

Restitution and Compensation Orders Report

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- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

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Restitution and Compensation Orders Report

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Abbreviations

VOCA Act *Victims of Crime Assistance Act 1996* (Vic)

VOCAT Victims of Crime Assistance Tribunal

VLRC Victorian Law Reform Commission

Glossary

Accused	A person who is charged with a criminal offence.
Adjourned undertaking	A sentence type that involves the adjournment of a criminal matter and the release of an offender, with or without conviction, for a specified period provided the offender gives an undertaking to comply with attached conditions.
Average	<p>A measure of the central tendency of a distribution of numerical values, also known as the mean. The average (or mean) is calculated by adding all the values in the set and then dividing the total by the number of values used. For example, 2.8 is the average value in the following set of numbers: 1, 2, 2, 3, 4, 5.</p> <p>The average is the sum of the values in the set (in this case 17) divided by the number of values used to reach that total (in this case 6). The average is particularly sensitive to the influence of outliers (values that are very small or very large relative to the majority of values in a set). An alternative way to measure the middle value in a set of numbers is to calculate the median, which is the middle value in a set or a distribution of values and is resistant to the influence of outliers.</p>
Bankruptcy	A declaration under the <i>Bankruptcy Act 1966</i> (Cth) that a person cannot pay their debts.
Beneficiary	In this report, a person, corporation or other entity in whose favour an order for restitution or compensation has been made.
Breach	A failure to comply with a court order.
Case	In criminal law, one or more charges against a person sentenced at one hearing. In civil law, an individual or corporation taking a private legal action against another person or corporation.
Charge	In this report, a single proven count of an offence.
Community correction order	A sentencing order, available since 16 January 2012, that may require the offender to comply with a range of conditions, including unpaid community work, treatment, supervision, curfews and restrictions on the offender's movements and associates (<i>Sentencing Act 1991</i> (Vic) pt 3A).

Compensation	In this report, payment of money by an offender to a victim following an order made under Part 4, Division 2 of the <i>Sentencing Act 1991</i> (Vic). Payment is made to compensate for pain, suffering or expenses incurred, or for property loss or damage caused directly because of an offence.
Creditor	In this report, a victim who is seeking to enforce a judgment debt, and more generally a person or company to whom money is owing.
Default	In this report, failure to pay a judgment debt or instalment order.
Defendant	In this report, an individual, company or institution against whom legal action is taken in a civil court.
Financial reparation	In this report, a payment by an offender to a victim to make amends for the commission of a crime.
Fine	A sentence that involves a court-ordered monetary penalty requiring an offender to pay a sum of money to the state.
Forfeiture	The removal by the state of property and/or goods from the owner following a court order or automatically following the commission of certain offences under the <i>Confiscation Act 1997</i> (Vic).
Garnishee order	A legal order for deduction of a debtor's wages to pay a judgment debt.
Higher courts	In this report, the County Court of Victoria and the Supreme Court of Victoria.
Imprisonment	A custodial sentence that involves the confinement of an offender in prison.
Informant	The police officer or government official (for example, a local authority or transport authority) who commences a charge against an accused and may give evidence against them in court.
Instalment order	An order under the <i>Sentencing Act 1991</i> (Vic) for payment of a compensation order by instalments, or an order under the <i>Judgment Debt Recovery Act 1984</i> (Vic) for payment of a judgment debt by instalments.
Judgment debt	The amount that must be paid by a judgment debtor as awarded under a court order.
Judgment debtor	A person who owes money under a judgment debt.
Judgment proof	A judgment debtor who, because of their limited financial resources, cannot be pursued to pay a judgment debt. A judgment debtor in this position may be protected from having an instalment order made against them under the <i>Judgment Debt Recovery Act 1984</i> (Vic).
Offender	A person who has been found guilty of an offence.
Pecuniary penalty order	A court order under the <i>Confiscation Act 1997</i> (Vic) requiring an offender to pay an amount that is equivalent to the benefits obtained by committing certain offences.

Reparation	A financial, practical or symbolic action directed towards making amends for a wrongdoing.
Restitution	In this report, return of goods or payment of money by an offender to a victim to restore stolen property, following an order made under Part 4, Division 1 of the <i>Sentencing Act 1991</i> (Vic).
Restraining order	A court order preventing an offender from disposing of, or otherwise dealing with, property except as directed by the court.
Victim	In this report, a person who has suffered harm, including a family member of a homicide victim, due to the action of an offender.
Victim survivor	In this report, a victim of a family violence or sexual offence. The Council has adopted this term to ensure consistency with other publications of the Department of Justice and Regulation, Victoria.

Executive summary and recommendations

In Victoria, victims of crime have a number of different options to seek compensation, including making an application for an order for restitution or an order for compensation under Part 4, Divisions 1 and 2 of the *Sentencing Act 1991* (Vic).

In 2016, the Victorian Law Reform Commission (VLRC) released *The Role of Victims of Crime in the Criminal Trial Process: Report*, which recommended that the Sentencing Advisory Council review whether restitution and compensation orders under the *Sentencing Act 1991* (Vic) should become sentencing orders (Recommendation 49).

In June 2017, the Attorney-General requested advice from the Council on this issue in the form of terms of reference, and this report constitutes the Council's response to that request.

Whether restitution and compensation orders should become sentencing orders has been considered at least twice before, once by the Victorian Parliament's Law Reform Committee in 1994 and more recently by the then Department of Justice in 2009. Neither review reached a firm conclusion on this issue.

Terms of reference

The terms of reference asked the Council to examine whether restitution and compensation orders made under the *Sentencing Act 1991* (Vic) should become sentencing orders, rather than remain as orders in addition to sentence (often called ancillary orders).

In considering this request, the Council was asked to advise whether:

- the purposes of sentencing should include the financial reparation of victims;
- there should be a presumption in favour of courts making such orders; and
- such orders should be enforced by the court in the manner of a fine.

If it concluded that restitution and compensation orders should become sentencing orders, the Council was asked to consider:

- the most appropriate processes and procedures for restitution and compensation orders in all courts;
- whether victims should have a right of appeal against the amount of an order awarded or the court's failure to make an order; and
- whether an offender's financial circumstances should be taken into account when making an order.

The Council was asked to report to the Attorney-General no later than 1 September 2018.

Context of the Council's recommendations

A substantial number of recent reviews and proposed reforms, both in Victoria and nationally, are likely to address some of the issues encountered by victims seeking compensation, as well as improve victims' experiences with the criminal justice system more broadly.

Recent reviews and reforms include:

- the Victorian Royal Commission into Family Violence and consequential improvements to the treatment of victim survivors of family violence;
- the VLRC's *The Role of Victims of Crime in the Criminal Trial Process: Report*, which made a number of recommendations aimed at improving the treatment of victims in the criminal justice system;
- the VLRC's review of the *Victims of Crime Assistance Act 1996* (Vic);
- the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse;
- the establishment of the National Redress Scheme for victims of institutional child sexual abuse; and
- the Commonwealth Government's review of the rules governing the early release of superannuation, and whether an offender's superannuation should be available to pay restitution or compensation to victims of crime.

Guiding principles and the limits to reform

The Council has approached the development of its recommendations having regard to the following guiding principles:

1. ensuring that proposed reforms accord with the rights contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Victims' Charter Act 2006* (Vic);
2. ensuring that proposed reforms will not place a victim in a situation of increased risk, in the context of both family violence offending and other kinds of interpersonal offending; and
3. managing victims' expectations, in particular avoiding the creation of false expectations for victims as to what the reforms to restitution and compensation orders can realistically achieve.

In preparing its advice, the Council has been conscious of the fact that most offenders have very limited financial resources. The Council does not, however, have data on the financial resources of offenders. Reforms that are intended to improve the enforcement of restitution and compensation orders rely on the assumption that the current system does not recover (or does not efficiently recover) payment of such orders from all offenders who have the capacity to pay.

Due to data limitations, however, it is difficult to test that assumption, and determine whether the current low level of payment of restitution and compensation orders reflects offenders' lack of means or failures or inefficiencies in enforcement. Due to data limitations, it is not possible to determine whether the current system is achieving efficient recovery of money from the small proportion of offenders who actually have the capacity to pay.

The Council's recommendations aim to increase payment and enforcement rates from those offenders who have some capacity to pay.

The Council has also stressed the need for a coherent approach to victims' compensation in Victoria, and the importance for the government to consider the interaction between the different options for compensation open to a victim.

The Council considers that the proper compensation of victims requires a coherent approach to both state and offender-paid compensation.

Should restitution and compensation orders become sentencing orders?

The current *hybrid* system of restitution and compensation orders, that is, a system that incorporates elements of both criminal and civil law, provides a number of practical benefits for victims that cannot be achieved in either a strictly criminal or a strictly civil proceeding. For example:

- victims do not need to establish their loss before a separate judicial officer;
- victims do not need to establish their loss to the criminal standard of proof ('beyond reasonable doubt'), but rather can satisfy the civil standard ('on the balance of probabilities');
- victims do not need to pay the costs associated with bringing a claim in a civil court; and
- the process is faster and more streamlined than bringing a separate claim for civil damages.

The Council has been cautious to preserve these benefits of the current system. The Council's intent is to improve the practical outcomes for victims, without removing the significant benefits of the current hybrid approach to restitution and compensation orders.

In light of the guiding principles, the Council considers that making restitution and compensation orders sentencing orders would raise several insurmountable problems, including eroding the fundamental principle of equality before the law, and potentially exposing victims to retraumatisation in the process of establishing their losses. The Council's consultation has established that the overwhelming majority of stakeholders do not consider that such a change would be desirable, and consider that it would be unlikely to improve practical outcomes for victims.

Similarly, in relation to the secondary question of whether the purposes of sentencing should be expanded to include victims' financial reparation, the Council has concluded that to do so could fundamentally undermine the sentencing process by leading to differential sentencing outcomes depending on the financial circumstances of an offender or the individual circumstances of a victim.

In light of its research and consultation, the Council recommends that restitution and compensation orders should not become sentencing orders.

Recommendation 1: Restitution and compensation orders to remain ancillary orders

Restitution and compensation orders should remain ancillary orders that are made in addition to a sentence under the *Sentencing Act 1991* (Vic), and should not become sentencing orders.

Recommendations for reform

While affirming the status of the orders as ancillary, the Council considers that the current system for making and enforcing restitution and compensation orders could be improved by:

- increasing the availability and consistency of information and legal advice to victims about restitution and compensation orders;
- increasing the use, in appropriate cases, of the current power to restrain assets for the purpose of meeting an order for restitution or compensation under the *Confiscation Act 1997* (Vic);
- retaining the ability of a court to take into account the financial circumstances of the offender in making a compensation order (sections 85H and 86(2) of the *Sentencing Act 1991* (Vic));
- increasing a victim's ability to enforce restitution and compensation orders on their own behalf; and
- considering the introduction of a hybrid model for enforcement of restitution and compensation orders, involving state enforcement of the orders through civil mechanisms, where a victim (who is a natural person) elects to assign their right of enforcement to the state.

Provision of information to victims

A number of stakeholders, including victims of crime, noted during consultation that there is a need to improve the consistency and timeliness of the provision of information to victims of crime concerning their right to restitution or compensation.

The Council recommends the establishment of a working group, coordinated by the Victims of Crime Commissioner, to review and consolidate information provided to victims of crime concerning their options for compensation, in order to ensure the consistency and accuracy of information provided to victims in relation to orders for restitution or compensation and the enforcement of these orders. As the Victims of Crime Commissioner's role is to advocate, investigate, report and advise in relation to systemic issues for victims of crime, the Council believes the Commissioner would be best placed to coordinate this reform.

Recommendation 2: Victims of Crime Commissioner to establish a working group to consider provision of information to victims

The Victims of Crime Commissioner should establish a working group that includes representation from:

- the Department of Justice and Regulation;
- the Office of Public Prosecutions; and
- Victoria Police.

The working group should review and consolidate information and resources provided to victims of crime concerning avenues for compensation to ensure that all resources contain consistent and accurate information on:

- making an application for a restitution and/or compensation order under the *Sentencing Act 1991* (Vic); and
 - how such an order is enforced.
-

Agencies to review policies and training

The Council notes that the timely investigation and restraint of offenders' assets can increase the possibility of successful enforcement of an order for restitution or compensation. The Council heard from a number of stakeholders that the use of these powers could be improved.

Accordingly, the Council recommends strengthening coordination between Victoria Police and the Office of Public Prosecutions regarding the investigation of offenders' assets and applications for restraining orders for the purposes of meeting an order for restitution or compensation.

Based on stakeholder feedback, the Council does not consider increased powers of forfeiture of an offender's assets to be appropriate or necessary.

Recommendation 3: Agencies to review policies and training

Victoria Police and the Office of Public Prosecutions should review policies and training to ensure that consistent internal and inter-agency approaches are taken to:

- investigating offenders' assets;
- applying for restraining orders under the *Confiscation Act 1997* (Vic); and
- applying for orders for restitution and/or compensation under the *Sentencing Act 1991* (Vic).

Retention of discretion to consider offenders' financial circumstances

The VLRC previously recommended that the County and Supreme Courts, in making a compensation order in favour of an individual under the *Sentencing Act 1991* (Vic), should not have regard to an offender's financial circumstances. The VLRC considered that an approach consistent with a civil court, which generally has no regard to a defendant's capacity to pay when determining an award of damages, should instead be adopted.

As it recommends strengthening the enforcement of restitution and compensation orders (through consideration of state enforcement of these orders using civil mechanisms), the Council recommends the retention of a court's discretion to consider an offender's financial circumstances when making such an order. The Council prefers an overall approach to restitution and compensation orders under the *Sentencing Act 1991* (Vic) that maintains the hybrid status of these orders.

Retention of the discretion to consider an offender's financial circumstances is also consistent with one of the Council's guiding principles: to avoid creating false expectations for victims of crime as to what amount of compensation they are likely to receive from an offender.

Recommendation 4: Retention of discretion to consider offenders' financial circumstances

Sections 85H and 86(2) of the *Sentencing Act 1991* (Vic) should be retained, allowing a court in making a compensation order for injury or property loss to take into account, at the court's discretion and as far as practicable, the financial circumstances of the offender and the nature of the burden that payment of the order will impose.

A Council Director expressed a minority view that section 86(2) of the *Sentencing Act 1991* (Vic) should be repealed, so that when a court considers making a compensation order for property loss, an offender's financial circumstances cannot be taken into account.

Instalment orders

The Council considers that the power of a court to make an instalment order at the time it makes a compensation order is underutilised. The Council therefore recommends that judicial officers should give particular consideration to whether it may be appropriate to make an instalment order at the time of making a compensation order. This recommendation aims to encourage payment of orders from offenders who are in a position to commence payment at the time the order is imposed.

Recommendation 5: Court to consider making instalment order following compensation order

When making a compensation order, a judicial officer should give particular consideration to whether it may also be appropriate to make an instalment order, having regard to the victim's wishes.

Waiver of fees associated with civil enforcement mechanisms for certain victims

The Council heard from a broad range of stakeholders that the removal of fees for victims who are natural persons, as well as not-for-profit and charitable organisations, could eliminate a financial barrier for victims seeking to enforce orders for restitution or compensation, and may encourage victims to enforce orders independently.

Consequently, the Council recommends that the Victorian Government should consider waiving enforcement fees for victims of crime who are natural persons or charitable organisations.

Recommendation 6: Waiver of Department of Justice and Regulation and court fees for victims

The Victorian Government should consider amending all necessary legislation to enable the Department of Justice and Regulation (including the Sheriff's Office), and all relevant courts, to waive appropriate fees for victims of crime seeking to enforce orders for restitution or compensation where the victim is a:

- natural person;
- public benevolent institution;
- charitable, religious or educational organisation; or
- other not-for-profit entity.

Consideration of state enforcement of restitution and compensation orders through civil mechanisms

The Council heard from stakeholders that the process of enforcing an order for restitution or compensation through the civil system can be expensive, complex and traumatic for victims. In order to overcome such barriers to enforcement, and consistent with maintaining the hybrid approach to restitution and compensation orders, the Council recommends consideration of a hybrid approach to enforcement of those orders, through state enforcement using civil mechanisms.

If state enforcement is introduced, the Council recommends that there be certain limits placed on the state's use of civil enforcement mechanisms. This acknowledges that vigorous state enforcement against offenders who have no capacity to pay could result in further punishment that is not taken into account in the sentencing process. Placing reasonable limits on civil enforcement by the state also seeks to avoid an approach that could lead to the imprisonment of persons for failure to pay civil orders.

Many stakeholders noted the potential risk to victims of family violence if state enforcement were to occur automatically. In accordance with this feedback, the Council recommends that the enforcement agency should only enforce orders at the election of the victim.

Recommendation 7: Consideration of state enforcement of restitution and compensation orders through civil mechanisms

The Victorian Government should consider whether the Department of Justice and Regulation's Infringement Management and Enforcement Services, or another specialist enforcement agency, should be empowered to enforce restitution and compensation orders on behalf of victims of crime who are natural persons.

If such state enforcement of restitution and compensation orders is introduced, the enforcement agency should:

- only enforce an order at the election of the victim, and the victim should have the ability to direct that the enforcement agency cease civil enforcement action;
- only be empowered to use civil mechanisms of enforcement, consistent with the current powers for a judgment creditor to enforce a judgment debt under the *Judgment Debt Recovery Act 1984* (Vic) and other relevant legislation;
- be bound by the protections for civil judgment debtors in Victoria, including:
 - limitations on the seizure and sale of goods or property that are protected under section 42 of the *Supreme Court Act 1986* (Vic); and
 - the prohibition under section 12 of the *Judgment Debt Recovery Act 1984* (Vic) on instalment orders against offenders whose income is solely derived from government benefits;
- only pursue enforcement of an order where, in the opinion of the enforcement agency, there is a reasonable prospect of substantially satisfying the order within a reasonable time; and
- receive all necessary additional resources, including:
 - sufficient staff, including legally qualified staff with expertise in judgment debt recovery and victims' compensation, and knowledge of the nature and dynamics of family violence; and
 - IT systems that allow for agency staff to ascertain whether an offender has fine debt and/or infringement debt, as well as any relevant civil debts for which enforcement action has been taken.

Consideration of a specialist victims' legal service

The Council heard from several stakeholders about the difficulties for victims in obtaining legal advice on their compensation options. Stakeholders considered that the current system for making and enforcing restitution and compensation orders could be improved through the provision of timely and comprehensive legal advice to victims on their compensation options.

A number of stakeholders emphasised the need for specialist advice in what is a complex area of law, including advice on all the potential avenues for compensation that may be open to victims, both against offenders and against third parties.

The Council considers the provision of comprehensive legal advice, although beyond the terms of reference, to be of particular importance in managing victims' expectations as to whether they are likely to receive compensation. It may also ensure that the most appropriate avenue for compensation is pursued depending on the circumstances of a particular case. The availability of such a legal service could complement a state enforcement agency, as victims could be directed to more suitable compensation options in circumstances in which an offender may not have any capacity to pay an order for restitution or compensation.

The Council also stresses the need for those providing legal advice to victims of crime to have an understanding of a broad range of compensation options for victims, including civil compensation. Those providing legal advice to victims of crime should also have an understanding of the potential dynamics between victims and offenders, particularly in the family violence context.

Recommendation 8: Consideration of a specialist legal service to assist victims of crime with compensation matters

The Victorian Government should consider establishing a specialist victims' legal service that would provide:

- comprehensive free legal advice to victims of crime on their options for compensation, including orders for restitution or compensation under the *Sentencing Act 1991* (Vic), the Victims of Crime Assistance Tribunal, civil compensation and/or any applicable compensation schemes; and
- legal information or advice throughout the criminal trial process where this is not provided by other agencies.

The victims' legal service should be supported by all necessary resourcing, including staff with expertise in victims' compensation (including civil compensation), and knowledge of the nature and dynamics of family violence.

1. Introduction to the reference

Structure of this report

- I.1 This report is divided into four chapters. In addition to this introductory chapter:
- Chapter 2 discusses the context of the Council's recommendations, and provides an overview of the many programs and reforms that are likely to affect the experience of victims navigating the criminal trial process and, specifically, the operation of restitution and compensation orders.
 - Chapter 3 presents the Council's recommendation that restitution and compensation orders should not become sentencing orders, and contains an examination of related questions, including whether:
 - the purposes of sentencing should be expanded to include victims' financial reparation;
 - restitution and compensation orders should be enforced in the same manner as a fine; and
 - there should be a presumption in favour of making restitution and compensation orders.
 - Chapter 4 presents the Council's recommendations for reform of the current system of enforcement of restitution and compensation orders. The Council also recommends that the government consider:
 - state enforcement of restitution and compensation orders through civil enforcement mechanisms; and
 - creation of a specialist legal service for victims of crime.
- I.2 This report refers to material in the Council's *Restitution and Compensation Orders: Issues and Options Paper*, published in March 2018.

Terms of reference

- I.3 On 13 June 2017, the Council received a request for advice from the Attorney-General, the Hon Martin Pakula, MP, in relation to whether restitution and compensation orders, made to victims of crime under the *Sentencing Act 1991* (Vic), should become sentencing orders, rather than remain as orders in addition to sentence (sometimes called *ancillary orders*).
- I.4 The request for advice followed a recommendation from the Victorian Law Reform Commission (VLRC) in *The Role of Victims of Crime in the Criminal Trial Process: Report* (VLRC report).¹
- I.5 The terms of reference provide that, in considering the question of whether restitution and compensation orders should become sentencing orders, the Council should advise whether:
- the purposes of sentencing should include the financial reparation of victims;
 - there should be a presumption in favour of courts making such orders; and
 - such orders should be enforced by the state in the manner of a fine.

1. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 243 (Recommendation 49).

- I.6 In the event that it concluded that restitution and compensation orders should become sentencing orders, the Council was asked to consider:
- the most appropriate processes and procedures for restitution and compensation orders in all courts;
 - whether victims should have a right of appeal against the amount of an order awarded, or the court's failure to make an order; and
 - whether an offender's financial circumstances should be taken into account when making an order.
- I.7 The Council was asked to consult with government and non-government stakeholders working in the criminal justice system and with victims, as well as with the broader Victorian community.
- I.8 The Council was required to report to the Attorney-General by no later than 1 September 2018.

Background to the terms of reference

- I.9 The VLRC report was tabled in parliament on 22 November 2016. The VLRC considered the role of the victim in the modern criminal trial process and identified five overarching rights and entitlements arising from the victim's inherent interest in that process. Those five rights and entitlements are:
1. to be treated with respect and dignity;
 2. to be provided with information and support;
 3. to be able to participate in processes and decision-making, without carrying the burden of prosecutorial decision-making;
 4. to be protected from trauma, intimidation and unjustified interference with privacy during the criminal trial process; and
 5. to be able to seek reparation.²
- I.10 The VLRC report contains 51 recommendations. Recommendation 49 is:
- 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 of courts making such orders;
 - (c) whether such orders should be enforced by the state in the manner of a fine.³
- I.11 The VLRC highlighted a number of issues relating to the enforcement of restitution and compensation orders in the current system, including the fact that most victims must take offenders to court to enforce an order as a judgment debt. The VLRC commented that the fact that restitution and compensation orders are not sentencing orders affects how they can be enforced; if they were sentencing orders, they could be enforced in the same manner as fines.

2. Ibid xv.

3. Ibid 243.

- I.12 The VLRC noted that the enforcement of restitution and compensation orders by the state may require the orders to be treated as sentencing orders, on the basis that this would reflect their punitive character. Any such change would come at a considerable cost to the community, and could have a significant effect on sentencing practices and outcomes. As a result, the enforcement of restitution and compensation orders needs to be considered within the broader question of whether these orders should be treated as sentencing orders and whether the purposes of sentencing should include compensating victims.
- I.13 The VLRC also commented on the need for data on making and enforcing orders in the current system, in order to assess the potential costs and benefits of state enforcement.

Submissions to the Victorian Law Reform Commission

- I.14 A range of submissions and evidence before the VLRC brought to light the issues with the current approach to the enforcement of restitution and compensation orders. The VLRC heard that victims who are awarded restitution and compensation may have to separately fund a solicitor to enforce the orders.⁴ The challenges to victims enforcing orders can be compounded by issues such as disability, language barriers and living in a remote location.⁵
- I.15 The VLRC reported differences of opinions among stakeholders on whether restitution and compensation orders should be enforced by the state.⁶ Some stakeholders supported state enforcement of the orders, proposing that the state could advance the compensation payment to the victim and require the offender to reimburse the state,⁷ or otherwise proposing that the orders become sentencing orders that are enforced in the same way as fines.⁸ Other stakeholders did not support restitution and compensation orders becoming sentencing orders, due to the risks that this would pose for equality before the law, as well as the procedural and evidentiary issues that would be raised by such a change.⁹
- I.16 A number of submissions to the VLRC raised the fact that most offenders have limited financial resources and cited this as a key reason why there would be little practical benefit in directing the state's resources towards the enforcement of the orders.¹⁰
- I.17 The question of whether restitution and compensation orders should be made sentencing orders in Victoria has been formally considered at least twice before: once by the Victorian Parliament's Law Reform Committee in 1994 and more recently by the then Department of Justice in 2009. Neither review reached a firm conclusion on this issue.

4. Ibid 241.

5. Ibid.

6. Ibid 242.

7. Ibid, citing submissions of Victoria Police, Magistrate John Lesser and a parent of a victim.

8. Victoria Police supported the adoption of the New Zealand model of enforcement, whereby restitution and compensation orders are treated as sentencing orders and are enforced as fines: Victoria Police, *Submission to the Victorian Law Reform Commission Reference on The Role of Victims of Crime in the Criminal Trial Process* (2015) 30.

9. See Director of Public Prosecutions, *Submission to the Victorian Law Reform Commission Reference on The Role of Victims of Crime in the Criminal Trial Process* (2015) 11.

10. See Supreme Court of Victoria, *Submission to the Victorian Law Reform Commission Reference on The Role of Victims of Crime in the Criminal Trial Process* (2015) 9; Director of Public Prosecutions (2015), above n 9, 11.

The Victorian Parliament's Law Reform Committee's final report (1994)

- I.18 In 1994, the Victorian Parliament's Law Reform Committee considered restitution and compensation for loss and damage to property¹¹ and its relationship to the sentencing process, and the enforcement procedures for restitution and compensation orders.
- I.19 The Committee released an interim report containing draft recommendations, one of which was that section 5(1) of the *Sentencing Act 1991* (Vic) be amended to provide that the purposes of a sentence include 'the restoration of victim losses to the extent that imposition of a sentence for that purpose reinforces or supports other sentencing purposes'.¹² In addition, the Committee proposed that restitution and compensation orders could constitute sentencing orders that may be made in addition to, or in substitution for, any sentence that could be imposed.¹³
- I.20 The Committee's final report, however, concluded that it was premature to make reparation of victims a purpose of sentencing, or for compensation orders to be legislated as sentencing orders, due to strong stakeholder opposition to this course.¹⁴
- I.21 The Committee considered that the increased recognition of victims would lead to reparation becoming more integrated into the criminal justice system and that, in time, 'the restoration of victims' losses would become a significant object of the sentencing process'.¹⁵

The Department of Justice's discussion paper (2009)

- I.22 In 2009, the Victorian Department of Justice (as it then was) commenced a review of both state-funded and offender-funded victims of crime compensation. A discussion paper was released asking a range of questions, including whether compensation orders should form 'an integral part of the sentencing process', and if such a change were to be introduced, how equality before the law could be maintained.¹⁶
- I.23 Given that this review was to consider the operation of both the state-funded Victims of Crime Assistance Tribunal (VOCAT) and offender-paid compensation, the discussion paper explored the possibility of the state seeking reimbursement of VOCAT claims from offenders.
- I.24 No final report was ever published, and no information is publicly available on the outcomes of the consultation process.

11. At this time, compensation for injury had not yet been introduced into the *Sentencing Act 1991* (Vic). Compensation for injury was later introduced on 1 January 2001: *Sentencing Act 1991* (Vic) s 85B as inserted by *Victims of Crime Assistance (Amendment) Act 2000* (Vic) s 21.

12. Law Reform Committee, Parliament of Victoria, *Restitution for Victims of Crime: Interim Report* (1993) 27 (Draft Recommendation 1).

13. *Ibid* 51 (Draft Recommendation 3).

14. Law Reform Committee, Parliament of Victoria, *Restitution for Victims of Crime: Final Report* (1994) 95.

15. *Ibid*.

16. Department of Justice, *Reviewing Victims of Crime Compensation: Sentencing Orders and State-Funded Awards* (2009) 52.

Focus on restitution and compensation orders under the Sentencing Act 1991 (Vic)

- I.25 The terms of reference direct the Council to examine restitution and compensation orders under the *Sentencing Act 1991* (Vic). The scope of the reference therefore does not extend to other avenues of compensation available to a victim or other aspects of the system for victims' compensation, such as the operation of the state-funded VOCAT system.
- I.26 Similarly, exploration of alternative models for funding the state-funded assistance scheme, such as the introduction of a victims' levy payable by offenders and the operation of the Commonwealth's National Redress Scheme for victim survivors of institutional child sexual abuse (see [2.15]–[2.22]), is outside the scope of the Council's reference.
- I.27 As discussed at [2.11], the VLRC conducted an inquiry into the operation of the VOCAT system, and reported to the Attorney-General by 27 July 2018.

Human rights considerations

- I.28 As a public statutory authority, the Council is required, in making a decision, to consider relevant human rights.¹⁷ To that end, in developing its advice, the Council has had regard to the rights contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- I.29 Further, the Council has specifically considered the human rights implications of any recommendations to reform the current system of restitution and compensation orders, including the potential for a disproportionate effect on certain groups, for example, victims, offenders or the family members of offenders.
- I.30 The Council has considered fundamental principles of law, including the rule of law and the principle of equality before the law, reflected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).¹⁸
- I.31 The Council has also had close regard to the *Victims' Charter Act 2006* (Vic), which sets out principles on how the criminal justice system and victim service agencies should respond to victims, including the right of a victim to apply for compensation from a person found guilty of a criminal offence.¹⁹

International frameworks

- I.32 A number of international declarations and instruments promote the rights of victims, with many countries adopting legislation or statements acknowledging rights for victims as a result of these international instruments and reforms.²⁰
- I.33 The United Nations' adoption, in November 1985, of the *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power* included an obligation for offenders to make fair restitution where appropriate.²¹

17. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

18. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3).

19. *Victims' Charter Act 2006* (Vic) ss 1, 16(1). The purposes of the Act are to recognise principles that govern the response to persons adversely affected by crime and to establish requirements for the monitoring and review of the principles set out in the Act: *Victims' Charter Act 2006* (Vic) s 1. Part 2 of the Act outlines principles governing responses to victims, including the right to information and to be treated with courtesy, respect and dignity: *Victims' Charter Act 2006* (Vic) ss 6–9.

20. See generally Marc Groenhuijsen, 'The Development of International Policy in Relation to Victims of Crime' (2014) (20)(1) *International Review of Victimology* 31; M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2) *Human Rights Law Review* 203.

21. *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 96th plen mtg, UN Doc A/Res/40/34 (29 November 1985) art 8.

- I.34 The 2001 *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century* encouraged restorative justice mechanisms.²² Subsequently, the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* were adopted by the United Nations Economic and Social Council.²³
- I.35 In 2001 the European Union adopted the *Council Framework Decision on the Standing of Victims in Criminal Proceedings* setting out basic rights for victims. Due to shortcomings in the Framework Decision's implementation, Directive 2012/29/EU was adopted in 2012, including a right to have a decision made about compensation from the offender as part of criminal proceedings.²⁴
- I.36 In addition to such frameworks, there have also been significant developments within victim rights' jurisprudence and international criminal proceedings.²⁵ The International Criminal Court, established by the Rome Statute in 2002,²⁶ now has a victim participation and redress regime that has been described as a 'new era' in victim participation.²⁷ In the International Criminal Court, a reparation order may be made after an offender has been found guilty. Evidence of loss may be adduced by a victim during the trial process.²⁸
- I.37 In addition, in 2005 the United Nations General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.²⁹

Guiding principles and the limits of reform

- I.38 The conclusions contained in this report have been influenced by the following guiding principles identified by the Council:
- ensuring that proposed reforms accord with the rights contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Victims' Charter Act 2006* (Vic);
 - ensuring that proposed reforms will not place a victim in a situation of increased risk, in the context of both family violence offending and other kinds of interpersonal offending; and
 - managing victims' expectations, in particular, avoiding the creation of false expectations for victims as to what the reforms to restitution and compensation orders can realistically achieve.

22. *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century*, GA Res 55/59, UN GAOR, UN Doc A/55/59 (17 January 2001) art 28.

23. *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2000/14, UN Doc E/2000/INF/2/Add.2 (27 July 2000).

24. *Council Directive 2012/29/EU of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* [2012] OJ L 315/57, art 16.

25. Bassiouni (2006), above n 20, 231–276.

26. *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

27. Bridie McAsey, 'Victim Participation and the International Criminal Court and Its Impact on Procedural Fairness' (2011) 18 *Australian International Law Journal* 105, 106.

28. Article 68(3) of the Rome Statute reads as follows: '[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. Article 75 sets out principles relating to 'reparations to victims'. See generally McAsey (2011), above n 27; International Criminal Court, *Representing Victims before the International Criminal Court: A Manual for Legal Representatives* (2010).

29. *United Nations Resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 64th plen mtg, UN Doc A/Res/60/147 (16 December 2005).

- I.39 In relation to this last principle, an inescapable fact confronting both the government and the courts when considering (or ordering) the compensation of victims by offenders is that most offenders have very limited financial resources.³⁰
- I.40 Reforms that are intended to improve the enforcement of restitution and compensation orders rely on the assumption that the current system does not recover (or does not efficiently recover) payment of such orders from all offenders who have the capacity to pay.
- I.41 Due to data limitations, however, it is difficult to test that assumption, and determine whether the current low level of payment of restitution and compensation orders reflects:
- offenders' lack of means; or
 - failures or inefficiencies in enforcement.
- I.42 Due to data limitations, it is not possible to determine whether the current system is achieving efficient recovery of money from the small proportion of offenders who actually have the capacity to pay.³¹
- I.43 The Council's recommendations aim to increase payment and enforcement rates from those offenders who have some capacity to pay orders.

Data limitations

- I.44 Because it is not recorded, the data provided in the Council's issues and options paper could not include payments for restitution or compensation:
- in matters that resolved prior to an order being made; or
 - following the making of an order, but without the court being notified.
- I.45 The Council was also unable to obtain a complete picture of the financial resources of offenders (see further at [4.12]–[4.15]).

Need for a coherent approach to victims' compensation in Victoria

- I.46 A number of stakeholders commented that, in order to improve the experience of victims seeking compensation, the government must consider the interaction of the different avenues for compensation open to a victim in Victoria.³²
- I.47 The Law Institute of Victoria submitted that, due to the limited financial resources of most offenders, state-funded compensation through VOCAT is a preferable avenue through which to achieve adequate compensation for victims of crime of violent offences,³³ given that the majority of offenders do not have the capacity to pay compensation to a victim.³⁴

30. See discussion in Sentencing Advisory Council, *Restitution and Compensation Orders: Issues and Options Paper* (2018) 38–39.

31. *Ibid* 64–67.

32. Meeting with Victims of Crime Commissioner (12 September 2017); Meeting with Deputy Chief Magistrate Broughton, Magistrates' Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017); Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018).

33. The *Victims of Crime Assistance Act 1996* (Vic) provides compensation for persons who are the primary, secondary or related victim of an act of violence, and that act of violence directly results in injury, death or, for primary victims, a significant adverse effect: *Victims of Crime Assistance Act 1996* (Vic) s 1.

34. Submission 14 (Law Institute of Victoria) 4.

- I.48 Several stakeholders raised the possibility of offenders contributing financially to a fund from which victims could draw compensation.³⁵
- I.49 As discussed in the issues and options paper, there is a need for a coherent approach to victim-orientated reform within the criminal justice system, including the issue of the compensation of victims for the effects of crime.³⁶
- I.50 The scope of the reference to the Council, however, does not extend to aspects of the victim's role in the criminal trial process or other avenues of compensation available to a victim other than orders for restitution or compensation under the *Sentencing Act 1991* (Vic). These matters are within the scope of the VLRC's review of VOCAT and therefore have not been examined by the Council.
- I.51 In determining which reforms it may wish to implement, the government will need to consider the VLRC's and the Council's recommendations together, with a view to providing avenues for accessible, equitable compensation to all victims.

Consultation

- I.52 Responding to the needs of victims is a responsibility shared across many different organisations and agencies within the criminal justice system. The Council therefore engaged in an extensive process of consultation that included:
- preliminary consultation with key stakeholders, prior to the publication of the issues and options paper;
 - a call for public submissions on the questions contained in the issues and options paper and any related issues;
 - an online survey;
 - two discussion forums with a broad range of stakeholders;
 - consultation with key stakeholders, following publication of the issues and options paper; and
 - further consultation with key stakeholders on the Council's proposed recommendations.
- I.53 The Council received 18 written submissions, including seven responses via the online survey.
- I.54 Further details of the submissions received by the Council, and the consultation it conducted, are presented in the appendix to this report.

35. Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018); Submission 1 (J. Kennedy); Meeting with Victims of Crime Commissioner (7 June 2018).

36. Sentencing Advisory Council (2018), above n 30, 6.

2. Context of the reference

Overview

- 2.1 This chapter examines the broader context in which the Council's recommendations are made, because a substantial number of initiatives and reforms currently being developed or implemented are likely to affect the experience of victims in the criminal trial process.
- 2.2 A large number of organisations and agencies involved in the criminal justice system have also been involved in reforms and reviews aimed at improving the system's responses to victims of crime, including financial compensation provided to victims. Of these, significant reviews have included the following:
- on 13 November 2013, the final report of the Victorian inquiry into the handling of child abuse allegations within religious and non-government organisations was tabled in parliament (the *Betrayal of Trust* report);³⁷
 - on 30 March 2016, the Victorian Royal Commission into Family Violence's final report was tabled in parliament;³⁸
 - on 22 November 2016, the Victorian Law Reform Commission's (VLRC's) final report into victims of crime in the criminal trial process was tabled in parliament;³⁹
 - on 15 December 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse's final report was tabled in the Australian Parliament;⁴⁰ and
 - by 27 July 2018, the VLRC presented to the Attorney-General its final report reviewing the *Victims of Crime Assistance Act 1996* (Vic) (VOCA Act).⁴¹
- 2.3 This chapter provides an overview of initiatives and reforms that may influence the experience of victims both in navigating the criminal process more broadly and in obtaining and enforcing orders for restitution or compensation.

37. Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013).

38. State of Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016).

39. Victorian Law Reform Commission (2016), above n 1.

40. Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017).

41. Victorian Law Reform Commission, 'Victims of Crime Assistance Act 1996' (lawreform.vic.gov.au, 2018) <<http://lawreform.vic.gov.au/all-projects/victims-crime-assistance-act-1996>> at 27 July 2018.

