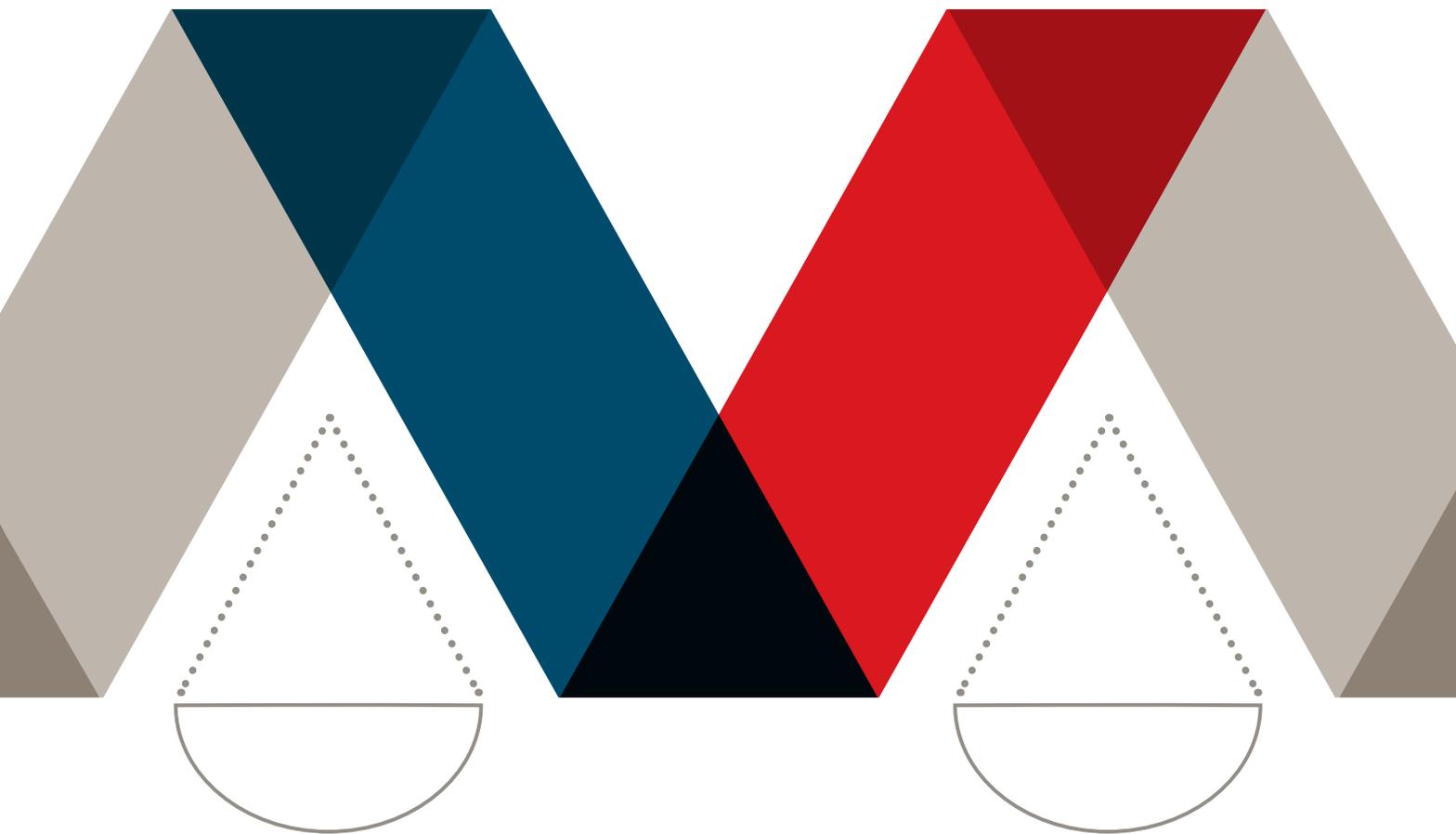


# The Role of Victims of Crime in the Criminal Trial Process

CONSULTATION PAPER JULY 2015





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CONSULTATION PAPER

JULY 2015



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# Preface

Every victim matters.

From the commission of the criminal offence, victims undergo a pathway through the criminal justice process. Each victim's pathway is intensely personal; and yet there are significant commonalities. Too often, the trauma suffered by victims is then compounded by their experience of the criminal trial process. There is an abundance of evidence that this is so.

The criminal trial process needs to respect the legitimate rights of accused persons. These should not be lessened or deflected. But the criminal trial process needs also to respect and fulfil the rights of victims and of the community. These sets of rights, properly viewed, are not exclusive one of the other. They are not in competition. They co-exist. Are victims' rights properly respected and fulfilled in the criminal trial process in Victoria?

On 27 October 2014, the then Victorian Attorney-General, the Honourable Robert Clark MP, asked the Victorian Law Reform Commission to review and report on the role of victims of crime in the criminal trial process.

This unique reference calls for both a root and branch review of the current role of victims in the criminal trial process and a conceptual analysis of what that role should be. The issues raised by this reference are complex and have far-reaching implications for the operation of the criminal justice system in Victoria.

This consultation paper considers the theory and practice of the criminal trial process in Victoria and across domestic and international jurisdictions in relation to victims of crime. The paper poses the overarching question: 'What should be the role of victims in the criminal trial process?' It sets out specific questions regarding the role of victims at each stage of the criminal trial.

I warmly encourage anyone with an interest in the issues discussed in this paper to make a written submission to the Commission by 30 September 2015.



**The Hon. P. D. Cummins AM**

Chair

Victorian Law Reform Commission

July 2015

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# Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

## **What is a submission?**

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed at the conclusion of the paper, that seek to guide submissions. You do not have to address all of the questions to make a submission. You may wish to make a submission addressing the three possible roles for victims set out in the introduction to Part Two, or propose a new victim-oriented model of criminal justice.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

## **What is my submission used for?**

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

## **How do I make a submission?**

You can make a submission in writing, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions, though we prefer them to be in writing and we encourage you to answer the questions contained in the paper and set out at the end.

Submissions can be made by:

Completing the online form at [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

Email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

## **Assistance**

Please contact the Commission if you need an interpreter or other assistance to make a submission.

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## Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published. The name of the submitter is published unless we are asked not to publish it.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the Commission's report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. Submissions may be confidential because they include personal experiences or other sensitive information. These submissions will not be published on the website or elsewhere. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at [www.foi.vic.gov.au](http://www.foi.vic.gov.au).

## Confidential submissions

When you make a submission, you must decide whether you want your submission to be public or confidential.

**Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the Commission's Report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published unless we are asked not to publish it.

**Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

## Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au).

**Submission deadline: 30 September 2015**

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## Terms of reference

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

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

In conducting the review, the Commission should consider:

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

**The Commission is to report by 1 September 2016.**

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# Glossary

**Acquitted** Found not guilty of the charge or charges on the indictment.

**Accused** Person charged with a criminal offence.

**Adversarial criminal trial** A contest between the prosecution and the accused in which the parties determine the issues in dispute and the evidence to be placed before an impartial judge and/or jury, who decide the guilt or not of the accused on the evidence presented.

**Alternative arrangements for giving evidence** Measures which modify the usual procedure where a witness gives oral evidence from the witness box in front of the jury.

**Civil jurisdiction** In this paper, the use of the term 'civil jurisdiction' when referring to Australian courts means the procedures for hearing legal disputes other than criminal cases.

**Committed to stand trial** The process of transferring a case against an accused from the Magistrates' Court to a superior court.

**Common law** Law that derives its authority from decisions of the courts rather than from legislation.

**Complainant** Term used in the *Criminal Procedure Act 2009* (Vic) and other legislation to describe the person against whom a sexual offence is alleged to have been perpetrated.

**Compensation** Monetary payment intended to compensate in part or in whole for an injury suffered as a result of the commission of a crime.

**Crown Prosecutor** A representative of the Victorian Director of Public Prosecutions responsible for prosecuting indictable offences on behalf of the state.

**Defence** The legal team representing the accused (in the lead up to, and including, the trial), or the offender (in sentencing).

**Director of Public Prosecutions (DPP)** The Director of Public Prosecutions is an independent authority who makes decisions about whether to prosecute, and prosecutes, criminal matters in the Supreme Court and County Court.

**Discharge** In this paper, used to describe the situation where a magistrate determines that there is not enough evidence to justify sending an accused person to trial, thereby ending the prosecution.

**Equality of arms** The notion that two sides in a contest have the same or similar resources available to them.

**Financial assistance** In this paper, refers to money that a victim may be eligible to receive from a state-funded victim compensation scheme.

**Indictable offences** Serious crimes which attract higher maximum penalties. Usually triable before a judge and a jury.

**Indictable offences triable summarily** Indictable offences which can be heard before a magistrate.

**Inquisitorial criminal trial** A form of criminal trial in which a judge or judges leads the parties in an official investigation that is aimed at establishing whether the accused committed the crime or crimes charged.

**Jury** The group of people selected according to the *Juries Act 2000* (Vic) to decide whether the accused is guilty or not guilty of the charges.

**Leave** The permission of the judge or magistrate.

**Lawyer** Includes barristers (sometimes referred to as counsel) and solicitors.

**Offender** Used to refer to a person who has been found guilty or has pleaded guilty to a crime.

**Office of Public Prosecutions** The Office of Public Prosecutions is the independent statutory authority that institutes, prepares and conducts criminal prosecutions on behalf of the Director of Public Prosecutions.

**Order** A direction by a court or tribunal that is final and binding unless overturned on appeal.

**Plea** An accused's answer to a charge of an offence, which usually takes the form of 'guilty' or 'not guilty'.

**Plea agreement** An agreement between the prosecution and accused as to which charge or charges the accused will plead guilty to, which might also include an agreed statement of facts.

**Prosecutor** A lawyer acting on behalf of the state against a person accused of committing a crime.

**Reparation** An action, which might be financial, practical or symbolic, directed towards making amends for wrongdoing. Sometimes referred to as 'restoration'.

**Restitution** In this paper, restitution is used only when referring to restitution orders made under the *Sentencing Act 1991* (Vic). Restitution orders require an offender to restore or return something lost or stolen, or its equivalent, to its rightful owner.

**Restorative justice** Procedures that operate as an alternative or in addition to the criminal trial process, which focus on repairing the harm, encouraging offenders to take responsibility for their actions and increasing the involvement of victims, families and communities in the criminal justice system.

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

**Summary offences** Less serious offences heard by a magistrate without a jury. Police prosecutors generally conduct the prosecution of state summary offences.

**Victoria Legal Aid** An organisation that provides legal advice to and representation for people who cannot otherwise afford legal assistance.

## PART ONE: CONSIDERING THEORY AND PRACTICE

# Introduction

- 2 Referral to the Commission
- 3 The Commission's approach

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# 1. Introduction

## Referral to the Commission

- 1.1 On 27 October 2014, the then Attorney-General of Victoria, the Honourable Robert Clark MP, asked the Victorian Law Reform Commission to review and report on the role of victims of crime in the criminal trial process.

### The terms of reference

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- (d) the role of victims in the decision to prosecute;
- (e) the role of victims in the criminal trial itself;
- (f) the role of victims in the sentencing process and other trial outcomes;
- (g) the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process; and
- (h) support for victims in relation to the criminal trial process.

The Commission is to report by 1 September 2016.

## The Commission's approach

### Reference framework: theory and practice

- 1.2 This reference goes to the very heart of our criminal justice system, posing the challenging question: 'What should be the role of victims in the criminal trial process?' Throughout this reference, the Commission's consideration of this question will be informed by two interrelated sources of information—theory and practice.
- 1.3 Many academics and researchers approach the question of the role of victims in the criminal trial process by examining the underlying purposes of the criminal justice system and the relationship between the victim, the accused and the state. Why do we have a criminal justice system at all, what do we (as a society) want it to achieve, and for whom? The lessons of history, developments in human rights law, empirical research and a broad cross-section of academic thought (ranging across law, sociology, philosophy, political theory, and psychology) all make valuable contributions to the task of imagining and understanding a criminal justice system suited to purpose.
- 1.4 Of course, the criminal justice system is not just a theoretical construct. Every year in Victoria, hundreds of criminal trials and thousands of guilty plea hearings impact directly on the lives of victims, accused and witnesses. Listening to the experiences of these people—and of the people who work in the criminal justice system—is crucially important. It allows for a systematic identification of the issues that exist, and an informed consideration of practical initiatives for improvement which have been implemented or championed in Victoria and around the world.
- 1.5 Practice and theory are interrelated. They inform each other. The Commission encourages an approach to this reference that considers what we can learn from theory and what we can learn from practice, both individually and together.

### Scope of the reference

- 1.6 The terms of reference ask the Commission to consider the role of victims of crime in the criminal trial process. While the terms of reference are broad, they do not encompass every aspect of the criminal justice system. This section sets out what is within, and what is outside, the scope of the Commission's review.
- 1.7 The terms of reference do not define the meaning and ambit of the word 'victim'. The Commission acknowledges that the experience of the criminal trial process by each victim is unique and its uniqueness is to be respected. Further, there are differential impacts of the criminal trial process upon categories of victims, such as child and young victims, victims of family violence, victims of sexual offences, victims from disadvantaged and marginalised communities, and other groups. While the Commission fully acknowledges those significant personal and categorical differences, consonantly with the terms of reference the consultation paper generally uses the broad term 'victim'. Reference is made to specific categories where the context requires it.
- 1.8 Further, the Commission acknowledges that there are members of the community who are dissatisfied with their personal experience of the criminal trial process. While the Commission encourages people to participate in our consultations and to make submissions that are informed by their experience, the Commission's reference is to review the role of victims in the criminal trial process. It is not to review or report on individual cases.

## The investigation phase and support for victims of crime

- 1.9 The terms of reference do not ask the Commission to consider the police investigation. However, a victim's journey through the criminal justice system starts with their first contact with the police and the police investigation that follows.
- 1.10 This early interaction can be a crucial phase of a victim's journey, with the potential to shape their perceptions of the entire criminal justice process. It is particularly relevant to a victim's need to be treated with respect and provided with information and support.<sup>1</sup> The terms of reference ask the Commission to consider 'support for victims in relation to the criminal trial process'.<sup>2</sup> In addressing this, the Commission has viewed support needs as being on a continuum, which starts with a person's first contact with the police and ends with the finalisation of criminal proceedings.
- 1.11 Some victims never start their journey through the criminal justice system. These victims may have been discouraged or impeded from reporting crimes committed against them by individuals or groups from outside the formal criminal justice system, including family members, other community members, or by members of religious groups to which the victim belongs.<sup>3</sup> Other victims may not report a crime for a variety of reasons, including a distrust of police and the justice system, or because of some other barrier to access such as being from a non-English speaking background, fear, or a lack of understanding of the criminal justice system.<sup>4</sup>

## The Magistrates' Court

- 1.12 Once the police decide to charge a suspect, the court processes begin. Those processes are set out in the *Criminal Procedure Act 2009* (Vic).
- 1.13 Every criminal prosecution starts in the Magistrates' Court. Criminal cases are dealt with either by summary procedure<sup>5</sup> or committal proceedings.<sup>6</sup> The large majority of criminal matters are dealt with entirely in the Magistrates' Court, by way of summary procedure.<sup>7</sup> During 2013–2014, the Magistrates' Court finalised 237,452 criminal matters.<sup>8</sup>
- 1.14 More serious criminal offences progress through the Magistrates' Court by way of committal proceedings.<sup>9</sup> At the conclusion of the committal proceedings, subject to a number of pre-conditions, the accused is committed to stand trial in either the Supreme Court or the County Court.<sup>10</sup> The Supreme Court finalised 89 criminal matters in 2013–14.<sup>11</sup> During the same year, the County Court finalised 2,361 criminal matters.<sup>12</sup>

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1 See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 2: Who are Victims of Crime and What are Their Criminal Justice Needs and Experiences?* (May 2015).

2 Terms of reference, [h].

3 See eg, Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response: Final Report*, ALRC Report No 114, NSWLRC Report No 126 (2010) [8.56], ch 26; Emma Birdsey and Lucy Snowball, 'Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services' (Crime and Justice Statistics: Bureau Brief, Issue Paper No 91, NSW Bureau of Crime Statistics and Research, 2013).

4 See, eg, Matthew Willis, 'Non-disclosure of Violence in Australian Indigenous Communities' (*Trends & Issues in Crime and Criminal Justice No.405*, Australian Institute of Criminology, 2011) 1; John McDonald et al, *Mapping Access and Referral Pathways for Marginalised Victims of Violent Crime in Rural and Regional Victoria* (University of Ballarat, 2010) iv (describing the reticence of people from culturally or linguistically diverse backgrounds to report crime).

5 *Criminal Procedure Act 2009* (Vic) ch 3.

6 *Ibid* ch 4.

7 This includes pleas of not guilty, which are called summary hearings: *ibid* pt 3.3.

8 Magistrates' Court of Victoria, *Annual Report 2013–14* (2014) 3.

9 *Criminal Procedure Act 2009* (Vic) s 100 (setting out the hearings which may occur during committal proceedings).

10 *Ibid* pt 4.9 (setting out the test for an accused to be committed to stand trial).

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

12 County Court of Victoria, *Annual Report 2013–2014* (2015) 4. The County Court also heard 3061 appeals from the Magistrates' Court during the same period.

- 1.15 The Commission recognises that a significant proportion of criminal cases are heard in the Magistrates' Court, albeit as summary hearings and not trials. While trial processes in the higher courts differ from summary hearing processes, they do share many features. As such, many of the issues raised by the terms of reference are common to the Magistrates' Court and the Supreme and County Courts.
- 1.16 The terms of reference relate to trials in the Supreme and County Courts. They do not cover hearings in the Magistrates' Court. The Criminal Procedure Act makes a clear distinction between 'trials' (which occur in the Supreme and County Courts) and 'hearings' (which occur in the Magistrates' Court). Only two procedures in the Magistrates' Court are covered by the terms of reference: compensation and restitution by the Victims of Crime Assistance Tribunal (VOCAT) and committal proceedings, as these proceedings are integral to the subsequent criminal trial process.

### Victims of Crime Assistance Tribunal

- 1.17 The terms of reference ask the Commission to consider 'the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process'.<sup>13</sup> The Commission considers VOCAT, which is independent to the trial process, to be an integral part of Victoria's system for the compensation of victims of crime.
- 1.18 While the Commission does not propose reviewing the quantum of awards made by VOCAT, VOCAT is part of the broader review of compensation and restitution proceedings.

### The sentencing process

- 1.19 The terms of reference ask the Commission to consider 'the role of victims in the sentencing process and other trial outcomes'.<sup>14</sup>
- 1.20 The terms of reference do not ask the Commission to consider sentencing outcomes. The Commission recognises however, that any proposal to change the role of the victim in the sentencing process should consider the way that proposal might affect sentencing outcomes.

### Appeals

- 1.21 The Criminal Procedure Act allows for the prosecution and defence to seek leave to appeal in certain circumstances.<sup>15</sup> As appeals are both a part of the trial itself,<sup>16</sup> and a trial outcome,<sup>17</sup> the Commission will consider the role of victims in the appeal process. The Commission's review will, however, be limited to the victim's role in appeal procedures, and will not include the substantive law of appeals.

### Criminal hearings not covered by the terms of reference

- 1.22 The terms of reference do not encompass:
- bail hearings
  - appeals from the Magistrates' Court to the County Court
  - parole hearings.
- 1.23 While each of these hearings is integral to our criminal justice system, and can often be a very important part of a victim's experience, they are not contained in the terms of reference and are therefore outside the scope of the Commission's review.

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13 Terms of reference [g].  
 14 Terms of reference [f].  
 15 *Criminal Procedure Act 2009* (Vic) pt 6.3.  
 16 Terms of reference [e].  
 17 Terms of reference [f].

## Terminology

### Victim, survivor, complainant

- 1.24 The terms of reference refer to the role of victims in the criminal trial process.
- 1.25 There has been much debate about the use of the terms 'victim' and 'survivor'. The term victim has been criticised, particularly in feminist literature, as reducing a person to their experience of victimisation. It is also said to connote weakness rather than the resilience and strength of surviving.
- 1.26 The Commission also acknowledges that there is some tension between the use of the term 'victim' and the presumption of innocence to which an accused is entitled during a criminal trial.
- 1.27 Reflecting this tension, the central piece of legislation setting out criminal trial procedures, the Criminal Procedure Act, uses the term 'complainant' in provisions setting out protective procedures which apply to victims during trials for sexual offences.
- 1.28 The Commission acknowledges the issues surrounding the use of the term 'victim'. However, as the terms of reference refer to 'victims' and the word 'victim' is used in many Victorian laws dealing with prosecution, punishment and reparation, the term 'victim' will be used in this consultation paper.

