina Dimopoulos, *Voices Against Violence: Paper 3: A Review of the Legislative Protections Available to Women with Disabilities Who Have Experienced Violence in Victoria* (2013) 119–21.

305 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (2014) 17 (recommendation 12).

306 Ibid 16 (recommendation 7). The Royal Commission into Family Violence notes that there has been limited progress in implementing this recommendation: Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol V 189.

307 Judicial College of Victoria, *Uniform Evidence Manual*, ch 2, part 2.1, div 3, s 31—‘Deaf and mute witnesses’, <<http://www.judicialcollege.vic.edu.au/eManuals/UEM/index.htm#27223.htm>>.

- 7.192 The Victorian Royal Commission into Family Violence recommended that the Judicial College of Victoria provide training to judicial officers to promote consistent application of section 31.<sup>308</sup> This training could also address the following additional issues raised by the Victorian Equal Opportunity and Human Rights Commission:
- the need for judicial officers to consider the effects of disability, such as physical barriers to court access, on a person's manner and ability to participate in court
  - the importance of adjusting judicial communication, and directing others in the court to do so where possible, such as in cross-examination
  - general education about disabilities and associated needs.<sup>309</sup>
- 7.193 The Commission considers that the early identification of a disability and associated needs, and the style of communication used by judicial officers and lawyers, are issues that can also be addressed by the introduction of intermediaries in Victoria.

### Intermediaries

- 7.194 Intermediary schemes aim to protect and empower vulnerable witnesses to give their best evidence. Intermediaries are not advocates or support workers. Their role is to facilitate communication between a witness and the court, to 'ensure that communication with the witness is as complete, coherent and accurate as possible'.<sup>310</sup> The general function of an intermediary is to:
- communicate to the witness any questions put to the witness
  - communicate to the person asking such questions the responses given in reply
  - explain the questions and answers as far as necessary to enable them to be understood by the witness and the questioner.<sup>311</sup>
- 7.195 Intermediaries are available in England and Wales where the quality of a witness's evidence is likely to be diminished because of a mental or physical disorder or an 'impairment of intelligence or social functioning'.<sup>312</sup>
- 7.196 Intermediaries can also be appointed for child witnesses in England and Wales. Children experience significant disadvantage when giving evidence in court, with the extent of the disadvantage depending on their age and maturity. Communication techniques used in cross-examination, such as leading questions, repetitive questioning, closed statements requiring affirmation or rejection, double-barrelled questions or questions phrased negatively, have been shown to confuse and mislead children.<sup>313</sup> Research has established that:
- the bundle of techniques and tactics which make up conventional cross-examination are quite remarkably unfit for the task of assessing the credibility and accuracy of a child's evidence, or at least, they are unfit if any part of the criterion for success is that the outcome of testing be itself credible and reliable.<sup>314</sup>

308 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol V 197, recommendation 175.  
 309 Submission 4 (Victorian Equal Opportunity and Human Rights Commission). See also Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers—Final Report* (2013), 222 (recommendations 26 and 27).  
 310 Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (United Kingdom, 2015) [3.12].  
 311 See *Criminal Procedure Act 1986* (NSW) sch 2 cl 88(1); *Youth Criminal Justice and Evidence Act 1999* (UK) s 29(2).  
 312 *Youth Justice and Criminal Evidence Act 1999* (UK) ss 16, 19, 29.  
 313 See, eg, Annie Cossins, 'Cross-examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68; Rachel Zajac, Sarah O'Neill and Harlene Hayne, 'Disorder in the Courtroom? Child Witnesses under Cross-Examination' (2012) 32 *Developmental Review* 181. For the judicial perspective, see Her Honour Judge Meryl Sexton, 'A Judicial Perspective' (Presentation at Victims Support Agency Symposium: Intermediary Programs and Communication Assistants Models, 18 February 2015).  
 314 Emily Henderson, 'All the Proper Protections—The Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses' (2014) 2 *Criminal Law Review* 93, 93–4.

## The role of intermediaries

7.197 Intermediaries have been a part of the criminal justice system in England and Wales since 2008, and can be used by victims, witnesses or accused persons.<sup>315</sup> They assist in court, during police interviews and in meetings with the prosecution service. Intermediaries assist the prosecution, defence and court in the lead-up to and during a trial in the following ways:

- preparing reports for the court about comprehension and communication capacity
- participating during a ground rules hearing, in which rules are established about how the witness will be questioned based on the intermediary's assessment report
- providing guidance on appropriate styles of questioning and reviewing the questions of counsel before trial
- providing assistance with identifying the need for other communication aids when necessary
- alerting the court to issues such as fatigue.<sup>316</sup>

7.198 Intermediaries are permitted to intervene where they believe that a question is too complicated or a witness has not understood it. The lawyer must be given a chance to rephrase the question before the judge can invite the intermediary to put the question to the witness.<sup>317</sup> Intermediaries have been reported as:

- empowering vulnerable witnesses, including victims
- helping to bring offenders to justice
- altering how judicial officers and lawyers understand effective communication.<sup>318</sup>

7.199 While improper questioning does still occur and procedures are reportedly not followed in some cases,<sup>319</sup> the English Court of Appeal has said:

It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round.<sup>320</sup>

7.200 In Australia, more limited schemes have been introduced in South Australia and New South Wales. South Australian legislation entitles witnesses with complex communication needs to be given communication assistance in court, including through a volunteer 'communication partner'.<sup>321</sup> New South Wales has introduced legislation for a pilot witness intermediary program for child victims of sexual offences.<sup>322</sup> The Tasmania Law Reform Institute is currently investigating the feasibility of introducing an intermediary scheme in Tasmania to facilitate equal access to justice for victims, witnesses and accused persons with complex communication needs.<sup>323</sup>

315 This became the case following a pilot program that commenced in 2004. See Amy Watts, *To Investigate Models of Intermediaries for Child Victims/Witnesses in the Criminal Justice System in England, Ireland, Austria and Norway* (The Winston Churchill Memorial Trust of Australia, 2014) 15.

316 Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (United Kingdom, 2015). For case examples, see *R v RL* [2015] EWCA Crim 1215; *R v FA* [2015] EWCA Crim 209; *R v Lubemba, R v JP* [2014] EWCA Crim 2064.

317 Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (United Kingdom, 2015) [3.93].

318 For a case example see *R v Watts* [2010] EWCA Crim 1824 [56]: 'Until recently there was no possibility of the court even considering the evidence of complainants with serious communication difficulties.' For commentary, see Emily Henderson, "'A Very Valuable Tool': Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence & Proof* 154, 167–8; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press, 2015).

319 Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 572, citing Penny Cooper, *Tell Me What's Happening 3: Registered Intermediary Survey 2011* (City University London, 2012) 4.

320 *R v Lubemba, R v JP* [2014] EWCA Crim 2064 [45].

321 *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) ss 5, 9, 12 (commenced 1 July 2016).

322 *Criminal Procedure Act 1986* (NSW) sch 2 pt 29 div 3. 'Witness' in part 29 is 'a child who is a complainant in the proceedings': cl 82.

323 Tasmania Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* Issues Paper No 22 (2016).

## Is an intermediary scheme needed in Victoria?

- 7.201 In 2013, the Victorian Parliament Law Reform Committee recommended that the Government consider establishing a witness intermediary scheme, modelled on that of England and Wales, for individuals with an intellectual disability or cognitive impairment.<sup>324</sup> This recommendation was given in-principle support by the government of the day.<sup>325</sup>
- 7.202 Almost universal support for the introduction of an intermediary scheme in Victoria was expressed in submissions to the Commission and during consultations.<sup>326</sup> The Commission was told that intermediaries are needed for child victims, vulnerable victims and those with a cognitive impairment, communication difficulty, mental illness or physical disability (such as blindness or deafness). The Office of the Public Advocate (OPA), DPP and the Supreme Court noted that intermediaries would facilitate access to the justice system.<sup>327</sup>
- 7.203 Only the Law Institute of Victoria and the Victorian Bar and Criminal Bar Association expressed opposition, on the basis that existing obligations for lawyers and judicial officers are sufficient and supported by training.<sup>328</sup> The Commission does not agree. The findings of earlier reviews about the barriers encountered by child victims and victims who have a disability, together with comments made during the Commission's review, have established that current arrangements are inadequate.
- 7.204 There is a need for intermediaries during the criminal trial process for child victims and for victims who have a disability that is likely to undermine the quality of their evidence. The scheme should be underpinned by legislation, to reinforce the victim's right to be assisted in this way.
- 7.205 The use of intermediaries may cause some delays in preparing for the trial, and cross-examination may take longer. However, as the Supreme Court noted, promoting access to the justice system is a strong justification.<sup>329</sup>

## Features of a Victorian intermediary scheme

### Ground rules hearings

- 7.206 In England and Wales, intermediaries provide an assessment report which informs a subsequent 'ground rules hearing'.
- 7.207 Ground rules hearings are a pre-trial process that involves all parties and the judge. During the hearing, rules are established about 'the conduct of questioning'. The court may give directions that:
- relieve a party of any duty to put its case to a witness in its entirety
  - concern the manner or duration of questioning
  - concern questions that may or may not be asked
  - allocate question topics among defendants where there is more than one defendant
  - concern the use of aids to help with communicating a question or answer.<sup>330</sup>

324 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers—Final Report* (2013) 285 (recommendation 36).

325 Victorian Government, *Whole of Victorian Government Response to the Law Reform Committee Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (5 September 2013) 20.

326 Submissions 14 (Victims of Crime Commissioner, Victoria), 17 (Office of the Public Advocate), 21 (Dianne Hadden), 23 (DPP), 26 (Victoria Police), 27 (Supreme Court of Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University), 37 (Dr Margaret Camilleri), 38 (Name withheld), 40 (Former VOCCC victim representatives), 43 (Liberty Victoria); Consultations 4 (Parent of victims), 12 (Parent of a victim), 13 (Parents of a victim), 18 (Child Witness Service, Department of Justice and Regulation), 20 (Parent of victims), 30 (Dr Tyrone Kirchengast, University of NSW), 32 (Legal Aid NSW), 34 (Office of the Director of Public Prosecutions, NSW), 37 (Centacare, Barwon South West Region), 38 (Executive Officer, Barwon South West RAJAC), 43 (Victoria Police SOCIT, Wodonga); Roundtables 3 (Victim support specialists, Geelong), 12 (Victim support specialists, Wodonga), 17 (Criminal justice agencies and stakeholder organisations), 18 (Victims of crime). While not referring specifically to intermediaries, the Victorian Equal Opportunity and Human Rights Commission (Submission 4) and Women with Disabilities Victoria (Submission 18) both identify a need to respond to communication and support needs of people with disabilities.

327 Submissions 17 (Office of the Public Advocate), 23 (DPP), 27 (Supreme Court of Victoria). See also Submission 37 (Dr Margaret Camilleri).

328 Submissions 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association).

329 Submission 27 (Supreme Court of Victoria).

330 *Criminal Procedure Rules 2015* r 3.9(7)(b).

- 7.208 Ground rules hearings appear to be vital in bringing to the attention of lawyers and judicial officers the comprehension capacity and communication needs of the witness. This helps the parties in planning questions and communication and the running of the trial. If a ground rules hearing is done effectively, there should be less need for an intermediary to intervene during cross-examination.<sup>331</sup>
- 7.209 Under the New South Wales pilot scheme, there is no provision for a ground rules hearing although the court can order that an intermediary provide an assessment report.<sup>332</sup> However, comments made to the Commission clearly support the approach taken in England and Wales.
- 7.210 The Child Witness Service noted that ground rules hearings would help judges understand a child's needs.<sup>333</sup> The DPP noted that ground rules conferences allow rules to be made by the judge about appropriate questioning, as well as identifying other measures to help the victim feel safe and confident.<sup>334</sup> The executive officer of the Barwon South West Regional Aboriginal Justice Advisory Committee told the Commission that an intermediary should assess the needs of a witness and rules should be established before the trial.<sup>335</sup> The Commission agrees and considers that assessment reports and ground rules hearings should be an integral aspect of an intermediary scheme in Victoria.

### Professional and impartial facilitators

- 7.211 Intermediaries in England and Wales are drawn from speech therapists, occupational therapists, psychologists, social workers, nurses and teachers, among others. They are selected to assist a particular witness on the basis of their skills and experience.<sup>336</sup>
- 7.212 In England and Wales and New South Wales, intermediaries are paid professional roles forming part of a registry or panel, and in England and Wales they must be accredited.<sup>337</sup> In contrast, in South Australia, communication partners are trained volunteers and a non-government organisation runs the Communication Partner Service.<sup>338</sup>
- 7.213 The paramount duty of intermediaries is to the court and they must perform their role impartially and neutrally.<sup>339</sup> In New South Wales, England and Wales, the intermediary must undertake to faithfully perform their functions before the witness gives their evidence.<sup>340</sup> A guidance issued by the Ministry of Justice for intermediaries in England and Wales states that they should not be alone with a witness at court, discuss the witness's evidence or express an opinion about evidence or about the prosecution.<sup>341</sup> A code of practice and a code of ethics guide their role.<sup>342</sup>
- 7.214 The DPP, Supreme Court and Child Witness Service supported the introduction of a scheme that uses professional qualified intermediaries with experience and training relevant to the role.<sup>343</sup> Liberty Victoria noted that intermediaries should be officers of the court with a duty to be impartial and ensure a witness gives their best evidence.<sup>344</sup>
- 7.215 The Commission favours an intermediary model that involves professionals with a range of skills, experience and qualifications, and from a range of cultural backgrounds. Intermediaries should be paid and trained to perform this vital role, with a paramount duty

331 Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (United Kingdom, 2015) [3.91].

332 *Criminal Procedure Act 1986* (NSW), sch 2 cl 89(6)–(7).

333 Consultation 18 (Child Witness Service, Department of Justice and Regulation).

334 Submission 23 (DPP). Ground rules hearings were also supported by Submission 21 (Dianne Hadden); Consultations 20 (Parent of victims), 32 (Legal Aid NSW), 43 (Victoria Police SOCIT, Wodonga); Roundtable 17 (Criminal justice agencies and stakeholder organisations).

335 Consultation 38 (Executive Officer, Barwon South West RAJAC).

336 Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (United Kingdom, 2015) [3.14].

337 *Ibid* [3.1]. In New South Wales, an intermediary must undertake a Department of Justice training course and have tertiary qualifications in psychology, social work, speech pathology or occupation therapy: see *Criminal Procedure Regulations 2010* (NSW) reg 100A.

338 See Attorney-General's Department, South Australia, 'Communication Partner Service' <<http://www.agd.sa.gov.au/initiatives/disability-justice-plan/communication-partner-service>>.

339 *Criminal Procedure Act 1986* (NSW) sch 2 cl 88(2); Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (United Kingdom, 2015) [3.14].

340 *Criminal Procedure Act 1986* (NSW) sch 2 cl 90(4); *Youth Justice and Criminal Evidence Act 1999* (UK) s 29(5).

341 Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (United Kingdom, 2015) [3.14].

342 *Ibid* 8–12.

343 Submission 23 (DPP), 27 (Supreme Court of Victoria); Consultation 18 (Child Witness Service, Department of Justice and Regulation). Victim support specialists in Wodonga also stated that intermediaries should be skilled professionals, subject to an accreditation system: Roundtable 12.

344 Submission 43 (Liberty Victoria).

to the court. Ideally, Aboriginal victims of crime should be able to access the services of an Aboriginal intermediary.

- 7.216 The Child Witness Service already conducts an assessment of the needs of child witnesses and provides a service valued by victims, lawyers and the judiciary. There is no equivalent service in England and Wales. Also in Victoria, the OPA coordinates a volunteer independent third person service that provides support and communication assistance to people with cognitive impairment and mental illness at police interviews. The OPA supported legislative reform that would see the introduction of intermediaries during criminal trials for victims, but offered the expansion of the independent third persons program as an alternative.<sup>345</sup>
- 7.217 Given the existence of these services in Victoria, it may be more appropriate to use existing expertise to coordinate a professional intermediary service rather than create a new service.

#### When intermediaries may be used

- 7.218 Intermediaries can be used in England and Wales as part of police interviews, including interviews recorded for the purposes of evidence-in-chief.<sup>346</sup> Intermediaries are also available to the police in New South Wales for interviews.<sup>347</sup>
- 7.219 The Child Witness Service told the Commission that it would be important to have intermediaries involved with police statements that are recorded for the purposes of forming a person's evidence-in-chief.<sup>348</sup> The OPA's independent third person program sees volunteers support and assist people with a cognitive impairment or mental illness in police interviews, including the video-recording of the victim's evidence-in-chief.<sup>349</sup>
- 7.220 The Commission considers that there should be continuity between the communication assistance provided at police interviews and in court, particularly where interviews are recorded as the victim's evidence-in-chief.<sup>350</sup> Simply expanding the OPA's volunteer service is not appropriate because the program lacks legislative foundation and resources.<sup>351</sup> Professional intermediaries should be used, with an overriding duty to the court. However, independent third person volunteers would still have an important role to play, particularly in assisting those not eligible for an intermediary. This is a matter about which close consultation with the OPA is required.

#### Eligibility for and appointment of intermediaries

- 7.221 In England and Wales, intermediaries can be appointed in any criminal proceedings for a witness who is under 17, or where the quality of the witness's evidence is likely to be diminished by reason of:
- 'mental disorder' as defined by the *Mental Health Act 1983*
  - 'significant impairment of intelligence or social functioning'
  - a physical disability or disorder.<sup>352</sup>
- 7.222 The prosecution can apply to use an intermediary, or the court can do this on its own initiative.<sup>353</sup> The court is required to take the views of the witness into account.<sup>354</sup>

345 Submission 17 (Office of the Public Advocate).

346 *Youth Justice and Criminal Evidence Act 1999* (UK) ss 27, 29(6); Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (United Kingdom, 2015) [3.15].

347 Consultation 49 (Commissioner of Victims Rights, NSW).

348 Consultation 18 (Child Witness Service, Department of Justice and Regulation). Having intermediaries involved from an early stage was also noted in Submission 40 (Former VOCC victim representatives); Consultations 19 (Victims of Crime Commissioner, Victoria), 20 (Parent of victims), 34 (Office of the Director of Public Prosecutions, NSW); Roundtables 12 (Victim support specialists, Wodonga), 18 (Victims of crime).

349 Submission 17 (Office of the Public Advocate).

350 In Victoria, video-recorded statements can be used as the evidence-in-chief of a child victim or a victim with a cognitive impairment in the prosecution of sexual offences, indictable offences involving assault, injury or threat of injury, and certain offences involving child pornography: *Criminal Procedure Act 2009* (Vic) s 366. See Chapter 8 for further discussion. Submission 31 (Professor Jonathan Doak, Nottingham Trent University) and Consultation 20 (Parent of victims) said that it would be helpful to have a person supporting children early on, rather than being appointed later as a stranger.

351 See Submission 17 (Office of the Public Advocate).

352 *Youth Justice and Criminal Evidence Act 1999* (UK) s 16(1)–(2). Note that special protections may continue to apply to a child victim 'in need of special protection' after attaining the age of 17 years, in accordance with ss 20–21 of the Act. The *Registered Intermediary Procedural Guidance Manual* states that a witness under 18 years of age is eligible: [3.6].

353 *Youth Justice and Criminal Evidence Act 1999* (UK) s 19(1).

354 *Ibid* s 19(3)(a).



- 7.223 In New South Wales, access to an intermediary is limited to child victims of sexual offences. For child victims under 16 years, the court must appoint an intermediary unless one is not available or it is impractical, unnecessary, inappropriate or not in the interests of justice.<sup>355</sup> For children 16 years and over, an application can be made or the court can appoint an intermediary on its own initiative where it is satisfied that the witness has difficulty communicating.<sup>356</sup>
- 7.224 The DPP expressed support for the use of intermediaries as a measure to ensure access to justice for victims and witnesses with a cognitive, communication, or physical disability, including individuals who are blind or deaf or who have autism or a speech disorder.<sup>357</sup> While submitting that intermediaries were not needed, the Law Institute of Victoria stated that, if intermediaries were introduced, they should be restricted to the most vulnerable victims of sexual and violent offences.<sup>358</sup>
- 7.225 The OPA recommended that intermediaries be available to people with a cognitive disability or mental illness.<sup>359</sup> Victim support specialists in Wodonga recommended that an individualised assessment process be part of the decision as to whether an intermediary is appointed.<sup>360</sup> Victoria Police said that the views of the victim should be taken into account.<sup>361</sup>
- 7.226 The Child Witness Service suggested that all children under the age of 10 should be able to access an intermediary and that children over 10 should have their need for an intermediary assessed. They also considered that individuals with a cognitive impairment, complex mental illness, or neurological conditions such as aphasia, dyslexia, serious learning difficulties and early stage dementia should be able to access an intermediary.<sup>362</sup>
- 7.227 Intermediaries aim not only to protect vulnerable witnesses from further trauma or distress, but also to promote equal participation in the criminal trial process. They do not stop an accused person from challenging the victim's evidence; rather, their role is to make sure this is done in a way that ensures fairness for the accused and the victim. For these reasons, restricting the availability of intermediaries to children only, or closed definitions of disability, or certain offences is not justified.

### Conclusion

- 7.228 Following the example set by New South Wales, the court should be required to appoint an intermediary in all cases where a child witness is under the age of 16. Further, any child under the age of 18 should be able to apply for an intermediary to be appointed where it is not otherwise mandatory.
- 7.229 However, if a child under the age of 16 requests that an intermediary not be appointed and is assessed as not needing one, the child's wishes should be respected and an intermediary should not be appointed.
- 7.230 The Commission acknowledges that the maximum age at which the law should presume that a child needs an intermediary is a matter that may require further consultation with experts in the development of communication and comprehension skills in children.
- 7.231 For adults, the Commission prefers an approach modelled on the *Youth Justice and Criminal Evidence Act 1999* in England and Wales. An assessment would be made of the victim's need for an intermediary based on whether a disability, as defined by the *Equal Opportunity Act 2010* (Vic), is likely to diminish the quality of their evidence. This assessment would then guide the court in determining whether an intermediary is required. There should also be a requirement to consider the victim's views. The

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355 *Criminal Procedure Act 1986* (NSW) sch 2 cl 89(3)(a), 89(4).  
356 *Ibid* sch 2 cl 89(3)(b).  
357 Submission 23 (DPP).  
358 Submission 25 (Law Institute of Victoria).  
359 Submission 17 (Office of the Public Advocate).  
360 Roundtable 12 (Victim support specialists, Wodonga).  
361 Submission 26 (Victoria Police).  
362 Consultation 18 (Child Witness Service, Department of Justice and Regulation).



Commission accepts that, for resourcing and initial implementation purposes, a phased introduction of intermediaries may be required, starting with, for example, sexual offences and family violence cases before broadening to other offences.

- 7.232 With regard to how an intermediary is appointed, the Commission considers that there is merit in a tripartite approach that:
- requires the court to appoint an intermediary for a child victim under 16 years of age unless the child requests that an intermediary not be appointed and is assessed as not needing one
  - empowers the court to appoint an intermediary by its own initiative for a child victim who is 16 years of age or older or a victim with a disability
  - allows a party to make an application for an intermediary to be appointed for a child victim who is 16 years of age or older or a victim with a disability.
- 7.233 Victoria Police and the DPP would need to have procedures in place to ensure that victims who would benefit from an intermediary are identified early and made aware of the role of intermediaries, and that the prosecution applies to the court, where required, to have an intermediary appointed for proceedings.

#### Fair trial considerations

- 7.234 The role of intermediaries is an active one—they are involved in pre-trial ground rules hearings and decisions about how a witness will give evidence, and they may intervene while the witness gives evidence where a question is too complicated or not understood. Although not raised in submissions and during consultations, there could be concern that intermediaries may undermine the principle of party control over the presentation of evidence to the court and the ability of the accused to test the prosecution’s evidence.
- 7.235 Commentary, evaluation and case law have not indicated that intermediaries in England and Wales intervene excessively, or otherwise threaten a fair trial for an accused.<sup>363</sup> Rather, their function has been described as aiming to remedy an ‘illegitimate advantage’ over a particularly disadvantaged witness.<sup>364</sup> Creating doubt about a victim’s testimony is a legitimate aim of cross-examination but it must be done in a manner that is also fair for children and people with disabilities and does not exploit vulnerability. Professionalism, impartiality, comprehensive guidance, detailed assessment procedures, appropriate jury directions and ground rules hearings are central to ensuring that the role of an intermediary does not undermine fairness to the accused.
- 7.236 Accused persons are not covered by the formal intermediary scheme in England and Wales, however courts have appointed intermediaries to assist vulnerable accused persons where necessary to ensure a fair trial.<sup>365</sup> While beyond its terms of reference, the Commission supports in principle the appointment of intermediaries to assist accused persons and other witnesses, to promote equal participation.<sup>366</sup>

363 See, eg, *R v Christian* [2015] EWCA Crim 1582; *R v RL* [2015] EWCA Crim 1215; Emily Henderson, ‘“A Very Valuable Tool”: Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence & Proof* 154, 167; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press, 2015) 284–6.

364 Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 539.

365 See, eg, *Dixon v R* [2013] EWCA Crim 465.

366 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) requires that an accused ‘have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance’: s 25(2)(j).

## Recommendations

- 30 The Department of Justice and Regulation, in consultation with the Office of the Public Advocate, should establish a scheme for the appointment of professional intermediaries, modelled on the Witness Intermediary Scheme in England and Wales. The intermediaries would assist in obtaining evidence from child victims and victims who have a disability, as defined by the *Equal Opportunity Act 2010* (Vic), that is likely to diminish the quality of their evidence.
- 31 The intermediary scheme should be underpinned by legislation that:
- (a) requires that an intermediary will be appointed for a child victim under 16 years of age, unless the child requests that an intermediary not be appointed and is assessed as not needing one
  - (b) empowers the court to appoint an intermediary, either upon application or by the court's own initiative, for a child victim 16 years or over
  - (c) empowers the court to appoint an intermediary, either upon application or by the court's own initiative, for a victim with a disability, as defined by the *Equal Opportunity Act 2010* (Vic), that is likely to diminish the quality of their evidence.

## Participation in restorative processes

- 7.237 Many victims of crime seek a more meaningful and inclusive way to participate, including more effective means of conveying their story and the impact of the offending.<sup>367</sup> The need to ensure a fair and impartial prosecution limits the extent to which victims can actively participate in court proceedings. Restorative justice conferences could offer victims who want to participate a supportive and flexible forum, responsive to their needs and interests, in which to voice their views and ask questions.<sup>368</sup>
- 7.238 Studies have consistently reported high levels of satisfaction among victims who choose to participate in restorative justice conferencing, including in the context of serious crimes.<sup>369</sup> For offenders who accept responsibility, restorative justice conferencing can be a satisfactory experience because it provides a forum in which to offer an explanation, express remorse or seek to make amends. There may also be benefits for the community to the extent that it increases confidence in the criminal justice system.<sup>370</sup>
- 7.239 However, restorative justice is not a process that every victim or offender would want to participate in and nor would it always be appropriate for them to do so. For this reason, it is crucial that any restorative justice scheme is based on informed consent and includes rigorous assessment of when it is suitable and safeguards for both victims and offenders.
- 7.240 Consistent with the terms of reference, the discussion and recommendations in this report about introducing restorative justice in Victoria focus on the criminal trial process for indictable offences. The stages at which restorative justice conferencing is contemplated include:

367 Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002) 50, 52; Haley Clark, "What is the Justice System Willing to Offer?" Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' *Family Matters* No 85, Australian Institute of Family Studies (2010); Tinneke Van Camp and Jo-Anne Wemmers, 'Victims' Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117.

368 Tinneke Van Camp and Jo-Anne Wemmers, 'Victims' Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117.

369 A summary of recent research on restorative justice involving serious offending is outlined at [7.252]–[7.260].

370 Submission 2 (Seppy Pour).

- where a decision is made by the DPP to discontinue a prosecution
- after a plea of guilty and before sentencing
- after a plea of guilty and in connection with an application for compensation or restitution orders (which may be made after sentencing).

## What is restorative justice?

- 7.241 The term restorative justice has been applied to a range of different justice innovations and interventions. Some of these, such as the County Koori Court sentencing process, do not require the victim to be involved and are more appropriately characterised as therapeutic justice or community justice.<sup>371</sup> Defining restorative justice is important because misunderstandings and inflated expectations about what restorative justice is, and can achieve, contribute to unease about incorporating it into criminal justice systems.
- 7.242 Restorative justice is a process, not an outcome.<sup>372</sup> The European Union Directive that sets out minimum standards for victims of crime describes restorative justice as:
- any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party.<sup>373</sup>
- 7.243 It is distinguished from the traditional criminal process both in terms of how crime is framed and the response to crime. Restorative justice is 'based on the fundamental principle that criminal behaviour not only violates the law, but also injures victims and the community'.<sup>374</sup> It gives priority to repairing harm and directly involving the affected people. Offenders are required to accept responsibility and confront the consequences of their actions. In this way, restorative justice demands that offenders actively engage in the process. It also requires active input from victims. Some victims will not desire this; some may not feel ready until years after criminal proceedings finish; and some may be placed at risk of further harm.<sup>375</sup>

## Victim-offender restorative justice conferences

- 7.244 The Commission's consideration of restorative justice has focused on victim-offender conferencing (sometimes referred to as 'mediation'). Many of the essential elements of restorative justice conferencing that have emerged from practice, research and guidelines promote the entitlements and interests of victims as well as offenders and are consistent with the United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.<sup>376</sup> They include:
- One or more conferences or meetings are conducted in person, by video link, through representatives, or through written correspondence.
  - There is rigorous assessment of suitability, extensive preparation and debriefing, and an impartial, skilled and professional facilitator.
  - Victims and offenders give free and informed consent to participation, and have the right to seek legal advice and to withdraw at any time.

371 Zöe Dawkins et al, *County Koori Court: Final Evaluation Report* (County Court of Victoria and Department of Justice, 2011) 34–5; Jacqueline Jouido Larsen, *Restorative Justice in the Australian Criminal Justice System* (Research and Public Policy Series No 127, 2014) 15.

372 Kathleen Daly, 'What is Restorative Justice? Fresh Answers to a Vexed Question' (2015) 12 *Victims and Offenders* 1, 13.

373 *Directive 2012/29/EU of the European Parliament and of the Council of the 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA* (2012) OJ L 315/57 art 2 (1.d). See also the definition of 'restorative process' in UN Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002), which extends to include participation by community members.

374 United Nations Office of Drugs and Crime, *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series, 2006) 6. See also Submissions 2 (Seppy Pour), 36 (Centre for Innovative Justice).

375 The potential risks of restorative justice in the context of gendered violence are discussed further below. See generally Julie Stubbs, 'Gendered Violence and Restorative Justice' in Anne Hayden et al (eds), *A Restorative Approach to Family Violence: Changing Tack* (2014), 206; Julie Stubbs, 'Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence' (2010) 33(3) *UNSW Law Journal* 970.

376 UN Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002).

- Offenders fully accept responsibility for the crimes charged.
- There are safeguards to protect the safety, privacy and legal rights of victims and offenders.
- Victims and offenders are actively involved.<sup>377</sup> Active involvement does not require victims to speak directly to offenders. It refers to the opportunity to consent to restorative justice and contribute to the direction and goals of the process.
- The process is dialogue-driven rather than a settlement-driven.<sup>378</sup> Reaching an outcome or agreement, whether financial, symbolic or otherwise, should be an option but not the predetermined aim. As Daly notes, '[a] meeting assumes an encounter or process conception ... not an outcome conception, because desired outcomes will vary by the context and purpose of the meeting'.<sup>379</sup>
- Agreements, where reached, are fair, reasonable and capable of being fulfilled by the offender.
- Offender participation in restorative justice after a guilty plea and before sentencing may be taken into account at the discretion of the sentencing judge.

7.245 Restorative justice processes are based on principles of respect, inclusion, direct accountability, consensual and empowered participation, safety, facilitator neutrality, direct communication and material and emotional reparation.<sup>380</sup> Many of these correlate with what Mary Koss refers to as victims' 'justice needs'.<sup>381</sup>

7.246 Restorative justice may therefore offer a more just experience for victims, as well as offenders, when compared to their interaction with the formal criminal trial process.<sup>382</sup> This is not to say that restorative justice should be a substitute for the criminal trial process. The formal justice system can be experienced as restorative by victims and will be viewed as the primary site for justice by many.<sup>383</sup>

## Restorative justice in Victoria

7.247 There is no legislated restorative justice process available in Victoria for indictable crimes committed by adults.<sup>384</sup> The South Eastern Centre Against Sexual Assault operates a restorative justice program for victims of sexual offences.<sup>385</sup> Two other Centres Against Sexual Assault told the Commission that they run a form of restorative justice with a therapeutic focus or as family therapy.<sup>386</sup> These processes operate independently of the criminal justice system and should not be affected by the recommendations in this report.

377 Restorative justice can also involve affected members of the broader community, but this will not be appropriate in all situations, such as in the context of the sentencing process.

378 Described as 'victim sensitive offender dialogue' and 'humanistic mediation' by Mark Umbreit, William Bradshaw and Robert Coates, 'Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue' (1999) 6 *International Review of Victimology* 321.

379 Kathleen Daly, 'What is Restorative Justice? Fresh Answers to a Vexed Question' (2015) 12 *Victims and Offenders* 1, 13. See also Mark Umbreit, William Bradshaw and Robert Coates, 'Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue' (1999) 6 *International Review of Victimology* 321, 327.

380 Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 12; Joanna Shapland, 'Implications for Growth: Challenges for Restorative Justice' (2014) 20(1) *International Review of Victimology* 111, 123; Heather Strang, 'Concluding Thoughts', in Anne Hayden et al (eds) *A Restorative Approach to Family Violence: Changing Tack* (2014) 221.

381 Mary Koss, 'Restorative Justice for Acquaintance Rape and Misdemeanour Sex Crimes' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (2010) 221; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002), 8–22. Justice needs are also referred to as 'justice interests': Kathleen Daly, 'Reconceptualizing Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge, 2014) 388; Consultation 17 (Dr Robyn Holder, Griffith University).

382 Tinneke Van Camp and Jo-Anne Wemmers, 'Victims' Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117.

383 Consultation 14 (A victim) stated that her criminal justice experience was restorative. See also Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395, 405–6; Haley Clark, "'What is the Justice System Willing to Offer?'" Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' (Family Matters No 85, Australian Institute of Family Studies, 2010) 30.

384 The Children's Court can refer young offenders to group conferencing but this is not necessarily a victim-centred process, as victim consent and participation are not preconditions. See *Children, Youth and Families Act 2005* (Vic) s 415.

385 South Eastern Centre Against Sexual Assault, *Restorative Justice Program* (Monash Health, undated); Melissa Davey, 'Victims Face Their Molester in Victoria's World-First Restorative Justice Program', *The Guardian* (online), 17 June 2015 <<http://www.theguardian.com/australia-news/2015/jun/17/all>>.

386 Roundtable 8 (Metropolitan Centres Against Sexual Assault).

7.248 Section 83A of the *Sentencing Act 1991* (Vic) allows the Magistrates' Court and County Court to defer sentencing for up to 12 months. This requires the agreement of the offender. Sentencing can be deferred for a number of purposes, including to allow the offender to participate in programs aimed at addressing the underlying causes of offending or the impact of offending on the victim.<sup>387</sup> When the matter returns to the court for sentencing, the court is required to consider the offender's behaviour during the deferral period. If a pre-sentence report was ordered, it must take that report into account, together with 'any other relevant matter'.<sup>388</sup> Emeritus Professor Arie Freiberg suggested that this provision would enable the County Court to order the deferral of a sentence for the purposes of a restorative justice conference.<sup>389</sup>

### Restorative justice for more serious offences

7.249 Significant concerns have been raised about the use of restorative justice to respond to serious violent offending, particularly sexual and family violence. These concerns include:

- victims being re-traumatised by the conduct or comments of the offender during the meeting
- unequal power relationships, and the risk of an offender exerting subtle forms of intimidation or control over the process
- failure to understand that apologies and forgiveness are often characteristic of a cycle of family violence
- inappropriate pressure being applied to victims to participate or to restore relationships when this is not safe or desirable
- the possibility of offending not being publicly denounced, thereby undermining goals of both specific and general deterrence
- gendered crimes that were historically minimised and regarded as 'private matters' may become private again if justice is meted out in a private conference rather than a public sentencing hearing
- a risk that restorative justice will be seen as a soft option for offenders or as a substandard justice option.<sup>390</sup>

### A supplementary measure

7.250 Some of the above concerns can be alleviated if restorative justice is understood as having a supplementary role in cases of serious offending, not a diversionary role. Restorative justice can be used to divert offenders away from the formal criminal process, but this is typically a response to less serious offending dealt with in the Magistrates' or Children's Court, which is outside the Commission's terms of reference.

7.251 The Commission's terms of reference encompass indictable (serious) offences dealt with by the Supreme or County Court.<sup>391</sup> For these matters, restorative justice as a diversionary measure is not appropriate. It is not about keeping serious matters out of court. Restorative justice conferencing should instead be understood as supplementing the formal court process in appropriate cases. This allows public accountability, denunciation, deterrence and punishment to occur in those cases where a prosecution can proceed.