Victorian Law Reform Commission recommendations

The Role of Victims of Crime in the Criminal Trial Process: Report (2016)

- 2.4 The issues and options paper provided an overview of the VLRC's *The Role of Victims of Crime in the Criminal Trial Process: Report* (VLRC report).⁴² If implemented, a number of the recommendations made by the VLRC in the report will significantly alter the current landscape for victims, including:
- amending the *Victims' Charter Act 2006* (Vic) to include recognition of the victim's interest in the criminal justice system's response to the crime;⁴³
 - amending the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to include certain minimum guarantees for victims of criminal offences, such as a right to be treated with respect at all times;⁴⁴
 - introducing victim-related professional development training for the profession;⁴⁵
 - establishing arrangements for system-wide monitoring and review of the implementation of the *Victims' Charter Act 2006* (Vic);⁴⁶
 - strengthening the relationship between victims and the prosecution, for example, through requiring prosecuting agencies to offer conferences before and after important court dates and requiring prosecuting agencies to consult with victims before making certain decisions (such as not proceeding with a charge);⁴⁷
 - establishing a legal service for victims of indictable violent crimes within Victoria Legal Aid;⁴⁸
 - increasing participation and the substantive rights of victims in court;⁴⁹ and
 - establishing a statutory scheme for restorative justice conferencing for indictable offences in Victoria.⁵⁰
- 2.5 At the time of writing, the government has not indicated whether it will accept all the recommendations made in the VLRC report, and the majority of the recommendations contained therein are awaiting implementation.
- 2.6 On 5 April 2018, the *Justice Legislation Amendment (Victims) Act 2017* (Vic) came in to operation, incorporating the VLRC's recommendations concerning the use of *intermediaries*⁵¹ in courts.
- 2.7 On 24 July 2018, the *Victims and Other Legislation Amendment Bill 2018* (Vic) was introduced into parliament, responding to a number of the VLRC's recommendations and proposing amendments to the *Victims' Charter Act 2006* (Vic) and the *Victims of Crime Commissioner Act 2015* (Vic).⁵²

42. Sentencing Advisory Council (2018), above n 30, 2–3, 9–10.

43. Victorian Law Reform Commission (2016), above n 1, xxi, 35.

44. *Ibid* xxi, 41.

45. *Ibid* xxi–xxii, 51–52, 54.

46. *Ibid* xxii, 78–81.

47. *Ibid* xxiv, 134–142.

48. *Ibid* xxiv, 118–126.

49. *Ibid* xxiv–xxv, 142–165.

50. *Ibid* xxvi, 174–194.

51. An intermediary is a person appointed to assist a witness by explaining questions or answers to the extent necessary to be understood by either the witness or the person asking the question. An intermediary may be appointed for a witness other than the accused, where the witness is under 18 years of age or has a cognitive impairment and the criminal proceeding is in a participating court venue: Victorian Law Reform Commission, 'Victims of Crime in the Criminal Trial Process' (lawreform.vic.gov.au, 2018) <<http://lawreform.vic.gov.au/all-projects/victims-crime-criminal-trial-process>> at 20 July 2018; see also *Justice Legislation Amendment (Victims) Act 2017* (Vic) pt 4 div 1.

52. Victoria, *Parliamentary Debates*, Legislative Assembly, 25 July 2018 (Martin Pakula, Attorney-General).

- 2.8 As part of the Victorian budget for 2017–18, the government also made announcements including:
- funding for the Victims of Crime Commissioner;
 - additional funding for the Office of Public Prosecutions to recruit more social workers to support victims before and during trials; and
 - additional funding to develop further guidance for judicial officers and magistrates about how to respond to the needs of victims in the courtroom.⁵³
- 2.9 In the Victorian budget for 2018–19, the government announced:
- additional funding for the Victims Assistance Program towards case management and recovery support, the Victims of Crime Helpline and support workers; and
 - funding to extend the intermediary scheme.⁵⁴
- 2.10 The VLRC's recommendations that directly relate to consideration of restitution and compensation orders are discussed further in Chapter 4.

Review of the *Victims of Crime Assistance Act 1996* (Vic)

- 2.11 The issues and options paper also discussed the VLRC's review of the VOCA Act and its relationship to the Council's reference. The review considered the operation and effectiveness of state-funded assistance to victims in Victoria. The VLRC provided its advice to government by 27 July 2018.
- 2.12 The VLRC's review sought submissions on a number of matters, including:
- the mechanisms for the state to seek from an offender recovery of a payment of an award under the VOCA Act;
 - the introduction of a victims' levy to supplement state-funded victims' compensation; and
 - the potential for the victims' financial assistance scheme to incorporate restorative justice opportunities.⁵⁵
- 2.13 Changes to the scheme for state-funded assistance in Victoria – including increased recovery from offenders of payments under the VOCA Act and changes to the categories or amounts of assistance available under the VOCA Act – may have implications for the use and enforcement of restitution and compensation orders.
- 2.14 The Council notes that the VOCA Act has been amended to remove the time limit of two years for applications in relation to child abuse.⁵⁶

53. Attorney-General, Victoria, and Premier of Victoria, 'Supporting Victims of Crime in the Justice System', Media Release (7 May 2017) <<https://premier.vic.gov.au/supporting-victims-of-crime-in-the-justice-system>> at 20 July 2018.

54. Attorney-General, Victoria, and Premier of Victoria, 'Stronger, Safer, Fairer: Investing in Victoria's Justice System', Media Release (1 May 2018) <<https://premier.vic.gov.au/stronger-safer-fairer-investing-in-victorias-justice-system>> at 20 July 2018.

55. See Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996: Supplementary Consultation Paper* (2017) 196–197, 211.

56. *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 37. As a result of this amendment, the VOCA Act allows a victim to make an application at any time after the occurrence of an act of violence consisting of physical or sexual abuse, if the act occurred when the victim was under the age of 18 years: *Justice Legislation Amendment (Victims) Act 2018* (Vic) s 29(1A).

Reforms to assist victims of institutional abuse

- 2.15 The Victorian Parliamentary Inquiry that resulted in the 2013 *Betrayal of Trust* report outlined how survivors of institutional child abuse face significant barriers in recovering compensation for the abuse they suffered. In particular, the *Betrayal of Trust* report found that identifying the correct organisational entity against which to bring civil proceedings is a major obstacle to seeking civil compensation where child abuse plaintiffs wish to commence proceedings against an institution that is unincorporated.⁵⁷ The report contained 15 recommendations, including:
- the creation of new offences relating to the concealment of child abuse, compulsory reporting, child endangerment and grooming;
 - avenues for improving access to civil litigation; and
 - proposals to improve organisational responses to allegations of criminal child abuse.⁵⁸
- 2.16 Since 2013, the Victorian Government has been engaging with the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse,⁵⁹ which in 2015 released *Redress and Civil Litigation Report*, making a range of recommendations relating to the establishment, funding and operation of a national redress scheme and to civil litigation processes generally.⁶⁰
- 2.17 On 11 July 2018, the Victorian Government announced that it had accepted in full or in principle 293 of the 409 recommendations of the Commission.⁶¹

The Royal Commission into Institutional Responses to Child Sexual Abuse and the National Redress Scheme

- 2.18 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended the establishment of a National Redress Scheme. The scheme commenced on 1 July 2018 and will run for 10 years.⁶²
- 2.19 As part of the National Redress Scheme, eligible survivors of institutional child sexual abuse are able to seek a range of redress options from institutions or organisations that have opted in to the scheme. These options include monetary payments of up to \$150,000, access to counselling and psychological services,⁶³ and direct personal responses – such as an apology – from the institutions or organisations responsible for the abuse.⁶⁴ Applications for redress will be assessed by independent decision-makers on a case-by-case basis, and survivors will be able to access independent legal advice funded under the scheme, before accepting any offers.⁶⁵

57. Parliament of Victoria, Family and Community Development Committee (2013), above n 37, 530.

58. Ibid xliii–xlvi.

59. Department of Justice and Regulation, 'Betrayal of Trust Implementation' (justice.vic.gov.au, 2018) <www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/betrayal+of+trust+implementation> at 20 July 2018.

60. Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015). The report outlines a proposed framework for a redress scheme.

61. Attorney-General, Victoria, 'Response to Child Abuse Royal Commission Recommendations', Media Release (11 July 2018) <<https://premier.vic.gov.au/response-to-child-abuse-royal-commission-recommendations>> at 20 July 2018; Department of Justice and Regulation, 'Victorian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse' (justice.gov.au, 2018) <<http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/institutional+responses+to+child+sexual+abuse/royal+commission+into+institutional+child+sexual+abuse>> at 20 July 2018.

62. Victim survivors will be able to lodge applications until 30 June 2027. The National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (Cth) was passed in the Senate on 19 June 2018 and the Act received Royal Assent on 21 June 2018; Department of Social Services (Cth), 'National Redress Scheme' (dss.gov.au, 2018) <<https://dss.gov.au/national-redress-scheme-for-people-who-have-experienced-institutional-child-sexual-abuse>> at 20 July 2018.

63. This may consist of a payment of up to \$5,000 for such services: *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 16.

64. *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 16(1)(c).

65. *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) pts II–III; Attorney-General, Victoria, 'Funding Victoria's Participation in National Redress', Media Release (15 June 2018) <<https://www.premier.vic.gov.au/funding-victorias-participation-in-national-redress>> at 20 July 2018.

- 2.20 The scheme is operated by the Commonwealth Department of Social Services, but under the *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (Vic), the Victorian Government will refer powers to the Commonwealth to ensure that Victorian state institutions participate in the scheme.⁶⁶ The Act also provides for the manner in which churches, charities and other non-government organisations operating in Victoria may participate in the scheme. The scheme will apply to an estimated 15,000 victim survivors in Victoria.⁶⁷
- 2.21 Those who pursue compensation under the scheme will be precluded from later pursuing civil proceedings against the same institution, organisation or official.⁶⁸ If a victim survivor has received a prior settlement, that amount will be indexed to account for inflation and deducted from any amount available to the victim survivor under the scheme.⁶⁹ If a victim survivor has previously received a court-ordered payment from the institution, they will not be eligible to access the redress scheme.⁷⁰
- 2.22 The Act has restricted eligibility for victim survivors who have serious criminal convictions, to be assessed on a case-by-case basis.⁷¹

Strengthening civil redress against organisations

- 2.23 A number of other reforms arising out of the Royal Commission into Institutional Responses to Child Sexual Abuse's *Redress and Civil Litigation Report* and the Victorian Parliamentary Inquiry's *Betrayal of Trust* report aim at improving access to civil litigation avenues, and have strengthened the ability of victim survivors of child abuse to seek redress from organisations or institutions.
- 2.24 In 2015, the limitation periods for causes of action relating to death or personal injury arising out of child abuse were abolished.⁷²
- 2.25 In 2016, the Victorian Government introduced new Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse, to be adopted by Victorian Government departments responding to such claims.⁷³
- 2.26 Further, in 2017, the Victorian Government introduced a new *duty of care* for organisations exercising care, supervision or authority over children. Organisations must now demonstrate that reasonable precautions are taken to prevent child abuse from occurring or face an automatic presumption that they failed in their duty of care.⁷⁴

66. *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (Vic) pt II ('Reference of matters to Commonwealth Parliament').

67. Australian Associated Press, 'Redress Scheme Covers 60,000 Survivors' (9news.com.au, 2018) <<https://www.9news.com.au/national/2018/06/24/10/01/redress-scheme-covers-60-000-survivors>> at 20 July 2018.

68. *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) ss 42(2)(c), 42(2)(d), 42(2)(e).

69. *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 30. See discussion in Karin Derkley, 'Child Sex Abuse Survivors May Go Empty-Handed' (liv.asn.au, 2018) <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/July-2018/Child-sex-abuse-survivors-may-go-empty-handed>> at 20 July 2018.

70. *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* (Cth) reg 11: 'Participating Institution ordered by court to pay compensation or damages is not responsible'; Department of Social Services (Cth), 'Who Can Apply?' (nationalredress.gov.au, 2018) <<https://www.nationalredress.gov.au/applying/who-can-apply>> at 20 July 2018; Explanatory Memorandum, *National Redress Scheme for Institutional Child Sexual Abuse Bill 2018* (Cth) 25.

71. *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 63.

72. *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic).

73. Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse (2015), above n 60; Department of Justice and Regulation (2018), above n 61.

74. *Wrongs Act 1958* (Vic) pt XIII, as amended by *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic) s 3.

Removal of the *Ellis* defence

- 2.27 Also arising out of the *Betrayal of Trust* report and the Royal Commission into Institutional Responses to Child Sexual Abuse, the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) creates the ability for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-government organisations using trusts to conduct their activities.⁷⁵
- 2.28 This Act removes the prior common law position that provided that neither unincorporated entities, nor their trustees, could be sued.⁷⁶ This reform could significantly improve victim survivors' ability to pursue civil compensation claims against unincorporated organisations such as the Catholic Church.⁷⁷

Proposal to access offender superannuation

- 2.29 On 8 December 2017, the Commonwealth Government announced that the Commonwealth Treasury would conduct a review of the rules governing the early release of superannuation benefits, including whether an offender's superannuation should be available to pay restitution or compensation to victims of crime. A consultation paper, *Review of the Early Release of Superannuation Benefits*, was published in December 2017.⁷⁸
- 2.30 In March 2018, the Minister for Revenue and Financial Services, Kelly O'Dwyer, announced that the Commonwealth Government was drafting legislation to allow victims access to an offender's superannuation.⁷⁹
- 2.31 In May 2018, the Commonwealth Government released a further consultation paper, *Review of Superannuation and Victims of Crime Compensation*, containing draft proposals, including two specific proposals to allow early access to an offender's superannuation for the purposes of victims of crime compensation:
- a new claw-back mechanism for 'out of character' superannuation contributions made by offenders to shield their assets from use in compensating victims;
 - new provisions to allow victims of serious, violent crimes to access an offender's superannuation balance for the purposes of compensation, where other assets have been exhausted, and subject to appropriate limits and thresholds.⁸⁰
- 2.32 The Council notes that allowing victims access to an offender's superannuation may increase the enforcement rates of restitution and compensation orders in Victoria.

75. *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) s 1; Attorney-General, Victoria, 'New Laws Pass Parliament for Child Abuse Victims to Sue', Media Release (24 May 2018) <<https://www.premier.vic.gov.au/new-laws-pass-parliament-for-child-abuse-victims-to-sue>> at 20 July 2018; Department of Justice and Regulation (2018), above n 61.

76. See *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565.

77. For further discussion of the *Ellis* defence, see Parliament of Victoria, Family and Community Development Committee (2013), above n 37, 531–536; Explanatory Memorandum, *Legal Identity of Defendants (Organisational Child Abuse) Bill 2018*.

78. The Treasury, Australian Government, *Review of the Early Release of Superannuation Benefits* (2017).

79. Elise Fantin, 'Victims of Crime Could Access the Superannuation of Their Perpetrators under New Proposal', ABC News (National) 26 March 2018 <www.abc.net.au/news/2018-03-26/proposal-for-victims-of-crime-access-perpetrators-superannuation/9587154> at 20 July 2018.

80. The Treasury, Australian Government, *Review of Superannuation and Victims of Crime Compensation* (2018).

Other relevant reforms

Restorative justice

- 2.33 A number of restorative justice frameworks and pilot programs have aimed to increase victim participation alongside the traditional criminal trial process.⁸¹ RMIT University's Centre for Innovative Justice, for example, has conducted research and developed a number of restorative justice conferencing projects, including:
- a restorative justice conferencing pilot program, funded by the Victorian Legal Services Board, focusing on serious driving offences;⁸²
 - identifying opportunities to use restorative justice conferencing to repair or heal harm caused to an injured worker (in conjunction with WorkSafe);⁸³
 - designing and piloting a restorative justice model for use with Transport Accident Commission clients;⁸⁴ and
 - the *Innovative Justice Responses to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community* report.⁸⁵
- 2.34 In October 2017, the Department of Justice and Regulation published a framework for restorative justice for victim survivors of family violence, arising out of the Victorian Royal Commission into Family Violence.⁸⁶ In addition, the VLRC report recommended the introduction of a statutory scheme for restorative justice, and proposed that it could be integrated with applications for restitution and compensation.⁸⁷
- 2.35 The relevance of restorative justice to restitution and compensation orders is discussed in detail at [3.109]–[3.125].

Legal assistance

- 2.36 On 1 June 2018, the Victorian Government announced \$2 million to support community legal services across Victoria through the extension of integrated service delivery between legal centres and other service providers.⁸⁸
- 2.37 Pursuant to the *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic), Victoria Legal Aid will have a new role coordinating Victoria's legal assistance sector; working with government, community legal centres and private lawyers to coordinate the delivery of legal assistance services across the state.⁸⁹

81. Victorian Law Reform Commission (2016), above n 1, 176–177.

82. RMIT University, 'Restorative Justice Conferencing' (rmit.edu.au, 2018) <<https://rmit.edu.au/about/our-education/academic-schools/graduate-school-of-business-and-law/research/centre-for-innovative-justice/what-we-do/current-research/restorative-justice-conferencing>> at 20 July 2018.

83. RMIT University, 'WorkSafe' (rmit.edu.au, 2018) <<https://www.rmit.edu.au/about/our-education/academic-schools/graduate-school-of-business-and-law/research/centre-for-innovative-justice/what-we-do/current-research/worksafe>> at 20 July 2018.

84. RMIT University, 'Restorative Justice Practices' (rmit.edu.au, 2018) <<https://www.rmit.edu.au/about/our-education/academic-schools/graduate-school-of-business-and-law/research/centre-for-innovative-justice/what-we-do/current-research/restorative-justice-practices>> at 20 July 2018.

85. RMIT University, *Innovative Justice Responses to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community* (2014); Submission 12 (Centre for Innovative Justice, RMIT University) 1.

86. Family Violence Restorative Justice Project, *Restorative Justice for Victim Survivors of Family Violence – Framework* (2017).

87. Victorian Law Reform Commission (2016), above n 1, xxvi, 174–194.

88. Attorney-General, Victoria, 'New Funding Grants for Legal Assistance Services', Media Release (1 June 2018) <<https://www.premier.vic.gov.au/new-funding-grants-for-legal-assistance-services>> at 20 July 2018.

89. Attorney-General, Victoria, 'New Laws For Better Access to Justice', Media Release (27 March 2018) <<https://www.premier.vic.gov.au/new-laws-for-better-access-to-justice>> at 20 July 2018.

Family violence reforms

- 2.38 Of the 227 recommendations of the Victorian Royal Commission into Family Violence, 90 have been implemented and 137 are in progress.⁹⁰ The Victorian Government has accepted all 227 recommendations. Alongside system-wide reforms, these recommendations include:
- measures relating to improved and specialist family violence support services;
 - resourcing of legal services for family violence matters;
 - improving risk assessment in the family violence context;
 - multidisciplinary approaches to family violence; and
 - the provision of information to victim survivors and information sharing between agencies.⁹¹

Fines reform

- 2.39 The *Fines Reform Act 2014* (Vic), amended by the *Fines Reform and Infringements Act Amendment Act 2016* (Vic), established Fines Victoria, a new administrative body responsible for the collection and management of fines in Victoria. The new Fines Victoria body commenced on 31 December 2017.
- 2.40 Under the new scheme, the Director of Fines Victoria has extensive powers to undertake enforcement action under the *Fines Reform Act 2014* (Vic).⁹² The *Fines Reform and Infringements Act Amendment Act 2016* (Vic) also amended the *Infringements Act 2006* (Vic) to provide for a range of social justice initiatives aimed at assisting vulnerable and disadvantaged people to deal with their unpaid infringement debt, including a *time served* scheme allowing prisoners to be released with a clean slate, and a *work and development permit* scheme allowing vulnerable and disadvantaged people to work off their fine debt.⁹³
- 2.41 A new family violence scheme commenced in 2018, allowing victim survivors to apply to have their infringement fine withdrawn if family violence substantially contributed to the offence or if it is not safe for the victim survivor to name the responsible person.⁹⁴

90. Victorian Government, 'The 227 Recommendations' (vic.gov.au, 2018) <<https://www.vic.gov.au/familyviolence/recommendations.html>> at 20 July 2018.

91. State of Victoria, Royal Commission into Family Violence (2016), above n 38.

92. See Sentencing Advisory Council (2018), above n 30, 90.

93. Department of Justice and Regulation, Infringement Management and Enforcement Services, 'Time Served' Scheme for Prisoners Fact Sheet (2016).

94. Department of Justice and Regulation, 'Family Violence Scheme – Fines Victoria' (justice.vic.gov.au, 2017) <<http://www.justice.vic.gov.au/home/justice+system/fines+and+penalties/family+violence+scheme>> at 20 July 2018.

3. Should restitution and compensation orders become sentencing orders?

Overview

- 3.1 This chapter examines the question of whether it is desirable to make restitution and compensation orders sentencing orders in Victoria, and the closely related question of whether the purposes of sentencing should be expanded to include victims' financial reparation.
- 3.2 These two questions are interrelated, as it would be incongruous to include victims' financial reparation as a purpose of sentencing but not create sentencing orders that could give effect to that purpose. Similarly, it would be incongruous to make restitution and compensation orders sentencing orders and not provide a rationale for their imposition in the purposes of sentencing.⁹⁵
- 3.3 The Council has concluded that it is *not* desirable to introduce restitution and compensation orders as sentencing orders in Victoria, nor to expand the purposes of sentencing to include victims' financial reparation.
- 3.4 The chapter discusses the Council's research and stakeholder comments, as well as its conclusions influenced by the guiding principles (see [1.38]), on the following issues:
 - the appropriateness of financial reparation as a sentencing order where offending occurs in the family violence context, and the potential to increase risks to victims;
 - evidentiary issues and the need to establish victims' losses before the court if the orders were sentencing orders and subject to the criminal standard of proof;
 - the potential for increased trauma to victims arising out of such changes;
 - the issue of maintaining equality before the law, parity and consistency in sentencing if the orders were sentencing orders;
 - the potential for disproportionate effects on particular offender groups;
 - the inadequacy of resources and capacity to accommodate an addition to the range of sentencing orders within the current system;
 - the likelihood of improving enforcement rates or outcomes for victims by making restitution and compensation orders sentencing orders;
 - the theoretical bases for the current purposes of sentencing, and whether *victims' financial reparation* is consistent with these purposes;
 - the issue of privileging financial reparation above other kinds of losses for victims;
 - the role of restorative justice processes; and
 - the desirability of enforcing restitution and compensation orders in the same manner as fines.

95. The Council notes, however, that some jurisdictions treat restitution and compensation orders as sentencing orders but do not have victims' financial reparation as a purpose of sentencing. See further Sentencing Advisory Council (2018), above n 30, 72.

Should restitution and compensation orders become sentencing orders?

3.5 The Council has been asked for advice as to whether restitution and compensation orders should become sentencing orders, rather than remain as orders made in addition to sentence.⁹⁶ In considering this request, the Council has also been asked to consider whether:

- the purposes of sentencing should include the financial reparation of victims;
- there should be a presumption in favour of courts making such orders; and
- such orders should be enforced by the court in the manner of a fine.

3.6 As noted at the start of this chapter, the Council considers that it is *not* desirable to make restitution and compensation orders sentencing orders in Victoria, on the basis of:

- the potential risks to victims and affected family members;
- the evidentiary implications;
- the risks to equality before the law, parity and consistency in sentencing;
- the potential for a disproportionate impact on particular offender groups;
- the significant resource implications of such a change;
- the absence of evidence that making restitution and compensation orders sentencing orders would increase payment or improve practical outcomes for victims; and
- overwhelming stakeholder opposition.

3.7 The overwhelming majority of stakeholders – including Victoria Police, Victoria Legal Aid, the Law Institute of Victoria, the Magistrates' Court of Victoria and the Victims of Crime Assistance Tribunal (VOCAT), and members of the Victims of Crime Consultative Committee and the Victim Survivors' Advisory Council – opposed making restitution and compensation orders sentencing orders.⁹⁷ A key concern for stakeholders was the impact on equality before the law, and the risk that wealthy offenders would be able to buy their way out of other sentencing dispositions, such as imprisonment.⁹⁸ Another key concern arose in relation to the evidentiary consequences of the orders becoming sentencing orders.

3.8 Only two stakeholders were in favour of making restitution and compensation orders sentencing orders in Victoria. These stakeholders did not provide specific reasons for this view, nor address how the issues associated with making the orders sentencing orders, as raised in the Council's issues and options paper, might be overcome.⁹⁹

96. While Victorian courts are currently empowered to order an offender to pay restitution or compensation as part of an adjourned undertaking, unconditional discharge or unconditional discharge for low-level offending, courts are not empowered to make a stand-alone order for restitution or compensation. Such orders are also not available for higher-level offending: *Sentencing Act 1991* (Vic) ss 70, 74, 77.

97. Submission 5 (Domestic Violence Victoria) 1; Submission 7 (Anonymous); Submission 8 (Victorian Aboriginal Legal Service) 5; Submission 9 (Women's Legal Service Victoria); Submission 10 (Anonymous); Submission 13 (Waller Legal); Submission 14 (Law Institute of Victoria) 2; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 4; Submission 17 (Victoria Legal Aid) 1; Submission 18 (Victoria Police) 1; Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018).

98. Submission 8 (Victorian Aboriginal Legal Service); Submission 9 (Women's Legal Service Victoria); Submission 14 (Law Institute of Victoria); Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal); Submission 17 (Victoria Legal Aid); Submission 18 (Victoria Police).

99. Submission 2 (D. Hadden); Submission 4 (X. Clark). See further Sentencing Advisory Council (2018), above n 30, 88–101.

- 3.9 Stakeholders indicated that making restitution and compensation orders part of an offender's sentence was unlikely to benefit victims or the community more broadly.¹⁰⁰ A number of stakeholders noted that there would be more benefit in changes to the enforcement of restitution and compensation orders within the current system.¹⁰¹ Several stakeholders noted the benefits of a hybrid criminal–civil framework (see further [3.64]–[3.75]) for making restitution and compensation orders, and the desirability of retention of this model.¹⁰²
- 3.10 In addition, if restitution and compensation orders were to become sentencing orders, this would undermine fundamental principles of the criminal justice system and the rights of the victim.¹⁰³

Potential risk to victims

- 3.11 As noted at [1.38], a key consideration for the Council is the need to ensure that any reforms do not place a victim in a situation of increased risk, both in the context of family violence offending and in relation to other types of interpersonal offending.
- 3.12 If restitution and compensation orders were to be made sentencing orders, it would be necessary to consider what status to accord the views of the victim on the appropriate sentence. Victims can hold differing views on receiving compensation directly from the offender (see [3.93]).
- 3.13 Currently, a victim's desire for a lengthy custodial sentence to be imposed, or even a victim's desire that an offender's rehabilitation be prioritised in the sentencing process, is not accepted as a legitimate consideration for determining the length and nature of a sentence.¹⁰⁴ Therefore, if restitution and compensation orders were to become sentencing orders, it is likely that a victim's views on sentence would not be determinative of sentence.¹⁰⁵
- 3.14 In some jurisdictions where restitution and compensation orders are part of an offender's sentence, there have been cases in which an order for financial reparation was made even though the victim did not wish for that order to be made.¹⁰⁶ It is possible, therefore, that if a Victorian court was similarly required to consider an order for restitution or compensation as part of an offender's sentence, the order may be made without regard to a victim's individual circumstances or wishes.
- 3.15 This would be undesirable both because it does not respect the wishes of the victim and because it could place victims, particularly victim survivors of family violence offending, at an increased risk of reprisal from an offender.¹⁰⁷ Additional complexities would arise where a victim and an offender were in an ongoing economic relationship with joint assets.¹⁰⁸

100. Submission 14 (Law Institute of Victoria) 4–5; Submission 17 (Victoria Legal Aid) 2; Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018); Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018).

101. Submission 14 (Law Institute of Victoria) 6; Submission 17 (Victoria Legal Aid) 3–4.

102. Submission 13 (Waller Legal) 1; Submission 17 (Victoria Legal Aid) 2; Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

103. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 4.

104. *Director of Public Prosecutions v Walden* [2003] VSCA 139 (12 September 2003) [43]. See further Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 182. Nevertheless, forgiveness may be a matter considered in mitigation: *R v Skura* [2004] VSCA 53 (7 April 2004) [13].

105. For further discussion of this issue, see Sentencing Advisory Council (2018), above n 30, 91.

106. See for example, Anna Leask, 'Victim Galina Velas Outraged at 19-Year Reparation Drip Feed', *New Zealand Herald* (Auckland) 20 June 2017 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11879167> at 20 July 2018; *R v Bourduk* [2016] NZDC 24416 (2 December 2016).

107. Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Domestic Violence Victoria (11 April 2018).

108. Meeting with Victim Survivors' Advisory Council (27 March 2018).

Stakeholders' views

- 3.16 A number of stakeholders were opposed to making restitution and compensation orders sentencing orders because of the potential exposure of victims, in particular victim survivors of family violence offending or interpersonal crimes such as sexual offending, to increased risk.¹⁰⁹
- 3.17 Domestic Violence Victoria submitted that any benefits of making the orders sentencing orders would be outweighed by the potential risks to victim survivors of family violence. Domestic Violence Victoria considered that retaining choice and control was of primary importance for those victim survivors, and that improvement of the system for restitution and compensation orders would be best achieved by strengthening enforcement mechanisms while retaining the status of the orders as orders made in addition to sentence.¹¹⁰
- 3.18 Domestic Violence Victoria also noted that victim survivors would have differing views about whether they wished to receive restitution and compensation. A key factor in this decision would be the assessment of risk to the victim survivor and any children. Taking the choice of whether to pursue restitution or compensation away from a victim survivor would be to take choice and control away and potentially perpetuate violence:
- If such orders become sentencing orders, choice and control will be taken away from victims of family violence, perhaps forcing them to stay 'connected' to the perpetrator of the violence against their own wishes and assessment of risk, and in a way that may escalate risk of harm to them ... If the offender does not have the means to pay the compensation or restitution immediately, payment could be stretched out over an extended period of time resulting in prolonged, risky and traumatic association between the survivor and the perpetrator that may otherwise have reduced or ended.¹¹¹
- 3.19 The Law Institute of Victoria, Victoria Police, the Victim Survivors' Advisory Council and representatives of Centre Against Sexual Assault (CASA) House also noted the potential exacerbation of situations of family violence and the risk of retribution if the orders were to become sentencing orders.¹¹²
- 3.20 Victoria Police and members of the Victim Survivors' Advisory Council highlighted the complexities where a victim and an offender are in a continuing relationship involving economic ties, and the potential to compound harm in such circumstances.¹¹³
- 3.21 Several stakeholders, including representatives of the Supreme Court of Victoria, stressed the importance of victims having the ultimate say on whether they wished to apply to receive compensation.¹¹⁴

109. Submission 5 (Domestic Violence Victoria) 1; Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

110. Submission 5 (Domestic Violence Victoria): 'It is imperative that the choice to pursue restitution and/or compensation remain with victims of family violence for their own safety and [well-being], and to assist them with their recovery. This will not be achieved if compensation and/or restitution orders become sentencing orders'.

111. Domestic Violence Victoria also noted that if the victim survivor is still in an intimate relationship with the offender, a sentencing order involving compensation may place them at a greater risk of continued family violence, including economic abuse: Submission 5 (Domestic Violence Victoria) 1.

112. Submission 14 (Law Institute of Victoria) 5; Submission 18 (Victoria Police) 2; Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

113. Submission 18 (Victoria Police) 2. A member of the Victim Survivors' Advisory Council noted the complexities that may arise where an offender may transfer assets into the name of their spouse: Meeting with Victim Survivors' Advisory Council (27 March 2018).

114. Submission 5 (Domestic Violence Victoria); Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018); Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

Evidentiary issues

- 3.22 In Victoria, a sentencing court may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt.¹¹⁵ However, 'if there are circumstances which the judge proposes to take into account *in favour of* the accused, it is enough if those circumstances are proved on the balance of probabilities'.¹¹⁶
- 3.23 If restitution and compensation orders were to become sentencing orders, any findings of fact as to the amount of a victim's loss would presumably be a matter adverse to the accused, and therefore would need to be proved beyond reasonable doubt. This would require additional evidence being presented before the court, and potentially further cross-examination of victims on their claimed losses and disclosure of confidential medical information.¹¹⁷ A key concern is the risk of additional trauma for victims seeking to establish their losses to the criminal standard of proof, rather than the current civil standard.
- 3.24 In addition, the court would also need to take into account an offender's financial position in order to impose a proportionate sentence. There would need to be some mechanism for submissions to be made before a court on an offender's financial means, including their assets and ability to meet any order for restitution or compensation that may be imposed.
- 3.25 The evidentiary issues that may arise if restitution and compensation orders were to become sentencing orders include the need to:
- establish an offender's financial position;
 - establish a victim's loss to the criminal standard of proof (*beyond reasonable doubt*) rather than the current civil standard (*on the balance of probabilities*); and
 - assess the appropriate amount of compensation.¹¹⁸
- 3.26 These evidentiary issues could lead to an increase in appeals.¹¹⁹

Stakeholders' views

- 3.27 During consultation, the evidentiary issues related to establishing loss or injury to the criminal standard of proof were also a central concern for a number of stakeholders, including the Law Institute of Victoria, Victoria Legal Aid, the Magistrates' Court of Victoria and VOCAT, Victoria Police, the Victim Survivors' Advisory Council, the Victims of Crime Consultative Committee, Domestic Violence Victoria, Waller Legal and Centre Against Sexual Assault (CASA) House.¹²⁰

115. *R v Storey* [1998] 1 VR 359, 369. Compare the burden of proof on sentencing in Queensland, discussed at Sentencing Advisory Council (2018), above n 30, 74.

116. *R v Storey* [1998] 1 VR 359, 369. See further Freiberg (2014), above n 104, 133–135.

117. Under the current system, an accused is entitled to seek access to a victim's records, and to introduce those records into evidence in a criminal trial, provided that they are relevant to the facts in issue: *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(1); *Todd (A Pseudonym) v The Queen* [2016] VSCA 29 (3 March 2016) [33]. An accused can access a range of records, including medical records and records relating to a victim's psychological or psychiatric history by filing a subpoena with the court: *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt 2 div 2A. However, there is a commonly utilised presumption that confidential communications (such as counselling records) of victims of sexual offending are excluded from criminal trials, including sentencing: *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C; see for example, *KR v BR* [2018] VSCA 159 (22 June 2018). This presumption may conflict with the necessity for disclosure of medical materials if a court is to be required to determine whether a victim has, for example, sustained an injury as a consequence of the offence, in order to seek to make an order for compensation. For further discussion of this issue, see Sentencing Advisory Council (2018), above n 30, 93–94.

118. For further discussion of these issues, see Sentencing Advisory Council (2018), above n 30, 92–95.

119. *Ibid* 100.

120. Submission 5 (Domestic Violence Victoria); Submission 13 (Waller Legal); Submission 14 (Law Institute of Victoria) 4–5; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 5; Submission 17 (Victoria Legal Aid) 2; Submission 18 (Victoria Police) 1–2; Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

- 3.28 Of particular concern was the potential for increased trauma and further victimisation resulting from cross-examination of a victim on their losses and the requirement to disclose confidential medical records.¹²¹
- 3.29 Domestic Violence Victoria raised concerns about the potential trauma and deterrent effect that requiring evidentiary matters to be established to the criminal standard of proof could have on survivors of family violence. Domestic Violence Victoria believed that this would outweigh any benefits of making restitution and compensation orders sentencing orders, stating:
- [Domestic Violence Victoria] believe the potential harms of disclosure of psychological records, survivor cross-examination, and any statements she has made related to loss and injuries to be used against her in other settings and/or used to appeal any criminal conviction outweigh any potential gains from making restitution and compensation orders sentencing orders.¹²²
- 3.30 Waller Legal similarly submitted that requiring victims to establish their losses to the criminal standard of proof could render the process more onerous than it was intended to be.¹²³
- 3.31 The Law Institute of Victoria, Victoria Legal Aid and Victoria Police were also concerned that the potential for cross-examination or the need to disclose additional material to the defence could cause further trauma to victims.¹²⁴ Victoria Police submitted that such evidentiary changes may result in revictimisation not only due to the potential requirements to disclose medical records and the prospect of further cross-examination but also due to the delay that would occur when the victim's loss was being contested.¹²⁵
- 3.32 During consultation meetings, the Victim Survivors' Advisory Council, the Victims of Crime Consultative Committee and Centre Against Sexual Assault (CASA) House also expressed concern regarding the increased possibility of a victim being cross-examined as to loss if restitution and compensation orders were to become sentencing orders.¹²⁶ A member of the Victim Survivors' Advisory Council commented that 'to be cross-examined is the most traumatic thing in the family violence context ... and the fact that the defence can have the medical information as well ... is a really big concern for me'.¹²⁷
- 3.33 Members of the Victim Survivors' Advisory Council noted that the way that disclosures of confidential information could be used posed significant risk to victim survivors of family violence, and that proving psychological injury (or even physical injury) in the family violence context to the necessary standard is 'really difficult'.¹²⁸
- 3.34 Stakeholders also noted that in the family violence context, the disclosure of medical materials could be used in family law proceedings in relation to parenting orders.¹²⁹

121. Studies have found that the experience of cross-examination not only causes distress and humiliation but also can leave victims with the perception that the information on which a decision is to be based has been rendered inaccurate. This can have the effect of undermining trust in the decision-maker. Over 70% of respondents in the Magistrates' Court disagreed or strongly disagreed that they had been treated with courtesy, dignity and respect during cross-examination by the accused's lawyers: Malini Laxminarayan et al., 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8(2) *Victims and Offenders* 119, 122; Victims Support Agency, *Information and Support Needs of Victims and Witnesses in the Magistrates' Court of Victoria* (2013) 17–18.

122. Submission 5 (Domestic Violence Victoria).

123. Submission 13 (Waller Legal).

124. Submission 14 (Law Institute of Victoria) 2; Submission 17 (Victoria Legal Aid) 4–5; Submission 18 (Victoria Police) 1–2.

125. Submission 18 (Victoria Police) 1.

126. Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

127. Meeting with Victim Survivors' Advisory Council (27 March 2018).

128. Meeting with Victim Survivors' Advisory Council (27 March 2018).

129. Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Domestic Violence Victoria (11 April 2018). It was noted that such adverse consequences could deter victim survivors from reporting family violence: Meeting with Domestic Violence Victoria (11 April 2018).

- 3.35 Stakeholders also raised concerns regarding the possibility of increased numbers of appeals if restitution and compensation orders were to become sentencing orders, as additional information disclosed in order to establish a victim's loss could potentially be used to form the basis of an appeal by the offender.¹³⁰
- 3.36 Victoria Legal Aid noted the possibility of an increase in appeals based on both dissatisfaction by an offender or a victim with the amount awarded and changes to an offender's financial circumstances being considered as constituting *fresh evidence* for the purposes of an appeal.¹³¹
- 3.37 Domestic Violence Victoria considered that the risk of additional appeals was one of the factors outweighing any potential benefits of making the orders sentencing orders.¹³² The Law Institute of Victoria had similar concerns, noting cases in which medical material for use in a compensation application was disclosed to the defence, who then used the material in an appeal against conviction.¹³³
- 3.38 The Magistrates' Court of Victoria and VOCAT cautioned that a potential increase in appeals would have resourcing implications for the higher courts. They noted that this was one of the adverse consequences of making the orders sentencing orders, and would be highly counterproductive for a victim's recovery.¹³⁴

Equality before the law

- 3.39 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that every person is equal before the law and is entitled to the equal protection of the law without discrimination.¹³⁵
- 3.40 A key concern with making restitution and compensation orders sentencing orders arises in relation to the principle of equality before the law, ensuring consistency and parity in sentencing and avoiding the preferential treatment for offenders with greater means to pay compensation.¹³⁶ The potential to undermine the principle of equality before the law by making restitution and compensation orders sentencing orders emerged as a crucial issue for the Council's consideration.