### Judge, magistrate, court

- 1.29 The Criminal Procedure Act refers to the powers of the 'court' during the criminal trial process. For example, section 337 provides that 'Unless the context otherwise requires, a power or discretion conferred on a court by or under this Act may be exercised by the court on the application of a party or on its own motion.'
- 1.30 It is the judge who exercises the power or discretion of the court in the Supreme and County Courts, and the magistrate who does so in the Magistrates' Court. The judge or magistrate presides over each stage of the criminal trial process, and makes decisions, orders and directions which bind the parties.
- 1.31 As such, while the legislation generally refers to 'the court', this consultation paper refers to 'the judge' or 'the magistrate'.

### Preliminary meetings

- 1.32 As part of its preliminary research on the reference, the Commission conducted a series of meetings with representatives from some of the key stakeholders in the criminal justice sector, and with individuals who have had personal experiences of the criminal trial process.
- 1.33 As part of these preliminary consultations, the Commission conducted two roundtable discussions. The first was with practitioners from across the criminal justice sector. The second was with a small group of people who had experienced the criminal trial process as a victim-witness or family member of a victim.
- 1.34 The purpose of these consultations was for the Commission to gain a preliminary understanding of the issues surrounding the current role of victims in the criminal trial process in Victoria, and to start to identify proposals and options for reform.
- 1.35 The preliminary meetings and roundtables do not form part of the Commission's formal consultations for this reference. Formal consultations will be conducted in conjunction with the publication of this consultation paper, along with a call for public submissions.

## Information papers

- 1.36 The Commission published a series of four information papers in May 2015. The four papers are:
1. *The Role of Victims of Crime in the Criminal Trial Process—History, Concepts and Theory*
  2. *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?*
  3. *The Role of Victims of Crime in the Criminal Trial Process—The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process*
  4. *The Role of Victims of Crime in the Criminal Trial Process—Victims’ Rights and Human Rights: the International and Domestic Landscape.*
- 1.37 The first information paper provides an overview of some historical, theoretical and philosophical approaches to the role of victims in the criminal trial process. The second information paper surveys the evidence about who victims are and what they need from the criminal justice system. These matters are dealt with in Chapter 2 of this consultation paper.
- 1.38 The third information paper examines the International Criminal Court (ICC) as a case study of victim participation. Processes at the ICC are considered against existing Victorian trial procedures throughout the chapters of this consultation paper.
- 1.39 The fourth information paper provides an overview of the sources of victims’ rights and issues relating to their enforceability internationally and in Australia. While relevant to and discussed in many parts of this consultation paper, victims’ rights are specifically discussed in Chapter 12.

## Consultation paper

- 1.40 The preliminary consultations, the background information contained in the information papers and other research undertaken by the Commission form the basis of this consultation paper.
- 1.41 The structure of this consultation paper is based on the reference framework. Part One considers the history and purposes of criminal justice systems and the needs and experiences of victims of crime, and these inform consideration of the question posed in Chapter 4, ‘What should be the role of victims in the criminal trial process?’
- 1.42 Part Two contains eight chapters which consider the role of victims at each stage of the common law adversarial criminal trial process.
- 1.43 Part Three concludes this consultation paper. It examines two key issues that arise at every stage of a victim’s journey through the criminal trial process and underlie many reform proposals: victims’ rights and victims’ support.
- 1.44 Each of the chapters in Parts Two and Three sets out questions designed to capture the issues and reform proposals identified, and guide the public and stakeholders in the preparation of submissions.

## **Formal consultation process**

- 1.45 The next stage of the reference will involve consulting widely with interested organisations and people to gather information and comments on the current role of the victim in the criminal trial process, identify additional issues and develop and test options for reform.
- 1.46 The Commission intends to consult with representatives across the criminal justice sector, including the judiciary, court personnel, legal practitioners, counsellors, social workers and support service providers (government and non-government).
- 1.47 The Commission seeks the views of individuals who have experienced the criminal trial process as victim-witnesses or the family and friends of victims.
- 1.48 The feedback and information that the Commission receives from submissions and formal consultations, combined with additional research, will inform its final recommendations to the Attorney-General. A report setting out the Commission's recommendations will be provided to the Attorney-General by the reporting date of 1 September 2016. Within 14 sitting days of receipt of the report, the Attorney-General must table the report in the Victorian Parliament. The Victorian Government then decides whether to implement the Commission's recommendations.

# The history of the common law adversarial criminal trial and the experiences and needs of victims of crime

- 10** Introduction
- 11** The historical development of the common law adversarial criminal trial
- 14** The modern common law adversarial criminal trial process
- 15** Victims and the criminal justice system

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## 2. The history of the common law adversarial criminal trial and the experiences and needs of victims of crime

### Introduction

- 2.1 The form of the adversarial criminal trial has changed considerably over time. These changes have related to shifting ideas about the nature and meaning of crime and what it is that the criminal justice system should achieve for victims, offenders and society generally.<sup>1</sup>
- 2.2 This chapter first outlines the development of the adversarial criminal trial process and the relationship between victims and the state in the common law system that developed in England after the Norman Conquest of 1066. It then provides an overview of the core elements of the modern adversarial criminal trial.
- 2.3 Finally, this chapter considers the justice needs of victims of crime and their experience of the modern adversarial trial process.

### Understanding crime and public prosecutions

- 2.4 The way in which crime is understood is inextricably linked to who is responsible for prosecuting crime and the relative place of victims, offenders and society in the criminal justice system.<sup>2</sup>
- 2.5 There are numerous theories about the meaning of crime, from multiple disciplines. Crime is variously described as:
  - what the law deems as criminal<sup>3</sup>
  - the 'legal response to deviance over which the state has the dominant if not exclusive right of action'<sup>4</sup>
  - conduct that 'injures or threatens' the common good<sup>5</sup>
  - conduct that society finds inherently immoral<sup>6</sup>
  - a reflection of societal values about appropriate behaviour<sup>7</sup>
  - a tool of governance<sup>8</sup>
  - a way to ensure public safety.<sup>9</sup>

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1 The Commission considered these issues in its information paper, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 1: History, Concepts and Theory* (May 2015).

2 See, eg, 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* (Willan Publishing, 2010) 6–7.

3 See, eg, Glanville Williams, 'The Definition of Crime' (1955) 8(1) *Current Legal Problems* 107; Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21, 22.

4 Celia Wells and Oliver Quick, *Lacey, Wells and Quick Reconstructing Criminal Law* (Cambridge University Press, 2010) 7.

5 S E Marshall and R A Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 11.

6 Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 46–7.

7 *Ibid* 40.

8 Jonathan Simon, *Governing Through Crime: Criminal Law and the Reshaping of American Government 1965-2000* (Oxford University Press, 2006) cited in Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 46–7.

9 Celia Wells and Oliver Quick, *Lacey, Wells and Quick Reconstructing Criminal Law* (Cambridge University Press, 2010) 6.

- 2.6 While there are important differences between these theories, a common theme is evident: crime is something more than a wrong done or a harm caused to an individual—it has a public or communal element. Crime profoundly affects individual victims, but also has broader adverse impacts for society generally. A crime committed against one individual can lead to fear, concern and apprehension in the general community.
- 2.7 Closely linked to the public nature of crime is the broadly accepted ‘general justifying aim’ of the modern criminal justice system as being to control crime by detecting, convicting and sentencing the guilty.<sup>10</sup> To achieve that aim, the purpose of the criminal trial is understood as being to establish that the accused committed the crime charged so that punishment can be lawfully imposed.<sup>11</sup> It has also been argued that the purposes of the criminal trial process, which encompass the imposition of punishment, are much broader than this, and include important expressive functions. Through public prosecutions, the state affirms the norms and values of society and facilitates the public denunciation and condemnation of conduct deemed criminal.<sup>12</sup> In doing so, the public prosecutor, on behalf of the state, plays an important role in helping to bring closure and restoration to the lives of individual victims, and also contributes to the rehabilitation of society more generally.<sup>13</sup>
- 2.8 This public aspect of crime is what justifies its prosecution by the state on behalf of the community, rather than on behalf of the victim.<sup>14</sup> According to liberal political theory, the social contract between individuals and the state requires the state to protect society’s individual members.<sup>15</sup>
- 2.9 This is the modern concept of the purpose of the common law adversarial trial. The state’s role in prosecuting crime, and the related purposes of the criminal trial, have not always been understood this way.

## The historical development of the common law adversarial criminal trial

### Common law jurisdictions

- 2.10 The ‘common law’ is a large body of judge-made rules,<sup>16</sup> which include rules of evidence and definitions of criminal offences. The common law system of law making developed in England following the Norman Conquest (1066). The basis of this system is that court rulings developed in earlier cases, called precedents, must be applied by courts determining later disputes with similar facts.<sup>17</sup>
- 2.11 Countries with legal systems based on the common law, also known as common law jurisdictions, are generally those countries which were colonised by the British, including Australia, Canada, New Zealand and the United States. Although legislation is replacing judge-made law as the primary source of legal rules in many common law countries, the use of precedent and the centrality of judge-made law remain core elements of common law systems today.<sup>18</sup>

### The history of the adversarial criminal trial

- 2.12 A key feature of contemporary common law systems is the adversarial criminal trial.<sup>19</sup> This form of criminal trial has been through several different phases since 1066.

10 Andrew Ashworth, ‘Concepts of Criminal Justice’ (1979) *Criminal Law Review* 412, 412, cited with approval in Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (Ministry of Justice, 2001) [8].

11 R A Duff et al, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007) 4–5.

12 Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 109 citing generally R A Duff, *Punishment, Communication and Community* (Oxford University Press, 2001).

13 *R v Beckett* [1998] VSC 219 [79]–[80].

14 S E Marshall and R A Duff, ‘Criminalization and Sharing Wrongs’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 20.

15 See, eg, Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 74–5.

16 Frank Maher and Louis Waller, *An Introduction to Law* (Law Book Company, 6th ed, 1991) 30–1.

17 Joseph Dainow, ‘The Civil Law and the Common Law: Some Points of Comparison’ (1967) 15 *American Journal of Comparative Law* 419, 425.

18 Gary Slapper and David Kelly, *The English Legal System* (Routledge, 10th ed, 2010) 2–3, 5, 100.

19 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 39.

## Vengeance and retribution

- 2.13 Historically, criminal disputes were considered private matters, and their resolution was driven by the need for vengeance or retribution.<sup>20</sup> An accused proved their innocence by surviving a physical ordeal, or by producing 'oath-helpers ... to back his denial by their oaths'.<sup>21</sup>
- 2.14 Private settlements, which could involve branding or maiming the offender, or the payment of land or money to the victims, were encouraged as the most appropriate form of dispute resolution.<sup>22</sup>
- 2.15 The role of the state was very limited and 'the choice to prosecute and the mode of punishment rested with the victim'.<sup>23</sup>

## Private prosecutions and the emergence of official institutions

- 2.16 From the mid-1100s onwards, the King's interest in maintaining peace in England led to increased Crown involvement in the settlement of criminal disputes.<sup>24</sup> Certain offences, including homicide, serious offences to the person, robbery, burglary, arson, and trespass, came to be known as breaches of the King's peace.<sup>25</sup>
- 2.17 The King established a series of official institutions, such as sheriffs and King's courts.<sup>26</sup> Early versions of the modern jury, parish constables and justices of the peace also emerged.<sup>27</sup>
- 2.18 Notwithstanding these developments, the role of laying charges against accused persons and conducting the prosecution was almost exclusively undertaken by the victim or their family until as late as the start of the 1400s.<sup>28</sup>
- 2.19 Between the 1400s and 1700s, royal courts and 'officers of royal justice', including justices of the peace, began to exercise increasing influence in conducting investigations and prosecutions. This has been described as one of the most significant developments in the history of the adversarial criminal trial.<sup>29</sup>
- 2.20 Nonetheless, in many cases victims remained responsible for apprehending the offender, filing charges with the magistrate, collecting evidence, organising witnesses, and running the criminal trial, well into the 1700s.<sup>30</sup>
- 2.21 The early criminal trial had a shape unfamiliar to modern common law courtrooms:
- For trials of more serious offences, the justice of the peace would examine the accused, the victim and witnesses before a grand jury of citizens, which would decide if the matter would proceed to a jury trial before the royal courts.<sup>31</sup>
  - The trial was often very short, sometimes only 15–20 minutes.
  - The evidence previously heard by the grand jury was read at the trial, followed by the victim telling the jury his or her account of the alleged crime.<sup>32</sup>
  - The accused would often tell his or her own version of events, in response to the evidence.<sup>33</sup>

20 Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan, 2006) 25–6.

21 See generally Sanjeev Anand, 'The Origins, Early History and Evolution of the English Criminal Trial Jury' (2005) 43 *Alberta Law Review* 407, 409.

22 Yue Ma, 'Exploring the Origins of Public Prosecution' (2008) 18(2) *International Criminal Justice Review* 190, 192–3.

23 Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan, 2006) 29.

24 Ibid 56.

25 David Seipp, 'The Distinction between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59; Frederick Pollock, 'The King's Peace in the Middle Ages' (1899) 13(3) *Harvard Law Review* 177, 177–8.

26 See, eg, Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan, 2006) 19.

27 Ibid 40–1, 48, 57–8.

28 Ibid 30–9.

29 R A Duff et al, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2006) 29.

30 Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan, 2006) 58–9; Gregory Durston, 'The Inquisitorial Ancestry of the Common Law Criminal Trial and the Consequences of its Transformation in the 18th Century' (1996) 5 *Griffith Law Review* 177, 181.

31 R A Duff et al, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2006) 29–30. Following passing of Marion committal statutes in 1154 and 1555, the justice of the peace played a greater role in assembling the prosecution case, ensuring that the private prosecutor and witnesses were bound over for trial.

32 Ibid 31.

33 Gregory Durston, 'The Inquisitorial Ancestry of the Common Law Criminal Trial and the Consequences of its Transformation in the 18th Century' (1996) 5 *Griffith Law Review* 177, 184.

- The accused was not informed of the charge before it was read to the court, to 'prevent the fabrication of a defence'; was usually detained before trial; and had no means to compel the attendance of witnesses.<sup>34</sup>
- The victim did not have to prove their case beyond reasonable doubt, there were few restrictions on what evidence and witness testimony could be admitted, and it is unlikely there was a presumption of innocence.<sup>35</sup>
- Jurors questioned witnesses, the accused and the judge, and sometimes asked for witnesses to be called to give evidence.<sup>36</sup>
- Judges frequently questioned the accused and witnesses, intervened in the presentation of the evidence and were known to challenge the jury's findings and verdict.<sup>37</sup>
- At the conclusion of the trial, the jury was responsible for delivering a verdict.

2.22 A key feature of these trials was that the accused was forbidden from being represented by a lawyer. Rather, judges were expected to protect the interests of the accused by highlighting weaknesses in the prosecution case and ensuring questions remained relevant. However, judges often failed to perform this role.<sup>38</sup> Victims, while permitted to engage a lawyer, rarely did so.<sup>39</sup>

### Transformation to the modern adversarial criminal trial

2.23 A series of developments linked generally to the need for greater crime control led to the modern form of public prosecutions, in which considerable emphasis is placed on the rights of the accused, and the victim is a witness not a prosecutor.

### Crime control, fair trials and public prosecutions

2.24 The industrial revolution and the corresponding growth in urban populations (particularly around London) led to a rise in crime during the 1700s.<sup>40</sup>

2.25 Informal associations for the prosecution of criminals became common. Members paid to join, and then shared the costs of conducting investigations and prosecutions, frequently engaging lawyers to carry out these tasks.<sup>41</sup> Victims, particularly institutional victims such as banks, the post office and state-run organisations, also began to use lawyers to conduct trials.<sup>42</sup> In contrast, defence lawyers remained forbidden, apart from on behalf of individuals charged with treason.<sup>43</sup>

2.26 From the mid-1700s, the government began to offer rewards and incentives for the apprehension and prosecution of criminals. The outcome was a sharp increase in 'false witnessing and false prosecution' and related miscarriages of justice.<sup>44</sup>

2.27 The early 1800s saw the establishment of a police force organised and run by the state. The police force was more efficient than individual victims at gathering evidence against the accused, including forensic and expert witnesses. However, police often failed to assess the reliability or credibility of the evidence they gathered, which also led to miscarriages of justice.<sup>45</sup>

2.28 Concurrently, accused persons were regularly imprisoned before trial with little

34 R A Duff et al, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2006) 32.

35 Gregory Durston, 'The Inquisitorial Ancestry of the Common Law Criminal Trial and the Consequences of its Transformation in the 18th Century' (1996) 5 *Griffith Law Review* 177, 185–6.

36 Ibid 183.

37 R A Duff et al, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2006) 35.

38 Ibid 32.

39 John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003) 253; Paul Rock, 'Victims, Prosecutors and the State in Nineteenth Century England and Wales' (2004) 4(4) *Criminal Justice* 331, 333.

40 Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan, 2006) 60.

41 John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003) 135–6.

42 Ibid 113–23.

43 Ibid ch 2.

44 Gregory Durston, 'The Inquisitorial Ancestry of the Common Law Criminal Trial and the Consequences of its Transformation in the 18th Century' (1996) 5 *Griffith Law Review* 177, 190–1.

45 Yue Ma, 'Exploring the Origins of Public Prosecution' (2008) 18(2) *International Criminal Justice Review* 190, 195–6.

opportunity or capacity to prepare a defence; they were not advised prior to trial of the evidence against them; they had no ability to subpoena witnesses; and in most cases were poor, illiterate and incapable of preparing a proper defence.<sup>46</sup>

- 2.29 Consequently, the form and conduct of criminal trials changed to address the disadvantaged position of the accused. Most notably, from the 1730s onwards judges began to permit the accused to be represented by a lawyer.<sup>47</sup> All restrictions on the presence of defence lawyers were formally lifted in 1836.<sup>48</sup> This contributed to the development of evidentiary rules and the modern style of cross-examination. Judges became 'neutral arbitrator[s]' of an adversarial contest between the prosecution and the accused's lawyer; juries become passive observers; and lawyers for accused persons advised their clients to remain silent at trial hearings, obliging the prosecution to prove its case.<sup>49</sup>
- 2.30 Private prosecutions by victims gradually lost prominence. By the 1850s, most offences were prosecuted on behalf of victims by the police. The first Director of Public Prosecutions (DPP) for England and Wales was appointed in 1879, with a very limited role.<sup>50</sup> It was not until 1985 that England established the Crown Prosecution Service, which together with the DPP, is now responsible for prosecuting criminal cases investigated by police in England and Wales on behalf of the state.<sup>51</sup>
- 2.31 The role of the Victorian DPP and Office of Public Prosecutions in prosecuting criminal matters in Victoria is considered in Part Two.

## The modern common law adversarial criminal trial process

- 2.32 While modern adversarial trial procedures are not uniform across the common law world, they share core elements:<sup>52</sup>
- The trial is a contest between the prosecution, acting as the state's representative, and the accused.
  - The role of the victim is that of a witness for the prosecution.
  - The trial must accord with the principles of a fair trial, which include:<sup>53</sup>
    - The accused has a presumption of innocence and the right to silence.
    - The prosecution has the burden of proving guilt beyond reasonable doubt.
    - The accused has the right to examine witnesses.
    - The prosecution must disclose all evidence for and against the accused.
    - The trial should be conducted without unreasonable delay.
    - If an accused is charged with a serious offence and cannot afford a lawyer, the accused should be provided with one by the state.
  - The prosecution and the defence decide how their respective cases will be conducted, and define the issues for the jury to consider.

46 R A Duff et al, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2006) 42.

47 John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003) 110.

48 See generally J M Beattie, 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9(2) *Law and History Review* 221.

49 R A Duff et al, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2006) 43.

50 The Director made the decision whether to prosecute in a small number of difficult or complex cases, and the Treasury Solicitor undertook the prosecution.

51 Crown Prosecution Service <<http://www.cps.gov.uk>>. The CPS was established following the 1982 Philips Royal Commission on Criminal Procedure, which identified serious inconsistencies and failings in the legal capacity and decisions to prosecute of the police forces. See Paul Rock, 'Victims, Prosecutors and the State in Nineteenth Century England and Wales' (2004) 4(4) *Criminal Justice* 331, 343-4.

52 The features of the modern adversarial criminal trial are discussed in more detail in *The Role of Victims of Crime in the Criminal Trial Process Information Paper 1: History, Concepts and Theory* (May 2015) 2-4.

53 These principles are aimed at remedying the imbalance in resources between the prosecution and the accused. See, eg, Mark Findlay, *Criminal Law: Problems in Context* (Oxford University Press, 2nd ed, 2006) 54.

- The judge plays a relatively passive role. The judge is not involved in investigating the alleged crime, deciding what charge(s) are filed against the accused, or how the prosecution or defence cases are conducted during the trial, except to ensure that the rules of evidence and procedure are followed.
  - The case is presented primarily by witnesses giving live oral evidence in court and being subject to cross-examination.
  - After the prosecution and the defence have presented their cases, the judge gives the jury instructions about the law to be applied to the evidence and their deliberations on the verdict.
  - The jury, after hearing all the evidence and the judge's instructions, determines whether the prosecution has proven beyond reasonable doubt that the accused committed the crime. In coming to a verdict of guilty or not guilty, the jury must rely only on the evidence presented in court.
- 2.33 The particular procedures adopted at each stage of the criminal trial process in Victoria are considered in detail in Part Two of this consultation paper.