387 *Sentencing Act 1991* (Vic) s 83A(1A).

388 *Ibid* s 83A(3).

389 Consultation 52 (Emeritus Professor Arie Freiberg AM).

390 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice—Final Report* (2009), 328; Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (2014) 35; Victorian Law Reform Commission, *Review of Family Violence Laws*, Final Report (2006) 81–2; Submission 14 (Victims of Crime Commissioner, Victoria), Roundtable 13, supplementary information (Victim support specialists, Ballarat).

391 As noted in Chapter 1, indictable offences determined summarily in the Magistrates' Court are beyond the Commission's terms of reference.

## Potential benefits for victims

- 7.252 Restorative justice conferencing has been described as ‘one of the most researched justice innovations of the twenty-first century’.<sup>392</sup> Research has shown that restorative justice can deliver positive outcomes for victims who want to participate and are ready to do so, including victims of serious and violent crimes.<sup>393</sup> It is often victims of serious crimes who expect more from their involvement in the criminal trial process.<sup>394</sup>
- 7.253 The Jerry Lee Program of randomised trials of restorative justice conferencing has conducted 12 trial programs over two decades in Canberra and different sites in the United Kingdom.<sup>395</sup> The programs in the United Kingdom include pre-sentence restorative justice conferences and serious robbery and burglary offences in the Crown Courts of London. The Jerry Lee Program found that, overall, victims who attended restorative justice conferences were:
- less fearful of repeat attack by the same person, more pleased with the way their case was handled, and less desirous of violent revenge against their offenders, after receiving far more offender apologies and satisfaction with their justice.<sup>396</sup>
- 7.254 A link between participation in restorative justice and reduced levels of post-traumatic stress symptoms among robbery and burglary victims in the short term was also identified.<sup>397</sup>
- 7.255 A separate evaluation by the University of Sheffield of the above restorative justice trials in the United Kingdom found that 85 per cent of victims and 80 per cent of offenders were satisfied overall.<sup>398</sup> Most also considered the process to be a fair one. A small number of participants were dissatisfied as a result of communication problems, disagreement about the circumstances of the offending or the lack of an outcome agreement.<sup>399</sup> While the Commission acknowledges that victims may not seek an apology from an offender, it is worth noting that 90 per cent of victims who participated in a conference received an apology compared to only 19 per cent of those who went through the traditional court process.<sup>400</sup> Overall, the University of Sheffield evaluation concluded that:

Conference victims and offenders were significantly more satisfied with what the criminal justice system had done with their case than control group participants, suggesting there is a positive effect of participating in restorative justice on confidence in criminal justice.<sup>401</sup>

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392 Jane Bolitho, ‘Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice’ (2015) 3(2) *Restorative Justice* 256, 257.

393 Mark Umbriet, William Bradshaw and Robert Coates, ‘Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue’ (1999) 6 *International Review of Victimology* 321; Tracey Booth, ‘Altered Perceptions of Conflict in Homicide Matters: The Role of Victim-Offender Conferencing’ (2003) 14 *Alternative Dispute Resolution Journal* 290; Mary Koss, ‘The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes’ (2014) 29(9) *Journal of Interpersonal Violence* 1623.

394 Kelly Richards, ‘Taking Victims Seriously? The Role of Victims’ Rights Movements in the Emergence of Restorative Justice’ (2009) 21(2) *Current Issues in Criminal Justice* 302, 303-4. This is reflective of individuals who contributed to the Commission’s reference: victims of sexual offences, family violence, murder, manslaughter and culpable driving.

395 Lawrence Sherman et al, ‘Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences’ (2015) 11 *Journal of Experimental Criminology* 501. The trials in Australia were in Canberra and involved restorative justice as a diversionary measure.

396 Ibid 502. None of the restorative justice programs trialled in the Australian Capital Territory or England included sexual or family violence offences.

397 Ibid 526; Caroline Angel et al, ‘Short-term Effects of Restorative Justice Conferences on Post-traumatic Stress Symptoms among Robbery and Burglary Victims: A Randomised Controlled Trial’ (2014) 10 *Journal of Experimental Criminology* 291.

398 See results for Justice Research Consortium (JRC) in Joanna Shapland et al, *Restorative Justice: The Views of Victims and Offenders. The Third Report from the Evaluation of Three Schemes* (Ministry of Justice Research Series 3/07, 2007) 26. These positive perceptions of restorative justice continued some eight or nine months after the conference.

399 Ibid 27–8.

400 Ibid 23.

401 Ibid 3–4. Another recent study in the UK found that the overall experience of those who participated in restorative justice was positive and they would recommend it to others. Research participants included victims of hate crimes, sexual offences, violent assaults and murder: Theo Gavrielides, ‘The Victims’ Directive and What Victims Want From Restorative Justice’ (2015) *Victims and Offenders* 1, 19.



- 7.256 Positive results have also emerged in New Zealand. A 2011 survey of 154 victims revealing that 82 per cent felt satisfied with their restorative justice experience, while 74 per cent felt better after the conference.<sup>402</sup> The Australian Institute for Criminology has noted that the potential benefits of restorative justice include:
- victim satisfaction and the meeting of unmet justice needs
  - offenders taking responsibility for their actions
  - increased compliance with a range of orders.<sup>403</sup>
- 7.257 Many victims will not be ready to participate in restorative justice conferencing until some time after criminal proceedings have been finalised. This is a matter outside the Commission's terms of reference. However, it is worth noting that the post-sentencing restorative justice program run by Corrective Services NSW has reportedly satisfied the unmet justice interests of victims of serious crimes, including murder, manslaughter, culpable driving and sexual offences.<sup>404</sup>

### Restorative justice and reoffending

- 7.258 The impact of restorative justice on reoffending rates has implications for the community in terms of costs and safety. Restorative justice conferencing does not always correlate to a reduction in reoffending, but it is rarely linked to an increase.<sup>405</sup>
- 7.259 It appears that, where an adult offender is willing to participate and a victim also wants to participate, the risk of reoffending can decrease.<sup>406</sup> The outcomes of the Jerry Lee Program in the United Kingdom demonstrated a reduction in the frequency of repeat offending where a personal victim was involved and the offending involved violence.<sup>407</sup> Overall £8 were saved in the costs of crime prevented for every £1 spent running restorative justice conferencing as a supplementary process, with greater cost-effectiveness found in cases involving serious offenders with prior convictions.<sup>408</sup>
- 7.260 An Australian Institute for Criminology review of restorative justice published in 2014 reached a similar conclusion. It found that restorative justice:
- may be more effective for more 'prolific offenders'
  - may prevent some offenders from further criminal activity, slow the offending of others, but have no effect on the criminal activity of others
  - is more effective in response to violent offending than property offending
  - benefits those who are willing to engage.<sup>409</sup>

402 New Zealand Ministry of Justice, *Victim Satisfaction with Restorative Justice: A Summary of Findings* (September 2011). Positive results have also been achieved in the context of family violence and sexual offences in New Zealand, with a specialised approach taken for sexual offences. This is discussed at [7.324].

403 Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology, 2014) 28.

404 Jane Bolitho, 'Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice' (2015) 3(2) *Restorative Justice* 256. See also Susan Miller and Kristen Hefner, 'Procedural Justice for Victims and Offenders? Exploring Restorative Justice Processes in Australia and the US' (2015) 32(1) *Justice Quarterly* 142, 163, suggesting that participation in restorative justice after conviction and sentencing can ameliorate victims' confusion and scepticism of the formal court process.

405 The variable impact of restorative justice on reoffending rates for different offenders is demonstrated in Lawrence Sherman et al, 'Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences' (2015) 11 *Journal of Experimental Criminology* 501, 528–31. See also Joanna Shapland et al, *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes* (Ministry of Justice Research Series 10/08, 2008); New Zealand Ministry of Justice, *Reoffending Analysis for Restorative Justice Cases: 2008 - 2011* (April 2014).

406 Heather Strang et al, 'Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review' (2013) 9(12) *Campbell Systematic Reviews* 5.

407 Lawrence Sherman et al, 'Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences' (2015) 11 *Journal of Experimental Criminology* 501, 524, 528.

408 Ibid 524–5. The greatest cost-benefit outcome arose in robbery and burglary offences in the Crown Courts in London (£14 saved for every £1 spent). See also results for 'JRC' in Joanna Shapland et al, *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes* (Ministry of Justice Research Series 10/08, 2008) 67.

409 Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology, 2014) 28.



## Developments in the use of restorative justice

### New Zealand

- 7.261 Restorative justice has been part of New Zealand's criminal justice system since 1989.<sup>410</sup> Any court, including the High Court, can adjourn sentencing to allow a restorative justice conference to take place.<sup>411</sup> Since 2014, the *Sentencing Act 2002* (NZ) has required District Court judges to adjourn sentencing so that inquiries can be made to determine whether restorative justice is appropriate where:
- an offender pleads guilty
  - there are one or more victims
  - a restorative justice process has not taken place
  - the judge is aware that an appropriate restorative justice process can be accessed.<sup>412</sup>
- 7.262 The wishes of the victim must be taken into account in determining whether restorative justice is appropriate. Matters assessed as suitable proceed to a restorative justice conference. The delivery of restorative justice services is guided by best practice standards published by the Ministry of Justice.<sup>413</sup> The court must take any outcomes arising from a restorative justice conference into account in sentencing.<sup>414</sup> The District Court's jurisdiction includes serious offences, but not murder, manslaughter or serious drug offences.

### England and Wales

- 7.263 England and Wales have recently introduced legislation that expressly provides for deferral of sentencing to allow for a restorative justice meeting to occur.<sup>415</sup> This is conditional on all parties consenting, including the victim. The Act does not exclude specific offences, offenders or victims. A Ministry of Justice Guidance states that restorative justice may be appropriate for any offence and can be more effective where greater harm has been experienced. It 'should not normally be used' in cases of domestic violence and should not proceed for hate crimes and sexual offences unless a victim requests it and there is a suitably skilled facilitator.<sup>416</sup> The *Code of Practice for Victims of Crime* requires information about restorative justice to be provided to victims of adult and youth offenders.<sup>417</sup>
- 7.264 The aims of the pre-sentence restorative justice scheme are:
- to provide victims with the opportunity to take part in restorative justice at an early stage of the criminal justice process
  - to offer victims more direct involvement in the criminal justice process, giving victims a voice and increasing victim satisfaction
  - to reduce reoffending.<sup>418</sup>
- 7.265 Victim-offender conferences, community conferences and indirect communication are listed as types of restorative justice activities.<sup>419</sup> Restorative justice services are dispersed across a range of organisations.

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410 Note that the New Zealand Law Commission has recently recommended the establishment of an alternative process for cases involving sexual offences, distinct from existing restorative justice processes but with some similar aspects, which is designed to address the justice needs of victims who do not wish to enter the criminal justice system: New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence*, Report 136 (2015) ch 9.

411 *Sentencing Act 2002* (NZ) s 25.

412 *Ibid* s 24A.

413 New Zealand Ministry of Justice, *Restorative Justice: Best Practice in New Zealand* (2004); *Restorative Justice Standards for Sexual Offending Cases* (2013).

414 *Sentencing Act 2002* (NZ) s 8(j). Section 10 lists the potential outcomes that must be taken into account and how the court is to do this.

415 *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 1ZA.

416 Ministry of Justice, *Pre-sentence Restorative Justice (RJ)* (United Kingdom, May 2014) [2.2], issued by the Secretary of State for Justice pursuant to s 1ZA(6) of the *Powers of the Criminal Courts (Sentencing) Act 2000*.

417 Ministry of Justice, *Code of Practice for Victims of Crime* (United Kingdom, October 2015) 34-5, issued pursuant to s 33, *Domestic Violence, Crime and Victims Act 2004*.

418 Ministry of Justice, *Pre-sentence Restorative Justice (RJ)* (United Kingdom, May 2014) [1.6].

419 *Ibid* [1.21].

## Australian Capital Territory

- 7.266 In February 2016, the Australian Capital Territory became the first state or territory in Australia to adopt legislation that allows the use of restorative justice as a supplementary response to the formal criminal process for serious offending.<sup>420</sup> Restorative justice has been expanded from youth offending to serious offences committed by adults, excluding sexual offences and domestic violence offences. Sexual offences and domestic violence offences will be included at a later date.<sup>421</sup> Referrals for prosecutions involving serious offences are permitted only after a guilty plea or finding of guilt.<sup>422</sup> In all cases, the victim and offender must consent and a suitability assessment is required.
- 7.267 One of the key objects of the *Crimes (Restorative Justice) Act 2004* (ACT) is to empower victims 'to make decisions about how to repair the harm done by offences'.<sup>423</sup> The Act requires the purposes, procedures and potential impact of restorative justice to be explained to victims and offenders.<sup>424</sup> This is to ensure victims and offenders are able to provide informed consent. In contrast to England and Wales, a centralised approach is taken. Referrals to restorative justice go through the director-general of the unit responsible for administering the Act.<sup>425</sup>

## Restorative justice conferencing for indictable offences in Victoria

- 7.268 In 2009, the Victorian Parliament Law Reform Committee recommended a pilot restorative justice program for serious offences involving adults, with clear eligibility guidelines and comprehensive specialist training for facilitators.<sup>426</sup> The Victorian Government accepted this recommendation 'in principle'.<sup>427</sup>
- 7.269 The Committee recommended further research into whether restorative justice is appropriate for family violence and sexual offences before including those offences in a restorative justice program.<sup>428</sup> The Government indicated that it only had plans to research the use of restorative justice in response to family violence in Koori families.<sup>429</sup>

## The views of victims

- 7.270 Victims of sexual offences who spoke to the Commission about restorative justice supported victims having choice about whether to participate, although some had no interest in confronting the offender themselves.<sup>430</sup> The parents of some child victims of sexual offences stated that they would have liked to have confronted the offender to explain the harm caused, or at least have had the option of participating in restorative justice.<sup>431</sup> Some victims sought no more than to have the offender appropriately punished by the court.<sup>432</sup>
- 7.271 The criminal trial process has been criticised for encouraging guilty offenders to deny and minimise their offending, rather than take responsibility for their actions.<sup>433</sup> Victims saw restorative justice as an opportunity to confront an offender with the consequences

420 *Crimes (Restorative Justice) Act 2004* (ACT), as amended by the *Crimes (Sentencing and Restorative Justice) Amendment Act 2016* (ACT).  
 421 *Crimes (Restorative Justice) Act 2004* (ACT) s 16(5). See Explanatory Statement, *Crimes (Sentencing and Restorative Justice) Amendment Bill 2015* (ACT) 3-4.  
 422 *Crimes (Restorative Justice) Act 2004* (ACT) ss 15, 16(3).  
 423 *Ibid* s 6(a).  
 424 *Ibid* ss 9, 25, 45, 53.  
 425 *Ibid* s 23.  
 426 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice—Final Report* (2009) 327 (recommendation 71).  
 427 Victorian Government, *Government Response, Parliament of Victoria Law Reform Committee Inquiry into Alternative Dispute Resolution and Restorative Justice* (tabled in Parliament 10 November 2009) 21.  
 428 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice—Final Report* (2009) 333 (recommendations 72-73). See also Victorian Law Reform Commission, *Review of Family Violence Laws*, Final Report (2006) 85 (recommendation 5).  
 429 Victorian Government, *Government Response, Parliament of Victoria Law Reform Committee Inquiry into Alternative Dispute Resolution and Restorative Justice* (tabled in Parliament 10 November 2009) 22.  
 430 Consultations 1 (A victim), 10 (A victim), 14 (A victim), 28 (Laurie Krause), 40 (A victim), 42 (Relative of a victim; a victim), 46 (A victim). Submission 38 (Name withheld) supported restorative justice as a supplementary process, but not for child sex offenders.  
 431 Consultations 3 (Parent of a victim), 4 (Parent of victims), 11 (Parent of a victim). These parents were not sure about the appropriateness of their child participating in restorative justice though.  
 432 Consultations 8 (Parent of a victim), 56 (Coleen Murphy (Kelly)).  
 433 Submission 36 (Centre for Innovative Justice).

of their wrongdoing, and possibly obtaining an acknowledgment of wrongdoing or an apology. The absence of a more empowering process for victims who seek direct offender accountability and acknowledgment may mean more pressure is placed on sentencing outcomes to achieve justice.

### The views of legal and victim support professionals

- 7.272 Legal professionals, victim support specialists and academics consulted by the Commission expressed support for restorative justice.<sup>434</sup> Restorative justice was considered to be particularly appropriate after a guilty plea, as a supplementary process to formal court proceedings. It was also suggested that compensation discussions could form part of restorative justice conferences.<sup>435</sup>
- 7.273 In addition, some contributors stated that restorative justice could be useful before guilt was determined, either while proceedings are under way or after a decision by the DPP to discontinue a prosecution.<sup>436</sup>
- 7.274 The Victims of Crime Commissioner, the Law Institute of Victoria and a participant at a regional roundtable questioned the appropriateness of restorative justice for serious offences or sexual offences.<sup>437</sup> The Victims of Crime Commissioner expressed concern about victims feeling pressured to participate in circumstances where confronting an offender may in fact exacerbate trauma or reinforce existing power imbalances. This legitimate concern is addressed below in relation to eligibility and suitability for restorative justice.

### Conclusion

- 7.275 Research demonstrates that restorative justice conferencing has something to offer victims of serious offences, where both the victim and offender want to participate. It can provide a satisfying and fair process that encourages offenders to be accountable. It may also help with the victim's recovery. It offers offenders willing to accept responsibility a procedurally fair process and has the potential to reduce the rates of reoffending.
- 7.276 Restorative justice conferencing appears to be better placed than the court process to respond to what Heather Strang has described as the 'non-material dimensions of victimization' such as anger, fear and mistrust.<sup>438</sup> Restorative justice can respond to the procedural justice needs of victims within a process that is flexible, supportive and focused on dialogue.<sup>439</sup> It requires active participation and allows for private interests (such as an apology, answers to questions or compensation) to be advanced. Focusing on the victim's interests and providing an additional option for their participation are consistent with the modern criminal trial process.

434 Submissions 2 (Seppy Pour), 5 (Centre for Rural and Regional Law and Justice), 7 (Youthlaw), 10 (Victoria Legal Aid), 21 (Dianne Hadden), 25 (Law Institute of Victoria), 26 (Victoria Police), 29 (Victorian Bar and Criminal Bar Association), 31 (Professor Jonathan Doak, Nottingham Trent University), 33 (Professor Jo-Anne Wemmers), 34 (Northern Centre Against Sexual Assault), 36 (Centre for Innovative Justice), 37 (Dr Margaret Camilleri); Consultations 9 (Magistrate Ron Saines), 18 (Child Witness Service, Department of Justice and Regulation), 23 (Court Network staff and Court Network—County Court), 26 (Magistrate Stella Stuthridge), 27 (Loddon Campaspe Centre Against Sexual Assault), 37 (Centacare, Barwon South West Region), 43 (Victoria Police SOCIT, Wodonga), 48 (Dr Heather Strang, University of Cambridge), 49 (Commissioner of Victims Rights, New South Wales), 52 (Emeritus Professor Arie Freiberg AM), 55 (Professor Edna Erez, University of Illinois at Chicago); Roundtables 3 (Victim support specialists, Geelong), 4 (Legal practitioners, Geelong), 5 (Victim support specialists, Morwell), 6 (Legal practitioners, Morwell), 7 (Victim support specialists, Melbourne), 8 (Metropolitan Centres Against Sexual Assault), 10 (Legal practitioners, Shepparton), 12 (Victim support specialists, Wodonga), 13 (Victim support specialists, Ballarat) 14 (Legal practitioners, Ballarat), 16 (Community legal centres).

435 Submissions 5 (Centre for Rural Regional Law and Justice), 26 (Victoria Police), 33 (Professor Jo-Anne Wemmers); Consultations 9 (Magistrate Ron Saines), 10 (A victim); Roundtable 13 (Victim support specialists, Ballarat).

436 Submissions 2 (Seppy Pour), 5 (Centre for Rural Regional Law and Justice), 7 (Youthlaw), 10 (Victoria Legal Aid), 21 (Dianne Hadden), 26 (Victoria Police), 31 (Professor Jonathan Doak, Nottingham Trent University), 33 (Professor Jo-Anne Wemmers); Consultations 9 (Magistrate Ron Saines). Some comments related to the use of restorative justice where police have not filed charges, however this was beyond the Commission's terms of reference.

437 Submissions 14 (Victims of Crime Commissioner, Victoria), 25 (Law Institute of Victoria); Roundtable 9 (Victim support specialists, Shepparton). Some participants in Roundtables 4 (Legal practitioners, Geelong) and 7 (Victim support specialists, Melbourne) felt that restorative justice would be suitable more often for less serious offences dealt with in the Magistrates' Court but did not object to the possibility of using restorative justice as part of the response to more serious crimes.

438 Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002) 23.

439 Tinneke Van Camp and Jo-Anne Wemmers, 'Victim Satisfaction with Restorative Justice: More than Simply Procedural Justice' (2013) 19 (2) *International Review of Victimology* 117.

- 7.277 Given the recent research, and the support expressed in submissions and during consultations, the Commission considers that restorative justice should no longer be seen as a process appropriate only for summary or non-violent offences in Victoria.
- 7.278 Restorative justice conferencing for indictable crime must be understood as requiring a different approach to that applied for less serious offending or youth offending:
- It should be supplementary, not diversionary.
  - It should only ever proceed with the informed consent of any victims involved.
  - It should be tailored to respond to the interests and needs of victims, rather than focusing primarily on the rehabilitation of the offender.

### When should restorative justice be available?

- 7.279 Theoretically, restorative justice could be used as a supplementary measure at any stage during or after the criminal trial process.<sup>440</sup> The stages within the scope of the Commission's terms of reference where restorative justice would be most appropriate and feasible are:
- where a decision is made by the DPP to discontinue a prosecution
  - after a guilty plea and before sentencing in the Supreme or County Court
  - after a guilty plea and in connection with an application for compensation or restitution orders by a victim in the Supreme or County Court (which may occur after sentencing).

### Prior to a determination of guilt

#### *Ongoing prosecution*

- 7.280 Some contributors to the Commission's reference suggested that restorative justice could be made available as an option while a prosecution is live and before a guilty verdict, with appropriate safeguards.<sup>441</sup> Restorative justice in this context presents unique challenges.
- 7.281 Before guilt has been legally determined, the accused is presumed innocent. Restorative justice requires the accused to accept responsibility. There may be little incentive for an accused to admit wrongdoing or demonstrate remorse while a prosecution is ongoing.
- 7.282 For victims, an expression of responsibility during a conference may be tarnished by the accused maintaining legal innocence.<sup>442</sup> In addition, if the prosecution came across material from the restorative justice conference that is relevant but harmful to the prosecution, it would be obliged to disclose it to the defence.<sup>443</sup> The victim may face a conflict between their role as a witness for the prosecution and the pursuit of more personal interests through a restorative justice conference.
- 7.283 Given these complexities, the Commission does not consider it appropriate at this time to introduce restorative justice conferencing as an option during live prosecutions before a finding of guilt.

440 See, eg, proposed sexual offences restorative justice framework in Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (2014). This is the approach taken in Belgium: Marie Keenan, Estelle Zinsstag and Caroline O'Nolan, 'Sexual Violence and Restorative Practices in Belgium, Ireland and Norway: A Thematic Analysis of Country Variations' (2016) 4(1) *Restorative Justice* 86, 100.

441 See Submissions 10 (Victoria Legal Aid), 21 (Dianne Hadden), 25 (Law Institute of Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University). Those in support of restorative justice at this stage were generally supportive of it being available at all stages.

442 Roundtable 10 (Legal practitioners, Shepparton).

443 Submission 23 (DPP).

### *Decision made by the DPP to discontinue a prosecution*

- 7.284 Restorative justice conferencing could be used where a prosecution will not be, or is no longer being, pursued. In line with the Commission's terms of reference, the use of restorative justice was considered in the context of the DPP making a decision not to proceed with a prosecution but not to a decision made by Victoria Police not to file charges.
- 7.285 Where offending is historical or occurs within a family, the Commission was told that restorative justice may have a role to play. This is particularly the case where a victim does not want a perpetrator imprisoned, or there is insufficient evidence for a prosecution, but the victim wants an acknowledgment or apology.<sup>444</sup> Historical sexual offences are notoriously difficult to prosecute successfully.<sup>445</sup> In many cases, the person accused will not be tried or convicted.<sup>446</sup> Victims may seek an alternative form of justice or a way to manage an ongoing family relationship.

### *Additional safeguards*

- 7.286 Restorative justice when the DPP has decided to discontinue a prosecution would require additional safeguards to protect the legal interests of victims and offenders. For offenders in particular, who would be required to admit responsibility after a prosecution has been discontinued, there would be little incentive to participate if doing so could be used against them in subsequent legal proceedings. Consistent with the United Nations' *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, the fact of participation by an offender should not be used as evidence of guilt in subsequent legal proceedings.<sup>447</sup>
- 7.287 The Basic Principles require the discussions to be confidential, except where disclosure is agreed to by the parties or required by law.<sup>448</sup> In its report about the use of restorative justice in response to sexual offending, the Centre for Innovative Justice suggested that all discussions should be protected except where a conference facilitator considers a person to be at immediate risk.<sup>449</sup>
- 7.288 The Commission considers that a privilege should apply to discussions in the course of restorative justice conferencing, with disclosure permitted where agreed by all participants or where there is an immediate risk of harm to a person. It may be reassuring to victims, as well as offenders, to know that what they say cannot be disclosed or used against them in later legal proceedings. Details about the application of the privilege and its relationship with the conference facilitator's report and any agreement reached by the parties, and whether any other exceptions should apply, are matters that require additional consideration.
- 7.289 These safeguards would not stop a prosecution from being pursued later or prevent a victim from pursuing a civil claim for compensation.<sup>450</sup> They would protect statements and admissions made by participants from unlawful or unauthorised disclosure and prevent the fact of an offender's participation from being used as evidence of guilt.

444 Submissions 10 (Victoria Legal Aid), 26 (Victoria Police), 29 (Victorian Bar and Criminal Bar Association); Consultations 9 (Magistrate Ron Saines), 21 (Victoria Police), 42 (Relative of a victim; a victim), 43 (Victoria Police SOCIT, Wodonga); Roundtable 4 (Legal practitioners, Geelong). The use of restorative justice for historical sexual offence or indecent assault matters was noted generally in Consultation 15 (DPP) and Roundtable 12 (Victim support specialists, Wodonga).

445 OPP representative, Roundtable 4 (Legal practitioners, Geelong). See also Kara Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26(1) *Current Issues in Criminal Justice* 55.

446 Submission 26 (Victoria Police). See discussion on attrition rates in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1187–90.

447 UN Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002) [8]. This was also noted in Submission 29 (Victorian Bar and Criminal Bar Association).

448 UN Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002) [14].

449 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (2014), 66.

450 The Northern Centre Against Sexual Assault stated that victims who participate should not be prevented from resorting to the traditional criminal process at a later stage: Submission 34.

- 7.290 Victoria Police expressed concern about the impact of restorative justice on a victim's compensation interests in matters where a conviction might be possible.<sup>451</sup> As stated above, restorative justice conferencing as a response to serious offending should supplement the formal court process, not replace it. Thus, if there is a reasonable prospect of conviction and the prosecution is in the public interest, the prosecution should continue in accordance with the DPP's policies.<sup>452</sup>

### *Conclusion*

- 7.291 In the context of indictable (serious) offences dealt with by the Supreme and County Courts, restorative justice conferencing should be supplementary to the traditional criminal trial process. The Commission considers it consistent with this position that victims can request a restorative justice conference where a prosecution has been pursued but is discontinued by the DPP. Restorative justice conferences and agreements should not bar further criminal proceedings. The fact of participation should not be admissible as evidence of guilt in subsequent legal proceedings and a privilege should apply to restorative justice discussions, the details of which require further consideration.
- 7.292 The potential appropriateness or otherwise of restorative justice should not be taken into account by the DPP in deciding whether to continue with a prosecution. That decision should be guided by the prospects of conviction and the public interest.

### *After a determination of guilt*

- 7.293 As noted above, legal and victim specialists consider restorative justice most appropriate after a determination of guilt, either before or after sentencing. Beyond the making of compensation and restitution orders, which may occur after sentencing, the Commission cannot make recommendations about restorative justice as a post-sentencing option but acknowledges that it may be more effective after sentencing for some victims.<sup>453</sup>

### *Prior to sentencing or compensation and restitution orders*

- 7.294 If restorative justice conferencing were undertaken before sentencing, the court could supervise the process. Subject to the consent of the victim and offender, the court could have the discretion to defer sentencing to allow time to assess whether restorative justice is appropriate, and for a restorative justice conference to take place. The offender would then return to the court for sentencing regardless of whether the restorative justice conference went ahead or its outcomes. Courts would therefore retain the function of publicly denouncing the offending and punishing the offender.
- 7.295 The DPP has expressed the view that restorative justice processes should not involve prosecution lawyers.<sup>454</sup> The Commission agrees that it is not appropriate to have the representative of the state in a conference focused on the private interests of individuals. The conference facilitator could keep the parties and court updated about progress. The facilitator could prepare an outcome report, attaching any agreement reached, for consideration by the prosecution, defence and judge.<sup>455</sup>

### *Impact on sentencing*

- 7.296 The DPP and the OPP Witness Assistance Service expressed concern that, if restorative justice conferencing were permitted before sentencing, and taken into account at sentencing, offenders may participate for disingenuous reasons, such as to have their sentence reduced.<sup>456</sup>

451 Submission 26 (Victoria Police).

452 See Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014).

453 Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology, 2014) 28.

454 Submission 23 (DPP); Consultation 15 (DPP).

455 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) s 28; Ministry of Justice, *Pre-Sentence Restorative Justice (RJ)* (United Kingdom, 2014) [2.31].

456 Submission 23 (DPP); Consultation 50 (Witness Assistance Service, OPP Victoria). See also Submission 38 (Name withheld).



- 7.297 Rigorous processes to assess suitability, thorough preparation and skilled facilitation can reduce this risk. The Commission also considers that it can partly be lessened by allowing restorative justice to be an option only where an offender pleads guilty, as distinct from a guilty verdict after a trial. In addition, if offenders do not participate genuinely, this could be reflected in the conference facilitator's outcome report and considered by the sentencing judge. The victim's views about the restorative justice conference could also be incorporated into the facilitator's report.<sup>457</sup>
- 7.298 Restorative justice is onerous for offenders because they are required to directly respond to the consequences of their actions, as narrated by the victim, and actively participate in the repair of harm. If judges do not have the discretion to take into account the offender's participation in a restorative justice conference, there may be little motivation for an offender to consent. Furthermore, the option of participating in a restorative process may also motivate some offenders to plead guilty early, thereby circumventing the need for the victim to give evidence at committal and/or trial.
- 7.299 In New Zealand, sentencing courts must take into account restorative factors, such as offers or agreements to make amends, remedial action, apologies, and compensation. The court must consider whether such offers or actions are genuine, capable of being achieved and acceptable to the victim.<sup>458</sup>
- 7.300 In England and Wales, the facilitator's report about the outcomes of the restorative justice process is provided to the court. The court has discretion as to how it takes participation in restorative justice into account at sentencing.<sup>459</sup> In the Australian Capital Territory, the court 'may consider whether the offender accepts responsibility for the offence to take part in restorative justice, but is not required to reduce the severity of any sentence as a result'.<sup>460</sup> If an offender elects not to take part, this cannot be taken into account.<sup>461</sup>
- 7.301 Victoria's Sentencing Act already requires judges to take a range of matters into account, such as the stage at which an offender pleaded guilty and any mitigating factor or relevant circumstance.<sup>462</sup> In addition, the County Court can defer sentencing to allow for participation in certain programs, and then take the offender's behaviour during the deferral period, and any pre-sentence report, into account at sentencing.<sup>463</sup>
- 7.302 The Commission is of the view that judges should decide how participation in restorative justice is taken into account at sentencing, based on consideration of the facilitator's report and any agreement reached between the offender and victim. It is also important for the law to state that participation in restorative justice will not automatically reduce the severity of a sentence. The Commission therefore favours the approach taken in the Australian Capital Territory.

457 See, eg, Ministry of Justice, *Pre-Sentence Restorative Justice (RJ)* (United Kingdom, 2014) [2.32].

458 *Sentencing Act 2002* (NZ) s 10.

459 Ministry of Justice, *Pre-sentence Restorative Justice (RJ)* (United Kingdom, 2014) [2.33]. That participation in a restorative justice conference is a matter to be taken into account at sentencing has been noted in *R v Collins* [2003] EWCA Crim 1867; *R v Barci* [2003] ECWA Crim 2816. Dr Heather Strang told the Commission that in a restorative justice pilot at the Crown Courts of London, offenders who participated in restorative justice conferencing were receiving comparable sentences to those who did not, after an initial spike in sentencing levels. The initial increase related to judges considering restorative justice outcomes to be insubstantial. A decision was made to provide more detailed outcome reports to judges, which lead to comparable sentencing levels: Consultation 48.

460 *Crimes (Restorative Justice) Act 2004* (ACT) s 53(e); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(y).

461 *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(h).

462 *Sentencing Act 1991* (Vic) s 5(2).

463 *Ibid* s 83A. This provision also applies to the Magistrates' Court but not the Supreme Court. Note the model proposed in Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (2014), in which the outcomes of pre-sentence restorative justice conferencing taken into account at sentencing: 63.



### *Relationship between restorative justice outcomes and compensation*

- 7.303 It was suggested that Victoria could follow New Zealand's approach of incorporating compensation agreements reached in restorative justice conferences into sentencing decisions.<sup>464</sup> As discussed in Chapter 9, having compensation orders form part of sentencing represents a substantial departure from current Victorian sentencing law. Sentencing orders are punitive, whereas compensation orders are ancillary (additional) civil orders.
- 7.304 Restorative justice involving serious offences should be dialogue-driven and flexible, rather than focusing on a particular outcome or agreement about compensation. For some victims, the financial aspects of harm will take a back seat to the emotional aspects.<sup>465</sup> Where an agreement is reached, the court could be empowered to take it into account in making a compensation or restitution order in addition to sentencing. Research suggests that payment of compensation by an offender can be validating, and that payment is more likely to be made where the offender has participated in a restorative justice conference than when they have not.<sup>466</sup>
- 7.305 Restorative justice conferences could take place after sentencing, in connection with an application for restitution or compensation orders.<sup>467</sup> This would separate restorative justice from sentencing, while retaining its connection to the criminal trial process, and allowing compensation orders to be made by a court where agreement is reached. Negotiating a compensation amount should not be seen as the aim of restorative justice conferencing where it occurs at this stage.

### *Conclusion*

- 7.306 The Commission considers that restorative justice should be made available as a pre-sentence option, and as an option in connection with applications for restitution or compensation under the Sentencing Act. The Supreme Court and County Court should be empowered to refer matters for a restorative justice conference, subject to the consent of victims and offenders and a suitability assessment.
- 7.307 This would require OPP solicitors to inform victims about their entitlement to request a restorative justice conference and refer them to sources of further information and legal advice. In Chapter 6, the Commission recommends the establishment of a legal service for victims at Victoria Legal Aid. This service should provide legal advice about participation in restorative justice conferencing.

### **Applications for state-funded financial assistance**

- 7.308 Finally, some contributors suggested that restorative justice could be incorporated into the processes of the Victims of Crime Assistance Tribunal (VOCAT).<sup>468</sup> The Commission's research and consultations indicate that restorative processes do not sit easily within the scheme that VOCAT administers for providing state-funded financial assistance to victims of crime.
- 7.309 Offenders do not need to admit wrongdoing for the victim to obtain financial assistance, and may not be involved. In contrast, restorative justice requires the consensual involvement of victims and offenders, and an acceptance of responsibility.

464 Roundtable 10 (Legal practitioners, Shepparton). The *Sentencing Act 2002* (NZ) allows courts to include a compensation agreement in a reparation order made as part of sentencing.

465 Consultation 48 (Dr Heather Strang, University of Cambridge); Joanna Shapland et al, *Restorative Justice: The Views of Victims and Offenders. The Third Report from the Evaluation of Three Schemes* (Ministry of Justice Research Series 3/07, 2007) 19.

466 Jeff Latimer, Craig Dowden and Danielle Muise, 'The Effectiveness of Restorative Justice Practices: A Meta Analysis' (2005) 85(2) *The Prison Journal* 127, 137.

467 Compensation and restitution orders can be made as ancillary orders against offenders who are found guilty or plead guilty pursuant to sections 85, 85B and 86 of the *Sentencing Act 1991* (Vic). See Chapter 9 for the role of victims in the making of compensation and restitution orders.

468 Submission 36 (Centre for Innovative Justice); Consultation 26 (Magistrate Stella Stuthridge).

- 7.310 Victoria Legal Aid told the Commission that its clients want to get an order from VOCAT as quickly as possible and without contact with the offender.<sup>469</sup> On balance, the Commission considers it inappropriate to incorporate restorative justice conferencing into current VOCAT processes.