Stakeholders' views

- 3.41 The majority of stakeholders – including the Law Institute of Victoria, Victoria Legal Aid, Victoria Police, the Magistrates' Court of Victoria and VOCAT – identified the risk of undermining equality before the law as a key reason to oppose the introduction of restitution and compensation orders as sentencing orders.¹³⁷
- 3.42 The Law Institute of Victoria, Victoria Legal Aid, the Women's Legal Service Victoria, Victoria Police, the Victorian Aboriginal Legal Service, the Magistrates' Court of Victoria and VOCAT all stressed the potential consequences for equality before the law if restitution and compensation orders became sentencing orders.¹³⁸

130. Submission 5 (Domestic Violence Victoria); Submission 14 (Law Institute of Victoria) 2; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 5; Submission 17 (Victoria Legal Aid) 2.

131. Submission 17 (Victoria Legal Aid) 2.

132. Submission 5 (Domestic Violence Victoria) 2.

133. Submission 14 (Law Institute of Victoria) 5.

134. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 5.

135. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

136. Sentencing Advisory Council (2018), above n 30, 95.

137. Submission 14 (Law Institute of Victoria) 2; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 4; Submission 17 (Victoria Legal Aid) 2; Submission 18 (Victoria Police) 3.

138. Submission 9 (Women's Legal Service Victoria); Submission 14 (Law Institute of Victoria) 4; Submission 17 (Victoria Legal Aid) 2.

These stakeholders were concerned that wealthy offenders would be able to 'buy' their way out of other sentencing dispositions, such as imprisonment, by offering to pay restitution or compensation.¹³⁹

- 3.43 Victoria Legal Aid submitted that a primary concern with making restitution and compensation orders sentencing orders was the:
- inequity for offenders arising out of offenders' differing financial circumstances and the perception of wealthier offenders receiving a lighter sentence overall due to a large compensation order component in the overall sentence.¹⁴⁰
- 3.44 The Law Institute of Victoria submitted that if restitution and compensation orders were to become sentencing orders rather than remain as orders made ancillary to sentence, the capacity to pay such an order would create discrepancies in sentencing between offenders with differing socioeconomic positions.¹⁴¹ The Law Institute of Victoria submitted that 'this development would have the potential to enable wealthier offenders to avoid more severe sentences by offering or being in a position to pay compensation or restitution'.¹⁴²
- 3.45 A number of stakeholders observed that such a system could also be unfair for victims of crime.¹⁴³ The Women's Legal Service Victoria raised concerns of the 'inequity of a scheme where [financial reparation] outcomes for victims would depend on the financial means of the perpetrator'.¹⁴⁴
- 3.46 A number of stakeholders noted the difficulties in achieving consistency in sentencing, and parity between offenders, if restitution and compensation orders were to become sentencing orders. The Magistrates' Court of Victoria and VOCAT noted the 'significant risk that it may create disparity in sentencing between those accused with financial means and those without'.¹⁴⁵
- 3.47 During an individual consultation meeting, Justice Terence Forrest of the Supreme Court of Victoria expressed similar concerns, stating:
- If a rich man comes to court, and his barrister says he can pay a [compensation order] that would be sufficient to cater to the justice of the situation, and a person in exactly the same situation without means cannot do that, one gets a [compensation order] and the other gets six months' jail. I don't think that's right.¹⁴⁶

Disproportionate impact on particular offender groups

- 3.48 If restitution and compensation orders were to become sentencing orders, there are particular offender groups that may be disproportionately affected. This is due to the fact that the enforcement of restitution and compensation orders is likely to have disproportionate and adverse consequences for particular offender groups. In addition, offenders who have limited financial resources are likely to be excluded from restitution and compensation orders as a sentencing disposition, as they would be unlikely to be able to meet such an order.

139. Submission 7 (Anonymous) 1 ('[it is] not fair that offenders with more money might "buy" their way out of a harsher sentence'); Submission 8 (Victorian Aboriginal Legal Service) 8 ('[such a change] would mean that people could potentially "buy their way" out of prison terms or orders which low-or-no income offenders would not have the capacity to do'); Submission 9 (Women's Legal Service Victoria) 1.

140. Submission 17 (Victoria Legal Aid) 2.

141. Submission 14 (Law Institute of Victoria) 4.

142. Submission 14 (Law Institute of Victoria) 4.

143. Submission 9 (Women's Legal Service Victoria) 1; Sentencing Advisory Council Director at meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

144. Submission 9 (Women's Legal Service Victoria) 1.

145. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal). Similarly, Victoria Police noted the 'challenges for the consistent sentencing of offenders for like offences, which would seem to undermine the principle of equal treatment of offenders before the law. That is, there should be parity between sentences': Submission 18 (Victoria Police) 3.

146. Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

- 3.49 The Council has identified the following groups that might be disproportionately affected by the introduction of restitution and compensation orders as sentencing orders:
- Aboriginal and Torres Strait Islander offenders;
 - female offenders (see further at [4.273]);
 - child and youth offenders; and
 - disadvantaged and vulnerable offenders more broadly (see further at [4.256]–[4.264]).

Stakeholders' views

- 3.50 The Victorian Aboriginal Legal Service and the Law Institute of Victoria raised significant concerns regarding the disproportionate impacts on Aboriginal and Torres Strait Islander offenders in the criminal justice system if restitution and compensation orders were to form part of sentence, particularly the possible consequence of further compounding the poverty and over-incarceration faced by Aboriginal and Torres Strait Islander people.¹⁴⁷ The Victorian Aboriginal Legal Service submitted that it is: fundamentally opposed to [restitution and compensation orders becoming sentencing orders], and consider that such an amendment has the potential to negatively impact Aboriginal and Torres Strait Islander people in disproportionate numbers. Such a [change] would compound the ever-increasing challenges Aboriginal and Torres Strait Islander people face with regards to contact with the criminal justice system, the inequality of over-incarceration and systemic, entrenched poverty and lack of education and employment opportunities.¹⁴⁸
- 3.51 A number of other stakeholders – including the Law Institute of Victoria, Victoria Police, Justice Connect, Victoria Legal Aid, the Magistrates' Court of Victoria and VOCAT – commented on the risk of disproportionate effects on disadvantaged offenders and the risk of offenders' further entrenchment within the criminal justice system if restitution and compensation orders were to become sentencing orders.¹⁴⁹
- 3.52 Jesuit Social Services stressed the potential disproportionate impact on particular offender groups, including those who:
- live in rural or remote locations;
 - are elderly;
 - have a physical disability;
 - have a cognitive impairment or mental health problem; and/or
 - fail Victoria Legal Aid's means test,¹⁵⁰ yet are living in poverty and fall below the poverty line.¹⁵¹
- 3.53 Another stakeholder also identified a need for a differentiated response for children sentenced under the *Children, Youth and Families Act 2005* (Vic), noting that making restitution and compensation orders sentencing orders with respect to children could undermine the application of the differentiated sentencing considerations applicable to this group in Victoria.¹⁵²

147. Submission 8 (Victorian Aboriginal Legal Service) 4–5; Submission 14 (Law Institute of Victoria) 5.

148. Submission 8 (Victorian Aboriginal Legal Service) 4–5.

149. Submission 14 (Law Institute of Victoria) 4; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 4; Submission 17 (Victoria Legal Aid) 3; Meeting with Justice Connect (18 April 2018).

150. Victoria Legal Aid applies a means test to assess whether, and to what extent, to fund legal assistance for someone charged with a criminal offence. The means test assesses the income and value of assets of a person applying for legal assistance, as well as the income and value of assets of any person who is financially associated with the person seeking legal assistance (such as a family member). Generally speaking, persons receiving a full grant of legal aid have a net disposable income of less than \$361 per week, and assets of under \$1,095: Victoria Legal Aid, 'Means Test' (handbook.vla.vic.gov.au, 2017) <<https://handbook.vla.vic.gov.au/handbook/12-means-test>> at 20 July 2018.

151. Jesuit Social Services also noted that persons who are applying for bail or are unable to access specialist courts and services due to geographical or other reasons may be disproportionately affected by restitution and compensation orders becoming sentencing orders: Submission 3 (Jesuit Social Services) 3.

152. Submission 10 (Anonymous) 2–3. For a discussion of the principles relevant to sentencing children in Victoria, see generally Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016).

Resource implications

- 3.54 If restitution and compensation orders were to become sentencing orders, there would be potential resource implications for a number of agencies, including the Office of Public Prosecutions and Victoria Legal Aid, criminal defence practitioners and the courts.¹⁵³ The likely increased demands on existing resources would arise out of:
- the need for additional training for judicial officers if they were to be required to assess and quantify injuries for the imposition of compensation orders as sentencing orders;
 - the need for additional training for those appearing for both the prosecution and the defence to equip legal practitioners to make (and challenge) submissions about victims' losses;
 - significant increases in hearing times and an increase in matters involving discussions about restitution and compensation orders;
 - the potential increases in appeals (see above at [3.26], [3.35]–[3.38]); and
 - the possible delays in the resolution of matters, due to the need to negotiate on matters relating to restitution and compensation.¹⁵⁴

Stakeholders' views

- 3.55 A number of stakeholders – including the Victorian Aboriginal Legal Service, Victoria Police, Victoria Legal Aid and the Magistrates' Court of Victoria and VOCAT – commented on the potential resource implications of making restitution and compensation orders sentencing orders.¹⁵⁵
- 3.56 The Victorian Aboriginal Legal Service submitted that:
- Besides complicating the criminal proceeding – and burdening magistrates, defence and prosecution with an additional strata of law to contend with – the time and resources required to undertake such determinations would prove onerous on an already swamped justice system.¹⁵⁶
- 3.57 Victoria Police commented on the resource implications and impact on court workloads if a victim's loss or injury needed to be established to the criminal standard of proof, noting that:
- Ensuring the timely resolution of matters is particularly relevant to the high volume criminal jurisdiction of the Magistrates' Court, which has experienced a significant increase in its workload in recent years.¹⁵⁷
- 3.58 Victoria Police submitted that if police prosecutors were required to make submissions on a victim's loss:
- they would require particular training around the calculation of such loss as well as ongoing legal advice. This would impose significant resourcing implications on Victoria Police, particularly in circumstances where the victim's loss or injury is not easily quantified.¹⁵⁸
- 3.59 Other stakeholders also noted that there would be a very real logistical issue for prosecutors if they were to have the additional burden of preparing and then presenting to a tribunal, in an admissible form to the standard of proof, material that would not need to be led under the current system.¹⁵⁹

153. For further discussion of the resource implications of making restitution and compensation orders sentencing orders, see Sentencing Advisory Council (2018), above n 30, 99–101.

154. Ibid 100.

155. Submission 8 (Victorian Aboriginal Legal Service); Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal); Submission 17 (Victoria Legal Aid) 3; Submission 18 (Victoria Police).

156. Submission 8 (Victorian Aboriginal Legal Service) 8.

157. Submission 18 (Victoria Police) 1.

158. Submission 18 (Victoria Police) 2.

159. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

- 3.60 The Magistrates' Court of Victoria and VOCAT also raised concerns regarding the significant impact that making restitution and compensation orders sentencing orders could have on court hearing times. Their submission noted that making restitution and compensation orders sentencing orders would likely increase the number of matters that are contested. In addition:
- [i]n the event that compensation for pain and suffering/injury were to become the subject of a sentencing order, the defence will require the production of relevant evidence and the opportunity to cross-examine the victim. This, in itself, constitutes a substantial hearing ... [T]he impact on court hearing times would be significant. This reform would require proportional investment in additional magistrates and court resources to maintain current timeframes for finalisation of criminal matters.¹⁶⁰
- 3.61 Victoria Legal Aid submitted that a primary concern was the likely delays to the resolution of matters, due to a decrease in matters resolving to a plea and the possible cooling of charge negotiations as certain charges may be linked to certain injuries or financial losses.¹⁶¹
- 3.62 Representatives of the Supreme Court of Victoria stressed the importance of timely sentencing, noting that establishing a victim's injury or loss would delay and complicate the sentencing process. The large proportion of appeals against sentence would likely increase if there was an additional factor of financial reparation as a sentencing order.¹⁶²
- 3.63 Stakeholders noted that increased appeals, including appeals from the Magistrates' Court to the County Court of Victoria, would have resourcing implications for the higher courts.¹⁶³

Improving outcomes for victims

- 3.64 The Council's intent in developing its recommendations is to improve practical outcomes for victims.¹⁶⁴ Therefore, a key question for the Council is whether there would be improved outcomes for victims if restitution and compensation orders became part of an offender's sentence. The hybrid nature of restitution and compensation orders, incorporating elements of both criminal and civil processes, has a number of practical benefits for victims, including that:
- victims do not need to establish their loss before a separate judicial officer;
 - victims do not need to establish their loss to the criminal standard of proof (*beyond reasonable doubt*), but rather can satisfy the civil standard (*on the balance of probabilities*);
 - victims do not need to pay the costs associated with bringing a claim in a civil court; and
 - the process is faster and more streamlined than bringing a separate claim for civil damages.¹⁶⁵

160. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 4.

161. Submission 17 (Victoria Legal Aid) 2.

162. Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

163. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 4; Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018). The Council notes that at the time of writing, the Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018 (Vic), which abolishes *de novo* appeals from the Magistrates' Court and the Children's Court to the County Court, has been second read and may affect the resourcing requirements for appeals: Victoria, *Parliamentary Debates*, Legislative Assembly, 25 July 2018 (Martin Pakula, Attorney-General).

164. For further discussion of the Council's approach to the reference, see [1.38]–[1.43] above. See further Sentencing Advisory Council (2018), above n 30, 5.

165. This current process for making restitution and compensation orders is likely to be further improved by the recommendations of the Victorian Law Reform Commission: Victorian Law Reform Commission (2016), above n 1, 233–235, 237–240 (Recommendations 45, 47–48). For further discussion of the current system, see Sentencing Advisory Council (2018), above n 30, 11–23.

- 3.65 As discussed in the issues and options paper, many of the issues with the current system of restitution and compensation orders concern the difficult and complex nature of civil enforcement of the orders. Bringing restitution and compensation orders into the sentencing framework would not necessarily overcome these difficulties. The Council's proposed measures for improving practical outcomes for victims within the current system are discussed in Chapter 4.

Stakeholders' views

- 3.66 A number of stakeholders – including the Law Institute of Victoria, the Victorian Aboriginal Legal Service, Victoria Legal Aid, the Magistrates' Court of Victoria and VOCAT, Waller Legal, the Victims of Crime Consultative Committee and the Victim Survivors' Advisory Council – expressed concern that making restitution and compensation orders sentencing orders would not of itself improve outcomes or be beneficial for victims.¹⁶⁶
- 3.67 One of the Law Institute of Victoria's key concerns was that making restitution and compensation orders part of an offender's sentence would not necessarily generate better compensation outcomes for victims.¹⁶⁷ The Law Institute of Victoria submitted that issues with the current system would not be rectified through making the orders sentencing orders:
- Due to the limited resources of most offenders, this reform would not necessarily generate better compensation for victims. Indeed, in many cases, a lack of financial capital means there is no reasonable prospect of recovery. The [Law Institute of Victoria] recognises the importance of the Victims of Crime Assistance Tribunal (VOCAT) in these instances, and believes that VOCAT's powers to award compensation are a better way for victims to ensure that compensation payments are made.¹⁶⁸
- 3.68 The Law Institute of Victoria was of the view that 'improved enforcement of current orders is a more effective and efficient response to the underlying issues',¹⁶⁹ while Victoria Legal Aid submitted that there is:
- little evidence that making [the orders] sentencing orders would increase the number of compensation orders made or have any practical benefit to victims.¹⁷⁰
- 3.69 Similarly, the Victorian Aboriginal Legal Service noted that 'converting a compensation or restitution order to be part of sentence will not suddenly change the financial capacity of the offender to pay'.¹⁷¹
- 3.70 Stakeholders commented on the practical benefits that the current hybrid system brings for victims.¹⁷² Waller Legal stressed that from a practical perspective, the mechanisms under the *Sentencing Act 1991* (Vic) were an efficient and viable alternative to a common law claim, and that it is critical that they remain available to victims of crime.¹⁷³
- 3.71 A member of the Victims of Crime Consultative Committee said:
- It's really a civil form of proceeding, so I think it's better it stays there, because otherwise you are making it harder for the victim of crime.¹⁷⁴

166. Submission 8 (Victorian Aboriginal Legal Service) 5; Submission 14 (Law Institute of Victoria); Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 4; Submission 17 (Victoria Legal Aid); Meeting with Waller Legal (28 November 2017); Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018).

167. Submission 14 (Law Institute of Victoria) 5.

168. Submission 14 (Law Institute of Victoria) 5.

169. Submission 14 (Law Institute of Victoria) 1.

170. Submission 17 (Victoria Legal Aid) 2.

171. Submission 8 (Victorian Aboriginal Legal Service) 5.

172. Submission 13 (Waller Legal) 1; Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

173. Submission 13 (Waller Legal) 1.

174. Meeting with Victims of Crime Consultative Committee (27 February 2018).

- 3.72 Waller Legal submitted that a victim needed time to seek experienced legal advice and prepare an application for an order for restitution or compensation.¹⁷⁵ If restitution and compensation orders were to become part of sentencing, a victim may not have an appropriate amount of time to prepare an application for compensation for injury.¹⁷⁶ This may pose practical difficulties for victims and remove benefits of the current system.
- 3.73 Changing the orders to sentencing orders, which may require victims' losses to be established to the criminal standard of proof,¹⁷⁷ could mean a common law claim might become a better alternative for a victim to pursue compensation than attempting to satisfy the onerous standard of proof as to injuries or losses.¹⁷⁸
- 3.74 Victims may face considerable challenges in bringing claims for civil compensation against offenders, however. A counsellor advocate from Centre Against Sexual Assault (CASA) House described the process of making a civil claim for compensation as 'incredibly horrific and traumatic' for a victim, stating that 'it's actually been described to me as more horrific than the criminal system, because there is less protection'.¹⁷⁹ In this regard, the current system is preferable for some victims of crime, as protections available in the criminal trial process are afforded to a victim seeking to obtain an order for restitution or compensation following the criminal trial process.¹⁸⁰
- 3.75 Further, a number of stakeholders noted that making restitution and compensation orders sentencing orders could unduly raise victims' expectations.¹⁸¹ RMIT University's Centre for Innovative Justice noted that the *symbolism* of making restitution and compensation orders sentencing orders was likely to lead to victims being disappointed by orders that cannot be enforced due to the limited financial resources of the offender.¹⁸²

Conclusion on the desirability of restitution and compensation orders becoming sentencing orders

- 3.76 In light of the discussion above, including the submissions and comments from stakeholders, the Council considers that restitution and compensation orders should not become sentencing orders for the following reasons:
- The Council agrees with stakeholders that the potential risk to victim survivors and affected family members cannot be justified. Further, as examined in Chapter 4, the Council considers that there are better avenues to improve the outcomes for victims seeking to enforce orders for restitution or compensation that more appropriately balance the need to compensate victims with ensuring their safety.

175. Submission 13 (Waller Legal).

176. The extent of a victim's injuries, whether physical or psychiatric, may not be clear or may not yet have stabilised at the time of sentencing.

177. See discussion above at [3.22]–[3.38]; Sentencing Advisory Council (2018), above n 30, 93.

178. Submission 13 (Waller Legal) 1.

179. Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

180. For example, in a civil claim for damages, a plaintiff may be cross-examined directly by the defendant (if the defendant does not have legal representation). In contrast, in a criminal proceeding relating to sexual offending or family violence, there are limits on an accused personally cross-examining certain witnesses. In such cases, an accused may not personally cross-examine the complainant, family members of the complainant or the accused's own family, or any other witness that the court declares to be a 'protected witness'. For victims of family violence or sexual offending who seek compensation under the *Sentencing Act 1991* (Vic), these protections apply: *Criminal Procedure Act 2009* (Vic) ss 353, 356.

181. Meeting with Centre for Innovative Justice, RMIT University (4 April 2018); Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

182. RMIT University's Centre for Innovative Justice noted that raising victims' expectations was likely to cause additional harms, due to victims being disappointed by the discrepancy between any order made and the likelihood of enforcement: Meeting with Centre for Innovative Justice, RMIT University (4 April 2018).

- The Council considers that the evidentiary requirements necessary to establish restitution and compensation orders to the criminal standard of proof, including the risk of revictimisation and additional trauma for victims, outweigh any potential benefits of making those orders sentencing orders.
- The Council shares stakeholder concerns that making restitution and compensation orders sentencing orders would likely undermine the principle of equality before the law, and would likely create differential sentencing outcomes based solely on offenders' financial resources. The Council did not identify any practical or satisfactory solutions to this fundamental problem, including in examining approaches from those jurisdictions that treat restitution and compensation orders as sentencing orders.
- The Council shares stakeholder concerns that making restitution and compensation orders sentencing orders would likely have an adverse effect on disadvantaged and vulnerable offender groups. The Council considers the potential disproportionate impact on particular offender groups to be a further reason that it would be undesirable and inappropriate to make restitution and compensation orders sentencing orders in Victoria. In developing the recommendations in Chapter 4, the Council has had regard to the impact that changes to the current system of enforcing restitution and compensation orders may have on particular offender groups.
- The Council shares stakeholder concerns that there would likely be significant resource implications for a number of agencies. Further, in the absence of supporting evidence that such a change would have positive outcomes for victims, the significant resource implications for multiple agencies and the courts cannot be justified. Given current pressures, the criminal justice system is unlikely to be able to accommodate such an addition to the range of available sentencing orders.
- The Council agrees with stakeholders that there would be little practical benefit for victims who wish to receive financial reparation from an offender, and that reform is better directed at improving the enforcement of orders within the current system. The Council is of the view that there is insufficient evidence to justify the removal of the considerable benefits of the existing hybrid system, which incorporates aspects of criminal and civil procedures into the restitution and compensation order process.

3.77 In summary, and in light of the guiding principles discussed at [1.38], the Council considers that making restitution and compensation orders sentencing orders raises several insurmountable issues, both conceptual and practical, and therefore makes the following recommendation:

Recommendation 1: Restitution and compensation orders to remain ancillary orders

Restitution and compensation orders should remain ancillary orders that are made in addition to a sentence under the *Sentencing Act 1991* (Vic), and should not become sentencing orders.

Should the purposes of sentencing be expanded to include victims' financial reparation?

- 3.78 A secondary consideration for the Council, expressed in the terms of reference, is whether the purposes of sentencing should be expanded to include victims' financial reparation.
- 3.79 As stated at [3.2], these two questions are interrelated, because it would be incongruous to include victims' financial reparation as a purpose of sentencing but not create sentencing orders that could give effect to that purpose. Similarly, it would be incongruous to make restitution and compensation orders sentencing orders and not provide a rationale for their imposition in the purposes of sentencing. Of the jurisdictions examined by the Council, none had financial reparation as a purpose of sentencing without giving effect to that purpose through sentencing orders for financial reparation.
- 3.80 The overwhelming majority of stakeholders did not support an expansion of the purposes of sentencing;¹⁸³ only one stakeholder was in favour of doing so.¹⁸⁴ The Council has concluded that such a change is not desirable for the reasons discussed in this section. Given the link between the questions of whether restitution and compensation orders should become sentencing orders and whether the purposes of sentencing should be expanded to include victims' financial reparation, many of the submissions received by the Council did not independently address the question of whether the purposes of sentencing should be expanded. Instead, stakeholders considered this to be undesirable for the same reasons given in opposition to making the orders sentencing orders, as discussed above at [3.11]–[3.77].

The current purposes of sentencing

- 3.81 The Council's issues and options paper examined in detail the existing purposes of sentencing in Victoria (which do not include victims' financial reparation) and their theoretical underpinnings, alongside the way in which courts currently consider victims' interests and financial loss in the sentencing process. That paper also examined jurisdictions where victims' financial reparation is a purpose of sentencing.¹⁸⁵
- 3.82 The current purposes of sentencing in Victoria are just punishment, deterrence (both specific and general), rehabilitation, denunciation and community protection.¹⁸⁶ While one of the purposes of the *Sentencing Act 1991* (Vic) is 'to ensure that victims of crime receive adequate compensation and restitution', this is a purpose of the Act,¹⁸⁷ as opposed to a purpose for which a sentence can be imposed. As a result, compensation of a victims' loss or injury is not a purpose of sentencing in Victoria.

183. Submission 4 (X. Clark); Submission 5 (Domestic Violence Victoria); Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal); Submission 17 (Victoria Legal Aid). While the following stakeholders did not specifically discuss the purposes of sentencing, they expressly opposed making restitution and compensation orders sentencing orders: Submission 7 (Anonymous); Submission 9 (Women's Legal Service Victoria); Submission 10 (Anonymous); Submission 13 (Waller Legal); Submission 14 (Law Institute of Victoria); Submission 18 (Victoria Police).

184. Submission 2 (D. Hadden).

185. For an overview of these jurisdictions, see Sentencing Advisory Council (2018), above n 30, 72 (Table 10).

186. See overview at *ibid* 63; *Sentencing Act 1991* (Vic) ss 5(1)(a)–(e).

187. *Sentencing Act 1991* (Vic) s 1(h)(i), referring to *Sentencing Act 1991* (Vic) pt 4 ('Orders in addition to sentence').

Consideration of victims' losses in the sentencing process

- 3.83 Historically, the recognition and consideration of victims' rights in criminal punishment have been overlooked, only beginning to emerge in England in the eighteenth century.¹⁸⁸ Theories of criminal punishment have generally focused on the relationship between the offender and the state, rather than between the offender and the individual victim.¹⁸⁹ Crime has been perceived as having a public or communal element, rather than simply being a wrong against an individual.¹⁹⁰ As a result, the structure of the adversarial criminal trial process has limited the role of the victim and focused instead on the relationship between the offender and the state.¹⁹¹ Victims have generally not had a participatory role in the criminal process, and their involvement as a witness is limited by the rules of evidence, with testimony subject to cross-examination.¹⁹²
- 3.84 Despite the historical limitations that have been placed on the role of the victim in the criminal trial process, significant reforms are changing this role, and a number of developments have allowed victims to have a greater degree of participation within the criminal trial process.¹⁹³ The availability of restitution and compensation orders as part of the criminal trial process has been described as one reflection of the increased recognition of the interests of victims of crime.¹⁹⁴
- 3.85 As a result of these historical limitations, the sentencing process has also focused on the relationship between the offender and the state and on the punishment of an offender based on an assessment of the gravity of offending rather than the impact of the crime on a victim.¹⁹⁵ While this includes an assessment of the harm caused to a victim, it does not specifically address the needs of a victim arising out of the individual harm or loss caused by the offence.¹⁹⁶ Many of the purposes of sentencing are derived from utilitarian theories of punishment directed at the offender (and the *common good* of the community at large),¹⁹⁷ rather than being directed towards recognition or consideration of a victim's consequential needs or losses.¹⁹⁸
- 3.86 The Victorian Law Reform Commission (VLRC) has noted that it is only comparatively recently that countries such as Australia have placed greater emphasis on restoration and reparation as purposes of sentencing, arguably reflecting the 'increasing recognition of the rights and needs of the victim'.¹⁹⁹

188. Matthew Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (2012) 71(1) *Cambridge Law Journal* 86, 88.

189. Sandra E. Marshall and Antony Duff, 'Criminalisation and Sharing Wrongs' (1998) 11(1) *Canadian Journal of Law and Jurisprudence* 7, 12; Adam Webster, 'Expanding the Role of Victims and the Community in Sentencing' (2011) 35 *Criminal Law Journal* 21.

190. Sandra E. Marshall, 'Victims of Crime: Their Station and Its Duties' (2004) 7(2) *Critical Review of International Social and Political Philosophy* 104, 110; Antony Duff, *Punishment, Communication and Community* (2001) 63; Antony Duff et al., *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (2007) 214–215; Matt Matravers, 'The Victim, the State, and Civil Society', in Anthony Bottoms and Julian V. Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (2010) 1–2.

191. Aldo S. Raineri, 'Re-integrating the Victim into the Sentencing Process: Victim Impact Statements as an Element of Offender Disposition' (1995) 11 *QUT Law Review* 79, 80–81; Webster (2011) above n 189, 27.

192. See Edna Erez, *Victim Impact Statements*, Trends and Issues in Crime and Criminal Justice no. 33 (1991) 1. See further Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Consultation Paper* (2015).

193. See Edna Erez and Julian Roberts, 'Victim Participation in the Criminal Justice System', in Robert C. Davis et al. (eds), *Victims of Crime* (3rd ed., 2007) 277–297.

194. *RK v Mirik and Mirik* (2009) 21 VR 623, 654.

195. Freiberg (2014), above n 104, 182, 269.

196. See Sentencing Advisory Council (2018), above n 30, 66.

197. See *ibid* 64.

198. Leslie Sebba, 'The Victim's Role in the Penal Process: A Theoretical Orientation' (1982) 30(2) *The American Journal of Comparative Law* 217, 229.

199. Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process: History, Concepts and Theory*, Information Paper no. 1 (2015) 20, citing Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed., 2010) 92–93.

- 3.87 The emergence of the victims' rights movement has seen victims' loss or injury, although not a purpose of sentencing, now considered in the sentencing process in Victoria in a number of ways.²⁰⁰ How recognition of such rights ought to interact with the other purposes of sentencing is somewhat unclear.²⁰¹

Victims' losses currently a factor to be considered in sentencing

- 3.88 Distinct from the purposes of sentencing are the factors outlined in section 5(2) of the *Sentencing Act 1991* (Vic) to which a court must turn its attention when sentencing an offender. These factors include, but are not limited to:
- the impact of the offence on any victim;
 - the personal circumstances of any victim of the offence; and
 - any loss, injury or damage resulting directly from the offence.²⁰²
- 3.89 These factors may bear upon the relevance of certain purposes of sentencing. For example, an offence with grave consequences may highlight the importance of achieving community protection through the sentencing process.
- 3.90 In addition to prosecution submissions, information on these matters may be provided to the court through the Victim Impact Statement.²⁰³ The Victim Impact Statement allows for a victim to participate in the sentencing process and to explain the impact of the offending in a way that has not traditionally occurred.²⁰⁴

Making victims' financial reparation a purpose of sentencing

- 3.91 It was noted in the Council's issues and options paper that an expansion of the purposes of sentencing to include victims' financial reparation could be inconsistent with the current purposes for which a sentence can be imposed, which are largely utilitarian in nature.²⁰⁵ This is because a purpose directed at financially compensating a particular victim may elevate the punishment of the offender based solely on the consequences of the crime for that particular victim, as opposed to considering the prosecution of the crime and sentencing of the offender from the perspective of the state. Such a purpose of sentencing would also make it difficult to achieve parity of sentence for similar offenders convicted of like offending.
- 3.92 If financial reparation were to become a purpose of sentencing, the sentencing exercise may be radically reorientated, requiring a court to focus on the consequential needs of the victim of crime and their particular losses or injury, as well as the financial capacity of the offender. While there is generally a link between the harm caused and the needs of the victim for financial compensation or restitution, this may not always be the case. Linking punishment to a victim's individual financial needs, rather than to the gravity of the offender's conduct or the harm caused, would be a substantial change to the sentencing exercise.²⁰⁶

200. Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (2010); Edna Erez and Julian Roberts, 'Victim Input at Sentencing', in Gerben Bruinsma and David Weisburd (eds), *Encyclopaedia of Criminology and Criminal Justice* (2014) 5425.

201. Robert Black, 'Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing' (1994) 39(1) *The American Journal of Jurisprudence* 225.

202. *Sentencing Act 1991* (Vic) s 5(2).

203. *Sentencing Act 1991* (Vic) s 8L. The victim's injuries or loss may also be put before the court through other aspects of the criminal process, such as through the prosecution opening. One of the purposes of the Victim Impact Statement is a therapeutic one in allowing victims to communicate how they have been affected and 'tell their story': Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria* (2009) 9.

204. See Erez (1991), above n 192.

205. See Sentencing Advisory Council (2018), above n 30, 67.

206. See further New South Wales Law Reform Commission, *Report 139: Sentencing* (2013) 401–403. The New South Wales Law Reform Commission previously rejected an expansion of the purposes of sentencing to include reparation and restoration because they were ancillary aspects of criminal procedure that were sufficiently accommodated within the system.

- 3.93 A victim's loss can be multifaceted, including factors such as a loss of trust, privacy and control over one's life, and loss of meaning and self-esteem. Victims can have greatly differing responses and experiences following criminal offending.²⁰⁷ Victims are not a homogenous group. The experiences and needs of victims depend on 'personal factors such as age, gender, ethnicity, socio-economic status and health; the type of crime; the seriousness of the crime; the victim's relationship with the offender; and the victim's interactions with authorities'.²⁰⁸
- 3.94 Fundamentally, if the purposes of sentencing required a court to consider the losses of an individual victim, this would necessarily lead to differential sentencing based on the needs of an individual victim, rather than the objective gravity of offending.
- 3.95 Similarly, expanding the purposes of sentencing to include victims' financial reparation could also mean that sentencing outcomes could be determined by an offender's capacity to pay restitution or compensation. In the same way that making restitution and compensation orders sentencing orders could impact on equality before the law, expanding the purposes of sentencing to include financial reparation could see differential sentencing outcomes depending on the financial circumstances of an offender or the individual circumstances of a victim.
- 3.96 In addition, the Council notes that elevating the financial reparation of a victim to the status of a purpose of sentencing may have the effect of privileging the pecuniary needs of victims at the expense of recognising other types of loss and harm. Monetary compensation will not necessarily address a victim's emotional and psychological needs.²⁰⁹ Furthermore, the Council heard that some victims preferred sentencing dispositions directed at punishment of the offender, and would not desire financial compensation if it were to constitute part of an offender's sentence or reduce an offender's custodial sentence.²¹⁰

Stakeholders' views

- 3.97 As noted at [3.80], many of the submissions received by the Council did not independently address the question of whether the purposes of sentencing should be expanded to include victims' financial reparation. Instead, stakeholders addressed the key question of whether restitution and compensation orders should become sentencing orders, and indicated that expanding the purposes of sentencing would be undesirable for the same reasons that it would be undesirable to make restitution and compensation orders sentencing orders.
- 3.98 Domestic Violence Victoria, the Magistrates' Court of Victoria and VOCAT and Victoria Legal Aid specifically opposed an expansion of the purposes of sentencing.²¹¹ Only one stakeholder supported the introduction of financial reparation as a purpose of sentencing.²¹²

207. Victims' Commissioner for England and Wales, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (2016) 8; Sam Garkawe, 'Restorative Justice from the Perspective of Crime Victims' (1999) 15 *Queensland University of Technology Law Journal* 40, 41–42; Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018); Submission 12 (Centre for Innovative Justice, RMIT University) 2.

208. Victims' Commissioner for England and Wales (2016), above n 207, 8. The Australian Institute of Criminology has stated that 'the impact of crime victimization varies with the individual. It can be short- or long-lasting; some may find the psychological impact hardest; for others it may be the physical injuries. Research continues to prove that each victim will react differently according to their life experience': Bree Cook et al., *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia*, Research and Public Policy Series no. 19 (2009) x. Studies have shown that compensation is of higher importance to victims of crimes relating to property than victims of personal violence: Annemarie ten Boom and Karlijn F. Kuijpers, 'Victims' Needs as Basic Human Needs' (2012) 18(2) *International Review of Victimology* 155, 162, citing M. C. Baumann and W. Schadler, 'Victims of Reported Crime – Their Expectations, Needs and Perspectives. An Inquiry of Crime Victims Concerning Victim Protection, Victim Support and Mediation', in Günther Kaiser et al. (eds), *Victims and Criminal Justice* (1991) 3–27.

209. Heather Strang and Lawrence W. Sherman, 'Repairing the Harm: Victims and Restorative Justice' (2003) 1 *Utah Law Review* 15, 25–26.

210. Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Victims of Crime Consultative Committee (27 February 2018).

211. Submission 5 (Domestic Violence Victoria); Submission 17 (Victoria Legal Aid); Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal).

212. Submission 2 (D. Hadden).

- 3.99 Victoria Legal Aid expressed concern that the focus of sentencing would be *recast* if the purposes of sentencing were expanded to include victims' financial reparation, stating that:
- including compensation as a sentencing purpose would recast the focus of sentencing away from the offenders' actions and consequences to a focus on individual victims, and may be detrimental to the development of sentencing in Victoria. Victoria Legal Aid supports the current *Sentencing Act* framework, in which compensation is among the purposes of the overall Act (section 1(i)), but not of the sentencing exercise itself.²¹³
- 3.100 A member of the Victim Survivors' Advisory Council indicated that victims would not necessarily want the focus of the sentencing exercise to shift towards financial reparation in this way, suggesting that it was important that restitution and compensation are 'not taking away from absolute sentencing, which I imagine for most people is the most important thing to get justice'.²¹⁴
- 3.101 The Magistrates' Court of Victoria and VOCAT submitted that expanding the purposes of sentencing may only have symbolic value for victims, stating:
- [o]n one view, expanding the purpose[s] of sentencing to include financial reparation has the potential to benefit victims and the community. Expanding what 'punishment' entails may strengthen the deterrent effect in sentencing. [Restitution and compensation orders] as sentencing orders could provide victims with an up-front statement of the reparation they are entitled to receive, contemporaneous with the sentencing of the offender. For some victims, this may be experienced as public recognition of the loss they have suffered.
- However, this 'certainty' may be largely symbolic and is unlikely to deliver practical benefits to most victims. It does not address the challenges and uncertainty related to enforcement action against offenders with no means to pay compensation. Further, it will not reduce system complexity or risks pertaining to re-traumatisation of or further violence to victims.²¹⁵
- 3.102 One individual submitted that they did not support an expansion of the purposes of sentencing because 'compensation should be over and above sentence',²¹⁶ while another was opposed to such an expansion because they considered victims' reparation to 'almost be part of rehabilitation'.²¹⁷
- 3.103 The Council also heard that a focus on financial compensation could overshadow other recognition that a victim may receive.²¹⁸

The Council's view

- 3.104 In light of the above considerations and the lack of stakeholder support, the Council does not believe that the purposes of sentencing should be expanded to include victims' financial reparation.
- 3.105 The Council is of the view that the arguments against making restitution and compensation orders sentencing orders, discussed above at [3.11]–[3.77], outweigh those in favour of an expansion of the purposes of sentencing.

213. Submission 17 (Victoria Legal Aid) 1–2.

214. Meeting with Victim Survivors' Advisory Council (27 March 2018).

215. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 4–5.

216. Submission 7 (Anonymous).

217. Submission 4 (X. Clark).

218. RMIT University's Centre for Innovative Justice commented, in the context of discussing restorative justice conferencing, that: 'if [victims] are going in thinking "I'll get heaps of money, this will be fantastic", and then they realise "oh, the offender has no capacity to pay", then does that disappointment just drown out other potential benefits they could get? [It may prevent] the ability to engage in a meaningful dialogue': Meeting with Centre for Innovative Justice, RMIT University (4 April 2018).