### The place of the victim

- 2.34 Ultimately, the victim in the modern adversarial criminal trial has been described as 'evidentiary cannon fodder, of witness or claimant, not of citizen with participatory rights and obligations'.<sup>54</sup>
- 2.35 Who then are victims of crime, what are their experiences, and what do victims need from the criminal justice system?

## Victims and the criminal justice system

### Victimisation—the data

- 2.36 During the 2014 calendar year, 205,913 people and 73,078 businesses or organisations in Victoria reported to the police that they had been the victim of one or more crimes.<sup>55</sup> The age group most likely to report an experience of victimisation were those aged between 25 and 29.<sup>56</sup>
- 2.37 There were 54,002 individuals who reported being the victim of a crime against the person, compared to 151,191 who reported being the victim of property crime.<sup>57</sup>
- 2.38 Just over half of all victims of crime were male (55.4 per cent).<sup>58</sup> However, there was a greater proportion of female victims of crimes against the person, and significantly more male victims of property and deception offences.<sup>59</sup>
- 2.39 The most prevalent crime against the person was non-sexual assault. In Victoria, men were slightly more likely than women to be victims of such assaults.<sup>60</sup>
- 2.40 Eighty per cent of Victorian sexual assault victims were female. Females were also more likely than males to be victims of abduction, stalking, harassment and intimidation offences.<sup>61</sup>

54 Jonathan Braithwaite, 'Juvenile Offending: New Theory and Practice', in L Atkinson and S Gerull (eds) *National Conference on Juvenile Justice* (Australian Institute of Criminology, 1993) 36.

55 Crime Statistics Agency (CSA), *Crime Statistics Year Ending 31 December 2014, Victim Reports, Table 3*, <<http://www.crimestatistics.vic.gov.au/home/crime+statistics/year+ending+31+december+2014/victim+reports>>.

56 Ibid Table 4.

57 Ibid Table 5. The CSA defines crimes against the person as homicide, assault, sexual offences, abduction, robbery, blackmail, extortion, stalking, harassment, threatening behaviour and dangerous and negligent acts endangering people. Property crime is defined as arson, burglary, break and enter, theft, deception, bribery and property damage.

58 Ibid Table 3.

59 Ibid Table 5. This was also reflected in the statistics for offences against children aged 0 to 14 years (see Table 6).

60 Ibid Table 5.

61 Ibid.

- 2.41 Australian Bureau of Statistics data indicate that male victims of assault are less likely to know their assailant than are female assault victims. Eighty per cent of women physically assaulted in 2013–14 were assaulted by someone that they knew, most commonly an intimate partner or family member.<sup>62</sup> Similar statistics exist in relation to face-to-face threatened assault,<sup>63</sup> homicide<sup>64</sup> and sexual offences.<sup>65</sup> This is not surprising in light of the fact that women are disproportionately victims of family violence offences.<sup>66</sup> The majority of sexual and family violence offenders are male.<sup>67</sup>
- 2.42 Individuals from disadvantaged or marginalised communities may have an increased likelihood of being offended against, and may also be vulnerable to certain types of offending.<sup>68</sup>
- 2.43 Disadvantaged and marginalised groups often also face greater barriers when seeking to access the criminal justice system. Research in relation to the victimisation of particular groups has been limited. Those studies that have been conducted show increased risk of criminal victimisation and/or greater barriers to justice for individuals who are homeless, of Aboriginal or Torres Strait Islander background, from a culturally or linguistically diverse background or who have a mental illness or disability.<sup>69</sup>
- 2.44 Children and young people also experience special difficulties in the criminal justice system, by reason of their age and related vulnerability.
- 2.45 Crime occurs to and within communities. Risk of criminal victimisation is usually dependent upon a ‘confluence of several risk factors’.<sup>70</sup> For example, in 2005 the Australian Institute of Criminology published a report analysing key results of the 2004 International Crime Victimisation Survey, which identified people with the following characteristics as being at higher risk of being a victim of personal crime:
- not being married
  - relatively higher incomes
  - residing at a postcode for less than one year
  - unemployment, or
  - an active lifestyle outside home in the evenings.<sup>71</sup>

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62 Australian Bureau of Statistics (ABS) ‘Physical Assault’, 4530.0 – *Crime Victimisation, Australia, 2013–14* (17 February 2015) <<http://www.abs.gov.au/ausstats/>>. Note that the Victorian CSA data tables include statistics on victim–offender relationship (including that 17,938 of the 54,002 offences against the person reported in Victoria in 2014 recorded a current or former partner or family member as the offender). However, this table does not disaggregate on the basis of sex (Table 7). Thus, ABS data for 2013–2014 are used.

63 ABS, ‘Threatened Assault’, 4530.0 – *Crime Victimisation, Australia, 2013–14* (17 February 2015), <<http://www.abs.gov.au/ausstats/>>.

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

65 ABS, ‘Victoria’, 4510.0 – *Recorded Crime – Victims, Australia, 2013* (26 June 2014) <<http://www.abs.gov.au/ausstats/>>.

66 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children 2009–2021* (March 2009) 29.

67 Ibid.

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

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

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

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

## The diverse impacts of crime

2.46 The experiences and needs of victims will vary depending 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. The Australian Institute of Criminology has noted:

the impact of crime victimisation 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.<sup>72</sup>

2.47 The most common effects of crime on victims include shock, a loss of trust in society, guilt, physical injury, financial loss, psychological injury, behavioural change and responses related to a perceived risk of future victimisation.<sup>73</sup> There is little doubt that the 'effects of crime are pervasive and deleterious to the victims' emotional health'.<sup>74</sup>

2.48 Research indicates that:

- An emotional reaction to being victimised occurs in the majority of victims.<sup>75</sup>
- Longer-term impacts are experienced by victims of severe sexual assaults, and to a lesser extent, physical assaults.<sup>76</sup>
- Sexual assault can lead to feelings of guilt, self-blame and unworthiness, as well as contributing to low reporting of sexual offences to police.<sup>77</sup>
- More serious or violent offences are more likely to cause higher levels of emotional stress and long-lasting psychological, social and physical impacts, while financial and property loss are more typically short-term experiences.<sup>78</sup>
- Victims of physical or threatened violence and/or attempted break-in tend to have poorer social wellbeing outcomes than people who have not experienced those crimes, for example feeling less safe at home.<sup>79</sup>
- Although property crimes (particularly non-violent property crimes) typically result in less severe and long-term effects than violent personal crimes, victims of property crimes do suffer emotional, psychological and physical health impacts.<sup>80</sup>

2.49 There is limited research comparing the experiences of victimisation across victims of different social categories, or across different types of crime. Nevertheless, research shows that the effects of crime may compound, and be compounded by, the vulnerability of individuals already experiencing disadvantage or marginalisation. For example, a 'convergence of factors increases the risk of physical and sexual violence for women' from

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

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

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

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

76 Ibid, 196.

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

78 Joanne Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims?' (2007) 14 *International Review of Victimology* 175, 196. Diane Green and Naelys Diaz, 'Predictors of Emotional Stress in Crime Victims: Implications for Treatment' (2007) 7(3) *Brief Treatment and Crisis Intervention* 194, 195.

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

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

culturally and linguistically diverse backgrounds, including recently arrived refugees.<sup>81</sup> For refugee women in particular, the impact of crime may be more complex by reason of their earlier traumatic experiences.<sup>82</sup> Family violence is one of the leading causes of homelessness for women, and once homeless, there is an increased risk of being a victim of crime.<sup>83</sup>

## Victims and the adversarial trial process

2.50 At its worst, the adversarial criminal trial process is experienced by victims as secondary victimisation,<sup>84</sup> causing negative psychological consequences that can be distinguished from, and compound, the trauma of the original event.<sup>85</sup> Judith Herman, an expert in traumatic stress, has observed that:

if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.<sup>86</sup>

2.51 Some victims of crime do have positive experiences in their interaction with criminal justice system agencies and officials. However, research from around the world over the last three decades has consistently reported victim dissatisfaction with some or all of the processes, actors and institutions making up the criminal justice system.<sup>87</sup>

2.52 Much of the research into the justice experiences and needs of victims has focused on victims of sexual offences. This may reflect the more severe and longer-term impact of these types of crimes on the victims. It may also reflect that sexual offence cases are more likely to go to trial than cases for other offences. Recent County Court statistics illustrate this point: there were 358 trials in the County Court of Victoria in 2013–14, and 40 per cent of those trials were for sexual offences. While overall 71 per cent of cases in the County Court resolved as a plea of guilty without a trial, only 44 per cent of sexual offence matters resolved as a plea of guilty.<sup>88</sup>

2.53 There have been significant innovations and reforms to the criminal trial process in Victoria and other common law jurisdictions. These reforms have mostly focused on vulnerable victims, primarily children and victims with cognitive impairments, and victims of serious and sexual offences. They will be considered throughout Part Two of this consultation paper.

## Victims' experience and justice needs

2.54 The following section provides an outline of victims' experience of the adversarial trial process and victims' justice needs. The Commission encourages readers to refer to information paper 2, *Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* published in May 2015, as a companion document to this section.

2.55 It is often said that victims want justice. But justice is a contested and contextual concept, shaped at a community level by culture, history, geography and resources, and at the individual level by the experiences, social situation and personalities of the people involved.<sup>89</sup> Justice means different things to different people.

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81 See, eg, Annabelle Allimant and Beata Ostapiej-Piatkowski, 'Supporting Women from CALD Backgrounds who are Victims/Survivors of Sexual Assault: Challenges and Opportunities for Practitioners' (Report No 9 2011, Australian Centre for the Study of Sexual Assault, 2011) 5.

82 Ibid 6.

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

84 Secondary victimisation refers the impact of a negative societal or community reaction to the original victimisation experience, for example, blaming the victim for his/her conduct in relation to a criminal offence.

85 Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4) *Social Justice Research* 313, 321; Judith Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159, 159.

86 Judith Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159, 159. Note that most of the research exploring victim distress and secondary victimisation from the criminal trial process has focused on victims of sexual offences. There is a relative lack of data on whether secondary victimisation occurs in other cases, especially non-violent offences.

87 Joanna Shapland et al, *Victims in the Criminal Justice System* (Gower Publishing, 1985); Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler, 1996); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002).

88 County Court of Victoria, *Annual Report 2013–2014* (2015) 10–11.

89 Michael King et al, *Non-adversarial Justice* (Federation Press, 2009) 46.

- 2.56 Understanding the justice needs of victims of crime is important. If victims' needs can be better satisfied by the criminal justice system, confidence in the criminal justice system should improve, and this may encourage victims to report crime and cooperate with justice agencies in order to bring offenders to account.<sup>90</sup>
- 2.57 Justice as a concept can be broken into two interrelated aspects:
- procedural justice (or procedural fairness)<sup>91</sup>
  - distributive justice (or substantive justice).

### Procedural justice

- 2.58 Procedural justice is concerned with the quality of an individual's experience of the processes that result in the ultimate outcome. Research indicates that victims of crime are more likely to consider an outcome fair and the system legitimate if the processes leading to that outcome are perceived to be fair.<sup>92</sup>
- 2.59 While there is need for caution when generalising about victims, studies suggest that the central ideas of procedural justice can be seen across highly diverse social environments.<sup>93</sup>
- 2.60 The procedural justice needs of victims which emerge from research are captured by the following three categories:
- participation and voice
  - information and support
  - trust, neutrality and respectful treatment.<sup>94</sup>

### Participation and voice

- 2.61 The passive role allocated to victims in adversarial trial processes can lead to feelings of frustration and alienation.<sup>95</sup> This in turn can exacerbate the traumatic impact of the crime itself.
- 2.62 A particular focus of research has been victims' exclusion from participating in, or contributing to, prosecutorial decisions, particularly in relation to decisions to discontinue a prosecution or to accept a plea of guilty to lesser charges. Studies have reported victim dissatisfaction with their inability to give directions to a prosecutor and with a perceived lack of transparency in the prosecutorial decision-making process.<sup>96</sup>
- 2.63 While many victims want the opportunity to have input into the decision-making process, they do not necessarily want the burden of responsibility for making the ultimate decision.<sup>97</sup> For example, a small study of sexual assault victims from Victoria found that

90 Tom Tyler, *Why People Obey the Law* (Princeton University Press, 2006); Ben Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System' (2011) 11(4) *Criminology & Criminal Justice* 345, 350; Judith Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159.

91 Some academics differentiate between procedural justice and the concept of 'interactional justice', which incorporates two aspects: informational justice and interpersonal justice. For the purposes of this paper, these aspects are incorporated into 'procedural justice'. See Malini Laxminarayan et al, 'Procedural and Interactional Justice: A Comparative Study of Victims in the Netherlands and New South Wales' (2012) 9(3) *European Journal of Criminology* 260.

92 Tom Tyler, 'Social Justice: Outcome and Procedure' (2000) 35(2) *International Journal of Psychology* 117; Stuart Ross et al, *Fairness and Equity for Victims of Crime: What Do They Want and Why Don't They Get It? Final Report* (ARC Discovery Project DP0665417, December 2009) 144.

93 Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8 *Victims and Offenders* 119, 141 (cautioning against generalisation of findings); Ben Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System' (2011) 11(4) *Criminology & Criminal Justice* 345, 350.

94 See, eg, Joanna Shapland et al, *Victims in the Criminal Justice System* (Gower Publishing, 1985); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002) 302; Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8 *Victims and Offenders* 119, 141.

95 Judith Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 581; Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No. 19, Australian Institute of Criminology, 1999) 54.

96 Stuart Ross et al, *Fairness and Equity for Victims of Crime: What Do They Want and Why Don't They Get It? Final Report* (ARC Discovery Project DP0665417, December 2009) 144. Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No.19, Australian Institute of Criminology, 1999) 54; Haley Clark, "'What is the Justice System Willing to Offer?'" Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' (*Family Matters*, No. 85, Australian Institute of Family Studies, 2010) 35; Justice Strategy Unit, South Australian Government, *Victims of Crime Review: Report One* (June 1999) 98.

97 Joanna Shapland et al, *Victims in the Criminal Justice System* (Gower Publishing, 1985) 178; Jo-Anne Wemmers and Katie Cyr, 'Victims' Perspective on Restorative Justice: How Much Involvement are Victims Looking For?' (2004) 11 *International Review of Victimology* 259, 270.

these victims instead sought participation through strong representation of their interests throughout the stages of the criminal trial process.<sup>98</sup>

- 2.64 Research also reveals that many victims feel that their role as a witness simultaneously requires them to re-live the trauma of the crime, while denying them the ability to voice the circumstances and impact of the crime in a way that is meaningful for them.<sup>99</sup>
- 2.65 Just retelling a traumatic event can be a traumatising experience.<sup>100</sup> Victims have described the process of giving evidence as humiliating, degrading and manipulative, and as adding to the trauma of the original crime.<sup>101</sup> The public nature of a criminal trial; the focus on what happened instead of the impact; aggressive cross-examination techniques; and rules of evidence that restrict the way in which a victim can communicate have all been identified as contributing to victims' distress and frustration.<sup>102</sup>
- 2.66 It has therefore been argued that reforms to the criminal justice system should be aimed at providing options for victims to give a full account of what happened to them in a supportive environment.<sup>103</sup>

### Information and support

- 2.67 The provision of timely, accessible and accurate information to victims about criminal procedures, sources of support and the status of their case is consistently identified in the research as one means to remedy victim dissatisfaction.<sup>104</sup>
- 2.68 Ensuring victims are informed sends a message that their experience of victimisation has not been forgotten in the criminal trial process. Accurate information also helps manage victims' expectations by setting out the reality of the victim's role within the criminal trial process.<sup>105</sup>

### Trust, neutrality and respectful treatment

- 2.69 Individuals are likely to be more satisfied with the outcome of the court process if they are treated with respect and dignity, and if they see the actors in the system as carrying out their roles impartially and fairly.<sup>106</sup> Fair dealings promote trust, address feelings of uncertainty and encourage positive perceptions of the system.<sup>107</sup>

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98 Haley Clark, "'What is the Justice System Willing to Offer?' Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' (*Family Matters*, No. 85, Australian Institute of Family Studies, 2010).

99 Ibid; Tinneke Van Camp and Jo-Anne Wemmers, 'Victims' Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117; Judith Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159.

100 Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No.19, Australian Institute of Criminology, 1999) 57.

101 Haley Clark, "'What is the Justice System Willing to Offer?' Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' (*Family Matters*, No. 85, Australian Institute of Family Studies, 2010) 34; See also Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003).

102 Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No. 19, Australian Institute of Criminology, 1999); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002); Haley Clark, "'What is the Justice System Willing to Offer?' Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' (*Family Matters*, No. 85, Australian Institute of Family Studies, 2010) 34.

103 Jonathan Doak et al, 'Victims and the Sentencing Process: Developing Participatory Rights?' (2009) 29(4) *Legal Studies* 651, 667. Procedural fairness, including giving victims greater voice, has been linked in some studies to victim wellbeing: see Tinneke Van Camp and Jo-Anne Wemmers, 'Victims' Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117. However, research on the impact on victims' mental health of their contact with the criminal justice system has also been described as 'inconclusive': Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and Their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221, 222; Jim Parsons and Tiffany Bergin, 'The Impact of Criminal Justice Involvement on Victims' Mental Health' (2010) 23(2) *Journal of Traumatic Stress* 182, 183.

104 See, eg, Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure, Interim Report*, Report No. 42; (1991); Justice Strategy Unit, South Australian Government, *Victims of Crime Review: Report One* (June 1999); Annemarie ten Boom & Karlijn Kuijpers, 'Victims' Needs as Basic Human Needs' (2012) 18(2) *International Review of Victimology* 155,163; Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8 *Victims and Offenders* 119, 141.

105 Victims Support Agency (VSA) *A Victim's Voice: Victim Impact Statements in Victoria* (Department of Justice, State of Victoria, 2009) 42.

106 Tom Tyler, 'Social Justice: Outcome and Procedure' (2000) 35(2) *International Journal of Psychology* 117; Jo-Anne Wemmers et al, 'What is Procedural Justice: Criteria used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures' (1995) 8(4) *Social Justice Research* 329; Jo-Anne Wemmers, *Victims and the Criminal Justice System* (Kugler, 1996).

107 Ben Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System' (2011) 11(4) *Criminology & Criminal Justice* 345, 345; Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and Their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221, 223.

- 2.70 In contrast, insensitive, infrequent or dismissive interactions may leave victims feeling that they are of lesser value in the system, that they have not been believed or that their victimisation is of minimal concern.<sup>108</sup>
- 2.71 The distress associated with giving evidence in court, particularly cross-examination, has been well documented. The experience can also undermine trust in the decision-making process by leaving victims feeling that the information on which a decision will be based has been rendered inaccurate by the questions used to obtain the evidence.<sup>109</sup>
- 2.72 Research suggests that victims of sexual assault in particular are likely to place emphasis on respectful and dignified treatment by authorities as a way of counteracting negative stereotypes, which still influence society's response to sexual assault victimisation.<sup>110</sup>

### Distributive justice

- 2.73 Distributive justice is concerned with the perception of justice arising from outcomes, such as a plea settlement, jury verdict, sentencing determination or award of compensation.
- 2.74 For some victims, the outcome of the trial process will be the major determinant of their satisfaction with the criminal justice system, even where procedures have been fair.<sup>111</sup>
- 2.75 The research suggests that, broadly speaking, victims seek distributive justice in the form of:
- punishment and retribution
  - deterrence, protection and community safety
  - material and emotional restoration (including validation and denunciation).

### Punishment and retribution

- 2.76 Retributive punishment refers to punishment as an end in itself. It is typically reflected in the imposition of a sentence that is proportionate to the gravity of the crime.
- 2.77 Retributive punishment is undoubtedly sought by some victims. However, for other victims, retribution is a lower priority than community acknowledgment and denunciation, public safety, emotional reparation and compensation.<sup>112</sup>
- 2.78 The level of retribution sought may vary depending on factors such as severity of offence, perceptions of immorality and the relationship between the victim and the offender.<sup>113</sup>

### Deterrence, protection and community safety

- 2.79 Some victims want an offender to face a prison sentence as a way of making them understand the gravity of the wrong committed, thus deterring future crime and protecting others from harm. Other victims may seek such an outcome through offender rehabilitation in addition, or as an alternative, to prison.<sup>114</sup>

108 Judith Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 585; Victims Support Agency, *Information and Support Needs of Victims and Witnesses in the Magistrates' Court of Victoria* (Department of Justice, State of Victoria, 2013) 17–18; Edna Erez et al, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169, 185.

109 Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8 *Victims and Offenders* 119, citing G M Matoesian, *Reproducing Rape: Domination Through Talk in the Courtroom* (Polity Press, 1993).