## Eligibility and suitability

### Free and informed consent

- 7.311 To be considered eligible and suitable for restorative justice, victims must provide free and informed consent. It is also critical that offenders provide informed consent, and accept full responsibility for their offending.<sup>470</sup> These conditions should be statutory prerequisites.<sup>471</sup>
- 7.312 Consent should be understood as a continuing prerequisite, which may be withdrawn at any time. One of the principles underlying the ACT *Crimes (Restorative Justice) Act* is that victims and offenders are under no obligation to take part or to continue to take part once started.<sup>472</sup> Victims and offenders must also be informed about their entitlement to seek legal advice.<sup>473</sup> These elements are essential, not only to prevent harm to the interests of victims and offenders, but also to facilitate a process that has the greatest potential to be restorative.

### Case-by-case suitability assessment

- 7.313 Robust procedures will also be necessary to assess whether each case referred by the court or other agency is suitable, in view of the unique circumstances and individuals. This is common to restorative justice conferencing programs.
- 7.314 The restorative justice program run by Corrective Services NSW has a thorough assessment process that includes separate interviews with the victim and offender.<sup>474</sup> In the Australian Capital Territory, the decision as to whether a matter is suitable lies with the director-general of the administrative unit responsible for the Crimes (Restorative Justice) Act, and the legislation lists factors relevant to suitability.<sup>475</sup> Suitability assessments for New Zealand's sexual offences restorative justice program involve a specialist clinical team made up of a senior restorative justice facilitator, a victim-survivor specialist (who is also a counsellor) and an offender specialist and psychologist.<sup>476</sup>
- 7.315 While victims come from a diversity of backgrounds and experience crime in many ways, a desire for procedurally just processes is common. The Commission therefore considers that each case should be rigorously assessed for suitability based on the circumstances and individuals involved, rather than having a blanket inclusion or exclusion of certain offences, offenders or victims.<sup>477</sup> General suitability factors could be prescribed in legislation, as occurs in the Australian Capital Territory, and allow for more detailed factors and considerations to be addressed in policy.

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469 Submission 10 (Victoria Legal Aid). Most victims who spoke to the Commission opted against having a hearing and preferred to have their claim determined on the papers.

470 This is consistent with the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002) [7]–[8].

471 Consideration would need to be given to the age at which a child is permitted to participate in restorative justice. The *Crimes (Restorative Justice) Act 2004* (ACT) indicates that an eligible victim will include a child at least 10 years of age capable of giving consent: s 17. If a victim is younger than 10 years, an immediate family member may be eligible for restorative justice: s 17(2). Parents may also be eligible regardless of the age of the child if 'the child victim is incapable of adequately understanding or responding to the experience of the offence, or has died': s 18.

472 *Crimes (Restorative Justice) Act 2004* (ACT) s 9. See also UN Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002) [7].

473 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) ss 32A(c), 45(c), 53(c).

474 Jane Bolitho, 'Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice' (2015) 3(2) *Restorative Justice* 256, 262–3.

475 *Crimes (Restorative Justice) Act 2004* (ACT) s 32–36.

476 Shirley Jülich and Fiona Landon, 'Restorative Justice and Sexual Violence: Overcoming the Concerns of Victim-Survivors', in Theo Gavrielides (ed) *A Victim-led Criminal Justice System: Addressing the Paradox* (IARS Publications, 2014) 43–4.

477 Submissions 5 (Centre for Rural Regional Law and Justice), 37 (Dr Margaret Camilleri); Consultations 26 (Magistrate Stella Stuthridge), 52 (Emeritus Professor Arie Freiberg AM); Roundtables 5 (Victim support specialists, Morwell), 7 (Victim support specialists, Melbourne), 10 (Legal practitioners, Shepparton).

- 7.316 Cases may be assessed for a video link or shuttle conference rather than a face-to-face conference. Relevant factors could include:
- the nature of the offending, level of harm and level of violence
  - the full acceptance by the offender of responsibility for the crime charged
  - the extent of the offender’s contrition or remorse
  - the offender’s criminal history
  - the personal characteristics, motivations, empathy and resilience of the victim and the offender, and their needs or sensitivities
  - whether appropriate support is available for the victim and the offender
  - physical and psychological safety
  - the nature and dynamic of any past or present relationship between the victim and the offender
  - any power imbalance between the victim and the offender
  - the balance of the benefits for the victim against the risk of further harm
  - the broader family or community context of the offending
  - any government or administrative policy that relates to the treatment of certain types of offences.<sup>478</sup>

#### Family violence and sexual violence

- 7.317 Sexual violence and family violence are often viewed as inappropriate for restorative justice. In a 2014 report examining the potential for a restorative justice program for sexual offences in Victoria, the Centre for Innovative Justice suggested that the debate has been focused on ‘ideology, principle and precaution’ because of a lack of existing programs.<sup>479</sup>
- 7.318 The Commission notes that, while sexual offences often occur in the context of a family relationship, some sexual offending involves an unknown perpetrator and some family violence will not involve sexual violence. Offending may be reported years after it occurred, when the offender is no longer a threat, or it may be reported with the threat of ongoing and escalating violence. The offences prosecuted may form part of an ongoing relationship of control, manipulation and abuse. Sexual violence and family violence are forms of gendered violence, to which the conventional justice system has historically failed to provide an appropriate response.<sup>480</sup> However, victims will have varied experiences and capacities, which require the availability of a range of options. Restorative justice, where carefully tailored to respond to the particular dynamics of gendered violence, is one such option.
- 7.319 Excluding sexual violence or family violence offences from restorative justice conferencing on principle denies some victims an option available to others. It ignores the fact that victims are autonomous individuals who have a clear understanding of their interests and capabilities. A number of sexual offence victims told the Commission that they were interested in restorative justice, or that it should at least be an option, even if they would

478 See generally suitability factors listed in *Crimes (Restorative Justice) Act 2004* (ACT) ss 33–36; Restorative Justice Unit, Corrective Services NSW, *Victim–Offender Conferencing Procedures Manual* (May 2013), unpublished report cited in Jane Bolitho, ‘Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice’ (2015) 3(2) *Restorative Justice* 256, 262–3; Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (2014) 50.

479 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (2014) 34.

480 See generally Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol IV 136–7; Kathleen Daly, ‘Conventional and Innovative Justice Responses to Sexual Violence’ (ACSSA Issues No 12, Australian Centre for the Study of Sexual Assault/ Australian Institute of Family Studies, 2011).

not participate in it themselves.<sup>481</sup> Rather than excluding particular offences, assessment procedures and conferencing processes should be developed to respond specifically to the circumstances and dynamics of gender-based violence.

- 7.320 There are significant and real concerns about re-privatising gendered crimes, re-inforcing power imbalances and re-traumatising victims, necessitating a specialised approach.<sup>482</sup> In addition, offences involving sexual or family violence should continue to be prosecuted where there is a reasonable prospect of conviction and it is in the public interest. Restorative justice should be supplementary to this process. The Commission notes the potential benefits for victims identified by the Victorian Parliament Law Reform Committee in 2009:
- Violence is condemned in a meaningful manner.
  - Victims are given an opportunity to tell their story.
  - The process encourages admissions of offending.
  - The victim's experiences may be validated.
  - Recognition can be given to the fact that the victim and offender may have an ongoing relationship.
  - There is a focus on rehabilitation over retribution.
  - The process promotes a more holistic understanding of the offending.
  - It may encourage the reporting of such crimes.<sup>483</sup>
- 7.321 Where violence involves family members, the question of whether restorative justice is appropriate will depend on the parties and circumstances involved. For example, a small study in New Zealand suggested that restorative justice conferences, combined with other interventions, could lead to positive change for victims who want or need to maintain a relationship with the offender.<sup>484</sup> As a dialogue-based process though, there is significant risk that it may 'be unintentionally coercive' and victims may 'put their needs aside "for the greater good"' of the family.<sup>485</sup>
- 7.322 A restorative justice scheme incorporating family violence matters needs to respond to the complexity and dynamics of family relationships and the fact that family violence is typically characterised by an ongoing pattern of behaviour in which emotional, financial, physical and sexual violence are used as tools of domination and subordination. Julie Stubbs has written extensively on restorative justice and family violence and warns against the use of generic models. She emphasises that for restorative justice to be safe and meaningful, facilitators and participants must fully understand the nature and dynamics of gendered violence and how it affects participation and decision making.<sup>486</sup> Referrals to professional support, treatment and intervention services would need to be integrated.<sup>487</sup>

481 Consultations 1 (A victim), 3 (Parent of a victim), 4 (Parent of victims), 10 (A victim), 11 (Parent of a victim), 14 (A victim), 28 (Laurie Krause), 40 (A victim), 42 (Relative of a victim; a victim), 46 (A victim). Submission 38 (Name withheld) was supportive but not for child sex offenders. Parents were not sure about the appropriateness of their child participating in restorative justice.

482 See, eg, Annie Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice (2008) 48 *British Journal of Criminology* 359; Kathleen Daly and Heather Nancarrow, 'Restorative Justice and Youth Violence Towards Parents', in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010), describing detrimental impacts for parent victims of youth violence where the offender did not accept responsibility.

483 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice—Final Report* (2009), 328–9 (footnotes omitted).

484 Venezia Kingi, 'The Use of RJ in Family Violence: The New Zealand Experience', in Anne Hayden et al (eds), *A Restorative Approach to Family Violence: Changing Tack* (Routledge, 2014) 156. The report distinguished between serious cases and those of less to medium seriousness. The research involved victims at the less to medium level of seriousness on this range, defined as not being seriously injured or requiring hospital admission.

485 Ibid 157.

486 See, eg, Julie Stubbs, 'Gendered Violence and Restorative Justice' in Anne Hayden et al (eds), *A Restorative Approach to Family Violence: Changing Tack* (Routledge, 2014) 207.

487 Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology, 2014) 33, citing D Weatherburn and M Macadam, 'A Review of Restorative Justice Responses to Offending' (2013) 1 *Evidence Base*.

### Existing practices and recent developments

- 7.323 Restorative justice is available for serious offences in Belgium, including sexual offences. It operates as a supplementary measure, available at any stage of the court process. Access to restorative justice is considered a right for victims.<sup>488</sup>
- 7.324 Restorative justice is also permitted in New Zealand in response to family violence and sexual violence. Best practices standards have developed for the use of restorative justice in response to sexual offences.<sup>489</sup> Project Restore offers a specialist restorative justice program for victims of sexual offences. It employs a clinical team model, with offender and victim specialists, a senior facilitator and a clinical supervisor all involved in risk and readiness assessment procedures. A small file review in 2012 concluded that in most cases, the outcomes sought by victims were achieved and their justice interests met.<sup>490</sup>
- 7.325 In 2009, the National Council to Reduce Violence against Women and their Children recommended trials to evaluate the ‘utility and suitability’ of restorative justice in the context of sexual and family violence, including processes driven by Aboriginal and Torres Strait Islander communities.<sup>491</sup> A report by the Centre for Innovative Justice in 2014 stated that there was sufficient evidence from programs in other jurisdictions to support a best-practice restorative justice model for sexual offences.<sup>492</sup> The model draws from the New Zealand experience and involves a specialised gender violence oversight team, specialist facilitators and an assessment process involving an expert panel.
- 7.326 A review of research commissioned by the Royal Commission into Institutional Responses to Child Sexual Abuse was published in March 2016. It concluded that restorative justice ‘can be practised to good effect following sexual abuse’ subject to conditions.<sup>493</sup> Those conditions include:
- specialised facilitators and sexual violence experts
  - vigilant suitability assessment
  - responsiveness to participant needs
  - victim readiness
  - targeted sex offender treatment programs.
- 7.327 In March 2016, the Victorian Royal Commission into Family Violence recommended the development of a framework and pilot program for restorative justice within two years as an additional option to formal court proceedings.<sup>494</sup> The seriousness of the offence in determining gateways and eligibility for restorative justice was noted as a matter to be addressed. The Royal Commission emphasised the importance of victims being involved in decision making about the appropriateness of restorative justice in their case.<sup>495</sup>

488 Marie Keenan, Estelle Zinsstag and Caroline O’Nolan, ‘Sexual Violence and Restorative Practices in Belgium, Ireland and Norway: A Thematic Analysis of Country Variations’ (2016) 4(1) *Restorative Justice* 86, 97–8, 100, which notes that participation in restorative justice in sexual violence cases often occurs post-conviction.

489 New Zealand Ministry of Justice, *Restorative Justice Standards for Sexual Offending Cases* (2013).

490 Shirley Jülich and Fiona Landon, ‘Restorative Justice and Sexual Violence: Overcoming the Concerns of Victim-Survivors’, in Theo Gavrielides (ed) *A Victim-led Criminal Justice System: Addressing the Paradox* (IARS Publications, 2014) 44-5; Shirley Jülich and Fiona Landon, ‘Achieving Justice Outcomes: Participants of Project Restore’s Processes’, in Estelle Zinsstag and Marie Keenan (eds) *Sexual Violence and Restorative Justice: Justice, Therapy and Collective Responsibility* (Routledge, in press).

491 National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence Against Women and their Children, 2009–2021* (2009) 122.

492 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (2014) 36; Submission 36 (Centre for Innovative Justice).

A three-year pilot of restorative justice conferencing for cases involving sexual violence at the post-conviction stage has also been recommended in Ireland: Marie Keenan, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities? A Collaborative Study on the Potential of Restorative Justice in Sexual Crime in Ireland* (University College Dublin, 2014).

493 Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 8.

494 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol IV 145, recommendation 122. The Royal Commission’s terms of reference defined ‘family violence’ as that falling within section 5 of the *Family Violence Protection Act 2008* (Vic).

495 Ibid, 144. The Royal Commission noted the support given to trialling restorative justice by organisations that work directly with victims.

## Conclusion

7.328 The Commission supports a phased approach to the implementation of restorative justice, in line with the approach recently taken in the Australian Capital Territory. Victims of sexual and family violence should initially be excluded from eligibility to allow time to develop appropriate processes and procedures. A specialised team should be involved in the careful development and implementation of restorative justice conferencing for sexual and family violence. The Commission considers such an approach to strike the balance between a safe and supportive process for victims and respecting their autonomy and expectations.

## Safeguards, procedures and oversight

7.329 Restorative justice conferencing should be a voluntary, safe and accessible process, which holds offenders to account and involves a neutral facilitator.<sup>496</sup> In addition to free and informed consent, and a rigorous and tailored suitability assessment process, the following matters, some of which are discussed above, will need to be addressed in legislation:

- the obligations owed to victims and offenders by those referring them to, assessing their suitability for, and facilitating restorative justice conferences, to provide relevant information (including about their right to seek legal advice)<sup>497</sup>
- that participation by an offender in restorative justice conferencing cannot be used as evidence of guilt in subsequent legal proceedings<sup>498</sup>
- the nature and extent of the privilege that applies to communications by participants during restorative justice conferencing<sup>499</sup>
- any restrictions that should apply to the content of restorative justice agreements between victims and offenders<sup>500</sup>
- monitoring and reporting of compliance with restorative justice agreements by offenders.<sup>501</sup>

7.330 A dedicated unit, independent of the criminal trial process, would be needed to develop best practice procedures and standards, provide oversight, promote awareness and monitor a restorative justice scheme in Victoria.<sup>502</sup> The Commission expects that the Department of Justice and Regulation would have responsibility for implementing the scheme. In doing so, it would need to ensure the following matters are addressed:

- Robust suitability assessment procedures so that only appropriate matters proceed to a conference.
- Procedures for preparing and debriefing victims and offenders, and for facilitating restorative justice conferences. Thorough preparation and debriefing are critical to avoid distress or harm to victims and offenders.<sup>503</sup>
- Processes that are responsive to the diverse needs and interests of victims and offenders, including adequate support.

496 Theo Gavrielides, 'The Victims' Directive and What Victims Want From Restorative Justice' (2015) *Victims and Offenders* 1, 19.

497 UN Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002) [13(a)]. See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) ss 25, 32A, 45, 53.

498 UN Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002) [8].

499 Ibid [14].

500 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) ss 51(3)–(5).

501 In the ACT, the director-general of the restorative justice administrative unit and the referral entity are empowered to do anything reasonable to check whether an agreement is being complied with, and must report to each other on non-compliance: *Crimes (Restorative Justice) Act 2004* (ACT), ss 57–58. In New Zealand, the conference facilitator keeps the victim informed as to the offender's progress.

502 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (2014) 45, recommending that the Department of Justice and Regulation establish a restorative justice unit to oversee the operation of restorative justice in Victoria.

503 Restorative Justice Council, *Best Practice Guidance for Restorative Practice* (2011) 5; Consultation 23 (Court Network staff and a Court Networker—County Court).



- Procedural safeguards to:
  - ensure victims and offenders provide informed consent throughout the process
  - ensure the physical and psychological safety of victims and offenders
  - protect communications by participants in the preparation, conference and debriefing stages of restorative justice conferences
  - monitor compliance by offenders with restorative justice agreements and keep victims informed.
- Clear referral pathways to support and legal advice.
- The qualifications, training and accreditation required of restorative justice facilitators, including specialisation for restorative justice conferences involving sexual or family violence.<sup>504</sup>
- Educating and training the community, legal profession, judiciary and victim support workers about restorative justice conferencing.
- Monitoring and evaluating the effectiveness of restorative justice conferences and the restorative justice scheme.

7.331 Careful consultation is required with Aboriginal people in Victoria about when and how restorative justice will be an appropriate response to offending. Particular consideration needs to be given to the interests of Aboriginal women. Indigenous women in Australia are more likely than non-Indigenous women to be the victims of gendered violence, the implications of which are affected by the ongoing impact of colonisation.<sup>505</sup> Separate models might be required, with oversight and control involving Aboriginal people.<sup>506</sup> In addition, consideration would need to be given to the interaction between pre-sentencing restorative justice conferencing and the County Koori Court sentencing process. The Commission was told that if victims were going to be encouraged to participate more in this process, there would need to be a Koori support worker for this purpose.<sup>507</sup>

504 Work has already been undertaken in relation to training and accreditation by the Victorian Association for Restorative Justice, which in November 2015, launched a group conference convener accreditation program: <<http://www.varj.asn.au/accreditation-of-conference-convenors>>.

505 Julie Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010) 115. Consultation 25 (Aboriginal Family Violence Prevention & Legal Service Victoria) emphasised the need for careful consultation with Aboriginal women.

506 See Harry Blagg, *Crime, Aboriginality and the Decolonialisation of Justice* (Hawkins Press, 2008) in relation to the importance of ownership over justice processes for Aboriginal and Torres Strait Islander people. An Aboriginal-operated restorative justice system was contemplated by the ACT Government: ACT Department of Justice and Community Safety, *Restorative Justice Options for the ACT: Issues Paper* (October 2003).

507 Consultation 38 (Executive Officer, Barwon South West RAJAC) suggested as a first step encouraging more Koori victims to make victim impact statements and receive support for this purpose.



## Recommendations

- 32 The Victorian Government should establish a statutory scheme for restorative justice conferencing for indictable offences in Victoria that is supplementary to the criminal trial process and available in the following contexts:
  - (a) where a decision is made by the Director of Public Prosecutions to discontinue a prosecution
  - (b) after a guilty plea and before sentencing
  - (c) after a guilty plea and in connection with an application for restitution or compensation orders by a victim.
- 33 The restorative justice conferencing scheme for indictable offences in Victoria should be based on:
  - (a) voluntary and informed victim consent and participation
  - (b) voluntary and informed offender consent and participation
  - (c) full acceptance by the offender of responsibility for the crimes charged
  - (d) rigorous processes to assess the suitability of restorative justice based on the individuals involved and the circumstances of each case.
- 34 The restorative justice conferencing scheme should apply initially to offences that do not involve sexual violence and family violence and be extended to sexual violence and family violence offences at a later stage.
- 35 The *Victims' Charter Act 2006* (Vic) should require prosecuting agencies to inform victims about their entitlement to request restorative justice conferencing and refer them to legal advice.
- 36 The Department of Justice and Regulation should be responsible for implementing the restorative justice conferencing scheme.

# Protection

**196** Introduction

**196** Victims as witnesses: reducing trauma and intimidation

**219** Victims' privacy: protection from unjustified interference

## 8 Protection

### Introduction

- 8.1 Chapter 7 discussed opportunities for victims to participate in the criminal trial process and the different forms that participation can take. By far the most challenging is to give evidence as a witness for the prosecution. Some victims are able to meet the challenge with relative ease. For others, the experience can be harrowing. Their private lives may be exposed to public scrutiny. They may be traumatised by seeing the accused in court and may find the courtroom environment intimidating and stressful. Cross-examination in particular can cause victims distress and further emotional harm.
- 8.2 Victims expect to be protected from further harm and trauma throughout the criminal trial process. Successive reforms over the past 30 years have focused on reducing the difficulties experienced when victims participate as witnesses. Protective measures have been introduced to reduce the distress of publicly responding to questions about the crime in an adversarial setting.
- 8.3 The first part of this chapter focuses on victims as witnesses. It examines whether reforms that protect certain victims from giving evidence multiple times, and that limit their exposure to the accused and the courtroom, should apply to other victims. It also reviews measures to protect victims' safety in and around courthouses.
- 8.4 Victims expect their privacy not to be infringed without their consent or sound justification. It can be particularly distressing for victims of sexual offences when personal and sensitive information is made public during a criminal trial. Limits have been imposed on the accused's access to a victim's medical and counselling records, and these are considered in the second part of this chapter.
- 8.5 Of course, accused persons have a right to cross-examine witnesses and access relevant material in order to make a full and proper defence. These are significant elements of the fundamental right to a fair trial and should be protected.<sup>1</sup> This does not mean that victims should not also be treated fairly and with appropriate respect for their dignity and humanity.<sup>2</sup>

### Victims as witnesses: reducing trauma and intimidation

- 8.6 In the criminal trial process, some victims give evidence at least twice: once at the committal hearing and again at the trial. Sections 123 and 124 of the *Criminal Procedure Act 2009* (Vic) restrict the cross-examination of witnesses, including victims, at committal hearings. Part 8.2 of the Act, which deals with witnesses, contains measures to reduce the likelihood of traumatisation, intimidation and distress when giving evidence.

1 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24, 25; *Re an Application Under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [38], [40].

2 See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129 (2016) 240 [8.98].

- 8.7 These provisions establish protections for victims that are described in more detail below. Each measure applies to different victims, depending on certain characteristics and the crime committed. In broad terms, however, they fall into two categories:
- **Special protections** for child victims and victims with a cognitive impairment in sexual offence cases.<sup>3</sup> Special protections involve using audiovisual recordings of the victim's statement to police as evidence-in-chief, cross-examining the victim at a special hearing, and prohibiting the victim's cross-examination at a committal hearing.
  - **Alternative arrangements** for other victims who appear as witnesses in sexual offence cases and cases involving conduct that constitutes family violence. These include various physical interventions such as remote facilities, support people and screens.
- 8.8 The Commission considers that these protections should be made available to a broader group of victims. The remainder of this section examines:
- which victims should be eligible and on what basis
  - the implications for the accused's fair trial
  - how the purpose of the reforms can be achieved.

### Special protections

- 8.9 In sexual offences cases, child victims and victims with a cognitive impairment are required to give evidence only once. This is achieved by separate provisions in the Criminal Procedure Act that allow the victim to have an audiovisual recording of their statement used as evidence-in-chief, to be cross-examined only at a special hearing, and prohibit their cross-examination at a committal hearing.
- 8.10 These measures were introduced as part of a suite of reforms in response to recommendations made in the Commission's *Sexual Offences: Law and Procedure* report.<sup>4</sup> They are designed to protect child victims and victims with a cognitive impairment in sexual offence cases from 'unnecessary delays and further trauma in the prosecution of sexual offences against them'.<sup>5</sup> In doing so, special protections can improve the reliability and accuracy of a victim's evidence.<sup>6</sup>

### Audiovisual recorded statement as evidence-in-chief

- 8.11 An audiovisual recorded statement is an audiovisual recording of a victim's interview with police.<sup>7</sup> Typically the victim describes the offending and is asked questions by a police officer. In practice, such statements are made at a police station with a specially trained police officer soon after the alleged offending has occurred.
- 8.12 In sexual offence cases, child victims and victims with a cognitive impairment are permitted to have their audiovisual recorded statement admitted as their evidence-in-chief at the trial. This measure is also available to child victims and victims with a cognitive impairment in proceedings for:
- indictable offences involving an assault, injury or threat of injury
  - certain offences involving child pornography.<sup>8</sup>

<sup>3</sup> In this chapter, the Commission uses the term 'special protections' to refer to the suite of measures currently available in sexual offence cases for child victims and victims with a cognitive impairment. This term does not exist in legislation.

<sup>4</sup> Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 164–166, 280–285, recommendations 42, 123–131; Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2183–85 (Rob Hulls).

<sup>5</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2184 (Rob Hulls).

<sup>6</sup> See, eg, Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 164, 273; Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers—Final Report* (2013) 273–6; Adrian Keane, 'Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re-professionalism' (2012) 16 *International Journal of Evidence and Proof* 175, 175–80.

<sup>7</sup> *Criminal Procedure Act 2009* (Vic) s 367.

<sup>8</sup> *Ibid* s 366. The child pornography offences are offences against sections 68, 69, 70AAB, 70AAC, 70AAD, 70AC of the *Crimes Act 1958* (Vic). Also covered are sections 23 (common assault) and 24 (aggravated assault) of the *Summary Offences Act 1966* (Vic) where those offences are related to the other offences to which the provisions apply, namely a sexual offence, indictable offence involving an assault on, or injury or threat of injury to, a person, or an offence involving child pornography.

- 8.13 The Royal Commission into Family Violence recommended that the Victorian Government consider introducing legislation allowing audiovisual recorded statements of adult and child victims of family violence to be admissible as their evidence-in-chief.<sup>9</sup> The Victorian Government has accepted all of the Royal Commission’s recommendations.
- 8.14 The use of audiovisual recorded statements has certain benefits:
- It reduces the number of times the victim must give an account of the offending.<sup>10</sup>
  - It captures the victim’s account closer to the time of the alleged offending.<sup>11</sup>
  - The interview format means the victim’s description of the offending is likely to have a more logical and narrative sequence than the traditional form of giving evidence-in-chief.<sup>12</sup> This can improve the accuracy and reliability of the victim’s evidence.<sup>13</sup>

### Special hearings

- 8.15 Special hearings take place in the Supreme Court or County Court. There is often an audiovisual recorded statement, which can be admitted as the victim’s evidence-in-chief. If there is no audiovisual recorded statement, the victim gives their evidence-in-chief at the special hearing.<sup>14</sup> After the evidence-in-chief has been either admitted in recorded form or given in person, the victim is cross-examined and re-examined.
- 8.16 During the special hearing, the victim is in a remote witness facility and the accused and their lawyer remain in the courtroom.<sup>15</sup> The special hearing is video-recorded.<sup>16</sup> The recording becomes the entirety of the evidence of the victim in the trial and in any subsequent retrial or civil proceeding.<sup>17</sup>
- 8.17 Special hearings can occur either before the jury has been empanelled and the trial has commenced, or during the trial. If it is held before the trial, the recording of the special hearing is played to the jury as the evidence of the victim.<sup>18</sup>
- 8.18 In deciding whether to hold the special hearing before or during the trial, the judge must have regard to:
- in the case of child victims, the victim’s age and maturity
  - the severity of any cognitive impairment
  - any preference expressed by the victim
  - whether holding the special hearing during the trial is likely to intimidate or have an adverse effect on the victim
  - the need to complete the victim’s evidence expeditiously
  - the likelihood that the victim’s evidence will include inadmissible evidence that may result in the discharge of the jury
  - any other relevant matter.<sup>19</sup>

9 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 173, recommendation 72.

10 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 268–269 [5.25] (referring specifically to child victims).

11 Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 539, 567; Kimberlee S Burrows and Martine B Powell, ‘Prosecutor’s Perspectives on Using Recorded Child Witness Interviews about Abuse as Evidence-in-Chief’ (2014) 47(3) *Australian & New Zealand Journal of Criminology* 374, 375; Mark R Kebbell and Nina J Westera, ‘Promoting Pre-recorded Complainant Evidence in Rape Trials: Psychological and Practice Perspectives’ (2011) 35 *Criminal Law Journal* 376, 378–9.

12 Submission 18 (Women with Disabilities Victoria); Consultation 18 (Child Witness Service, Department of Justice); Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 359, 370; Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers—Final Report* (2013) 274–5; Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1128 [26.168].

13 Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 539, 567; Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1128 [26.168]; Mark R Kebbell and Nina J Westera, ‘Promoting Pre-recorded Complainant Evidence in Rape Trials: Psychological and Practice Perspectives’ (2011) 35 *Criminal Law Journal* 376, 378–9.

14 *Criminal Procedure Act 2009* (Vic) ss 367–368.

15 *Ibid* s 372.

16 *Ibid* s 370.

17 *Ibid* s 374.

18 *Ibid* ss 373–374.

19 *Ibid* s 370(1B).

- 8.19 A special hearing must happen within three months of the accused's committal from the Magistrates' Court or, if the special hearing occurs during the trial, on a date specified at the pre-trial directions hearing.<sup>20</sup>
- 8.20 If a victim's evidence has been taken by special hearing, the accused's lawyer can further cross-examine the victim only with the permission of the court in a narrow set of circumstances.<sup>21</sup>
- 8.21 Special hearings are mandatory in sexual offence matters where the victim is a child or has a cognitive impairment, although the prosecution may apply for the victim's evidence to be given in court.<sup>22</sup> The judge may grant this application if satisfied that the victim is aware of the right to have a special hearing, and is able and wishes to give evidence in court.<sup>23</sup>
- 8.22 There can be significant benefits to victims who give evidence in a special hearing:
- It relieves them of the need to give evidence in the traditional courtroom environment, which many victims find stressful and foreign.<sup>24</sup>
  - Special hearings can occur separately from the trial and there is scope for them to be conducted earlier in the criminal trial process. This means that the victim is cross-examined closer in time to the offending, which can enhance the quality of a victim's account when subject to cross-examination.
  - The special hearing process allows for more judicial intervention. Improper questioning and the intervention of the judge can be edited out of the recording, which deals with concerns about judicial intervention prejudicing the jury against the accused.<sup>25</sup>
  - The recording of the special hearing is admissible as the victim's evidence in subsequent related proceedings, which avoids the victim giving evidence multiple times.<sup>26</sup>

### Prohibition on cross-examination at committal hearings

- 8.23 Section 123 of the Criminal Procedure Act prohibits magistrates from allowing child victims and victims with a cognitive impairment in sexual offence cases to be cross-examined at a committal hearing.<sup>27</sup> The prohibition was introduced in response to recommendations made by the Victorian Law Reform Commission in its final report on Sexual Offences.<sup>28</sup>

20 Ibid ss 181(2)(d)(iii), 371.

21 Ibid s 376.

22 Ibid ss 369, 370(2).

23 Ibid s 370(2).

24 Terese Henning, 'Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments—'Plus Ça Change' or Prospects New?' (2013) 37 *Criminal Law Journal* 155, 159; Mark R Kebell and Nina J Westera, 'Promoting Pre-recorded Complainant Evidence in Rape Trials: Psychological and Practice Perspectives' (2011) 35 *Criminal Law Journal* 376, 378–9; Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers—Final Report* (2013) 292.

25 Terese Henning, 'Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments—'Plus Ça Change' or Prospects New?' (2013) 37 *Criminal Law Journal* 155, 159.

26 Ibid s 374.

27 Ibid s 123. Note that the prohibition only applies if the child victim or the victim with a cognitive impairment has also gave a statement or had their statement recorded, and the statement or the recording of the statement (and its transcript) have been provided to the accused or their lawyer: s 123(c).

28 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 164–5, recommendation 42.

## Expanding eligibility for special protections

- 8.24 Broad support was expressed in submissions and consultations for expanding eligibility for some or all of the special protections to other victims.<sup>29</sup> The Victorian Bar and Criminal Bar Association, the Law Institute of Victoria and some lawyers consulted by the Commission opposed expanding eligibility.<sup>30</sup>
- 8.25 The Commission considers that special protections should be made available to a wider group of victims. The criteria for eligibility should be the same for each measure, so that eligibility for one means eligibility for all.
- 8.26 The combination of protections available to child victims and victims with a cognitive impairment in sexual offence cases is unique to Victoria. All Australian jurisdictions except Queensland allow certain victims to have an audiovisual recording of their interview with police admitted as their evidence-in-chief.<sup>31</sup> Similarly, all Australian jurisdictions except New South Wales provide for certain victims to give their evidence at the equivalent of a special hearing.<sup>32</sup> Equivalent provisions exist in New Zealand and the United Kingdom.<sup>33</sup>
- 8.27 While comparable laws in other jurisdictions contain features from which Victoria could draw, the strength of the Victorian special protections is that, combined, they allow the victim to give evidence only once and away from the accused and the courtroom. This result is lost if any one of the three elements is excluded.

## Who should be eligible?

### *Victims of certain offences*

- 8.28 It was suggested to the Commission that special protections could be expanded on the basis of the type of offending, specifically to:
- all victims of sexual offences<sup>34</sup>
  - victims of family violence, or where there is an ongoing relationship between the accused and the victim<sup>35</sup>
  - victims of offences where intimidation is a feature in the offending, such as hate crimes, kidnapping, false imprisonment and human trafficking<sup>36</sup>
  - victims of offences involving serious physical violence.<sup>37</sup>
- 8.29 This approach provides a simple means of limiting access to special protections. Eligibility would be based on forms of offending that are most likely to cause the victim such severe emotional trauma, intimidation or distress that the quality of their evidence is likely to be diminished unless they have access to the special protections.

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29 Submissions 14 (Victims of Crime Commissioner, Victoria), 18 (Women with Disabilities Victoria), 21 (Dianne Hadden), 23 (DPP), 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault), 36 (Magistrate John Lesser), 37 (Dr Margaret Camilleri), 38 (Name withheld), 39 (Safe Steps), 39 (OPP), 40 (Former VOCCC victim representatives), 43 (Victoria Police SOCIT, Wodonga); Consultations 9 (Magistrate Ron Saines), 18 (Child Witness Service, Department of Justice and Regulation), 22 (Professor Jonathan Doak, Nottingham Trent University), 34 (Office of the Director of Public Prosecutions, NSW), 40 (A victim), 50 (Witness Assistance Service, OPP Victoria); Roundtables 1 (Victim support specialists, Mildura), 5 (Victim support specialists, Morwell), 9 (Victim support and therapeutic specialists, Shepparton), 10 (Legal practitioners, Shepparton), 15 (Magistrates of the Magistrates' Court of Victoria) (referring to summary proceedings).

30 Submission 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association); Roundtable 6 (Legal practitioners, Morwell).

31 *Evidence Act 1929 (SA)* ss 12AB; *Evidence Act (NT)* ss 21A(1) (definitions), 21B; *Evidence Act 1906 (WA)* s 106HB; *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* ss 40D, 40F; *Criminal Procedure Act 1986 (NSW)* ss 306S, 306U, 306V; *Evidence (Children and Special Witnesses Act) 2001 (Tas)* ss 5, 8.

32 *Evidence Act 1977 (Qld)* s 21A(2); *Evidence Act 1929 (SA)* ss 4, 13, 13A; *Evidence Act (NT)* s 21B; *Evidence Act 1906 (WA)* ss 106I–106K (applies to children only); *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* s 40Q; *Evidence (Children and Special Witnesses Act) 2001 (Tas)* ss 6, 6B, 8.

33 *Evidence Act 2006 (NZ)* ss 103, 105, 106; *Youth Justice and Criminal Evidence Act 1999 (UK)* ss 16, 17, 27, 28.

34 Submissions 21 (Dianne Hadden), 23 (DPP), 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault); Consultations 9 (Magistrate Ron Saines); 22 (Professor Jonathan Doak, Nottingham Trent University), 34 (Office of the Director of Public Prosecutions, NSW), 43 (Victoria Police SOCIT, Wodonga); Roundtables 5 (Victim support specialists, Morwell).