- 3.106 The benefits for victims in receiving recognition of their financial losses through such a purpose of sentencing are likely to be largely symbolic. Sentencing orders for financial reparation are likely to create a false expectation for victims that they are more likely to receive compensation, which, given the large proportion of offenders without financial resources, is not realistic (see at [1.39]–[1.43], [4.7]–[4.22]).
- 3.107 Victims' financial reparation is best achieved through the existing framework of restitution and compensation orders, sitting outside the purposes for which sentences are imposed, as ancillary orders, as well as through an appropriately funded and accessible state-funded compensation system.²¹⁹ Expanding the purposes of sentencing could lead to differential sentencing outcomes depending on an offender's financial capacity.
- 3.108 In addition, the current legislative framework allows for financial (and other) losses sustained by victims to be appropriately considered by sentencing courts as a factor in determining sentence.

The role of restorative justice conferencing

- 3.109 The term *restorative justice* applies to procedures that operate as an alternative to, or in addition to, the criminal trial process, whereby victims and offenders actively participate in processes focused on victim healing, holding the offender to account, community restoration, repairing harm and loss, and repairing damaged relationships.²²⁰ Restorative justice processes attempt to repair the harms caused by criminal behaviour and provide healing for the victim, offender and the community in a way that criminal justice systems have traditionally been unable to, due to their emphasis on punishment of the offender over dialogue and repair.²²¹
- 3.110 The value of restorative justice processes is said to be found in the fact that barriers to direct and open communication between an offender and a victim are removed in a way that cannot occur within the constraints of the formal criminal trial or sentencing process.²²² Victims are able to 'participate and give their own account in an informal setting, to seek reparation from the offender and to pursue the truth'.²²³
- 3.111 In Victoria, the term *restorative justice* has been applied to a range of different justice interventions and programs.²²⁴ There is no legislated restorative justice process available in Victoria for indictable crimes committed by adults.²²⁵
- 3.112 In its 2016 report, the VLRC recommended the phased introduction of restorative justice conferencing for indictable offences in Victoria, to be available both as a pre-sentence option following a plea of guilt and as an option in connection with applications for restitution or compensation after a plea of guilt.²²⁶ The report suggests that, initially, the scheme should not apply to sexual violence and family violence offences.²²⁷

219. See [2.11]–[2.14] for discussion of the Victorian Law Reform Commission's review of VOCAT.

220. Victorian Law Reform Commission (2016), above n 1, 175; RMIT University, Centre for Innovative Justice, *Restorative Justice Conferencing Pilot Program: Restorative Justice for People Affected by a Serious Motor Vehicle Collision (Information for Victims)* (n.d.) 2; Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395, 400.

221. Masahiro Suzuki and William Wood, 'Restorative Justice Conferencing as a "Holistic" Process: Convenor Perspectives' (2017) 28(3) *Current Issues in Criminal Justice* 277; Natalie Hogan, 'Restorative Justice and Its Implications on the Criminal Justice System' (Honours Thesis, Indiana University, 2013); Submission 12 (Centre for Innovative Justice, RMIT University) 5.

222. See for example Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System*, Research and Public Policy Series no. 127 (2014) iv.

223. Jonathan Doak, *Victim Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008) 251.

224. See Victorian Law Reform Commission (2016), above n 1, 175–177; Sentencing Advisory Council (2018), above n 30, 69–70.

225. The Children's Court can refer young offenders to group conferencing, but victim consent or participation is not a precondition: *Children, Youth and Families Act 2005* (Vic) s 415.

226. The VLRC also recommended introducing restorative justice conferencing where the Director of Public Prosecutions makes a decision to discontinue a prosecution: Victorian Law Reform Commission (2016), above n 1, 194.

- 3.113 The Council's issues and options paper discussed the role of restorative justice conferencing and its relevance for the payment of restitution and compensation orders, noting the New Zealand system where restorative justice conferencing plays a large role in the financial reparation of victims.²²⁸

Stakeholders' views

- 3.114 The Council received feedback from stakeholders that restorative justice conferencing can play a key role for victims in terms of acknowledging the harm and loss arising out of criminal offending in ways that traditional sentencing cannot.²²⁹
- 3.115 Some stakeholders, however, expressed the view that restorative justice conferencing should not be framed as a means of obtaining restitution and compensation.²³⁰ Doing so could have the potential to overshadow the possible benefits that such processes can have for a victim and detract from a victim's broader needs.
- 3.116 Stakeholders noted that financial reparation could be a positive outcome of restorative justice processes, but it should not be the primary focus of restorative justice, nor should it be put forward as an incentive for a victim's participation in a restorative justice process. RMIT University's Centre for Innovative Justice, the Victorian Aboriginal Legal Service and Jesuit Social Services all discussed the role of restorative justice processes in their submissions to the Council.²³¹
- 3.117 RMIT University's Centre for Innovative Justice submitted that restorative justice has the potential to meet many of the justice needs of victims, operating alongside the conventional criminal justice system as a complementary process. However, RMIT University's Centre for Innovative Justice raised concerns regarding the use of restorative justice conferencing to reach agreements for the financial reparation of victims, stating:
- [a]ny attempt to re-frame restorative justice processes as a new means of achieving financial redress for victims would be of concern to the [Centre for Innovative Justice], since framing restorative justice in this way would have the effect of limiting its desirable qualities of openness and flexibility.²³²
- 3.118 RMIT University's Centre for Innovative Justice also submitted that restorative justice processes can have benefits in providing opportunities for participation, voice, validation, vindication, offender accountability and prevention,²³³ but cautioned against framing restorative justice as a way to achieve financial redress:

227. Victorian Law Reform Commission (2016), above n 1, 194. The Royal Commission into Family Violence recommended the development of a framework and pilot program for restorative justice options for victim survivors of family violence: State of Victoria, Royal Commission into Family Violence (2016), above n 38, 78. The Department of Justice and Regulation and Court Services Victoria are undertaking implementation of this recommendation through the Family Violence Restorative Justice Project: Family Violence Restorative Justice Project (2017), above n 86.

228. Sentencing Advisory Council (2018), above n 30, 69–70.

229. Meeting with Centre for Innovative Justice, RMIT University (4 April 2018); Submission 3 (Jesuit Social Services) 1–2; Submission 8 (Victorian Aboriginal Legal Service) 8–9.

230. Meeting with Centre for Innovative Justice, RMIT University (4 April 2018); Meeting with Jesuit Social Services (15 May 2018).

231. Submission 3 (Jesuit Social Services) 1; Submission 8 (Victorian Aboriginal Legal Service) 8–9; Submission 12 (Centre for Innovative Justice, RMIT University) 2–7.

232. Submission 12 (Centre for Innovative Justice, RMIT University) 5.

233. Kathleen Daly has conceptualised five themes for what victims are looking for in responses to crime: participation, voice, validation, vindication, offender accountability: Kathleen Daly, 'Sexual Violence and Victims' Justice Interests', in Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (2017) 108–139. The sixth theme, prevention, has been conceptualised by the Centre for Innovative Justice arising out of their restorative justice work: Submission 12 (Centre for Innovative Justice, RMIT University) 3.

Framing restorative justice through the lens of achieving restitution or compensation outcomes may compromise its ability to deliver its other potential benefits for victims. On the one hand, it may unduly focus victims towards achieving pecuniary outcomes without allowing them the capacity to identify the range of needs that they may have, and which the process may be able to address. It may also compound some of the harms associated with the crime, since framing restorative justice as an opportunity for financial redress may raise – and yet still fail to meet – victims' expectations of achieving such redress.²³⁴

- 3.119 RMIT University's Centre for Innovative Justice emphasised that to view financial reparation as the purpose of restorative justice conferencing, or to highlight it as a purpose of these conferences, could mean that the broad range of potential benefits of restorative justice for victims could be lost.²³⁵
- 3.120 The Victorian Aboriginal Legal Service supported a model of restorative justice whereby mediation could be used between victims and offenders to come to agreements on restitution and compensation.²³⁶ The Victorian Aboriginal Legal Service was of the view that circle sentencing, and mediation in particular, could be therapeutic for both victims and offenders.²³⁷ The Victorian Aboriginal Legal Service commented that, while some victims may not want financial compensation, those victims might be amenable to a mediation process due to other benefits, stating:
- [The Victorian Aboriginal Legal Service] supports a model of round-table mediation by which victim and offender – along with the appropriate supports and qualified professional mediators – work together to arrange a [reparation] plan. The agreement of such a mediation process could then be presented to the court ... Naturally, not all victims would be willing to participate in such a process, but evidence from other jurisdictions suggests that mediation processes based on the principles of restorative justice can have positive outcomes for both victim and offender.²³⁸
- 3.121 Jesuit Social Services also supported the development of appropriate referral pathways for victims to access restorative justice conferences, but noted that 'restorative justice should not be automatically part of the victims' compensation process, given that most victims want financial assistance to be dealt with quickly'.²³⁹
- 3.122 Jesuit Social Services submitted that increased access to restorative justice conferences would provide an opportunity for increased victim satisfaction and therefore supported dedicated funding to ensure a readily available referral pathway.²⁴⁰ It stated that restorative justice conferencing is cost effective, can increase victim satisfaction and can ultimately lead to enhanced community safety.²⁴¹

The Council's view

- 3.123 The Council agrees with stakeholders that restorative justice processes play an important role in complementing the traditional criminal justice system, and can provide significant benefits for victims, one part of which may be an agreement concerning financial reparation.

234. Submission 12 (Centre for Innovative Justice, RMIT University) 5.

235. Submission 12 (Centre for Innovative Justice, RMIT University) 8.

236. Submission 8 (Victorian Aboriginal Legal Service) 8.

237. Submission 8 (Victorian Aboriginal Legal Service) 9.

238. Submission 8 (Victorian Aboriginal Legal Service) 10.

239. Submission 3 (Jesuit Social Services) 2.

240. Submission 3 (Jesuit Social Services) 2.

241. Meeting with Jesuit Social Services (15 May 2018); Email correspondence with Jesuit Social Services (19 July 2018). Jesuit Social Services noted that a 2010 KPMG independent evaluation of young people who completed a group conference between 2007 and 2009 found that more than 80% of participants had not reoffended two years later (compared with 57% for the comparison group of young people who had been placed on probation or on a youth supervision order). This study also found that restorative justice conferencing is more cost-effective than keeping a young person in detention: KPMG, *Department of Human Services: Review of the Youth Justice Conferencing Program Final Report* (2010) 59–63. Jesuit Social Services also noted that a number of evaluations have shown that group conferencing achieves very high rates of victim satisfaction: Larsen (2014), above n 222, 26–27; Ministry of Justice, New Zealand, *Restorative Justice Victim Satisfaction Survey – Research Report* (2016) 10–25.

- 3.124 The Council is of the view, however, that financial reparation should not be framed as a purpose of restorative justice conferencing, as to do so would likely detract from the non-pecuniary benefits that such processes can provide. The Council supports the development of appropriate referral pathways to restorative justice processes, and believes that restorative justice can produce positive outcomes for victims of crime.²⁴² However, restorative justice processes are not the means through which financial reparation ought to be sought for the majority of victims of crime. In addition, there are certain types of offending that may not be suitable for restorative justice conferencing.²⁴³
- 3.125 The Council considers that, while restorative justice conferencing can play a key role in restoring harm and loss, it does not address practical difficulties associated with the current system of restitution and compensation orders in Victoria.

Should restitution and compensation orders be enforced in the manner that fines are enforced?

- 3.126 The terms of reference asked the Council to consider the question of how restitution and compensation orders should be enforced within the broader question of whether the orders should be treated as sentencing orders (see further [1.3]–[1.8]).
- 3.127 If the orders were to become sentencing orders, it follows that they should be enforced by the state in the same way as other sentences imposed on offenders by the courts. If the orders remain ancillary to the sentence imposed on an offender, the orders should not be enforced in the manner that fines are enforced, as this would constitute further punishment that is not taken into account in the sentencing process.
- 3.128 Therefore, in considering whether restitution and compensation orders should become sentencing orders, it was necessary for the Council to consider whether enforcement of the orders in the same manner that fines are enforced was desirable.

Stakeholders' views

- 3.129 There was significant stakeholder opposition to restitution and compensation orders becoming sentencing orders because of the negative consequences that would follow if the orders were enforced in the manner that fines are enforced. A number of stakeholders – including the Women's Legal Service Victoria, the Magistrates' Court of Victoria and VOCAT, the Victorian Aboriginal Legal Service, the Law Institute of Victoria and Victoria Police – raised concerns regarding the negative consequences of enforcing restitution and compensation orders in the manner that fines are enforced, if the orders were to become sentencing orders.²⁴⁴
- 3.130 The Magistrates' Court of Victoria, VOCAT and the Women's Legal Service Victoria noted the recent changes to the enforcement of fines in Victoria, and the efforts to remove the burden of enforcement of fines from the courts.²⁴⁵

242. Submission 12 (Centre for Innovative Justice, RMIT University); Submission 8 (Victorian Aboriginal Legal Service); Meeting with Jesuit Social Services (15 May 2018).

243. For example, where there are power imbalances between a victim and a perpetrator, it may not be appropriate for restorative justice conferencing to occur: Meeting with Centre for Innovative Justice, RMIT University (4 April 2018). However, it is noted that following a recommendation of the Victorian Royal Commission into Family Violence, restorative justice conferencing is being piloted in the context of some family violence offending: see further [2.38].

244. Submission 8 (Victorian Aboriginal Legal Service) 5; Submission 9 (Women's Legal Service Victoria) 1; Submission 14 (Law Institute of Victoria) 3; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6; Submission 18 (Victoria Police) 3.

245. Submission 9 (Women's Legal Service Victoria) 1; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6. The Women's Legal Service Victoria noted that increasing the numbers of orders to be enforced through making restitution and compensation orders sentencing orders would be counterintuitive, given recent reforms to the fines system: Submission 9 (Women's Legal Service Victoria) 1.

- 3.131 The Magistrates' Court of Victoria and VOCAT also submitted that any changes to the enforcement of restitution and compensation orders should be consistent with conceptual underpinnings of the changes made to the enforcement of court fines in Victoria.²⁴⁶
- 3.132 The Victorian Aboriginal Legal Service expressed concern that enforcement of the orders in the manner that fines are enforced would have 'disastrous' consequences for Aboriginal and Torres Strait Islander peoples:
- converting such orders to an enforceable state fine would ... compound debt, further entrench poverty and then place Aboriginal and Torres Strait Islander people in a position where contact with the criminal justice system would increase via unpaid fines, potentially necessitating sheriffs' involvement, possible community service and even jail.²⁴⁷
- 3.133 The Law Institute of Victoria submitted that 'there is no clear evidence from any jurisdiction which currently has restitution or compensation orders as sentencing orders, that enforcing the orders the way fines are enforced improves victim compensation'.²⁴⁸ The Law Institute of Victoria expressed concern that breach of such a sentencing order would depend on capacity to pay, with a 'risk of unintended consequences for people who don't have capacity to pay'.²⁴⁹
- 3.134 Stakeholders noted that if an offender cannot pay an order for restitution or compensation, the consequences of non-payment (such as community service or even further imprisonment),²⁵⁰ would not be of benefit to victims.²⁵¹
- 3.135 Only one stakeholder was in favour of restitution and compensation orders becoming sentencing orders enforceable in the manner that fines are enforced, noting that they 'would like to see them in lieu of or at least on par with, fines'.²⁵²

The Council's view

- 3.136 Given that the Council has concluded that it would not be desirable to make restitution and compensation orders sentencing orders, it is neither desirable nor appropriate to enforce restitution and compensation orders in the same way as fines. As discussed in Chapter 4, the Council has concluded that the Victorian Government should consider empowering a state agency to undertake enforcement of restitution and compensation orders through civil mechanisms, at the election of a victim of crime who is a natural person.
- 3.137 As the Council has concluded that the orders should not become sentencing orders, it is not appropriate to treat the orders as fines for the purposes of enforcement, as this would create a further punitive burden on the offender that is not acknowledged in the offender's sentence.

246. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6.

247. Submission 8 (Victorian Aboriginal Legal Service) 5.

248. Submission 14 (Law Institute of Victoria) 3.

249. Submission 14 (Law Institute of Victoria) 4.

250. For example, since 1 July 2017, work and development permits have allowed eligible debtors to work off their infringements through unpaid work, courses, medical treatment, drug and alcohol counselling or mentoring: *Fines Reform Act 2014* (Vic) pt 2A.

251. Victoria Police noted that 'in circumstances where the offender serves further imprisonment time or undertakes community service as a result of default, there will be no direct benefit for the victim in terms of recompense': Submission 18 (Victoria Police) 3; Justice Connect stated that 'the reality is that community work or exposure of risk to imprisonment of people who are judgment proof really does nothing to repair the financial loss of victims': Meeting with Justice Connect (18 April 2018). See also Kate Warner and Jenny Gawlik, 'Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice' (2003) 36(1) *Australian & New Zealand Journal of Criminology* 60, 67.

252. Submission 4 (X. Clark).

Should there be a presumption in favour of making restitution and compensation orders?

3.138 In considering the question of whether restitution and compensation orders should become sentencing orders, the Council has also been asked to advise whether there should be a presumption in favour of courts making such orders.

3.139 As noted in Chapter 2, in its 2016 report, the VLRC examined the victim's role in obtaining restitution and compensation orders against offenders (for the benefit of individual victims), and made a number of recommendations aimed at improving the processes and procedures for restitution and compensation orders. Those recommendations included:

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.

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.²⁵³

3.140 Under the current provisions, a court may make a restitution order for property loss and a compensation order for property loss on its own motion, or on the application of the prosecution or the person seeking compensation.²⁵⁴ A court may only make a compensation order for property loss on its own motion if the person in whose favour the order is to be made does not object to the order; and the court has given the offender the opportunity to be heard in respect of the order.²⁵⁵

3.141 A court can only make a compensation order for injury on the application of the person who has suffered an injury as a result of the offence.²⁵⁶

3.142 The VLRC's recommendation was that these powers be made consistent, empowering courts to make restitution orders for property loss and compensation orders for both property loss and injury on its own motion. The VLRC also recommend that courts be required to make inquiries as to whether an order for restitution or compensation will be made, which will provide an additional mechanism to ensure that victims are notified of their rights to seek restitution or compensation following the sentencing process.²⁵⁷

253. Victorian Law Reform Commission (2016), above n 1, xviii.

254. *Sentencing Act 1991* (Vic) ss 84, 86.

255. *Sentencing Act 1991* (Vic) s 86(1B).

256. *Sentencing Act 1991* (Vic) s 85B(1).

257. The Council recommends that the Victims of Crime Commissioner establish a working group to ensure that consistent and accurate information is provided to victims of crime on the compensation avenues: see further [4.23]–[4.45].

The Council's view

- 3.143 The Council has concluded that restitution and compensation orders should not become sentencing orders, and that there should not be a presumption in favour of making the orders as sentencing orders.
- 3.144 Further, the Council similarly does not believe there should be a presumption in favour of making the orders as ancillary orders. The Council supports the VLRC's recommendation in relation to a consistent approach to the powers of courts in making restitution and compensation orders. However, the Council notes that caution should be exercised in relation to making compensation orders without consideration of the victim's views. The Council has heard from a range of stakeholders, particularly from the family violence sector, on the need for victims to have control over legal processes that may place them at risk.²⁵⁸
- 3.145 The Council's recommendations in relation to the provision of information to victims on their entitlements to restitution and compensation (Recommendation 2, see [4.23]–[4.45]), and in relation to the review of policies and procedures of prosecutorial agencies (Recommendation 3, see [4.46]–[4.91]), aim to ensure that victims are informed of their entitlements, and that victims receive appropriate support and referrals in relation to the exercise of these rights.
- 3.146 The Council considers that it is preferable that the orders remain made by application, or otherwise at the court's discretion, provided such a course is not opposed by a victim.

Minority view

- 3.147 A Council Director considered that there should be a presumption in favour of making restitution and compensation orders for property loss arising out of offences of dishonesty, unless the victim elects not to seek an order from the court. That Director considered that this approach would promote victims' financial reparation.

258. Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Domestic Violence Victoria (11 April 2018).

4. Improving payment and enforcement rates of restitution and compensation orders

Overview

- 4.1 As discussed in Chapter 3, the Council recommends that restitution and compensation orders should not be made sentencing orders in Victoria. However, the Council considers that there are a number of reforms that may improve the current system for making and enforcing restitution and compensation orders in Victoria, while still keeping the orders ancillary to an offender's sentence.
- 4.2 No reforms to making or enforcing restitution and compensation orders are likely to overcome the fundamental difficulty of many, if not most, offenders having limited capacity to pay such orders.²⁵⁹ Consequently, the Council acknowledges that restitution and compensation orders are only one element of a broader system intended to provide adequate and timely compensation to victims of crime. Such a system will necessarily involve a state-based compensation regime, as well as other available compensation avenues (where applicable),²⁶⁰ alongside options for victims to seek compensation directly from the offender.
- 4.3 The coordination of victims' reparation is a responsibility that is shared across a number of government agencies, and there are several reforms currently being undertaken to improve the provision of financial and other support to victims of crime (see Chapter 2).
- 4.4 Consistent with – and necessarily confined by – the terms of reference, this chapter presents the Council's recommendations on:
 - improved provision of information to victims;
 - the review of policies and training to ensure consistent use of current powers to investigate and restrain alleged offenders' assets and to secure them for the purposes of meeting any future order for restitution or compensation;
 - consideration of state enforcement of restitution and compensation orders on behalf of victims (who are natural persons) through civil enforcement mechanisms, by the Department of Justice and Regulation's Infringement Management and Enforcement Services or by another specialist enforcement agency; and
 - consideration of the establishment of a specialist victims' legal service.
- 4.5 The Council's recommendations aim to strengthen the system for making and enforcing restitution and compensation orders, while affirming their status as *hybrid* orders, involving elements of both criminal and civil law. The recommendations aim to improve the outcomes for victims of crime when seeking, obtaining and enforcing restitution and compensation orders in Victoria.

259. See further [4.12]–[4.22]. See also Sentencing Advisory Council (2018), above n 30, 38–39.

260. Examples include the capacity to take civil action for damages against a third party, and any entitlement of the victim to financial reparation under a scheme such as the National Redress Scheme. On the latter, see Department of Social Services (Cth) (2018), above n 62.

- 4.6 The recommendations are presented sequentially, beginning with recommendations that propose improvements to processes that occur prior to a court making an order for restitution or compensation, followed by recommendations that intend to increase payment of the orders, and consideration of state enforcement of the orders through civil mechanisms. The final recommendation addresses victims' legal needs, which extend beyond the restitution and compensation order scheme.

Focus on offenders with some financial resources

- 4.7 Adapting the typology used in the Council's *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria: Report*, there are four broad categories of offenders subject to restitution and compensation orders, namely those who:
- can't pay (offenders who have no capacity to pay);
 - will pay (offenders who have capacity and are willing to pay);
 - might pay (offenders who have capacity but may require encouragement to pay); and
 - won't pay (offenders who have capacity but refuse to pay).²⁶¹
- 4.8 The consideration of this typology is intended to direct the recommendations towards those offenders who have some capacity to pay reparation to their victims (those in the *will pay*, *might pay* and *won't pay* categories), as opposed to those who *can't pay* due to their financial circumstances. This typology has informed the Council's development and consideration of proposals for reform.
- 4.9 The recommendations contained in this chapter aim to increase the payment of orders made against offenders who have some capacity to make financial reparation to their victims.

Observations on current payment and enforcement rates

- 4.10 In the Council's issues and options paper, it was reported that the rate of civil enforcement action taken to pursue the payment of restitution and compensation orders made in Victoria is very low.²⁶² Across all Victorian courts, between 2007–08 and 2016–17, civil enforcement actions were rarely pursued: less than 2% of restitution and compensation orders had enforcement actions recorded against them.²⁶³
- 4.11 The issues and options paper also presented the payment rates for orders made in Victorian courts between 2007–08 and 2016–17 (where this data was available). Rates varied across each court, and in the Magistrates' Court an average of 12.5% of orders had completed payments each financial year.²⁶⁴ The issues and options paper also noted that this data does not reflect restitution and compensation matters that might be either resolved prior to an order being made or paid following the making of an order, without the court being notified.²⁶⁵

261. For further discussion of this typology, see Sentencing Advisory Council, *The Imposition of Court Fines and Infringement Penalties in Victoria: Report* (2014) 76–78.

262. Sentencing Advisory Council (2018), above n 30, 44.

263. Ibid xviii.

264. Payment rates of orders for restitution and compensation for property loss made in the Magistrates' Court between 2007–08 and 2016–17 varied from 14.8% to 22.5% each financial year (for both partial and completed payments). For compensation orders for injury, payment rates varied from zero to 19% (for both partial and completed payments): Sentencing Advisory Council (2018), above n 30, 24–35.

265. See further ibid 27, 32, 34.

- 4.12 In addition, the Council noted that a large proportion of offenders have limited financial resources and, consequently, a limited capacity to pay any order.²⁶⁶ Although the overall proportion of people facing criminal charges that receive assistance from Victoria Legal Aid is not known, it is clear that it is significant,²⁶⁷ and that, necessarily, these people must be of low income and own minimal assets in order to receive assistance.²⁶⁸
- 4.13 It is essential to consider the limited financial resources of most offenders when assessing the Council's statistical findings on the payment rates of restitution and compensation orders. It may be that the number of orders currently enforced is simply a reflection of the limited financial resources of the majority of offenders, rather than inefficiencies or failings within the scheme for enforcement of those orders.
- 4.14 While the Council's recommendations are aimed at improving payment by offenders with some financial resources, it may be that there are, in reality, a relatively small number of offenders who fall within the categories of *might pay* (and can be encouraged to pay their order for restitution or compensation) or *won't pay* (and against whom enforcement action must be taken).
- 4.15 During consultation, a number of stakeholders commented on the data on the payment and enforcement rates presented in the issues and options paper (as well as the likelihood that further orders are paid but are not captured in the data), suggesting that this may simply reflect the limited financial resources of the offenders against whom such orders are made.²⁶⁹
- 4.16 Justice Terence Forrest of the Supreme Court of Victoria noted:
- I suspect that most people convicted of criminal offences don't have much in the way of assets. I also expect that your 10% compliance with orders might be more of a reflection of the fact that offenders don't have much in the way of assets, than any wilful act.²⁷⁰
- 4.17 Justice Forrest further stated: 'I would think that ... 90%, perhaps more, are on Legal Aid. If they are on Legal Aid, there's a reason for that'.²⁷¹

266. For example, in 2016–17, Victoria Legal Aid assisted 90,649 unique clients, of which 53% were receiving government benefits and 28% had no income: Victoria Legal Aid, *Annual Report 2016–2017* (2017) 3, 25.

267. In the Magistrates' Court in 2014–15, there were 101,106 matters finalised, and in the same year Victoria Legal Aid made 12,604 grants of legal aid to assist with summary criminal matters. This figure does not include legal information services provided by Victoria Legal Aid duty lawyers in the Magistrates' Court. In 2014–15, Victoria Legal Aid provided duty lawyer services in 59,869 matters: see Law and Justice Foundation of New South Wales, *Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid's Summary Crime Program* (2017) 222; Victoria Legal Aid, *Annual Report 2014–2015* (2015) 43, 44.

268. Victoria Legal Aid applies a means test to assess whether, and to what extent, to fund legal assistance for someone charged with a criminal offence. The means test assesses the income and value of assets of a person applying for legal assistance, as well as the income and value of assets of any person who is financially associated with the person seeking legal assistance (such as a family member). Generally speaking, persons receiving a full grant of legal aid have a net disposable income of less than \$361 per week, and assets of under \$1,095: Victoria Legal Aid (2017), above n 150. Under the heading 'Wealthy clients', Victoria Legal Aid notes that where an offender appears to have an asset, the asset may be owned by someone else. Alternatively, the asset may be subject to a restraining order: Victoria Legal Aid, 'Explainer – Why We Fund Serious Criminal Cases' ([legalaids.vic.gov.au](https://www.legalaids.vic.gov.au/about-us/news/explainer-why-we-fund-serious-criminal-cases), 2018) <<https://www.legalaids.vic.gov.au/about-us/news/explainer-why-we-fund-serious-criminal-cases>> at 20 July 2018.

269. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018); Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018). Many stakeholders commented on the fact that the majority of offenders have limited financial resources: Submission 3 (Jesuit Social Services) 2; Submission 9 (Women's Legal Service Victoria) 1; Submission 12 (Centre for Innovative Justice, RMIT University) 8; Submission 14 (Law Institute of Victoria) 4; Submission 17 (Victoria Legal Aid) 3; Submission 18 (Victoria Police) 3.

270. Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

271. Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018). However, a person may be provided with Legal Aid assistance even if they have an asset provided that the asset is restrained: *Confiscation Act 1997* (Vic) s 143.

- 4.18 A number of other stakeholders commented that, in their experience, many applications for restitution or compensation are resolved privately between parties.²⁷² For example, Deputy Magistrate Felicity Broughton commented that, in the Magistrates' Court of Victoria, particularly in relation to applications for compensation for injury:
- [T]here might not be any sort of formal application that's raised in court. Sometimes [there] might be, but then it might be struck out on the basis that the parties have come to some arrangement between them. I've certainly had cases where that has happened but none of that data is captured.²⁷³
- 4.19 Her Honour noted that, in respect of the Magistrates' Court, 'statistics regarding [the imposition of compensation orders for injury] would be extremely misleading as [they] wouldn't reflect what's happening between the parties'.²⁷⁴ Similarly, a representative of the Law Institute of Victoria noted that because there was no requirement that the court be notified if an order for restitution or compensation had been paid, it was likely that these statistics underrepresented the actual numbers of orders paid.²⁷⁵
- 4.20 The Law Institute of Victoria submitted that many compensation applications are resolved by way of a negotiated settlement between the parties, which may include payment of the order within a certain period of time. In these circumstances, the motivation for agreement to the settlement for the convicted person is that:
- [T]hey want to a) finalise the matter b) avoid having an order which consumes all of their restrained assets and c) have the restraining order removed from their property.²⁷⁶
- 4.21 A number of stakeholders noted that the data published in the Council's issues and options paper on matters in the Supreme Court was surprisingly low,²⁷⁷ and it did not capture matters that may have commenced as an application for restitution or compensation but resolved by way of a deed of settlement or terms of release.²⁷⁸
- 4.22 The Council acknowledges that this data on low payment and enforcement rates, rather than being evidence of wilful non-payment, may reflect the fact that the majority of offenders are of limited financial resources. Nevertheless, the Council's recommendations aim to increase the payment of orders by offenders who have some capacity to make financial reparation to their victims.

272. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Submission 14 (Law Institute of Victoria) 6.

273. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

274. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

275. A representative of the Law Institute of Victoria noted that, of the compensation matters they had been involved in, they estimated that 98% of orders were paid by the offender: Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

276. Submission 14 (Law Institute of Victoria) 6. As noted by the Council in the issues and options paper, another significant motivation for an offender to settle is that they may rely on payment of compensation as a factor in mitigation relevant to the issue of remorse on the plea: Sentencing Advisory Council (2018), above n 30, 18.

277. The Council identified 25 cases in which an order for restitution or compensation for property loss or a compensation order for injury was made in the Supreme Court between 2007–08 to 2016–17. The following steps were taken to obtain this data: the Council used the JADE database to search Supreme Court cases from 2007–08 to 2016–17 (searching each year separately), for the terms '85B', 'compensation order' and 'restitution'. The results were cross-checked against data provided to the Council by the Supreme Court of Victoria. A similar search using the AustLII database was conducted for the same search terms.

278. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

Improving information on compensation options available to victims

- 4.23 Although the Council's issues and options paper did not contain any direct questions on the provision of information to victims of crime about their compensation options, a number of stakeholders raised issues regarding the consistency and timeliness of the provision of this information to victims.²⁷⁹
- 4.24 A number of victims of crime consulted by the Council stated that they could not recall being advised of their compensation avenues, or otherwise stated that when they did learn of the option to seek restitution or compensation directly from the offender, it was too late.²⁸⁰
- 4.25 Several victims of crime noted that it is difficult to consider compensation during the criminal trial process, as the victim's primary focus is on the criminal proceedings.²⁸¹ Different victims may seek varying levels of involvement throughout the stages of the criminal trial process.²⁸² In addition, they noted that there is a large amount of information for a victim to process from the moment of reporting a criminal incident.²⁸³
- 4.26 The following section addresses the need for victims of crime to be provided with timely and consistent information on their compensation options.

Legal and policy framework

- 4.27 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.²⁸⁴
- 4.28 The Director of Public Prosecutions' policy requires Office of Public Prosecutions solicitors to inform victims that they may have an entitlement to apply for an order for restitution or compensation or to seek financial assistance from the Victims of Crime Assistance Tribunal (VOCAT).²⁸⁵ The Office of Public Prosecutions' *Financial Assistance, Compensation and Restitution for Victims of Crime* booklet explains the options and assistance available.²⁸⁶

279. Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Victims of Crime Consultative Committee (27 February 2018).

280. Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017). The Department of Justice and Regulation's Victims Support Agency has previously emphasised that the timing of the provision of information is key, as victims are unlikely to take in new information when in a highly distressed state: Victims Support Agency (2009), above n 203, 10. The Magistrates' Court of Victoria noted that 'victims do not know what they are entitled to and are unable to navigate the complexity of the system without emotional and financial expense': Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 2.

281. Meeting with Victim Survivors' Advisory Council (27 March 2018).

282. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?*, Information Paper no. 2 (2015) 16. See also 'Victims' Commissioner for England and Wales (2016), above n 207, 5.

283. Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

284. *Victims' Charter Act 2006* (Vic) ss 7, 13(2).

285. Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* (2017).

286. Office of Public Prosecutions, *Financial Assistance, Compensation and Restitution for Victims of Crime* (2013).

The Victorian Law Reform Commission's recommendations on information and support

4.29 The Victorian Law Reform Commission (VLRC) considered the information and support provided to victims in connection with the criminal trial process, and identified that the 'provision of timely, accessible and accurate information to victims about criminal procedures and the status of their case is consistently identified as one means to remedy some victim dissatisfaction and increase levels of confidence in the criminal trial process'.²⁸⁷ The VLRC made the following recommendations in respect of the provision of information to victims:

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.

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.

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.²⁸⁸

287. Victorian Law Reform Commission (2015), above n 282, 19.

288. Victorian Law Reform Commission (2016), above n 1, xxiii–xxiv. The Council notes that, at the time of writing, the *Victims and Other Legislation Amendment Bill 2018* (Vic), which makes a number of changes in relation to the VLRC's recommendations including amendments to the *Victims' Charter Act 2006* (Vic) and the *Victims of Crime Commissioner Act 2015* (Vic), has been second read: Victoria, *Parliamentary Debates*, Legislative Assembly, 25 July 2018 (Martin Pakula, Attorney-General).

- 4.30 The VLRC noted that victims may need information or legal advice on matters related to compensation. The Commission's Recommendation 47 provides:
- [t]he *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.²⁸⁹
- 4.31 The VLRC recommended that the Victims of Crime Commissioner should have responsibility for monitoring and reporting on the implementation of – and compliance with – principles under the *Victims' Charter Act 2006* (Vic).²⁹⁰

Current sources of information on compensation options for victims

- 4.32 Depending on the nature of the alleged offence, a victim may be assisted by a number of agencies, including:
- the Department of Justice and Regulation's Victims Support Agency;
 - Victoria Police; and/or
 - the Office of Public Prosecutions.
- 4.33 There are a number of key sources of information for victims of crime, including:
- the Director of Public Prosecutions' *Supporting Victims and Witnesses* website (victimsandwitnesses.opp.vic.gov.au); and
 - the Victims Support Agency's *A Victim's Guide to Support Services and the Criminal Justice System* booklet.²⁹¹
- 4.34 The Victims Support Agency's booklet is distributed to victims by agencies including Victoria Police.²⁹² The booklet provides an overview of the criminal justice system and what to expect, but does not contain explicit information about victims' potential entitlement to orders for restitution or compensation.²⁹³
- 4.35 The Director of Public Prosecutions' *Supporting Victims and Witnesses* website contains information for family members of homicide victims to seek compensation orders; this is located under the heading 'Your entitlements' within the category of information for 'Bereaved family members'. For other victims, information on compensation orders is located under the heading 'Witness expenses' within the category of information for 'Victims'. Reference to compensation orders is also contained under the heading 'Victims Charter', which is also within the general category of information for 'Victims'.²⁹⁴

289. Victorian Law Reform Commission (2016), above n 1, xxviii.

290. Ibid 62–67. See also Victims and Other Legislation Amendment Bill 2018 (Vic).

291. Victims Support Agency, *A Victim's Guide to Support Services and the Criminal Justice System* (2017).

292. Ibid; Meeting with Victoria Police (19 September 2017).

293. The booklet notes that victims might need their own lawyer if seeking financial assistance or compensation, and also states that, 'if you are a victim of violent crime, you should be told about any compensation you can get from the person who committed the crime. You can also apply for financial assistance from the government': Victims Support Agency (2017), above n 291, 36. There is no explicit reference to restitution or compensation for victims of non-violent crime.

294. Office of Public Prosecutions, 'Your Entitlements' (victimsandwitnesses.opp.vic.gov.au, 2018) <<https://victimsandwitnesses.opp.vic.gov.au/bereaved-family-members/your-entitlements>> at 20 July 2018; Office of Public Prosecutions, 'Witness Expenses' (victimsandwitnesses.opp.vic.gov.au, 2018) <<https://victimsandwitnesses.opp.vic.gov.au/victims/witness-expenses>> at 20 July 2018; Office of Public Prosecutions, 'Victim's Charter' (victimsandwitnesses.opp.vic.gov.au, 2018) <<https://victimsandwitnesses.opp.vic.gov.au/victims/victims-charter>> at 20 July 2018.

Stakeholders' views

- 4.36 While the Council did not consult specifically on the issue of the provision of information to victims of crime, a number of stakeholders noted that the provision of information to victims on compensation matters could be improved.²⁹⁵ There was broad support for improved provision of accurate and timely information to victims on compensation matters.²⁹⁶
- 4.37 Several members of the Victims of Crime Consultative Committee and the Victim Survivors' Advisory Council noted that they learned of the option to seek restitution or compensation under the *Sentencing Act 1991* (Vic) well after the completion of their criminal proceedings, due to the focus on the criminal matter or the separation of family following the offending.²⁹⁷ Victims may have difficulty turning their minds to matters such as compensation during any criminal process, and therefore it is necessary for there to be repeated opportunities for victims to consider their compensation options.²⁹⁸
- 4.38 A number of members of the Victim Survivors' Advisory Council noted the importance of particular support for victims of crime who are children or young people,²⁹⁹ as well as for victims from culturally and linguistically diverse communities.³⁰⁰
- 4.39 Several members of the Victims of Crime Consultative Committee supported a centralised agency having a role in coordinating the provision of information to victims.³⁰¹

The Council's view

- 4.40 The Council supports the VLRC's Recommendation 47 in relation to strengthening a victim's right to be informed of their possible entitlements under the *Victims' Charter Act 2006* (Vic). However, effectively translating the change in victims' legislative entitlements under the *Victims' Charter Act 2006* (Vic) will require a coordinated effort from key agencies.
- 4.41 The Victims of Crime Commissioner's role is to advocate, investigate, report and advise in relation to systemic issues for victims of crime.³⁰² The Council believes that the Victims of Crime Commissioner is best placed to convene and oversee a working group to review and consolidate policies and resources across diverse agencies to ensure that victims are provided with accurate and timely information on their compensation options.

295. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 2; Meeting with Victims of Crime Commissioner (12 September 2017); Meeting with Waller Legal (28 November 2017); Meeting with Community Operations and Victims Support Services, Department of Justice and Regulation (30 November 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017); Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

296. Submission 13 (Waller Legal); Submission 17 (Victoria Legal Aid); Meeting with Victims of Crime Commissioner (7 June 2018); Meeting with Victoria Police (8 June 2018).

297. Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018).

298. Meeting with Victim Survivors' Advisory Council (27 March 2018).

299. Meeting with Victim Survivors' Advisory Council (27 March 2018). The barriers to children and young people exercising their legal rights are greater for those in out-of-home care: Meeting with Victim Survivors' Advisory Council (27 March 2018).

300. Meeting with Victim Survivors' Advisory Council (27 March 2018). The Council has previously noted the need for interpreters in criminal matters: Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders: Report* (2017) 61.

301. Meeting with Victims of Crime Consultative Committee (27 February 2018).

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

- 4.42 This approach is consistent with the VLRC's recommendation that the Victims of Crime Commissioner have responsibility for monitoring and reporting on the implementation of – and compliance with – principles contained in the *Victims' Charter Act 2006* (Vic).³⁰³
- 4.43 The proposed working group may also consider the provision of information to victims of crime on enforcement options for restitution and compensation orders, in the event that state enforcement of restitution and compensation orders through civil mechanisms is introduced (see further [4.147]–[4.306]).
- 4.44 The Council also notes that existing sources of information, such as the Office of Public Prosecutions' *Supporting Victims and Witnesses* website,³⁰⁴ could be amended to include basic and accessible information regarding the restitution and compensation order process to ensure that a victim receives such information from the early stages of the criminal trial process.
- 4.45 The Victims of Crime Commissioner will require additional resources in order to establish and coordinate the working group.

Recommendation 2: Victims of Crime Commissioner to establish a working group to consider provision of information to victims

The Victims of Crime Commissioner should establish a working group that includes representation from:

- the Department of Justice and Regulation;
- the Office of Public Prosecutions; and
- Victoria Police.

The working group should review and consolidate information and resources provided to victims of crime concerning avenues for compensation to ensure that all resources contain consistent and accurate information on:

- making an application for a restitution and/or compensation order under the *Sentencing Act 1991* (Vic); and
- how such an order is enforced.

303. Victorian Law Reform Commission (2016), above n 1, xvi, xxii, 62–67.

304. As noted at [4.35], the Office of Public Prosecutions' *Supporting Victims and Witnesses* website contains information for family members of homicide victims to seek compensation orders, located under the heading 'Your Entitlements'. For other victims, information on compensation orders is located under the heading 'Witness Expenses': Office of Public Prosecutions (2018), 'Your Entitlements', above n 294; Office of Public Prosecutions, 'Witness Expenses', above n 294; Office of Public Prosecutions (2018), 'Victim's Charter', above n 294.

Investigation of alleged offenders' assets and applications for restraining orders

Overview

- 4.46 The *Confiscation Act 1997* (Vic) provides for the confiscation of the proceeds and instruments of crime, and property suspected to be tainted in relation to serious criminal activity. The overarching objectives of this regime are to deprive persons of the proceeds of crime, disrupt criminal enterprises and deter criminal activity.³⁰⁵ The Act provides for the restraint, confiscation and forfeiture of property in specific circumstances.
- 4.47 The purposes of the *Confiscation Act 1997* (Vic) include to 'preserve assets for the purpose of restitution and compensation to victims of crime'.³⁰⁶ While most forfeiture and confiscation under the Act happen in the absence of an order for restitution or compensation, to the extent that the two intersect, enforcement under the Act may assist a victim in receiving payment of an order.
- 4.48 The Office of Public Prosecutions conducts legal proceedings under the *Confiscation Act 1997* (Vic) for the restraint and confiscation of assets.³⁰⁷ Asset Confiscation Operations, within the Department of Justice and Regulation, is then responsible for the enforcement and management of seized, restrained and forfeited property.³⁰⁸
- 4.49 Timely investigation and restraint of offenders' assets will assist victims to enforce any order for restitution or compensation that may be made. During consultation, the Council asked stakeholders whether there should be changes to the current use of the powers under the *Confiscation Act 1997* (Vic) to improve access to an offender's assets, or alternatively, to broaden the circumstances in which an offender's assets may be forfeited to meet an order for restitution or compensation.³⁰⁹

Legislative framework

- 4.50 Section 15(1) of the *Confiscation Act 1997* (Vic) allows for a restraining order to be made to preserve property for the purposes of satisfying:
- a forfeiture order;³¹⁰
 - automatic forfeiture;³¹¹
 - a pecuniary penalty order;³¹² and/or
 - an order for restitution or compensation.³¹³
- 4.51 The interaction between asset confiscation and restitution and compensation orders therefore arises when property is restrained for the purpose of obtaining an order for restitution or compensation under the provisions of the *Confiscation Act 1997* (Vic).

305. *Confiscation Act 1997* (Vic) s 3A; Victorian Auditor-General's Office, *Asset Confiscation Scheme* (2013) 1; Justice Chris Maxwell, 'The Role of Courts under Asset Confiscation Legislation' (Paper presented at the OPP Proceeds of Crime Conference, Victoria, 6 October 2011).

306. *Confiscation Act 1997* (Vic) s 1(h).

307. *Confiscation Act 1997* (Vic) ss 16(1), 32(1).

308. Department of Justice and Regulation, 'Asset Confiscation' (justice.vic.gov.au, 2018) <<http://www.justice.vic.gov.au/home/justice+system/fines+and+penalties/asset+confiscation+process>> at 20 July 2018.

309. For further discussion, see Sentencing Advisory Council (2018), above n 30, 109–112.

310. *Confiscation Act 1997* (Vic) pt 3 div 1.

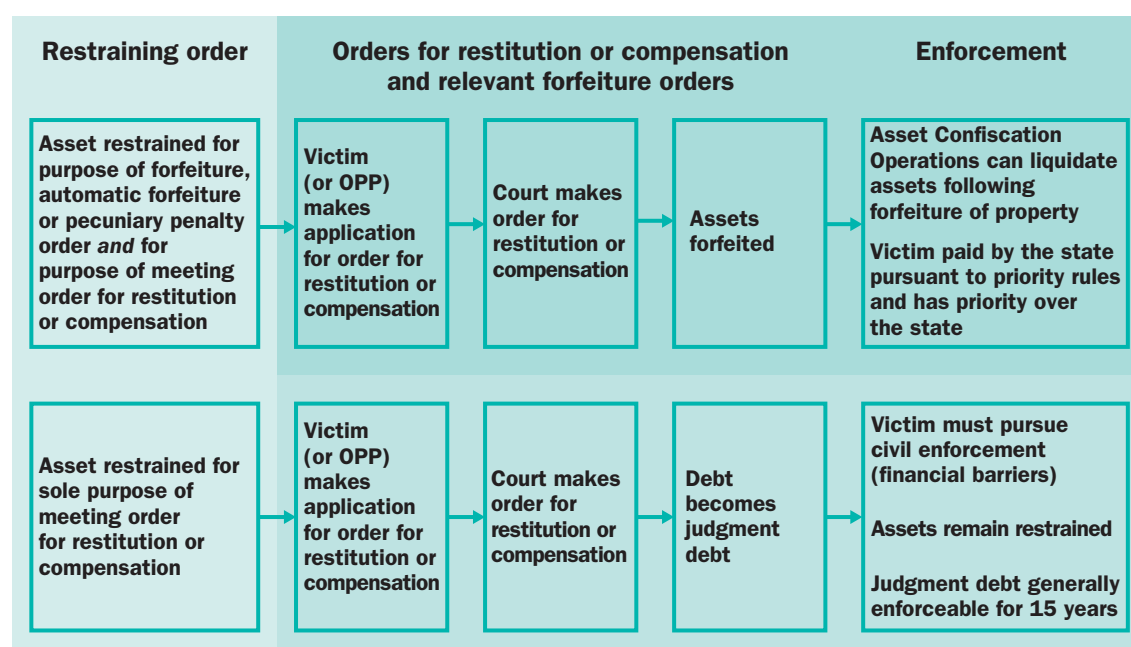
311. *Confiscation Act 1997* (Vic) pt 3 divs 2, 4.

312. *Confiscation Act 1997* (Vic) pt 8.

313. *Sentencing Act 1991* (Vic) pt 4 divs 1–2. Victoria is the only Australian jurisdiction in which a restraining order can be sought for the sole purpose of meeting a future order for restitution or compensation: Meeting with Victoria Police (19 September 2017); Tobin Meagher, Andrew Moore and Alice Zheng, 'Australia', in Jonathan Tickner, Sarah Gabriel and Hannah Laming (eds), *Asset Recovery 2018: Getting the Deal Through* (2018) 9, 14.

- 4.52 A restraining order preserves an asset and prevents dealings or disposal of that property by an offender.³¹⁴ A restraining order can be obtained if a person is charged (or will be charged within 48 hours) with an indictable offence or certain other offences,³¹⁵ or where the property is suspected of being *tainted*, that is, connected to a serious profit-motivated offence.³¹⁶ An application for a restraining order must state the purpose for which it is sought, and it may specify more than one purpose.³¹⁷
- 4.53 Where a restraining order has been made for the sole purpose of meeting an order for restitution or compensation, Asset Confiscation Operations does not assist a victim with the enforcement of the order against the offender.³¹⁸ As a consequence, the victim still needs to pursue civil enforcement to obtain payment of the compensation order as a judgment debt, through seizure and sale of the restrained asset.
- 4.54 As shown in Figure 1, Asset Confiscation Operations can enforce an order for restitution or compensation for a victim in circumstances in which:
- the offender's assets are restrained;
 - the restrained property is forfeited, either because it is tainted or because it is property in which the offender has an interest and the offence is a defined, serious profit-motivated offence; and
 - an order for restitution or compensation, under the provisions of the *Sentencing Act 1991* (Vic), is awarded to the victim in respect of the same offending.³¹⁹

Figure 1: Current system of powers under the *Confiscation Act 1997* (Vic) and enforcement of restitution and compensation orders



314. *Confiscation Act 1997* (Vic) s 14(1).

315. *Confiscation Act 1997* (Vic) s 16(1), sch 1.

316. A person does not have to have been charged for a restraining order to be made, as the property may fall within the civil forfeiture regime: *Confiscation Act 1997* (Vic) s 3, pt 4.

317. *Confiscation Act 1997* (Vic) s 15(2).

318. Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

319. *Confiscation Act 1997* (Vic) pt 3; Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).

- 4.55 In these circumstances, the state is responsible for the enforcement of any forfeiture, automatic forfeiture or pecuniary penalty order.³²⁰ The provisions of the *Confiscation Act 1997* (Vic) provide that, where a restraining order has been made for the purpose of paying an order for restitution or compensation as well as for another purpose, the payment of any order for restitution or compensation is to be given priority, and the state must first pay the order out of any property forfeited.³²¹ In those circumstances, the state pursues the forfeiture order, and the victim does not need to pursue civil enforcement.

Processes and policies for investigating and/or restraining an offender's assets

- 4.56 During consultation, the Council was advised that the extent to which an offender's assets are investigated by Victoria Police for the purposes of meeting a future order for restitution or compensation depends largely on the individual informant handling the case.³²² Informants' workloads, and the need to prioritise investigation of the alleged offences, mean that additional investigation of an offender's financial position to meet a possible order for restitution or compensation may be difficult to complete within the prescribed timeframes.³²³
- 4.57 Prior to July 2014, investigation of an offender's assets was undertaken by Victoria Police Criminal Proceeds Squad.³²⁴ In 2013, the Victorian Auditor-General published a report on the operation of the Asset Confiscation Scheme, which involves cooperation between Victoria Police, the Office of Public Prosecutions and Asset Confiscation Operations.³²⁵ The report considered that it was ineffective for the Criminal Proceeds Squad's resources to be used to undertake work on behalf of victims. It was recommended that the focus of the squad should be on pursuing profit-motivated, serious and organised crime, rather than pursuing compensation for victims.³²⁶

320. *Confiscation Act 1997* (Vic) pts 3, 8; Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).

321. *Confiscation Act 1997* (Vic) ss 30–31, 36ZA–36ZB. In some circumstances, an offender's legal costs may be paid out of restrained property if the costs have been incurred prior to the making of the restraining order: Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017). The *Confiscation Act 1997* (Vic) provides that a court may order Victoria Legal Aid to provide funding for a person's legal costs if the person has restrained property and is unable to afford the full cost of obtaining private legal representation: *Confiscation Act 1997* (Vic) s 143.

322. Meeting with Victoria Police (19 September 2017); Meeting with Waller Legal (28 November 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017); Meeting with Victoria Police Prosecutors (7 December 2017); Submission 11 (Angela Sdrinis Legal); Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017); Meeting with Victims of Crime Commissioner (12 September 2017). See also Victorian Auditor-General's Office, *Follow Up of Asset Confiscation Scheme* (2016) 8–11.

323. Meeting with Victoria Police Prosecutors (7 December 2017). For matters in the Magistrates' Court, Victoria Police Prosecutors have tight timeframes within which to serve either a preliminary brief or a brief on the accused. After the commencement of a proceeding, if the accused requests a preliminary brief, the informant must serve the preliminary brief on the accused within 14 days: *Criminal Procedure Act 2009* (Vic) s 35. The preliminary brief must contain a range of matters, including any orders that will be sought: *Criminal Procedure Act 2009* (Vic) s 37(g). Victoria Police prosecutors noted that these timeframes can make it difficult to prepare statements of loss or damage to be included in a preliminary brief: Meeting with Victoria Police Prosecutors (7 December 2017).

324. From 2009 to March 2013, up to 60% of the Criminal Proceeds Squad's work related to victims of crime: Victorian Auditor-General's Office (2013), above n 305, 45. Following the 2013 audit, a new model focusing the squad's work on profit-motivated, serious and organised crime became effective in July 2014: Victorian Auditor-General's Office (2016), above n 322, 9.

325. Victorian Auditor-General's Office (2013), above n 305.

326. Ibid 51.

- 4.58 Following the Auditor-General's recommendation, responsibility for investigating an offender's assets in order to potentially meet an order for restitution or compensation was decentralised, and is now undertaken by the informant, except in relation to serious profit-motivated offending.³²⁷ During consultation, Victoria Police advised that it is necessary for this responsibility to sit with the informant, as they will have the relevant information concerning the offender and the offending.³²⁸
- 4.59 Victoria Police submitted that, in relation to victims' compensation, the following steps are taken to identify appropriate matters for asset investigation and restraint:
- the Criminal Proceeds Squad conducts daily scans of Incident Fact Sheets and the Law Enforcement Assistance Program (LEAP) to identify potential matters for applications for restitution or compensation;
 - the Criminal Proceeds Squad consults with the Office of Public Prosecutions; and
 - the Criminal Proceeds Squad considers requests for assistance from individual police informants.³²⁹
- 4.60 If a police informant refers a matter to the Criminal Proceeds Squad for consideration of a restraining order, the Criminal Proceeds Squad can further investigate whether the offender has any assets.³³⁰
- 4.61 Victoria Police submitted that when a potential compensation matter is identified, an information pack regarding compensation options and instructions on how to make an application for a restraining order are provided to the relevant informant. The informant may be assisted in preparing an application for a restraining order by the Criminal Proceeds Squad.³³¹ During consultation, Victoria Police advised that a new guide for informants on compensation matters is currently being developed.³³²
- 4.62 Victoria Police submitted that the Criminal Proceeds Squad is responsible for the preparation of the necessary legal documentation for the Office of Public Prosecutions in relation to restraining order applications for the purposes of meeting an order for restitution or compensation under the *Confiscation Act 1997* (Vic).³³³
- 4.63 In order to make an application for a restraining order under the *Confiscation Act 1997* (Vic) in a particular case, an informant must prepare an affidavit in support of the application.³³⁴ This can require communication between representatives of the Office of Public Prosecutions and Victoria Police.³³⁵

327. Meeting with Victoria Police (19 September 2017). In the 12 months to February 2016, victims' compensation work had dropped to around 10.1% of the Criminal Proceeds Squad's work: Victorian Auditor-General's Office (2016), above n 322, 9.

328. Victoria Police noted that the informant will also have established a relationship with the victim: Meeting with Victoria Police (8 June 2018).

329. Submission 18 (Victoria Police) 4; Meeting with Victoria Police (8 June 2018).

330. Submission 18 (Victoria Police) 4; Meeting with Victoria Police (8 June 2018).

331. The Criminal Proceeds Squad is available to assist informants with queries: Meeting with Victoria Police (8 June 2018).

332. Meeting with Victoria Police (8 June 2018).

333. Submission 18 (Victoria Police) 4.

334. *Confiscation Act 1997* (Vic) s 16(4); Meeting with Victoria Police (19 September 2017); Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (6 June 2018).

335. Submission 18 (Victoria Police) 4; Meeting with Victoria Police (8 June 2018).

- 4.64 The Office of Public Prosecutions stated that it scans all files that are referred to it for prosecution to determine whether there is the potential for an application for restitution or compensation.³³⁶ If the potential is identified for such an application to be made, the Office of Public Prosecutions undertakes searches to ascertain whether an alleged offender has any assets in the form of property.³³⁷

Training

- 4.65 Victoria Police submitted that training to assist informants in identifying the potential for a restraining order for the purposes of a compensation order is currently provided to members seeking to qualify as detectives, and by regions who specifically request such training.³³⁸ Further, the Criminal Proceeds Squad's *Investigation Guidelines* are 'available to all members on the Victoria Police Intranet and include information relevant to victim compensation'.³³⁹
- 4.66 Some stakeholders, however, have described Victoria Police policies, and training provided to police members on investigating an offender's assets, as *ad hoc*.³⁴⁰ During the Council's preliminary consultations, it was noted that there may be forthcoming updates to internal Victoria Police procedures in order to standardise guidance provided to informants regarding victims' compensation and the investigation of offenders' assets.³⁴¹

Victoria Police's views

- 4.67 Victoria Police's submission states that it has 'already streamlined ... procedures for investigating an alleged offender's assets and making applications for restraining [orders] under the *Confiscation Act*'.³⁴²
- 4.68 Decisions concerning whether to investigate an offender's assets need to be made within the context of Victoria Police's available resources, and so must be balanced against competing priorities.
- 4.69 Victoria Police submitted that the Accountability and Resource Model is its primary mechanism to determine how to allocate resources towards investigation of offenders' assets and compensation matters.³⁴³ Victoria Police's submission states:
- [w]here an investigation is captured and assessed as complex or presenting significant reputational risk to the organisation, the [Criminal Proceeds Squad] takes responsibility for the restraint of assets so that the victim may make an application for compensation at a later date. Where an investigation is not assessed as complex, the relevant region takes responsibility for that component of the investigation with support and advice provided by the [Criminal Proceeds Squad] as required.³⁴⁴

336. Meeting with Office of Public Prosecutions (7 September 2017). This is undertaken in accordance with the Director of Public Prosecutions' policies: Sentencing Advisory Council (2018), above n 30, 14–15.

337. Meeting with Office of Public Prosecutions (7 September 2017). The Director's policy on making such applications, however, may limit the instances in which such applications are pursued. For further discussion of the Director of Public Prosecutions' policies, see Sentencing Advisory Council (2018), above n 30, 14–15.

338. Submission 18 (Victoria Police) 4.

339. Submission 18 (Victoria Police) 4–5.

340. Meeting with Waller Legal (28 November 2017); Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018). Victoria Police also noted that applications for restraining orders for the sole purpose of preserving assets for restitution or compensation can depend on individual informants, and that the majority of applications come from the Sexual Offences and Child Abuse Investigation Teams (SOCIT): Meeting with Victoria Police (19 September 2017).

341. Meeting with Victoria Police (19 September 2017).

342. Submission 18 (Victoria Police) 4.

343. Submission 18 (Victoria Police) 4.

344. Submission 18 (Victoria Police) 4.

- 4.70 From Victoria Police's perspective, when a victim reports an alleged offence, the primary focus is on gathering evidence to support charging the alleged offender. The requirement that an informant also consider the secondary issue of an alleged offender's financial resources poses practical and resourcing challenges for Victoria Police members.
- 4.71 During the Council's stakeholder discussion forum, a representative from Victoria Police's Sexual Crimes Squad summarised these issues as follows:
- From an investigative perspective, our focus is on gaining the evidence to get to the first step, we need to get the person prosecuted first, so that's got to be our main focus and main aim.
- That's an almighty challenge right from the very start to try and restrain things, when we have not even got the evidence that an offence has actually been committed, never mind that that's the offender. We'd have to be very, very careful as to when we step in with those restraining orders, it can cause us an awful lot of problems down the track.³⁴⁵
- 4.72 Victoria Police considered that most matters suitable for asset investigation and restraining order applications were being identified under current policies and procedures, but that any gaps were a result of inadequate resourcing.³⁴⁶

The Office of Public Prosecutions' role

- 4.73 Applications for restraining orders for the purpose of meeting a future order for restitution or compensation are prepared by Victoria Police's Criminal Proceeds Squad then referred to the Office of Public Prosecutions, which conducts the application proceedings.³⁴⁷
- 4.74 During consultation, it was noted that the onus is largely on Victoria Police's informants to undertake asset investigations in relation to victims' compensation matters, and that informants are supported by Victoria Police's Criminal Proceeds Squad.³⁴⁸ The Office of Public Prosecutions also has a role in identifying opportunities for victims' compensation.³⁴⁹ Therefore, both Victoria Police and the Office of Public Prosecutions work together to identify victims' compensation opportunities, and to consult with victims to ascertain whether they wish to pursue an application for restitution or compensation.³⁵⁰
- 4.75 The Office of Public Prosecutions stated that it scans all files that are referred to it for prosecution to determine whether there is the potential for an application for restitution or compensation.³⁵¹
- 4.76 If the potential for such an application is identified, the Office of Public Prosecutions undertakes searches to ascertain whether an alleged offender has any assets in the form of property.³⁵²

345. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018).

346. A representative of Victoria Police noted that further resourcing for Victoria Police would assist in enabling informants to identify and commence compensation applications in an increased number of matters: Meeting with Victoria Police (8 June 2018).

347. Submission 18 (Victoria Police) 4.

348. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

349. Submission 18 (Victoria Police) 4; Meeting with Victoria Police (8 June 2018).

350. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

351. Meeting with Office of Public Prosecutions (7 September 2017). This is undertaken in accordance with the Director of Public Prosecutions' policies: see Sentencing Advisory Council (2018), above n 30, 14–15.

352. Meeting with Office of Public Prosecutions (7 September 2017).

Stakeholders' views

- 4.77 In consultation, it was noted that a barrier to pursuing an application for a restraining order for the purposes of meeting a future order for restitution or compensation is sometimes the fact that no investigation into an alleged offender's assets has been conducted.³⁵³
- 4.78 Further, a number of stakeholders indicated that the approach to undertaking investigations into offenders' assets, and gathering information to support a restraining order for the purposes of securing assets for a future order for restitution or compensation, differed between Victoria Police locations, and largely depended on the individual informant handling the case.³⁵⁴
- 4.79 Stakeholders noted that the powers available under the *Confiscation Act 1997* (Vic) for restraint have the potential to greatly assist victims of crime seeking restitution or compensation.³⁵⁵ A number of key stakeholders, including the Magistrates' Court of Victoria and VOCAT, considered *better use* of the powers under the Act likely to assist victims, particularly in relation to the risk of dissipation of assets by offenders seeking to avoid liability or payment.³⁵⁶
- 4.80 Stakeholders raised the fact that, when faced with potential civil enforcement action, some parties may attempt to transfer or hide their assets, in order to defeat their creditors.³⁵⁷ A number of participants in the Council's stakeholder discussion forums questioned whether Victoria Police's and the Office of Public Prosecutions' procedures were followed in every instance and noted the need for victims to have assistance with identifying risks that may arise from seeking restitution or compensation.³⁵⁸
- 4.81 Several stakeholders, however, considered that it was unreasonable or unrealistic to expect Victoria Police to consider compensation matters when investigating alleged criminal offences in every instance.³⁵⁹
- 4.82 A number of stakeholders considered the issue to be one of resourcing.³⁶⁰ One stakeholder commented:
- I think a great proportion of that problem is one of [Victoria Police's] resources and policies, frankly. If, hypothetically, there was a radical restructure and re-resourcing [of] that aspect of what [Victoria Police] do, you might find that there would be a significant increase in property identified and restrained.³⁶¹

353. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

354. Submission 11 (Angela Sdrinis Legal) 1; Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017); Meeting with Waller Legal (28 November 2017); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018); Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

355. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018). Waller Legal also noted, '[i]t would be helpful for victims to know the financial position of the offender at an early stage to enable them to make an informed decision about whether or not it would be financially viable to pursue a claim against them under the *Sentencing Act*': Submission 13 (Waller Legal) 1.

356. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6; Meeting with Victims of Crime Consultative Committee (27 February 2018). This view was shared by some members of the Law Institute of Victoria: Submission 14 (Law Institute of Victoria) 3. The issue of offenders dissipating or transferring assets to avoid liability was raised by members of the Victim Survivors' Advisory Council: Meeting with Victim Survivors' Advisory Council (27 March 2018).

357. Submission 11 (Angela Sdrinis Legal) 2; Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

358. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018). One stakeholder noted that although there had been increased training provided for detectives in Victoria Police, this had not translated into increased numbers of applications for restraining orders: Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (6 June 2018). A member of the Victims of Crime Consultative Committee supported improvements to Victoria Police's investigation of assets: Meeting with Victims of Crime Consultative Committee (27 February 2018).

359. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018). Several members of the Victim Survivors' Advisory Council considered that putting a further burden on Victoria Police informants to investigate offenders' assets would be unfair: Meeting with Victim Survivors' Advisory Council (27 March 2018).

360. Meeting with Victoria Police (8 June 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018); Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

361. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

- 4.83 The possibility of another agency, separate from Victoria Police or the Office of Public Prosecutions, undertaking investigations of alleged offenders' assets was raised by at least two stakeholders.³⁶²

Risks of increasing the use of restraining orders

- 4.84 A number of stakeholders also commented on the potential negative consequences that a restraining order can have on an alleged offender – entitled to the presumption of innocence – as it can affect their capacity to access their own financial resources (including to defend themselves against any charges) or to earn an income prior to the matter being prosecuted.³⁶³
- 4.85 Several stakeholders noted that victims who pursue compensation³⁶⁴ may, during any relevant criminal trial, face cross-examination about whether the allegations are financially motivated, in order to undermine their credit.³⁶⁵ In consultation, it was also noted that caution around restraining assets in particular cases must be exercised, for example, the conviction rate for sexual offences is lower than other categories of criminal offending and the focus of Victoria Police in these instances is on securing a criminal conviction.³⁶⁶ In offences involving allegations that are reliant on the credibility of the victim's evidence, the risk of acquittal on the basis of challenges to the victim's motivations for making the allegations may be increased.
- 4.86 Victoria Police noted that the use of restraining orders could, in some cases, put a victim at risk of reprisal from an offender.³⁶⁷
- 4.87 Further, it was noted during consultation that the acquittal of an offender in circumstances in which property had been restrained might expose Victoria Police to a possible civil claim by the offender, on the grounds of an unjustified restraint of their assets.³⁶⁸

The Council's view

- 4.88 Strengthening the coordinated approach by Victoria Police and the Office of Public Prosecutions to the investigation of offenders' assets, as well as applications for restraining orders for the purposes of meeting an order for restitution or compensation, is likely to further consistency between cases and achieve improved enforcement of restitution and compensation orders for victims.

362. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018). The Council notes that introducing another investigative agency to consider alleged offenders' assets prior to any finding of guilt or criminal process would raise practical and theoretical issues.

363. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018); Submission 14 (Law Institute of Victoria) 3 (some members of the Law Institute of Victoria hold this view). A restraining order may provide for (or be varied to provide for) an offender's reasonable living expenses or business expenses, but must not provide for an offender's legal expenses: *Confiscation Act 1997* (Vic) ss 14(4)–(5).

364. Victims may pursue compensation from a number of sources, including through bringing a civil action, or under the *Sentencing Act 1991* (Vic). See further Sentencing Advisory Council (2018), above n 30, 6.

365. An application for a restraining order for the purposes of a future order for restitution or compensation may be sought prior to criminal proceedings: *Confiscation Act 1997* (Vic) s 16. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Meeting with Victoria Police (8 June 2018). Counsellor advocates of CASA House noted that such arguments 'continue to be a very effective strategy': Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

366. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018). The difficulties in achieving convictions in sexual assaults, particularly for historical sexual offending, were also noted by counsellor advocates at CASA House: Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

367. Meeting with Victoria Police (8 June 2018).

368. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018); Meeting with Victoria Police (8 June 2018). The court generally requires the party making an application for a restraining order to make an undertaking as to damages or costs in relation to the making and operation of a restraining order: *Confiscation Act 1997* (Vic) s 14(7). However, the Council also heard that there is rarely financial loss caused by the restraint of property and that, as such, any action for compensation for financial loss against Victoria Police would be extremely rare: Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

- 4.89 The Council notes that targeted use of restraining orders over alleged offenders' assets may limit those circumstances in which an offender attempts to hide or move their assets in order to avoid paying compensation to a victim.
- 4.90 The Council agrees with Victoria Police that there would be significant resourcing implications if Victoria Police were required to investigate alleged offenders' assets as part of the investigation of every offence.³⁶⁹ In addition, the presumption of innocence³⁷⁰ requires a cautious approach to be taken to actions that limit an offender's financial liberty, including their right to access their own financial resources to defend against any criminal charges.³⁷¹ The Council does not consider it necessary or appropriate that investigation of an offender's assets be undertaken in every case.
- 4.91 The Council also notes the comments of other stakeholders that suggest an inconsistency in informants' approaches to the investigation of offenders' assets and knowledge of the relevant legal processes.³⁷² Consequently, there may be opportunities to strengthen and consolidate training and policies in relation to these matters, for both Victoria Police and the Office of Public Prosecutions, with the aim of increasing the identification of appropriate cases in which to apply for a restraining order for the purposes of restitution or compensation.

Recommendation 3: Agencies to review policies and training

Victoria Police and the Office of Public Prosecutions should review policies and training to ensure that consistent internal and inter-agency approaches are taken to:

- investigating offenders' assets;
- applying for restraining orders under the *Confiscation Act 1997* (Vic); and
- applying for orders for restitution and/or compensation under the *Sentencing Act 1991* (Vic).

Increased powers to forfeit an offender's assets considered and dismissed

- 4.92 The state has the power to forfeit an offender's assets in particular circumstances.³⁷³ These circumstances generally involve forfeiture of restrained assets following a finding of guilt for a serious profit-motivated offence (for example, a serious drug trafficking offence),³⁷⁴ or following a conviction for certain offences³⁷⁵ where the property is *tainted*, that is, found to have been used, or intended to have been used, in connection with the offence.³⁷⁶
- 4.93 The Council consulted stakeholders on the question of whether there ought to be broadening of the circumstances in which the Director of Public Prosecutions or a police prosecutor may apply to a court for a forfeiture order following an offender's conviction for an offence.

369. Submission 18 (Victoria Police) 5.

370. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1).

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

372. Submission 11 (Angela Sdrinis Legal) 1; Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017); Meeting with Waller Legal (28 November 2017); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018); Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

373. Sentencing Advisory Council (2018), above n 30, 44–45.

374. *Confiscation Act 1997* (Vic) s 35(1). Serious profit-motivated offences are listed in *Confiscation Act 1997* (Vic) sch 2.

375. *Confiscation Act 1997* (Vic) s 32. For indictable offences and certain (profit-motivated) summary offences, see *Confiscation Act 1997* (Vic) sch 1.

376. *Confiscation Act 1997* (Vic) s 32(1). Sentencing Advisory Council (2018), above n 30, 44–45.

The Council posed questions on whether there should be a power to apply to a court for a forfeiture order of the relevant property where a restraining order has been obtained for the purposes of meeting a future order for restitution or compensation, even if the property is not tainted.³⁷⁷

- 4.94 While a number of stakeholders considered that the existing powers to restrain assets for the purposes of meeting a future order for restitution or compensation could be better utilised, there was little support for broadening the circumstances in which an offender's assets may be forfeited to meet such an order.
- 4.95 Participants in the Council's stakeholder discussion forum stated that the discretionary forfeiture of *untainted* assets would potentially conflict with rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).³⁷⁸
- 4.96 A number of stakeholders commented on the potential consequences for innocent third parties and family members.³⁷⁹ One participant in the stakeholder discussion forum stated:
- I would have thought on the one hand if you have an accused who is in an intact family and the result is that an innocent partner and the children get thrown out of the house, that's pretty unconscionable ... as a public policy position.³⁸⁰
- 4.97 A member of the Victim Survivors' Advisory Council noted that it is 'a very difficult situation if you are the partner: You are taken down with the offender. It's horrible'.³⁸¹
- 4.98 The complexity of the impact of such measures in the family violence context was also highlighted by a number of stakeholders.³⁸² Domestic Violence Victoria noted that such a system could put women and children, who may also be victims of the offender, at risk.³⁸³
- 4.99 In addition, participants noted that the civil system already enabled judgment creditors to seize and sell property, and that such a change to the powers under the *Confiscation Act 1997* (Vic) was unjustified, as the same ends could be achieved by strengthening a victim's ability to enforce the orders through the civil system.³⁸⁴
- 4.100 The Council agrees that an increase in powers to forfeit untainted assets is undesirable, particularly in light of the potential consequences raised by stakeholders, such as consequences for innocent third parties, and the limited group of offenders to which any such changes would apply. The Council prefers an approach that strengthens victims' abilities to exercise their rights to enforce judgment debts through civil mechanisms, particularly given that the same ends can be achieved through an improved use of these civil enforcement powers (see the discussion of civil enforcement powers at [4.190]–[4.197]).

377. For further discussion of the Council's proposal, see Sentencing Advisory Council (2018), above n 30, 109–112.

378. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

379. A participant at the Council's Stakeholder Discussion Forum commented that the potential forfeiture of untainted assets would be 'brutal' and could have considerable consequences for innocent third parties, stating 'there are so many [people] that just lose everything because of the actions of their partner': Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018). This issue was also noted at the Meeting with Victim Survivors' Advisory Council (27 March 2018). While a third party may make an *exclusion application* to protect their interest in a property from a forfeiture order, this involves an application to a court. In addition, not all parties will be able to demonstrate a relevant interest in the property to prevent forfeiture: *Confiscation Act 1997* (Vic) pt 6.

380. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

381. Meeting with Victim Survivors' Advisory Council (27 March 2018).

382. Meeting with Victim Survivors' Advisory Council (27 March 2018). A member of the Victim Survivors' Advisory Council noted that in her situation, her partner had moved the family's property solely into her name, but she was unable to sell the property due to pending family law proceedings: Meeting with Victim Survivors' Advisory Council (27 March 2018). This example highlights the complexities of asset separation in family violence contexts.

383. Meeting with Domestic Violence Victoria (11 April 2018).

384. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018); Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

Consideration of an offender's financial circumstances when making a compensation order

- 4.101 In making an order for compensation against an adult offender, a court *may* take into account the financial circumstances of the offender and the nature of the burden that the order's payment would impose.³⁸⁵ However, a court is not prevented from making a compensation order only because it has been unable to determine the financial circumstances of the offender.³⁸⁶
- 4.102 For restitution and compensation orders against children, the Children's Court of Victoria *must* take into account the financial circumstances of the offender and the nature of the burden that the order's payment would impose. Further, the Children's Court may only make an order of up to \$1,000.³⁸⁷
- 4.103 Recommendation 46 of the VLRC's 2016 report states that:
- 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.³⁸⁸
- 4.104 In other words, the VLRC recommended that the County and Supreme Courts, in making a compensation order in favour of an individual under the *Sentencing Act 1991* (Vic), should not have regard to an offender's financial circumstances, and should instead adopt an approach consistent with a civil court, which generally has no regard to a person's capacity to pay when determining an award of damages.
- 4.105 The VLRC made this recommendation in order to create a system for compensation under the *Sentencing Act 1991* (Vic) that is more consistent with civil compensation proceedings. The VLRC stated that if restitution and compensation orders are to provide a quick and efficient means of obtaining civil recompense, an offender's financial circumstances are not relevant. The VLRC characterised the ability for the court to consider an offender's financial position as 'conceptually flawed',³⁸⁹ as it allowed for a consideration of the effect of the order on the offender, which is an assessment relevant to criminal sentencing, but irrelevant in civil damages assessments.³⁹⁰
- 4.106 The removal of the court's discretion to have regard to an offender's capacity to pay could lead to large compensation orders being made against offenders who have no realistic prospect of ever paying the order.
- 4.107 The VLRC, however, stated that concerns about managing the expectations of victims, in the face of such orders that cannot realistically be enforced at the time they are made, could be addressed by ensuring that victims are adequately informed about the process and have access to information and advice.³⁹¹

385. *Sentencing Act 1991* (Vic) ss 85H, 86(2).

386. *Sentencing Act 1991* (Vic) ss 85H, 86(3).

387. *Children, Youth and Families Act 2005* (Vic) s 417.

388. Victorian Law Reform Commission (2016), above n 1, xviii.

389. *Ibid* 236–237.

390. A civil damages assessment strictly compensates a plaintiff for the actual damage that they have incurred, without any regard for the defendant's capacity to pay. The fundamental principle of civil damages is 'that damages should be assessed so that they represent no more and no less than a plaintiff's actual loss': *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn). An award of damages will be made 'unconditionally, in a lump sum, once and for all': Michael Tilbury, 'Damages for Personal Injuries: A Statement of the Modern Australian Law' (1980) 14(3) *University of Western Australia Law Review* 260, 261.

391. Victorian Law Reform Commission (2016), above n 1, 237.

Stakeholders' views

- 4.108 During consultation, a number of stakeholders questioned the desirability of removing the discretion of the court to consider an offender's financial circumstances for compensation orders made in the higher courts.³⁹²
- 4.109 Central to stakeholders' concerns was the importance of managing victims' expectations. The Council heard from a number of stakeholders about the potential for legal processes that create false expectations in victims to lead to further trauma.³⁹³
- 4.110 Judicial officers, including Justice Terence Forrest of the Supreme Court of Victoria, commented that the ability to consider an offender's financial position is useful in determining whether a victim is likely to receive payment from an offender and in managing the expectations of a victim.³⁹⁴
- 4.111 Deputy Chief Magistrate Felicity Broughton of the Magistrates' Court of Victoria noted that the victims' compensation system needs to be approached strategically and coherently, and that:
- most of the time, there is no money available from the offender and it would be unfair and unreasonable to raise a victim's expectation of entitlement in circumstances where it is highly unlikely that the victim will ever actually receive any payment from the offender.³⁹⁵
- 4.112 In the context of discussion about changes to the enforcement of restitution and compensation orders made as ancillary orders, a number of stakeholders noted that, if the state were to undertake enforcement on behalf of a victim, it would be important for an offender's financial capacity to be taken into account in the making of an order to avoid further entrenching disadvantage.³⁹⁶
- 4.113 Similarly, it is important to clarify that retention of the provisions does not mean that a court is *required* to take into account an offender's financial position in making a compensation order. Affirming the *hybrid* nature of the orders, a court may disregard an offender's financial position if it does not consider it appropriate to take an offender's financial position into account.
- 4.114 The Council heard during consultation of the need for courts to recognise the harm caused by the offending.³⁹⁷ It has been suggested that compensation orders can provide *symbolic recognition* of the consequences of criminal offending.³⁹⁸ Some stakeholders considered an offender's financial means to be irrelevant to the determination of appropriate compensation for victims.³⁹⁹

392. Meeting with Centre for Innovative Justice, RMIT University (4 April 2018); Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018); Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018). Justice Connect questioned the purpose of making compensation orders that are unlikely to be fulfilled, particularly given longitudinal research suggesting that persons who have been sentenced to custodial terms have limited financial prospects: Meeting with Justice Connect (18 April 2018).