110 Malini Laxminarayan, 'Interactional Justice, Coping and the Legal System: Needs of Vulnerable Victims' (2013) 19(2) *International Review of Victimology* 145; Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) 345–6.

111 Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990) 122.

112 See, eg, Edna Erez and Pamela Tontodonato 'The Effect of Victim Participation in Sentencing on Sentence Outcome' (1990) 28 *Criminology* 451, 467; Joanna Shapland et al, *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield, 2006) 72; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002) 302; Judith Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 585.

113 Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8 *Victims and Offenders* 119, 124.

114 Joanna Shapland et al, *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield, 2006); Haley Clark, "'What is the Justice System Willing to Offer?'" *Understanding Sexual Assault Victims' Survivors' Criminal Justice Needs* (*Family Matters*, No. 85, Australian Institute of Family Studies, 2010) 30.

- 2.80 Victims of violent offences (including family violence and sexual assault) have been reported as particularly concerned about their immediate personal safety and the protection of others. This is often a key motivation for these victims wanting an offender to serve a custodial sentence.<sup>115</sup>

### Material and emotional restoration

- 2.81 Restoration (or reparation) is a broad term that is generally understood to include any attempt, whether financial, practical or emotional, to make good a wrong.
- 2.82 Research indicates that some victims place value on what offenders can do by way of practical or emotional restoration, rather than the amount of money that offenders can afford to pay to them.<sup>116</sup>
- 2.83 In relation to financial restoration, it has been suggested that victims may prefer compensation from an offender rather than state-funded compensation, even though it is likely to be limited, because it links offender recognition with the harm caused.<sup>117</sup>
- 2.84 Emotional restoration may be facilitated by processes which:
- allow for the offender to make an apology<sup>118</sup>
  - require an offender to understand the harm caused to the victim
  - facilitate the demonstration of remorse by an offender
  - see an offender, family and/or community members validate a victim's experience and denounce the offender's actions
  - allow an offender to demonstrate rehabilitation.<sup>119</sup>
- 2.85 A guilty plea or verdict or an award of compensation may ultimately be necessary for some victims to feel that validation and denunciation have truly occurred, particularly in the context of sexual assault or family violence.<sup>120</sup>

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115 Annemarie ten Boom and Karlijn Kuijpers, 'Victims' Needs as Basic Human Needs' (2012) 18(2) *International Review of Victimology* 155, 161; Haley Clark, "'What is the Justice System Willing to Offer?'" Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' (*Family Matters*, No. 85, Australian Institute of Family Studies, 2010) 30; Judith Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 595.

116 Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002) 8–24; Joanna Shapland et al, *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield, 2006) 72.

117 David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change (2014) 20(1) *International Review of Victimology* 145, 148.

118 For contrasting opinions on the relative importance of an apology see Judith Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 587; Heather Strang et al, 'Victims Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis' (2006) 62(2) *Journal of Social Issues* 281.

119 See generally Haley Clark, "'What is the Justice System Willing to Offer?'" Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' (*Family Matters*, No. 85, Australian Institute of Family Studies, 2010); Joanna Shapland et al, *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield, 2006); Heather Strang et al, 'Victims Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis' (2006) 62(2) *Journal of Social Issues* 281; Judith Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571; Shirley Julich, 'Views of Justice Among Survivors of Historical Child Sexual Abuse: Implications for Restorative Justice in New Zealand' (2006) 10(1) *Theoretical Criminology* 125; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002); Bruce Feldthusen et al, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law* 66.

120 Shirley Julich, 'Views of Justice Among Survivors of Historical Child Sexual Abuse: Implications for Restorative Justice in New Zealand' (2006) 10(1) *Theoretical Criminology* 125, 129; Judith Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 585; Bruce Feldthusen et al, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law* 66, 97–8.

# Alternative criminal justice models

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## 3. Alternative criminal justice models

### Introduction

- 3.1 The common law adversarial criminal trial process is only one model of criminal justice. This chapter outlines four alternative approaches:
- inquisitorial criminal trial processes of civil law jurisdictions
  - hybrid trial processes of the International Criminal Court
  - restorative justice
  - theoretical models of criminal justice systems designed specifically to incorporate victims.
- 3.2 This chapter focuses on the general structure and underlying principles of each of these models.

### Inquisitorial criminal trial processes

- 3.3 Civil law jurisdictions (countries that have a civil law legal system) are based on Roman law. In civil law jurisdictions, legal codes are the fundamental source of law and judicial decisions have much less influence.<sup>1</sup>
- 3.4 Civil law jurisdictions typically have inquisitorial criminal trial processes, which are fundamentally different in nature and procedure to the common law adversarial trial process.<sup>2</sup>

### Underlying principles

- 3.5 Criminal trials in civil law jurisdictions are official investigations carried out by judicial officers in order to determine the truth.
- 3.6 The prosecution and the accused exert much less control over the proceedings than do their common law counterparts. Judges play an active decision-making role and victims have more opportunities to participate in inquisitorial trial processes, including as a party.<sup>3</sup>

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1 Frank Maher and Louis Waller, *An Introduction to Law* (Law Book Company, 6th ed, 1991) 56.

2 There is a large literature on the differences between adversarial and inquisitorial justice systems: see, eg, John D Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment' (2005) 68 *Modern Law Review* 737. Other commentators have cautioned against attaching too much weight to the labels 'adversarial' and 'inquisitorial': see, eg, Sarah Summers, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing, 2007) 5–10.

3 Sarah Summers, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing, 2007) 6–8.

## Features of the criminal trial process in inquisitorial criminal justice systems

- 3.7 Inquisitorial criminal trial procedures vary across countries with civil law systems.<sup>4</sup> Nevertheless, the archetypal inquisitorial criminal trial process has the following characteristics:
- There is a high degree of judicial control over the criminal trial process, rather than it being driven by the prosecutor and the accused.<sup>5</sup> A judicial officer<sup>6</sup> oversees the conduct of the investigation from the outset.<sup>7</sup>
  - It is dominated by the preliminary investigation phase, during which witnesses are called and evidence is gathered.<sup>8</sup> This phase is not a public hearing.<sup>9</sup> It is directed by a judicial officer.
  - Information gathered during the preliminary phase, including information about the offender relevant to sentencing, is compiled into a dossier, or case file, which is relied on through the criminal trial process.<sup>10</sup>
  - At the trial, the evidence is often presented by the judge. The hearing often commences with an examination of the accused.
  - Less emphasis is placed on oral evidence from victims and witnesses, with greater reliance on information contained in the case file.<sup>11</sup>
  - There is limited or no cross-examination of victims or witnesses in the manner of an adversarial trial.<sup>12</sup>
  - There are far fewer rules governing the exclusion of evidence than in common law jurisdictions. Rather, all evidence that is logically relevant is admitted.<sup>13</sup>
  - A determination of guilt is made only after a complete investigation, which generally includes a hearing.<sup>14</sup> As a result, pleas of guilty and plea bargaining are often described as incompatible with inquisitorial systems 'because the truth cannot be negotiated or compromised'.<sup>15</sup>
  - Guilt is determined by a tribunal comprising one or more professional judges and, in some jurisdictions, lay people.
  - Proof of guilt must be established beyond reasonable doubt.<sup>16</sup>
  - Defence lawyers play a smaller role in inquisitorial trials compared to adversarial trials. Instead, judges are often expected to protect the position of the accused throughout the criminal trial process.<sup>17</sup>
- 3.8 Arguably, some inquisitorial criminal justice systems place less emphasis on the accused's fair trial rights, even though fair trial guarantees are contained in the European Convention on Human Rights.<sup>18</sup>

4 See generally Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001); see also Harry Dammer, Erika Fairchild and Jay S Albanese, *Comparative Criminal Justice Systems* (Wadsworth, 3rd ed, 2006) 143.

5 Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 114.

6 Usually an examining magistrate or a prosecutor. In inquisitorial legal systems, prosecutors are often members of the judiciary.

7 Frances Pakes, *Comparative Criminal Justice* (Willan Publishing, 2004) 75.

8 Harry Dammer, Erika Fairchild and Jay S Albanese, *Comparative Criminal Justice Systems* (Wadsworth, 3rd ed, 2006) 144.

9 Ibid.

10 See, eg, Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 304.

11 Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 114.

12 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 39.

13 Frances Pakes, *Comparative Criminal Justice* (Willan Publishing, 2010) 91.

14 Máximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' in Stephen C Thaman (ed), *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial* (Carolina Academic Press, 2010) 3, 29.

15 Ibid.

16 Mirjan Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506, 543.

17 Jacqueline Hodgson, 'Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform' (2002) 51 *International and Comparative Law Quarterly* 781, 791.

18 Ibid 813.

## The role of the victim

- 3.9 Inquisitorial criminal trial processes are often described by academic commentators as more favourable to victims than adversarial criminal trial processes.<sup>19</sup> This is attributed to the absence of cross-examination, less restrictive rules of evidence and greater judicial control over the proceedings.<sup>20</sup>
- 3.10 The investigative nature of proceedings in inquisitorial systems also lends itself to victims playing a more active role in trial proceedings.<sup>21</sup> This involvement can take a number of forms. The three most commonly used modes of victim involvement across civil law countries are: civil party, auxiliary prosecutor or legally represented victim-witness.

### Victims as ‘civil parties’

- 3.11 All countries with inquisitorial criminal trial processes permit victims a role as ‘civil party’ (called *partie civile* in France and Belgium, and the ‘adhesion procedure’ in Germany).<sup>22</sup>
- 3.12 The role of the civil party is to facilitate victims seeking civil compensation orders against the offender.<sup>23</sup> While participation may occur at various stages of the proceedings, the scope of participation is generally limited to establishing the civil compensation claim (rather than facilitating conviction of the accused).<sup>24</sup>
- 3.13 In order to be a civil party, a victim must:
- Be eligible to become a civil claimant.
  - Notify the court and the prosecution of their intention to make a claim for compensation.<sup>25</sup> In some jurisdictions, including France, Germany and the Netherlands, victims are permitted to provide such notification at any point up until closing arguments are presented.<sup>26</sup>
  - Appear in court and substantiate their claim by providing evidence to the court of the damage caused as a result of the offence. This can be done either orally or in writing, but in all cases must be supported by adequate documentary evidence.<sup>27</sup>

### Victims as auxiliary prosecutors

- 3.14 Victims are incorporated into inquisitorial criminal proceedings as auxiliary prosecutors in a number of European countries, including Germany, Sweden, Norway and Austria.<sup>28</sup>
- 3.15 Generally, as auxiliary prosecutors, victims can play an active role in the lead-up to and during the trial.<sup>29</sup> Victims may be permitted to ‘submit evidence, comment on representations made by the prosecution and defence, and express their opinions on key decisions taken’.<sup>30</sup> As auxiliary prosecutors, victims are often also permitted legal representation throughout the criminal trial process.

19 See, eg, Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia: Report of the National Child Sexual Assault Reform Committee* (National Child Sexual Assault Reform Committee, 2010) [6.72]; Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 39.

20 See, eg, Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia: Report of the National Child Sexual Assault Reform Committee* (National Child Sexual Assault Reform Committee, 2010) [6.72].

21 Commentators argue that this is because trials in inquisitorial criminal justice systems are not strictly contests between two opposing parties, but rather official investigations subject to substantial judicial control. Therefore, introducing a third actor—the victim—is less of a challenge to the structure of inquisitorial criminal trials and has fewer implications for the rights of the accused.

22 Susanne Walther, ‘Reparation in the German Criminal Justice System: What Is, and What Remains to be Done’ (2000) 7 *International Review of Victimology* 265, 269.

23 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 27.

24 Ibid.

25 Ibid 319.

26 Ibid 319, 363.

27 Marion E Brienen and Ernestine H Hoegen, ‘Compensation Across Europe: A Question for Best Practice’ (2000) 7 *International Review of Victimology* 281, 283.

28 Jonathan Doak, ‘Victims’ Rights in the Criminal Justice System’ in G Bruinsma and D Wesiburd (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer, 2014) 5497, 5504.

29 Ibid.

30 Ibid.

- 3.16 Auxiliary prosecutors are sometimes characterised as separate parties to the criminal proceeding;<sup>31</sup> they stand beside the prosecutor.<sup>32</sup> If a victim adopts the role of auxiliary prosecutor, they are independent of and subsidiary to the prosecutor.<sup>33</sup>

### Legal representatives for victims

- 3.17 In many civil law jurisdictions, victims of serious offences, and in particular sexual offences, are permitted to have lawyers throughout the trial. This is separate from whether or not they are permitted to appear as auxiliary prosecutors. The precise functions of victims' lawyers vary between jurisdictions, although they generally involve protecting the interests of victims and providing support throughout the criminal trial process.

### Comparative analysis

- 3.18 The terms of reference ask the Commission to undertake 'a comparative analysis of the criminal trial process, particularly in civil law jurisdictions'.<sup>34</sup> This is done throughout Part Two of this paper by identifying and comparing the different roles and procedures in place for victims in civil law inquisitorial trial processes relative to each stage of the common law adversarial trial.

## The International Criminal Court

- 3.19 In May 2015, the Commission published an information paper discussing the role of victims in proceedings before the International Criminal Court (ICC).<sup>35</sup> The Commission encourages readers to review the Commission's information paper as a companion to this consultation paper.
- 3.20 The ICC was established by the Rome Statute on 1 July 2002.<sup>36</sup> The Pre-Trial, Trial and Appeals Chambers comprise the judicial branch of the ICC.
- 3.21 The ICC has jurisdiction over war crimes, crimes against humanity, and genocide.<sup>37</sup> This focus on crimes involving mass victimisation restricts to some degree a direct comparison with domestic criminal justice systems. Nonetheless, the Court's largely adversarial trial procedures and adherence to fair trial principles<sup>38</sup> mean that it shares some core features with the criminal trial process in Australia.
- 3.22 The ICC's trial processes might be described as a hybrid of procedures from the two dominant legal traditions, common law and civil law. While victim participation is drawn from inquisitorial civil traditions, most other trial procedures are drawn from adversarial common law traditions.<sup>39</sup>
- 3.23 Victims are incorporated into the ICC in two main ways: victims' participation in the criminal trial process, and the ICC's regime for redress and reparations.

31 Susanne Walther, 'Reparation in the German Criminal Justice System: What Is, and What Remains to be Done' (2000) 7 *International Review of Victimology* 265, 266.

32 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 28.

33 Kerstin Braun, 'Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure' 14(9) *German Law Journal* 1889, 1890.

34 Terms of reference [b].

35 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 3: The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process* (May 2015).

36 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002 ('Rome Statute')). In this consultation paper, the term 'ICC' will be used to refer to the entire institutional structure of the ICC, which includes the Presidency, the Office of the Prosecutor, the Registry and other offices encompassing the Office of Public Counsel for Victims, the Office of Public Counsel for Defence and the Trust Fund for Victims, and the Chambers (the Pre-Trial Chamber, the Trial Chamber and the Appeals Chamber).

37 *Ibid* art 5.

38 Scott T Johnson, 'Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court' (2009) 16 *ILSA Journal of International and Comparative Law* 489, 491; John Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy' (2009) 7 *Journal of International Criminal Justice* 17, 34; M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 443, 464.

39 Judge Anita Usacka, 'Building the International Court' (2011) 23 (2) *Pacific McGeorge Global Business & Development Law Journal*, 225, 229 (speech delivered in Salzburg, Austria on 19 July 2010).

- 3.24 The ICC's scheme for victim participation permits victims to express their views and concerns where their personal interests are affected.<sup>40</sup> In practice, victim participation has been interpreted as allowing victims to be legally represented, make submissions on points of law, question witnesses, submit evidence and make opening and closing statements. Nonetheless, victims do not have party status in ICC proceedings.<sup>41</sup>
- 3.25 The ICC's regime for victim redress and reparations can be divided into two parts: reparations, which flow from the court's power to order offenders to pay reparations to victims of crimes within its jurisdiction; and the Trust Fund for Victims, which provides assistance to victims outside court-ordered reparations.<sup>42</sup> Victims can access the Trust Fund irrespective of a finding of guilt.<sup>43</sup>
- 3.26 Proponents of victim participation and redress and reparations argue that it benefits victims because:
- It provides an acknowledgement of and focus on the interests, needs and suffering of victims.<sup>44</sup>
  - It offers an opportunity to serve victims' justice needs, such as being heard,<sup>45</sup> having their interests taken into account<sup>46</sup> and being able to contribute to 'fact-finding and truth telling'.<sup>47</sup>
  - It recognises victims' agency and helps restore their dignity.<sup>48</sup>
- 3.27 Victim participation has also been described as benefiting the ICC's proceedings by ensuring the Court receives a nuanced and complete version of events surrounding the alleged crimes,<sup>49</sup> and that proceedings are sensitive to the needs of victims.<sup>50</sup>
- 3.28 It has been said that the scheme for victims' participation and reparations at the ICC represents a shift in international criminal prosecutions from retributive justice<sup>51</sup> to a more restorative approach.<sup>52</sup> However, whether this dual focus is possible or preferable is far from settled.
- 3.29 As only a small number of cases have reached trial or reparations proceedings, the implications of the ICC's victims' participation and reparations schemes remain to be seen. Challenges associated with allowing victims to participate in ICC proceedings are discussed in more detail throughout Part Two of the consultation paper.

40 Rome Statute, art 68(3).

41 See, eg, *Prosecutor v Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of the Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial') (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [39].

42 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 1–2, 75–6.

43 Ibid.

44 See, eg, Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' (2012) 18(2) *Michigan Journal of Gender and the Law* 297, 314–15; Victims' Rights Working Group, 'Submission to the Hague Working Group of the Assembly of States Parties: The Importance of Victim Participation' (8 July 2013).  
45 Victims' Rights Working Group, 'Submission to the Hague Working Group of the Assembly of States Parties: The Importance of Victim Participation' (8 July 2013) 1.

46 Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2014) 102.

47 Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' (2012) 18(2) *Michigan Journal of Gender and the Law* 297, 315.

48 REDRESS, *The Participation of Victims in International Criminal Court Proceedings: A Review of Practice and Consideration of Options for the Future* (October 2012) 5; Victims' Rights Working Group, 'Submission to the Hague Working Group of the Assembly of States Parties: The Importance of Victim Participation' (8 July 2013) 1; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2014) 102.

49 Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' (2012) 18(2) *Michigan Journal of Gender and the Law* 297, 301.

50 Ibid.

51 Retributive justice focuses primarily on determining guilt and imposing punishment. The proceedings before the ICTY and the ICTR are considered to have been retributive in focus. See Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' (2012) 18(2) *Michigan Journal of Gender and the Law* 297, 314–15.

52 War Crimes Research Office, *Victim Participation at the Case Stage* (2009) 36.

## Restorative justice

- 3.30 The traditional criminal justice system is regularly criticised for failing to deliver emotional reparation to victims for the non-material effects of crime and for failing to meet victims' procedural justice needs.
- 3.31 Proponents of restorative justice principles and practices argue that incorporating restorative justice into traditional criminal trial processes has the potential to considerably improve outcomes for victims.<sup>53</sup> Restorative justice has been described as 'both a way of thinking about crime and a process for responding to crime'.<sup>54</sup>
- 3.32 The Victorian Parliamentary Law Reform Committee suggested that restorative justice:
- focuses on repairing the harm caused by the offence, on encouraging offenders to take responsibility for their actions and on increasing victim and community involvement in the criminal justice system.<sup>55</sup>
- 3.33 Together, the principles and practices of restorative justice amount to 'a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible'.<sup>56</sup>
- 3.34 Restorative justice practices have common principles:
- respect for the dignity of the individual
  - victim empowerment through participation
  - offender responsibility through participation
  - a holistic perspective on reparation.
- 3.35 Restorative justice has traditionally been understood as referring to processes such as victim–offender mediation and family group conferencing, where a fundamental element is the offender participating and taking responsibility for their actions.<sup>57</sup>
- 3.36 However, restorative justice principles are capable of being applied beyond victim–offender mediations and family group conferencing. For example, the victim participation scheme at the ICC is said to be based on restorative justice principles of victim empowerment and respect for victims' dignity.<sup>58</sup>
- 3.37 The New Zealand Ministry of Justice has suggested that 'there is no one way that restorative processes should be delivered',<sup>59</sup> adopting instead the argument that:
- ... the essence of restorative justice is not the adoption of one form rather than another; it is the adoption of any form which reflects restorative values and which aims to achieve restorative processes, outcomes and objectives.<sup>60</sup>

53 Tinneke Van Camp and Jo-Anne Wemmers, 'Victims' Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117; Heather Strang et al, 'Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis' (2006) 62(2) *Journal of Social Issues* 281.

54 New Zealand Restorative Justice Trust, *New Zealand Restorative Justice Practice Manual* (Ministry of Justice, 2000) 13.

55 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009) xliii.

56 Howard Zehr, *The Little Book of Restorative Justice* (Good Books, 2002), 37, as cited by New Zealand Ministry of Justice, *Restorative Justice in New Zealand Best Practice* <<http://www.justice.govt.nz/publications/global-publications/r/restorative-justice-in-new-zealand-best-practice/publication#3>>.