35 Submissions 10 (Victoria Legal Aid), 21 (Dianne Hadden), 23 (DPP); Consultations 50 (Witness Assistance Service, OPP Victoria); Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

36 Submission 37 (Dr Margaret Camilleri).

37 Roundtable 10 (Legal practitioners, Shepparton).



- 8.30 Adult victims of sexual offences can have an audiovisual recording of their statement admitted as their evidence-in-chief, and be cross-examined at a special hearing, in the Northern Territory<sup>38</sup> and the United Kingdom.<sup>39</sup> In the United Kingdom, there is a presumption in favour of this procedure being used for adult victims of sexual offences on the basis that these victims are assumed to be fearful or distressed about testifying unless they inform the court otherwise.<sup>40</sup>
- 8.31 In the Australian Capital Territory, victims of sexual offences are not required to give evidence at committal hearings.<sup>41</sup> Special hearings are available for adult victims of sexual offences who are likely to ‘suffer severe emotional trauma’, or ‘be intimidated or distressed’.<sup>42</sup> The Australian Capital Territory introduced these reforms as part of a deliberate effort to reduce trauma and intimidation.<sup>43</sup>
- 8.32 There will certainly be adult victims of sexual offences who can benefit from having their evidence-in-chief video-recorded, for the same reasons as do child victims and victims of sexual offences who have cognitive impairments.<sup>44</sup> Adult victims can also find retelling their story and being cross-examined particularly distressing, given the nature of the offending.<sup>45</sup>
- 8.33 However, the Commission is not persuaded that special protections should automatically be available to all victims of sexual offences. Not all victims of sexual offences require or seek special protection. Moreover, sexual offences constitute a sizeable portion of the Magistrates’ Court and County Court workloads: in 2015, just over 200 cases involving sexual offences had committal hearings with cross-examination.<sup>46</sup> In a 12-month period, approximately 255 cases involving sexual offences proceeded to a trial in the County Court.<sup>47</sup> Given this volume, extending special protections to all victims of sexual offences would have considerable resource implications for police, the prosecution and courts. These implications are discussed further at [8.50]–[8.53].
- 8.34 Making special protections available to all victims of family violence-related offending would be even more resource-intensive. Family violence encompasses a large number of offences, including sexual offences,<sup>48</sup> serious assaults, homicide offences, and threats to kill or cause serious injury, as well as property offences involving theft, burglary and damage to property.<sup>49</sup> The Office of Public Prosecutions (OPP) reportedly deals with 400

38 *Evidence Act* (NT) s 21B. In the Northern Territory, victims of sexual offences and ‘serious violent offences’ are eligible to have a video-recording of their police interview admitted as their evidence-in-chief and give their evidence by way of a special hearing. ‘Serious violent offences’ include offences involving the possession and publication of child abuse material, murder, manslaughter, offences involving causing serious harm to the person, assaults, threats, kidnapping and deprivation of liberty. See *Evidence Act* (NT) s 21A; *Criminal Code Act* (NT) sch 1.

39 *Youth Justice and Criminal Evidence Act 1999* (UK) ss 17(4), 19, 27–8.

40 *Ibid.*

41 *Magistrates’ Court Act 1930* (ACT) s 90AB(1).

42 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 40P–40Q, 40S. Note that this has a more restrictive application, being only to ‘complainants’ who the court considers will suffer emotional trauma or be intimidated and distressed.

43 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 3 July 2008, 2669–2670 (Simon Corbell). See also Jessica Anderson, Kelly Richards and Katie Willis, *Evaluation of the ACT Sexual Assault Reform Program*, Technical and Background Paper 51, (Australian Institute of Criminology, 2012) 31; Jessica Kennedy and Patricia Easteal, ‘The Conception, Gestation and Birth of Legislation: The Sexual and Violent Offence Legislation Amendment Act 2008 (ACT) (2011) 10(2) *Canberra Law Review* 8, 23–6.

44 Nina J Westera and Martine B Powell, ‘Prosecutors’ perceptions of the utility of video-evidence for adult complainants of sexual assault’ (2015) 39 *Criminal Law Journal* 198, 199; Mark R Kebbel and Nina J Westera, ‘Promoting pre-recorded complainant evidence in rape trials: Psychological and practice perspectives’ (2011) 35 *Criminal Law Journal* 376, 378–80; Nina J Westera, Mark R Kebbel and Becky Milne, ‘It Is Better, but Does It Look Better? Prosecutor Perceptions of Using Rape Complainant Investigative Interviews as Evidence’ (2013) 19(7) *Psychology, Crime and Law* 595, 595–607; Mark R Kebbel, Catriona M E O’Kelly and Elizabeth L Gilchrist, ‘Rape Victims’ Experiences of Giving Evidence in English Courts: A Survey’ (2007) 14 *Psychiatry, Psychology and Law* 111.

45 The traumatising experience of sexual assault can cause victims giving evidence to experience confusion, flashbacks, panic attacks, dissociation and difficulties remembering, as well as physical responses such as nausea: Submission 30 (Loddon Campaspe Centre Against Sexual Assault). See also The Advocate’s Gateway, *Working with Traumatised Witnesses, Defendants and Parties: Toolkit 18* (July 2015). Data provided by the Magistrates’ Court of Victoria (11 February 2016).

47 County Court of Victoria, *2014–15 Annual Report* (2015) 6, 22 (in the 2014–15 financial year, a total of 657 cases proceeded to trial and resolved either with an acquittal, a finding or guilt or a plea of guilty during the trial. Sexual offences account for 40 per cent of criminal trials in the County Court).

48 See Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol II 214–15. The prevalence of sexual offending in the family violence context is difficult to estimate. The Royal Commission observed that the ‘vast majority of sexual assaults perpetrators are known to victims and a large portion are perpetrated by family members’.

49 Section 5 of the *Family Violence Protection Act 2008* (Vic) defines family violence as behaviour by a person towards a family member of that person if that behaviour is physically or sexually abusive, emotionally or psychologically abusive, or economically abusive, threatening, coercive or in any way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person, or behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of behaviour that constitutes family violence. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 191.

to 500 cases 'nominated' as family violence matters each year,<sup>50</sup> although it is unclear how many of these cases involve cross-examination at a committal hearing (of the victim or other witnesses) or proceed to a trial.

### *Victims with certain characteristics*

- 8.35 Extending special protections to victims of certain offences invariably leaves out victims of other offences. The Victorian Equal Opportunity and Human Rights Commission noted, for example, that victims with disabilities experience 'a range of serious crimes against the person, not just sexual offences' and that these other victims should be eligible for special hearing procedures.<sup>51</sup> It also observed that current special protections do not protect those with communication difficulties who do not also experience a cognitive impairment, despite these victims facing significant challenges giving evidence in sexual offence trials.<sup>52</sup>
- 8.36 The Commission received a number of proposals to base eligibility for special protections on the individual victim's characteristics, sometimes in combination with the type of offending. Suggested categories included:
- all child victims<sup>53</sup>
  - child victims and victims with a cognitive impairment in cases involving serious violence, such as homicides and serious assaults<sup>54</sup>
  - people with disabilities who are victims of indictable offences involving an assault, injury or threat of injury<sup>55</sup>
  - victims with communication difficulties.<sup>56</sup>
- 8.37 Some other jurisdictions have taken an approach along these lines. In South Australia and New South Wales, all child victims can have an audiovisual recording of their police interview admitted as their evidence-in-chief.<sup>57</sup> In New South Wales, this measure is also available to all victims with a cognitive impairment, regardless of offence type.<sup>58</sup>

### *A case-by-case approach*

- 8.38 Others who commented on this issue favoured a more discretionary approach.<sup>59</sup> This approach would see the court determine eligibility for special protections on a case-by-case basis, with regard to the victim's personal characteristics and the nature of the offending.
- 8.39 This approach has been taken in New Zealand. There, the question of whether a victim should be entitled to give evidence using 'alternative ways', including audiovisual recorded evidence-in-chief and special hearings, is determined entirely on a case-by-case basis. Many factors are relevant to such a determination, including 'age or maturity' (no age is specified), 'physical, intellectual, psychological, or psychiatric impairment', 'trauma suffered' by the victim, 'fear of intimidation', 'linguistic or cultural background or religious beliefs', relationship with another party to the proceeding, 'nature of the evidence', 'nature of the proceeding', and any other ground.<sup>60</sup>

50 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 194. See also Director of Public Prosecutions and Office of Public Prosecutions, *Annual Report 2014–15* (2015) 10.

51 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (2014) 113.

52 Ibid 114.

53 Consultation 18 (Child Witness Service, Department of Justice and Regulation).

54 Submission 23 (DPP).

55 Submission 4 (Victorian Equal Opportunity and Human Rights Commission).

56 Ibid; Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime—Research Findings* (2014) 114. This recommendation builds on a recommendation made by the Victorian Parliamentary Law Reform Committee's 2013 report on access to justice for people with disabilities that consideration be given to expanding the availability of special hearings for people with an intellectual disability or cognitive impairment (and other 'alternative arrangements for giving evidence'): Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers—Final Report* (2013) 293.

57 *Evidence Act 1929* (SA) s 12BA; *Criminal Procedure Act 1986* (NSW) ss306M, 306S, 306U, 306V.

58 *Criminal Procedure Act 1986* (NSW) ss 306S, 306U, 306V.

59 Submissions 14 (Victims of Crime Commissioner, Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University), 37 (Dr Margaret Camilleri), 40 (Former VOCCC victim representatives); Consultation 50 (Witness Assistance Service, OPP Victoria).

60 *Evidence Act 2006* (NZ) s 103(3).

## Conclusion

- 8.40 The comments received by the Commission were instructive but no clear consensus emerged. Similarly, a survey of other jurisdictions revealed that they take a variety of approaches, depending on features particular to that jurisdiction. None can be easily transposed to Victoria. The range of approaches proposed in submissions and consultations and taken in other jurisdictions illustrates how difficult it can be to be prescriptive about the circumstances in which protective measures should be taken while at the same time preserving a fair trial.
- 8.41 Ultimately, special protections are about protecting victims from unnecessary trauma, intimidation and distress, and ensuring they are able to give their best evidence. This rationale should form the basis of any expansion of existing special protections. Material gathered by the Commission shows that victims, other than child victims and victims with a cognitive impairment in sexual offence cases, can be unnecessarily traumatised, fearful and distressed by giving evidence in a courtroom and in the presence of the accused. This may unfairly undermine the accuracy and reliability of their evidence.
- 8.42 The Commission considers that where this is the case, victims should be eligible to benefit from special protections. That is, eligibility for special protections should be based on criteria relating to the victim's likely experience of the criminal trial process, rather than to the type of offending or the victim's personal characteristics. This would be achieved by making special protections available to:
- all child victims
  - 'protected victims'.

### Child victims

- 8.43 All child victims should be able to use the special protections unless they do not wish to do so. The challenges faced by child victims giving evidence are well established.<sup>61</sup> The child's age alone is sufficient reason to protect them from the distress of giving oral evidence, and being cross-examined, in the courtroom in front of the accused.
- 8.44 This approach is consistent with protections available in most Australian jurisdictions, and in the United Kingdom, and is supported by contributors to this reference.<sup>62</sup> It is also consistent with the Commission's view that all child victims should be eligible to use alternative arrangements (discussed below) and intermediaries (discussed in Chapter 7).<sup>63</sup>

### Protected victims

- 8.45 The Commission considers that for all other victims eligibility for special protections should be determined on a case-by-case basis. Victims would be eligible if assessed as a 'protected victim' as defined in the Criminal Procedure Act. Protected victims should be defined as victims who are likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.<sup>64</sup>

61 See, eg, Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) ch 14; Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) [5.13]–[5.44]; Robyn Layton, 'Our Best Investment: A State Plan to Protect and Advance the Interests of Children' (Child Protection Review, Government of South Australia, 2003); Kirsten Hanna et al, 'Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-Examination Fair?' (2012) 19(4) *Psychiatry, Psychology and the Law*, 530; Rachel Zajaz, Sarah O'Neill and Harlene Hayne, 'Disorder in the Courtroom? Child Witnesses under Cross-Examination' (2012) 32 *Development Review* 181.

62 Submission 23 (DPP) (although limiting support to child victims of offences involving serious violence), 31 (Professor Jonathan Doak, Nottingham Trent University); Consultations 18 (Child Witness Service, Department of Justice and Regulation). See also *Evidence Act 1977* (Qld) s 21A (definition of special witness); *Evidence Act 1929* (SA) s 4 (definition of vulnerable witness); *Criminal Procedure Act 1986* (NSW) ss 306M, 306ZA, 306ZB, 306ZH; *Youth Justice and Criminal Evidence Act 1999* (UK) s 16 (witnesses eligible for assistance on the grounds of age or incapacity).

63 Note that in Chapter 7, the Commission acknowledges that while all child victims should be able to access an intermediary, it may be necessary to limit the initial phase of the scheme to more serious offences, such as sexual offences and offences involving family violence.

64 *Evidence (Children and Special Witnesses) Act* (2001) (Tas) s 8(1); *Evidence Act 1906* (WA) s 106R; *Evidence Act 1977* (Qld) s 21A.

### Factors relevant to assessment

- 8.46 The likelihood of trauma, intimidation or distress should be the principal issue when a court decides whether a victim is eligible for special protection. The most relevant factors should be those connected to the criminal trial process itself, in particular:
- the victim's relationship with the accused
  - the subject matter of the victim's expected evidence
  - the nature of the alleged offending perpetrated against the victim
  - the victim's preference.
- 8.47 Queensland, South Australia, Tasmania, New Zealand and the United Kingdom also list the victim's age, any disability, and cultural or linguistic background as relevant factors.<sup>65</sup> The presence of one or more of these factors does not automatically mean that a victim will be in need of special protections. However, material gathered by the Commission and existing research demonstrate that such personal characteristics are often relevant to whether a victim is likely to be traumatised, intimidated or distressed by giving evidence in court.<sup>66</sup>
- 8.48 Recognising the significance of a victim's personal characteristics is consistent with the *Victims' Charter Act 2006* (Vic). Section 6(2) requires that investigatory, prosecuting and victims' services agencies take into account and be responsive to the diverse characteristics of victims.
- 8.49 In considering whether a victim's disability should be a relevant factor, disability should be understood as defined in the *Equal Opportunity Act 2010* (Vic).<sup>67</sup> Existing provisions limiting special protections to victims with a cognitive impairment (as defined in the Criminal Procedure Act) are unduly restrictive. The Office of the Public Advocate, the Victorian Equal Opportunity and Human Rights Commission, Women with Disabilities Victoria and the Child Witness Service all observed that other types of disability, such as blindness or mental illness, may make individuals vulnerable to trauma or more fearful or intimidated in the courtroom.<sup>68</sup>

### Practical implications

- 8.50 The Commission's recommendations have implications for police and prosecution practices and the courts. The existing police practice of audiovisually recording the statement of child victims and victims with a cognitive impairment in sexual offence matters will have to be expanded.<sup>69</sup> In addition, a case-by-case approach requires police to identify victims who fall within the definition of protected victim, so that an audiovisual recording of the victim's evidence-in-chief can be taken. This may not always occur.

65 *Evidence Act 1977* (Qld) s 21A; *Evidence Act 1929* (SA) ss 4, 13, 13A; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8; *Evidence Act 2006* (NZ) ss 103, 105; *Youth Justice and Criminal Evidence Act* (UK) s 17(2).

66 Submissions 4 (Victorian Equal Opportunity and Human Rights Commission), 18 (Women with Disabilities Victoria); Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime* (2014) 112–6; Australian Human Rights Commission, *Equality Before the Law: Towards Disability Justice Strategies* (2014) 16–7; Nina Westera and Martine Powell, 'Prosecutors' Perceptions of the Utility of Video-evidence for Adult Complainants of Sexual Assault' (2015) 39 *Criminal Law Journal* 198, 203, noting that victims suffering from psychological distress, Indigenous victims, victims from different cultural backgrounds and victims who are intimidated or likely to retract their evidence because of family violence dynamics, especially benefit from audiovisually recorded evidence-in-chief. See also Victoria Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Who Are the Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* Information Paper 2 (2015) 3–11.

67 *Equal Opportunity Act 2010* (Vic) s 4 (definitions). Disability is defined as including 'total or partial loss of bodily function', or 'the presence of organisms that may cause disease' or 'malfunction of a part of the body', including a 'mental or psychological disease or disorder'; 'a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder', or 'malformation or disfigurement of part of the body', and includes 'a disability that may existing in the future and...behaviour that is a symptom or manifestation of a disability'.

68 Submissions 4 (Victorian Equal Opportunity and Human Rights Commission), 17 (Office of the Public Advocate), 18 (Women with Disabilities Victoria); Consultation 18 (Child Witness Service, Department of Justice and Regulation).

69 Police practices will also be affected by the recommendation of the Royal Commission into Family Violence that audiovisual recorded statements be admissible in proceedings regarding family violence-related offending. See Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 173, recommendation 72.

- 8.51 Until audiovisual recordings of interviews are made more widely available, not all victims will give their evidence-in-chief in this way. This should not entirely undermine the effect of the Commission's recommendations. Protected victims will still benefit from giving their evidence-in-chief and being cross-examined at a special hearing.
- 8.52 Prosecution lawyers will also need to assess whether a victim may be eligible for special protections and discuss this with the victim. In addition, the prosecution should be responsible for applying to the court for the victim to be considered a protected victim. This accords with the Commission's view of the relationship between the victim and the prosecution, and the OPP's responsibilities to provide victims with information and consult with them throughout the criminal trial process.<sup>70</sup>
- 8.53 There will also be some implications for the courts. Most notably, the reforms proposed will reduce the number of victims giving evidence at committal hearings and increase the use of special hearings. Some judges of the County Court, some magistrates and the Director of Public Prosecutions (DPP) recognised that this is likely to increase the workload of the higher courts.<sup>71</sup> Changes in listing procedures will be required, although judges consulted by the Commission did not view these practical concerns as insurmountable.<sup>72</sup>

## Alternative arrangements

### Law and procedure

- 8.54 Certain victims can also take advantage of modifications to normal arrangements during court proceedings. These measures also aim to reduce the trauma, intimidation and distress associated with giving evidence, although they are arguably less protective than special protections. They are described in the Criminal Procedure Act as alternative arrangements, and include:
- the use of remote witness facilities, whereby the victim gives evidence from a room separate from the courtroom and the evidence is transmitted to the courtroom via closed circuit television ('remote witness facilities')<sup>73</sup>
  - the placement of screens in the courtroom to remove the accused from the direct line of vision of the victim when giving evidence<sup>74</sup>
  - having a support person beside the victim when giving evidence, to provide emotional support<sup>75</sup>
  - allowing only specified people to be present in court<sup>76</sup>
  - requiring lawyers not wear robes, and to be seated rather than standing when questioning the victim.<sup>77</sup>
- 8.55 In sexual offence cases, the judge must order that remote witness facilities be used and that a support person be present.<sup>78</sup> If the victim elects not to use remote facilities, the judge must then direct that a screen be in place and a support person be available.<sup>79</sup> If the victim does not want to use either the remote facility or a support person and a screen, the judge can permit this only if satisfied that the victim is aware that the alternative arrangement is available and is willing and able to give evidence without it.<sup>80</sup>

70 The Commission discusses this relationship and makes recommendations about providing information to victims and conducting conferences with victims in Chapter 6.

71 Submission 23 (DPP); Roundtables 11 (Judges of the County Court of Victoria), 15 (Magistrates of the Magistrates' Court of Victoria). See also Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) 107. Judges interviewed as part of that evaluation observed that special hearings take more time than ordinary trial processes: the special hearing itself takes time, after which the defence, prosecution and the judge must watch the recording again during the trial. These concerns were not raised directly with the Commission.

72 Consultation 31 (Judge of the County Court of Victoria); Roundtable 11 (Judges of the County Court of Victoria).

73 *Criminal Procedure Act 2009* (Vic) ss 360(a), 362.

74 *Ibid* s 360(b).

75 *Ibid* s 360(c).

76 *Ibid* s 360(d).

77 *Ibid* s 360(e)(f).

78 *Ibid* s 363.

79 *Ibid* ss 364–365.

80 *Ibid* ss 363–365.

- 8.56 In cases involving family violence, the court may order the use of alternative arrangements at its discretion.<sup>81</sup> The Royal Commission into Family Violence recommended that it be mandatory that victims in family violence-related proceedings be able to give evidence remotely, unless they wish to give evidence in the courtroom.<sup>82</sup>

### Expanding alternative arrangements

- 8.57 A number of victims consulted by the Commission used alternative arrangements when giving evidence.<sup>83</sup> Some found this experience positive.<sup>84</sup>
- 8.58 Alternative arrangements are only expressly available for victims of sexual offences and offences involving family violence. There was broad support among victims, support workers, academics, police, some lawyers and a member of the judiciary for expanding the availability of alternative arrangements to a broader group of victims.<sup>85</sup> Remote witness facilities were especially highlighted as a positive arrangement that should be readily available to more victims.<sup>86</sup>
- 8.59 Similarly to proposals regarding special protections, contributors suggested that alternative arrangements should be made available:
- to victims of certain offence types or victims with certain characteristics<sup>87</sup>
  - on a case-by-case basis.<sup>88</sup>

### The Commission's conclusion

- 8.60 As with special protections, proposals made by contributors and a survey of other jurisdictions were instructive, but did not reveal a clear consensus about the basis for expanding eligibility for alternative arrangements.
- 8.61 The Commission considers that an approach that avoids complexity and achieves consistency with its recommendations about special protections, and ensures victims who require alternative arrangements can use them, should be preferred.
- 8.62 Therefore, in accordance with the Commission's recommendations regarding special protections, all child victims should be eligible to use alternative arrangements unless they do not wish to do so. This is consistent with protections available in most Australian jurisdictions, and in the United Kingdom, and is supported by contributors to this reference.<sup>89</sup> Other victims should be eligible to use alternative arrangements if they fall within the definition of a 'protected victim' described at [8.45]–[8.49].

81 Ibid ss 359–360.

82 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 172–3, recommendation 72 (this recommendation also applies to family violence intervention order proceedings). The Royal Commission also recommended consideration be given to allowing family violence victims to give their evidence-in-chief through audiovisual recorded statements: Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 172–3, recommendation 71.

83 Consultations 24 (A victim and relative), 28 (Laurie Krause), 29 (Parent of victims), 41 (A victim), 44 (Kristy McKellar), 46 (A victim).

84 Consultations 28 (Laurie Krause), 29 (Parent of victims), 46 (A victim).

85 Submissions 18 (Women with Disabilities Victoria), 26 (Victoria Police), 31 (Professor Jonathan Doak, Nottingham Trent University), 40 (Former VOCCC victim representatives), 38 (Name withheld); Consultations 26 (Loddon Campaspe Centre Against Sexual Assault), 36 (Magistrate John Lesser), 46 (A victim), 50 (Witness Assistance Service, OPP Victoria), Roundtable 4 (Legal practitioners, Geelong), 10 (Legal practitioners, Shepparton).

86 Submissions 23 (DPP), 31 (Professor Jonathan Doak, Nottingham Trent University), 39 (Safe Steps); Consultations 3 (Parent of a victim), 15 (DPP), 26 (Loddon Campaspe Centre Against Sexual Assault), 28 (Laurie Krause), 40 (A victim), 46 (A victim), 50 (Witness Assistance Service, OPP Victoria); Roundtables 5 (Victim support specialists, Morwell), 7 (Victim support specialists, Melbourne), 12 (Victim support specialists, Wodonga).

87 Submissions 18 (Women with Disabilities Victoria) (victims with disabilities), 38 (Name withheld) ('vulnerable victims'), 40 (Former VOCCC victim representatives); Consultation 36 (Magistrate John Lesser); Roundtables 4 (Geelong legal practitioners) (assault victims), 10 (Shepparton legal practitioners) (victims of serious offences or victims for whom there are safety issues or where there is a real fear of the accused).

88 Submissions 14 (Victims of Crime Commissioner, Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University); Consultation 19 (Victims of Crime Commissioner, Victoria).

89 Submission 23 (DPP) (although limiting support to child victims of offences involving serious violence), 31 (Professor Jonathan Doak, Nottingham Trent University); Consultations 18 (Child Witness Service, Department of Justice and Regulation), 22 (Professor Jonathan Doak, Nottingham Trent University). See also *Evidence Act 1977* (Qld) s 21A (definition of special witness); *Evidence Act 1929* (SA) s 4 (definition of vulnerable witness); *Criminal Procedure Act 1986* (NSW) ss 306M, 306ZA, 306ZB, 306ZH; *Youth Justice and Criminal Evidence Act 1999* (UK) s 16 (witnesses eligible for assistance on the grounds of age or incapacity). It is also consistent with the Commission's view that all child victims should be eligible to use intermediaries, discussed in Chapter 7, and special protections, discussed above at [8.43].



## Limits on giving evidence at committal for other victims

- 8.63 Being cross-examined at committal can be distressing for all victims, not just victims who need protection. The stress experienced by victims who are cross-examined at committal can limit their ability or willingness to give evidence at trial.<sup>90</sup>
- 8.64 Cross-examination at a committal hearing is often described as worse than at the trial. Material gathered by the Commission suggests two reasons for this:
- Victims cannot tell their story through evidence-in-chief. Rather, their statement is tendered to the magistrate and they are subject only to cross-examination.<sup>91</sup>
  - The manner of questioning by the defence is not constrained by the presence of a jury. As a result it may be more oppressive or intimidating.<sup>92</sup>
- 8.65 To address these problems, the Commission considered whether reforms were necessary to limit cross-examination at committal of victims who do not fall within the definition of 'protected victim'.

## Law and policy

- 8.66 The accused is only allowed to cross-examine a witness at a committal hearing if the magistrate is satisfied that the accused has identified an issue to which the proposed cross-examination relates, and that cross-examination on that issue is 'justified'.<sup>93</sup> In making this determination, the magistrate must have regard to whether the informant consents to cross-examination being allowed,<sup>94</sup> and the need to ensure that:
- the prosecution case is adequately disclosed.
  - the issues are adequately defined.
  - the evidence is of sufficient weight to support a conviction.
  - a fair trial will take place (including that the accused is able to prepare and present a defence).
  - matters relevant to a potential plea of guilty, or a potential discontinuance, are clarified.
  - trivial, vexatious or oppressive cross-examination is not permitted.
  - the interests of justice are otherwise served.<sup>95</sup>
- 8.67 The restrictions on cross-examining witnesses described above were put in place to reduce delays, identify guilty pleas earlier in the criminal trial process and encourage a cooperative approach.<sup>96</sup> They were not introduced for the benefit of victims.

## The test for cross-examining victims at committal

- 8.68 Over the last three decades, all Australian jurisdictions have considered, and imposed, restrictions on the accused's right to examine witnesses at committal. Western Australia and Tasmania have removed this right entirely.<sup>97</sup> Committal hearings were abolished in the United Kingdom in 2001 and in New Zealand 2011.<sup>98</sup> Although there was support for

90 Submission 40 (Former VOCCC victim representatives); Consultations 45 (Victims Support Agency, Department of Justice and Regulation), 50 (Witness Assistance Service, OPP Victoria). Similar findings were also reported in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1215 [26.114].

91 Consultations 1 (A victim), 50 (Witness Assistance Service, OPP Victoria).

92 Consultation 50 (Witness Assistance Service, OPP Victoria); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1215 [26.114].

93 *Criminal Procedure Act 2009* (Vic) s 124(3).

94 *Ibid* s 124(2).

95 *Ibid* s 124(4).

96 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 4978 (Rob Hulls).

97 *Justices Act 1959* (Tas) ss 55–60 (note that ss 56A and 57A have been repealed. These sections provided for the examination of witnesses as part of committal proceedings); *Criminal Procedure Act 2004* (WA) ss 41, 43, 44.

98 *Crime and Disorder Act 1998* (UK) s 51 (abolishing committal hearings for indictable offences). In New Zealand, committal proceedings have been replaced by a process of pre-trial case management. To cross-examine witnesses before a trial, an application must be made for an oral evidence order: *Criminal Procedure Act 2011* (NZ), ss 54–59 (pre-trial case management process), ss 90–100 (oral evidence order process).



this reform among contributors, including some judges of the County Court,<sup>99</sup> abolishing committals entirely involves considerations beyond the role of the victim and is outside the Commission's terms of reference.

- 8.69 Members of the judiciary, victim support workers and former victim representatives on the Victims of Crime Consultative Committee also expressed support for expanding the prohibition on cross-examination at committal to all victims and allowing greater pre-trial management.<sup>100</sup> However, as with expanding special protections to all sexual offence or family violence victims, removing all victims from committal hearings is likely to have considerable resource implications and may reduce the fairness of the criminal trial process.<sup>101</sup>
- 8.70 The Commission considers that a more balanced approach involves strengthening the test for cross-examining victims at committal hearings. The DPP, a number of magistrates and former Victims of Crime Consultative Committee victim representatives supported such an approach.<sup>102</sup> The terms of this test are discussed below.

### Substantial reasons in the interests of justice

- 8.71 The DPP proposed that the current committal test be amended to require the accused to identify a 'substantial issue' to which the proposed questioning relates, rather than just an 'issue'.<sup>103</sup>
- 8.72 This would bring the test in Victoria closer to those that exist in Queensland and New South Wales, where the magistrate must be satisfied that there are 'substantial reasons why, in the interests of justice', the witness should be required to give oral evidence or be cross-examined' ('substantial reasons test').<sup>104</sup>
- 8.73 In Queensland, the substantial reasons test applies to all witnesses, whereas in New South Wales it applies to witnesses other than victims of serious offences, for whom a stricter test applies (discussed below at [8.75]–[8.77]).

### Central to whether the accused stands trial

- 8.74 The former victim representatives of the inaugural Victims of Crime Consultative Committee proposed a stricter test than the 'substantial reasons' tests in New South Wales and Queensland. They recommended that cross-examination only be permitted where the defence can demonstrate that the issue in question is central to whether the accused should stand trial.<sup>105</sup>
- 8.75 This proposal mirrors elements of the committal hearing test in New South Wales for victims of 'offences of violence' which include sexual offences, attempted murder, grievous bodily harm, abduction, kidnapping and robbery.<sup>106</sup> For these offences, cross-examination of the victim will only be permitted where there are 'special reasons why the alleged victims should, in the interests of justice, attend to give oral evidence'.<sup>107</sup> The New South Wales test was introduced with the express intention of reducing the trauma experienced by victims from being cross-examined multiple times.<sup>108</sup>

99 Submissions 14 (Victims of Crime Commissioner, Victoria), 31 (Professor Jonathan Doak, Nottingham Trent University); Consultations 22 (Professor Jonathan Doak, Nottingham Trent University), 31 (Judge of the County Court of Victoria); Roundtable 11 (Judges of the County Court of Victoria).

100 Submissions 34 (Northern Centre Against Sexual Assault) (referring only to removing victims from committal hearings), 40 (Former VOCCC victim representatives); Consultations 1 (A victim), 31 (Judge of the County Court of Victoria), 36 (Magistrate John Lesser); Roundtable 11 (Judges of the County Court of Victoria);

101 The implications of removing the right of the accused to cross-examine victims at a committal hearing are discussed in detail below at [8.83–8.90].

102 Submissions 23 (DPP), 40 (Former VOCCC victim representatives); Consultations 9 (Magistrate Ron Saines), 26 (Magistrate Stella Stuthridge).

103 Submission 23 (DPP).

104 *Criminal Procedure Act 1986* (NSW) s 91(3); *Justices Act 1886* (Qld) s 110B(1). It is notable that in both New South Wales and Queensland, there is no need for either party to seek leave if the prosecution consents to the witness being called. See *Criminal Procedure Act 1986* (NSW) s 91(2); *Justices Act 1886* (Qld) s 110A(5).

105 Submission 40 (Former VOCCC victim representatives).

106 *Criminal Procedure Act 1986* (NSW) ss 93(1), 94 (defining offences of violence).

107 *Ibid* s 93(1).

108 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 November 1987, 16745f, cited in *Kant v Director of Public Prosecutions* (1994) 34 NSWLR 216, 225, regarding *Justices Act 1902* (NSW) s 43EA(2), which is the predecessor provision to section 93.

- 8.76 Courts have interpreted the term ‘special reasons’ as including a real possibility that if the victim is subject to cross-examination, the defendant will not be committed for trial.<sup>109</sup> However, special reasons may arise in a broader set of circumstances. The New South Wales Court of Criminal Appeal has stated that what amounts to special reasons must be assessed on a case-by-case basis:
- there must be some features of the particular case by reason of which [the case] is out of the ordinary and it is in the interests of justice that the alleged victim should be called to give oral evidence.<sup>110</sup>
- 8.77 Special reasons do not justify cross-examination ‘in the hope that some issue of credibility or fact might arise’.<sup>111</sup> Special reasons can be established in a range of circumstances, including:
- where a victim has given inconsistent accounts of the offending (although this is often insufficient on its own)
  - where cross-examination will eliminate possible areas of dispute
  - where it is necessary to establish important facts as the foundation of the defence (or eliminate any possibility of a particular defence)
  - in the context of scientific witnesses, where it is necessary to explore possible avenues of inquiry such as alternative hypotheses or the need for further forensic testing or analysis
  - where cross-examination is the only way to obtain proper disclosure.<sup>112</sup>

#### The Commission’s conclusion

- 8.78 When compared with other jurisdictions surveyed by the Commission, Victoria has the least restrictive threshold test to cross-examine witnesses at committal. In a 12-month period, there were 1309 applications to cross-examine witnesses at a committal hearing, out of a total 2830 committal hearings finalised. Of those applications, 1170 (approximately 89 per cent) were granted, although it is unknown what proportion of those were to cross-examine victim–witnesses.
- 8.79 The Commission considers it appropriate to impose stricter limits on the accused’s right to cross-examine victims at the committal. Victims should only be cross-examined where cross-examination relates directly and substantially to the decision to commit for trial. This test draws on the interpretation of ‘special reasons’ in New South Wales and South Australia, and the proposal of the former Victims of Crime Consultative Committee victim representatives.
- 8.80 The Commission considers that this stronger test is in keeping with the original purpose of committals: to filter out weak or inappropriate cases. It limits cross-examination of victims to a narrow set of circumstances where the interests of justice require it. The Commission’s approach, in effect, sets out in legislation the definition of ‘special reasons’ already established by the New South Wales Court of Appeal. However, the Commission considers that the wholesale adoption of the New South Wales test in Victoria would not achieve the purposes of reform. Providing a clear legislative definition of the test eliminates the risk that the test might be expanded too widely, which would undermine the point of the reform.<sup>113</sup>

109 *B v Gould* (1993) 67 A Crim R 297, 303. See also *KT v DPP* (NSW) [2009] NSWSC 1126 [54]–[58]; *O’Hare v DPP* [2000] NSWSC 430 [51]; *Murphy v DPP* [2006] NSWSC 965 [44].

110 *B v Gould* (1993) 67 A Crim R 297, 303.

111 *Campbell v Richardson* [2008] NSWSC 122 (22 February 2008) [72]. See also *B v Gould* (1993) 67 A Crim R 297, 303–4; *R v Kennedy* (1997) A Crim R 341, 352.

112 *Goldsmith v Newman and the State of South Australia* (1992) 59 SASR 404, 411 discussing the equivalent provision in the South Australian legislation.

113 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report No 114 (2010) [23.124], citing concerns raised by Women’s Legal Service New South Wales.

## Protection and a fair trial

- 8.81 The protective measures discussed above may have implications for the fairness of the criminal trial process. In particular:
- Special protections and the Commission’s proposed test for cross-examining victims at a committal hearing may limit the accused’s opportunity to test the evidence at the committal hearing stage of the criminal trial process.
  - Special protections and the use of remote facilities and other alternative arrangements depart from traditional trial procedures and may impact on the jury’s assessment of the evidence.
- 8.82 These concerns are discussed in turn below.

### Restricting cross-examination of victims at committal hearings

- 8.83 In most jurisdictions, reforms to the committal process have been implemented after careful consideration of their implications for a fair trial.<sup>114</sup> The advantages and disadvantages associated with whether the accused should retain their right to examine witnesses at committal have been ably documented elsewhere.<sup>115</sup> The Commission has found no evidence that these reforms have undermined a fair trial. Jonathan Doak noted that the legal profession has adapted effectively to the removal of oral committal hearings in the United Kingdom.<sup>116</sup>
- 8.84 The primary objection to reform was that cross-examining the victim at a committal hearing provides the accused and the prosecution with an opportunity to assess the strength of the case. This promotes the early resolution of cases without the need for a trial.<sup>117</sup> It was argued that there are advantages for both the accused and the victim—the accused gets a benefit at sentence for the early guilty plea and the victim benefits from faster disposition of the case.<sup>118</sup>
- 8.85 The Commission heard that committal hearings with cross-examination lead to resolution ‘frequently’<sup>119</sup> and for ‘numerous’<sup>120</sup> and ‘many’ cases.<sup>121</sup> This assessment is anecdotal and difficult to evaluate.
- 8.86 The Magistrates’ Court, the County Court and the Supreme Court do not have data that show whether committal hearings encourage early pleas of guilty. The available data shows the percentage of cases passing through a committal hearing which involve cross-examination of one or more witnesses. For example, over a 12-month period in the Magistrates’ Court, 46 per cent of matters that proceeded through a committal involved cross-examination of one or more witnesses.<sup>122</sup> Data from the Supreme Court and County Court shows the percentage of cases that are finalised following a trial over a 12 month period: 22 per cent in the County Court; and 38 per cent in the Supreme Court.<sup>123</sup>

114 See, eg, the Hon. Martin Moynihan, *Review of the Civil and Criminal Justice System of Queensland* (Queensland Government, 2008) 161–219; Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System: Final Report* (1999) 239–246. See also, Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1214–1218.