393. A representative of RMIT University's Centre for Innovative Justice commented that 'there's an enormous amount of damage that can be done by a legal process or system which doesn't deliver ... but also holds out the promise of something more than they will get': Meeting with Centre for Innovative Justice, RMIT University (4 April 2018). Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018). Kate Warner and Jenny Gawlik comment that it 'seems pointless to make the order if there is but a very slim chance that the offender will have the means to pay', noting that to do so 'can be damaging to victims': Warner and Gawlik (2003), above n 251, 74.

394. Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

395. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

396. Meeting with Jesuit Social Services (15 May 2018); Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

397. Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre for Innovative Justice, RMIT University (4 April 2018). See further at [3.83]–[3.90] in relation to how a victim's loss and the harm caused by the offending are increasingly recognised in the sentencing process.

398. Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Centre for Innovative Justice, RMIT University (4 April 2018).

399. Meeting with Victims of Crime Commissioner (7 June 2018).

- 4.115 It was noted, however, that maintenance of the discretion would preserve the flexible approach that courts can adopt, depending on the circumstances of the case. It was suggested that, in practice, judicial officers in the Magistrates' Court often take into account an offender's financial circumstances in order to impose an order that both compensates a victim for their losses and is likely to be paid. In the higher courts, judicial officers may utilise this discretion to make orders against offenders even when, on the evidence, it appears that offenders have limited financial prospects. This is both because the financial circumstances of offenders may change in the future and because, in cases involving very serious offending, the loss or injury caused by the offender requires a sizeable compensation order to be made, irrespective of the offender's financial resources.
- 4.116 Although it may be appropriate in some cases for large compensation orders to be made against offenders with limited financial prospects, no victim consulted by the Council indicated that receiving a large compensation order that was purely symbolic was beneficial. In addition, a number of victims of crime noted that making large, unenforceable orders was likely to create further frustration, disappointment and secondary victimisation for victims in whose favour such orders are made.⁴⁰⁰
- 4.117 Representatives of the Supreme Court of Victoria commented on the need for expectation management from the beginning of the restitution and compensation order process, and that the key to this was in assessing an offender's financial status.⁴⁰¹
- 4.118 In the context of increased enforcement powers, a number of stakeholders questioned the utility of making an order for restitution or compensation when there was no prospect of successful enforcement, and when there was a risk of further entrenching criminality.⁴⁰²

The Council's view

- 4.119 The Council recommends a strengthened approach to enforcement of restitution and compensation orders (see [4.127]–[4.306]), and consequently recommends the retention of a court's discretion to consider an offender's financial circumstances when making such an order.
- 4.120 The Council's recommendation to retain the power to consider an offender's financial position in making a compensation order needs to be contemplated in light of the Council's recommendation that the Victorian Government consider introducing state enforcement of restitution and compensation orders on behalf of victims of crime who are natural persons. Such a change may significantly alter the landscape for the enforceability of these orders.
- 4.121 While the Council appreciates the VLRC's desire to achieve greater consistency between the approach of civil courts to determining amounts of compensation and the approach of a criminal court in making a compensation order, the Council prefers an overall approach to restitution and compensation orders under the *Sentencing Act 1991* (Vic) that maintains the *hybrid* status of the orders, combining elements of civil law while recognising that the orders follow the criminal sentencing process. The Council also prefers a consistent approach to the imposition of compensation orders across all jurisdictions, and therefore recommends the retention of the discretion in both the Magistrates' Court and the higher courts.

400. One stakeholder noted that having an order for compensation that cannot be paid creates secondary victimisation for victims: Meeting with Victim Survivors' Advisory Council (27 March 2018). Some stakeholders also emphasised the importance of the VOCAT system in providing symbolic acknowledgment of the harms caused by the offending: Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

401. Justice Terence Forrest noted, '[t]he key is the offender's financial status. A lot revolves around that': Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

402. Meeting with Justice Connect (18 April 2018); Meeting with Jesuit Social Services (15 May 2018); Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

- 4.122 One practical difference between restitution and compensation orders under the *Sentencing Act 1991* (Vic) and civil proceedings brought by a plaintiff for civil damages is that, due to the potential for considerable legal costs arising from civil legal proceedings, it is financially unviable for civil proceedings to be brought against persons who have limited or no financial assets.⁴⁰³ As applications for restitution and compensation under the *Sentencing Act 1991* (Vic) do not involve the applicant paying court costs,⁴⁰⁴ there is a greater potential for these orders to be sought against persons who do not have any financial resources.
- 4.123 As noted at [4.12], the reality is that a large proportion of offenders have limited financial resources. Removing a judicial officer's ability to consider the financial circumstances and prospects of the offender in determining a compensation order is likely to lead to more orders being made against offenders who have no realistic chance of making payment.
- 4.124 The Council notes that this power is discretionary and does not *require* judicial officers to consider an offender's financial circumstances, but maintains the court's flexibility to do so in appropriate cases. The Council further notes that, in some cases, it may not be appropriate or desirable to consider an offender's financial circumstances in determining the appropriate amount of compensation. For example, when making an order for compensation for property loss, where the victim's financial loss is clearly established on the evidence (such as in cases of obtaining financial advantage or property by deception), it may not be appropriate to reduce the amount of a compensation order, even where an offender's financial prospects are limited.⁴⁰⁵ However, there may be circumstances in which it is desirable to consider the likelihood of payment of the order.
- 4.125 In order to preserve the flexible approach that courts can adopt – depending on the circumstances of the case, and in accordance with the Council's recommendation that the government consider state enforcement of restitution and compensation orders through civil mechanisms (see [4.147]–[4.306]) – the Council recommends the retention of the court's ability to take into account an offender's financial circumstances.

Recommendation 4: Retention of discretion to consider offenders' financial circumstances

Sections 85H and 86(2) of the *Sentencing Act 1991* (Vic) should be retained, allowing a court in making a compensation order for injury or property loss to take into account, at the court's discretion and as far as practicable, the financial circumstances of the offender and the nature of the burden that payment of the order will impose.

403. Meeting with Waller Legal (28 November 2017); Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

404. There are no fees applicable to making an application for restitution or compensation in any Victorian court.

405. The Council undertook research to consider the use of sections 85H and 86(2) of the *Sentencing Act 1991* (Vic) in the Victorian higher courts. The Council could only locate one case in which section 86(2) was used to reduce an order for compensation for property loss on the basis of the impecunious financial circumstances of the offender: *Dutton Garage Wholesale Pty Ltd v Sandro Mark Terzini* [2017] VCC 1991 (6 January 2018). The powers are generally used in assessing compensation for injury (including for pain and suffering).

Minority view

- 4.126 A Council Director considered that section 86(2) of the *Sentencing Act 1991* (Vic) should be repealed, and that, in addition, there should be a presumption in favour of making a compensation order for property loss unless the victim elects not to seek an order from the court (see [3.147]). That Director noted:

An offender's means at the time of sentence, even if impecunious, may change for the better over time and a victim should not be deprived of a just order that may be enforced at an appropriate time. The unsatisfactory alternative for the victim to have to seek civil redress (where financial means of the offender are irrelevant) and within the period of the statute of limitations (6 years) is to be avoided.

Instalment orders

- 4.127 In making a compensation order for property loss or injury, the court may direct that the compensation be paid by instalments.⁴⁰⁶ If an offender is in default of payment of any one instalment, the whole of the compensation available becomes due and payable.⁴⁰⁷ The court can also make an order as to when the payment of instalments should commence.⁴⁰⁸
- 4.128 There is no similar, express power that an instalment order can be made by the court in respect of a restitution order for property loss, most likely because these orders are generally made to order the return of goods found in the possession of the offender at the time of their arrest.⁴⁰⁹
- 4.129 The Council could not identify any case in the higher courts of Victoria in which an instalment order was made in relation to a compensation order at the time the compensation order was imposed.⁴¹⁰
- 4.130 The power to make an instalment order in respect of a compensation order appears to be an underutilised provision, the use of which may encourage greater payment of compensation orders by offenders.
- 4.131 A number of stakeholders noted that instalment orders are a practical measure to encourage payment of the orders.⁴¹¹
- 4.132 Dr Rory Gallagher, a specialist in applied behavioural science, has spoken of the need for courts to capture the *court moment* experienced by a person when they come before a magistrate or judge and receive a sentence. There may be an increase in payment if the seriousness and authority of the court conveyed during a sentencing hearing are extended to the payment process, which should occur as soon as possible after the sentencing event.⁴¹²

406. *Sentencing Act 1991* (Vic) s 85B(4).

407. *Sentencing Act 1991* (Vic) s 85B(4).

408. Justice Bell notes in *RK v Mirik and Mirik* that '[i]t is implicit in the provisions of s 85B(1) and (4) and s 85H(1) that the court also has a discretion to defer the date from which the payment of any compensation or instalments would commence': *RK v Mirik and Mirik* (2009) 21 VR 623, 643.

409. An order for restitution may also be made for the payment from money taken from the offender's possession at the time of the arrest of an amount not exceeding the value of stolen goods: *Sentencing Act 1991* (Vic) s 84.

410. The Council used the AustLII database to search Victorian cases for the terms '85B', 'compensation order' and 'instalment'. No results were found in which an instalment order was made in respect of a compensation order.

411. Submission 2 (D. Hadden); Meeting with Victims of Crime Commissioner (12 September 2017); Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018); Meeting with Chief Magistrate, Deputy Chief Magistrate Felicity Broughton and Simone Shields, Principal Registrar of the Magistrates' Court of Victoria (26 June 2018).

412. Sentencing Advisory Council (2014), above n 261, 116, citing Meeting with Dr Rory Gallagher (26 June 2013).

- 4.133 When making a compensation order, the Council recommends that judicial officers give particular consideration to whether it would also be appropriate to make an instalment order. The court would also need to consider whether a victim wishes to receive instalment payments from an offender. The Council noted in the issues and options paper that it may be retraumatising for a victim if an offender makes payment of instalments over a long period of time.⁴¹³
- 4.134 The Council does not suggest that an instalment order should be made for every compensation order. In some circumstances, it may be more appropriate that the total compensation order be paid immediately by the offender. In other cases, it may be unlikely that an offender is able to make repayments at the point of the order being made, such that the order will need to be enforced independently by the victim or, should the state undertake enforcement, be referred to the enforcement agency for civil enforcement action to be taken (discussed at [4.147]–[4.306]).
- 4.135 A court will also need to consider whether any relevant property is restrained, as this may have practical consequences for an offender's ability to meet an instalment order. It may be necessary for a restraining order to be varied to allow an offender to meet an instalment order.⁴¹⁴
- 4.136 Failure to comply with an instalment order could then lead to the matter being referred to the proposed enforcement agency, were such an agency introduced. Consideration of enforcement by a state agency is discussed at [4.147]–[4.306].⁴¹⁵

Recommendation 5: Court to consider making instalment order following compensation order

When making a compensation order, a judicial officer should give particular consideration to whether it may also be appropriate to make an instalment order, having regard to the victim's wishes.

413. Sentencing Advisory Council (2018), above n 30, 80. This issue was also raised by Victoria Police during consultation: Meeting with Victoria Police (8 June 2018).

414. Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018); Meeting with Victoria Police (8 June 2018).

415. The Council considered whether restitution and compensation orders should be automatically transferred by the sentencing court to the civil jurisdiction. However, the Council is of the view that offenders should have the opportunity to pay the order immediately, or otherwise comply with an instalment order made by the court, before any further enforcement action is taken, as enforcement action may have a negative effect on an offender's credit history.

Waiving fees

- 4.137 In each court jurisdiction, there are fees that a judgment creditor must pay to apply for or carry out various civil enforcement mechanisms. It can cost a victim a substantial amount of money to enforce a civil judgment debt, depending on the type of enforcement mechanism pursued and the complexity of the matter.⁴¹⁶
- 4.138 In the issues and options paper, the Council asked whether enforcement fees should be waived for victims of crime seeking to enforce restitution and compensation orders in the civil jurisdiction of the court in which the order was made.⁴¹⁷

Current practice

- 4.139 In the Magistrates' Court of Victoria, judgment creditors with *limited means* may apply to access the court's *fee waiver scheme*.⁴¹⁸ However, the Magistrates' Court is unable to specifically waive fees for victims of crime who do not fall within that scheme, but are seeking to enforce restitution and compensation orders. This is due to section 22 of the *Magistrates' Court Act 1989* (Vic), which requires registrars to charge fees as prescribed by regulations.⁴¹⁹
- 4.140 During consultation, the Council heard that the County and Supreme Courts of Victoria waive civil enforcement fees, but only when the court is made aware that the judgment creditor is seeking to enforce an order for restitution or compensation. Due to the nature of civil enforcement proceedings, this may not always be apparent to a registry officer.⁴²⁰
- 4.141 The Council does not have data on how often (or how consistently) these fees are waived for victims of crime. It is also unclear whether it is apparent to registry officers when a judgment creditor is seeking to enforce a judgment debt that is the result of an order for restitution or compensation.⁴²¹

Stakeholders' and the Council's views

- 4.142 A number of stakeholders supported the waiving of fees to assist victims enforcing restitution and compensation orders through civil mechanisms.⁴²² No stakeholder was opposed to such a change, although the question of the resource implications of such a change was raised.⁴²³

416. Meeting with Waller Legal (28 November 2017). The costs of enforcing a civil judgment debt are set out in the respective court rules: *Magistrates' Court (Fees) Regulations 2012* (Vic) sch 1; *County Court (Fees) Regulations 2012* (Vic) sch 1; *Supreme Court (Fees) Regulations 2012* (Vic) sch 1.

417. Sentencing Advisory Council (2018), above n 30, 102–104.

418. There are no criteria that limit a person making an application to the fee waiver scheme: Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 5.

419. *Magistrates' Court Act 1989* (Vic) s 22.

420. Regulation 6 of the *Supreme Court (Fees) Interim Regulations 2017* (Vic) provides that no fee is payable in respect of a matter arising from a criminal proceeding. Representatives of the higher courts confirmed that it is the practice of registry officers to waive fees for a victim seeking to enforce a judgment debt: Meeting with Justice Terence Forrest and Judicial Registrar Mark Pedley, Supreme Court of Victoria (24 April 2018); Email correspondence with County Court of Victoria (23 May 2018).

421. The Council heard during consultation that the practices of the County Court of Victoria vary with regard to fees for victims of crime seeking to enforce restitution and compensation orders: Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (6 June 2018).

422. Submission 18 (Victoria Police) 3; Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Domestic Violence Victoria (11 April 2018).

423. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (6 June 2018); Meeting with Chief Magistrate, Deputy Chief Magistrate Felicity Broughton and Simone Shields, Principal Registrar of the Magistrates' Court of Victoria (26 June 2018).

- 4.143 This recommendation proposes that the government consider the removal of fees for victims who are natural persons, as well as not-for-profit and charitable organisations. In the same way that charitable organisations receive exemptions for various state taxes, consideration should be given to waiving fees for organisations established for a religious, charitable or educational purpose, on the basis that these entities may be less able to pursue civil enforcement of an order for restitution or compensation on their own behalf. Stakeholders noted that well-resourced corporate entities do not face the same financial barriers as individuals and benevolent institutions when seeking to enforce an order for restitution or compensation.⁴²⁴
- 4.144 Courts and relevant agencies will need to develop procedures to ensure that victims who are eligible for fee waivers are appropriately identified (for example, by amending forms to ensure that judgment creditors who are victims are identified).
- 4.145 The removal of certain fees for initiating civil enforcement proceedings may also encourage victims who wish to enforce their orders independently to do so without having to incur further costs.
- 4.146 The Council considers that questions regarding the resourcing implications of such a change are a matter for the government. The Victorian Government will also have to consider which fees could be reasonably waived, and whether there ought to be limits, for example, on the number of times a victim could seek to initiate a particular enforcement action without having to pay the associated costs.

Recommendation 6: Waiver of Department of Justice and Regulation and court fees for victims

The Victorian Government should consider amending all necessary legislation to enable the Department of Justice and Regulation (including the Sheriff's Office), and all relevant courts, to waive appropriate fees for victims of crime seeking to enforce orders for restitution or compensation where the victim is a:

- natural person;
- public benevolent institution;
- charitable, religious or educational organisation; or
- other not-for-profit entity.

424. Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

State enforcement of restitution and compensation orders through civil mechanisms

- 4.147 In the issues and options paper, the Council asked whether it would be desirable for restitution and compensation orders to be enforced – either automatically or at the request of the victim – by the Infringement Management and Enforcement Services within the Department of Justice and Regulation, potentially through Fines Victoria.⁴²⁵
- 4.148 Under the current system, when a victim receives an order for restitution or compensation, it becomes a civil judgment debt that the victim must enforce independently in the civil jurisdiction of the court in which the order was made.⁴²⁶
- 4.149 State enforcement would provide an avenue for victims to have their orders enforced without having to navigate civil enforcement processes themselves. Instead, the state would undertake the civil enforcement of the order as if it were the victim,⁴²⁷ bearing the burden and costs of enforcing the debt, and operating within the current powers available to enforce a debt through civil enforcement mechanisms.⁴²⁸
- 4.150 The following section outlines a proposal for state enforcement of the orders through civil mechanisms. As this proposal extends beyond sentencing, and beyond the terms of reference (see [1.3]–[1.8]), the Council recommends further consideration of this proposal by the government, in order to assess the viability of such an approach.
- 4.151 In the issues and options paper, the Council proposed that either the orders could be transferred automatically to Infringement Management and Enforcement Services for automatic enforcement through existing civil enforcement mechanisms or a victim could elect that the state undertake civil enforcement action. The Council believes that, consistent with the majority of stakeholder feedback, most notably from the family violence sector, the enforcement agency should only undertake enforcement at the election of the victim.⁴²⁹
- 4.152 The enforcement agency should only enforce the orders according to existing *civil* powers for enforcement of judgment debts and should not enforce the orders in the same manner as fines are enforced. The provision of state assistance to victims of crime who are natural persons recognises the fact that these orders occupy a hybrid space, incorporating aspects of both criminal and civil systems. Therefore, the Council proposes a *hybrid* approach to enforcement of the orders, in order to support the enforcement of orders against offenders who have capacity to pay (those in the *will pay*, *might pay* and *won't pay* categories; see further [4.7]–[4.22]).

425. Sentencing Advisory Council (2018), above n 30, 104–105.

426. Restitution and compensation orders made in the Children's Court of Victoria are enforced in the civil jurisdiction of the Magistrates' Court: *Children, Youth and Families Act 2005* (Vic) s 418.

427. One stakeholder described this option as the state 'stepping into the shoes of the victim' for the purposes of enforcing the debt: Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).

428. For a summary of civil enforcement powers, see Sentencing Advisory Council (2018), above n 30, 39–43.

429. Submission 5 (Domestic Violence Victoria) 2; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6; Submission 17 (Victoria Legal Aid) 3; Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018); Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

- 4.153 As noted in the issues and options paper, a large proportion of restitution and compensation orders are made in favour of corporations or similar entities.⁴³⁰ The Council considers it preferable for the state to only provide assistance for the enforcement of restitution and compensation orders in circumstances in which the victim is a natural person, rather than a corporation or similar entity. This is because of the need to preserve the state's resources for those victims who cannot enforce orders themselves, due to financial or other barriers.⁴³¹

Comparable schemes

- 4.154 The Council acknowledges that this proposal, to maintain the status of restitution and compensation orders as orders made in addition to sentence but to consider state enforcement of the orders through civil mechanisms, would represent a novel approach in Australia. However, the system in Saskatchewan, Canada, for the enforcement of restitution orders offers a similar model of state civil enforcement of orders for victims' financial reparation.⁴³² The Council acknowledges that the Saskatchewan model and legal context differ from the proposed model and legal context in Victoria in some key respects.

Saskatchewan's victim services

- 4.155 In Canada, orders for victims' financial reparation (described in that jurisdiction as *restitution orders*) are sentencing orders. Significantly, restitution orders may only be made in respect of property damage, or 'readily ascertainable' costs arising from physical injury.⁴³³ The enforcement process differs depending on the province in which the restitution order is made and whether it is made as a stand-alone order or as part of a conditional sentence or probation.⁴³⁴
- 4.156 In the province of Saskatchewan, stand-alone restitution orders become civil debts that a victim previously had to enforce on their own.⁴³⁵ The provincial government has implemented a new program to ease the burden on victims, by transferring enforcement to the state (for individuals and not-for-profit entities only), allowing victims to register their orders for civil enforcement with the Ministry of Justice, at no cost.⁴³⁶
- 4.157 The Council has consulted with the Saskatchewan Government's Victims Services, Ministry of Justice.⁴³⁷ There are a number of significant differences between the operation of the restitution system in Saskatchewan and the operation of Victoria's model for restitution and compensation orders.

430. In the Magistrates' Court, in 2016–17, almost half (49.9%) of all beneficiaries for orders for restitution or compensation for property loss were individual persons, while 42.8% were corporations, small businesses or not-for-profit entities. Of the 195 beneficiaries of compensation orders for injury in 2012–13 (the most recent year available with a sufficiently large number of beneficiaries), 52.8% were individual persons: see Sentencing Advisory Council (2018), above n 30, 25–27.

431. This may include emotional barriers such as grief: Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

432. See further Sentencing Advisory Council (2018), above n 30, 75.

433. There is no provision for damages for pain and suffering: *Criminal Code*, RSC 1985, c C-46, ss 738(1), 732.1(3.1)(a), 742.3(2)(f).

434. Sentencing Advisory Council (2018), above n 30, 81.

435. Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

436. Government of Saskatchewan, 'Victim Impact Statement and Restitution' (Saskatchewan.ca, 2018) <<https://www.saskatchewan.ca/residents/justice-crime-and-the-law/victims-of-crime-and-abuse/victim-impact-statement-and-restitution#completing-a-statement-on-restitution>> at 20 July 2018. The Council noted in the issues and options paper that under the Saskatchewan Restitution Civil Enforcement Program, 74% of orders were paid in 2014–15: Jo-Anne Wemmers et al., *Restitution in the Context of Criminal Justice* (2017) 9; Sentencing Advisory Council (2018), above n 30, 81. However, following consultation with Saskatchewan's Ministry of Justice, it was clarified that this figure referred to criminal enforcement of restitution orders in Saskatchewan, not to the orders enforced as part of the Civil Enforcement Program: Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

437. Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

- 4.158 In the Saskatchewan model, as a restitution order is a sentencing order, the sentencing principle of proportionality applies.⁴³⁸ Information about an offender's financial position and capacity to pay any such order is considered prior to the order being imposed.⁴³⁹ As noted previously, restitution can only be sought for readily ascertainable costs arising from criminal offences. It is not possible to seek restitution for pain and suffering or future expenses. Therefore, the amounts awarded are generally fairly low.⁴⁴⁰
- 4.159 In addition, the relatively small population of Saskatchewan⁴⁴¹ allows for the victims' Civil Enforcement Program to operate on a small budget, with a single staff member responsible for following up unpaid restitution orders with offenders. During consultation, it was noted that there were approximately 75 files being actively pursued or monitored by the department.⁴⁴²

Enforcement of child support payments

- 4.160 The enforcement of child support payments in Australia provides a comparable model for the civil enforcement of restitution and compensation orders, as it involves the state pursuit of debts between individuals. If requested, the Commonwealth Department of Human Services can enforce payment of child support where there has been a child support assessment, a child support agreement or a registered court order for child support.⁴⁴³ The debt becomes a debt to the Commonwealth.⁴⁴⁴
- 4.161 A difference, however, between making restitution and compensation orders and assessing child support liabilities is that, in assessing the child support liability of each parent, a number of factors are taken into account, such as the taxable income of both parents.⁴⁴⁵ As discussed at [4.101], restitution and compensation orders may be made without regard to an offender's financial means.
- 4.162 A parent receiving only Centrelink payments may be required to pay child support out of those payments, depending on other factors such as the level of care that they provide to the child.⁴⁴⁶ The Department of Human Services can access information on a parent's tax return (through information sharing with the Australian Taxation Office).⁴⁴⁷ In addition to these powers, the Department has a broader information-gathering power under which the Child Support Registrar or a court can require a person to provide information, attend and answer questions and/or produce documents.⁴⁴⁸

438. *Criminal Code*, RSC 1985, c C-46, ss 738(1)(a), 741(1); *R v Siemens* (1999) 26 CR (5th) 302 [10].

439. Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

440. Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

441. Saskatchewan was estimated to have a population of 1.16 million as at 1 October 2017: Saskatchewan Government, *Saskatchewan Quarterly Population Report – Third Quarter 2017* (2017).

442. Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

443. *Child Support (Registration and Collection) Act 1988* (Cth) s 113; Department of Human Services (Cth), 'Child Support Collect' (humanservices.gov.au, 2018) <<https://www.humanservices.gov.au/individuals/enablers/child-support-collect/28001>> at 25 July 2018.

444. *Child Support (Registration and Collection) Act 1988* (Cth) ss 30, 69B, 113, 117; Department of Social Services (Cth), '5.4.2 The Registrar's Power to Bring Proceedings', *Child Support Guide* (dss.gov.au, 2018) <<http://guides.dss.gov.au/child-support-guide/5/4/2>> at 25 July 2018.

445. In initially calculating the child support liability of each parent, the following factors are taken into account as part of the assessment formula: the taxable income of both parents, whether either parent is supporting other children, the costs of raising children (including their ages and the number of children) and the level of care each parent provides: Department of Human Services (Cth), 'The Assessment Formula' (humanservices.gov.au, 2018) <<https://www.humanservices.gov.au/individuals/services/child-support/child-support-assessment/how-we-work-out-your-assessment/assessment-formula>> at 25 July 2018.

446. Department of Social Services (Cth), '2.4.12 The Minimum Annual Rate of Child Support', *Child Support Guide* (guides.dss.gov.au, 2018) <<http://guides.dss.gov.au/child-support-guide/2/4/12>> at 25 July 2018.

447. *Child Support (Registration and Collection) Act 1988* (Cth) s 16C.

448. *Child Support (Registration and Collection) Act 1988* (Cth) s 120; Department of Social Services (Cth), '6.2.4 Information Gathering Powers under the CSRC Act', *Child Support Guide* (guides.dss.gov.au, 2018) <<http://guides.dss.gov.au/child-support-guide/6/2/4>> at 25 July 2018.

- 4.163 If a parent fails to meet their child support obligations, enforcement action may be taken under the *Family Law Act 1975* (Cth) or the *Child Support (Registration and Collection) Act 1988* (Cth).⁴⁴⁹ The Child Support Registrar may choose to enforce the debt in the Family Court of Australia, the Federal Circuit Court or local/state courts.⁴⁵⁰
- 4.164 Administrative methods of child support payment collection can include deductions from a parent's earnings, intercepting tax refunds, bank account or social security deductions, or issuing overseas travel bans.⁴⁵¹ If these methods are unsuccessful, the registrar can commence civil enforcement, or in the case of serious actions or omissions, prosecute the parent.⁴⁵²
- 4.165 The registrar can decide not to pursue recovery of the debt where it is considered not economical to pursue recovery of the debt or the debt is not legally recoverable.⁴⁵³ For example, a debt is considered uneconomical to pursue if the debtor is 'serving a period of imprisonment and has no assets or source of income'.⁴⁵⁴ A payee can object to a decision not to pursue the recovery of a debt that has remained unpaid for at least six months.⁴⁵⁵

Stakeholders' views on state enforcement

- 4.166 A key question during consultation was whether the state should have a role in enforcing restitution and compensation orders, if the orders were to remain ancillary to sentence.
- 4.167 There was significant stakeholder support for the state provision of assistance to victims in enforcing restitution and compensation orders through civil mechanisms.⁴⁵⁶
- 4.168 The Magistrates' Court of Victoria and VOCAT also noted that measures to improve the ability of victims to enforce orders independently may be insufficient to overcome the issues with accessibility of the civil enforcement system.⁴⁵⁷
- 4.169 While the Magistrates' Court of Victoria and VOCAT considered any proposal for state enforcement of orders to be a matter for the government, the court submitted that a consistent approach should be applied to enforcement, such that either all orders are enforced by the state or all orders are enforced privately through the civil jurisdiction.⁴⁵⁸

449. *Child Support (Registration and Collection) Act 1988* (Cth) s 113.

450. Department of Social Services (Cth), '5.4.1 Choice of Court', *Child Support Guide* (guides.dss.gov.au, 2018) <<http://guides.dss.gov.au/child-support-guide/5/4/1>> at 25 July 2018; *Child Support (Registration and Collection) Act 1988* (Cth) s 113.

451. *Child Support (Registration and Collection) Act 1988* (Cth) pt V; Department of Human Services (Cth), 'Recovering Child Support Payments' (humanservices.gov.au, 2018) <<https://www.humanservices.gov.au/individuals/enablers/recovering-child-support-payments/29946>> at 25 July 2018. There are limitations on the amount that can be deducted from social security payments: see Department of Social Services (Cth), '5.2.5 Collection from Social Security Pensions & Benefits', *Child Support Guide* (guides.dss.gov.au, 2018) <<http://guides.dss.gov.au/child-support-guide/5/2/5>> at 25 July 2018.

452. Department of Human Services (Cth) (2018), 'Recovering Child Support Payments', above n 451. Enforcement actions can include bankruptcy or the appointment of a receiver, garnishee orders, seizure and sale of personal property or real property and/or the parent being summonsed to court to provide evidence about their financial circumstances: Department of Social Services (Cth), '5.4.4 Enforcement under the FL Act', *Child Support Guide* (guides.dss.gov.au, 2018) <<http://guides.dss.gov.au/child-support-guide/5/4/4>> at 25 July 2018; *Family Law Act 1975* (Cth) pt VII div 13A sub-divs E–F, pt XIII; *Family Law Rules 2004* (Cth) reg 20.05. Rule 25B.11 of the *Federal Circuit Court Rules 2001* (Cth) sets out the orders that can be made by the Federal Circuit Court. *Child Support (Registration and Collection) Act 1988* (Cth) ss 30, 67, 105, 106; Department of Social Services (Cth), '5.4.3 Enforcement by Civil Action', *Child Support Guide* (guides.dss.gov.au, 2018) <<http://guides.dss.gov.au/child-support-guide/5/4/3>> at 25 July 2018.

453. Department of Social Services (Cth), '5.7.1 Non-Pursuit of Debt', *Child Support Guide* (guides.dss.gov.au, 2018) <<http://guides.dss.gov.au/child-support-guide/5/7/1>> at 25 July 2018; *Public Governance, Performance and Accountability Rule 2014* (Cth) ss 11(a)–(b). See also *Public Governance, Performance and Accountability Act 2013* (Cth) s 103(c).

454. Department of Social Services (Cth) (2018), above n 453.

455. *Child Support (Registration and Collection) Act 1988* (Cth) ss 4(1), 80(1).

456. Submission 2 (D. Hadden); Submission 4 (X. Clark); Submission 5 (Domestic Violence Victoria) 3; Submission 7 (Anonymous) 1; Submission 11 (Angela Sdrinis Legal) 2–3; Submission 13 (Waller Legal) 2; at least two participants in the Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018); Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Centre for Innovative Justice, RMIT University (4 April 2018).

457. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6.

458. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6.

- 4.170 A major barrier preventing victims from taking enforcement action was noted to be fear of reprisals from the offender.⁴⁵⁹ A further benefit of state enforcement was that it allowed victims to have some distance from the process. Rosie Batty, Chair of the Victim Survivors' Advisory Council, stated that the enforcement process was:
- similar to an intervention order in the sense that when you are the one doing it there is a lot of potential harm and risk that could come your way, but when the police take that out it is viewed very differently by the offender.⁴⁶⁰
- 4.171 Similarly, Domestic Violence Victoria considered the option of state enforcement at the election of the victim to be the most 'amenable to being family violence and trauma-informed, retaining survivor control and choice while also offering a degree of separation from enforcement'.⁴⁶¹
- 4.172 Justice Terence Forrest stated that if there were an asset that could be used to meet a judgment debt, private civil law firms would be able to assist victims to undertake civil enforcement action against the offender, drawing their payment from the realised asset.⁴⁶² However, other stakeholders noted that private firms, particularly those offering assistance on a no-win no-fee basis, could enter into agreements with victims that resulted in significant depletion of any possible compensation.⁴⁶³ In addition, one stakeholder described a case in which a victim did not have the resources to proceed with civil enforcement, and therefore could not have their order for restitution or compensation paid, even though there was an asset to be realised.⁴⁶⁴
- 4.173 A number of stakeholders did not support state enforcement of restitution and compensation orders through civil mechanisms. Both Victoria Legal Aid and Victoria Police preferred the option of increased support for victims of crime to enforce the orders independently.⁴⁶⁵ Victoria Legal Aid questioned whether state enforcement of the orders would lead to greater payment of orders in favour of victims, stating:
- [Victoria Legal Aid] would be concerned with a blanket transfer of enforcement to the state without putting in place appropriate safeguards to protect against oppressive consequences which could significantly impede offender rehabilitation and reintegration.⁴⁶⁶
- 4.174 Victoria Police raised the issue of resourcing of state enforcement of restitution and compensation orders, submitting:
- [w]e do not support restitution and compensation orders being enforced by the state (either automatically or by election) due to the significant resourcing implications this would impose on the state, as well as such a process' potential for constituting further punishment.⁴⁶⁷

459. Meeting with Victim Survivors' Advisory Council (27 March 2018). It should be noted that the Council did not hear directly from any victim survivor in whose favour an order for restitution or compensation had been made and who had not sought civil enforcement on the basis that they were afraid of the consequences of such an action.

460. Meeting with Victim Survivors' Advisory Council (27 March 2018).

461. Submission 5 (Domestic Violence Victoria) 2.

462. Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

463. Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018); Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

464. A stakeholder at the Council's Restitution and Compensation Orders Stakeholder Discussion Forum commented that there are circumstances in which a restraining order is placed over an offender's assets for the purposes of meeting a future order for restitution or compensation, but the victim does not proceed with enforcement action, and the restraining order sits in abeyance: Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

465. Submission 17 (Victoria Legal Aid) 3; Submission 18 (Victoria Police) 3.

466. Submission 17 (Victoria Legal Aid) 3.

467. Submission 18 (Victoria Police) 3.

- 4.175 In the context of commenting on the question of whether restitution and compensation orders should become sentencing orders, the Women's Legal Service Victoria noted that any change that resulted in large numbers of restitution and compensation orders being returned to the courts for enforcement would be counterproductive, given recent efforts to clear the courts of the backlog of matters relating to fines enforcement.⁴⁶⁸

The Council's views on state enforcement

- 4.176 The Council is of the view that the Victorian Government should consider introducing state enforcement through civil mechanisms for victims of crime who are natural persons. Such assistance is likely to increase the payment of restitution and compensation orders in Victoria.
- 4.177 This recommendation is made on the basis that as the orders are *hybrid* orders,⁴⁶⁹ and incorporate aspects of both criminal and civil law, there should be a *hybrid* approach taken to the enforcement of the orders.
- 4.178 This approach has practical benefits for victims of crime. The Council has heard that there are instances in which the offender has some financial means, but the compensation order is not enforced due to the victim's limited resources.⁴⁷⁰ The provision of assistance by the state would mean that victims who face financial or other barriers to civil enforcement would be able to have the state assist them in exercising their existing rights to enforce the judgment debt against the offender.
- 4.179 The Council does not have any data on how many victims will be in a position whereby they have an order for restitution or compensation that can be successfully enforced against an offender. Therefore, the Victorian Government will need to consider the public value (in terms of its costs and benefits) of such a service and also how it could operate. The government should consider whether the service could be incorporated into an existing agency, such as the Department of Justice and Regulation's Infringement Management and Enforcement Services, with appropriate further resourcing.
- 4.180 The Council acknowledges that such a change would require significant investment from the Victorian Government, as it may require the creation of a new specialist enforcement agency.

Enforcement at the election of the victim

- 4.181 Automatic enforcement of restitution and compensation orders could place victims at risk. This is particularly the case for victim survivors of family violence. A victim survivor may be in regular contact with an offender and may hold concerns that enforcement action would trigger an escalation in violence or an act of retaliation from the offender that threatens the safety of the victim survivor or any protected person.⁴⁷¹

468. Submission 9 (Women's Legal Service Victoria) 1.

469. For further discussion of the hybrid status of the orders, see Sentencing Advisory Council (2018), above n 30, 17–24.

470. Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017); Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

471. See for example, Isobelle Barrett Mayering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper no. 8 (2010) 10. For further discussion, see Sentencing Advisory Council (2018), above n 30, 105. A protected person is a person who is protected by a family violence intervention order, a family violence safety notice or a recognised domestic violence order: *Family Violence Protection Act 2008* (Vic) s 4.

- 4.182 In this way, the enforcement of restitution and compensation orders differs significantly from the enforcement of fines, as restitution and compensation orders explicitly relate to financial reparation in favour of an individual victim of crime, and therefore may lead to an increased risk to a victim in whose favour the order is made. As a result, the Council considers that a cautious approach to enforcement is necessary.
- 4.183 A number of stakeholders noted that state enforcement, if introduced, should not be automatic but should involve a process of consultation with a victim in order to assess whether the victim wishes the order to be enforced.⁴⁷²
- 4.184 Members of the Victim Survivors' Advisory Council noted that victims of family violence would want to be involved in the decision to enforce an order but would then wish to hand over the responsibility for enforcement to a third party.⁴⁷³
- 4.185 At least one stakeholder, however, considered that there were advantages to introducing automatic enforcement of all restitution and compensation orders, and preferred that there be an 'opt-out' approach.⁴⁷⁴
- 4.186 Domestic Violence Victoria noted that there is a dilemma with regard to developing appropriate supports for victim survivors of family violence. On the one hand, there is a desire, regarding the enforcement of orders, to shift the burden of decision-making away from victim survivors, while on the other, there is a need to develop *victim-centric* approaches that allow victims to retain control over legal matters, particularly when there are safety concerns present.⁴⁷⁵
- 4.187 Ultimately, Domestic Violence Victoria submitted that state enforcement should only proceed at the election of the victim survivor.⁴⁷⁶ Similarly, the Magistrates' Court of Victoria and VOCAT also noted that any system for state enforcement of the orders should enable victims to 'choose to assign their rights to enforce [the order] to the state'.⁴⁷⁷ The Magistrates' Court of Victoria noted that a victim-centric approach:
- requires regard for each victim's individual circumstances, a process which provides victims with systemic assistance to make informed choices and proactively manage associated safety risks or other possible unintended consequences that are specific to each individual victim's circumstances.⁴⁷⁸
- 4.188 In accordance with the majority of stakeholder feedback, particularly from the family violence sector, the Council recommends that any enforcement agency should only enforce orders at the election of the victim.⁴⁷⁹ The Council considers the submissions and comments from Domestic Violence Victoria, as well as the Victim Survivors' Advisory Council, to be particularly compelling on the issue of the best approach to managing the safety concerns of victim survivors.