57 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009) 187–92.

58 REDRESS, *The Participation of Victims in International Criminal Court Proceedings: A Review of Practice and Consideration of Options for the Future* (October 2012) 5. The ICC procedures are discussed in more detail in this consultation paper in Chapters 7 and 8. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 3: The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process* (May 2015).

59 New Zealand Ministry of Justice, *Restorative Justice in New Zealand Best Practice*, <<http://www.justice.govt.nz/publications/global-publications/r/restorative-justice-in-new-zealand-best-practice/publication#3>>.

60 Allison Morris 'Critiquing the Critics: A Brief Response to Critics of Restorative Justice' (2002) 42 *British Journal of Criminology* 596, 600.

- 3.38 There will be times prosecutions are not commenced, for reasons which might relate to the strength of the evidence, or, particularly for sexual offences, the reluctance of the victim to be subjected to the trial process.<sup>61</sup> It has been suggested that at the pre-charge stage, restorative justice pathways may provide an avenue for victims to obtain a justice outcome that would not otherwise be available.<sup>62</sup> A live question is whether designing alternative pathways is an appropriate response to the flawed nature of the current system, or whether it is the current system itself which should be reformed.
- 3.39 While research suggests that restorative practices can benefit victims from diverse backgrounds, at different points in the criminal process and across the range of criminal offences, it is also recognised that restorative justice practices may not be suitable in all circumstances.<sup>63</sup> In particular, they may not be appropriate for more serious crimes. Restorative justice practices which involve victim–offender mediation or conferencing may not provide emotional reparation for some victims, may risk further emotional harm, and may not align with an individual victim’s justice needs and interests.<sup>64</sup> Restorative justice practices may be incapable of fulfilling a range of sentencing purposes, especially general deterrence and denunciation. The appropriateness of implementing restorative justice practices at various stages of the criminal trial process is considered in more detail throughout Part Two.

## Theoretical models of victim-centred criminal justice

- 3.40 Academics have advanced a number of models of criminal justice which re-design the criminal justice system’s fundamental framework, and the trial process, so as to incorporate victims’ justice needs.
- 3.41 The following are six models or approaches taken from a much broader field of academic research. These provide examples of ways in which wholesale reform might be imagined.

### The neighbourhood court model

- 3.42 In 1977, Nils Christie argued that in modern criminal justice systems, the state has taken over the victim’s conflict with the offender, to the detriment of both parties to the conflict and society generally.<sup>65</sup>
- 3.43 Christie argued that when the state prosecutes offences, this denies victims the opportunity to be involved in something of great importance to them—the prosecution of the crime committed against them.<sup>66</sup> The victim has also lost the opportunity ‘to come to know the offender’, leaving the offender as an inhuman, stereotyped criminal, of whom the victim remains frightened.<sup>67</sup> When the state prosecutes, the offender is more readily able to distance himself or herself from the victim’s blame, and avoid responding to a personal confrontation with the victim.<sup>68</sup> Finally, society loses ‘opportunities for norm-clarification’, that is, the opportunity to discuss the appropriateness of certain conduct and what conduct should or should not be criminalised.<sup>69</sup>

61 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (May 2014) 15–16, discussing attrition rates for prosecutions of sexual assault cases.

62 Ibid 55–6. The CIJ highlights that most victims never report sexual offences to police and even fewer proceed to court, and also recommends restorative justice pathways be open for victims who choose not to report to police but still seek a justice outcome.

63 An exception is John Braithwaite, who views restorative justice as a way of ‘reforming the entire legal system, our family lives, our conduct in the workplace, our practice of politics’: see John Braithwaite, ‘Principles of Restorative Justice’ in Andreas von Hirsch et al, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigm?* (Hart Publishing, 2003) 1.

64 Heather Strang et al, ‘Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis’ (2006) 62(2) *Journal of Social Issues* 281, 303.

65 Nils Christie, ‘Conflicts as Property’ (1977) 17(1) *British Journal of Criminology* 1.

66 Ibid 8.

67 Ibid.

68 Ibid 8–9.

69 Ibid.

- 3.44 Christie proposed a new model of criminal justice based on a ‘victim-oriented, neighbourhood court’.<sup>70</sup> In Christie’s model the criminal process has four stages:
- the determination of guilt
  - a consideration of the impact on the victim, in particular how the offender can assist the victim, and what the victim then needs from the community and the state
  - punishment of the offender, which should only be what is necessary to impose in addition to the restitution the offender pays to the victim
  - measures to rehabilitate the offender.<sup>71</sup>

### The adversary–retribution and defence–welfare models

- 3.45 In 1982 Leslie Sebba advanced two alternative theoretical approaches to the role of the victim as part of a ‘truly victim-oriented examination of the criminal process’.<sup>72</sup>
- 3.46 The ‘adversary–retribution’ model maintains the basic features of a common law trial but with greater emphasis on the victim. The trial tends more towards a confrontation between the accused and the victim, and the sentencing process aims to deliver a punishment which would ‘fit the crime’, based primarily on the victim’s injuries.<sup>73</sup> The state plays the role of facilitator, ‘acting primarily on behalf of the victim’.<sup>74</sup>
- 3.47 The ‘social defence–welfare’ model seeks to avoid the victim–offender confrontation. Instead, the state stands ‘in the shoes of the victim in prosecuting the offender’, while also ensuring rehabilitation of the offender and adequate compensation of the victim.<sup>75</sup>
- 3.48 Ultimately, Sebba argued that for all crimes except those involving severe violence, the state should provide the machinery for victims themselves to achieve their desired objectives, through the adversary–retribution model.<sup>76</sup> For the most serious crimes, the state should prosecute on behalf of the victim and provide compensation for harm suffered, reflecting the social defence–welfare model.<sup>77</sup>

### The punitive and non-punitive victims’ rights models

- 3.49 In 1999, Kent Roach developed two models of victims’ rights—‘punitive’ and ‘non-punitive’. These are based on the idea that victims’ needs and interests are important considerations that should be incorporated into the values of the criminal justice system.<sup>78</sup>
- 3.50 Under the punitive victims’ rights model, the interests and rights of victims are as important as the rights of the accused.<sup>79</sup> Related to this is an emphasis on establishing the accused’s factual guilt, rather than ensuring that he or she has a fair trial.<sup>80</sup> This model relies on punishment as the primary response to crime.<sup>81</sup>
- 3.51 The non-punitive victims’ rights model emphasises crime prevention. When a crime has occurred, ‘the focus is on reducing the harm it causes through healing, compensation, and restorative justice’.<sup>82</sup>

70 Ibid 10–12.

71 Ibid 10–11.

72 Leslie Sebba, ‘The Victim’s Role in the Penal Process: A Theoretical Orientation’ (1982) 30(2) *American Journal of Comparative Law* 217, 217–18.

73 Ibid.

74 Ibid.

75 Ibid 232–3.

76 Ibid.

77 Ibid 240.

78 Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89(2) *Journal of Criminal Law and Criminology*, 671. Like Sebba, Roach has also criticised Packer’s models for failing to consider the role of victims: see 673–4.

79 Ibid 700–1.

80 Ibid 702–3.

81 Ibid 699.

82 Ibid 709 (see also 706–7).

3.52 Roach argued that the non-punitive victims' rights model, particularly, its restorative justice elements, provides options which are likely to give greater effect to victims' needs and interests and provide victims, offenders and their respective families with the opportunity to respond constructively to crime.<sup>83</sup>

### A proposal for structural reform

3.53 In 2008, Jonathan Doak suggested that the needs and interests of victims cannot be properly accommodated 'without wholesale reform at a structural level, nor without a re-evaluation of the theoretical assumptions that underpin existing structures and institutions'.<sup>84</sup>

3.54 For Doak, such wholesale reform could come in the shape of:

- the increased use of restorative justice processes, which 'allow victims to participate and give their own account in an informal setting, to seek reparation from the offender and to pursue the truth'.<sup>85</sup>
- adopting an inquisitorial method for the adjudication of guilt,<sup>86</sup> which would give victims status during the trial, allow victims to give their account in a more narrative fashion, and emphasise the value of finding the truth.<sup>87</sup>

3.55 Doak concluded that any reforms should not remove ultimate decision-making power from the state, and conceded that the above proposals require further development, particularly with respect to whether they should exist inside or outside the formal criminal justice system.<sup>88</sup>

### Incorporating restorative justice principles

3.56 In 2009, Jo-Anne Wemmers examined whether restorative justice processes belong inside or outside the formal criminal justice system.<sup>89</sup>

3.57 Wemmers rejected abolishing the criminal justice system in favour of restorative justice processes in all cases. Such a fundamental reform would place all responsibility for the resolution of disputes involving crime onto victims and offenders.<sup>90</sup> She argued this approach is unlikely to satisfy the interests of the community in punishing crime, or satisfy victims' interests. She also rejected simply adding restorative justice processes onto the traditional criminal justice system, as this only gives victims a place outside of the trial process.<sup>91</sup>

3.58 Instead, Wemmers argued in favour of incorporating restorative justice values into the criminal justice system, by giving victims formal status, although not necessarily making them an equal party. She proposed the procedural structure of the ICC as an example of such an approach.<sup>92</sup>

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83 Ibid 714.

84 Jonathan Doak, *Victim Rights, Human Rights and Criminal Justice* (Hart Publishing, 2008) 251.

85 Ibid 263–4.

86 Ibid 254.

87 Ibid 269–84.

88 Ibid 264.

89 Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims A Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395, 401. Victims' needs are generally for information, participation, support, reparation, protection and status. For more information on victims' needs, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Law Process Information Paper 2: Who Are Victims of Crime and What Are their Criminal Justice Needs and Experiences?*

90 Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims A Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395, 403–5.

91 Ibid 408.

92 Ibid.

### Putting victims at the heart of the criminal justice system

- 3.59 In 2009, Matthew Hall examined the United Kingdom government's commitment to 'put victims at the heart of the criminal justice system'.<sup>93</sup> His analysis distinguished between 'non-fundamental' and 'fundamental' reforms. Fundamental reforms are those that change the decision-making structure of the criminal justice system by allowing victims to influence or determine matters, such as whether to pursue a prosecution or what an offender's sentence should be.<sup>94</sup>
- 3.60 For Hall, proper victim-oriented reform requires accommodating victims' therapeutic needs and administering criminal justice in a way that genuinely revolves around victims.<sup>95</sup> Hall advanced a series of reforms that he argued are non-fundamental but which place victims at the centre of the criminal justice system through changes in practice, culture and evidence taking.
- 3.61 Victims' rights feature in Hall's account. He considered that effective measures for the prompt enforcement of victims' rights were the only way to change practices and culture in the legal system that have sidelined victims. According to Hall, permitting legal representation for victims for this purpose is a non-fundamental reform, because it leaves the positions of the system's existing parties (the accused and the state) unchanged.<sup>96</sup>

93 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 1, citing Queen's Speech of 15 November 2009.

94 Ibid 40. Hall also describes restorative justice and the adoption of inquisitorial practices as fundamental reforms.

95 Ibid 41.

96 Ibid 41, 210.



PART TWO: VICTIMS AND THE CRIMINAL TRIAL PROCESS

**What should be  
the role of victims  
in the criminal trial  
process?**

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## 4. What should be the role of victims in the criminal trial process?

- 4.1 Part Two of this consultation paper considers the role of the victim at each stage of the common law adversarial criminal trial process:
- the decision to prosecute
  - committal proceedings
  - pre-trial proceedings
  - the trial
  - sentencing
  - compensation and restitution
  - appeals.
- 4.2 Each chapter (Chapters 5–11) has the same structure:
- an outline of the current Victorian processes and procedures, with a particular focus on victims
  - consideration of victim-related procedures in other jurisdictions which are distinctly different from Victoria
  - discussion and options for reform
  - questions designed to capture the issues and reform proposals identified, and guide the preparation of submissions.
- 4.3 Before turning to a detailed exploration of the individual stages of the criminal trial process, it is important to consider the fundamental, overarching question for this reference:
- What should be the role of victims in the criminal trial process?
- 4.4 In order to make such a conceptually complex task more approachable, the Commission has identified three broad answers to the question:
- The role of the victim should be ‘protected witness’.
  - The role of the victim should be ‘participating witness’.
  - The role of the victim should be ‘prosecuting witness’.
- 4.5 Each of the above answers leads to different proposals for reform, some of which have overlapping features. The Commission also notes that victims can be, and have been, afforded different roles at different stages of criminal proceedings.

## Protected witness

- 4.6 In general terms, the current role of victims throughout the criminal trial proceedings in Victoria is as a witness for the state. As will be seen in Chapter 8, victims of certain offences are afforded various protective measures throughout the criminal trial process in their role as witnesses. These protective measures have been progressively adopted to reduce the risks of secondary victimisation of vulnerable witnesses, such as children and victims with cognitive impairments, and to restrict reliance on wrongful gender stereotypes in sexual offence matters.<sup>1</sup>
- 4.7 Reforms to better protect victims as witnesses do not fundamentally alter the relationship between victim, prosecutor, court, community and accused. Rather, they are designed to provide as much protection and support to victims in their role as a witness as possible, while also balancing the right of the accused to a fair trial. Measures to protect victim-witnesses are also reflected in policies and support services aimed at ensuring that victims are treated with fairness, respect and dignity.
- 4.8 The types of reforms (whether adopted or proposed) that fall into the ‘protected witness’ category include:
- restricting the number of times victims are required to give evidence during the stages of the criminal trial process
  - expanding the use of alternative arrangements for giving evidence by victims
  - strengthening obligations on prosecutors to keep victims informed of the progress and conduct of the trial
  - enhancing victim support and advice services, including through the establishment of commissioners for victims of crime
  - expanding evidentiary rules to prevent unjustified interference with victims’ privacy, and aggressive, harassing or otherwise traumatic questioning
  - prohibiting the judge, prosecutor and accused’s lawyer from making statements to the jury about victims based on stereotypes and prejudice.
- 4.9 Despite recent reforms, victims may still experience the criminal trial as traumatic and alienating, particularly where legislated reforms are not accompanied by operational and cultural change within the legal profession and the judiciary.<sup>2</sup> Dismissive or infrequent interactions with key criminal justice actors can undermine victims’ satisfaction with the criminal justice system and cause distress.<sup>3</sup>
- 4.10 Operationally, reforms need to be accompanied by institutional structures and resources ‘to guarantee that services and facilities are offered consistently and automatically to all victims’.<sup>4</sup> Effecting cultural change requires key actors to be aware of reforms, understand the purpose of the reforms, and accept the reforms and purposes for reform as legitimate.<sup>5</sup> As part of such reforms, enforcement mechanisms, such as complaints or review procedures, can have a role in creating a culture of compliance within the legal profession.<sup>6</sup>

1 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure, Final Report* (2004) chs 4–6.

2 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No. 27, Australian Institute for Family Studies, 2014); Laura Hoyano ‘Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants’ (2015) 2 *Criminal Law Review* 107, 109.

3 Bluett-Boyd and Fileborn’s research participants identified change-resistant individuals and agencies as a key barrier to reform. The need for cultural change at each stage of the process was identified as a necessary prerequisite to entrenching reforms to criminal justice processes: Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No. 27, Australian Institute for Family Studies, 2014) (xi). See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 2: Who Are Victims and What Are Their Criminal Justice Needs and Experiences?* (May 2015) [33]–[37].

4 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 192.

5 Ibid 197.

6 Ibid 210; Douglas E Beloof, ‘The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review’ (2005) *Brigham Young University Law Review* 255; Simon Evans and Carolyn Evans, ‘Legal Redress under the Victorian Charter of Human Rights and Responsibilities’ (2006) 17 *Public Law Review* 264, 281.

## Participating witness

- 4.11 The progressive introduction of protected-witness reforms was not directed towards addressing victims' core procedural justice needs:
- to exercise agency
  - to express the impact that victimisation has had on their life in their own terms
  - to meaningfully participate in decision making throughout the different stages of the criminal trial process.<sup>7</sup>
- 4.12 These needs have been targeted through the adoption of a second category of reforms, which can be characterised as 'participating-witness' reforms.<sup>8</sup> Participating-witness reforms have generally been of two types:
- legislative or policy obligations that provide for victims' interests, views or concerns to be taken into account by the judge or the prosecutor when making rulings or exercising discretion
  - procedures that allow victims to be heard, for example to make submissions opposing applications for access to their confidential records during pre-trial, or to present a victim impact statement during sentencing.
- 4.13 Proposals for further participating-witness reforms tend to either strengthen existing modes of victim participation, or call for the adoption of alternative procedures drawn from other legal systems and theory, including:
- strengthening and expanding prosecutorial obligations to consult with victims
  - giving victims standing, generally to be exercised through legal representation, during some or all of the stages of the criminal trial process where certain rights or interests are affected
  - giving victims the option of engaging in restorative justice procedures as an alternative or complementary pathway to existing trial, sentencing and reparation procedures.
- 4.14 Proponents of greater victim participation argue that these types of reform do not fundamentally change the nature of the justice system, while critics argue that they invariably will. This might depend on the nature and extent of the particular reform being considered. At the very least, the traditional two-party adversarial criminal justice system is challenged by reforms which require that the views, interests and rights of a third actor be incorporated into that system.<sup>9</sup>
- 4.15 As with protected-witness reforms, the successful introduction of participating-witness reforms requires cultural as well as legislative change. Reforms introduced to date have required prosecutors to engage victims in decision making,<sup>10</sup> judges to consider the rights and interests of victims, and defence lawyers to deal with the presence of victims in court in ways not previously required. Nonetheless, research suggests that legal actors can be creative and flexible in the way they manage increased victim participation and such approaches can be effective in bridging the gap between victims' needs and other institutional goals.<sup>11</sup>

7 See discussion of victims' procedural justice needs in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 2: Who Are Victims and What Are Their Criminal Justice Needs and Experiences?* (May 2015) [10]–[38].

8 For discussion of the shift from improving victim experience to increasing victim participation, see 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* (Willan Publishing, 2011) 1, 1–2; Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-making' (2004) 44 *British Journal of Criminology* 967.

9 Edna Erez et al, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169.

10 Christine Englebrecht, 'The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System' (2011) 36(2) *Criminal Justice Review* 129, 146. See also Edna Erez et al, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169, 171.

11 Edna Erez et al, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169, 184–5.

- 4.16 Research also suggests that the introduction of participatory reforms can create unrealistic expectations in victims as to what that participation will actually achieve, while potentially causing delay and complexity in the criminal process. Caution is therefore required, as unmet expectations and delay have the potential to cause distress and harm to victims.<sup>12</sup>

### Prosecuting witness

- 4.17 Some modes of increasing victim participation in the criminal trial process involve extending to victims some or all of the functions, rights and obligations that are traditionally associated with the role of the prosecutor. Reform proposals in this vein are based on the idea that permitting victims a role comparable to a prosecutor is the best way to empower victims, respect their agency and preclude them being sidelined as mere witnesses in the criminal trial process.<sup>13</sup>
- 4.18 Reforms that require prosecutors to follow victims' instructions or directions about the conduct of the trial make a victim a 'prosecuting witness'. Such reforms change the role of the prosecutor from an impartial representative of the public interest to the victim's lawyer.
- 4.19 Less radical prosecuting-witness reforms, which retain the core functions and status of the state as independent public prosecutor, include:
- making a range of participatory victim rights enforceable by the victim throughout the criminal trial process, with consequences for the conduct of the trial if they are infringed
  - giving victims the autonomy to supplement the state-run prosecution in the role of subsidiary or auxiliary prosecutor.
- 4.20 An auxiliary prosecutorial role is available to victims in a number of inquisitorial justice systems in Europe, although the limitations and characterisation of the role differ.
- 4.21 The distinction between participating-witness and prosecuting-witness reforms may be difficult to discern in some circumstances. In essence, the Commission sees the distinction lying in the extent to which victims are able to independently take on functions traditionally within the sole purview of the public prosecutor, and therefore dictate rather than influence proceedings.
- 4.22 Further, at different stages of the trial process, victims may have different roles, such that the role of victims in the trial process changes between participating witness and prosecuting witness.<sup>14</sup>
- 4.23 If victims were to take on the role of prosecuting witness, the issues relating to the need for attitudinal and behavioural change within institutions and stakeholders discussed in relation to participating-witness reforms would also arise. In addition when looking at transposing victim-centred aspects from foreign legal systems into Victoria's, it is salient to note the following observation of the 2008 Moynihan Review in Queensland:

Simply because a reform has been effective elsewhere, does not mean, however, that it can be transplanted to a different cultural and social context and be assumed to have the same results. Local legal cultures must be considered and local refinements and adjustments will necessarily be required over time.<sup>15</sup>

12 Ibid.

13 Douglas Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' (2005) *Brigham University Law Review* 256; Tyrone Kirchengast, 'Victims Lawyer, Victim Advocates, and the Adversarial Criminal Trial' (2013) 16(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 568.