115 See, eg, Asher Flynn, ‘A Committal Waste of Time? Reforming Victoria’s Pre-trial Process: Lessons from Other Jurisdictions’ (2013) 27 *Criminal Law Journal* 175; The Hon. Martin Moynihan, *Review of the Civil and Criminal Justice System of Queensland* (Queensland Government, 2008) 161–219.

116 Consultation 22 (Professor Jonathan Doak, Nottingham Trent University).

117 Submissions 10 (Victoria Legal Aid), 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association); Consultations 15 (DPP), 47 (Victoria Legal Aid); Roundtables 4 (Legal practitioners, Geelong), 6 (Legal practitioners, Morwell), 10 (Legal practitioners, Shepparton), 14 (Legal practitioners, Ballarat), 15 (Magistrates of the Magistrates’ Court of Victoria).

118 Consultation 47 (Victoria Legal Aid); Roundtable 6 (Legal practitioners, Morwell).

119 Submission 29 (Victorian Bar and Criminal Bar Association).

120 Submission 25 (Law Institute of Victoria).

121 Consultation 15 (DPP).

122 Data provided by the Magistrates’ Court of Victoria (11 February 2016). This 12-month period corresponds with the 2015 calendar year.

123 County Court of Victoria, *2014–2015 Annual Report* (2015) 21; Supreme Court of Victoria, *2013–14 Annual Report* (2015) 45.

- 8.87 The data does not show how many of these cases involved cross-examination of the victim. Nor does it show whether a decision to plead guilty is related to evidence gathered through cross-examination of the victim, or whether any decision is an early one. Moreover, it is not possible to link cases committed from the Magistrates' Court to the corresponding proceedings in the Supreme or County Courts. Ultimately, determining whether cross-examination of the victim at a committal hearing encourages early pleas of guilty requires an examination of individual court files and interviews with practitioners and accused persons about decisions to plead guilty.
- 8.88 Moreover, some judges of the County Court and support workers expressed scepticism about whether committal hearings facilitate the early resolution of cases.<sup>124</sup> It was suggested that committal hearings are instead used to generate inconsistencies in victims' evidence.<sup>125</sup> The Moynihn Review of the civil and criminal justice system in Queensland also concluded that the primary purpose of committal hearings is 'exposing inconsistencies in [witness's] testimony ... a purpose which is quite different from the historical purpose of the committal'.<sup>126</sup>
- 8.89 Committal hearings are not the only way to encourage early pleas. The special protection process also allows the accused to see the strength of the case against them. Viewing an audiovisual recording of the victim's statement allows an early assessment of the victim's evidence-in-chief.<sup>127</sup> Special hearings can also be held before the trial, thereby allowing the victim to be cross-examined earlier in the criminal trial process.<sup>128</sup>
- 8.90 The Commission considers that, in the absence of evidence to the contrary, reducing the risk of victims being unnecessarily intimidated and traumatised outweighs (potentially unfounded) concerns that fewer cases will be resolved early through cross-examination at committal.<sup>129</sup>

### Prejudice against the accused

- 8.91 Remote facilities, special hearings and the use of screens are sometimes said to prejudice the jury against the accused.<sup>130</sup> Such measures, it is suggested, may convey to the jury that the accused is so dangerous that the victim must be in a different room or hidden behind a screen.<sup>131</sup> Protective procedures may also imbue the victim's evidence with more credibility than it deserves.<sup>132</sup>

124 Roundtables 9 (Victim support and therapeutic specialists, Shepparton), 11 (Judges of the County Court of Victoria).

125 Consultation 43 (Victoria Police SOCIT, Wodonga); Roundtable 11 (Judges of the County Court of Victoria).

126 The Hon. Martin Moynihn, *Review of the Civil and Criminal Justice System of Queensland* (Queensland Government, 2008) 166.

127 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 269 [5.25]; Mark R Kebbell and Nina J Westera, 'Promoting Pre-recorded Complainant Evidence in Rape Trials: Psychological and Practice Perspectives' (2011) 35 *Criminal Law Journal* 376, 378–9; Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) 1128 [26.168].

128 Whether a special hearing is held before or during the trial, it must occur within three months of the accused being committed for trial: *Criminal Procedure Act 2009* (Vic) s 371. Note that the court may extend this time more than once at or before the time expires: s 371(2). As a result of concerns raised by the Child Witness Service, the Commission considered whether the Criminal Procedure Act should require special hearings to occur before the criminal trial, as was the case when the process was introduced. However, an evaluation of the reforms found that this requirement was contributing to delay and imposing a considerable burden on court resources. Although the Child Witness Service suggested that the current arrangement creates uncertainty for victims, it has been welcomed by the courts for allowing more flexibility. Ultimately, the Commission does not intend to be prescriptive about the timing of the special hearing process. It considers courts better placed to manage operational issues associated with the timetabling of cases. See generally Consultation 18 (Child Witness Service, Department of Justice and Regulation); Victoria, *Parliamentary Debates*, Legislative Assembly, 21 June 2012, 2945 (Robert Clark); Success Works, *Sexual Assault Reform Strategy, Final Evaluation Report* (2011) 107; Criminal Procedure Amendment Bill 2012 (Vic) cl 24–26; County Court of Victoria, *2011–2012 Annual Report* (2012) 12.

129 Submissions 14 (Former VOCCC victim representatives), 23 (DPP), 31 (Professor Jonathan Doak, Nottingham Trent University); Consultations 9 (Magistrate Ron Saines), 22 (Professor Jonathan Doak, Nottingham Trent University); Roundtable 15 (Magistrates' Court of Victoria).

130 Roundtables 6 (Legal practitioners, Geelong), 10 (Legal practitioners, Shepparton).

131 Roundtable 6 (Legal practitioners, Geelong).

132 Louise Ellison and Vanessa E Munro, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2014) 23(1) *Social & Legal Studies* 3, 5.

- 8.92 However, consultation participants told the Commission that protective procedures can work in favour of the accused. A victim's evidence may have less impact, or appear less realistic, when it is given from a remote facility.<sup>133</sup> This perception was a focus of discussion in the 2011 *Final Evaluation Report for the Sexual Assault Reform Strategy*, and has been raised in evaluations of similar reforms introduced in the United Kingdom in 1999.<sup>134</sup>
- 8.93 Research suggests that juries' assessments of the accused's or the victim's evidence are not significantly affected by the use of remote facilities, screens or support people. A 2011 study examining mock juror perception of rape victims giving evidence using remote facilities, pre-recorded evidence or screens was 'unable to identify any clear or consistent evidence of a detrimental impact on either party as a consequence of using divergent modes of giving evidence'.<sup>135</sup> The authors noted that their findings:
- should go some way towards assuaging the concerns of critics and—in the context in which previous research has strongly indicated that their use is welcomed by vulnerable witnesses themselves—they should give advocates greater confidence in encouraging complainants of sexual offence to make use of protective special measures.<sup>136</sup>
- 8.94 Similarly, a 2005 Australian-based study of mock sexual assault jury trials concluded that there was 'no consistent pattern' to suggest that jurors were being 'systematically affected' by whether the victim gave evidence in court, through a remote witness facility, or using a pre-recorded tape.<sup>137</sup>
- 8.95 Victim support specialists consulted by the Commission felt strongly that the potential for such measures to reduce the distress experienced by victims giving evidence outweighed the risk that the impact of the victim's evidence would be diminished.<sup>138</sup>
- 8.96 The Commission notes that any residual concern about the impact of special hearings and alternative arrangements on the fair trial of the accused can be remedied by an appropriate direction from the trial judge to the jury. The Criminal Procedure Act currently requires judges to warn juries that they are 'not to draw any inference adverse to the accused or give the evidence greater or lesser weight because of the making of [alternative] arrangements'.<sup>139</sup>

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133 Consultations 15 (DPP), 31 (Judge of the County Court of Victoria); Roundtables 10 (Legal practitioners, Shepparton), 11 (Judges of the County Court of Victoria), 14 (Legal practitioners, Ballarat).

134 Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) 111; Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (2006) (Home Office, London UK) 55–7; *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Government Equalities Office, 2010) 90.

135 Louise Ellison and Vanessa Munro, 'A "Special" Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2013)? *Social & Legal Studies* 23.

136 Ibid 25.

137 Natalie Taylor and Jacqueline Joudo, 'The Impact of Pre-recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study' (Research and Public Policy Series No 68, Australian Institute of Criminology, January 2005) x, 66.

138 Consultation 27 (Loddon Campaspe Centre Against Sexual Assault).

139 *Criminal Procedure Act 2009* (Vic) s 361.

## Recommendations

- 37 The *Criminal Procedure Act 2009* (Vic) should be amended to include a definition of protected victim. A protected victim should be defined as a victim who is likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or give evidence fairly.

Factors relevant to determining whether a victim is a protected victim should include:

- (a) the nature of the offending perpetrated against the victim
  - (b) the victim's relationship with the accused
  - (c) the subject matter of the evidence the victim is expected to give
  - (d) the victim's views
  - (e) and any other factor the court considers relevant.
- 38 Eligibility for protective procedures under section 123 and Divisions 5 and 6 of Part 8.2 of the *Criminal Procedure Act 2009* (Vic) should be extended to also apply to protected victims. All child victims other than child victims of sexual offences should be considered protected victims unless the court is satisfied that the child victim is aware that the protective procedures are available and does not wish to use them.
- 39 Section 124 of the *Criminal Procedure Act 2009* (Vic) should be amended to provide that the Magistrates' Court must not grant leave to cross-examine a victim at a committal hearing except on a matter that relates directly and substantially to the decision to commit for trial. The test for granting leave should include reference to whether the victim is able to and wishes to be cross-examined at a committal hearing.
- 40 The *Criminal Procedure Act 2009* (Vic) should be amended so that the court must order the use of alternative arrangements set out in section 360 of the Act for:
- (a) child victims and victims with a cognitive impairment
  - (b) victims determined to be protected victims in accordance with recommendation 37,
- unless the court is satisfied that the victim is aware of their right to use those arrangements and is able and wishes to give evidence without them.

## Achieving the purpose of reforms

### A guiding principle

- 8.97 The Commission considers that a guiding principle should augment the above recommendations to ensure their consistent application by professionals in the criminal justice system and by the courts. Guiding principles assist courts in interpreting and giving meaning to statutory provisions.<sup>140</sup>
- 8.98 In its report on sexual offences, the Commission recommended that a guiding principle be included in relevant legislation to ensure that laws related to sexual offences are interpreted in accordance with the ‘social problem that the legislation seeks to address and the principles the legislation endeavours to uphold’.<sup>141</sup>
- 8.99 This recommendation is reflected in Part 8.2 of the Criminal Procedure Act, which contains principles about how to interpret provisions relating to witnesses in sexual offence proceedings. Part 8.2 now also applies to victims of family violence.<sup>142</sup> The recommendations in this report see the application of Part 8.2 of the Criminal Procedure Act expanded to all victims in need of protection from unjustified trauma, intimidation and distress arising from giving evidence. This expanded application should be reflected in the guiding principle in Part 8.2.
- 8.100 The new guiding principle should explicitly recognise that all victims are entitled to protection from the unnecessary trauma, intimidation and distress experienced when they give evidence in a criminal trial because of exposure to the accused, the formality and unfamiliarity of the courtroom environment, and the conduct of cross-examination.<sup>143</sup>
- 8.101 The Commission considers that the guiding principle does not undermine the right of the accused to have the victim cross-examined. In addition, the Commission acknowledges that, while all victims respond differently to stress, even well-conducted criminal proceedings and proper cross-examination can be traumatic and challenging.

## Recommendation

- 41 The *Criminal Procedure Act 2009 (Vic)* should be amended to include a guiding principle that, in interpreting and applying Part 8.2, courts are to have regard to the fact that measures should be taken that limit, to the fullest practical extent, the trauma, intimidation and distress suffered by victims when giving evidence.

140 Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) 390 [8.87]–[8.89]; *Sexual Offences: Law and Procedure*, Final Report (2004) 459 [9.48].

141 Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) [8.87]. See also *Sexual Offences: Law and Procedure*, Final Report (2004) 459 [9.48].

142 Recommendations 71 and 72 of the Royal Commission into Family Violence, once implemented, will further expand this application.

143 Victims’ experiences of cross-examination in particular are discussed in more detail in Chapter 5.



## Information for victims

- 8.102 Victims need to be informed about whether they may be eligible to use special protections and alternative arrangements. Those who are eligible must be equipped to make an informed decision about whether to use them. This point was repeatedly highlighted in consultations and submissions, and is supported by existing research.<sup>144</sup> Several consultation participants suggested that victims are not receiving the information they need to make an informed decision about whether to use protective procedures.<sup>145</sup>
- 8.103 This can be a complicated choice and not all victims will want to, or should, use protective procedures.<sup>146</sup> One victim said that she wanted to give evidence in court so that she was standing up to the perpetrator as a grown woman—she said that there was something ‘raw and empowering about being in the same room’. At the same time, she knew that she may be more nervous, have more anxiety and find giving evidence much more difficult.<sup>147</sup> Another victim described giving evidence in the remote facility as more intimidating than in the courtroom, and would have liked more information about which option to choose.<sup>148</sup>
- 8.104 As the decision may not be easy, victims need time to make it. Support workers expressed concern that some victims are being asked on the day they are to give evidence whether they would like to use a remote facility.<sup>149</sup> This was considered inadequate notice.<sup>150</sup>
- 8.105 To ensure victims are consistently provided with adequate information about using special protections or alternative arrangements, the Commission recommends that the Victims’ Charter Act be amended so that prosecution lawyers are obliged to provide this information to victims.<sup>151</sup> Prosecution lawyers should also be obliged to relay the victim’s views to the court. This accords with recommendations 37 and 38, which require the court to consider the victim’s views as part of deciding whether to order special protections or alternative arrangements.

## Recommendation

- 42 The *Victims’ Charter Act 2006 (Vic)* should be amended to require prosecuting agencies to inform victims about special protections and alternative arrangements for giving evidence and to state the victim’s preferences about the use of such procedures to the court.

## Protection measures addressed by the Victorian Royal Commission into Family Violence

### Recording a victim’s evidence at the scene

- 8.106 The practice of recording evidence and a victim’s statement at the scene (scene-recorded evidence) is one way to reduce the number of times a victim must give evidence. Scene-recorded statements differ from audiovisual recorded statements that constitute a victim’s evidence-in-chief in special hearings. The latter are recorded in a police station shortly

144 Consultations 27 (Loddon Campaspe Centre Against Sexual Assault), 31 (Judge of the County Court of Victoria), 41 (A victim), 47 (Victoria Legal Aid); Roundtable 12 (Victim support specialists, Wodonga); Matthew Hall, ‘The Use and Abuse of Special Measures: Giving Victims the Choice?’ (2007) 8 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 33.

145 Consultations 41 (A victim), 44 (Kristy McKellar), 47 (Victoria Legal Aid); Roundtables 9 (Victim support and therapeutic specialists, Shepparton), 12 (Victim support specialists, Wodonga).

146 Consultation 47 (Victoria Legal Aid); Roundtable 11 (Judges of the County Court of Victoria).

147 Consultation 40 (A victim).

148 Consultation 41 (A victim).

149 Consultation 12 (Victim support specialists, Wodonga).

150 Ibid.

151 The Commission makes recommendations about the provision of information to victims throughout the criminal trial process in Chapter 6.

after the offence, usually with a specialised investigator present—see [8.11]–[8.14]. In contrast, scene-recorded statements are taken by front-line police officers at the scene of the alleged offence.

- 8.107 Scene-recorded evidence is an aspect of broader reforms aimed at improving police responses to family violence.<sup>152</sup> This is beyond the Commission’s terms of reference. However, scene-recorded evidence and statements may have an impact on the criminal trial process. The New South Wales Office of the Director of Public Prosecutions told the Commission there is anecdotal evidence that the use of scene-recorded statements has led to an increase in early pleas of guilty.<sup>153</sup>
- 8.108 Scene-recorded statements aim to increase reporting of family violence, guilty pleas and conviction rates by reducing:
- the trauma associated with giving evidence in criminal proceedings
  - the likelihood that the victim will be pressured into changing their evidence or not cooperating with the prosecution.<sup>154</sup>

### Royal Commission recommendation

- 8.109 The Victorian Royal Commission into Family Violence considered whether ‘body-worn cameras’ should be introduced more widely to improve police responses to family violence.<sup>155</sup> Body-worn cameras can be used to collect evidence at the scene, including scene-recorded statements. The Royal Commission recommended that:

Victoria Police conduct a trial in two divisions of the use of body-worn cameras to collect statements and other evidence from family violence incident scenes [within 12 months]. The trial should be supported by any necessary legislative amendment to ensure the admissibility of evidence collected in criminal and civil proceedings. It should also be subject to a legislative sunset period, evaluation and the use of any evidence only with the victim’s consent.<sup>156</sup>

- 8.110 The Commission notes that the Royal Commission expressed concern about the use of scene-recorded evidence without the victim’s consent and welcomes the proposal to conduct a small trial, subject to evaluation.<sup>157</sup> This approach seems appropriate given the following problems associated with the use of scene-recorded statements:
- Police may inadvertently capture evidence or material that is harmful to the victim. Statements may be recorded in a victim’s home and may be ‘highly personal and extremely graphic’.<sup>158</sup> This has implications for the victim’s privacy.
  - Not all victims of family violence will conform to expectations about how they are supposed to behave at the scene.<sup>159</sup>
  - The victim may be perceived as involved in the offending and there could be ‘unintended criminalisation of a victim if the video depicts injuries inflicted on the perpetrator in self-defence’.<sup>160</sup>

152 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 80–2.

153 Consultation 34 (Office of the Director of Public Prosecutions, NSW).

154 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2014 (Brad Hazzard) 1486; New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2014, 2571 (Paul Lynch), 2572 (Geoff Provest).

155 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 80–2, 106–7.

156 Ibid 107, recommendation 58.

157 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 107. In New South Wales, the victim’s consent is not required, although their wishes are a relevant consideration for the prosecutor when deciding whether to use a scene-recorded statement as evidence: See *Criminal Procedure Act 1986* (NSW) ss 289D, 289G.

158 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 82. See also Women’s Legal Service NSW, Submission to Department of Justice New South Wales, *Review of Domestic Violence Evidence in Chief (DVEC) Reforms*, 30 June 2016, [18]–[19].

159 Heather Douglas and Leigh Goodmark, ‘Beware the Unintended Consequences of Police-worn Body Cameras’, *The Conversation* (29 September 2015) <<http://theconversation.com>>. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 81.

160 Heather Douglas and Leigh Goodmark, ‘Beware the Unintended Consequences of Police-worn Body Cameras’ *The Conversation* (29 September 2015) <<http://theconversation.com>>. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 81.

- In New South Wales, there have been circumstances in which adverse inferences have been drawn from a victim's refusal to consent to a scene-recorded statement.<sup>161</sup>
- It is unclear whether the New South Wales legislation permits a scene-recorded statement to be edited, or whether a victim can view the statement before it is disclosed.<sup>162</sup>

8.111 It is not clear whether the Royal Commission's recommendation will encompass family violence offending that is dealt with in the Supreme Court or County Court, in particular sexual offending. In light of the concerns noted above, it may be appropriate to limit the pilot to summary criminal proceedings in the Magistrates' Court at first.

### Court architecture and facilities

8.112 The Victims' Charter Act includes a principle that 'a prosecuting agency and the courts should, during the course of a court proceeding and within a court building' minimise the victim's exposure to unnecessary contact with, or protect them from intimidation by, the accused, witnesses for the defence and the accused's family or supporters.<sup>163</sup>

8.113 The layout of courts and their infrastructure can make it very difficult to observe this requirement. The Royal Commission into Family Violence identified as a consistent theme the need for improvements to court infrastructure and technology.<sup>164</sup> Similar themes were echoed during this reference. Victims should be able to feel safe, have private conversations and access facilities for this purpose throughout the criminal trial process.

### Court architecture

8.114 Contributors told the Commission about deficiencies in court architecture which heighten the anxiety of attending court. These include:

- having to pass closely by the accused or their family inside the courtroom<sup>165</sup>
- using the same entry and exit to the court precinct as the accused and their family and other members of the public<sup>166</sup>
- having to wait in public areas with the accused and their family and other members of the public.<sup>167</sup>

8.115 The Royal Commission into Family Violence identified the lack of separate entry and exits and adequate waiting rooms as creating a risk for victims in court precincts. It concluded:

As a community we should not tolerate situations where emotionally stressed and fearful victims, who are often accompanied by young children, have to spend lengthy periods in court waiting areas in the vicinity of perpetrators and, sometimes, perpetrators' supporters. Nor should we tolerate situations in which people with disabilities or people who are from culturally and linguistically diverse backgrounds and others are forced to attend court premises that do not meet their needs or which make them feel unsafe.<sup>168</sup>

8.116 Remodelling court precincts to have more than one entry and sufficient private waiting areas will require significant investment by the Victorian Government, particularly in regional Victoria, where court buildings are often smaller, older and less well equipped.<sup>169</sup> For example, the Shepparton courthouse is currently undergoing a \$73 million redevelopment over three years, with security and safety for all court users a priority.<sup>170</sup>

161 Consultation 33 (Women's Legal Service NSW). See also Women's Legal Service NSW, Submission to New South Wales Department of Justice, *Review of Domestic Violence Evidence in Chief (DVEC) Reforms*, 30 June 2016, [15]–[17].

162 Consultation 32 (Legal Aid NSW).

163 *Victims' Charter Act 2006* (Vic) s 12.

164 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 152.

165 Consultations 1 (A victim); 13 (Parents of a victim).

166 Consultations 28 (Laurie Krause), 42 (Relative of a victim; a victim), 43 (Victoria Police SOCIT, Wodonga); Roundtables 9 (Victim support specialists, Shepparton), 12 (Victim support specialists, Wodonga).

167 Consultations 28 (Laurie Krause), 43 (Victoria Police SOCIT, Wodonga); Roundtables 9 (Victim support and therapeutic specialists, Shepparton), 10 (Legal practitioners, Shepparton), 12 (Victim support specialists, Wodonga).

168 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 170.

169 Submission 5 (Centre for Rural Regional Law and Justice).

170 Court Services Victoria, *Shepparton Law Courts Project* (updated 16 October 2015) <<https://www.courts.vic.gov.au/projects-resources/shepparton-law-courts-project>>.

## Facilities

- 8.117 Most remote witness facilities are located within court precincts. Numerous victims and victim support workers told the Commission that the value of giving evidence by way of a remote witness facility can be undermined by the prospect, and reality, of seeing the accused while entering the court precinct or waiting to give evidence.<sup>171</sup>
- 8.118 This problem need not await major building works to be resolved. Remote witness facilities could be located away from the court precinct, or made accessible by a separate entrance. The OPP in Melbourne has remote witness facilities on the premises from which victims give evidence.<sup>172</sup> In Wangaratta, the remote witness facility at the court has a separate entrance, which protects victims from encountering the accused and their supporters.<sup>173</sup>
- 8.119 While the development of modern, safe, accessible court buildings should be a priority, the urgency can be reduced to some extent by investing in off-site or alternative entry remote witness facilities.<sup>174</sup> Remote witness facilities are used frequently where they are available, with some variation between metropolitan and regional areas.<sup>175</sup> In regional courts, facilities struggle to meet demand.<sup>176</sup> The Wodonga court has only one remote facility and one court with a videolink facility, which is also used by people in custody.<sup>177</sup> Victim support specialists in Shepparton and Ballarat identified the same problem.<sup>178</sup>
- 8.120 The use of a screen in the courtroom to prevent the victim seeing the accused appears to be used relatively rarely.<sup>179</sup> When a screen is used, it is often just a whiteboard.<sup>180</sup> A victim may be required to enter the court in view of the accused, before the screen is placed in front of the accused.<sup>181</sup> The Commission was told that more sophisticated screens should be available.<sup>182</sup> Investing in more sophisticated screens will help address the demand for remote witness facilities and videolink technology in regional courts.
- 8.121 Comments to the Commission are consistent with the 2011 final evaluation report of the sexual assault reform strategy, which noted that access to remote facilities, screens and the use of support people was working well in Melbourne but less so in regional courts.<sup>183</sup> Victims across Victoria should have equal access to protective procedures.

## Royal Commission recommendation

- 8.122 Recommendation 70 of the Victorian Royal Commission into Family Violence, which has been accepted by the Victorian Government, should go some way towards addressing the concerns outlined above. Most relevantly to the problems identified by this Commission, the recommendation obliges the Victorian Government to fund and complete works in all courts hearing family violence matters so that there are:
- safe waiting areas
  - separate entry and exit points for applicants and respondents
  - remote witness facilities to allow witnesses to give evidence off-site and from court-based interview rooms.<sup>184</sup>

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171 Consultations 23 (Court Network staff and a Court Networker—County Court), 28 (Laurie Krause), 50 (Witness Assistance Service, OPP Victoria); Roundtables 5 (Victim support specialists, Morwell), 7 (Victim support specialists, Melbourne), 9 (Victim support specialists, Shepparton), 12 (Victim support specialists, Wodonga).

172 Consultation 50 (Witness Assistance Service, OPP Victoria).

173 Roundtable 12 (Victim support specialists, Wodonga).

174 A similar observation was made by the Victorian Royal Commission into Family Violence: *Report and Recommendations* (2016) vol III 170.

175 Submission 5 (Centre for Rural Regional Law and Justice); Roundtables 1 (Victim support specialists, Mildura), 5 (Victim support workers, Morwell), 10 (Legal practitioners, Shepparton), 12 (Victim support specialists, Wodonga).

176 Consultation 43 (Victoria Police SOCIT, Wodonga); Roundtable 13 (Victim support specialists, Ballarat).

177 Consultation 43 (Victoria Police SOCIT, Wodonga).

178 Roundtables 9 (Victim support and therapeutic specialists, Shepparton), 13 (Victim support specialists, Ballarat).

179 Consultations 44 (Kristy McKellar); Roundtable 4 (Legal practitioners, Geelong).

180 Consultation 50 (Witness Assistance Service, OPP Victoria); Roundtable 4 (Legal practitioners, Geelong).

181 Consultation 50 (Witness Assistance Service, OPP Victoria).

182 Consultations 23 (Court Network staff and a Court Networker—County Court), 50 (Witness Assistance Service, OPP Victoria).

183 Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) 111.

184 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III 172, recommendation 70.

- 8.123 The recommendation is primarily directed towards applicants in family violence intervention order proceedings and victims of family violence-related offences, but will benefit those who are victims of other offences. However, the recommendation is limited to the headquarter courts for each of the 12 Magistrates' Court regions.<sup>185</sup>

### Conclusion

- 8.124 The Commission considers that the substance of recommendation 70 should be extended to victims of crime who use courthouses in which the Supreme and County Courts sit. In their submissions to the Royal Commission into Family Violence, the Supreme Court and the County Court acknowledged the need for their court buildings and facilities to be improved so that victims' exposure to the accused is reduced or eliminated.<sup>186</sup>
- 8.125 The submission of Court Services Victoria to the Royal Commission into Family Violence noted that it has been funded to conduct an audit of all Victorian courts 'to upgrade existing court facilities to overcome safety shortcomings'.<sup>187</sup> The results of this audit should inform the implementation of the Commission's recommendation, made below.

## Recommendation

- 43 Court Services Victoria, in consultation with investigatory, prosecuting and victims' services agencies, should implement measures to protect victims attending court proceedings on indictable criminal matters, including by:
- (a) ensuring that victims can enter and leave courthouses safely, including, where possible, allowing them to use a separate entrance and exit
  - (b) making available separate rooms for victims to wait in at court and ensuring victims know where they are
  - (c) establishing remote witness facilities that are off-site or accessed via a separate entry to that used by other court users
  - (d) using more appropriate means to screen victims from the accused when giving evidence in the courtroom.

## Victims' privacy: protection from unjustified interference

- 8.126 The criminal trial process makes public the private lives of victims. The prosecution or the accused may seek access to the victim's records on the basis that the accused is entitled to all relevant material in order to make a full defence.<sup>188</sup> In addition, it is a tenet of the adversarial criminal justice system that justice is administered in open court.<sup>189</sup> Generally speaking, evidence about the victim, including about their private life, can be seen or accessed by the public.
- 8.127 Victims expect that their privacy will not be interfered with unlawfully or arbitrarily and that measures will be taken to protect their privacy interests.<sup>190</sup> This section focuses on two issues:

185 Ibid.

186 Supreme Court of Victoria, Submission No 705 to the Royal Commission into Family Violence, 29 May 2015, 10–11; County Court of Victoria, Submission 835 to the Royal Commission into Family Violence, 29 May 2016, 6.

187 Court Services Victoria, Submission No 646 to the Royal Commission into Family Violence, 29 May 2016, 12.

188 *Alister v R* (1984) 154 CLR 404, 450–51.

189 See *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46, 60 [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report 129 (2016) [8.53]–[8.56].

190 See, eg, United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, A/RES/40/34 (29 November 1985), annex [6(b)] measures to minimise inconvenience to victims, protect their privacy and ensure their safety from intimidation and retaliation.

- restrictions on the right of the accused to access victims' private information
- restrictions on criminal trial proceedings being public.

## The meaning of privacy

- 8.128 Privacy ensures individuals are able to live dignified and autonomous lives, in which they are safe, and exercise control over the use and disclosure of their personal information.<sup>191</sup>
- 8.129 In Victoria, the *Charter of Human Rights and Responsibilities 2006* (Vic) protects a person's right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with' and 'not to have his or her reputation unlawfully attacked'.<sup>192</sup> Legislation at a federal, state and territory level regulates how private information is handled by public and private entities.<sup>193</sup> In Victoria, the way that criminal justice agencies handle victims' personal information is regulated by the *Privacy and Data Protection Act 2014* (Vic) and the *Health Records Act 2001* (Vic).<sup>194</sup> Victims' privacy is also protected by certain provisions of the *Open Courts Act 2015* (Vic), which regulates public access to court proceedings.
- 8.130 Privacy is a broad concept and has been described as notoriously difficult to define.<sup>195</sup> What is regarded as private differs between people, and between contexts. It is not necessary to provide an exhaustive definition here. It is enough to recognise that privacy is premised on the autonomy and dignity of the individual. Dignity and autonomy are achieved by ensuring victims can exercise a measure of control over access to their personal information and the purposes for which it may be disclosed and used. This understanding informs the Commission's discussion about the appropriate level of access to, and use of, a victim's private information.

## Access to the victim's records

- 8.131 An accused is entitled to seek access to a victim's records and to introduce those records into evidence, provided they are relevant to the facts in issue.<sup>196</sup>
- 8.132 An accused can seek access to records by filing a subpoena with the court. Subpoenas are used to compel individuals or organisations to produce documents or to appear in court. In criminal proceedings, an accused may subpoena a range of the victim's personal records, including:
- medical records
  - psychological or psychiatric history
  - dealings with government departments
  - bank records.
- 8.133 Generally speaking, the documents sought under a subpoena must be provided if they have evidentiary value, also described as a legitimate forensic purpose.<sup>197</sup> According to the High Court of Australia, this means that it must be 'on the cards' that the document would assist the accused in their defence.<sup>198</sup>

191 Victorian Law Reform Commission, *Defining Privacy*, Occasional Paper (2002) 1–4; Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001) 3–4; Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report 123 (2014) 30–2.

192 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

193 See *Privacy Act 1988* (Cth) s 2A; *Privacy and Data Protection Act 2014* (Vic); *Health Records Act 2001* (Vic); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2009* (Qld); *Premier and Cabinet Circular No 12* (SA); *Personal Information Protection Act 2004* (Tas); *Information Privacy Act 2014* (ACT); *Information Act* (NT). See also Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report 123 (2014) 43–4.

194 In general terms, investigatory and prosecuting agencies are exempt from restrictions on the collection, use and disclosure of personal information and personal health information when performing law enforcement functions: *Privacy and Data Protection Act 2014* (Vic) s 3(1) (definition of 'law enforcement agency'), s 15; *Health Records Act 2001* (Vic) s 3(1) (definitions of 'law enforcement agency' and 'law enforcement function'); Health Privacy Principles 1.1(g), 2.2(j).

195 See, eg, Victorian Law Reform Commission, *Defining Privacy*, Occasional Paper (2002) 1. See also the discussion regarding the definition of privacy as a legal right in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) 141–7.

196 *Alister v R* (1984) 154 CLR 404, 450–51 (Brennan J).

197 See *Alister v R* (1984) 154 CLR 404, 450–51; *Carter v Hayes* (1994) 61 SASR 451 (in which 'evidentiary value' was described as being synonymous with 'legitimate forensic purpose').

198 *Alister v R* (1984) 154 CLR 404, 414 (Gibbs CJ). See also David Ross, *Ross on Crime* (Thomson Lawbook, 2nd ed, 2004) 906–7.



## Confidential communications

- 8.134 In recent years, Victoria and other Australian and overseas jurisdictions have introduced reforms that restrict the records the accused can obtain, by limiting access to the victim's 'confidential communications'.<sup>199</sup> Confidential communications are communications made in confidence by a victim of a sexual offence to a medical practitioner or counsellor, either before or after the alleged sexual offending occurred.<sup>200</sup>
- 8.135 Chapter 7 discusses reforms to victims' participation in applications to access and use their confidential communications. The focus of this section is on what information personal to the victim should fall within the definition of a confidential communications.
- 8.136 Part 2, division 2A of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) relates to confidential communications. The aims of the confidential communications provisions are:
- to promote the public interest in victims of sexual assault seeking counselling
  - to protect victims from the harm that might be caused if their private information is made public.<sup>201</sup>
- 8.137 The court is required to grant leave before the accused (or any other party) can subpoena, access or use a victim's confidential communications.<sup>202</sup>
- 8.138 The judge must balance various factors when deciding whether to allow access to a victim's confidential communications.<sup>203</sup> The court grants leave only if it is satisfied that:
- the evidence will have substantial probative value to a fact in issue
  - other evidence relating to the matter contained in the confidential communication, and of similar or greater probative value, is not available
  - the public interest in allowing the evidence to be introduced outweighs the public interest in confidentiality and protecting the victim from harm.<sup>204</sup>
- 8.139 In balancing the public interest, the judge must take into account:
- the likelihood, nature and extent of harm that may be caused to the victim
  - the extent to which the evidence is necessary to allow the accused to make a full defence
  - the need to encourage victims of sexual offences to seek counselling
  - the extent to which victims may be discouraged from seeking counselling if the confidential communications are accessed
  - the extent to which the effectiveness of counselling may be diminished, if the confidential communications are accessed
  - whether a discriminatory belief or bias is behind the application
  - whether the victim objects to the disclosure
  - the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of the person.<sup>205</sup>

199 Known as protected confidences in New South Wales and protected communications in South Australia and Western Australia.

200 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32B.

201 See Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 212; Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2184 (Rob Hulls). See also Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

202 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 32C, 32D.

203 *Ibid* s 32C(1).

204 *Ibid* s 32D(1).

205 *Ibid* s 32D(2). Reasons must be given for any determination to grant or refuse leave: s 32D(4).



## Expanding the protection to a broader range of records

- 8.140 As noted above, protecting confidential communications is about ensuring victims of sexual offences are not discouraged from seeking counselling.<sup>206</sup> This purpose is integral to the current definition of a confidential communication. All Australian jurisdictions require a counselling relationship to exist before a record can be protected.<sup>207</sup>
- 8.141 Support was expressed in consultations and submissions for expanding the confidential communications provisions to a broader range of records, such as:<sup>208</sup>
- medical records (other than records already falling within the definition of confidential communications), including psychiatric or psychological records<sup>209</sup>
  - records held by the Department of Health and Human Services<sup>210</sup>
  - records made by social workers<sup>211</sup>
  - school records<sup>212</sup>
  - records held by specialist family violence services (the nature of these records was not specified).<sup>213</sup>
- 8.142 Most of this information, other than school records, would be health information for the purposes of the *Health Records Act 2001* (Vic). As such, it is protected from being used or disclosed for any purpose other than the purpose for which it was collected, unless authorised or required by law or the person concerned.<sup>214</sup>
- 8.143 The definition relevantly includes personal information or an opinion about a person's physical, mental or psychological health or disability. It extends to all personal information collected in providing a health service. It also encompasses the dispensing of a prescription drug.<sup>215</sup>

### *The role of privacy*

- 8.144 Some contributors who told the Commission that the confidential communications provisions should be expanded suggested that certain types of personal information, such as contact with alcohol and drug rehabilitation services, records relating to psychiatric treatment, or records indicating contact with child safety workers, are being sought and used to undermine a victim's credibility.<sup>216</sup> This view was advanced by support specialists, counsellors and victims, who considered that personal information about the victim, created in a particular context for a particular purpose, should not be treated as relevant to the victim's credibility, or lack of it, in a criminal trial.<sup>217</sup>

206 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) [4.71]; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, Report 114 (2010) [27.100]; Alicia Jillard, Janet Loughman and Edwina MacDonald, 'From Pilot Project to Systemic Reform' (2012) 37(4) *Alternative Law Journal* 254, 254.