472. Submission 17 (Victoria Legal Aid) 3; Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Domestic Violence Victoria (11 April 2018). A counsellor advocate at CASA House emphasised the particular and grave risks to victims of child sexual abuse of automatic enforcement of restitution and compensation orders: Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

473. Meeting with Victim Survivors' Advisory Council (27 March 2018).

474. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6.

475. Meeting with Domestic Violence Victoria (11 April 2018).

476. Submission 5 (Domestic Violence Victoria) 1.

477. The Magistrates' Court submission proposed an 'opt-out system, whereby victims may choose to assign their rights to enforce [the order] to the state': Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6.

478. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6. Similarly, Supreme Court Justice Terence Forrest noted that 'the victim ought to have the ultimate say on whether enforcement proceeds. They will know better than anyone else whether they want to keep going': Meeting with Justice Terence Forrest and Judicial Registrar Mark Pedley, Supreme Court of Victoria (24 April 2018).

479. Submission 5 (Domestic Violence Victoria) 1; Submission 17 (Victoria Legal Aid) 3; Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Domestic Violence Victoria (11 April 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

- 4.189 Consistent with the need for a victim to be able to elect that enforcement proceed, if state enforcement of the orders is introduced, victims should also be able to communicate to the enforcement agency that they wish enforcement actions to cease.

Powers to enforce

- 4.190 A judgment debt can be enforced by a variety of means through the civil jurisdiction⁴⁸⁰ of the court that made the order, including applying for:
- an instalment order;⁴⁸¹
 - a warrant for seizure and sale of goods;⁴⁸²
 - a warrant for seizure and sale of real estate;⁴⁸³
 - an order for attachment of earnings;⁴⁸⁴
 - a charging order if an offender owns shares;⁴⁸⁵ and
 - an attachment of debt procedure (a *garnishee order*).⁴⁸⁶
- 4.191 If state enforcement is introduced, the enforcement agency should have the ability to enforce orders consistent with those civil mechanisms in Victoria. The enforcement agency should therefore be able to apply for any civil warrant, or order, in the appropriate court on behalf of a victim.
- 4.192 Additionally, the enforcement agency should be empowered to enter into a private instalment agreement with the offender;⁴⁸⁷ or apply to the court for an instalment order.⁴⁸⁸
- 4.193 In assessing the enforcement powers of the enforcement agency, the Victorian Government may wish to assess whether the agency should have the power to pursue the bankruptcy of the offender.
- 4.194 Bankruptcy proceedings raise complex legal issues with respect to restitution and compensation orders. The law is unclear as to whether an order for restitution or compensation is extinguished by bankruptcy.⁴⁸⁹

480. The powers to enforce civil judgment debts can be contrasted with the powers to enforce fines and infringements arising from criminal matters: *Fines Reform Act 2014* (Vic). A key difference is the fact that offenders may face consequences such as further imprisonment for non-payment of fines.

481. *Judgment Debt Recovery Act 1984* (Vic) s 6.

482. *Magistrates' Court Act 1989* (Vic) s 111(1)(a); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 69; *County Court Civil Procedure Rules 2008* (Vic) O 69.

483. *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 69.06; *County Court Civil Procedure Rules 2008* (Vic) O 69.06. The *Magistrates' Court Act 1989* (Vic) only authorises a warrant for seizure and sale in the case of personal property: *Magistrates' Court Act 1989* (Vic) s 111.

484. *Magistrates' Court Act 1989* (Vic) s 111(1)(b); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 72; *County Court Civil Procedure Rules 2008* (Vic) O 72.

485. *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 73; *County Court Civil Procedure Rules 2008* (Vic) O 73. There is no equivalent provision in the *Magistrates' Court General Civil Procedure Rules 2010* (Vic).

486. *Magistrates' Court Act 1989* (Vic) s 111(1)(c); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 71; *County Court Civil Procedure Rules 2008* (Vic) O 71. These mechanisms are discussed in detail in Sentencing Advisory Council (2018), above n 30, 39–43.

487. Orders would be made in compliance with section 13 of the *Judgment Debt Recovery Act 1984* (Vic), noting that no instalment order can be made where the income of the offender is derived solely from a pension benefit allowance or other regular payment under the *Commonwealth Social Security Act 1947* (Cth) or section 24 of the *Children, Youth and Families Act 2005* (Vic). See further at [4.266]–[4.271].

488. *Judgment Debt Recovery Act 1984* (Vic) pt II. If an offender defaults on payment of an order under the *Judgment Debt Recovery Act 1984* (Vic), they can be summonsed to court, where the order can be confirmed, varied or cancelled: *Judgment Debt Recovery Act 1984* (Vic) s 18. In considering whether to make an instalment order, it is not appropriate for a court to make an order requiring the judgment debtor to pay a very large proportion of their weekly income where the debt continues to accrue interest: *Cahill v Howe* [1986] VR 630, 634.

489. The *Bankruptcy Act 1966* (Cth) does not specify whether restitution and compensation orders are *provable* (provable debts are those that a creditor can claim for in bankruptcy): *Bankruptcy Act 1966* (Cth) s 82. However, in *Re Lenske* it was held that a debt payable under a restitution order was *provable* and therefore may be extinguished upon bankruptcy. In that case, the debt was not extinguished, but a permanent stay was ordered on enforcement of the orders: *Re Lenske*; *Ex parte Lenske* (1986) 9 FCR 532, 532. Not all provable debts are extinguished by bankruptcy: *Bankruptcy Act 1966* (Cth) s 153. See further Fitzroy Legal Service, *The Law Handbook* (2017) 367.

- 4.195 It is important to note that imprisonment can still be a consequence for non-payment of a civil debt in two limited circumstances:
- a judgment debtor may be sentenced to up to 40 days' imprisonment for persistent wilful default under the *Judgment Debt Recovery Act 1984* (Vic) where they have the means to pay and refuse to do so 'without an honest and reasonable excuse';⁴⁹⁰ and
 - a judgment debtor may be imprisoned for up to two months under the *Imprisonment of Fraudulent Debtors Act 1958* (Vic) where they are about to leave Victoria without paying the debt or instalments or are about to move elsewhere within Victoria with intent to avoid paying the debt.⁴⁹¹
- 4.196 The Council examined sentencing remarks in Victorian courts, and could not find any cases in which an offender was sentenced to imprisonment under either of these provisions in the financial years between 2007–08 and 2016–17.⁴⁹²
- 4.197 In Saskatchewan, the enforcement agency utilises cognitive behavioural techniques to encourage offenders to accept responsibility for the financial consequences of their offences and to pay the orders. This is generally achieved by speaking to offenders over the telephone about the consequences of both their offending and not complying with payment of restitution, and encouraging them to make voluntary payments.⁴⁹³ This approach, however, needs to be considered in light of the fact that, in Saskatchewan, restitution orders are part of an offender's sentence. As the orders in Victoria are made in addition to sentence, it may not be appropriate to pursue civil enforcement mechanisms within behavioural change frameworks generally utilised in correctional contexts.

Civil protections for debtors apply

- 4.198 As discussed at [3.127], it would not be desirable to retain the status of restitution and compensation orders as ancillary orders and yet enforce the orders in the same manner that fines are enforced, as this would involve further criminal punishment that is not acknowledged within the offender's sentence.
- 4.199 In enforcing infringements and court fines arising from criminal matters against natural persons, the Director of Fines Victoria has a range of enforcement options. If the criminal debtor fails to take appropriate action to repay their debt,⁴⁹⁴ the Director has the power to detain or immobilise vehicles, and may break, enter and search premises to locate property that could be seized or sold.⁴⁹⁵ If an offender is returned to court for non-payment of fines or infringements, the court may order unpaid community work or imprisonment.⁴⁹⁶

490. *Judgment Debt Recovery Act 1984* (Vic) s 19.

491. *Imprisonment of Fraudulent Debtors Act 1958* (Vic) s 22.

492. Note *Bogdanovic v Magistrates' Court of Victoria* [2017] VSC 696 (27 November 2017) where orders made under the *Imprisonment of Fraudulent Debtors Act 1958* (Vic) were quashed and remitted back to the Magistrates' Court. The Council undertook searches of Victorian criminal sentencing decisions in all courts, as well as searches of all Victorian decisions published on AustLII from both the criminal and the civil jurisdictions of the higher courts.

493. Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

494. A range of powers is available to the Director of Fines Victoria where a person has failed to pay either an infringement or a court fine. For unpaid infringement fines, if a debtor fails to respond to a *penalty reminder notice* and *notice of final demand*, the Director may take enforcement action, which can include driver and vehicle sanctions. For unpaid court fines, the court fine is registered with the Director of Fines Victoria upon default of payment (*Fines Reform Act 2014* (Vic) s 15). If no action is taken by a debtor following a notice of final demand, the Director can apply to the Magistrates' Court for an enforcement warrant to undertake a range of sanctions, including seizing and selling vehicles: *Infringements Act 2006* (Vic) ss 12, 29, 101, 106; *Fines Reform Act 2014* (Vic) ss 16, 24, 126, 132, 140. Further failure to comply can result in a sheriff executing a warrant to break, enter and search premises, arresting and bailing a debtor to appear before a court or releasing a debtor on a community work permit (*Fines Reform Act 2014* (Vic) ss 109–111, 119). Once an offender has been returned before a court for non-payment of either unpaid infringements or unpaid court fines, they can be sentenced to unpaid community work or imprisonment (among other orders): *Sentencing Act 1991* (Vic) ss 69, 69H; *Fines Reform Act 2014* (Vic) ss 164–165.

495. If the matter has reached the stage of a warrant being issued, there are powers to detain and immobilise vehicles to enforce the warrant: *Fines Reform Act 2014* (Vic) pt 11; Fines Victoria, 'What Happens if You Don't Pay' (online.fines.vic.gov.au, 2018) <<https://online.fines.vic.gov.au/About-Fines/What-happens-if-you-dont-pay>> at 26 July 2018.

- 4.200 Enforcing restitution and compensation orders in this manner would involve further punishment that is not taken into account in the sentencing process. In addition, such an approach could potentially lead to the imprisonment of persons for failure to pay civil orders.⁴⁹⁷
- 4.201 In Victoria, under the current powers for civil enforcement of judgment debts, if an offender has very limited financial means, it may not be possible to enforce an order against them. Offenders in this situation are sometimes referred to as *judgment proof*. An offender may be judgment proof if they do not have any assets, or if any assets that they do have are protected⁴⁹⁸ and cannot be obtained in satisfaction of a judgment debt. If an offender does not own their own home, a car valued at over \$7,800 or assets other than normal household items,⁴⁹⁹ and has no income other than Centrelink payments,⁵⁰⁰ they cannot be forced to pay an order for restitution or compensation.
- 4.202 The Council considers that the current protections applicable to judgment debtors in Victoria should apply to the state enforcement of restitution and compensation orders, in order to reflect the *hybrid* nature of the orders, incorporating elements of both criminal and civil law.
- 4.203 If an offender is judgment proof, it may still be possible for the debt to be enforced if the offender's financial circumstances improve at a later time. A judgment debt can be enforced for at least 15 years,⁵⁰¹ so a victim may seek payment if the offender's financial circumstances improve within that time.

Stakeholders' views

- 4.204 A number of stakeholders considered that state enforcement of restitution and compensation orders would only be appropriate if it were confined to the powers of civil judgment creditors to enforce judgment debts in Victoria.⁵⁰²
- 4.205 Central to these concerns was the possibility that failure to pay an order for restitution or compensation could lead to further imprisonment for an offender and could also prevent an offender from reintegrating into the community.⁵⁰³ Both the Victorian Aboriginal Legal Service and Victoria Legal Aid expressed strong concerns in relation to offenders facing imprisonment for failure to pay an order for restitution or compensation.⁵⁰⁴

496. *Fines Reform Act 2014* (Vic) s 165. For non-payment of court fines, imprisonment can be ordered under *Sentencing Act 1991* (Vic) s 69H.

497. *Sentencing Act 1991* (Vic) s 69H; *Fines Reform Act 2014* (Vic) pt 14.

498. Pursuant to *Supreme Court Act 1986* (Vic) s 42, the provisions of the *Bankruptcy Act 1966* (Cth) apply to protect an offender who is a judgment debtor. Provisions contained in the *Judgment Debt Recovery Act 1984* (Vic) also limit the ability to extract money from those with limited means.

499. *Bankruptcy Act 1966* (Cth) s 116(2)(b); *Bankruptcy Regulations 1996* (Cth) regs 6.03–6.03B. The *Bankruptcy Act 1966* (Cth) and *Bankruptcy Regulations 1996* (Cth) contain a number of amounts and thresholds that are regularly indexed. The \$7,800 threshold for motor vehicles was last updated on 24 April 2018, but is indexed each financial year: Australian Financial Security Authority, 'Indexed Amounts' (afsa.gov.au, 2018) <www.afsa.gov.au/insolvency/how-we-can-help/indexed-amounts-0> at 17 July 2018.

500. An instalment order cannot be made if the debtor's only income is a pension or other government benefit, unless the debtor consents to such an order being made: *Judgment Debt Recovery Act 1984* (Vic) s 12.

501. The enforcement of a judgment debt was previously said to be limited to just 15 years, due to the operation of *Limitation of Actions Act 1958* (Vic) s 5(4). However, the Full Federal Court has held that these provisions do not limit the enforcement of a judgment debt to 15 years: *Dennehy v Reasonable Endeavours Pty Ltd* (2003) 130 FCR 494. This position has also been accepted in subsequent case law: *Barrak v Bakarar* (2005) 194 FLR 223. However, enforcement of a judgment debt after the 15-year period has lapsed is likely to involve further legal expenses.

502. Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018); Submission 8 (Victorian Aboriginal Legal Service) 5; Meeting with Jesuit Social Services (15 May 2018); Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018). These views were expressed in consultation discussions regarding both the option of restitution and compensation orders becoming sentencing orders and the option of the orders remaining ancillary orders but being enforced by the state.

503. Financial Counselling Australia, in its report *Double Punishment: How People in Prison Pay Twice*, examines the escalation of debt among prisoners and the effects that such debt has on rehabilitation, reoffending and reintegration into the community. Fine and infringement debts are considered to be among the most stressful and problematic debts for a prisoner to manage: Financial Counselling Australia, *Double Punishment: How People in Prison Pay Twice* (2018) 3, 12, 22, 29.

504. Submission 17 (Victoria Legal Aid) 3. The Victorian Aboriginal Legal Service outlined the particular risks for the Aboriginal and Torres Strait Islander community of enforcing restitution and compensation orders in the same way as fines: Submission 8 (Victorian Aboriginal Legal Service) 5.

- 4.206 A number of stakeholders noted the community interest in ensuring that any state enforcement scheme should not extinguish an offender's prospects of rehabilitation.⁵⁰⁵
- 4.207 Victoria Legal Aid noted that if state enforcement of restitution and compensation orders is introduced, non-payment of the orders should not be subject to the same full range of enforcement options available to the Director of Fines Victoria for non-payment of fines.⁵⁰⁶ Victoria Legal Aid stated:
- many offenders have multiple debts, and the impact of state enforcement mechanisms is likely to be particularly punitive on this cohort. Fines Victoria's new extensive powers, such as imposing driver sanctions, could be crippling for those who are trying to maintain employment and reintegrate into the community.⁵⁰⁷
- 4.208 Similarly, the Magistrates' Court of Victoria and VOCAT noted that there are 'significant public policy reasons as to why civil debts powers to enforce should not mirror the powers in relation to fines'.⁵⁰⁸
- 4.209 Representatives of Victims Services, Ministry of Justice, Saskatchewan, noted that they achieve the most success by asking for voluntary payments from offenders, rather than from taking civil enforcement actions against the offender. They noted that, in any case, most offenders do not have assets that can be seized.⁵⁰⁹
- 4.210 The Victims of Crime Commissioner and a member of the Victims of Crime Consultative Committee supported enforcement against offenders that extended beyond the current powers for civil enforcement, in order to allow payments to be deducted from an offender's government benefit payments.⁵¹⁰

Penalty interest rates and compounding debt

- 4.211 Although interest is not levied against unpaid fines and infringements, Jesuit Social Services noted that offenders with fines and infringement debt can accrue further debts through penalties for late payments and costs such as enforcement and warrant fees.⁵¹¹
- 4.212 Interest does accrue, however, on all outstanding civil judgments.⁵¹² The rates differ among the courts and from year-to-year, and are currently set at approximately 10% per annum.⁵¹³ In addition to the payment of interest, an offender may also have to pay the other party's costs of bringing the enforcement action.⁵¹⁴

505. Submission 17 (Victoria Legal Aid) 3; Meeting with Jesuit Social Services (15 May 2018); Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

506. Submission 17 (Victoria Legal Aid) 3. See further [3.126]–[3.137] above.

507. Submission 17 (Victoria Legal Aid) 3.

508. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6. The submission noted that the powers for enforcement of court fines extend to including issuing enforcement warrants to arrest a person if the debt is not paid.

509. Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

510. Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victims of Crime Commissioner (7 June 2018). The Council notes that there is no prohibition under the *Judgment Debt Recovery Act 1984* (Vic) on judgment debtors and creditors entering into private agreements for payment of judgment debts, even where a debtor's sole income is derived from government benefits: *Judgment Debt Recovery Act 1984* (Vic) s 7.

511. Meeting with Jesuit Social Services (15 May 2018).

512. The amount of penalty interest due on a court judgment is calculated on the money ordered to be paid, backdated to the date the complaint was filed with the court. The relevant interest rate applies until the amount outstanding is paid in full: Magistrates' Court of Victoria, 'Penalty Interest Rates' (magistratescourt.vic.gov.au, 2018) <<https://www.magistratescourt.vic.gov.au/jurisdictions/civil/penalty-interest-rates>> at 26 July 2018; Meeting with Chief Magistrate, Deputy Chief Magistrate Felicity Broughton and Simone Shields, Principal Registrar of the Magistrates' Court of Victoria (26 June 2018).

513. Supreme Court of Victoria, *Penalty Interest Rates* (2014); County Court of Victoria, 'Fees' (countycourt.vic.gov.au, 2018) <<https://www.countycourt.vic.gov.au/fees>> at 26 July 2018; Magistrates' Court of Victoria (2018), above n 512.

514. *Judgment Debt Recovery Act 1984* (Vic) s 20; Magistrates' Court of Victoria, 'Enforcement of Civil Debt' (magistratescourt.vic.gov.au, 2012) <<https://www.magistratescourt.vic.gov.au/jurisdictions/civil/enforcement-civil-debt>> at 26 July 2018.

- 4.213 If state enforcement of the orders is introduced, the enforcement agency may wish to forgo accrued interest for all outstanding civil debts arising from restitution and compensation orders made in the Children's Court, Magistrates' Court, County Court and Supreme Court of Victoria, from the date that a complaint is filed with a relevant court for enforcement, as not doing so may compound the offender's debt.⁵¹⁵

Recommendation 7: Consideration of state enforcement of restitution and compensation orders through civil mechanisms

The Victorian Government should consider whether the Department of Justice and Regulation's Infringement Management and Enforcement Services, or another specialist enforcement agency, should be empowered to enforce restitution and compensation orders on behalf of victims of crime who are natural persons.

If such state enforcement of restitution and compensation orders is introduced, the enforcement agency should:

- only enforce an order at the election of the victim, and the victim should have the ability to direct that the enforcement agency cease civil enforcement action;
- only be empowered to use civil mechanisms of enforcement, consistent with the current powers for a judgment creditor to enforce a judgment debt under the *Judgment Debt Recovery Act 1984* (Vic) and other relevant legislation;
- be bound by the protections for civil judgment debtors in Victoria, including:
 - limitations on the seizure and sale of goods or property that are protected under section 42 of the *Supreme Court Act 1986* (Vic); and
 - the prohibition under section 12 of the *Judgment Debt Recovery Act 1984* (Vic) on instalment orders against offenders whose income is solely derived from government benefits;
- only pursue enforcement of an order where, in the opinion of the enforcement agency, there is a reasonable prospect of substantially satisfying the order within a reasonable time; and
- receive all necessary additional resources, including:
 - sufficient staff, including legally qualified staff with expertise in judgment debt recovery and victims' compensation, and knowledge of the nature and dynamics of family violence; and
 - IT systems that allow for agency staff to ascertain whether an offender has fine debt and/or infringement debt, as well as any relevant civil debts for which enforcement action has been taken.

- 4.214 Consistent with this recommendation, where the victim has elected that the state should enforce the order, the victim should not be permitted to simultaneously pursue civil enforcement individually.

515. Jesuit Social Services noted that penalties for late payments that accrue against debtors are undesirable and can entrench socioeconomic disadvantage: Meeting with Jesuit Social Services (15 May 2018).

Considerations for operation of the enforcement agency

4.215 The following section provides some considerations for the government as to how the enforcement agency might operate in practice, based on the Council's research and consultation during the reference.

Information to victims on enforcement of orders

- 4.216 Victims in whose favour orders for restitution or compensation are made will need to be provided with information on how the orders are enforced, and on their right to apply to the enforcement agency to seek state enforcement of the order. They will also need to be provided with practical information on how to contact the enforcement agency.
- 4.217 The Council considers courts to be in the best position to provide this information consistently to victims, or their legal representative, at the time that the order for restitution or compensation is made.
- 4.218 Consideration was given to the idea that the enforcement agency could directly contact all victims of crime in whose favour orders had been made. In Saskatchewan, the Victims Services agency sends a letter to all victims of crime who have received a restitution order to advise them of how much restitution was ordered and the possibility of the state undertaking civil enforcement on their behalf (for certain victims of crime).⁵¹⁶ However, in Victoria there would be practical difficulties in identifying victims who are the beneficiaries of such orders. In addition, contact could pose safety risks for victims (see discussion at [4.181]–[4.189]).
- 4.219 The provision of information to victims on how restitution and compensation orders are enforced ought to be considered by the Victims of Crime Commissioner's working group on the provision of information to victims (see discussion of Recommendation 2 at [4.23]–[4.45]).
- 4.220 If victims need further legal advice on their enforcement options, they will need to be directed to available legal assistance, as the courts cannot provide legal advice.⁵¹⁷

Investigation of offenders' assets

- 4.221 When an eligible victim of crime has notified the enforcement agency that they wish the agency to pursue civil enforcement, the enforcement agency will need to gather information (in addition to any information that the victim may be able to provide) on an offender's financial position, in order to determine whether and how to enforce the order.
- 4.222 A key advantage of state enforcement of judgment debts is that the enforcement agency may be in a position to obtain more information about an offender's financial position and assets than an individual seeking to privately enforce a judgment debt. For example, the Council heard during consultation that often victims are unable to initiate civil enforcement actions because they do not have a current address for the offender, and therefore cannot serve legal documents on them.⁵¹⁸

⁵¹⁶ Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

⁵¹⁷ Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

⁵¹⁸ Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017); Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (4 May 2018).

- 4.223 If state enforcement of restitution and compensation orders is introduced, the enforcement agency should obtain information on an offender's financial position by:
- undertaking searches on whether the offender owns any real or personal property;
 - obtaining information through VicRoads on any registered vehicles owned by the offender;
 - ascertaining whether the offender has any outstanding fine debt or outstanding civil debt;
 - developing information-sharing agreements with relevant agencies to ascertain whether the offender is in receipt of any government payments; and
 - ascertaining whether the offender has received any compensation through information sharing with the Prisoner Compensation Quarantine Fund.⁵¹⁹
- 4.224 During consultation, Infringement Management and Enforcement Services noted that they are currently implementing reforms following the *Fines Reform Act 2014* (Vic).⁵²⁰ Under the new Fines Victoria scheme, the Director of Fines Victoria has extensive powers to take enforcement action under the *Fines Reform Act 2014* (Vic), including the option to issue an enforcement warrant against a fine defaulter; allowing for the seizure and sale of the defaulter's personal property,⁵²¹ applying driver and vehicle sanctions,⁵²² or placing a charge over real property.⁵²³
- 4.225 It may be possible for the state agency enforcing restitution and compensation orders to share information and resources with Fines Victoria. The enforcement agency will also need to develop frameworks and procedures for identifying whether an offender's assets are subject to a restraining order.⁵²⁴
- 4.226 The enforcement agency will need to develop legal frameworks, agreements and policies in order to obtain relevant information on offenders' financial positions in a manner that is consistent with the *Privacy and Data Protection Act 2014* (Vic), as well as rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), such as the right to privacy.⁵²⁵
- 4.227 In Saskatchewan, Victims Services, Ministry of Justice, can:
- attempt to access the most current address of the offender through a central government agency; and
 - undertake credit searches through Equifax, a credit reporting agency, to ascertain whether the offender is employed and to send a *trace letter* to their bank account to ascertain how much money is held in any identified accounts.⁵²⁶
- 4.228 If state enforcement is introduced, the Victorian Government may wish to consider the most efficient and cost-effective avenues for accessing information on offenders' finances, with regard to privacy and other relevant rights.
- 4.229 Additionally, the Council notes that the enforcement agency may also wish to share information on enforcement of orders with VOCAT where a victim has applied for, or received compensation from, multiple sources.

519. The *Corrections Act 1986* (Vic) provides for the creation of a Prisoner Compensation Quarantine Fund for the purpose of paying into that fund damages awarded to prisoners for civil wrongs: *Corrections Act 1986* (Vic) pt 9C. Amounts awarded to a prisoner for medical and legal costs are excluded and are not paid into the fund: *Corrections Act 1986* (Vic) s 104V. For further discussion, see Sentencing Advisory Council (2018), above n 30, 61.

520. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (4 May 2018). See also *Fines Reform Amendment Act 2017* (Vic).

521. *Fines Reform Act 2014* (Vic) ss 106, 109.

522. *Fines Reform Act 2014* (Vic) s 89.

523. *Fines Reform Act 2014* (Vic) s 96.

524. This may require information sharing with the Office of Public Prosecutions and Asset Confiscation Operations: Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

525. This point was raised in consultation: Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

526. Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

Decision to enforce

- 4.230 A key issue raised by state enforcement of restitution and compensation orders is whether there should be limits on when the agency could take civil enforcement action against an offender.
- 4.231 A number of stakeholders emphasised that the majority of offenders have limited financial resources.⁵²⁷ This is supported by the statistical information on offenders' resources showing a large percentage with limited financial resources.⁵²⁸
- 4.232 As noted at [4.101], orders for restitution and compensation may be made without consideration of an offender's capacity to pay.⁵²⁹ Therefore, significant orders may be made against offenders who have very limited financial prospects.⁵³⁰
- 4.233 As noted at [4.7], the Council intends to strengthen enforcement against those offenders who have some capacity to pay reparation to their victims (those in the *will pay*, *might pay* and *won't pay* categories), as opposed to those who *can't pay* due to their financial circumstances.
- 4.234 The Council considers that if state enforcement of restitution and compensation orders is introduced, the enforcement agency should only pursue enforcement of an order where, in the opinion of the enforcement agency, there is a reasonable prospect of substantially satisfying the order for restitution or compensation within a reasonable time, taking into account matters such as:
- the offender's financial circumstances; and
 - the nature of the losses experienced by the victim.⁵³¹
- 4.235 The question of whether enforcement action should be taken against offenders with limited financial resources is relevant to the question of how state assistance with civil enforcement of restitution and compensation orders can be balanced against the community's interest in allowing for the possibility of an offender's rehabilitation. Civil enforcement that does not allow for an offender's rehabilitation is likely to have criminogenic consequences.
- 4.236 There is also a further need to manage victims' expectations on the likelihood of successful enforcement.⁵³²
- 4.237 If the enforcement agency decides there is no reasonable prospect of enforcing an order, the enforcement agency should be empowered to reassess this position if the offender's financial circumstances change.⁵³³

527. Meeting with Victoria Legal Aid (20 September 2017); Meeting with Waller Legal (28 November 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

528. As noted in the issues and options paper, a significant proportion of offenders receive assistance from Victoria Legal Aid, and these persons have very limited financial resources: Sentencing Advisory Council (2018), above n 30, 38. For example, in 2016–17, Victoria Legal Aid assisted 90,649 unique clients, of which 53% were receiving government benefits and 28% had no income: Victoria Legal Aid (2017), above n 266, 3, 25. See further [4.12]–[4.22].

529. *Sentencing Act 1991* (Vic) ss 85H, 86(2).

530. For example, in the Council's issues and options paper, it was noted that the compensation orders for injury made in the Supreme Court ranged from tens of thousands of dollars to one order in excess of \$500,000: Sentencing Advisory Council (2018), above n 30, 20. In the higher courts, these orders would often be made against those who were sentenced to lengthy terms of imprisonment. For example, in *Director of Public Prosecutions v Tan* [2016] VCC 2055 (23 December 2016) a compensation order of \$1,317,273.70 was made against an offender sentenced to six years' imprisonment.

531. If the enforcement agency were to take unreasonable or inappropriate enforcement actions, the enforcement agency could be at risk of the court ordering that the enforcement agency pay the costs of the application: *Judgment Debt Recovery Act 1984* (Vic) s 20.

532. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Meeting with Centre for Innovative Justice, RMIT University (4 April 2018); Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018).

533. As noted above at [4.203], a judgment debt can be enforced for at least 15 years.

Context of enforcement against individual offenders who are judgment debtors

- 4.238 Although the Council recommends that the enforcement action against offenders remains consistent with the powers of civil enforcement in Victoria, there may be some circumstances in which it may be in the interests of the broader community that enforcement action (or a particular type of enforcement action) is not taken against an offender who is of limited financial resources, but does not meet the requirements to be deemed *judgment proof*.⁵³⁴
- 4.239 In addition, it is appropriate that there be some statutory limitations on civil enforcement by the enforcement agency. These limitations recognise that the enforcement agency is a government agency, and so must have regard to both the broader public interest and human rights considerations.⁵³⁵
- 4.240 The following section discusses some factors that, if present in a given case, may cause the enforcement agency to carefully consider whether enforcement action is in the interests of the victim and the broader community. The enforcement agency will also need to consider whether enforcement action is likely to subvert a sentencing order made by a criminal court by creating significant difficulties for an offender seeking to comply with a court-imposed order (such as a community correction order).
- 4.241 Key considerations in assessing whether and how to proceed with enforcement action include:
- the amount of the order;
 - whether the offender has other fines or infringement debt, or other known civil debts;
 - the age of the offender;
 - the type and length of sentence imposed on the offender; and
 - any known information about an offender's financial position, assets and dependants.
- 4.242 In addition, the enforcement agency may wish to consider other relevant characteristics of the offender in determining how to proceed in relation to enforcement action against debtors who, for example:
- have caregiving responsibilities, dependants or payments due according to child support agreements;
 - have known or suspected mental illness or cognitive impairment; and/or
 - are currently completing treatment related to substance abuse, a men's behaviour change program or other treatment programs and this may require the offender to financially contribute to their treatment or attend appointments that may result in absences from work or payment for transport, in order to comply with a community correction order or other court matter.

534. Sentencing Advisory Council (2018), above n 30, 37–38.

535. Section 38(1) of the *Charter of Human Rights and Responsibilities 2006* (Vic) provides that 'it is unlawful for a public authority to act in a way that is incompatible with a [Charter] right or, in making a decision, to fail to give proper consideration to a relevant [Charter] right', subject to certain exceptions set out in the remainder of the section. This imposes obligations on public authorities to observe Charter rights, in accordance with the intention of parliament that the Charter have a normative effect on administrative practice: *Director of Housing v Sudi* (2011) 33 VR 559, 596 (Weinberg JA). The intent is that 'the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature': *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373, 401 (Bell J).

Age of the offender

- 4.243 The Children's Court may make an order for restitution or compensation of up to \$1,000 against a child, but it must take into account the child's financial circumstances and the nature of the burden that payment would impose in determining the amount and method of payment.⁵³⁶
- 4.244 If a young person is sentenced in the higher courts, however, the judicial officer does not have to take into account their financial circumstances in imposing a compensation order.⁵³⁷
- 4.245 If state enforcement of restitution and compensation orders were to be introduced, the enforcement agency may wish to consider whether it is financially viable or desirable to pursue civil enforcement of orders made in the Children's Court of Victoria.
- 4.246 This approach is consistent with the emphasis on rehabilitation in the Children's Court, and the recognition that children and young people share particular developmental characteristics that affect impulsivity and cognition.⁵³⁸ The emphasis on rehabilitation acknowledges that children and young people's cognitive faculties are still developing,⁵³⁹ and therefore the community is best served by the promotion of the offender's development of pro-social behaviours.
- 4.247 The enforcement agency may also wish to exercise discretion in relation to young offenders,⁵⁴⁰ as well as *youthful offenders*, including persons who may be more psychosocially immature than their chronological age would indicate.⁵⁴¹

Interaction of civil enforcement action with an offender's ability to comply with a community correction order or other court order

- 4.248 In its 2016 *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)*, the Council found substantial increases in the number of offenders who received a community correction order either as a principal sentence or in a combined order.⁵⁴²
- 4.249 Given the increasing use of community correction orders in Victorian courts, in exercising the discretion to enforce a judgment debt against an offender, a question may arise as to whether enforcement of a debt through execution of a warrant or other civil mechanisms may diminish the ability of an offender to comply with a community correction order. For example, this may occur where an offender has a car that is valued over \$7,800 that they use to attend appointments as a condition of a community correction order.
- 4.250 If the enforcement agency wishes to obtain an attachment of earnings order (an application to a court to order a debtor's employer to divert funds from their wages directly to the creditor),⁵⁴³ it may be necessary to consider whether the offender is obliged to make any financial contributions to treatment programs required as part of a community correction order.⁵⁴⁴

536. *Children, Youth and Families Act 2005* (Vic) s 417. In addition, there are limits on civil enforcement actions against children. Children cannot be subject to imprisonment under the *Judgment Debt Recovery Act 1984* (Vic) or the *Imprisonment of Fraudulent Debtors Act 1958* (Vic) for failure to pay a civil debt: *Children, Youth and Families Act 2005* (Vic) s 418(4).

537. *Sentencing Act 1991* (Vic) ss 85H, 86(2). See further [4.101]–[4.125].

538. See further Sentencing Advisory Council (2016), above n 152, 51.

539. *Webster (A Pseudonym) v The Queen* [2016] VSCA 66 (11 April 2016) [8].

540. Young offenders are persons below the age of 21 at the time of sentence: *Sentencing Act 1991* (Vic) s 3(1).

541. *Pitone v The Queen* [2017] VSCA 3 (25 January 2017) [19]; *R v Mills* [1998] 4 VR 235, 241.

542. Sentencing Advisory Council, *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) x.

543. See further Sentencing Advisory Council (2018), above n 30, 42.

544. Some men's behaviour change programs require a financial contribution from the participant. See for example, LifeWorks, 'Men's Behaviour Change Program' (lifeworks.com.au, 2016) <<https://lifeworks.com.au/programs/mens-behaviour-change-program>> at 26 July 2018.

- 4.251 In addition, it may be necessary to consider whether the offender has financial obligations under any other orders or agreements overseen by courts. For example, an order of the Family Court can require persons to undertake self-funded random drug testing as a precondition of access to children.⁵⁴⁵
- 4.252 Medical issues, such as prescriptions to manage mental health conditions or drug and alcohol addictions, may also be relevant in assessing whether it is appropriate to pursue civil enforcement against an offender.

Offenders with mental illness and/or cognitive disabilities

- 4.253 Research has shown that offenders with mental illness or cognitive disabilities⁵⁴⁶ face greater difficulties in dealing with the criminal justice system than other offenders.⁵⁴⁷ Further, people with mental illness or cognitive impairments are overrepresented in the criminal justice system, both as perpetrators and as victims of crime.⁵⁴⁸
- 4.254 Issues that offenders with cognitive impairments may face include difficulties with communication and basic living skills, such as managing budgeting, which may impact on their ability to comply with any instalment order or payment arrangement.⁵⁴⁹
- 4.255 The enforcement agency may wish to carefully consider the effect of any civil enforcement action – particularly civil enforcement action to seize and sell property – on offenders with cognitive disabilities (and on their dependants or family members).

Offenders with limited financial resources

- 4.256 Even where an offender is not technically *judgment proof*,⁵⁵⁰ they may have very limited assets, meaning that enforcement of an order for restitution or compensation could create significant financial hardship or otherwise lead to consequences such as homelessness.
- 4.257 The Council heard throughout consultation of the limited socioeconomic status of the majority of persons convicted of criminal offences. Jesuit Social Services noted research finding that 50% of people in prison in Victoria come from 6% of postcodes, and that consideration of an offender's economic context needs to provide for a broad understanding of disadvantage.⁵⁵¹
- 4.258 Factors such as compromised physical and mental health and cognitive impairment may affect an offender's capacity to meet a financial order.⁵⁵²

545. *Family Law Act 1975* (Cth) s 64B. See further Andersons Solicitors, 'Drug Tests and Family Court Hearings' (andersons.com.au, 2015) <<https://www.andersons.com.au/lawtalk/2015/february/drug-tests-and-family-court-hearings>> at 26 July 2018.

546. The term *cognitive disability* is used to refer to an intellectual disability or an acquired brain injury.

547. Suzanne Brown and Glenn Kelly, *Issues and Inequities Facing People with Acquired Brain Injury in the Criminal Justice System* (2012) 4; Lubica Forsythe and Antonette Gaffney, *Mental Disorder Prevalence at the Gateway to the Criminal Justice System*, Trends and Issues in Crime and Criminal Justice no. 438 (2012).

548. Eileen Baldry et al., 'Reducing Vulnerability to Harm in Adults with Cognitive Disabilities in the Australian Criminal Justice System' (2013) 10(3) *Journal of Policy and Practice in Intellectual Disabilities* 222; Ruth McCausland et al., *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost–Benefit Analysis of Early Support and Diversion* (2013). Some studies have estimated that upwards of 50% of persons in custody in Australia suffer from some form of mental illness: Forsythe and Gaffney, (2012), above n 547, 6.

549. Meeting with Jesuit Social Services (15 May 2018).

550. See [4.201] for further discussion of *judgment proof* offenders.

551. Tony Vinson et al., *Dropping Off the Edge 2015* (2015) 59; Meeting with Jesuit Social Services (15 May 2018).

552. Meeting with Jesuit Social Services (15 May 2018).

- 4.259 A participant in the Council's stakeholder discussion forum noted that, when considering enforcement of restitution and compensation orders:
- [Y]ou can't ignore who your general offender is at the moment – their age, they are between 25 and [their] 30s, drug and alcohol is rife, homelessness is a significant issue for us and mental health is also a significant issue.⁵⁵³
- 4.260 A number of stakeholders raised concerns about the potentially disproportionate effect of civil enforcement on offenders with limited financial resources.⁵⁵⁴ Victoria Legal Aid stated that if the Council is to recommend state enforcement of restitution and compensation orders, exemptions and other safeguards should be provided for vulnerable offenders.⁵⁵⁵
- 4.261 Justice Connect noted that offenders who are homeless may rely on their cars for shelter.⁵⁵⁶ Seizure of an offender's car may place them in a position in which they cannot attend the appointments necessary to comply with other court orders.
- 4.262 In addition, pursuit of enforcement against offenders with limited financial resources is likely to prevent any attempts on the offender's part to rehabilitate.⁵⁵⁷ A stakeholder noted the potential consequences of enforcement action on an offender's rehabilitation:
- [I]f there is [enforcement of restitution and compensation orders in the manner that fines are enforced], [if] the person may not be in a position now to pay it, but will be in a space of time if their financial position improves, then there is even less incentive for people to go and find employment. If they are going to get a job and then the state is going to take half their pay away ... you are really just disincentivising [an] offender's capacity and desire to rehabilitate themselves. [It's] just another layer of the system making it difficult for people to escape poverty and the social circumstances in which they find themselves.⁵⁵⁸
- 4.263 RMIT's Centre for Innovative Justice noted that 'an offender in one context is a victim in another', and that it is important to consider the effect of additional financial burdens on offenders, who may themselves be victim survivors of family violence or other offending.⁵⁵⁹
- 4.264 A number of participants at the Council's stakeholder discussion forum agreed that reducing an offender's chances of rehabilitation was ultimately counterproductive, as it was likely to create further victims of crime.⁵⁶⁰ Civil enforcement mechanisms against persons in these circumstances could therefore have undesirable and unforeseen consequences.

553. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018).

554. Meeting with Justice Connect (18 April 2018); Meeting with Jesuit Social Services (15 May 2018).

555. Submission 17 (Victoria Legal Aid) 3.

556. Meeting with Justice Connect (18 April 2018). It is important to note that family violence has been recognised as a driver of homelessness. A study by the Australian Institute of Health and Welfare found that between 2011 and 2014, 36% of the people – mostly women and children – who accessed homelessness services in Australia did so due to family violence: Australian Institute of Health and Welfare, 'Over One-Third of Specialist Homelessness Clients Seek Domestic and Family Violence Support', Media Release (3 February 2016) <<https://www.aihw.gov.au/news-media/media-releases/2016/2016-feb/over-one-third-of-specialist-homelessness-clients>> at 26 July 2018.

557. See for example, the case of Damien Mantach, who was sentenced to five years' jail for offences relating to stealing \$1.5 million from a political party. Prior to being sentenced, the offender had repaid \$535,085.65. A compensation order for \$882,108 was subsequently made, but with the accrual of interest the amount owed had become \$1,061,871. The offender's father wrote to the victim outlining the difficulties his son would face in paying the remainder of the order, noting that following his release from prison, his son's ability to make payments will be 'almost non-existent' and that further enforcement actions would be 'vindictive': Richard Willingham, 'Damien Mantach's Father Writes to Liberal Party Asking for Debt Over \$1.5m Theft to Be Forgiven' ABC News (Melbourne) 13 July 2018 <<http://www.abc.net.au/news/2018-07-13/damien-mantachs-father-letter-liberal-party-debt-waive/9984818>> at 26 July 2018; *Director of Public Prosecutions v Mantach* [2016] VCC 1027 (19 July 2016).

558. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018).

559. Meeting with Centre for Innovative Justice, RMIT University (4 April 2018).

560. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018). See also Financial Counselling Australia (2018), above n 503, 29. Financial Counselling Australia note that when prisoners are released with a 'clean slate' this relieves 'an immediate pressure for them to re-offend to tackle outstanding debts'.

- 4.265 If an order is for a large amount of money, it may be that an offender is unlikely to be able to pay an order for restitution or compensation within a reasonable period of time. It will be necessary for the enforcement agency to assess whether it is prudent to pursue enforcement. This would need to involve careful consideration of the victim's wishes (see further [4.276]).

Limitation of instalment agreements

- 4.266 The government may wish to consider limiting the circumstances in which the enforcement agency would enter into an instalment agreement directly with an offender.
- 4.267 If state enforcement of restitution and compensation orders is introduced, the government may wish to prohibit the agency entering into payment agreements directly with offenders for payment of an order for restitution or compensation if the offender's income is derived solely from:
- a pension, benefit, allowance or other regular payment under the *Commonwealth Social Security Act 1947* (Cth); and/or
 - a payment under section 24 of the *Children, Youth and Families Act 2005* (Vic).
- 4.268 While the *Judgment Debt Recovery Act 1984* (Vic) does not prohibit individual judgment creditors from entering into agreements directly with judgment debtors relying on deductions from the debtor's government benefits, the Council is of the view that as the enforcement agency is acting on behalf of the state, there needs to be caution in relation to direct negotiations with such offenders.
- 4.269 As noted previously, persons with cognitive impairments are overrepresented in the criminal justice system.⁵⁶¹ During consultation, the Council heard that persons with cognitive impairments may enter into agreements to make reparation that they cannot realistically satisfy because they do not understand the process or otherwise have not properly considered and understood the implications of the agreement.⁵⁶² Allowing for the possibility of instalment agreements directly between the state enforcement agency and individual offenders may lead to situations where offenders agree to payment arrangements with which they cannot realistically comply.
- 4.270 While the enforcement agency ought to have the ability to enter into an agreement with an offender in appropriate circumstances, they should not have the ability to enter into instalment agreements directly with offenders whose sole income is derived from government benefits.
- 4.271 If a victim wishes to pursue a private agreement for payment of an order with an offender whose income is solely derived from welfare, they would still be able to reassume the enforcement of their own debt and undertake enforcement mechanisms in the manner they desire.⁵⁶³

561. Meeting with Jesuit Social Services (15 May 2018). See also [4.253].

562. Meeting with Jesuit Social Services (15 May 2018). Similarly, the RMIT Centre for Innovative Justice noted that in some cases young people participating in restorative justice conferencing tended to overpromise what they could provide for victims of crime: Meeting with Centre for Innovative Justice, RMIT University (4 April 2018).

563. If Recommendation 6 is adopted, a victim could enforce their judgment debt independently without having to pay certain fees: see [4.137]–[4.146].

Effect of civil enforcement on third parties

- 4.272 The enforcement agency may also wish to carefully consider the effect of any civil enforcement action (particularly civil enforcement action to seize and sell property) on the dependants or family members of offenders against whom such orders have been made.
- 4.273 Such considerations may arise in the context of enforcement action against female offenders,⁵⁶⁴ and offenders who have primary carer responsibilities for children or other relatives.
- 4.274 The enforcement agency would need to carefully consider the potential consequences of enforcement action on innocent third parties. A member of the Victim Survivors' Advisory Council noted the potential difficulties for innocent third parties who have a shared asset with a partner, when the partner has been convicted of criminal offending either against them or in an unrelated context.⁵⁶⁵
- 4.275 It is also important to note that the offender may themselves be a victim survivor of family violence. Research has shown that women in contact with the criminal justice system (whether in prison or otherwise) have experienced family violence at much higher rates than women in the rest of the community.⁵⁶⁶ Civil enforcement against an offender who is a victim of family violence may place them in a position of increased risk of further family violence.

Communication with victim on decision to enforce

- 4.276 The Council notes that the enforcement agency will need to liaise with victims of crime who wish to enforce their orders to discuss the prospects of enforcement of the order, and to notify and discuss the enforcement agency's decision regarding whether, and how, to pursue enforcement.
- 4.277 Stakeholders emphasised the importance of managing the victim's expectations about the likely success of enforcement.⁵⁶⁷
- 4.278 The enforcement agency will need to develop a framework for communication with the victim that is consistent with the principles outlined in the *Victims' Charter Act 2006* (Vic).⁵⁶⁸ The enforcement agency will also need to conduct these discussions with a victim without breaching the privacy rights of the offender.⁵⁶⁹

564. For discussion of the particular issues that may arise in relation to female offenders, see Corrections Victoria, *Correctional Management Standards for Women Serving Community Correctional Orders* (2009); Corrections Victoria, *Better Pathways: An Integrated Response to Women's Offending and Reoffending: A Four-Year Strategy to Address the Increase in Women's Imprisonment in Victoria 2005–2009* (2005).

565. Meeting with Victim Survivors' Advisory Council (27 March 2018).

566. State of Victoria, Royal Commission into Family Violence, *Volume V: Report and Recommendations* (2016) 237.

567. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Meeting with Centre for Innovative Justice, RMIT University (4 April 2018); Meeting with Jesuit Social Services (15 May 2018).

568. The Council was advised that RMIT University's Centre for Innovative Justice has been engaged by the Office of Public Prosecutions to conduct research on how the Office of Public Prosecutions communicates with victims about plea resolution decisions, as well as the decision to discontinue charges: Meeting with Centre for Innovative Justice, RMIT University (4 April 2018). If state enforcement of the orders is to be introduced, the agency may wish to draw on this research in developing an approach to discussions with victims on whether to bring civil enforcement action against an offender.

569. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (4 May 2018). The Council notes that there may be cases in which the offender is at risk from the victim, or where there may be a family violence intervention order or safety notice that protects the offender from the victim. Therefore, it is important to preserve the privacy of victims seeking to enforce restitution and compensation orders, as well as the privacy of the offender.

- 4.279 The enforcement agency may need to discuss with the victim whether small payments over a long period of time would be desirable or may prevent the victim from progressing in their recovery from the offending.⁵⁷⁰
- 4.280 The Council acknowledges that the need for the enforcement agency to communicate directly with victims of crime, and manage complex matters such as enforcement where the victim survivor has experienced family violence, would require a reorientation of the services of Infringement Management and Enforcement Services, were that agency to take on the proposed role of the enforcement agency.⁵⁷¹ Infringement Management and Enforcement Services does not currently have the necessary expertise within the organisation to provide appropriate support to victims.⁵⁷²
- 4.281 A number of stakeholders noted that, for some victims, the reality is that compensation will not be able to be recovered from the offender.⁵⁷³ In these circumstances, it is important that the victim be directed to legal assistance for advice on other sources of compensation, such as VOCAT. For this reason, the Council recommends that the government consider the creation of a specialist victims' legal service (see [4.307]–[4.338]).
- 4.282 If a victim wishes to appeal such a decision, they would have the ability to do this under the existing mechanisms for appealing decisions of government agencies, including by application for review of the decision to the Victorian Civil and Administrative Tribunal. If the enforcement agency decides not to pursue enforcement on behalf of a victim, the victim should retain their right to independently enforce the order.

Other operational issues

- 4.283 If state enforcement of restitution and compensation orders is introduced, there are a number of other matters that will require careful consideration by the enforcement agency.
- 4.284 With regard to the mechanics of enforcement and payment to victims, the Council notes that:
- offenders should not make payments directly to victims (as this may lead to further traumatisation); and
 - the enforcement agency should promptly pass on any received payments to the victims.⁵⁷⁴
- 4.285 A key challenge is how to navigate the enforcement of outstanding criminal fine and infringement debt, which will be enforced by Fines Victoria, with the enforcement of restitution and compensation orders through civil mechanisms. A further difficulty arises where an offender also has outstanding civil debt for which enforcement action is being taken.

570. In some instances, a victim may not wish to receive compensation over a lengthy period of time: see for example, Leask (2017), above n 106; Teleconference with Legal Services Commissioner/Group Manager, National Service Delivery, Ministry of Justice, New Zealand (11 December 2017).

571. Fines Victoria currently does not provide support to persons who wish to have fines waived due to family violence circumstances, instead referring persons to appropriate services such as Victoria Legal Aid for assistance with other issues arising from family violence: Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (6 June 2018).

572. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (6 June 2018).

573. Restitution and Compensation Orders Stakeholder Discussion Forum (19 March 2018).

574. In Saskatchewan, payments are passed on to victims within 30 days of receipt: Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government (6 April 2018).

- 4.286 Under the current system for Fines Victoria, warrants are executed in the order that they are issued.⁵⁷⁵ Sheriff's officers aim to execute all warrants against a person simultaneously, in order to best utilise resources.⁵⁷⁶ If state enforcement of the orders is introduced, it may be desirable that the state develop a policy to allow the victim to receive payments made towards the offender's fine debt. This would be consistent with the provision that the court must give preference to imposing an order for restitution or compensation rather than a fine, if the court considers that the offender has insufficient means to pay both.⁵⁷⁷
- 4.287 The enforcement agency may need to liaise with the Office of Public Prosecutions in order to vary any restraining order applying to an offender's assets. In circumstances in which an offender's assets have been restrained for the sole purpose of meeting an order for restitution or compensation (see further [4.50]–[4.100]), the enforcement agency will need to pursue civil enforcement mechanisms in order to have the restrained asset seized and sold. The responsibility for any application to vary or cancel a restraining order would remain with the Office of Public Prosecutions.⁵⁷⁸
- 4.288 In addition, consideration ought to be given to the interaction of enforcement action by the enforcement agency with any proceedings to recover payments made through VOCAT to victims of crime directly from the offender.⁵⁷⁹
- 4.289 The issue of how to navigate the interaction of fines enforcement with state enforcement of restitution and compensation orders is beyond the Council's terms of reference and will also depend on the agency's operational structure, IT systems and resourcing.

Resourcing of enforcement agency

- 4.290 If state enforcement of restitution and compensation orders is introduced, the enforcement agency should be supported by all necessary additional resourcing, including:
- sufficient staff, including legally qualified staff with expertise in judgment debt recovery and victims' compensation, and knowledge of the nature and dynamics of family violence; and
 - IT systems that allow for agency staff members to ascertain whether an offender has fine debt and/or infringement debt, as well as any relevant civil debts for which enforcement action has been taken.
- 4.291 Victoria Police was opposed to the idea of state enforcement of restitution and compensation orders on the basis of the considerable resource implications that such a change could have.⁵⁸⁰ Representatives of Infringement Management and Enforcement Services noted that their staff do not currently have the expertise to assess enforcement strategies for the enforcement of civil debts.⁵⁸¹

575. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (4 May 2018).

576. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (4 May 2018).

577. *Sentencing Act 1991* (Vic) s 53(2). Allowing a similar provision to apply at the point of enforcement of restitution and compensation orders would enable a victim's financial interests to take priority over the financial interests of the state.

578. This issue was raised at Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

579. The issue of recovery of payments made through VOCAT directly from offenders and the current unworkability of section 51 of the *Victims of Crime Assistance Act 1996* (Vic) were raised by a number of stakeholders: Meeting with Deputy Chief Magistrate Broughton, Magistrates' Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017); Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

580. Submission 18 (Victoria Police) 3.

581. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (4 May 2018); Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (6 June 2018).

- 4.292 A number of stakeholders, including Deputy Chief Magistrate Broughton and representatives of Domestic Violence Victoria and Centre Against Sexual Assault (CASA) House, stressed the importance of expertise in the assessment of risk for victim survivors of family violence and interpersonal crimes.⁵⁸²
- 4.293 The Council acknowledges that Infringement Management and Enforcement Services is not currently equipped to undertake civil enforcement of restitution and compensation orders on behalf of victims in the manner envisioned by the Council, and would require considerable changes to their current structure and resourcing.
- 4.294 In order to effectively enforce judgment debts, the enforcement agency will need to have staff with appropriate legal experience in debt recovery, as well as staff who are appropriately trained in recognising and responding to issues for victims experiencing family violence.
- 4.295 The enforcement agency will also need to be equipped with IT systems that allow staff to easily and accurately obtain a full picture of other outstanding criminal debts and civil warrants against an offender.

Legal assistance for offenders who are judgment debtors

- 4.296 If more restitution and compensation orders are enforced, there is likely to be an increase in the number of offenders who need legal assistance and representation to respond to correspondence from, and enforcement action taken by, the enforcement agency.
- 4.297 As noted at [4.253], it has been estimated that at least 50% of offenders in Victoria's prison system suffer from some form of mental impairment (including acquired brain injuries, mental illness or cognitive impairment).⁵⁸³ In these circumstances, individual offenders may need assistance to understand correspondence and respond to the enforcement agency.
- 4.298 In addition, many offenders will have difficulties responding to written communications from the enforcement agency due to issues such as cognitive impairment, and may need financial advice and legal assistance to comply with and understand the consequences of these legal processes.
- 4.299 Offenders who are contacted by the state enforcement agency and do not have the means to engage their own legal representation would be likely to need to contact a community legal centre or another *pro bono* legal service for assistance.⁵⁸⁴ There is no available support for Victoria Legal Aid to provide assistance in such matters.⁵⁸⁵
- 4.300 Justice Connect commented that the introduction of state enforcement through civil mechanisms is likely to lead to:
- push back on services like ours and [Victoria] Legal Aid to give people advice: 'you are judgment proof, [or] no, you are not... these are the options'. There is just a lot more churn ... It will cost services money.⁵⁸⁶

582. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

583. Meeting with Jesuit Social Services (15 May 2018).

584. Meeting with Justice Connect (18 April 2018).

585. Submission 14 (Law Institute of Victoria).

586. Meeting with Justice Connect (18 April 2018).

- 4.301 The Council considers that there should be appropriate funding and support for existing services that are likely to be required to provide assistance to offenders who face civil enforcement action by the state enforcement agency.
- 4.302 The Council notes that appropriate support for offenders will ultimately assist victims of crime to obtain timely resolution of their compensation matters. Offenders without legal support may not be able to respond to communications from the enforcement agency, which may delay the resolution of matters.⁵⁸⁷
- 4.303 As noted at [4.195], in limited circumstances an offender can face imprisonment for failure to pay a civil judgment debt. The enforcement agency should also develop policies to ensure that if an offender is facing imprisonment for persistent wilful default on an instalment order under the *Judgment Debt Recovery Act 1984* (Vic) or an offence against the *Imprisonment of Fraudulent Debtors Act 1958* (Vic), no proceedings are commenced without the judgment debtor having legal representation.
- 4.304 The Council also notes that there are likely to be better outcomes for victims of crime if both victims and offenders obtain legal advice and assistance as early as possible in the process. The Law Institute of Victoria noted that many compensation applications are determined without any legal assistance for the offender (who is the respondent to the application). Several stakeholders noted that self-represented litigants create difficulties for courts, as they may require assistance to participate in the proceedings.⁵⁸⁸
- 4.305 The Law Institute of Victoria submitted that one way of achieving greater payment of restitution and compensation orders is to 'increase the incentive to settle' through negotiation between the parties, stating that:
- sensible negotiation of this type only occurs with the assistance of competent legal representation. No funding is currently available for *Sentencing Act* compensation (or restitution) orders from Victoria Legal Aid. Similarly, even well-resourced defendants often find themselves unable to pay for legal representation in these proceedings as their funds are all restrained, and there is a specific veto on funds being released ... for legal expenses.⁵⁸⁹
- 4.306 The Council is of the view that legal assistance for both parties to a compensation application is likely to lead to better compensation outcomes for victims of crime.

587. Financial Counselling Australia, in the *Double Punishment: How People in Prison Pay Twice* report, discusses the difficulties that offenders without assistance (in particular, prisoners) face in responding to correspondence relating to debt and the delays that necessarily occur in such matters: Financial Counselling Australia (2018), above n 503, 17–21. One stakeholder observed that some victims of crime (for example, some victims of childhood sexual abuse) may also have been sentenced for a criminal offence, and therefore there can be an overlap between victim and offender populations: Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

588. Submission 14 (Law Institute of Victoria) 6; Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

589. Submission 14 (Law Institute of Victoria) 6.

Consideration of a specialist victims' legal service

- 4.307 Although the provision of legal assistance to victims is beyond the terms of reference, and was not a matter on which the Council specifically consulted, the proposal for a *victims' legal service* was raised several times during consultation.⁵⁹⁰
- 4.308 A number of stakeholders commented that the operation of the current system for making and enforcing restitution and compensation orders could be improved through the provision of timely and comprehensive legal advice to victims on their compensation options.⁵⁹¹
- 4.309 As discussed previously, applications for restitution and compensation can be made by the prosecution or by the victim (either with their own private legal representation or independently).⁵⁹² However, such applications are not always straightforward. Waller Legal noted the complexities of some applications for compensation, which can involve:
- requesting reports and clinical notes from treating medical practitioners, arranging for an independent medico-legal assessment and report, preparing affidavit material and preparing written submissions.⁵⁹³

Gaps in current legal services

- 4.310 Throughout consultation, the Council heard about the difficulty in victims obtaining legal advice on their compensation options.⁵⁹⁴
- 4.311 Victoria Legal Aid submitted that although it does not have a specific statutory requirement to assist victims, it currently provides information, advice and representation to victims of crime seeking to access financial assistance from VOCAT and can also assist victims to apply for orders for restitution or compensation under the *Sentencing Act 1991* (Vic).⁵⁹⁵
- 4.312 Community legal centres regularly provide legal assistance to victims of family violence, in particular to apply for intervention orders. Some centres also assist victims of crime to apply for compensation through the VOCAT system. However, community legal centres typically lack capacity and expertise to provide victims of crime with detailed legal advice and representation on other compensation options, including restitution and compensation orders and claims against third parties, such as an institution, or under redress schemes.⁵⁹⁶

590. Submission 14 (Law Institute of Victoria) 6; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal); Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre for Innovative Justice, RMIT University (4 April 2018); Meeting with Domestic Violence Victoria (11 April 2018); Meeting with Jesuit Social Services (15 May 2018); Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

591. Submission 14 (Law Institute of Victoria) 6; Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 5; Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre for Innovative Justice, RMIT University (4 April 2018); Meeting with Domestic Violence Victoria (11 April 2018); Meeting with Jesuit Social Services (15 May 2018); Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

592. *Sentencing Act 1991* (Vic) s 85C; see discussion in Sentencing Advisory Council (2018), above n 30, 13–16.

593. Submission 13 (Waller Legal).

594. Meeting with Victims of Crime Consultative Committee (27 February 2018); Meeting with Victim Survivors' Advisory Council (27 March 2018); Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018); Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

595. Submission 17 (Victoria Legal Aid) 1. However, during preliminary consultation Victoria Legal Aid noted that they very rarely assist victims with applications for restitution or compensation: Meeting with Victoria Legal Aid (20 September 2017).

596. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018). A member of the Victim Survivors' Advisory Council noted that in some instances the experience of the legal practitioners providing assistance through community legal centres may not be adequate to meet the complexity of some victims' legal issues: Meeting with Victim Survivors' Advisory Council (27 March 2018). It is noted that some community legal centres have developed specialist expertise in the family violence sector. Twenty centres throughout Victoria now provide specialist duty lawyers for family violence intervention order matters and other specialist family violence services. The fact that community legal centres are already embedded in local communities and have existing capacity to link in with services such as social workers and health workers was said to be among the benefits of community legal centres undertaking this work. See further Federation of Community Legal Centres Victoria, 'Federation of Community Legal Centres' (fclc.org.au, 2018) <<https://www.fclc.org.au>> at 1 August 2018.

- 4.313 While some private legal firms (and some personal injury firms) provide no-win no-fee assistance to victims of crime, the Council has heard that these arrangements can involve costs agreements that place high fees on contact between solicitors and clients,⁵⁹⁷ and this can significantly reduce the amount of compensation that a victim eventually obtains. Stakeholders also noted that only a small number of private firms undertake this work.⁵⁹⁸
- 4.314 In addition, if a victim is not successful, they may still have to pay their solicitor's disbursements and the other party's costs (depending on the terms of the agreement).⁵⁹⁹ If a victim wishes to seek or enforce an order for a smaller amount of money, it is unlikely that such firms will be able to assist due to the costs of enforcement outweighing any amount that is likely to be recovered.
- 4.315 A counsellor advocate at Centre Against Sexual Assault (CASA) House noted the importance of 'adequate legal representation and fair legal representation' and commented that they had seen cases in which 'there is an outcome and half of the costs go to the lawyers, and this person lost two or three years battling for this bit of money'.⁶⁰⁰

Need for specialist legal assistance

- 4.316 During consultation, Deputy Chief Magistrate Felicity Broughton emphasised the fact that victims' compensation is a complex and specialised area of law. Practitioners need to be able to make an assessment of victims' compensation options across a number of areas of law, including compensation orders under the *Sentencing Act 1991* (Vic), as well as any options that may be open to a victim through civil compensation, against the offender, a third party or under any statutory scheme including the *Victims of Crime Assistance Act 1996* (Vic) (VOCA Act).⁶⁰¹
- 4.317 Such an assessment requires the legal practitioner to be able to undertake investigations into the availability of any assets. The legal practitioner must also consider the likelihood of risk to a victim that may result from any legal action.⁶⁰²
- 4.318 Deputy Chief Magistrate Felicity Broughton stated:
- [a]ny assumption in this area ought to be on the basis of 'do no more harm' ... You need to have people with expertise, who can make an assessment of the complexity of the situation from the victims' perspective, with a trauma-informed understanding, who actually understand not only the complexity of the sort of trauma-related environment in which they are working, but also the really complex technical and legal questions that arise.⁶⁰³
- 4.319 The importance of an understanding of family violence and the need to be able to identify and assess risk factors when assisting victims with compensation matters was highlighted by a number of stakeholders.⁶⁰⁴

597. Cost agreements are legal contracts between legal services and clients that outline the payment agreements between solicitors and their clients: Victorian Legal Services Board, 'Cost Agreements' (lsbc.vic.gov.au, 2015) <http://lsbc.vic.gov.au/?page_id=4318> at 26 July 2018.

598. Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018).

599. If a victim is successful, there can be an *uplift* in the firm's fees, which can significantly reduce any compensation ordered: Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018); *Legal Profession Uniform Application Act 2014* (Vic) sch 1 item 182 ('Uplift fees').

600. Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

601. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018). This view was shared by a number of stakeholders: Meeting with Waller Legal (28 November 2017); Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

602. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

603. Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018).

604. Meeting with Waller Legal (28 November 2017); Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018); Domestic Violence Victoria argued for 'free legal advice, assistance and representation', not just legal information, and emphasised the importance of such services being integrated with risk assessment and safety planning; Submission 5 (Domestic Violence Victoria) 2; Meeting with Domestic Violence Victoria (11 April 2018).

- 4.320 There is a need, therefore, for a victim to be able to access free legal advice on compensation options, including but not limited to matters related to restitution or compensation under the *Sentencing Act 1991* (Vic).⁶⁰⁵

Role in managing victims' expectations on prospects of enforcement

- 4.321 A number of stakeholders commented that if victims were to receive appropriate legal advice on their compensation options prior to obtaining an order for restitution or compensation, it may avoid further disappointment if the order cannot be enforced due to the limited financial resources of the offender.⁶⁰⁶
- 4.322 RMIT's Centre for Innovative Justice commented on the potential for victims of crime to be significantly disappointed by compensation orders under the *Sentencing Act 1991* (Vic), and the need for victims to be supported in navigating legal processes.⁶⁰⁷

Who should provide legal assistance to victims of crime?

- 4.323 As this recommendation is beyond the scope of the terms of reference, it is phrased as an invitation for further consideration of a specialist victims' legal service by the government.
- 4.324 The Council spoke with a number of agencies that indicated that, with additional resourcing, they may be able to provide legal assistance to victims under such a model, including Victoria Legal Aid and Justice Connect.⁶⁰⁸
- 4.325 As noted at [2.4], the VLRC recommended in its 2016 report that Victoria Legal Aid should be funded to establish a legal service for victims of violent crimes.⁶⁰⁹

- 4.326 Victoria Legal Aid submitted:

[a] funding and legal advice and representation service for victims would be the most effective approach to improving access to compensation for victims of crime.

We think that [Victoria Legal Aid] is well placed to provide this service, and manage the broad role of providing legal assistance to victims. It dovetails with the Victorian Law Reform Commission's recommendation that [Victoria Legal Aid] be funded to support [victims of violent indictable crimes in relation to substantive legal entitlements connected with the criminal trial process]. [Victoria Legal Aid] does not currently provide this service to victims and does not have capacity to create a new service given existing resource constraints.⁶¹⁰

605. It was noted that such assistance would be 'extremely helpful' for victims of crime: Meeting with Victoria Legal Aid and Law Institute of Victoria (25 June 2018). Comment was also made on the potential for such a service to provide assistance to victims of crime considering their options under the Commonwealth's Redress Scheme (see further [2.18]–[2.22]): Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018). The scheme has been criticised on the basis that legal advice will not be accessible for many victim survivors potentially eligible for the scheme, and that the costs of legal advice will significantly reduce any compensation a victim will receive: Grace Ormsby, 'Lawyer Condemns Disgraceful Compensation Caps', *Lawyers Weekly* (Sydney) 23 July 2018 <<https://www.lawyersweekly.com.au/sme-law/23677-lawyer-condemns-disgraceful-compensation-caps-in-redress-scheme>> at 1 August 2018.

606. Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria (24 April 2018); Restitution and Compensation Orders Stakeholder Discussion Forum (15 March 2018); Meeting with Chief Magistrate, Deputy Chief Magistrate Felicity Broughton and Simone Shields, Principal Registrar of the Magistrates' Court of Victoria (26 June 2018); Waller Legal noted that they regularly provide victims with advice on the financial viability of pursuing a claim for restitution and compensation: Submission 13 (Waller Legal).

607. Meeting with Centre for Innovative Justice, RMIT University (4 April 2018).

608. Submission 17 (Victoria Legal Aid) 4; Meeting with Justice Connect (18 April 2018).

609. Victorian Law Reform Commission (2016), above n 1, 126 (Recommendation 23). The Council heard in preliminary consultations that Victoria Legal Aid is investigating the possibility of providing such a service: Meeting with Victoria Legal Aid (20 September 2017).

610. Submission 17 (Victoria Legal Aid) 4.

- 4.327 Although the Council noted that conflicts of interest may arise in such circumstances, Victoria Legal Aid stated that the issue of legal conflicts is not insurmountable, given their capacity to assign work to private practitioners.⁶¹¹ However, the Victims of Crime Commissioner was of the view that a separate legal service would be more appropriate, not only because of the potential for legal conflicts but also because victims may perceive Victoria Legal Aid to be more aligned with the provision of services to alleged offenders.⁶¹² A number of victims of crime also preferred that a separate service be created to assist victims of crime.⁶¹³
- 4.328 Justice Connect commented on the potential for the development of online resources for persons to access legal resources and information independently.⁶¹⁴ This would enable a legal service to 'triage' those clients who are most in need of individualised legal assistance from those who are able to navigate legal issues independently.⁶¹⁵
- 4.329 Rosie Batty, Chair of the Victim Survivors' Advisory Council, commented with regard to community legal centres that there is a concern due to:
- the constant threat of cuts to community legal centres. The federal government [is] seeking to continue to reduce funding constantly. So that's really good to utilise them in this space, but that to acknowledge that [this represents] additional work. [T]hey are certainly not funded sufficiently even to do the work that they are currently doing really.⁶¹⁶
- 4.330 It may be possible, however, to establish a specialist legal service for victims of crime that builds on the existing expertise within the community legal centre sector. An example of a specialist victims of crime legal assistance service is knowmore, a national legal service that provides free legal assistance for survivors of institutional child sexual abuse.⁶¹⁷ knowmore provides specialist advice on compensation options, including redress schemes and civil claims, and also connects clients to private lawyers who can progress civil claims. knowmore employs multidisciplinary staff to provide specialist, trauma-informed and culturally safe services.⁶¹⁸
- 4.331 As the question of the provision of legal assistance to victims is beyond its terms of reference, the Council has not consulted specifically on this issue. Accordingly, who should provide such advice to victims is a question for the government.
- 4.332 In considering a specialist victims' legal service, the government will therefore need to consult on and consider where such an agency should be located institutionally.

611. Submission 17 (Victoria Legal Aid) 4.

612. This may particularly be the case if Victoria Legal Aid has provided legal assistance to the offender in proceedings involving the victim: Meeting with Victims of Crime Commissioner (7 June 2018).

613. Meeting with Victim Survivors' Advisory Council (27 March 2018).

614. Meeting with Justice Connect (18 April 2018). An example may be FineFixer, a web tool developed to direct users to relevant information regarding fines in Victoria, provided by the Moonee Valley Legal Service: Moonee Valley Legal Service, 'About FineFixer' (finefixer.org.au, 2018) <<https://finefixer.org.au/about-finefixer>> at 26 July 2018.

615. Another stakeholder, however, preferred victims of crime receiving legal advice, rather than being directed to legal information, in order to self-represent, due to the complexity of the legal issues raised (such as the question of whether there is a potential third party defendant): Teleconference with Jacinta Smith, Insurance Litigation Lawyer (15 June 2018).

616. Meeting with Victim Survivors' Advisory Council (27 March 2018). The need for funding for community legal centres was also noted in consultation: Meeting with Centre Against Sexual Assault (CASA) House (11 April 2018).

617. knowmore, 'About Us' (knowmore.org.au, 2018) <<http://knowmore.org.au/about-us>> at 27 July 2018.

618. knowmore employs counsellors, social workers and Aboriginal and Torres Strait Islander engagement staff, and is a program of the National Association of Community Legal Centres. knowmore is funded by the Australian Government through the Attorney-General's Department: *ibid*.

Scope of legal assistance

- 4.333 The Magistrates' Court of Victoria and VOCAT and Victoria Police supported the consideration of the creation of a 'one-stop shop' for legal services for victims of crime.⁶¹⁹ The Magistrates' Court of Victoria and VOCAT noted that this could be integrated with any state assistance for the enforcement of restitution and compensation orders.⁶²⁰
- 4.334 In its 2016 report, the VLRC examined the possibility of expanding the opportunities for victims to participate in the criminal trial process. The VLRC concluded that greater participation of victims in the criminal trial process risks undermining the accused's right to a fair trial and the conduct of an impartial and independent prosecution. The VLRC also noted that such an expansion is likely to create delay and add to the cost and complexity of the criminal trial process.⁶²¹
- 4.335 The Council proposes that the specialist legal service provide comprehensive, free legal advice to victims of crime on their options for compensation, including but not limited to their options under the *Sentencing Act 1991* (Vic).
- 4.336 The Council does not propose that a specialist victims' legal service provide legal assistance to a victim of crime in a way that would conflict with or undermine the work of Victoria Police or the Office of Public Prosecutions.⁶²²
- 4.337 The Council also does not seek to contradict the findings of the VLRC's 2016 report in relation to the most appropriate ways to achieve victim participation in court proceedings without creating conflict with the adversarial trial process.
- 4.338 The Council also notes, as discussed at [4.296]–[4.306], that, similarly, appropriate legal assistance for offenders would be likely to ultimately assist victims of crime to obtain better compensation outcomes, and would avoid the difficulties posed by offenders appearing unrepresented in Victorian courts.⁶²³

Recommendation 8: Consideration of a specialist legal service to assist victims of crime with compensation matters

The Victorian Government should consider establishing a specialist victims' legal service that would provide:

- comprehensive free legal advice to victims of crime on their options for compensation, including orders for restitution or compensation under the *Sentencing Act 1991* (Vic), the Victims of Crime Assistance Tribunal, civil compensation and/or any applicable compensation schemes; and
- legal information or advice throughout the criminal trial process where this is not provided by other agencies.

The victims' legal service should be supported by all necessary resourcing, including staff with expertise in victims' compensation (including civil compensation), and knowledge of the nature and dynamics of family violence.

619. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6; Submission 18 (Victoria Police) 3.

620. Submission 16 (Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal) 6.

621. Victorian Law Reform Commission (2016), above n 1, xix.

622. The potential negative consequences of a 'victim's lawyer' providing advice in a way that impinged on the progress of the criminal prosecution were raised by Victoria Police: Meeting with Victoria Police (8 June 2018).

623. Legal assistance for offenders would also prevent situations in which a victim would have to directly communicate with an offender regarding a compensation matter: see further [4.296]–[4.306].

Concluding remarks

- 4.339 The Council notes the desirability of a coherent approach to the compensation of victims for the effects of criminal offending. As discussed at [2.11], the VLRC has been asked to consider the operation and effectiveness of the VOCA Act and VOCAT. The VLRC has been asked to review the amounts of financial assistance available to victims of crime, noting that the state-funded scheme must be sustainable for the state.
- 4.340 The Victorian Government will need to consider the Council's recommendations alongside recommendations made by the VLRC in respect of the operation of the state-funded victims' compensation system, with a view to providing avenues for accessible, equitable compensation to all victims of crime.

Appendix: consultation

Preliminary consultation: meetings and teleconferences

Date	Meeting/teleconference
14 August 2017	Meeting with Victorian Law Reform Commission
18 August 2017	Meeting with Registry, County Court of Victoria
7 September 2017	Meeting with Office of Public Prosecutions
11 September 2017	Meeting with Chief Magistrate, Magistrates' Court of Victoria and Magistrates Charlie Rozencwajg and Susan Cameron
11 September 2017	Meeting with Judicial Registrar Mark Pedley, Supreme Court of Victoria
12 September 2017	Meeting with Victims of Crime Commissioner
13 September 2017	Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation
19 September 2017	Meeting with Victoria Police
20 September 2017	Meeting with Victoria Legal Aid
21 September 2017	Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation
4 October 2017	Meeting with Deputy Chief Magistrate Broughton, Magistrates' Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal
9 November 2017	Teleconference with Legal Aid Queensland
28 November 2017	Meeting with Waller Legal
30 November 2017	Meeting with Community Operations and Victims Support Services, Department of Justice and Regulation
4 December 2017	Teleconference with Director of Public Prosecutions, Queensland
7 December 2017	Meeting with Witness Support Services, Office of Public Prosecutions
7 December 2017	Meeting with Victoria Police Prosecutors
11 December 2017	Teleconference with Legal Services Commissioner/Group Manager, National Service Delivery, Ministry of Justice, New Zealand
11 December 2017	Meeting with Victorian Law Reform Commission

Consultation: meetings, teleconferences and events

Date	Meeting/teleconference/event
27 February 2018	Meeting with Victims of Crime Consultative Committee
15 March 2018	Restitution and Compensation Orders Stakeholder Discussion Forum
19 March 2018	Restitution and Compensation Orders Stakeholder Discussion Forum
27 March 2018	Meeting with Victim Survivors' Advisory Council
3 April 2018	Meeting with Victorian Law Reform Commission
4 April 2018	Meeting with Centre for Innovative Justice, RMIT University
6 April 2018	Teleconference with Victims Services, Ministry of Justice, Saskatchewan Government
11 April 2018	Meeting with Domestic Violence Victoria
11 April 2018	Meeting with Centre Against Sexual Assault (CASA) House
18 April 2018	Meeting with Justice Connect
24 April 2018	Meeting with Justice Terence Forrest, Judicial Registrar Mark Pedley and Claire Downey, Supreme Court of Victoria
4 May 2018	Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation
15 May 2018	Meeting with Jesuit Social Services
6 June 2018	Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation
6 June 2018	Meeting with Office of Public Prosecutions
7 June 2018	Meeting with Victims of Crime Commissioner
8 June 2018	Meeting with Victoria Police
13 June 2018	Meeting with Retirement Income Policy Division, Department of the Treasury, Australian Government
15 June 2018	Teleconference with Jacinta Smith, Insurance Litigation Lawyer
25 June 2018	Meeting with Victoria Legal Aid and Law Institute of Victoria
26 June 2018	Meeting with Chief Magistrate, Deputy Chief Magistrate Felicity Broughton and Simone Shields, Principal Registrar of the Magistrates' Court of Victoria

Submissions

Number	Date received	Person/organisation
1	3 April 2018	J. Kennedy
2	4 April 2018	D. Hadden
3	6 April 2018	Jesuit Social Services
4	9 April 2018	X. Clark
5	11 April 2018	Domestic Violence Victoria
6	16 April 2018	Confidential
7	17 April 2018	Anonymous
8	17 April 2018	Victorian Aboriginal Legal Service
9	19 April 2018	Women's Legal Service Victoria
10	20 April 2018	Anonymous
11	20 April 2018	Angela Sdrinis Legal
12	20 April 2018	Centre for Innovative Justice, RMIT University
13	20 April 2018	Waller Legal
14	27 April 2018	Law Institute of Victoria
15	3 May 2018	Confidential
16	4 May 2018	Magistrates' Court of Victoria and Victims of Crime Assistance Tribunal
17	16 May 2018	Victoria Legal Aid
18	16 May 2018	Victoria Police

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