14 For example, the International Criminal Court's (ICC) victim participation regime arguably places victims in a participatory-witness and prosecuting-witness role. See discussion of ICC in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 3: the International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process* (May 2015).

15 The Hon. Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, 2008) 166.

## Questions

- 1 Should the role of victims in the criminal trial process be that of protected witnesses, participating witnesses or prosecuting witnesses?
- 2 Could victims have different roles at different stages of the trial?
- 3 If changes to attitudes and behaviour are needed to achieve the intent of legislative reform, how might those changes be achieved?

# The role of victims in the decision to prosecute

- 42** Introduction
- 42** The current system in Victoria
- 44** The Director of Public Prosecutions (DPP)
- 45** The role of victims in the decision to continue or discontinue a prosecution
- 48** The role of victims in the plea negotiation process
- 49** Alternative processes and procedures
- 54** Discussion and options for reform

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## 5. The role of victims in the decision to prosecute

### Introduction

- 5.1 This chapter is concerned with the role of victims in the decision to prosecute. A lack of involvement in, and understanding of, a decision of the prosecutor not to proceed with a prosecution or to accept a plea of guilty to lesser charges may be a particular source of concern for victims.<sup>1</sup>
- 5.2 The role of victims in the decision to prosecute is inherently linked to the role and duties of the prosecutor. As such, this chapter considers the role and responsibilities of the Director of Public Prosecutions (DPP), before turning to two key prosecutorial decisions:
- whether to continue or discontinue a prosecution
  - whether to negotiate a plea settlement with the accused rather than continue to trial.
- 5.3 In respect of these key prosecutorial decisions, this chapter examines the current system in Victoria and how the victim is incorporated in other jurisdictions, and considers some options for reform.
- 5.4 Although there are other stages in the criminal trial process at which the prosecutor is required to make important decisions, the victim's role in respect of these decisions is covered in later chapters. The prosecutor's duties and relationship with a victim are central to analysing the role of victims at every stage of the trial process.

### The current system in Victoria

#### Reporting the crime

- 5.5 Generally, victims of crime have a choice about whether to report a crime to police, and following a report, whether to make a statement to police. As stated in [1.11], some victims may have been discouraged or impeded in exercising those choices, including by family members and other community members. Further, the attitudes of those to whom an offence is reported can significantly impact on the decision making of victims.
- 5.6 Victims do not have the power to decide whether an alleged offender is charged by the police with a criminal offence.

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<sup>1</sup> In relation to the plea negotiation process, see Stuart Ross et al, *Fairness and Equity for Victims of Crime: What Do They Want and Why Don't They Get It? Final Report* (ARC Discovery Project DP0665417, December 2009) 144. See also Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No. 19, Australian Institute of Criminology, 1999); Haley Clark, "What is the Justice System Willing to Offer?" *Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs* (Family Matters, No. 85, Australian Institute of Family Studies, 2010) 34.

- 5.7 The decision to charge an accused and then proceed to prosecution has significant ramifications for victims. Where charges are not filed or a prosecution is discontinued, victims may be left without any avenue to have their justice needs fulfilled. On the other hand, if a prosecution proceeds against the wishes of victims, their personal interests are secondary to the public interest in the state prosecuting and punishing criminal activity.

### Filing charges

- 5.8 Although victims have the power to commence and conduct a private prosecution, in practice the decision to charge is made by the police, sometimes after obtaining advice from the Office of Public Prosecutions (OPP).<sup>2</sup> Although victims' views may be considered, the decision to charge a suspect is based on an assessment of the evidence, the law and the public interest.
- 5.9 If the police decide to charge a suspect, the victim's journey through the criminal court process begins. The law governing this process is primarily set out in the *Criminal Procedure Act 2009* (Vic).
- 5.10 There are three ways to commence a criminal prosecution:
- Filing a charge with the Magistrates' Court.<sup>3</sup> While any individual may act as an informant and file a charge, in Victoria charges are almost always filed by police officers or other public officials.<sup>4</sup>
  - Filing a direct indictment in the Supreme or County Court.<sup>5</sup> This may only be done by the DPP or Crown Prosecutor,<sup>6</sup> and most commonly occurs after an accused has been discharged at the end of committal proceedings.
  - A direction by a judge that a person be tried for perjury.<sup>7</sup>
- 5.11 Criminal cases are dealt with in the Magistrates' Court by way of summary procedure or committal proceedings.<sup>8</sup>

### Summary procedure

- 5.12 Summary offences, and indictable offences that are able to be determined summarily, are prosecuted by Victoria Police prosecutors by way of summary procedure.<sup>9</sup> The entire proceedings are conducted in the Magistrates' Court. As noted in Chapter 1, summary proceedings are beyond the Commission's terms of reference.

### Committal proceedings

- 5.13 Serious indictable offences progress through the Magistrates' Court by way of a committal proceeding. At the conclusion of the committal proceeding the magistrate will either:
- discharge the accused for lack of evidence
  - commit the accused to stand trial.<sup>10</sup>

2 The DPP has discretion as to whether to give advice to an external investigatory or prosecutorial body, *Public Prosecutions Act 1994* (Vic) s 22(1)(ce).

3 *Criminal Procedure Act 2009* (Vic) ss 5(a), 6(1)(a). Alternatively, a charge sheet may be filed with a bail justice (s 6(1)(b)), or by signing a charge sheet and issuing a summons (if the informant is a police officer or public officer) (ss 6(1)(c), 14).

4 Ibid s 3. Private prosecutions now very rarely occur. See Chapter 2 of this consultation paper and Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 1: History, Concepts and Theory* (May 2015) for examination of the shift from victims conducting prosecutions to the state undertaking that role.

5 *Criminal Procedure Act 2009* (Vic) s 5(b).

6 Ibid ss 159, 161.

7 Ibid ss 5(c), 415.

8 Ibid ch 3 'Summary Procedure' and ch 4 'Committal Proceeding'.

9 Ibid s 27. Section 28 outlines the offences that must or can be determined summarily.

10 Ibid s 141(4).

- 5.14 If an accused is committed for trial, the case must be transferred to the Supreme Court or County Court. The DPP decides which court the trial should be heard in by filing an indictment (the document containing the charges against the accused) in that court.<sup>11</sup>
- 5.15 When deciding in which court to file the indictment, the DPP must have regard to a number of matters, including the complexity of the case, the seriousness of the alleged offence and any particular importance attaching to the case.<sup>12</sup>
- 5.16 The Criminal Procedure Act does not provide a role for victims in any of these processes (save for potentially as a witness at the committal hearing). Chapter 6 considers committal proceedings and the role of victims in more detail. The role of victims in the trial is covered by Chapter 8.

## The Director of Public Prosecutions (DPP)

- 5.17 The Victorian DPP is responsible, on behalf of the state, for the prosecution of indictable offences, including the committal hearing, trial, plea negotiation, sentencing hearing and any subsequent appeal.<sup>13</sup>
- 5.18 The DPP is supported by the Office of Public Prosecutions (OPP). Lawyers working for the OPP represent the DPP and take over the prosecution of indictable offences from the police at the first hearing in the Magistrates' Court after the charge is filed (called a filing hearing). The DPP may take over the prosecution of any summary or indictable offence, including where a private individual has filed a charge in the Magistrates' Court.<sup>14</sup>
- 5.19 Lawyers at the OPP prepare cases for committal, trial or sentencing hearing. OPP lawyers brief either Crown Prosecutors or private barristers to conduct the prosecution in court on behalf of the DPP. Crown Prosecutors are barristers whose functions are set down in the *Public Prosecutions Act 1994* (Vic). They are briefed by OPP solicitors in the most serious and complex cases. They have delegated authority from the DPP to make decisions about whether to accept a plea of guilty as part of plea negotiations.<sup>15</sup> The Chief Crown Prosecutor and Senior Crown Prosecutors are also delegated the power to discontinue a prosecution.<sup>16</sup>

## Prosecutorial duties

- 5.20 The DPP must maintain independence from all other participants in the criminal justice system and is obliged to act in the public interest.<sup>17</sup> These obligations flow to Crown Prosecutors, solicitors and private barristers briefed by the DPP. It is often said that a prosecutor's role is that of a 'minister of justice'.<sup>18</sup>
- 5.21 The DPP has emphasised that:
- Prosecutors represent the DPP, not the government, the police, the victim, or any other person. The DPP represents the Crown and acts in the public interest.<sup>19</sup>
- 5.22 As noted in Chapter 2, that the prosecutor is not the victim's lawyer is often cited as a cause of victims' dissatisfaction with the criminal justice system.<sup>20</sup>

11 Ibid ss 159, 160. The Supreme Court can override the DPP and order the transfer of a trial to the court it deems appropriate (s 167).

12 Ibid s 160(2).

13 *Public Prosecutions Act 1994* (Vic) s 22 lists the functions of the Victorian DPP. The DPP is appointed by the Governor-in-Council under s 87AB of the *Constitution Act 1975* (Vic). Commonwealth crimes are prosecuted by the Commonwealth Director of Public Prosecutions.

14 *Public Prosecutions Act 1994* (Vic) s 22(1)(b)(ii).

15 Ibid s 30; Director of Public Prosecutions Victoria, *Director's Policy: Resolution* (24 November 2014) [11]. Note that in cases involving death, the acceptance of a plea of guilty to lesser charges 'requires approval of the DPP, or in his absence, the Chief Crown Prosecutor': at [12]. Except where the decision to discontinue constitutes a 'special decision', in which case the procedures set down in Division 2 of Part 8 of the *Public Prosecutions Act 1994* (Vic) must be followed: *Public Prosecutions Act 1994* (Vic) s 30(2).

17 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Ethics* (24 November 2014) [3]. For commentary, see Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 173–8.

18 Director of Public Prosecutions Victoria, *Director's Policy: The Crown's Role on Plea and Sentence Hearings* (13 April 2015) [5].

19 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Ethics* (24 November 2014) [3].

20 For a more detailed discussion, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* (May 2015) [16]–[18].

- 5.23 Although the DPP does not represent victims, the DPP does have a statutory obligation to 'ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime'.<sup>21</sup>
- 5.24 OPP staff and lawyers have a number of professional obligations to victims, which include:
- ensuring that victims are treated with dignity and respect
  - consulting with victims about certain decisions
  - referring victims to support services
  - informing victims about court processes and the status of their case
  - informing victims about the right to provide a victim impact statement
  - informing victims about possible entitlements to compensation, restitution and financial assistance.<sup>22</sup>
- 5.25 No Australian jurisdiction, including Victoria, gives victims the right to commence legal proceedings against a prosecutor for failing to fulfil his or her obligations.<sup>23</sup>
- 5.26 The DPP and all prosecutors are also obliged by legislation to have regard to 'considerations of justice and fairness', and 'the need to conduct prosecutions in an effective, economic and efficient manner'.<sup>24</sup> Prosecutors are officers of the court and must act fairly in the way they conduct the trial.<sup>25</sup> This includes complying with ongoing disclosure obligations.<sup>26</sup>

## The role of victims in the decision to continue or discontinue a prosecution

- 5.27 Whether or not to continue with an indictable prosecution once proceedings have been commenced is a decision that rests with the DPP. It is a decision that is subject to constant re-evaluation throughout the criminal trial process.
- 5.28 In some circumstances, the DPP will decide not to continue a prosecution after the committal hearing. In 2013–14 there were 198 cases where an accused was committed for trial in the County Court of Victoria but the prosecution was discontinued before the trial commenced.<sup>27</sup> In addition, where a jury has been unable to reach a verdict, or an accused has successfully appealed a conviction, the DPP has to decide whether to continue the prosecution in front of a new jury.<sup>28</sup>
- 5.29 The DPP has two criteria that must be met before deciding to continue a prosecution:
- there is a reasonable prospect of a conviction
  - the prosecution is in the public interest.<sup>29</sup>

21 *Public Prosecutions Act 1994* (Vic) s 24(c). This obligation extends to Crown Prosecutors (s 36(3)) and staff of the OPP (ss 41(2), 43(3)).

22 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014); *Victims' Charter Act 2006* (Vic).

23 For Victoria, see *Victims' Charter Act 2006* (Vic) s 22. See generally Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 265. See Chapter 12 of this consultation paper for detailed consideration of victims' rights instruments and methods of enforcement.

24 *Public Prosecutions Act 1994* (Vic) s 24(a)–(b).

25 *Richardson v The Queen* (1974) 131 CLR 116; Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Ethics* (24 November 2014) [6].

26 *Criminal Procedure Act 2009* (Vic) ss 110, 111, 185, 416; Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Ethics* (24 November 2014) [6]; Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 129–35.

27 County Court of Victoria, *Annual Report 2013–2014* (2015) 4.

28 For a list of 18 examples of circumstances in which the decision as to whether or not to prosecute arises, see Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 182.

29 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014) [2], [9]. Ending a prosecution by filing a notice of discontinuance does not have the same effect as an acquittal. A discontinuance means that the charges against the accused may be revived at a later time: see *Criminal Procedure Act 2009* (Vic) s 177(6)–(7).

## Reasonable prospect of conviction

5.30 In assessing whether there is a reasonable prospect of conviction, prosecutors must have regard to a range of matters, including:

- the availability, competence and compellability of witnesses
- the credibility and reliability of witnesses
- how witnesses are likely to stand up to giving evidence in court
- whether there is any reason to suspect that a witness has concocted a false story
- whether there is other admissible and reliable evidence, such as medical evidence
- possible arguments that the defence may advance.<sup>30</sup>

## Public interest

5.31 Whether the prosecution is in the public interest is the dominant consideration in the decision to continue or discontinue a prosecution.<sup>31</sup> The DPP's prosecutorial discretion policy lists a range of public interest factors to be taken into account, including:

- the seriousness of the offence, including whether it can only be tried on indictment
- the personal circumstances of the victim and offender, including any particular vulnerability of the victim
- the prevalence of the offence and the need for deterrence
- the availability of alternatives to prosecution
- whether the alleged offence is of particular public concern
- any entitlement of the victim to compensation, reparation or forfeiture if prosecution action is taken
- the attitude of the victim to a prosecution.<sup>32</sup>

5.32 A prosecution may be discontinued by the Director at any time during proceedings, except during a trial.<sup>33</sup> The *Victims' Charter Act 2006* (Vic) requires the prosecution to inform a victim as soon as reasonably practicable of a decision to discontinue.<sup>34</sup> However, the DPP's prosecutorial discretion policy goes further and requires that:

The views of the informant and victims should be sought and recorded before a discontinuance is filed. Their views should be taken into account but are not determinative. The informant and victims should be informed of the decision to enter a discontinuance before it is publicly announced.<sup>35</sup>

## Internal review of the decision to discontinue a prosecution

5.33 Prosecutors must seek authorisation from the DPP to discontinue a prosecution.<sup>36</sup>

5.34 The *OPP Complaints Policy* permits complaints from victims dissatisfied with a decision not to proceed with a prosecution. However, there is no publicly accessible DPP or OPP policy that sets out a process for internal review or the handling of a complaint seeking reconsideration of a decision to discontinue a prosecution.<sup>37</sup>

30 See Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014) [3] for full list of reasonable prospect of conviction factors.

31 Ibid [4].

32 Ibid [5] for full list of public interest factors.

33 *Criminal Procedure Act 2009* (Vic) s 177(2). See [5.18] of this consultation paper for circumstances in which the Director may delegate this decision to the Chief Crown Prosecutor or Senior Crown Prosecutors.

34 *Victims' Charter Act 2006* (Vic) s 9(c)(ii). This does not create a legal right or cause of action for breach in accordance (s 22).

35 Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014) [12].

36 Ibid [10]: 'A decision to enter a discontinuance may be made only by the Director'.

37 Office of Public Prosecutions, *OPP Complaints Policy* (April 2015) 1.

- 5.35 The Director may provide a victim with reasons for a decision to discontinue if requested in accordance with the policy *The Giving of Reasons for Discretionary Decisions*.<sup>38</sup>
- 5.36 The DPP may give advice to another agency about whether a prosecution should go ahead. For example, if a person believes that an offence under the *Occupational Health and Safety Act 2004* (Vic) has been committed, they may request that the Victorian Workcover Authority bring a prosecution. If the Authority decides not to prosecute, the person may ask for the matter to be referred to the DPP for advice about whether there should be a prosecution. That advice must be provided to the person, as well as reasons why the Authority has not followed the DPP's advice (if that is the situation).<sup>39</sup>

### Judicial review of the decision to discontinue a prosecution

- 5.37 Most DPP discretionary decisions are immune from review by the courts.<sup>40</sup> In *Maxwell v The Queen*<sup>41</sup> Justices Gaudron and Gummow confirmed that certain decisions of the DPP are not able to be challenged through the courts, including decisions to proceed or not proceed with a prosecution. They stated:

The integrity of the judicial process—particularly, its independence and impartiality and the public perception thereof—would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.<sup>42</sup>

- 5.38 After citing this passage with approval, the joint judgment of Justices Gummow, Hayne, Crennan, Kiefel and Bell in *Likiardopoulos v The Queen*<sup>43</sup> confirms that:

sanctions available to enforce well established standards of prosecutorial fairness are to be found mainly in the powers of a trial judge and are not directly enforceable at the suit of the accused or anyone else by prerogative writ, judicial order or an action for damages.<sup>44</sup>

- 5.39 In *Maxwell v The Queen*, Justices Gaudron and Gummow noted that the line of authority on which they were relying was based on the view that the discretion of the DPP was part of the prerogative of the Crown, and 'may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all States and Territories and in the Commonwealth. Similarly, it may pay insufficient regard to the fact that some discretions are conferred by statute'.<sup>45</sup> This point was picked up by Chief Justice French in *Likiardopoulos v The Queen*, who raised the possibility that a prosecutor's exercise of statutory power may be open to judicial review.<sup>46</sup>

38 Director of Public Prosecutions Victoria, *Director's Policy: The Giving of Reasons for Discretionary Decisions* (17 April 2015). The Director may provide reasons for a discretionary decision in appropriate circumstances, on the request of an interested party, including the victim, subject to any statutory restrictions, and consistent with the Director's overriding obligation to act fairly and in the best interests of all parties.

39 *Occupational Health and Safety Act 2004* (Vic) s 131.

40 This relates to the independence of the DPP and separation of powers doctrine: see Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters, 2014) 178. The *Administrative Decision (Judicial Review) Act 1977* (Cth) (ADJR Act) sch 1, para (xa) declares decisions to prosecute persons for an offence against a law of the Commonwealth, a State or a Territory are not reviewable. Courts are denied jurisdiction to hear an application under the ADJR Act in respect of a 'related criminal justice process decision', including a decision 'in connection with the investigation, committal for trial or prosecution of the defendant' (ss 9A(1), (4)).

41 (1996) 184 CLR 501; [1996] HCA 46.

42 *Ibid* [26] (Gaudron and Gummow JJ) (citations omitted). See also joint judgement of Dawson and McHugh JJ, in which they note that while a Court has an inherent power to prevent abuses of its processes, it should rarely, if ever, need to do so on the basis of the exercise of prosecutorial discretion.

43 [2012] HCA 37.

44 *Ibid* [37].

45 *Maxwell v The Queen* [1996] HCA 46, [25] (Gaudron and Gummow JJ).

46 *Likiardopoulos v The Queen* [2012] HCA 37, [4].

## The role of victims in the plea negotiation process

- 5.40 In Victoria, as in other common law adversarial jurisdictions, the plea negotiation process between the prosecution and the accused can occur in a range of circumstances and for a range of reasons.
- 5.41 Indictments often contain multiple charges of varying degrees of seriousness, sometimes expressed as alternative charges.<sup>47</sup> Commonly, the accused will negotiate with the prosecution, offering to plead guilty to an offence with a lower penalty if the more serious offence is discontinued, or to plead guilty to the more serious charge if an agreement can be reached about the facts on which the plea is based.
- 5.42 There may be an evidentiary problem that will make it difficult for the prosecution to prove a necessary element of an offence, a legal issue that undermines the strength of the prosecution case, an issue with the availability, reliability or credibility of crucial prosecution witnesses, or some matter in the public interest that makes resolution of the matter following negotiations an appropriate course to take (rather than proceeding to trial).
- 5.43 The *Victims' Charter Act 2006* (Vic) requires prosecutors to inform victims about a decision to:
- accept a plea of guilty to a lesser offence
  - substantially alter charges
  - not proceed with some or all charges.<sup>48</sup>
- 5.44 However, these obligations are not enforceable, and only require the victim be informed of the decision after it has been made. There is no statutory requirement for the victim to be involved in the process leading to the plea agreement.
- 5.45 The DPP's policy on resolution states that when considering a plea of guilty, a prosecutor must have regard to the views of victims, among other matters.<sup>49</sup> In addition, a prosecutor 'should consult the victims and the informant prior to the resolution of a prosecution by a plea of guilty to lesser charges'.<sup>50</sup> The views of the victim are to be taken into account but are not determinative.<sup>51</sup> Victims must be informed if a prosecution resolves in a plea of guilty, 'regardless of whether the plea of guilty is to lesser charges'.<sup>52</sup>
- 5.46 Victims cannot enforce obligations set out in prosecution guidelines. While victims can complain about a lack of consultation in accordance with the *OPP Complaints Policy*, there are no implications for the subsequent sentencing proceedings if there has been a lack of consultation with a victim prior to the agreement to accept a plea settlement.<sup>53</sup>

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47 Examples of alternative charges include: murder or manslaughter; rape or indecent assault; robbery or theft.  
48 *Victims' Charter Act 2006* (Vic) s 9(c).  
49 Director of Public Prosecutions Victoria, *Director's Policy: Resolution* (24 November 2014) [5].  
50 *Ibid* [7].  
51 *Ibid* [8].  
52 *Ibid* [9].  
53 See Chapter 12 of this consultation paper for discussion about the potential enforcement of victims' rights.