207 See, eg, *ER v Kahn* [2015] NSWCCA 230, [73], per Hall J: 'Central to the sexual assault communications privilege are the concepts of "confidence" and "counselling". They arise and apply where a victim or alleged victim of a sexual assault offence has participated in "counselling" provided or conducted by a "counsellor".' This judgment affirmed that Family and Community Services documents do not fall within the privilege unless they are specifically counselling records.

208 Consultation 27 (Loddon Campaspe Centre Against Sexual Assault).

209 Consultation 33 (Women's Legal Service NSW); Roundtables 3 (Victim support specialists, Geelong), 8 (Metropolitan Centres Against Sexual Assault).

210 Consultation 12 (Parent of victims), 19 (Victims of Crime Commissioner, Victoria); 46 (A victim), 47 (Victoria Legal Aid); Roundtable 3 (Victim support specialists, Geelong).

211 Submission 14 (Victims of Crime Commissioner, Victoria); Consultation 19 (Victims of Crime Commissioner, Victoria); Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

212 Submission 14 (Victims of Crime Commissioner, Victoria); Consultation 19 (Victims of Crime Commissioner, Victoria); Roundtable 9 (Victim support and therapeutic specialists, Shepparton).

213 Submission 39 (Safe Steps).

214 *Health Records Act 2001* (Vic); Health Privacy Principle 1, Health Privacy Principle 2.

215 *Health Records Act 2001* (Vic) s 3(1) (definitions of 'health information', 'personal information' and 'health service').

216 Roundtables 3 (Victim support specialist, Geelong), 8 (Metropolitan Centres Against Sexual Assault), 9 (Victim support and therapeutic specialists, Shepparton).

217 Consultation 12 (Parent of a victim); Roundtables 3 (Victim support specialist, Geelong), 8 (Metropolitan Centres Against Sexual Assault), 9 (Victim support and therapeutic specialists, Shepparton). See also Roundtable 11 (Judges of the County Court of Victoria) (expressing concerns about the potential for such records to be misused).

- 8.145 On the other hand, lawyers argued that if a record is relevant to the criminal proceedings, including to the credibility of the victim, it should be admitted as evidence.<sup>218</sup> According to the Law Institute of Victoria, ‘consistency is one of the hallmarks of truth and the issues communicated by complainants at different times can serve as an effective test of credibility.’<sup>219</sup>
- 8.146 The divergent views put to the Commission reflect different attitudes about the balance between the privacy interests of victims and the accused’s interest in having access to all relevant material.
- 8.147 The approach taken in Canada in reconciling these interests is instructive. Privacy is central to the Canadian provisions relating to confidential communications. They expressly protect records about which the victim has a ‘reasonable expectation of privacy’.<sup>220</sup> Examples are provided in Canada’s Criminal Code and include:
- medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social service records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature but does not include records made by persons responsible for the investigation or prosecution of the offence.<sup>221</sup>
- 8.148 As is the case in Victoria, the Canadian law is aimed at encouraging victims to seek counselling and report sexual offences. However, the Canadian provisions place greater emphasis on promoting the equality, personal security and privacy rights of victims.<sup>222</sup>
- 8.149 An evaluation of the operation of the Canadian provisions in 2012 concluded that the scheme was ‘for the most part, working well’ and that it ‘strikes an appropriate balance between the competing interests of complainants and defendants’.<sup>223</sup>
- 8.150 The Supreme Court of Canada has found that the Canadian provisions do not violate the right of an accused to ‘make a full answer and defence’.<sup>224</sup> In reaching its conclusion, the court noted that the right to make a full answer and defence does not include a right to records that are not relevant or ‘would serve to distort the search for truth’.<sup>225</sup> The Court noted that a victim’s records, in particular therapeutic records, are made in a particular context and are unreliable as a factual account of an event.<sup>226</sup> The Court cautioned against the use of records that challenge the credibility of the victim at large, on the basis that doing so operates unfairly against victims whose lives have been more heavily documented.<sup>227</sup>

### *The Commission’s conclusion*

- 8.151 The Commission has concerns about victims’ privacy similar to those stated by the Supreme Court of Canada. Victims and victim support specialists consulted by the Commission stressed that some victims have long-term contact with social services and there is a risk that records about regular contact with child safety, family violence or drug and alcohol support services will be used to undermine the victim’s reliability and inaccurately depict their life.<sup>228</sup>

218 Submissions 23 (DPP), 25 (Law Institute of Victoria).

219 Submission 25 (Law Institute of Victoria).

220 *Criminal Code*, RSC 1985 C-46, s 278.1.

221 *Ibid* ss 278.5(2), 278.7(2)–(3).

222 Standing Senate Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the Act to the Criminal Code (Production of Records in Sexual Offence Proceedings): Final Report* (December 2012) 13.

223 *Ibid*.

224 See generally *R v Mills* [1999] 3 RCS 668.

225 *Ibid* [89].

226 *Ibid*.

227 *Ibid* [92], citing with approval K Busby, ‘Discriminatory Use of Personal Records in Sexual Violence Cases’ (1997) 9 *Canadian Journal of Women and the Law* 148, 161–2.

228 Consultation 12 (Parent of a victim); Roundtables 8 (Metropolitan Centres Against Sexual Assault), 9 (Victim support and therapeutic specialists, Shepparton).

- 8.152 The right not to have privacy unlawfully or arbitrarily interfered with is protected in Victoria's Human Rights Charter. As in Canada, a balancing exercise would need to occur where fair trial rights and the victim's right to privacy compete. Where the accused can demonstrate that the records have a substantial probative value, and that their interest in accessing the records should prevail over the interests of preserving confidentiality and protecting the victim from harm, they will be permitted to subpoena, access and use the relevant records. The Commission does not propose to deny the accused access to evidence that is necessary to make an effective defence. Rather, the Commission seeks to limit access to the victim's private records in the absence of a good reason for their disclosure or the victim's consent.
- 8.153 The Commission considers that the current confidential communications provisions should be expanded to include records defined as health information and protected by the Health Records Act. These records contain personal information about the victim's contact with social services and medical and psychiatric treatment. Victims are entitled to expect that these sensitive records will be private and protected against misuse in a criminal trial.

### Practical concerns

- 8.154 Expanding the range of records to which the confidential communications provisions apply will make it more cumbersome for accused people to gain access to these documents. It is likely to impose a burden on judicial resources and lawyers. Improving the ability of victims to respond to applications to subpoena, access or use confidential communications, as recommended in Chapter 7, could also increase the burden on courts and lawyers.
- 8.155 Concerns about delays and the impact on judicial resources were raised by the Victorian Bar and Criminal Bar Association and some judges of the County Court.<sup>229</sup> County Court judges are already spending considerable time reviewing the materials sought and redacting it where necessary.<sup>230</sup>
- 8.156 As discussed in Chapter 7, delays have been a particular problem in New South Wales.<sup>231</sup> However, in Victoria, practice notes issued by the Supreme Court and County Court set strict timeframes that require the defence to turn its mind early to whether confidential communications will be sought.<sup>232</sup> Delays should be more manageable in Victoria if compliance with practice notes is enforced.
- 8.157 It is difficult to estimate the magnitude of any potential delay, cost or resourcing issues without data about the number of applications presently being made or the volume of the records being sought. Reforms to expand and improve the operation of the Victorian provisions will need to be monitored. Recommendations about data collection and monitoring reforms are made in Chapter 4.
- 8.158 Practical and resource-related concerns alone should not stand in the way of reforms. As part of the statutory responsibility of the office to report on systemic issues affecting victims, the Victims of Crime Commissioner should monitor the implementation of the expanded confidential communications provisions, and propose reforms if necessary.

229 Submission 29 (Victorian Bar and Criminal Bar Association); Roundtable 11 (Judges of the County Court of Victoria).

230 County Court of Victoria, *2014–15 Annual Report* (2015) 23.

231 Consultations 32 (Legal Aid NSW), 33 (Women's Legal Service NSW).

232 See Supreme Court of Victoria, *Practice Note No 6 of 2014—Criminal Division: Case Management by Post-Committal Directions Hearings* (26 September 2014): the court is to be advised within 48 hours of the committal hearing whether there are 'any subpoena issues'; County Court of Victoria, *County Court Criminal Division Practice Note—PNCR 1–2015* (21 October 2015) [2.10], [4.10], [6.5], [21.1–[21.7]]. According to the County Court's Annual Report for 2014–15, the judge administering the list at the Initial Directions Hearing requires applications for confidential communications to be filed within 8 weeks of the committal: 23.

## Recommendation

- 44 Division 2A of Part 2 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should apply to the victim's health information as defined by the *Health Records Act 2001* (Vic).

### Publication of criminal proceedings

- 8.159 Privacy issues also arise in the context of victim impact statements. Concerns were raised in submissions and consultations about the media or public gaining access to the contents of victim impact statements.<sup>233</sup> Victim impact statements often contain sensitive and personal information so it is understandable that some victims seek control over their publication.
- 8.160 The contents of victim impact statements become public when victims read them out in court, or the judge refers to them in sentencing remarks. Additionally, court proceedings are a matter of public record.
- 8.161 Criminal proceedings are public because a fundamental element of a fair trial is the principle of open justice.<sup>234</sup> Criminal proceedings should take place in open court so that they can be subject to 'public and professional scrutiny'.<sup>235</sup> Courts will depart from this principle only in exceptional circumstances.<sup>236</sup>
- 8.162 In Victoria, common law principles relating to open courts are consolidated in the *Open Courts Act 2013* (Vic). The Open Courts Act contains a statutory presumption in favour of proceedings being public. However, it also allows for suppression orders or closed court orders in a range of circumstances, including, most relevantly, where the order is necessary to:
- 'protect the safety of any person'.<sup>237</sup>
  - 'avoid causing undue distress or embarrassment' to a victim or witness in 'any criminal proceeding involving a sexual offence or a family violence offence'.<sup>238</sup>
  - 'avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding'.<sup>239</sup>
- 8.163 Suppression orders are orders that prohibit or restrict the publication or report of all or part of a proceeding or any information derived from it.<sup>240</sup> A closed court order is an order that the court be closed to the public for some or all of a proceeding, or that only certain persons be allowed in.<sup>241</sup> Given the fundamental importance of the open courts principle, the Commission does not propose that these categories be extended to a broader range of victims or other categories of offences.
- 8.164 More informal measures are also in place. The Supreme Court and the former victim representatives of the inaugural Victims of Crime Consultative Committee told the Commission that where a victim does not want certain parts of their victim impact statement referred to by the judge, this can be conveyed to the court.<sup>242</sup> The Commission has not been told that this approach is not working in practice.

233 Submissions 21 (Dianne Hadden), 23 (DPP), 24 (Fiona Tait); Roundtable 3 (Victim support specialists, Geelong).  
 234 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129 (2016) [8.53].  
 235 *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).  
 236 Ibid.  
 237 *Open Courts Act 2013* (Vic) 18(1)(c) (suppression orders), 30(2)(c) (closed court orders).  
 238 Ibid ss 18(1)(d) (suppression orders), 30(2)(d) (closed court orders).  
 239 Ibid ss 18(1)(e) (suppression orders), 30(2)(e) (closed court orders).  
 240 Ibid s 17.  
 241 Ibid s 30(1).  
 242 Submissions 27 (Supreme Court of Victoria), 40 (Former VOCCC victim representatives).

- 8.165 In addition, in practice the Supreme Court and the County Court files are not open for inspection by the public. Victim impact statements are made available only with the courts' permission, and will not ordinarily be released.<sup>243</sup> Similarly, the DPP's media policy is that the OPP will not give victim impact statements to the media.<sup>244</sup>
- 8.166 The Commission considers that for victims who seek to prevent the contents of their victim impact statements from being made public, the current mechanisms for ensuring non-disclosure are adequate.

# Financial reparation

**228** Introduction

**228** Financial reparation for victims

**230** Restitution and compensation orders against offenders

**243** State-funded financial assistance

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## 9 Financial reparation

### Introduction

- 9.1 Victims have an interest in how the harm to them can be repaired as part of the criminal justice system's response to the crime. Reparation refers to the action of making amends for a wrong or injury.<sup>1</sup> Reparation may be made through the payment of compensation, the return of stolen goods, the performance of work, an apology or other means, depending on the harm caused. Non-monetary forms of reparation may be obtained through the criminal trial process or a restorative justice process. This chapter focuses on financial reparation and the victim's role in the making of restitution and compensation orders against offenders.<sup>2</sup>
- 9.2 Restitution and compensation orders can be made against offenders for the benefit of victims under the *Sentencing Act 1991* (Vic). These orders directly respond to the interest of victims in repairing harm. While it is the Sentencing Act that allows the court to make these orders, they cannot form part of an offender's punishment. Rather, they are 'ancillary orders'; that is, they are in addition to the sentence, not part of it. They are civil in nature, but are made at the end of criminal proceedings where an offender has been found guilty. Victims can also pursue compensation by starting a legal action against the offender in a court's civil jurisdiction, unconnected to the criminal trial. This is beyond the scope of the Commission's review.
- 9.3 Victims can also seek state-funded financial assistance from the Victims of Crime Assistance Tribunal (VOCAT). VOCAT orders financially assist a large number of victims who cannot obtain compensation from the offender. The orders can also validate an individual's experience of harm. The Commission's terms of reference do not provide for an extensive review of VOCAT. VOCAT is addressed in so far as it has an impact on a victim's participation in the criminal trial process.

### Financial reparation for victims

#### Expectation and experience

- 9.4 The impacts of crime can be devastating and long-term, especially for victims of serious and violent crime. Crime can cause psychological injury, emotional harm, physical injury and financial loss. Victims may have to pay for treatment and incur costs for lost or damaged goods, security or relocation. They may lose work earnings or leave entitlements.
- 9.5 The traditional criminal trial process was not designed to respond to all of these impacts. Once guilt was established, the task was to determine just punishment, although an

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1 *Macquarie Dictionary* (6th ed, Macquarie Dictionary Publishers Pty Ltd, 2013) 1245.

2 The Commission's terms of reference ask it to consider 'the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process'. Any issues relating to the amount of money awarded are beyond the terms of reference.



aggrieved person was able to seek compensation for loss and damage to property.<sup>3</sup>

- 9.6 Since 2000, victims have been able to seek compensation for injury, pain and suffering, as well as property loss, as orders against an offender at the end of the criminal trial process.<sup>4</sup> These provisions recognise that the victim's interest may not be satisfied through punishment and public denunciation of the offender alone. The victim may also reasonably expect to have an effective pathway to seek financial repair of harm.<sup>5</sup>
- 9.7 Some victims want nothing to do with an offender once criminal proceedings are finalised. They may not want to receive money from the offender, particularly over a long period.<sup>6</sup> The prospect of further court proceedings will also deter some individuals from pursuing compensation.<sup>7</sup> Moreover, many offenders cannot afford to pay compensation. In these circumstances the victim may only seek financial assistance from the state.
- 9.8 Other victims prefer to receive compensation directly from the offender rather than the state.<sup>8</sup> Some place more value on what the offender can do to repair or acknowledge the harm than on how much the offender can pay.<sup>9</sup> For example, the parent of a victim described it as 'a matter of principle' to pursue the offender for compensation, as he had failed during criminal proceedings to acknowledge the harm he had caused.<sup>10</sup>

## Legal framework

- 9.9 Victims can seek financial reparation for harm directly from offenders in two ways:
- At the end of the criminal trial, they may seek a restitution or compensation order under Divisions 1 and 2 of Part 4 of the Sentencing Act (restitution and compensation orders). These orders are discussed in the next section.
  - They may make a civil law claim for compensation through the civil jurisdiction of Victoria's courts, rather than as part of the criminal trial process. This is an entirely separate legal action governed by rules of civil procedure. Civil litigation can be a difficult and costly process, requiring understanding of rules of evidence, legal principles, disclosure obligations and costs rules.<sup>11</sup> It is outside the Commission's terms of reference to examine civil actions by victims.<sup>12</sup>
- 9.10 Victims can seek financial assistance from the state rather than from the offender by applying to VOCAT under the *Victims of Crime Assistance Act 1996* (Vic).<sup>13</sup> The victim's eligibility for assistance does not depend on a plea or finding of guilt. Financial assistance is provided to cover certain expenses and small symbolic awards can be made. The state can then pursue an offender to recover money paid to a victim.<sup>14</sup>

3 *Crimes Act 1915* (Vic) s 572; *Crimes Act 1958* (Vic) s 546.

4 *Sentencing Act 1991* (Vic) pt 4 div 1–2.

5 See generally discussion in *RK v Mirik and Mirik* (2009) 21 VR 623 (Bell J).

6 Consultation 47 (Victoria Legal Aid); Roundtable 13 (Victim support specialists, Ballarat).

7 Consultation 29 (Parent of victims).

8 David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' (2014) 20(1) *International Review of Victimology* 145, 148; Joanne Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower Publishing 1985) 177. Consultations 13 (Parents of a victim), 14 (A victim), 28 (Laurie Krause), 48 (Dr Heather Strang, University of Cambridge); Roundtable 13 (Victim support specialists, Ballarat).

9 Consultation 14 (A victim); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002) 8–24; Joanna Shapland et al, *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield, 2006) 72.

10 Consultation 11 (Parent of a victim).

11 Arnold Dallas McPherson Lawyers indicate a preference for civil claims over Sentencing Act compensation claims but note that even civil claims are 'rare': Submission 12.

12 There are also redress schemes set up to respond to offending in the context of particular institutions. See Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015). See also Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-government Organisations* (2013) vol 2, Part H.

13 Preceded by the *Criminal Injuries Compensation Act 1972* (Vic) and *Criminal Injuries Compensation Act 1983* (Vic).

14 *Sentencing Act 1991* (Vic) s 87A.

## Restitution and compensation orders against offenders

- 9.11 One of the purposes of the Sentencing Act is 'to ensure that victims of crime receive adequate compensation and restitution'.<sup>15</sup> However, in the criminal courts, a sentence cannot be imposed for the purpose of compensating a victim.<sup>16</sup>
- 9.12 Restitution and compensation orders can be made as 'ancillary orders' under the Sentencing Act; that is, they are in addition to the sentence. They are characterised as non-punitive orders and should not act as a mitigating circumstance when determining the appropriate sentence for an offender.<sup>17</sup> Although made in connection with the criminal trial process, they are in effect civil orders that respond to the harm experienced by the individual rather than the harm to the state.<sup>18</sup>
- 9.13 These orders are only relevant to sentencing when the court is considering ordering a fine. Where an offender cannot pay both a fine and a restitution or compensation order, the restitution or compensation order has priority.<sup>19</sup>
- 9.14 The Court of Appeal has described Sentencing Act compensation orders as a quick, efficient and cheap means for victims to obtain a civil compensation order at the end of criminal proceedings.<sup>20</sup> Applications are subject to the lower civil standard of proof (the balance of probabilities), rather than the standard applied to criminal proceedings (beyond reasonable doubt). There is no legislatively prescribed cap on the amount of compensation, although awards for loss of earnings cannot be sought.<sup>21</sup>

## The Sentencing Act process for making orders

- 9.15 The Commission's consultation paper asked whether, in practice, the process under the Sentencing Act provides a swifter and less complex avenue for victims to obtain compensation orders against offenders than making a civil law claim. Most of the responses to this question said that it does not,<sup>22</sup> although the Law Institute of Victoria sees no need for reform.<sup>23</sup>
- 9.16 The Commission was unable to obtain reliable data from the Supreme or County Courts about how often applications for restitution or compensation orders are made by victims, or granted. Such data would not, in any case, take into account matters that resolve by way of private settlement. Anecdotal information received by the Commission suggests that the provisions are infrequently used.<sup>24</sup> A discussion paper released by the Department of Justice in 2009 noted that fewer than 20 orders were made in the County Court, and 'less than a handful' in the Supreme Court, each year.<sup>25</sup>
- 9.17 Arnold Dallas McPherson Lawyers stated that Sentencing Act compensation orders have very limited value.<sup>26</sup> The Victorian Bar and Criminal Bar Association submitted that Part 4 of the Act, under which the orders are made, is 'fairly infrequently used'.<sup>27</sup> Part of the

15 Ibid s 1(i).

16 Ibid s 5(1). For each offence listed in the *Crimes Act 1958* (Vic), a maximum penalty is prescribed by Parliament. The *Sentencing Act 1991* (Vic) (and for children, the *Children, Youth and Families Act 2005* (Vic)) sets out the sentencing orders available to the court, the purposes for which sentences can be imposed and relevant factors. For further information about sentencing, see Sentencing Advisory Council, *A Quick Guide to Sentencing* (2015).

17 See *R v Ross* (2007) 17 VR 80, [19] (Vincent JA; Chernov JA and Whelan AJA agreeing).

18 Restitution and compensation orders can be made to benefit a corporate body, as a legal 'person': *Interpretation of Legislation Act 1984* (Vic) s 38. Corporate entities that suffer loss are not part of the Commission's review.

19 *Sentencing Act 1991* (Vic) s 53.

20 *R v Ross* (2007) 17 VR 80, [19] (Vincent JA; Chernov JA and Whelan AJA agreeing); *DPP v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [2] (Buchanan JA). See also *Kaplan v Lee-Archer* (2007) 15 VR 405, [25] (Buchanan JA); *RK v Mirik and Mirik* (2009) 21 VR 623, [11] (Bell J).

21 For discussion about how the amount of compensation to be awarded is determined, see *DPP v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345; *DPP v Esso Australia Pty Ltd* (2001) 126 A Crim R 13. The inability to claim lost earnings was raised by Arnold Dallas McPherson Lawyers: Submission 12, but this was not part of the Commission's review.

22 Submissions 12 (Arnold Dallas McPherson Lawyers), 13 (David Levesque), 21 (Dianne Hadden), 23 (DPP). Submission 16 (Name withheld) described the process as slow but adequate.

23 Submission 25 (Law Institute of Victoria).

24 Submissions 12 (Arnold Dallas McPherson Lawyers), 29 (Victorian Bar and Criminal Bar Association); Consultations 9 (Magistrate Ron Saines), 36 (Magistrate John Lesser); Roundtables 10 (Legal practitioners, Shepparton), 14 (Legal practitioners, Ballarat).

25 Department of Justice, *Reviewing Victims of Crime Compensation: Sentencing Orders and State-Funded Awards: Discussion Paper* (Victorian Government, 2009), 6–7. A final report was not released.

26 Submission 12 (Arnold Dallas McPherson Lawyers); Roundtable 14 (Legal practitioners, Ballarat).

27 Submission 29 (Victorian Bar and Criminal Bar Association).

problem is that many offenders have little money, which means that orders cannot be enforced.<sup>28</sup>

- 9.18 The next section considers difficulties in applying for the orders, before turning to challenges associated with enforcing them. The Commission considers that the application process can be reformed, making it a faster and simpler avenue for compensation.

### Procedure

- 9.19 Restitution and compensation orders can be made for loss or injury that is a direct result of offences for which an offender has been found guilty. Although applications can be determined at the sentencing hearing, they are typically determined after it. A victim usually makes an application, either personally or through their lawyer. The Director of Public Prosecutions (DPP) can apply on the victim's behalf.<sup>29</sup>

- 9.20 Three types of financial reparation order can be sought by victims through the Sentencing Act:

- Restitution for loss of property, which relates specifically to restoration for stolen goods connected to theft (restitution).<sup>30</sup>
- Compensation for property loss, damage or destruction, which compensates for the value of loss, destruction or damage to property, and is not limited to any particular offence (compensation for property loss).<sup>31</sup>
- Compensation for injury, which can compensate victims for pain and suffering, medical and counselling expenses and other expenses directly resulting from an offence (compensation for injury).<sup>32</sup>

- 9.21 The Sentencing Act sets out different procedures, and uses different terminology, for each type of order. For example:

- Only compensation orders for property loss can be made by the court on its own initiative. The court must ask the prosecution if an application will be made if evidence has been presented of property loss, damage or destruction.<sup>33</sup> In contrast, orders for restitution and compensation for injury can only be made following application by the DPP or the victim.
- There is a 12-month limitation period to apply for compensation for injury, starting from the date the offender is found guilty or convicted.<sup>34</sup> This does not apply to applications for restitution or compensation for property loss.
- If an application is made for compensation for injury, the court must not refuse to determine the application, except where relevant facts do not sufficiently appear from prescribed material.<sup>35</sup> In contrast, where an application relates to restitution or compensation for property, the court's power is described as one that must not be exercised unless the relevant facts appear from a list of prescribed sources.<sup>36</sup>

28 Submissions 12 (Arnold Dallas McPherson Lawyers), 29 (Victorian Bar and Criminal Bar Association); Consultation 47 (Victoria Legal Aid); Roundtables 2 (Legal practitioners, Mildura), 10 (Legal practitioners, Shepparton), 16 (Community legal centres).

29 See *Sentencing Act 1991* (Vic) ss 84(5)(b)(iii) (restitution), 85C(1)(b)(iii) (injury), 86(5)(b)(ii) (property loss); Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [62]–[65]. Further discussed at [9.53]–[9.65] of this chapter.

30 *Sentencing Act 1991* (Vic) s 84.

31 *Ibid* s 86.

32 *Ibid* s 85B. Injury is defined as one of, or a combination of: physical bodily harm; a mental illness or disorder; pregnancy; or grief, distress, trauma and other significant adverse effect: s 85A. Any award made under the *Victims of Crime Assistance Act 1996* (Vic) must be deducted: ss 85I.

33 *Ibid* s 86AA.

34 *Ibid* s 85C(1)(a).

35 *Ibid* s 85F. Ian Freckelton has described it as 'very rare' for a court to decline to hear an application for compensation for injury. See Ian Freckelton, 'Compensation Applications Require a Watching Brief' [2009] *Monash University Law Research Series* 5.

36 The material is listed at *Sentencing Act 1991* (Vic) ss 84(7)–(8) (restitution), 86(8)–(9) (compensation for property).

- The financial circumstances of the offender, and the burden imposed by a compensation order, may be taken into account when making an order for compensation for injury or property loss.<sup>37</sup> The offender's financial circumstances are not relevant to restitution orders.
- For compensation applications, the Sentencing Act requires each party to bear their own legal costs, unless the judge orders otherwise.<sup>38</sup> There is no costs provision for restitution orders.
- The hearing procedure for restitution and compensation orders does not have to follow any specific format, except as described in section 85G, which relates only to compensation for injury. This is intended to allow for flexible and fair procedures<sup>39</sup> and to promote an efficient and low-cost procedure.<sup>40</sup>

### A more accessible process for victims

9.22 The above description shows that different terminology and procedures are used for the different orders. There is no clear justification for these differences. The procedure for applying for orders has been described as 'both lengthy and complicated' and in need of streamlining.<sup>41</sup> Arnold Dallas McPherson Lawyers noted that an application for Sentencing Act compensation orders can be more expensive than commencing separate civil proceedings for compensation.<sup>42</sup>

9.23 The former victim representatives on the inaugural Victims of Crime Consultative Committee submitted that the procedure should be simple enough that victims do not need to retain a lawyer.<sup>43</sup> The Victims of Crime Commissioner told the Commission that:

Expedient and efficient processes are vital when considering the compensation and restitution of victims of crime, as delays and complicated procedures often add to a victim's stress and trauma, deny them justice and hamper their recovery.<sup>44</sup>

9.24 It can be expensive and complex to seek compensation by commencing separate civil proceedings against offenders. Some victims will prefer to pursue this path, and it should remain open to them.<sup>45</sup> Others, however, will consider their interests best served by having the matter dealt with quickly through the Sentencing Act, even if it means less compensation. To facilitate this latter option, the Commission's recommendations below aim to:

- ensure a process that is not overly difficult to navigate
- encourage courts and the prosecution to properly consider the interest of victims
- make sure victims are aware of their entitlements and can access legal advice.

### Consistent statutory provisions

9.25 The Commission considers that the Sentencing Act provisions for the making of restitution and compensation orders should be consolidated. It would make applying for these orders simpler for victims who seek to pursue this option. Comparable legislation in Queensland provides a single set of procedures for restitution and compensation orders.<sup>46</sup>

9.26 As part of creating a simpler set of provisions and a more accessible process for making

37 Ibid ss 85H, 86(2).

38 Ibid ss 85K, 86(9D).

39 *RK v Mirik and Mirik* (2009) 21 VR 623 [15] (Bell J). In *DPP v Esso Australia Pty Ltd* (2001) 126 A Crim R 13, Cummins J noted 'it is undesirable that s 85B proceedings be burdened down by substantial complex or technical rules of procedure as may properly apply on the civil side': [23].

40 *R v Ross* (2007) 17 VR 80 [19].

41 Submission 40 (Former VOCCC victim representatives); Consultations 9 (Magistrate Ron Saines), 40 (A victim).

42 Submission 12 (Arnold Dallas McPherson Lawyers).

43 Submission 40 (Former VOCCC victim representatives).

44 Submission 14 (Victims of Crime Commissioner, Victoria).

45 A restitution or compensation order made pursuant to the *Sentencing Act 1991* (Vic) may be deducted from an order for compensation made in the court's civil jurisdiction: see Ian Freckelton, *Criminal Injuries Compensation: Law, Practice & Policy* (LBC Information Services, 2001) 301.

46 See *Penalties and Sentencing Act 1992* (Qld) pt 3 div 4, which provides for restitution and compensation orders to be made as part of sentencing.

orders, the following matters, discussed below, should be addressed:

- application procedures
- the court's powers to make orders
- hearing procedures
- the financial circumstances of offenders.

## Applications

- 9.27 Varying degrees of procedural guidance are provided for the different types of order. Where compensation for injury is sought, a general application form must be filed, and there is a list of matters to be addressed in the application.<sup>47</sup> In contrast, there is no form or guidance for those who apply for restitution or compensation for property loss, nor for applications in the Supreme Court. It has been suggested that the lack of forms or procedural guidance causes confusion for both victims and lawyers.<sup>48</sup>
- 9.28 The Commission agrees that the procedure should enable victims to apply for restitution or compensation without legal assistance and, for this reason, considers that there should be a standard application form for Sentencing Act restitution and compensation orders. However, legal assistance should be available to those who need it. In Chapter 6, the Commission recommends a legal service be established to provide legal advice and assistance to victims in relation to substantive legal entitlements connected to the criminal trial process.

## Powers of the court

### *A requirement on courts to make orders*

- 9.29 The Commission's consultation paper asked whether there should be a presumption in favour of making restitution and compensation orders. This would require courts to make an order, subject to exceptions, and would not require an application being made by or on behalf of the victim.
- 9.30 This is the approach taken in New Zealand. There, the court must make an order of reparation in favour of a victim where lawfully entitled to make such an order, subject to the offender's financial circumstances or other special circumstances.<sup>49</sup> The court can order that a report be prepared addressing relevant matters, including the offender's financial means.<sup>50</sup>
- 9.31 The Victims of Crime Commissioner favours a presumption on the basis that victims currently lack support for making applications.<sup>51</sup> Victoria Police also favours a presumption and has suggested that the interest of victims in restitution and compensation orders would then be viewed as an ordinary part of the criminal trial process.<sup>52</sup> Arnold Dallas McPherson Lawyers stated that the value of the Sentencing Act provisions is limited because the orders are not automatically made following conviction.
- 9.32 The idea of a statutory presumption did not receive universal support. Concern was expressed about the risks and it was suggested that a presumption would be unworkable in Victoria.<sup>53</sup> The DPP opposed a statutory presumption on the grounds that, as a 'quasi-civil matter', restitution and compensation should be addressed separately to sentencing.<sup>54</sup>
- 9.33 At a practical level, requiring courts to make restitution or compensation orders could lead to orders being made that victims do not want, and without proper consideration

47 County Court of Victoria, *County Court Criminal Divisions Practice Note* (21 October 2015) 34–5, Attachment 5.

48 Submission 12 (Arnold Dallas McPherson Lawyers).

49 *Sentencing Act 2002* (NZ) ss 12, 32.

50 *Ibid* s 33.

51 Submission 14 (Victims of Crime Commissioner, Victoria).

52 Submission 26 (Victoria Police).

53 Submission 16 (Name withheld); Consultation 36 (Magistrate John Lesser); Roundtables 6 (Legal practitioners, Morwell), 10 (Legal practitioners, Shepparton), 14 (Legal practitioners, Ballarat).

54 Submission 23 (DPP).

being given to compensation as distinct from sentencing. It may be in a victim's interest to pursue compensation through separate civil proceedings, rather than through the Sentencing Act. In addition, large numbers of orders could be made that cannot be enforced because of the offender's financial circumstances.<sup>55</sup> The Law Institute of Victoria suggested that a model similar to New Zealand's could act as a disincentive to pleas of guilty, and therefore potentially increase the number of trials and contested hearings.<sup>56</sup>

9.34 The presumption in favour of making reparation orders in New Zealand was introduced after reparation became a sentencing order, which resulted in reparation being ordered as part of a sentence more frequently.<sup>57</sup> The criminal justice system of New Zealand is different from Victoria's in three fundamental ways:

- reparation orders are part of an offender's sentence and the reparation of victims is a purpose for which a sentence may be imposed<sup>58</sup>
- sentencing may be preceded by a restorative justice conference, the outcomes of which must be taken into account at sentencing<sup>59</sup>
- reparation orders are enforced punitively like a fine.<sup>60</sup>

9.35 In Tasmania, sentencing courts are obliged to make a compensation order for loss suffered as a result of burglary, stealing or unlawful injury to property offences.<sup>61</sup> The Tasmania Law Reform Institute has described the provision as unwise, unrealistic and as creating 'false hopes' and disillusionment for victims. It recommended that the provision be replaced by a requirement that the courts consider making a compensation order for all offences, as occurs in England.<sup>62</sup>

#### *Orders on the court's own motion*

9.36 One victim told the Commission that she simply wanted a process in which judges could make compensation orders without victims first being required to make an application.<sup>63</sup>

9.37 Since 2012, courts in Victoria have been able to make compensation orders for property loss without an application being made. The court is also obliged to ask the prosecution whether an application for compensation will be made if an offender is convicted or found guilty and evidence of loss, damage or destruction has been presented. Importantly, the making of orders on the court's own motion (that is, on its own initiative) is conditional on the consent of the person in whose favour the order is to be made.<sup>64</sup>

9.38 In contrast, orders for restitution and orders for compensation for injury still require an application to be made.

#### *Conclusion*

9.39 The Commission considers that courts should have the power to make restitution and compensation orders of their own motion, but should not be required to do so. The exercise of this power should be subject to the consent of the injured person. This would be additional to the court's existing powers to order restitution or compensation where an application is made by or on behalf of the victim.

9.40 This would create consistency across all restitution and compensation orders under

55 Ibid; Consultation 52 (Emeritus Professor Arie Freiberg AM). The Commission recommends below the repeal of sections 85H and 86(2) of the *Sentencing Act 1991* (Vic), which allow courts to take account of an offender's financial circumstances. In Chapter 6, a legal service for victims is recommended. These recommendations aim to ensure that victims receive advice about the feasibility of pursuing compensation orders and are able to obtain appropriate compensation orders through the Sentencing Act.

56 Submission 25 (Law Institute of Victoria). See also Submission 29 (Victorian Bar and Criminal Bar Association).

57 New Zealand Law Commission, *Compensating Crime Victims* (Report 121, 2010) 10.

58 *Sentencing Act 2002* (NZ) ss 7(1)(d), 12.

59 Ibid ss 8(j), 10, 24A, 25.

60 *Summary Proceedings Act 1957* (NZ) s 79 (definition of 'fine').

61 *Sentencing Act 1997* (Tas) s 68(1)(a). Compensation orders are ancillary.

62 Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) 169–73 (recommendation 54).

63 Consultation 46 (A victim).

64 The intention of this amendment was to facilitate the making of such orders 'in clear and simple cases': *Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Act 2012* (Vic) s 1(b); *Sentencing Act 1991* (Vic) ss 86AA, 86(1A)(b).



Part 4 of the Sentencing Act and also align with most other jurisdictions in Australia.<sup>65</sup> Courts would be empowered to make orders where there is clear evidence about the victim's loss without victims first being required to make an application. Requiring consent allows victims to determine what is in their best interests. Of course, victims need to be advised about their options, as discussed at [9.58]–[9.65].

- 9.41 The Commission acknowledges that determining compensation for injury can be complex, particularly the question of what is an appropriate amount for pain and suffering. Courts will need to consider updating practice notes to give parties guidance on the material the court requires to determine an application.
- 9.42 In addition, the existing obligation on courts to ask the prosecution whether a compensation order for property loss will be sought should be extended to restitution and compensation orders for injury. This does not require the court to make orders after enquiring; and in many cases, if a victim is not aware of their entitlements, they will need time to seek legal advice.
- 9.43 An obligation to enquire forces the court and the prosecution to turn their minds to whether the victim is aware of their entitlements upon an offender being found guilty. This is especially important if compensation for injury is sought because the Sentencing Act requires applications to be brought within 12 months.<sup>66</sup> Furthermore, it could encourage the police and the Office of Public Prosecutions (OPP) to discuss with victims at an early stage the possibility of restraining the offender's assets to pay for any subsequent restitution or compensation order.
- 9.44 The following recommendation is directed to the Supreme and County Courts, consistent with the terms of reference. As a matter of principle, the Commission considers that it is applicable to the determination of restitution and compensation order applications in the Magistrates' Court.