## Alternative processes and procedures

### Victims' involvement in the decision to continue or discontinue a prosecution

5.47 The role of the prosecutor in other Australian jurisdictions, including obligations and responsibilities to victims, resembles that of Victoria. The purpose of this section is to outline alternative procedures in other jurisdictions that enhance the victims' role in prosecutorial decision making.

#### United States

- 5.48 The *Crime Victims' Rights Act* (CVRA) of 2004<sup>54</sup> applies to all federal matters in the United States.
- 5.49 The CVRA provides for a 'reasonable right to confer with the attorney for the Government in the case'.<sup>55</sup> Although prosecutors must confer, they retain control over the ultimate decision.<sup>56</sup>
- 5.50 Victims are able to assert this right with or without a lawyer in a district court.<sup>57</sup> However they are not granted independent legal standing in the criminal proceedings.
- 5.51 In *United States of America v Heaton*,<sup>58</sup> the District Court of Utah refused to consider an application by a prosecutor for a charge against an accused to be dropped until the prosecutor was in a position to 'recount that the victim has been consulted ... and what the victim's views were on the matter'.<sup>59</sup> The judges relied on the right of victims under the CVRA to be treated with fairness and respect for dignity, which it considered could only be satisfied if the judges ensured that it had heard the victim's views on the dismissal application.<sup>60</sup> The right of victims to confer with the prosecutor was viewed as a 'convenient mechanism' for the judges to be informed of the victim's views.<sup>61</sup>

#### Civil law inquisitorial trial systems

- 5.52 Although there is not a wealth of information available in English regarding prosecutorial decision making in inquisitorial criminal justice systems,<sup>62</sup> the available material has allowed for a review of the law and practice in France, Germany, the Netherlands and Sweden.<sup>63</sup>
- 5.53 It is important to recall that civil law jurisdictions and common law jurisdictions have a fundamentally different approach to criminal prosecutions, both in principle and practice. Centrally, the inquisitorial system merges prosecution with investigation, rendering a direct comparison of inquisitorial and adversarial procedures difficult. There is also variation in principle and practice between different civil law inquisitorial jurisdictions, which can be seen in the differing implementation of the two key principles underlying the decision to prosecute in civil law systems: the principle of legality<sup>64</sup> and the principle of expediency.<sup>65</sup>

54 *Crime Victims' Rights Act*, 18 U.S.C. § 3771, as enacted in Title 1 of the *Justice for All Act* of 2004.

55 *Ibid* § 3771(a)(5).

56 *In re Dean*, 527 F.3d 391 (5th Cir. 2008) 395.

57 *Crime Victims' Rights Act*, 18 U.S.C. § 3771(d)(1), (3).

58 *United States of America v Heaton* 458 F Supp 2d 1271 (2006).

59 *Ibid* 1273.

60 *Ibid* 1272.

61 *Ibid* 1273.

62 Michael Tony, 'Prosecutors and Politics in Comparative Perspective' (2012) 41(1) *Crime and Justice*, 1, 26.

63 These countries were selected because they represent different examples of the practices of inquisitorial systems and there is sufficient information available in English.

64 Yue Ma, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective' (2002) 12 *International Criminal Justice Review* 22, 30.

65 Also known as the 'principle of opportunity': Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 147–8.

- 5.54 France and the Netherlands<sup>66</sup> both follow the principle of expediency, under which prosecutors are permitted to exercise discretion over whether to commence a prosecution, based on a variety of public interest factors.<sup>67</sup> The public interest may include victims' interests, although this is a matter for guidelines in each jurisdiction.<sup>68</sup>
- 5.55 In contrast, Sweden and Germany operate under the principle of legality, where prosecution is mandatory if there is sufficient evidence.<sup>69</sup> Nonetheless, the prosecutor is given a limited discretion not to prosecute on certain public interest grounds, generally related to the minor nature of the offence.<sup>70</sup>

## Review of a decision to discontinue a prosecution

### United Kingdom

#### Judicial review

- 5.56 In England and Wales victims can apply to the courts for judicial review of a decision by the Crown Prosecution Service (CPS) to prosecute or not to prosecute.<sup>71</sup> The availability of judicial review for a decision not to proceed with a prosecution recognises that this decision 'is in reality a final decision for a victim'.<sup>72</sup>
- 5.57 Victims have been successful where they have been able to show that the law has not been properly applied, that evidence has not been properly considered, that CPS policy has not been applied, and that a previous court or coronial decision has not been carefully considered.<sup>73</sup>
- 5.58 In relation to the court's willingness to interfere with prosecutorial discretion, the Supreme Court has stated that:

the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else ... In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences ... So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere.<sup>74</sup>

66 Yue Ma, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective' (2002) 12 *International Criminal Justice Review* 22, 31; G Gillieron, *Public Prosecutions in the United States and Europe* (Springer, 2014) 296.

67 Marianne Wade, 'The Power to Decide—Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today' in Marianne Wade and Jörg-Martin Jehle (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, 2006) 27, 32.

68 Marc Groenhuijsen and Rianne Letschert, 'Legal Reform on Behalf of Victims of Crime: the Primacy of the Dutch Legislature in a Changing International Environment' (Tilburg Law School Legal Studies Research Paper Series No. 02/2011) 4, noting that prosecution guidelines were under consideration, which would require the prosecutor take into account victims' interests when deciding whether or not to prosecute.

69 Beatrix Elsner and Julie Peters, 'The Prosecution Service Function within the German Criminal Justice System' in Marianne Wade and Jörg-Martin Jehle (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, 2006) 207, 207. Peter Asp, 'The Prosecutor in Swedish Law' (2012) 41(1) *Crime and Justice* 141, 148.

70 Josef Zila, 'The Prosecution Service Function within the Swedish Criminal Justice System' in Marianne Wade and Jörg-Martin Jehle (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, 2006) 285, 294.

71 *R v DPP ex parte C* [1995] 1 Cr App R 136.

72 *R v Christopher Killick* [2011] EWCA Crim 1608, [48].

73 For a helpful summary of cases relating to the applicability of judicial review to CPS decisions, see Crown Prosecution Service, *Appeals: Judicial Review of Prosecutorial Decisions* <[http://www.cps.gov.uk/legal/a\\_to\\_c/appeals\\_judicial\\_review\\_of\\_prosecution\\_decisions/](http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/)>.

74 *R v Director of Public Prosecutions ex parte Manning* [2000] EWHC Admin 342 [23] (Lord Bingham of Cornhill CJ).

- 5.59 If a decision of the CPS is quashed as a result of an application for judicial review, this does not then require the CPS to prosecute. Rather the CPS is required to reconsider its decision and ensure it addresses any errors of law identified by the court in the original decision.<sup>75</sup> The final decision as to whether to prosecute is still a matter for the CPS.

### Internal review

- 5.60 Following criticism of the internal processes of the CPS for review of a decision not to prosecute in *R v Christopher Killick*,<sup>76</sup> and the coming into force of the binding European Union *Directive 2012/29/EU*,<sup>77</sup> the CPS enacted the *Victims' Right to Review Scheme* in June 2013.<sup>78</sup> The purpose of the scheme is to provide victims with a structured internal review process for any qualifying decision by the CPS. Qualifying decisions are restricted to CPS decisions not to lay charges and decisions that will in effect end a prosecution.<sup>79</sup>
- 5.61 The scheme is intended to provide a review process that does not require victims to commence judicial review proceedings in court. Victims can still apply to a judge for review if they are dissatisfied with the CPS decision after an internal review.
- 5.62 The scheme does not apply to all CPS decisions. Relevantly, the decisions that are excluded include:
- to proceed with some (but not all) charges or to proceed with charges against some (but not all) alleged offenders
  - to terminate a charge or charges (but not all) or to terminate proceedings against one accused (but not all)
  - to substantially alter a charge or charges
  - to discontinue where a victim requests proceedings be stopped, or withdraws support.<sup>80</sup>
- 5.63 The scheme sets out a clear procedure and timeframes for the CPS to follow when a victim seeks internal review of a qualifying decision.
- 5.64 The scheme excludes decisions made by police not to proceed. However, it appears that a similar 'right to review' scheme has been enacted at police level.<sup>81</sup>

### Civil law inquisitorial systems

- 5.65 In Sweden, France and Germany, victims can seek review of a decision not to prosecute from a more senior prosecutor, who can order that the prosecution go ahead.<sup>82</sup> In Germany, a second stage of review is available in cases where the original prosecutor determined there was insufficient evidence to prosecute and the reviewing prosecutor agrees with this assessment. When this occurs, the victim can request that a judge review that decision.<sup>83</sup> If the judge finds there is enough evidence, the judge can order that the prosecution be initiated.<sup>84</sup>

75 *R v Director of Public Prosecutions ex parte Manning* [2000] EWHC Admin 342, [42].

76 [2011] EWCA Crim 1608.

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

78 Crown Prosecution Service, *Victims' Right to Review Guidance: Issued by the Director of Public Prosecutions* (July 2014) [4]–[6]. For further detail about the history of the CPS Victims' Right to Review Scheme, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 4: Victims' Rights and Human Rights: the International and Domestic Landscape* (2015).

79 Crown Prosecution Service, *Victims' Right to Review Guidance: Issued by the Director of Public Prosecutions* (July 2014) [9].

80 *Ibid* [11].

81 A 'victims' right to review scheme' at police level was implemented as of 1 April 2015 'for all National Recording Standard Offences'. *City of London Police, Victims' Right to Review Scheme* <<https://www.cityoflondon.police.uk/contact-city-police/victim-and-witness-support/Pages/victims-right-to-review-scheme.aspx>>.

82 G Gillieron, *Public Prosecutions in the United States and Europe* (Springer, 2014) 275–76 (Germany); 297 (France); Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 891 (Sweden).

83 Beatrix Elsner and Julie Peters, 'The Prosecution Service Function within the German Criminal Justice System' in Marianne Wade and Jörg-Martin Jehle (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, 2006) 207, 229.

84 New Zealand Law Commission, *Alternative Pre-trial and Trial Processes: Possible Reforms* (New Zealand Law Commission, 2012) 68, noting that in Germany, it is uncommon for victims to seek such a review.

- 5.66 Victims in France can also influence the decision as to which charges are pursued by the prosecutors. If a victim seeks a more severe penalty than the crime the accused is charged with permits, the victim may file a complaint with the examining magistrate, who may order that the matter be prosecuted in a higher jurisdiction with the power to impose greater penalties.<sup>85</sup>
- 5.67 Victims in the Netherlands can appeal decisions not to prosecute to a court. The court can overturn the prosecutor's decision to drop the case and order that a prosecution be initiated.<sup>86</sup>

## The plea negotiation process

### New South Wales

#### Court certification

- 5.68 In New South Wales, for matters that resolve following negotiations about the charges on an indictment or the facts of an offence(s), prosecutors are expected to file a certificate with the court confirming consultation with the victim.<sup>87</sup>
- 5.69 If this certificate is not filed, the charge negotiations, or any agreed statement of fact, cannot be taken into account by the court.
- 5.70 The certification scheme is designed to provide a procedural safeguard to complement existing obligations to consult with victims in the Office of the Director of Public Prosecutions' (ODPP) Prosecution Guidelines, and thereby promote greater accountability and transparency in the plea negotiation process.<sup>88</sup>
- 5.71 The certificate filed with the court must be signed by the Director of Public Prosecutions (or an authorised person) and must verify:
- that consultation has taken place between the victim, the police officer in charge of the investigation and the prosecutor; or
  - if consultation has not taken place, the reasons for that; and
  - that the statement of agreed facts arising from the charge negotiation process constitutes a fair and accurate account of the objective criminality of the offender.<sup>89</sup>
- 5.72 The New South Wales ODPP *Prosecution Guidelines* require prosecutors to seek the victim's views 'at the outset of formal discussions', or at least before any formal proposition is put to the accused's lawyers.<sup>90</sup>
- 5.73 The views of the victim (and police informant) must be recorded in writing. If a victim disagrees with the proposed charges, and the matter is in a higher court, the prosecutor should consult a more senior officer within the ODPP. While the victim's views are to be taken into account, the ODPP Prosecution Guidelines make it clear that the victim's views 'are not alone determinative' and that 'it is the general public, not any private individual or sectional, interest that must be served.'<sup>91</sup>

85 Yue Ma, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective' (2002) 12 *International Criminal Justice Review* 22, 34.

86 Henk van de Bunt and Jean-Louis van Gelder, 'The Dutch Prosecution Service' (2012) 41(1) *Crime and Justice* 117, 118. See also Martine Blom and Paul Smit, 'The Prosecution Service Function within the Dutch Criminal Justice System Today' in Marianne Wade and Jörg-Martin Jehle (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, 2006) 237, 251, noting that such appeals rarely occur.

87 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A.

88 The Hon. Michael Veitch, *Crimes (Sentencing Procedure) Amendment Bill 2010*, Second Reading (23 November 2010) 3; New South Wales Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.90]–[8.93].

89 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A(2).

90 Office of the Director of Public Prosecutions for New South Wales, *Prosecution Guidelines*, 37 <<http://www.odpp.nsw.gov.au/prosecution-guidelines>>.

91 *Ibid* 38.

## United States

### Enforceable right to conferral

- 5.74 In the United States, the *Crime Victims' Rights Act* (CVRA) provides victims with a 'reasonable right to confer with the attorney for the Government' in all federal cases.<sup>92</sup> It also gives victims a right to be 'reasonably heard' during any District Court public proceeding concerning a plea.<sup>93</sup>
- 5.75 If a victim feels that he or she has not been conferred with or reasonably heard, relief may be sought from a District Court. If relief is denied by the District Court, the victim may seek a review by the Court of Appeals.<sup>94</sup> While victims are not given standing in the criminal proceedings, they are given an alternative avenue for judicial enforcement of their rights, which has the capacity to provide a stronger safeguard than the certification scheme in New South Wales.
- 5.76 The CVRA contemplates relief including having a 'plea or sentence' re-opened, but only if all of the following circumstances exist:
- The victim asserted the right to be heard before or during the plea hearing, but relief was denied by the District Court.
  - The application for review of the District Court's decision was made to the Court of Appeals within 10 days.
  - The accused 'has not pled guilty to the highest offense charged'.<sup>95</sup>
- 5.77 In matters where there are multiple victims, which make it impractical for all victims to be consulted in relation to a plea negotiation, the court can 'fashion a reasonable procedure' to give effect to CVRA rights, which 'does not unduly complicate or prolong the proceedings'.<sup>96</sup>
- 5.78 The Fifth Circuit of the Court of Appeals has stated that the obligation to confer with victims is one that applies before prosecutors enter into the plea negotiation process, not just once a plea settlement has been reached. While prosecutors must confer, they retain control over the ultimate decision.<sup>97</sup> This means that they do not have to make a decision that is consistent with the views of the victim if they consider the public interest requires a different course of action.

### Civil law inquisitorial systems

- 5.79 Negotiated plea settlements have been described as inconsistent with the inquisitorial trial procedures of civil law jurisdictions.<sup>98</sup> This is because the inquisitorial criminal trial process is directed at searching for the truth—a process that cannot be negotiated or arrived at by consensus.<sup>99</sup>
- 5.80 As a result, the use of prosecutorial discretion to dispose of matters by way of negotiated settlements in inquisitorial jurisdictions is limited.<sup>100</sup> Nonetheless, in Europe the practice is growing, although it is commonly limited to less serious crimes.<sup>101</sup>

92 *Crime Victims' Rights Act* 18 U.S.C. § 3771(a)(5) (2004).

93 *Ibid* § 3771(a)(4).

94 *Ibid* § 3771(d)(3). The petition to the Court of Appeals is for a writ of mandamus. See Chapter 12 of this consultation paper for further discussion of the enforcement mechanisms in the CVRA.

95 *Ibid* § 3771(d)(5). The ability to apply for a plea or sentence to be re-opened does not appear to apply if only the right to confer with the prosecutor is infringed.

96 *Ibid* § 3771(d)(2).

97 *In re Dean*, 527 F.3d 391 (5th Cir. 2008) 395. For commentary, see Elliot Smith, 'Comment: Is There a Pre-Charge Conferral Right in the CVRA?' (2010) *University of Chicago Legal Forum* 407.

98 Máximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization thesis in Criminal Procedure' (2004) 45(1) *Harvard International Law Journal* 1, 36.

99 *Ibid* 37. See further discussion at Chapter 2 of this paper.

100 Jackie Hodgson, 'Plea Bargaining: Some Comparative Observations' (University of Warwick School of Law Legal Studies Research Paper No 2013/29, 2013) 2.

101 See generally Marianne Wade et al, 'Well-informed? Well-represented? Well Nigh Powerless? Victims and Prosecutorial Decision-making' (2008) 14 *European Journal of Criminal Policy and Research* 249; Jackie Hodgson, 'Plea Bargaining: Some Comparative Observations' (University of Warwick School of Law Legal Studies Research Paper No 2013/29, 2013).

- 5.81 The literature which does exist suggests that it is a prosecutorial process in which victims rarely play a role.<sup>102</sup> For example, in Poland, Germany and Sweden, a prosecutor does not need the agreement of a victim to proceed by way of a negotiated settlement.<sup>103</sup>

## Discussion and options for reform

- 5.82 The Commission encourages consideration of whether some or all of the procedures and approaches in place in the other jurisdictions considered above might be adopted in Victoria. In doing so, it is instructive to note that based on the Commission's research, the reforms in New South Wales, the United Kingdom and the United States discussed above appear not to have fundamentally altered the nature of the relationship between the prosecutor and the victim.

### Participating-witness reforms—enhancing consultation with victims

- 5.83 Reforms to the role of the victim in the context of prosecutorial decision making are often focused on how the wishes of victims can be given greater weight and how consultation between the victim and the prosecutor can be improved. Such reforms can generally be characterised as participating-witness reforms.

### Giving greater weight to victims' wishes

- 5.84 Reform proposals might involve giving the wishes of victims more influence when the OPP is considering whether or not to proceed with a prosecution, or to accept a plea following negotiations. Commentators have expressed concern about such proposals on the basis that some victims may seek to pursue a prosecution for reasons unrelated to the likelihood of obtaining a conviction, such as for therapeutic reasons.<sup>104</sup> Evidence about whether participating in a criminal trial has therapeutic benefits for victims is inconclusive.<sup>105</sup> Some evidence suggests that involvement in the criminal trial, particularly the experience of giving evidence and being cross-examined, causes victims distress and can lead to secondary victimisation. Therefore, if an acquittal is a likely prospect, it may not be in the victims' best interests to proceed, despite their preference to do so.
- 5.85 Moreover, if the wishes of victims are given considerable weight, costs may be incurred running trials that are unlikely to result in a conviction. Another consequence is that accused persons, who might have entered a plea to less serious charges or to a negotiated set of facts, may instead be acquitted of more serious charges.
- 5.86 In some cases, victims may seek to have a prosecution discontinued. This could be for a number of reasons, such as fear, wanting to move on, forgiving the offender, or because they would prefer an outcome not available through the criminal justice system. In such circumstances, consideration must be given to whether the views of victims should be given weight in the decision to discontinue a prosecution.
- 5.87 The European Court of Human Rights has considered this issue in the context of family violence. It concluded that continuing a prosecution in circumstances where the victim wants to withdraw may be justified because of the risk family violence poses to the victim's health and rights and the need to prevent further crime.<sup>106</sup> Of course, this gives rise to questions about whether such an approach appropriately protects or potentially disempowers victims.

102 Erika Luna, 'Prosecutor King' (2014) 1 *Stanford Journal of Criminal Law and Policy* 48, 68.

103 See, eg, Regina Rauxloh, *Plea Bargaining in National and International Law* (Routledge, 2012) 92: 'In informal negotiations, on the other hand, victims rarely have any say. Even as joint prosecutor, the victim is usually excluded from the settlements.'

104 The Hon. Geoffrey Flatman and Mirko Bagaric, 'The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 6(2) *Deakin Law Review* 238, 251.

105 Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and Their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221, 222; Jim Parsons and Tiffany Bergin, 'The Impact of Criminal Justice Involvement on Victims' Mental Health' (2010) 23(2) *Journal of Traumatic Stress* 182, 183.