## Recommendation

- 45 Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991 (Vic)* should be consolidated to provide a consistent set of procedures for restitution and compensation orders in the Supreme Court and County Court, and include the following elements:
- (a) The court may make restitution and compensation orders on its own motion.
  - (b) The court must make inquiries as to whether an application for restitution or compensation orders will be made.
  - (c) A simple form prescribed in the *Sentencing Regulations 2011 (Vic)* to assist victims and their representatives in making an application for restitution or compensation orders.

65 *Penalties and Sentences Act 1992 (Qld)* pt 3; *Victims Rights and Support Act 2013 (NSW)* ss 94, 97; *Sentencing Act 1995 (WA)* pt 16; *Sentencing Act 1997 (Tas)* pt 9; *Crimes (Sentencing) Act 2005 (ACT)* pt 7 s 134; *Sentencing Act (NT)* pt 5 div 1.

66 *Sentencing Act 1991 (Vic)* s 85C(1)(a). Extensions of time can be sought in accordance with section 85D. Applications for restitution orders and compensation for property loss must be made 'as soon as practicable after the offender is found guilty, or convicted, of the offence': ss 84(5)(a), 86(5)(a).



## Financial circumstances of offenders

- 9.45 In determining an application for compensation for property loss or injury, sections 85H and 86(2) of the Sentencing Act state that the court may consider the financial circumstances of an offender and the burden that a compensation order would impose.<sup>67</sup> Victoria Police, the Victims of Crime Commissioner and Arnold Dallas McPherson Lawyers submitted that the financial circumstances of offenders should not be taken into account. They said that if the primary purpose of these orders is to restore victims and ensure they receive adequate compensation, the offender's financial circumstances are irrelevant.<sup>68</sup>
- 9.46 If a victim elects to pursue a separate claim for compensation in a civil court, the offender's financial circumstances will not be relevant to the making of orders. In 2006, the Australian Law Reform Commission made a similar observation and recommended that judges should not be required to take the financial circumstances of offenders into account in the context of federal offences.<sup>69</sup>
- 9.47 The Victorian Bar and Criminal Bar Association and the Law Institute of Victoria did not consider there to be a need for change.
- 9.48 The Law Institute of Victoria noted that its 'members report that often orders are made regardless of the offender's financial circumstances'.<sup>70</sup> Indeed, while courts may consider how a compensation order will affect an offender's prospects for rehabilitation, an order can still be made that may compromise the prospect of rehabilitation.<sup>71</sup> There have been cases in which a victim's interest in receiving an appropriate order for compensation has taken priority over an offender's lack of financial means.<sup>72</sup>

## Conclusion

- 9.49 There is clearly an interest in not leaving offenders with a crushing financial burden that, realistically, they cannot pay off. For victims, large compensation orders that cannot be paid may cause disappointment.<sup>73</sup> On the other hand, it is clearly in the interests of victims and the community that victims are adequately compensated, and that offenders take some responsibility for this rather than leaving it all to the state.<sup>74</sup> Besides, while an offender may lack means at the time of a sentencing hearing, they may be able to pay later on. Compensation orders can be enforced as a judgment debt for 15 years.<sup>75</sup> Under the current approach, orders that could be fulfilled at a later date may be discounted.
- 9.50 In contrast to sentencing, orders for compensation are not made for the purposes of punishing an offender. They are civil orders made in the interests of victims to repair harm suffered by the victim.<sup>76</sup> Consistent with this purpose, the Commission considers that taking into account the impact of a compensation order on an offender is conceptually flawed and may explain the different approaches taken by courts to different cases.<sup>77</sup> If Sentencing Act compensation orders are designed to provide victims with a quick and

67 Where an offender lacks the means to pay both a fine and a restitution or compensation order, the latter must be prioritised: *Sentencing Act 1991* (Vic) s 53(2).

68 Submissions 12 (Arnold Dallas McPherson Lawyers), 14 (Victims of Crime Commissioner, Victoria).

69 Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, Report 103, (2006) [8.33]–[8.35]. That the offender's financial circumstances would not be relevant to proceedings in the court's civil jurisdiction was noted in Submission 27 (Supreme Court of Victoria).

70 Submission 25 (Law Institute of Victoria).

71 *RK v Mirik and Mirik* (2009) 21 VR 623, [137]–[139] (Bell J); *Josefski v Donnelly* [2007] VSCA 6, [17]–[19] (Nettle JA; Buchanan and Vincent JJA agreeing). See also *Shepherd v Kell* [2013] VSC 24, [30] (Lasry J) (citations omitted).

72 See, eg, *RK v Mirik and Mirik* (2009) 21 VR 623, [138], [141] (Bell J).

73 Submission 13 (David Levesque). The Victims of Crime Commissioner also notes that the effectiveness of restitution and compensation orders depends on how often orders are complied with, and whether voluntarily or after enforcement proceedings: Submission 14. See further Department of Justice, *Reviewing Victims of Crime Compensation: Sentencing Orders and State-Funded Awards: Discussion Paper* (Victorian Government, 2009) 30.

74 See *Gregory v Gregory* (2000) 112 A Crim R 19, [28] (Cummins J); *DPP v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [26] (Vincent JA).

75 *Limitation of Actions Act 1958* (Vic) s 5(4). If a prisoner receives compensation for injury in prison, any amount over \$10,000 is held in the Prisoner Compensation Quarantine Fund for 12 months and can be paid to a victim to satisfy an order of damages or a judgment debt in accordance with the *Corrections Act 1986* (Vic) pt 9C.

76 *R v Ross* (2007) 17 VR 80, [19] (Vincent JA; Chernov JA and Whelan AJA agreeing); *DPP v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [2] (Buchanan JA). See also *Kaplan v Lee-Archer* (2007) 15 VR 405, [25] (Buchanan JA, Vincent and Nettle JJA agreeing).

77 See table of comparable cases in *Chalmers v Liang* [2011] VSCA 439, appendix. See *Moresco v Budimir* [2015] VSC 51 and *Shepherd v Kell* [2013] VSC 24.

efficient means of obtaining civil recompense, an offender's financial circumstances are not relevant. However, if they were to become a sentencing option, then taking an offender's financial circumstances into account would be justified as an aspect of determining an appropriate punishment.

- 9.51 Repealing sections 85H and 86(2) of the Sentencing Act would not limit the court's discretion to take into account disadvantage suffered by an offender as a result of the summary nature of Sentencing Act procedures.<sup>78</sup>
- 9.52 Concerns about managing the expectations of victims in the face of orders that cannot realistically be enforced at the time they are made can be addressed by ensuring that victims are adequately informed about the process and have access to information and legal advice. A legal service is recommended in Chapter 6 to advise and assist victims of violent indictable crimes about their legal entitlements, including the feasibility of pursuing compensation orders.

## Recommendation

- 46 Sections 85H and 86(2) of the *Sentencing Act 1991* (Vic) should be repealed to the extent that they apply to applications made by individuals in the Supreme Court and County Court under Division 2 of Part 4 of that Act.

### Legal assistance for victims

- 9.53 The DPP is authorised by the Sentencing Act to apply on behalf of victims for restitution and compensation orders.<sup>79</sup> The DPP's policy, *Victims and Persons Adversely Affected by Crime* (Victims Policy), sets out criteria that considerably limit the circumstances in which the DPP will do so. Unless all the criteria are satisfied, the OPP solicitor must refer the victim to another service for assistance.<sup>80</sup>
- 9.54 One criterion is that it not be too difficult to determine the amount of restitution or compensation that a victim should claim. The offender needs to be in a financial position to pay at least a substantial amount of the order and not oppose the application.<sup>81</sup> Offenders therefore need only oppose an application and the process becomes more complicated for victims.<sup>82</sup>
- 9.55 When the DPP applies for restitution or compensation orders for a victim, the victim is represented by an institution that is already familiar with their matter. The DPP can apply at the start of the prosecution to restrain the offender's assets to satisfy a compensation claim.<sup>83</sup> In addition, the victim does not have to pay legal costs for the application.<sup>84</sup>
- 9.56 However, the DPP told the Commission that it does not have the capacity or expertise to apply for restitution and compensation orders for victims in all cases. The DPP also expressed concern about creating the impression that it acts on behalf of victims.<sup>85</sup>

78 *Sentencing Act 1991* (Vic) ss 85B(1), 86(1). In *RK v Mirik and Mirik* (2009) 21 VR 623, [153]–[155], Bell J drew on the court's general discretion under section 85B(1), rather than section 85H (financial circumstances of the offender) to discount a compensation order by 25 per cent. See also *Kelly (a pseudonym) v R1 (a pseudonym)* [2016] VSCA 90, [21], in which the Court of Appeal said that if, as suggested, a practice had developed in the County Court to apply a 25 per cent discount 'it should cease': [22].

79 *Sentencing Act 1991* (Vic) ss 84(5)(b)(ii) (restitution), 85C(1)(b)(iii) (injury), 86(5)(b)(ii) (property loss).

80 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [64].

81 *Ibid* [63].

82 Submissions 26 (Victoria Police), 38 (Name withheld).

83 Consultations 13 (Parents of a victim) and 44 (Kristy McKellar) both referred to the offender hiding or disposing of assets as an issue. In relation to the DPP's powers to restrain property, see *Confiscation Act 1997* (Vic); Director of Public Prosecutions Victoria, *Director's Policy Regarding the Proceeds of Crime* (11 August 2015). These matters are outside the Commission's terms of reference.

84 For applications for compensation for property loss or for personal injury, the Sentencing Act requires each party to bear their own legal costs, unless the judge orders otherwise: *Sentencing Act 1991* (Vic) ss 85K, 86(9D). If each party bears their own costs, victims may have to pay costs incurred by their solicitor. Costs have been awarded against offenders in some cases: *R v Scarborough* [2000] VSC 255; *Gregory v Gregory* (2000) 112 A Crim R 19.

85 Submission 23 (DPP).

Making an application for a restitution or compensation order does require the DPP to act on the victim's behalf and, in doing so, give priority to the victim's legal interests over the public interest. This could conflict with the DPP's responsibility to provide an impartial public prosecutions service.

- 9.57 In practice, the DPP seldom acts on behalf of victims and most have to retain a private lawyer and pay legal costs.<sup>86</sup> Finding lawyers in regional areas to take on victims' compensation or VOCAT matters is more difficult than in metropolitan areas.<sup>87</sup> Victoria Legal Aid indicated in its submission that it can assist with restitution and compensation applications.<sup>88</sup> Community legal centres told the Commission that they are rarely approached for assistance.<sup>89</sup>

### Access to legal advice and assistance

- 9.58 Victims are not always told about the option of applying for restitution or compensation orders through the Sentencing Act, or are being told late in proceedings.<sup>90</sup> The parent of a child victim stated:

I understood there was the option of applying to VOCAT or enduring a civil action against the offender. The option of the processes in Part 4 of the Sentencing Act were never articulated to me. It is therefore clear that the full array of compensation options should be conveyed to victims at multiple times during the investigation, trial, sentencing process ... A legal advocate for the victim will ensure that this process is completed.<sup>91</sup>

- 9.59 The Victorian Bar and Criminal Bar Association suggested that victims' lack of awareness and infrequent use of the Sentencing Act to obtain restitution and compensation orders could reflect the focus of criminal proceedings on the determination of guilt and imposition of penalties, rather than on compensating victims.<sup>92</sup>
- 9.60 It is in the interests of victims and the community that victims are aware of, and able to access, a legal procedure that holds offenders accountable for the repair of harm they have caused. Some victims will be capable of negotiating Part 4 of the Sentencing Act themselves, but the process cannot operate on an assumption that everyone can do this. The Supreme Court put the view that it is highly desirable for victims to have access to legal assistance where the law protects their interests, such as in providing the right to seek compensation.<sup>93</sup>
- 9.61 The Commission agrees with the Supreme Court and considers that a state-funded legal service to advise and assist victims with applications for Sentencing Act restitution and compensation orders can be justified by its connection with the criminal trial process. The same cannot be said for claims that victims pursue separately in the civil courts.
- 9.62 In Chapter 6, the Commission has recommended that a legal service should be established at Victoria Legal Aid to assist victims of violent indictable crimes in pursuing their substantive legal entitlements, including Sentencing Act restitution and compensation orders. Victoria Legal Aid could continue to provide assistance with VOCAT applications in light of the overlap between the two forms of financial reparation and the fact that the state covers the victim's VOCAT costs.<sup>94</sup>

86 Submissions 12 (Arnold Dallas McPherson Lawyers), 26 (Victoria Police); Consultations 11 (Parent of a victim), 37 (Centacare, Barwon South West Region), 45 (Victims Support Agency, Department of Justice and Regulation).

87 Roundtable 4 (Legal practitioners, Geelong).

88 Submission 10 (Victoria Legal Aid).

89 Roundtable 16 (Community legal centres).

90 Submission 38 (Name withheld); Consultations 1 (A victim), 9 (Magistrate Ron Saines), 20 (Parent of victims), 25 (Aboriginal Family Violence Prevention & Legal Service Victoria), 28 (Laurie Krause), 29 (Parent of victims); Roundtable 10 (Legal practitioners, Shepparton).

91 Submission 38 (Name withheld).

92 Submission 29 (Victorian Bar and Criminal Bar Association).

93 Submission 27 (Supreme Court of Victoria).

94 The legal costs paid by VOCAT to legal practitioners are set out in Victims of Crime Assistance Tribunal, *Guideline 1 of 2016: Costs Guideline* (1 January 2016). Victims cannot be charged costs unless VOCAT orders this: *Victims of Crime Assistance Act 1996* (Vic) s 48.

## Making victims aware of the availability of legal assistance

- 9.63 The DPP's Victims Policy requires OPP solicitors to ensure that victims are informed that they may be entitled to restitution and compensation and to financial assistance from VOCAT.<sup>95</sup> There is no express obligation in the *Victims' Charter Act 2006* (Vic) to do so. Instead, the Act contains a general obligation to provide information about 'possible entitlements and legal assistance' and to refer the victim to relevant services.<sup>96</sup>
- 9.64 Some victims told the Commission that they were not told until some time into the criminal trial process, or not told at all, about their right to seek an order for restitution or compensation as an additional order to sentencing.<sup>97</sup> The delay may mean that an opportunity to restrain the offender's assets is missed.<sup>98</sup>
- 9.65 Restitution and compensation orders are substantive legal entitlements for victims. The *Victims' Charter Act* is the most visible statutory instrument stating victims' entitlements. It should therefore include an express obligation on investigatory and prosecuting agencies to inform victims of their possible entitlements under Divisions 1 and 2 of Part 4 of the *Sentencing Act*, and to refer victims to legal assistance. The police informant and OPP solicitors are in the best position to ensure that victims know that legal assistance is available, and are referred to it early. The victim, or their lawyer, should be given materials in the OPP's possession that are relevant to an application for restitution or compensation.

## Recommendation

- 47 The *Victims' Charter Act 2006* (Vic) should be amended to require investigatory and prosecuting agencies to inform victims of their possible entitlements under Part 4 of the *Sentencing Act 1991* (Vic) and refer them to available legal assistance.

## Appeals and enforcement

### Appeals

- 9.66 The DPP can appeal a restitution or compensation order where an error has occurred and it is in the public interest to appeal.<sup>99</sup> Offenders can commence appeal proceedings to challenge the making of the order.<sup>100</sup>
- 9.67 Dissatisfied victims cannot appeal a restitution or compensation order at all, nor a decision by the court not to make one. Their remaining option is to commence proceedings for compensation in the court's civil jurisdiction.<sup>101</sup> Western Australia is the only jurisdiction the Commission is aware of that allows victims to appeal against a restitution or compensation order, or a court's refusal to make one.<sup>102</sup>

95 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [61]. A booklet has been produced for this purpose: Office of Public Prosecutions Victoria, *Financial Assistance: Financial Assistance, Compensation and Restitution for Victims of Crime* (2013). There is some information in the Office of Public Prosecutions Victoria, *Pathways to Justice: A Guide to the Victorian Court System for Victims and Witnesses of Serious Crimes* (2013).

96 *Victims' Charter Act 2006* (Vic) s 7.

97 Consultations 1 (A victim), 12 (Parent of a victim), 13 (Parents of a victim), 28 (Laurie Krause), 40 (A victim), 42 (Relative of a victim; a victim).

98 Consultation 44 (Kristy McKellar); this related to a prosecution in the Magistrates' Court by Victoria Police.

99 *Criminal Procedure Act 2009* (Vic) ss 3 (definition of 'sentence'), 287.

100 See for example, *Chalmers v Liang* [2011] VSCA 439, [3]. See also *Kelly (a pseudonym) v R1 (a pseudonym)* [2016] VSCA 90, [19], where the court stated that it will not disturb an award except in the limited circumstances identified in *House v The King* (1936) 55 CLR 299, 504–5 (Dixon, Evatt and McTiernan JJ).

101 *DPP v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [2] (Buchanan JA).

102 *Sentencing Act 1995* (WA) s 114A.

- 9.68 The DPP, among others, expressed support for giving victims in Victoria the right to commence appeal proceedings where the court has refused to make an order or if they consider the order inadequate.<sup>103</sup> Victims and offenders would avoid the time and expense associated with commencing proceedings in the court's civil jurisdiction.<sup>104</sup> One victim suggested that this right could be exercised in consultation with the DPP.<sup>105</sup>
- 9.69 The Law Institute of Victoria, the Victorian Bar and the Criminal Bar Association oppose such reform.<sup>106</sup> They consider existing civil procedures sufficient. In their view, granting victims a right to appeal would be fundamentally inconsistent with Victoria's adversarial system of criminal justice, in which decisions about appeals are made only by the DPP and the offender.
- 9.70 While permitting victims to appeal decisions regarding restitution and compensation would depart from current appeal procedures in the criminal justice system, it would retain the distinction between sentencing decisions and restitution and compensation orders. Sentencing decisions concern the offender's punishment for committing the offence. Restitution and compensation orders are civil remedies that are additional to sentencing and provide for direct reparation by the offender to the victim. The Commission therefore considers it conceptually sound that victims have a right to seek leave to appeal decisions regarding restitution and compensation orders. It may lead to a small increase in appeals, but the resources taken up by this increase may be offset by the costs avoided by victims not commencing civil proceedings.
- 9.71 The Commission's recommendation below is restricted to appeals by a victim against restitution and compensation orders by the Supreme or County Courts, in line with the terms of reference. As a matter of principle, the Commission considers that the proposed amendment could be extended to such orders made in the Magistrates' Court.

## Recommendation

- 48 The *Criminal Procedure Act 2009* (Vic) should be amended to enable victims to seek leave to appeal, independently of the Director of Public Prosecutions:
- (a) a refusal by the Supreme Court or County Court to make an order pursuant to Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic)
  - (b) orders made by the Supreme Court or County Court pursuant to Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic).

### A right to be heard where a conviction is set aside

- 9.72 If the Court of Appeal sets aside an offender's conviction and is considering whether a restitution or compensation order made in connection with that conviction should not take effect, Supreme Court rules state that victims 'may be heard' in the appeal.<sup>107</sup>

103 Submission 23 (DPP). Support was also expressed in Submissions 21 (Dianne Hadden), 26 (Victoria Police), 31 (Professor Jonathan Doak, Nottingham Trent University), 38 (Name withheld).

104 Submission 26 (Victoria Police).

105 Submission 38 (Name withheld).

106 Submissions 25 (Law Institute of Victoria), 29 (Victorian Bar and Criminal Bar Association).

107 *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 2.47. A restitution or compensation order is usually suspended for the duration of the appeal. If a conviction is set aside, the restitution or compensation order will not take effect unless the Court of Appeal orders otherwise: *Criminal Procedure Act 2009* (Vic) s 311.

9.73 The fact that a victim may be heard by the Court of Appeal is not articulated in the DPP’s policies. Although the DPP’s Victims Policy instructs OPP solicitors to inform victims that restitution or compensation orders are suspended pending an appeal and will be ineffective if a conviction is set aside, they are not instructed to inform victims that they may be heard in the appeal.<sup>108</sup> This omission should be rectified by the DPP.

### Enforcement of orders

9.74 The fact that restitution and compensation orders are not sentencing orders affects how they can be enforced. A court-ordered fine, which is a sentencing option for some criminal offences,<sup>109</sup> is enforced by the state. In contrast, the state cannot punish an offender for failing to fulfil a compensation order. Instead, victims have to take the offender to court to enforce the order as a judgment debt.<sup>110</sup> If an offender has no income and no assets, or is imprisoned for a long time, attempts to enforce the order are likely to be futile.<sup>111</sup>

9.75 Judgment debts can be enforced in a number of ways, including through:

- an instalment order
- a warrant to seize and sell assets
- an order requiring a portion of an offender’s employment income to be paid towards the debt or petitioning for bankruptcy.<sup>112</sup>

9.76 The enforcement process ‘prolongs what is already a very traumatic situation’ and may have an impact on the victim’s recovery.<sup>113</sup> It can also require ongoing contact with offenders. The DPP noted that the victim may need to engage a lawyer. A lawyer acting for a victim in this situation submitted that there are major barriers to enforcing an order, including significant legal costs.<sup>114</sup> A victim of childhood sexual offences told the Commission that she obtained a compensation order with the assistance of one solicitor but then needed to fund a separate solicitor to attempt to enforce the order.<sup>115</sup> The stress, cost and time dedicated to trying to enforce orders may be compounded by other factors, such as disability, language barriers and living in a regional location.

### Enforcement by the state

9.77 The Commission’s consultation paper considered whether restitution and compensation orders should be enforced by the state. In effect, they would be treated like court-ordered fines for the purposes of enforcement, as occurs in New Zealand.<sup>116</sup> South Australian and Queensland laws also provide for state enforcement.<sup>117</sup> Importantly, in each of these jurisdictions, a compensation order forms part of an offender’s punishment.

108 Director of Public Prosecutions Victoria, *Director’s Policy: Victims and Persons Adversely Affected by Crime* (11 August 2015) [70]–[71].

109 *Sentencing Act 1991* (Vic) s 49.

110 *Ibid* ss 85(1), 85M, 87. Restitution orders requiring the restoration, transfer or delivery of goods by the offender to a person do not result in a judgment debt but are enforceable through the civil jurisdiction of the court: s 85(2).

111 A court cannot order that social security payments from Centrelink be used to repay a debt, with the exception of instalment orders, which can be made where the person consents: *Judgment Debt Recovery Act 1984* (Vic) s 12.

112 See *County Court Civil Procedure Rules 2008* (Vic) r 66.02; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.02; *Judgment Debt Recovery Act 1984* (Vic); *Bankruptcy Act 1966* (Cth). See also *Josefski v Donnelly* [2007] VSCA 6, [12].

113 Submission 13 (David Levesque); Consultation 47 (Victoria Legal Aid); Roundtable 2 (Legal practitioners, Mildura).

114 Submission 13 (David Levesque). A similar comment was made in Roundtable 4 (Legal practitioners, Geelong).

115 Consultations 10 (A victim), 11 (Parent of a victim).

116 Fines are enforced by way of the *Summary Proceedings Act 1957* (NZ) pt 3. The definition of fine includes a reparation order: s 79. See further Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2015) 138–139.

117 *Criminal Law (Sentencing) Act 1988* (SA) pt 7, pt 9 div 2A–div 3; *Penalties and Sentences Act 1992* (Qld) pt 3.



- 9.78 In Tasmania, compensation orders are described as ancillary orders, but are enforceable as fines. If deemed uncollectable, they can be enforced as a judgment debt in the court's civil jurisdiction.<sup>118</sup> In 2008, the Tasmania Law Reform Institute noted that only Magistrates' Court compensation orders were being enforced in this way and that recovery rates were poor.<sup>119</sup>
- 9.79 A number of stakeholders supported the transfer of the enforcement burden from victims to the state.<sup>120</sup> Victoria Police, a magistrate and the parent of a victim suggested that the government could advance to the victim the amount of compensation that an offender cannot pay and then the offender could be ordered to pay the state.<sup>121</sup> The Law Institute of Victoria did not support any change.<sup>122</sup>

### Conclusion

- 9.80 From the perspective of victims, there is a compelling case, supported by precedent in other jurisdictions, for having the state enforce restitution and compensation orders. However, if these orders were enforced by the state like a fine, offenders who do not pay would be doubly punished. Poorer offenders could be exposed to a greater punitive burden than wealthier offenders. This is not desirable.
- 9.81 For this reason, it could be argued that restitution and compensation orders enforced using the resources of the state and the threat of further punishment should be made a sentencing option to reflect their punitive character.<sup>123</sup> Having restitution and compensation as a sentencing option would suit some victims because they may not need to commence separate proceedings.<sup>124</sup> However, state enforcement would come with considerable costs for the community, and marginalised and disadvantaged offenders would still be at risk of being differentially punished because of their financial circumstances.
- 9.82 Such a reform could have a significant impact on sentencing practices and outcomes, especially in the Magistrates' Court, which are matters beyond the Commission's terms of reference. In addition, the Commission does not have data indicating how frequently restitution or compensation orders are made by courts or satisfied by offenders, which would enable the Commission to assess the costs and benefits of state enforcement.
- 9.83 The enforcement of restitution and compensation orders is best considered within the broader question of whether they should be treated as sentencing orders, and whether the purposes of sentencing should include compensating victims.
- 9.84 This broader question was considered in 1994 by the Victorian Parliamentary Law Reform Committee. The Committee concluded that it was premature to make the reparation of victims a sentencing order, but considered that 'reparation will be more fully integrated into the criminal justice system as increased recognition continues to be given to the importance of promoting the interests of victims'.<sup>125</sup>
- 9.85 A 2009 discussion paper published by the Department of Justice also inquired into this issue, but a final report was not published. This issue needs to be addressed squarely, considered in detail and resolved. It should be subject to a separate and dedicated review. In view of its expertise in conducting research on sentencing policy, and its responsibility

118 *Sentencing Act 1997* (Tas) s 69. Enforcement is pursuant to the *Monetary Penalties Enforcement Act 2005* (Tas). Options include suspending a drivers licence or vehicle registration, seizure and sale of property, redirection of earnings, and imprisonment. An order is deemed uncollectable in accordance with section 109.

119 Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [4.4.28]. It recommended that compensation orders become a sentencing option rather than being ancillary (recommendation 53).

120 Submissions 13 (David Levesque), 31 (Professor Jonathan Doak, Nottingham Trent University), 34 (Northern Centre Against Sexual Assault), 38 (Name withheld); Consultations 10 (A victim), 11 (Parent of a victim), 21 (Victoria Police), 29 (Parent of victims), 36 (Magistrate John Lesser). Mr Levesque suggested a compensation order be a condition of a community corrections order.

121 Submissions 26 (Victoria Police), 38 (Name withheld); Consultation 36 (Magistrate John Lesser).

122 Submission 25 (Law Institute of Victoria). Submission 21 (Dianne Hadden) supported restitution and compensation orders being enforced as a civil debt, or alternatively giving victims a right to appeal.

123 States are encouraged to consider having restitution available as a sentencing option in the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, A/RES/40/34 (29 November 1985) annex, [9].

124 See New Zealand Law Commission, *Compensating Crime Victims* (Report 121, 2010) 10.

125 Law Reform Committee, Parliament of Victoria, *Inquiry into Restitution for Victims of Crime—Final Report* (1994) xiii–xv.



to advise the Attorney-General on sentencing issues,<sup>126</sup> the Sentencing Advisory Council is best placed to conduct such a review.

## Recommendation

- 49 The Attorney-General should ask the Sentencing Advisory Council to review whether orders made under Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic) should become a sentencing option. The review should consider:
- (a) whether the purposes of sentencing should include the financial reparation of victims
  - (b) whether there should be a presumption in favour of courts making such orders
  - (c) whether such orders should be enforced by the state in the manner of a fine.

## State-funded financial assistance

### Victims of Crime Assistance Tribunal (VOCAT)

- 9.86 VOCAT administers a state-funded scheme for the award of financial assistance to eligible victims of violent crime as set out in the *Victims of Crime Assistance Act 1996* (Vic). The objects of the Act are:
- to assist victims in their recovery from crime by paying for financial expenses incurred or reasonably likely to be incurred
  - to pay certain victims special financial assistance ‘as a symbolic expression by the State of the community’s sympathy and condolence for, and recognition of, significant adverse effects experienced ... as victims of crime’
  - to give victims recourse to financial assistance where compensation for an injury cannot be obtained from an offender or another source.<sup>127</sup>
- 9.87 Applications for financial assistance can be made to VOCAT at any time up to two years after the alleged offending occurred.<sup>128</sup> Victims may be awarded financial assistance even if an offender has not been charged or found guilty of the crime.
- 9.88 An award of financial assistance can be made where a person suffers physical or psychological harm or pregnancy. However, loss or damage to property is excluded from the definition of injury.<sup>129</sup>
- 9.89 This financial assistance scheme affects the victim’s role in the criminal trial process in a number of ways:
- Victims may be required to put their application to VOCAT for financial assistance on hold while the criminal trial process is under way.
  - Victims may be cross-examined by the defence about their application to VOCAT.
  - The defence may seek to subpoena VOCAT material in preparing for criminal proceedings.

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127  
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129

*Sentencing Act 1991* (Vic) s 108C.  
*Victims of Crime Assistance Act 1996* (Vic) s 1(2).  
Ibid s 29 (applications can be made after 2 years in exceptional circumstances).  
Ibid s 3.

- An award of financial assistance by VOCAT must be reduced by any amount received through a Sentencing Act compensation order.<sup>130</sup> A Sentencing Act compensation order for injury must be reduced by the amount ordered by VOCAT.<sup>131</sup>
- Some victims cannot pursue Sentencing Act restitution or compensation orders, or a civil claim for compensation, because of the costs or complexity involved. Their only option may be to apply to VOCAT.
- Some victims cannot enforce Sentencing Act compensation orders because the offender does not have the financial means to satisfy the order or has disposed of assets. Their only option may therefore be to apply to VOCAT.

9.90 The scheme established by the Victims of Crime Assistance Act is not a compensation scheme. It is not intended to reflect compensation orders that might be made under the Sentencing Act or through a civil claim. However, where the criminal trial process does not lead to an acknowledgment of harm or public accountability through a finding of guilt, an award by VOCAT is an acknowledgment by the state of the harm caused.<sup>132</sup> This may have an emotionally restorative effect. The lower burden of proof that applies to VOCAT proceedings means that victims of violent crimes may be awarded financial assistance despite an offender having been acquitted or a decision being made not to prosecute.<sup>133</sup>

9.91 Applying to VOCAT for financial assistance can be a validating and restorative process for many victims, although it can also be difficult or stressful, depending on whether the application is successful and on the attitude of the presiding tribunal member.<sup>134</sup> VOCAT is not required to conduct proceedings in a formal manner and is not bound by rules of evidence.<sup>135</sup> VOCAT describes its hearing process as ‘an opportunity for victims to give voice to the impact of the crime and to receive acknowledgement and validation for their trauma’.<sup>136</sup>

## Offences

9.92 Primary victims, secondary victims and related victims may be eligible for different levels of financial assistance under the Victims of Crime Assistance Act.<sup>137</sup> Currently, eligibility depends on an ‘act of violence’ having been committed. An act of violence is defined as a ‘criminal act or series of related criminal acts’ committed in Victoria that ‘directly resulted in injury or death to one or more persons’.<sup>138</sup> The criminal acts covered are:

- offences that involve assault, injury, or threat of injury, and which are punishable by imprisonment
- prescribed sexual offences (including rape, indecent assault, incest, and a sexual offence against a child or person with a cognitive impairment)
- stalking, child stealing and kidnapping offences
- conspiracy, incitement or attempting to commit one of the above offences.<sup>139</sup>

130 Ibid ss 16, 62.

131 *Sentencing Act 1991* (Vic) s 85I.

132 Submissions 7 (Youthlaw), 12 (Arnold Dallas McPherson Lawyers); Consultations 4 (Parent of victims), 11 (Parent of a victim), 25 (Aboriginal Family Violence Prevention & Legal Service Victoria), 29 (Parent of victims). The Koori VOCAT List was considered to be more restorative than the general list by a participant in Roundtable 2 (Legal practitioners, Mildura).

133 *Victims of Crime Assistance Act 1996* (Vic) ss 8A(7), 31, 50(4). Submission 7 (Youthlaw) states that this is especially true for individuals who were victimised as children and could not report offending until they were older.

134 Submission 38 (Name withheld); Roundtables 2 (Legal practitioners, Mildura), 3 (Victim support specialists, Geelong), 8 (Metropolitan Centres Against Sexual Assault), 16 (Community legal centres).

135 *Victims of Crime Assistance Act 1996* (Vic) s 38. The Act provides for alternative arrangements for giving evidence, private hearings and non-disclosure orders, and victims can elect to have their application determined without a hearing: ss 37(3), 42, 43, 26(d) respectively.

136 Victims of Crime Assistance Tribunal, *Hearings* (6 May 2011) <<https://www.vocat.vic.gov.au/determining-application/hearings>>. A similar point was made in Consultation 26 (Magistrate Stella Stuthridge) and Roundtable 14 (Legal practitioners, Ballarat).

137 These are defined at sections 7, 9, 11 respectively of the *Victims of Crime Assistance Act 1996* (Vic).

138 Ibid s 3.

139 Ibid (definition of ‘relevant offence’).

- 9.93 Part 4 of the Sentencing Act and the Victims of Crime Assistance Act are inextricably linked. If a victim seeking financial reparation is not eligible to apply for financial assistance from VOCAT, their options are limited to applying for compensation under Part 4 of the Sentencing Act (subject to the offender being found guilty) or commencing civil proceedings. Against this background, the Commission sought comments on whether any offences that are currently excluded from the VOCAT scheme should be included.

### Family violence

- 9.94 In a roundtable with magistrates, the Commission was told that the Victims of Crime Assistance Act does not accommodate the particular dynamics and characteristics of family violence. Instead, the Act is framed around a conception of crime as a single violent act.<sup>140</sup> The Commission was referred to the following recommendation that the Magistrates' Court and Children's Court put forward to the Victorian Royal Commission into Family Violence:

Include 'related acts' occurring in the context of family violence as a circumstance in which the category A Special Financial Assistance award amount (currently \$10,000) is available for category B, C or D acts of violence pursuant to Rule 7 of the Victims of Crime Assistance (Special Financial Assistance) Regulations.<sup>141</sup>

- 9.95 The Victorian Royal Commission into Family Violence subsequently recommended that the matters raised regarding assistance under the Victims of Crime Assistance Act should be addressed either as part of this Commission's review or as part of a separate review of VOCAT.<sup>142</sup>
- 9.96 The proposal by the Magistrates' Court and Children's Court addresses an important issue of equity for family violence victims and warrants further consideration. It gives rise to important questions about the amount and timing of awards, including for counselling. These matters are beyond the Commission's terms of reference. Consistent with the Royal Commission's recommendation, they should be addressed as part of a separate review of VOCAT, along with the awards and assistance available to victims of other acts of violence.
- 9.97 It was also proposed to the Commission that family violence be listed as a relevant factor under section 52 of the Victims of Crime Assistance Act.<sup>143</sup> Section 52 requires VOCAT to refuse an application where the act of violence was not reported 'within a reasonable time' or where a victim failed to provide 'reasonable assistance' with the investigation or prosecution, unless there were special circumstances. This is an important point, which should be addressed as part of a comprehensive review of VOCAT (see below).

### Property offences

- 9.98 Dianne Hadden proposed in her submission that eligibility for financial assistance under the Victims of Crime Assistance Act be extended to victims of online fraud and non-violent offences, such as property damage and burglary (with intent only).<sup>144</sup> Victoria Police was open to this possibility given the substantial impact such crimes can have on victims, but noted that this could act as a disincentive for individuals to obtain property insurance.<sup>145</sup>
- 9.99 In the consultation paper, the Commission observed that expanding the scheme to victims of property offences could shift the costs of insuring private property from the individual to the state. The Magistrates' Court warned that expanding eligibility to victims of non-violent and property crimes would substantially increase the number and complexity of claims and the costs of the scheme.

140 Roundtable 15 (Magistrates of the Magistrates' Court of Victoria). See also Submission 1 (Australian Law Reform Commission).  
 141 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to the Royal Commission into Family Violence, (June 2015), 60. Magistrate Ron Saines also referred to a need for tribunal members to have broader discretion to determine appropriate categories and the range of assistance: Consultation 9.  
 142 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol IV 87, recommendation 106.  
 143 Submission 10 (Victoria Legal Aid); Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to the Royal Commission into Family Violence, (June 2015), 60.  
 144 Submission 21 (Dianne Hadden).  
 145 Submission 26 (Victoria Police).

9.100 This issue was considered as part of an in-depth review of compensation for victims of crime by the New Zealand Law Commission in 2010. It found no international precedent, fundamental problems and no social benefit to state-funded compensation for property loss.<sup>146</sup> Like its New Zealand counterpart, the Commission sees no compelling reason for such an expansion.

### Access to and use of VOCAT records in criminal proceedings

9.101 VOCAT records may be subpoenaed and used by the defence in criminal proceedings to demonstrate inconsistencies in a victim's evidence and to challenge the credibility of a victim.

### Access to VOCAT records

9.102 Section 42A of the Victims of Crime Assistance Act prevents access to records that VOCAT has ordered remain confidential. Leave to access a record can be granted by VOCAT where it is in the public interest.

9.103 A VOCAT practice direction sets out special procedures for requests for 'classified documents'. This guides registrars and tribunal members as to the types of documents that the tribunal may declare confidential pursuant to section 42A.<sup>147</sup> Classified documents include:

- medical, psychological, psychiatric and counsellor reports provided by or on behalf of the victim
- police briefs and related police documents
- hospital records
- other documents filed by third parties.<sup>148</sup>

9.104 If the defence subpoenas a victim's VOCAT file, the victim will be notified if the tribunal member considers it appropriate.<sup>149</sup> VOCAT's practice is to provide the documents in a sealed envelope and advise the court hearing the criminal matter that it objects to the release and inspection of the documents, without leave of that court. In objecting to the release and inspection of the documents, VOCAT draws the court's attention to section 42A, as well as section 65 of the Act (below). It is ultimately for the court hearing the criminal matter to determine whether the documents should be released.<sup>150</sup>

### Use of VOCAT records in criminal proceedings

9.105 In accordance with section 65 of the Act, evidence of any document prepared solely for the purpose of a VOCAT application, and evidence of anything said on the hearing of an application, will not generally be admissible in criminal proceedings. There are a number of exceptions. Most relevantly, a victim can provide consent if 'the words or document principally refers or relates' to them, or the court hearing the criminal matter can rule material admissible if it is 'in the interests of justice'.<sup>151</sup>

9.106 In sexual offence cases, access to and use of medical or counselling records that are in VOCAT's possession, but were not prepared for the purpose of VOCAT proceedings, is subject to the confidential communication provisions of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).<sup>152</sup>

146 New Zealand Law Commission, *Compensating Crime Victims*, Report 121 (2010) 26–7.

147 Information provided by a Tribunal Member, Victims of Crime Assistance Tribunal, 5 July 2016.

148 Victims of Crime Assistance Tribunal, *Practice Direction No 1 of 2015: Access to Files* (1 April 2015) 2. Separate processes are set out for responding to direct requests for documents and for responding to subpoenas.

149 Ibid 4.

150 Ibid; Information provided by a Tribunal Member, Victims of Crime Assistance Tribunal, 5 July 2016.

151 *Victims of Crime Assistance Act 1996* (Vic) ss 65(1)(e), (2). There are exceptions for criminal proceedings, which relate to offences against the Act and dishonesty offences.

152 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C. Documents prepared for the purpose of VOCAT proceedings are not covered: s 32E(1)(c).

## Restricting access to and use of VOCAT records

- 9.107 The above provisions do not stop the defence from issuing a subpoena for VOCAT records. The Commission was told by a number of magistrates that VOCAT records are regularly subpoenaed for criminal proceedings.<sup>153</sup>
- 9.108 Once VOCAT receives a subpoena, the victim may or may not be notified that their records have been sought. The court hearing the criminal matter can order that the documents be released to, or inspected by, the defence despite VOCAT's objection. Evidence of a document prepared for VOCAT and evidence of anything said at a VOCAT hearing can be ruled admissible in the interests of justice. This is a broad test.
- 9.109 The Commission considers that, where criminal proceedings are ongoing, the defence's access to VOCAT records relating to a victim should be restricted. Medical, psychological, psychiatric and counselling records and reports provided to VOCAT should not be accessed or used for the purposes of criminal proceedings without the victim's consent.<sup>154</sup> If such records are considered critical to the defence, subpoenas should be directed to the relevant medical or counselling services. In addition, application forms, statements, medical assessment reports and correspondence between a victim and VOCAT are prepared for a specific purpose—determining eligibility under the Victims of Crime Assistance Act. This Act creates an entitlement to financial assistance for eligible victims to assist with their recovery after crime.
- 9.110 Victims are entitled to apply for assistance from VOCAT to help them with their recovery. They should not be discouraged from doing so because of fear that an offender will seek to access or use their VOCAT records in criminal proceedings.
- 9.111 Section 113 of the *Victims Rights and Support Act 2013* (NSW) provides greater clarity and protection. An application for victims' support, any supporting documents, and any documents provided or prepared in connection with an application, are not admissible as evidence in any other criminal or civil proceeding, except where the applicant is an accused person in criminal proceedings. Further, a person cannot be compelled to produce an inadmissible document.<sup>155</sup> The Commission is of the view that such a provision would be appropriate in Victoria in relation to criminal proceedings.

## Recommendations

- 50 Applications, supporting documentation and documents provided to or prepared for, or on behalf of, the Victims of Crime Assistance Tribunal at any time in connection with an application for financial assistance under the *Victims of Crime Assistance Act 1996* (Vic) should be inadmissible as evidence in any criminal legal proceedings except:
- (a) in criminal proceedings in which the applicant is the accused
  - (b) in or arising out of proceedings before the Victims of Crime Assistance Tribunal
  - (c) with the applicant's consent.
- 51 A person should not be required by subpoena or any other procedure to produce any application or document that would be inadmissible following the implementation of recommendation 50.

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Consultation 26 (Magistrate Stella Stuthridge); Roundtable 15 (Magistrates of the Magistrates' Court of Victoria).  
Roundtable 14 (Legal practitioners, Ballarat).  
*Victims Rights and Support Act 2013* (NSW) s 113. See also *Victims of Crime Assistance Act* (NT) s 64.

## Cross-examination about VOCAT applications

- 9.112 Victims are sometimes cross-examined about whether they have made an application to VOCAT for financial assistance.<sup>156</sup> The defence may seek to suggest that the victim's allegations are financially motivated.
- 9.113 In Queensland, victims who have applied for assistance cannot be cross-examined in criminal proceedings relating to the same offence about whether they made an application for assistance or what the outcome was.<sup>157</sup>
- 9.114 Some magistrates and lawyers told the Commission that cross-examination in relation to VOCAT records during the criminal trial process has no probative value.<sup>158</sup> It was suggested that defence lawyers could be required to seek leave from the court before asking a victim questions about a VOCAT application.<sup>159</sup> The Law Institute of Victoria opposes such a restriction.<sup>160</sup>
- 9.115 On balance, the Commission considers that more robust provisions regulating access to, and admissibility of, VOCAT materials, as recommended above, would provide victims with sufficient protection. Further, where the defence cannot demonstrate the probative value of questioning a victim about their VOCAT application, a judge or magistrate already has the power to disallow cross-examination on that point.

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156 Consultations 26 (Magistrate Stella Stuthridge), 36 (Magistrate John Lesser), 43 (Victoria Police SOCIT, Wodonga).

157 *Victims of Crime Assistance Act 2009* (Qld) s 137.

158 Consultation 36 (Magistrate John Lesser); Roundtables 14 (Legal practitioners, Ballarat), 15 (Magistrates of the Magistrates' Court of Victoria).

159 Consultation 36 (Magistrate John Lesser); Roundtable 15 (Magistrates of the Magistrates' Court of Victoria).

160 Consultation 51 (Criminal Law Section, Law Institute of Victoria).

# Conclusion



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## 10 Conclusion

- 10.1 This report does not recommend changing the adversarial trial process itself. Within that trial process, the report recommends that the role of the victim should be conceptualised, understood and implemented in accordance with modern jurisprudence. The jurisprudence is that, in the modern trial, there is a triangulation of interests: those of the public, the accused and the victim. Within that triangulation, the interest of the victim in the criminal trial is not that of a party; but it is that of a participant.
- 10.2 The victim's role has been changing progressively in Victoria and other common law jurisdictions for three decades, albeit not in the same way or at the same pace. It is no longer confined to that of a prosecution witness. Victoria's public prosecutions service has been required by law to give appropriate consideration to the concerns of victims of crime since 1994.<sup>1</sup> Also that year, the courts were first required by law to have regard to the impact of the crime on the victim when sentencing an offender.<sup>2</sup> The following year, the Witness Assistance Service was established within the Office of Public Prosecutions, to support victims and witnesses of serious crime throughout the court process.
- 10.3 Since then, numerous entitlements and obligations created in law and policy have affected how criminal trials are conducted, particularly for victims of sexual offences and family violence. Victims can also participate at other stages of the criminal justice system's response to crime, notably when the offender is nearing the end of a custodial sentence and being considered for parole or ongoing post-sentence monitoring and supervision.
- 10.4 The *Victims' Charter Act 2006* (Vic) was a watershed in the evolution of the victim's place in the criminal justice system. It restated, from the victim's perspective, rights that had been established by other legislation and set out obligations owed to victims by criminal justice agencies. The Act was intended to achieve a consistent system-wide approach to the way in which victims are treated by those agencies.
- 10.5 By all accounts, there have been significant improvements in the information and support services that are now available to victims. There is also evidence of cultural change, in that criminal justice agencies are more aware of and responsive to victims' needs and expectations. Most recently, the legislatively established Victims of Crime Commissioner and Victims of Crime Consultative Committee have provided ongoing means by which the views of victims can contribute to law and policy across the criminal justice system.
- 10.6 Notwithstanding these reforms, and the promising results, victims continue to feel marginalised and disrespected. They have recounted to the Commission numerous incidents when they were not informed of the progress of court proceedings, did not know what was expected of them when giving oral evidence as a prosecution witness, could not get answers from the prosecution to their questions about the trial, and were not consulted about a plea resolution decision or decision to discontinue charges.

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1 *Public Prosecutions Act 1994* (Vic).  
2 *Sentencing (Victim Impact Statement) Act 1994* (Vic).

- 10.7 In the trial itself, victims continue to be traumatised by not being acknowledged and by being exposed to unnecessarily harsh and intrusive cross-examination. At times, they feel unsafe on court premises in the presence of the accused's friends and family.
- 10.8 Criminal justice agencies and judicial officers told the Commission that a key reason why the promise of law and policy reform is not always realised in practice is because there is a need for cultural change. They maintained that victims are not always treated with respect during the criminal trial process because some lawyers and judicial officers do not appear to have embraced the victim-centred reforms of recent years.
- 10.9 This report argues for a more strategic approach to be taken in order to drive cultural change, implement the reforms that have been made and provide a context for further reform. It calls for the role of the victim in the criminal trial process, as it has evolved, to be recognised as that of a participant.
- 10.10 While the victim's role has evolved through the cumulative effect of law and policy reforms, and the victim is increasingly recognised as having an inherent interest in the process, the role has not been conceptualised differently. As long as the victim's role is still perceived as only that of a witness, the reforms can be seen, at best, as peripheral modifications to the criminal trial process. At worst, there are fears that the reforms weaken the laws and procedures that uphold the principles of a fair trial.
- 10.11 In describing the victim as a participant, the Commission seeks to encapsulate the reality that victims have an inherent interest in the response by the criminal justice system to the crime committed against them. This inherent interest arises from the fact that the person has been a victim of crime. It is given effect through rights and entitlements held by victims, and the imposition of obligations on criminal justice agencies. It also gives rise to legitimate expectations by victims about how they should be treated and how their personal interests are recognised during the criminal trial process.
- 10.12 Being recognised as a participant does not mean that the victim is a party to the criminal proceedings or takes on any of the functions that are traditionally associated with the role of a public prosecutor. Nor does it diminish the right of the accused to a fair trial. The Commission intends it to mean that the criminal trial process will accommodate the triangulation of interests of the accused, the victim and the community. The requirement of a fair trial will be enhanced, not diminished, by properly accommodating that triangulation.
- 10.13 The role of the victim as a participant should be embedded in the language and perceptions of criminal justice agencies. This will foster cultural change by describing what the victim's role has become and what it means for the adversarial criminal trial process. The Commission recommends expressly recognising the role in legislation, and introducing education and training initiatives to explain what it means in practice.
- 10.14 To reinforce cultural change, and further encourage compliance with victim-centred reforms, the Commission has made a number of recommendations to increase the accountability of criminal justice agencies to Parliament and to individual victims.
- 10.15 The report also explores the extent to which victims' legitimate expectations about how they should be treated are being met. Recommendations to overcome disadvantages are made, including to address disparities between rural and regional areas and metropolitan areas in the availability of services for victims, and to reduce the trauma of giving evidence at the trial. The Commission also recommends that an intermediary service be established for child victims and victims with a disability that is likely to diminish the quality of their evidence.

- 10.16 Other recommendations are of potential benefit to all victims. They reinforce the obligations on the Director of Public Prosecutions to consult victims when making significant decisions that affect the conduct of the trial; they provide for victims to have access to legal advice and assistance in order to protect their legal interests where necessary during the criminal trial process; and they facilitate the process by which victims may obtain restitution and compensation orders at the end of the criminal trial.
- 10.17 Recommendations are made about establishing a restorative justice conferencing scheme. Such a scheme would not be part of the criminal trial but could operate alongside sentencing and provide a means for victims to participate directly in a satisfying and procedurally fair process that may advance their private interests. The Commission is aware that there has been—and continues to be—a great deal of research into restorative justice schemes in Australia and overseas, and considers that it is now time to introduce a scheme in Victoria.
- 10.18 The Commission’s recommendations build on and modify a range of laws and policies while calling for greater coherence and system-wide strategies to consolidate the victim’s role as a participant. They are based on current evidence, yet victims’ views and expectations will continue to change as the reforms are introduced. In addition, they have been made at a time when the broad-ranging recommendations of the Victorian Royal Commission into Family Violence, which will have ramifications throughout the criminal justice system, are being implemented. Therefore, it would be prudent to review the effect of the reforms recommended in this report, and the Victims’ Charter Act, in five years. The Commission recommends that the Victims of Crime Commissioner lead such a review.
- 10.19 Throughout the review, the Commission has noted, both directly and through victims’ comments, the professionalism and commitment of the staff of criminal justice agencies and community-based organisations that provide support to victims of crime, and of the courts themselves. The Commission’s recommendations are made in the expectation that the reforms will build on their achievements.

# Appendices

254 **Appendix A: Overview of the criminal trial process for victims**

261 **Appendix B: Submissions**

263 **Appendix C: Consultations**

## Appendix A: Overview of the criminal trial process for victims

Phase	Victim's role
<b>Decision to prosecute</b>	
Victoria Police decides to charge a suspect, sometimes after obtaining advice from the Office of Public Prosecutions. <sup>1</sup>	<p>The victim's views may be considered but the decision to charge a suspect is based on an assessment of the evidence, the law and the public interest.</p> <p>The Office of Public Prosecutions must inform the victim, as soon as reasonably practicable, about the offences charged or why no offence is charged.<sup>2</sup></p>
<b>Commencement of criminal proceedings in the Magistrates' Court</b>	
<p>There are three ways to begin a criminal prosecution:</p> <ul style="list-style-type: none"> <li>• A police officer or other public official files a charge sheet containing a charge with the Magistrates' Court.<sup>3</sup></li> <li>• The Director of Public Prosecutions or a Crown Prosecutor files a direct indictment in the Supreme or County Court.<sup>4</sup></li> <li>• A judge directs that a person be tried for perjury.<sup>5</sup></li> </ul>	The victim has no role.

1 Victims have the power to commence and conduct a private prosecution but this very rarely occurs nowadays. The shift from private prosecutions by victims to public prosecutions by the state is discussed in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory*, Information Paper 1 (2015).

2 *Victims' Charter Act 2006* (Vic) ss 9(a)–(b).

3 *Criminal Procedure Act 2009* (Vic) ss 5(a), 6(1)(a). Alternatively, a charge sheet may be filed with a bail justice: s 6(1)(b), or the proceeding may begin by issuing a summons when the charge sheet is signed: ss 6(1)(c), 14. A criminal proceeding against a child is commenced in the same manner in the Children's Court: *Children, Youth and Families Act 2005* (Vic) s 528.

4 *Criminal Procedure Act 2009* (Vic) s 5(b). This usually occurs after an accused person has been discharged at the end of committal proceedings.

Phase	Victim's role
<b>Decision to continue or discontinue a prosecution</b>	
<p>The Director of Public Prosecutions may decide to discontinue a prosecution at any time during proceedings, except during a trial.<sup>6</sup></p>	<p>The Office of Public Prosecutions must inform the victim, as soon as reasonably practicable, of a decision not to proceed with a prosecution.<sup>7</sup></p> <p>The Director of Public Prosecution's policy is that:</p> <ul style="list-style-type: none"> <li>• the victim's views should be taken into account but are not determinative</li> <li>• the victim should be informed of a decision to discontinue before it is publicly announced.<sup>8</sup></li> </ul>
<b>Plea negotiations</b>	
<p>Plea negotiations between the prosecution and the accused can occur in a range of circumstances for a range of reasons.</p> <p>The accused commonly offers to plead guilty to an offence with a lower penalty if a more serious offence is discontinued, or to plead guilty to a more serious charge if an agreement can be reached about the facts on which the plea is based.</p> <p>The prosecution may be disposed to negotiate rather than proceed to trial because of:</p> <ul style="list-style-type: none"> <li>• an evidentiary problem that will make it difficult to prove a necessary element of an offence</li> <li>• a legal issue that undermines the strength of the prosecution case</li> <li>• an issue with the availability, reliability or credibility of crucial prosecution witnesses</li> <li>• some other reason in the public interest.</li> </ul>	<p>The Office of Public Prosecutions must inform the victim, as soon as reasonably practicable, of a decision to substantially modify or not to proceed with a charge, or to accept a plea of guilty to a lesser offence.<sup>9</sup></p> <p>The Director of Public Prosecution's policy is that:</p> <ul style="list-style-type: none"> <li>• when considering a plea of guilty, the views of the victim must be taken into account but are not determinative</li> <li>• the prosecution should consult the victim prior to the resolution of a prosecution by a plea of guilty to lesser charges</li> <li>• the victim should be informed if a prosecution resolves in a plea of guilty, regardless of whether the plea of guilty is to lesser charges.<sup>10</sup></li> </ul>

5 *Criminal Procedure Act 2009* (Vic) ss 5(c), 415.

6 *Ibid* s 177(2).

7 *Victims' Charter Act 2006* (Vic) s 9(c).

8 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014) [12].

9 *Victims' Charter Act 2006* (Vic) s 9(c).

10 Director of Public Prosecutions Victoria, *Director's Policy: Resolution* (24 November 2014) [5], [7]–[9].

Phase	Victim's role
<b>Hand-up brief at committal mention hearing</b>	
<p>At a committal mention hearing, the accused may waive the right to a committal hearing and proceed by way of hand-up brief.</p> <p>If so, the prosecutor submits (hands up) to the magistrate the evidence against the accused, including witness statements and exhibits.</p> <p>The accused then either</p> <ul style="list-style-type: none"> <li>pleads guilty and is committed to the Supreme or County Court for a sentence hearing if the magistrate is satisfied that there is enough evidence to support a conviction.<sup>11</sup></li> <li>pleads not guilty and elects to stand trial. The accused is then committed for trial in the Supreme or County Court if the magistrate is satisfied that the accused understands the nature and consequences of the election.<sup>12</sup></li> </ul>	<p>The victim has no right to participate in the committal mention hearing.</p>
<b>Application at committal mention hearing for leave to cross-examine witnesses</b>	
<p>If the accused wishes to exercise the right to a committal hearing, the court is informed at a committal mention hearing and the committal hearing is scheduled.</p> <p>If wanting to cross-examine witnesses (including the victim) at the committal hearing, the accused must apply at a committal mention hearing for leave to do so.<sup>13</sup> The magistrate must not grant leave unless satisfied that cross-examination of the witnesses is justified, having regard to factors set out in the <i>Criminal Procedure Act 2009</i> (Vic).<sup>14</sup></p> <p>The cross-examination of child victims and cognitively impaired victims in sexual assault matters is absolutely prohibited.<sup>15</sup> The cross-examination by the accused of any victim of a sexual offence or family violence is also prohibited.<sup>16</sup></p>	<p>The victim has no right to participate in the committal mention hearing and there is no obligation on the prosecution to consult the victim before deciding whether to consent to or oppose an application to cross-examine witnesses.</p>

11 *Criminal Procedure Act 2009* (Vic) ss 141(4)(b), 142(1).  
12 *Ibid* s 143(4).  
13 *Ibid* s 125.  
14 *Ibid* ss 124(2), 124(3)(b), 124(4).  
15 *Ibid* s 123.  
16 *Ibid* ss 353–355.



Phase	Victim's role
<b>Committal hearing</b>	
<p>If the magistrate grants all or part of the accused's application to cross-examine a witness or witnesses, a committal hearing is held and the relevant witnesses are required to attend court.<sup>17</sup></p> <p>At the conclusion, the magistrate must either find that there is enough evidence to support a conviction and commit the accused to stand trial in the Supreme or County Court, or discharge the accused.<sup>18</sup></p> <p>If the committal hearing involves a sexual offence, the only people permitted to be present in court while the victim is giving evidence are the police officer, the accused, a support person, the lawyers for the prosecution and the accused, specified court officials and anyone authorised by the court.<sup>19</sup></p>	<p>A victim who is a witness may be cross-examined on the issues that the magistrate has permitted.<sup>20</sup></p> <p>If the victim is to appear as a witness, the Office of Public Prosecutions must ensure that the victim is informed about the process of the hearing and the victim's role as a witness for the prosecution.<sup>21</sup></p>
<b>Directions hearings in the Supreme and County Court</b>	
<p>Typically, two directions hearing are held: one immediately after the accused has been committed for trial and a second in the lead-up to the trial. The purpose of these hearings is to make any necessary orders for the fair and efficient conduct of the proceedings.<sup>22</sup> These pre-trial procedures play an important role in shaping the future conduct of the trial by narrowing the issues and evidence in dispute and setting the limits on what evidence can be used.</p>	<p>The victim has no role in directions hearings.</p>

17 Ibid s 129.

18 Ibid s 141.

19 Ibid s 133(3).

20 Ibid s 132(1).

21 *Victims' Charter Act 2006* (Vic) s 11(2).

22 *Criminal Procedure Act 2009* (Vic) s 181. The County Court and the Supreme Court each have Practice Notes which set out how the court will conduct direction hearings.

23 *Criminal Procedure Act 2009* (Vic) s 344. An application for leave may be heard out of time if it is in the interests of justice to do so: s 345.

Phase	Victim's role
<b>Pre-trial applications</b>	
<p>Matters identified at the directions hearings that require pre-trial resolution or rulings by the judge are generally addressed at the commencement of the trial, before the jury is empanelled. Such matters might include:</p> <ul style="list-style-type: none"> <li>• general evidentiary applications</li> <li>• arguments about whether multiple charges or charges against co-accused should be heard within the same trial or in separate trials</li> <li>• evidence of the victim's prior sexual history</li> <li>• publication of the identity of the victim</li> <li>• confidential communications</li> <li>• special hearings.</li> </ul> <p>Applications to cross-examine or admit evidence about the victim's sexual activities must be made at least 14 days before the trial.<sup>23</sup> There is no obligation to serve the notice on the victim or for the victim to be informed that the application is being made.</p> <p>Any party who seeks to subpoena, produce or adduce a confidential communication must give each party in the proceedings, the informant and the medical practitioner or counsellor, at least 14 days notice.<sup>24</sup> The informant must give a copy of the notice to the victim within a reasonable time.<sup>25</sup></p>	<p>Victims have no role in any pre-trial matters, apart from applications relating to confidential communications (discussed below) and, if relevant, as a witness.</p> <p>The accused can request that the victim not be present in court when an application to cross-examine or admit evidence about the victim's sexual activities is heard. If this occurs, the court must order that the victim not be present.<sup>26</sup></p> <p>The victim may seek permission from the judge to appear in court and make submissions in relation to any confidential communications. As the recipient of the subpoena, the medical practitioner or counsellor may also appear and make submissions.<sup>27</sup></p>
<b>The trial</b>	
<p>The first step in the formal trial is when the charge(s) on the indictment are read out to the accused, who pleads not guilty<sup>28</sup> in the presence of a panel of potential jurors.<sup>29</sup> A jury of 12 people is then selected.<sup>30</sup></p>	<p>The victim is not present during, and has no input into, the selection of the jury.</p> <p>The victim's role may be that of witness for the prosecution.</p>

24 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C(2). A judge may waive the requirement to give notice or shorten the 14-day timeframe: s 32C(3).

25 *Ibid* s 32C(4).

26 *Criminal Procedure Act 1986* (Vic) s 348.

27 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C(5).

28 This is called an arraignment: *Criminal Procedure Act 2009* (Vic) s 215.

29 *Criminal Procedure Act 2009* (Vic) s 217.

30 *Juries Act 2000* (Vic) ss 30, 36. The process for jury selection is set out in the Act.

Phase	Victim's role
<p>The structure of the trial is as follows:</p> <ul style="list-style-type: none"> <li>• The judge gives preliminary instructions to the jury about the trial process and procedures.</li> <li>• The prosecutor gives an opening address to the jury setting out the prosecution case against the accused.<sup>31</sup></li> <li>• The accused's lawyer presents to the jury a response to the prosecution's opening.<sup>32</sup></li> <li>• The prosecution case is presented to the jury, through the evidence of witnesses and exhibits.</li> <li>• Each witness for the prosecution, including the victim, gives evidence in three stages: evidence-in-chief, where open-ended questions are asked by the prosecution; cross-examination by the accused's lawyer; re-examination by the prosecutor.</li> <li>• The accused may give evidence and call other witnesses to give evidence but is not required to do so.<sup>33</sup></li> <li>• After the jury has heard all the evidence, the prosecutor and accused's lawyer make submissions to the judge about what directions of law should be given to the jury.<sup>34</sup></li> <li>• The prosecutor, followed by the accused's lawyer, make closing addresses to the jury 'for the purpose of summing up the evidence'.<sup>35</sup></li> <li>• The trial judge gives directions of law to the jury, 'so as to enable the jury to properly consider its verdict'.<sup>36</sup></li> <li>• The jury deliberates and decides whether the verdict is guilty or not guilty.</li> </ul>	<p>If the victim is to appear as a witness, the Office of Public Prosecutions must ensure that the victim is informed about the process of the trial and the victim's role as a witness for the prosecution.<sup>37</sup></p> <p>At the start of the trial before the jury the judge will often make an order that all witnesses are to remain outside the courtroom until they have given their evidence. This is to prevent them from being influenced by what is said by the judge, prosecutor, accused's lawyer or other witnesses.</p> <p>This general order does not apply to victims. Rather, judges may only exclude victims at this stage if they consider it 'appropriate to do so'.<sup>38</sup> The judge can order the victim to leave the court at any time after he or she has given evidence.<sup>39</sup></p> <p>Prosecutors make numerous decisions in the lead-up to and throughout the trial. These decisions generally relate to what evidence to put before the jury, which witnesses to call and how to respond to defence cross-examination questions, legal applications and witnesses.</p> <p>In making these decisions, the prosecutor has considerable discretion, which is limited by general principles of fairness. The victim has no say in these decisions.</p>

31 *Criminal Procedure Act 2009* (Vic) s 224.

32 *Ibid* s 225.

33 *Ibid* s 226.

34 *Jury Directions Act 2015* (Vic) ss 11, 12.

35 *Criminal Procedure Act 2009* (Vic) ss 234, 325.

36 *Ibid* s 238.

37 *Victims' Charter Act 2006* (Vic) s 11(2).

38 *Criminal Procedure Act 2009* (Vic) s 336A(1).

39 *Ibid* s 336A(2).

Phase	Victim's role
<b>Sentencing; compensation and restitution</b>	
<p>Once an accused has been found guilty by jury verdict or has pleaded guilty, the matter proceeds to a sentencing hearing (also known as a plea hearing). Most matters are resolved by a plea of guilty.</p> <p>Unless the judge orders otherwise, sentencing hearings are conducted in open court. The victim and any of their support people may be present, as may support people for the offender, members of the public and the media.</p> <p>The factors which the sentencing court must have regard to include:</p> <ul style="list-style-type: none"> <li>• the impact of the offending on any victim</li> <li>• the personal circumstances of any victim</li> <li>• any injury, loss or damage resulting directly from the offence.<sup>40</sup></li> </ul> <p>Following a sentence, the judge may also consider making an order that the offender pay compensation or make restitution to the victim. These orders are ancillary to the sentencing orders.<sup>41</sup></p>	<p>The victim may present a victim impact statement to the court about the impact, injury, loss or damage resulting from the offence, and may read it out in court.</p> <p>The Office of Public Prosecutions must inform the victim, as soon as reasonably practicable, of the outcome of the criminal proceeding, including any sentence imposed.<sup>42</sup></p> <p>The victim can apply for an order that the offender pay compensation or make restitution for harm caused as a direct result of the offence. In certain circumstances, the Director of Public Prosecutions will apply on the victim's behalf.</p>
<b>Appeals</b>	
<p>The prosecution or the offender may appeal to the Court of Appeal during the trial process against an interlocutory decision made by a trial judge (a decision made either before or during the trial). The prosecution or offender may also appeal against a sentence imposed after conviction. An offender may appeal against a conviction. The prosecution may apply for a fresh trial after acquittal in limited circumstances.</p>	<p>The victim has no role in interlocutory appeals, appeals against convictions or appeals against a sentence.</p> <p>The Office of Public Prosecutions must inform the victim, as soon as reasonably practicable, when an appeal has been instituted, the grounds of the appeal and the result of the appeal.<sup>43</sup></p> <p>If the Court of Appeal sets aside an offender's conviction and is considering whether a compensation or restitution order made in connection with that conviction should not take effect, the Supreme Court rules state that victims 'may be heard' in the appeal.<sup>44</sup></p>

40 *Sentencing Act 1991* (Vic) s 5(2)(daa)–(db).

41 *Ibid* ss 84, 85B, 86.

42 *Victims' Charter Act 2006* (Vic) s 9(e).

43 *Ibid* s 9(f).

44 *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 2.47. A compensation or restitution order made under sections 84, 85B or 86 of the *Sentencing Act* is usually suspended for the duration of the appeal. If a conviction is set aside, the compensation or restitution order will not take effect unless the Court of Appeal orders otherwise: *Criminal Procedure Act 2009* (Vic) s 311.

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## Appendix B: Submissions

1. Australian Law Reform Commission
2. Seppy Pour
3. Melville Miranda
4. Victorian Equal Opportunity and Human Rights Commission
5. Centre for Rural Regional Law and Justice, Deakin University Law School (Centre for Rural Regional Law and Justice)
6. Confidential
7. Youthlaw
8. Mary Iliadis
9. Associate Professor Tracey Booth
10. Victoria Legal Aid
11. Sandra Betts
12. Arnold Dallas McPherson Lawyers
13. David Levesque
14. Victims of Crime Commissioner, Victoria
15. Kristy McKellar
16. Name withheld
17. Office of the Public Advocate
18. Women with Disabilities Victoria
19. Dr Tyrone Kirchengast, University of New South Wales
20. Phil Cleary
21. Dianne Hadden
22. Joy and Roger Membrey
23. Director of Public Prosecutions Victoria (DPP)
24. Fiona Tait
25. Law Institute of Victoria
26. Victoria Police
27. Supreme Court of Victoria
28. Chris Gill
29. Victorian Bar and Criminal Bar Association
30. Loddon Campaspe Centre Against Sexual Assault

31. Professor Jonathan Doak, Nottingham Trent University
32. Professor Edna Erez, University of Illinois at Chicago
33. Professor Jo-Anne Wemmers
34. Northern Centre Against Sexual Assault
35. Annalise Roberts and Miranda Escott-Burton
36. Centre for Innovative Justice, RMIT University (Centre for Innovative Justice)
37. Dr Margaret Camilleri
38. Name withheld
39. Safe Steps Family Violence Response Centre (Safe Steps)
40. Victim representatives on the inaugural Victims of Crime Consultative Committee (Former VOCCC victim representatives)
41. Colleen Murphy (Kelly)
42. Vixen Collective
43. Liberty Victoria

# Appendix C: Consultations

Consultations were held in Ballarat, Bendigo, Geelong, Melbourne, Mildura, Morwell, Shepparton, Sydney, Warrnambool and Wodonga.

## Separate discussions

The Commission consulted separately with the people and organisations listed below in chronological order.

1. A victim
2. Commissioner for Victims' Rights, South Australia
3. Parent of a victim
4. Parent of victims
5. Sue and Don Scales, Mildura
6. Magistrate Lesley Flemming
7. Aimee Mazaa, Mallee District Aboriginal Services
8. Parent of a victim
9. Magistrate Ron Saines
10. A victim
11. Parent of a victim
12. Parent of a victim
13. Parents of a victim
14. A victim
15. Director of Public Prosecutions Victoria (DPP)
16. Judges of the County Court of Victoria
17. Dr Robyn Holder, Griffith University
18. Child Witness Service, Department of Justice and Regulation
19. Victims of Crime Commissioner, Victoria
20. Parent of victims
21. Victoria Police
22. Professor Jonathan Doak, Nottingham Trent University
23. Court Network staff and a Court Networker—County Court
24. Justin Lewis, Crown Prosecutor
25. Aboriginal Family Violence Prevention & Legal Service Victoria



26. Magistrate Stella Stuthridge
27. Loddon Campaspe Centre Against Sexual Assault
28. Laurie Krause
29. Parent of victims
30. Dr Tyrone Kirchengast, University of New South Wales
31. Judge of the County Court of Victoria
32. Legal Aid NSW
33. Women's Legal Service NSW
34. Office of the Director of Public Prosecutions, NSW
35. Parent of a victim
36. Magistrate John Lesser
37. Centacare, Barwon South West Region
38. Executive Officer, Barwon South West Regional Aboriginal Justice Advisory Committee (RAJAC)
39. Office of Public Prosecutions Victoria (OPP)
40. A victim
41. A victim
42. Relative of a victim; a victim
43. Victoria Police Sexual Offences and Child Abuse Investigation Team, Wodonga (Victoria Police SOCIT, Wodonga)
44. Kristy McKellar
45. Victims Support Agency, Department of Justice and Regulation
46. A victim
47. Victoria Legal Aid
48. Dr Heather Strang, University of Cambridge
49. Commissioner of Victims Rights, New South Wales
50. Witness Assistance Service, OPP Victoria
51. Criminal Law Section, Law Institute of Victoria
52. Emeritus Professor Arie Freiberg AM
53. Parent of a victim
54. Victorian Bar and Criminal Bar Association
55. Professor Edna Erez, University of Illinois at Chicago
56. Colleen Murphy (Kelly)
57. Victorian Legal Services Commissioner and CEO Victorian Legal Services Board

## Roundtable discussions

The Commission convened group discussions with the people and organisations listed below in chronological order.

1. Victim support specialists, Mildura: Mallee Sexual Assault Unit and Mallee Domestic Violence Unit; Victims Assistance Program—St Luke’s
2. Legal practitioners, Mildura: Rebecca Boreham, Barrister and Solicitor; Jade Bott & Associates; Martin Irwin & Richards; Mallee District Aboriginal Service; Murray Mallee Community Legal Centre
3. Victim support specialists and academic, Geelong: Barwon Centre Against Sexual Assault; Court Network; Victims Assistance Program—Centacare; Ian Parsons, Research Fellow, Centre for Rural Regional Law and Justice, Deakin University Law School
4. Legal practitioners, Geelong: Criminal Lawyers Geelong; Office of Public Prosecutions; Victoria Legal Aid; WS Lawyers
5. Victim support specialists, Morwell: Court Network; Gippsland Centre Against Sexual Assault; Ramahyuck District Aboriginal Corporation; Victims Assistance Program—Windermere
6. Legal practitioners, Morwell: Verhoeven & Curtain; Victoria Legal Aid
7. Victim support specialists, Melbourne: metropolitan Victims Assistance Program workers
8. Metropolitan Centres Against Sexual Assault: Gatehouse Centre; Eastern Centre Against Sexual Assault; Northern Centre Against Sexual Assault; Western Region Centre Against Sexual Assault
9. Victim support and therapeutic specialists, Shepparton: Victims Assistance Program—Gateway Health, and a therapeutic professional
10. Legal practitioners, Shepparton: Camerons Lawyers; Deane & Associates; Faram Ritchie Davies; Victoria Legal Aid
11. Judges of the County Court of Victoria
12. Victim support specialists, Wodonga: Centre Against Violence; Court Network; Victims Assistance Program—Gateway Health
13. Victim support specialists, Ballarat: Ballarat Centre Against Sexual Assault; Victims Assistance Program—Centacare
14. Legal practitioners, Ballarat: Central Highlands Community Legal Centre; Dianne Hadden Lawyer; Justin Burke Lawyers; Victoria Legal Aid
15. Magistrates of the Magistrates’ Court of Victoria
16. Community legal centres: Federation of Community Legal Centres (Vic); Goulburn Valley Community Legal Centre; Youthlaw; Eastern Community Legal Centre; Knowmore
17. Criminal justice agencies and stakeholder organisations
18. Victims of crime





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Victorian  
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**The Role of Victims of Crime  
in the Criminal Trial Process**

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