106 *Opuz v Turkey* (ECHR, Third Section, Application No. 33401/02, 9 June 2009) [144]–[145].

## Enhancing consultation with victims

- 5.88 In the context of discontinuing a prosecution or entering into a plea negotiation, one option for ensuring that consultation with victims by prosecutors is meaningful and effective is to allow victims to obtain independent legal advice, or representation if appropriate.
- 5.89 While legal advice should only be given by a qualified lawyer, if representation is limited to asserting victims' views and interests to prosecutors, it could be provided by a non-legal victim advocate. The training and accreditation required of an advocate would need to be carefully considered so as to ensure the victim's interests are properly represented.
- 5.90 The Commissioner for Victims' Rights in South Australia has provided funding to victims for legal representation while they are involved in consultations with the South Australian Office of the Director of Public Prosecutions.<sup>107</sup> While it is not the function of the Commissioner to provide legal advice about plea negotiations, the Commissioner is empowered to 'assist victims in their dealings' with prosecutors,<sup>108</sup> which leaves open the possibility of funding the provision of legal representation or advice on issues related to plea negotiation.
- 5.91 In 1999, the Law Reform Commission of Western Australia considered how to strengthen and formalise prosecutorial obligations to consult with victims as part of the plea negotiation process.<sup>109</sup>
- 5.92 It recommended victims be:
- afforded the right to be consulted prior to any negotiations
  - entitled to submit a statement for consideration in the plea negotiation process
  - afforded the right to be informed of the outcome of any negotiation, and related reasons (irrespective of whether they took part in any consultation or provided a statement).<sup>110</sup>
- 5.93 The Law Reform Commission of Western Australia also recommended that consultation be mandatory. To achieve this, it proposed that prosecutors be subject to a legislative obligation that would preclude a plea agreement being reached without the prosecution having first taken all reasonable steps to consult the victim.<sup>111</sup> How this would work in practice was not expanded upon, although the court certification scheme that exists in New South Wales is an example of a statutory mechanism that aims to ensure prosecutors consult victims properly as part of the plea negotiation process. A similar scheme could be introduced for prosecutorial decisions to discontinue a prosecution.

## Victims as prosecuting witnesses

- 5.94 In the introduction to Part Two, the possibility of allowing victims to participate as prosecuting witnesses in the criminal trial is raised.
- 5.95 Reform proposals that give victims the power to proceed with a prosecution when the DPP decides to discontinue would need to consider the responsibilities such a role would entail. These include deciding the charges with which to proceed, what evidence to rely on and how to finance a private prosecution. Even the role of auxiliary prosecutor in inquisitorial criminal trials in civil law systems is subject, or subsidiary, to the key role of the prosecutor or investigating judicial officer.<sup>112</sup>

107 Michael O'Connell, *Victims' Rights: Integrating Victims in Criminal Proceedings* <[www.aija.org.au](http://www.aija.org.au)>.

108 *Victims of Crime Act 2001 (SA)* s 16(3)(b).

109 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System (1999)* 212–13.

110 *Ibid* 213.

111 *Ibid* 212–13.

112 The role of victims as auxiliary prosecutors in inquisitorial trials is explored in Chapter 8 of this consultation paper.

- 5.96 If the role of victims as prosecuting witnesses is not subsidiary to the public prosecutor, circumstances may arise where the positions of the DPP and the victim-prosecutor are in conflict. This is most likely where the DPP seeks to enter into a plea agreement based on a careful assessment of the charges, evidence and public interest, but the victim-prosecutor prefers to proceed to a trial. In this context, who should have the final decision?
- 5.97 Any reforms that amplify the role of the victim to include prosecutorial decision-making power are likely to change the relationship between the prosecutor and the victim and challenge the fundamental structure of the adversarial criminal trial process. In addition, giving victims decision-making power may also require them to bear additional responsibilities and obligations. The Commission notes that empirical research suggests that while victims may express dissatisfaction with their 'outsider' status in respect of prosecutorial decision making, victims do not necessarily seek that role for themselves.

### Restorative justice

- 5.98 As discussed at [3.38], there are instances where although a victim has made a complaint to the police, either the police decide not to charge the accused or the victim is reluctant for the matter to go to trial. It has been proposed that restorative justice might provide an alternative process at this early stage, to give victims some autonomy in the decision to prosecute and an alternative avenue to fulfil some of their justice needs.
- 5.99 In mid-June 2015 the South Eastern Centre Against Sexual Assault commenced a partly government-funded pilot of such a proposal, based on research by the Centre for Innovative Justice (CIJ).<sup>113</sup>
- 5.100 The CIJ also recommended a system for referrals to restorative justice to occur after a prosecution has commenced. The CIJ proposal is intended to apply in circumstances where the OPP has assessed a case as unlikely to succeed at trial, the victim consents, and the judge has given his or her approval.<sup>114</sup>
- 5.101 This restorative justice approach focuses on the offender acknowledging the harm caused, as narrated by the victim, and seeking to repair that harm. The CIJ noted that a number of factors will determine whether a particular matter is suitable for referral to a restorative justice process, including:
- type and severity of offence and harm caused to the victim
  - the victim's relationship with the offender
  - the time between the commission of the offence and the commencement of the prosecution
  - any particular vulnerabilities of the victim and offender.<sup>115</sup>
- 5.102 Some of the considerations and issues surrounding the use of restorative justice as an alternative to prosecution are considered in Chapter 7. One of the significant issues is ensuring that a victim's choice is made freely, and is not a second-best option taken simply to avoid being subjected to re-victimisation during the trial process.

113 Melissa Davey, 'Victims Face Their Molester in Victoria's World-First Restorative Justice Program', *The Guardian* (online) 17 June 2015 <<http://www.theguardian.com/australia-news/2015/jun/17/victims-face-their-molester-in-victorias-world-first-restorative-justice-program>>.

114 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (May 2014) 61.

115 *Ibid* 59–60.

## Questions

### The role of victims

- 4 Should victims have a greater role in the decision to continue or discontinue a prosecution?
- 5 If a victim wants to withdraw their complaint, should this determine whether the prosecution continues?
- 6 Should a victim be able to require a prosecution to proceed where the DPP decides it should be discontinued?
- 7 Should victims have a greater role in the decision to accept a plea of guilty after plea negotiations?

### Consultation

- 8 Is there adequate consultation with victims before a decision is made to continue with charges, discontinue a prosecution or accept a plea of guilty after plea negotiations? If not, what additional consultation do victims require?
- 9 If the prosecution fails to consult with victims about a decision to discontinue a prosecution, or to accept a plea of guilty after plea negotiations, should this attract consequences? If so, what should those consequences be?
- 10 Should victims be given the opportunity to access legal advice or representation during any consultation with the prosecution?

### Review of decisions

- 11 Should there be a way to review decisions made by the DPP or Crown Prosecutor to discontinue a prosecution or accept a plea after plea negotiations? If so, what mechanism might be used?

### Alternative procedures

- 12 Should victims be able to pursue restorative justice or other alternative processes instead of, or at any point during, a traditional prosecution? Why, or why not?



# The role of victims in committal proceedings

- 60** Introduction
- 61** The current system in Victoria
- 64** Alternative processes and procedures
- 67** Discussion and options for reform

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## 6. The role of victims in committal proceedings

### Introduction

- 6.1 Before serious indictable charges are heard during a trial at the Supreme or County Courts, the case progresses through the key preliminary step of committal proceedings in the Magistrates' Court.
- 6.2 The way in which committal proceedings are run can impact on victims' subsequent experience of the trial.
- 6.3 This chapter examines the role of victims in committal proceedings in Victoria, other Australian jurisdictions and New Zealand, and in preliminary hearings in inquisitorial systems. It then discusses victim-centred reform issues and proposals, before posing a series of questions.
- 6.4 While the evidence of victims, eye-witnesses, experts, police and other witnesses may be tested during committal hearings, this chapter will focus on the role of victims in committal proceedings. The wider question of whether committal hearings should be abolished altogether in Victoria is not addressed in this consultation paper.

### Purposes of committal proceedings

- 6.5 The central purposes of committal proceedings are:
  - to determine whether there is enough evidence against the accused for him or her to stand trial
  - to ensure that the prosecution has disclosed to the accused the evidence against him or her
  - to identify early pleas
  - to clarify issues prior to the trial.<sup>1</sup>
- 6.6 Australian courts have repeatedly affirmed the importance of committal proceedings in the criminal trial process.<sup>2</sup>

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1 See *Criminal Procedure Act 1986* (Vic) s 97. See also The Hon. Martin Moynihan, *Review of the Civil and Criminal Justice System of Queensland* (Queensland Government, 2008) 162.

2 *Grassby v The Queen* (1989) 87 ALR 618, 627 (Dawson J); *Barton v The Queen* (1980) 147 CLR 75, 100 (Gibbs ACJ and Mason J); *Director of Public Prosecutions v Bayly* (1994) 126 ALR 290; *Purcell v Vernardos* (No.2) [1997] 1 Qd R 317.

## The current system in Victoria

- 6.7 In Victoria, when an accused is charged with one or more indictable offences, the case must proceed through committal proceedings<sup>3</sup> before it can be heard in the County or Supreme Court.<sup>4</sup> The exceptions are indictable offences specifically identified in the *Criminal Procedure Act 2009 (Vic)* as capable of being heard summarily and commenced in the summary procedure stream of the Magistrates' Court, and cases where the Director of Public Prosecutions files a direct indictment in a superior court.
- 6.8 For cases that progress through committal proceedings, there are two options for an accused:
- to elect to proceed at committal mention hearing by way of hand-up brief
  - to elect that a committal hearing be held.

### Hand-up brief at committal mention

- 6.9 An accused may waive the right to a committal hearing and may be committed to stand trial on the basis of the evidence contained in the brief of evidence. In such cases, at the committal mention hearing the prosecutor submits (hands up) to the magistrate the evidence against the accused, which is contained in the brief of evidence and includes witness statements and exhibits. After the evidence has been handed up to the magistrate, the accused may do one of two things:
- enter a plea of guilty. If the magistrate is satisfied there is enough evidence to support a conviction, the magistrate will commit the accused to either the Supreme or the County Court for a sentence hearing.<sup>5</sup>
  - enter a plea of not guilty and elect to stand trial.<sup>6</sup> If the magistrate is satisfied the accused understands the nature and consequences of the election, the accused is committed for trial in the Supreme or County Court.<sup>7</sup>

### Committal hearing with cross-examination

- 6.10 To proceed to a committal hearing with cross-examination, the accused must first make an application at the committal mention hearing for leave to cross-examine witnesses, including the victim.<sup>8</sup> In sexual assault matters there is an absolute prohibition on cross-examination of child victims and cognitively impaired victims.<sup>9</sup>
- 6.11 In seeking leave to cross-examine a witness at the committal hearing, the accused must identify:
- what issues will be canvassed in cross-examination
  - the reason why the evidence of the witness is relevant to the issue
  - why cross-examination on the issue is justified
  - whether the prosecution consents to or opposes the cross-examination.<sup>10</sup>

3 Six types of hearing may occur during committal proceedings: filing hearing, special mention hearing, compulsory examination hearing, committal case conference, committal mention hearing and committal hearing: *Criminal Procedure Act 2009 (Vic)* s 100.

4 *Ibid* s 96.

5 *Ibid* ss 141(4)(b), 142(1).

6 *Ibid* s 143.

7 *Ibid* s 143(4).

8 *Ibid* s 125.

9 *Ibid* s 123.

10 *Ibid* s 119(c) and (d).

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- 6.12 The magistrate must not grant leave unless satisfied that cross-examination of the witness is justified.<sup>11</sup> In determining whether cross-examination is justified, the magistrate must have regard to whether the informant consents,<sup>12</sup> and the need to ensure that:
- the prosecution case is adequately disclosed
  - the issues are adequately defined
  - the evidence is of sufficient weight to support a conviction
  - a fair trial will take place (including that the accused is able to prepare and present a defence)
  - matters relevant to a potential plea of guilty are clarified
  - matters relevant to a potential discontinuance of prosecution (withdrawing the charges) are clarified
  - trivial, vexatious or oppressive cross-examination is not permitted
  - the interests of justice are otherwise served.<sup>13</sup>
- 6.13 Victims are not provided with a right to participate in the committal mention hearing. There is no obligation on the prosecution to consult with the victim prior to deciding whether to consent to or oppose an application to cross-examine witnesses.
- 6.14 If the magistrate grants all or part of the accused's application to cross-examine a witness or witnesses, a committal hearing is held and the relevant witnesses are required to attend court.<sup>14</sup>
- 6.15 Ordinarily, witnesses are only cross-examined. Their written statements are received as evidence-in-chief. Further, witnesses can only be cross-examined about the issues the magistrate has permitted.<sup>15</sup> The magistrate may allow additional lines of questioning during the committal hearing, on application by the accused.<sup>16</sup> The magistrate may disallow any question that does not relate to an issue for which leave has been granted, or if it appears to the court that the question is not justified.<sup>17</sup>
- 6.16 If the committal hearing involves a sexual offence, the only people permitted to be present in court while the victim is giving evidence are the police officer, the accused, a support person, the lawyers for the prosecution and the accused, specified court officials and anyone authorised by the court.<sup>18</sup> Protective procedures for the taking of evidence from vulnerable victims and victims of sexual and family violence offences, which are reviewed in Chapter 8, also apply during committal hearings. They include the use of remote witness facilities and closed circuit television; a prohibition on asking victims about their reputation for chastity; limits on when defence lawyers can ask questions about victims' sexual history and access victims' medical and counselling records; and obligations on the magistrate to prevent improper questions and questioning.

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11 Ibid s 124(3)(b).  
12 Ibid s 124(2).  
13 Ibid s 124(4).  
14 Ibid s 129.  
15 Ibid s 132(1).  
16 Ibid s 132A.  
17 Ibid s 132(2).  
18 Ibid s 133(2).

- 6.17 All the evidence of witnesses at the committal hearing is audio-recorded.<sup>19</sup> At the conclusion of the evidence for the prosecution, which includes the statements of any witnesses not cross-examined and exhibits, the accused may make a submission that there is not enough evidence to support a conviction.<sup>20</sup> If this submission is accepted, the court must discharge the accused.<sup>21</sup> If the submission is rejected, the magistrate must commit the accused to stand trial in the Supreme or County Court. At this point, the accused must enter a plea of guilty or not guilty to any charges which he or she is committed to stand trial for.<sup>22</sup>
- 6.18 Once an accused is committed for trial, the case is transferred to either the County Court or Supreme Court. The transcript of the evidence from the committal and all witness statements and exhibits are provided to the defence, the prosecution and the trial court.
- 6.19 There is no provision in the Criminal Procedure Act for an available witness's recorded committal evidence to be played to the court as evidence at the trial; they must appear in person in court and give evidence again.<sup>23</sup> Thus, during the criminal trial process, a victim (other than a child or cognitively impaired victim of a sexual offence) may be required to give evidence and be cross-examined at least twice.

### Application for summary jurisdiction

- 6.20 Not all indictable offences must proceed through a committal hearing.<sup>24</sup> For some indictable offences, there is an opportunity between the charge(s) being filed and the conclusion of the committal hearing for the accused or the prosecutor to apply to the magistrate for the offence to be heard in the summary proceedings of the Magistrates' Court.<sup>25</sup> The magistrate may grant the application if it is appropriate for the matter to be heard in the Magistrates' Court, having regard to a range of factors.<sup>26</sup>
- 6.21 At a summary hearing the magistrate, sitting without a jury, determines whether the accused is guilty. Because the matter is being heard in the Magistrates' Court, a more restricted sentencing range applies on a finding or plea of guilty than in the higher courts.<sup>27</sup>
- 6.22 In determining an application to proceed by way of summary hearing, the court is not required to take into account the views or interests of the victim. In addition, there is no obligation on the prosecution to consult with the victim prior to a summary jurisdiction application.

19 Ibid s 130(8); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt 6.

20 *Criminal Procedure Act 2009* (Vic) s 141(4). The accused may call witnesses at this point, although it is very rare for this to occur.

21 Ibid. Note that if the court is of the opinion that the evidence is of sufficient weight to support a conviction for an indictable offence other than the offence with which the accused is charged, the court must adjourn the committal proceeding to enable the informant to file a charge sheet in respect of that other offence.

22 Ibid s 144.

23 In Victoria, if a witness is unavailable at the trial and the accused cross-examined the witness at a previous hearing (or had a reasonable opportunity to cross-examine the witness), the transcript or recording of that evidence may be used at the trial. See *Evidence Act 2008* (Vic) ss 65(3), (5).

24 The prosecution of certain indictable offences capable of being heard summarily may commence in the summary or the committal streams of the Magistrates' Court.

25 *Criminal Procedure Act 2009* (Vic) ss 28, 30(2), 125.

26 These factors are set out in the *Criminal Procedure Act 2009* (Vic) s 29(1).

27 The maximum term of imprisonment that may be imposed is two years for a single offence and five years aggregate for multiple offences, and the maximum term of a community corrections order is two years for a single offence, four years for two offences, and five years for three or more offences. See *Sentencing Act 1991* (Vic) ss 38, 41A, 113, 113A–C.

## Alternative processes and procedures

### Australia

#### No right to cross-examine witnesses at committal hearing

- 6.23 In 2004, Western Australia removed the right of the accused to cross-examine victims and witnesses at committal hearing, following a review by the Law Reform Commission of Western Australia.<sup>28</sup> The Commission recommendation that ‘the preliminary hearing should be abolished’<sup>29</sup> was based on the small number of matters that actually went to preliminary hearing (10 per cent of all indictable matters), concerns about delays and costs, and the desirability of limiting the number of times victims and witnesses are required to give evidence.<sup>30</sup>
- 6.24 The *Criminal Procedure Act 2004* (WA) obliges the prosecution to disclose all evidence to the accused at the time the matter is listed in the Magistrates’ Court. A disclosure hearing may be held, in which the magistrate must be satisfied that the prosecutor’s disclosure obligations have been met before committing the accused for sentence or trial in a superior court.<sup>31</sup> Alternatively, the accused may consent to being committed by the magistrate to a superior court, without any hearing or need even to appear in court.<sup>32</sup> In neither circumstance are witnesses called or is evidence led or tested, and the magistrate does not have the power to discharge an accused due to lack of evidence.
- 6.25 In Tasmania, there is no provision for evidence to be tested before an accused is committed for trial to the Supreme Court.<sup>33</sup> Once the case is before the Supreme Court, the accused or the prosecutor may seek an order from the Supreme Court for a witness to give evidence on oath in a preliminary proceeding.<sup>34</sup> The Supreme Court may only make such an order if it is in the interests of justice to do so, and, if the order is for a victim of a sexual offence to give evidence and be cross-examined, in exceptional circumstances.<sup>35</sup> Preliminary proceedings occur in the Magistrates’ Court before justices of the peace.<sup>36</sup>
- 6.26 All other Australian jurisdictions have committal hearings which are similar in purpose and procedure to those in Victoria.

#### General limits on right to cross-examine witnesses at committal hearing

- 6.27 The test for granting leave to call a witness and/or cross-examine a witness at a committal hearing differs across the other Australian jurisdictions. In South Australia, the magistrate must be satisfied that ‘special reasons’ exist before granting leave for a witness to be called to give oral evidence.<sup>37</sup>

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28 Law Reform Commission of Western Australia, *Review of The Criminal and Civil Justice System. Final Report* (1999) 242-3.  
29 Ibid 245. Committal hearings were called preliminary hearings in Western Australia.  
30 Ibid (Recommendation 302).  
31 *Criminal Procedure Act 2004* (WA) ss 41, 43, 44.  
32 Ibid s 43.  
33 *Justices Act 1959* (Tas) ss 55–60.  
34 *Criminal Code Act 1924* (Tas) s 331B.  
35 Ibid s 331B; *Justices Act 1959* (Tas) s 3.  
36 *Criminal Code Act 1924* (Tas) s 331B; *Justices Act 1959* (Tas) ss 3, 61.  
37 *Summary Procedure Act 1921* (SA) s 106(1)–(2). The factors relevant to determining whether there are special reasons mirror those in Victoria. See *Summary Procedure Act 1921* (SA) s 106(3).

- 6.28 In the Australian Capital Territory, the test to be applied by the magistrate is whether ‘the interests of justice cannot be adequately satisfied by leaving cross-examination to the trial’.<sup>38</sup> In both New South Wales and Queensland, the magistrate must be satisfied there are ‘substantial reasons why, in the interests of justice’, the witness ‘should attend to give oral evidence or be cross-examined’.<sup>39</sup> However, if the prosecution consents to a witness being called to give evidence at the committal hearing, there is no need for either party to also seek leave of the court for the witness to be called.<sup>40</sup>
- 6.29 In the Northern Territory, if the prosecution consents, the magistrate must grant an application to cross-examine a witness unless ‘it would not be in the interests of justice’.<sup>41</sup> Where the prosecution does not consent, the magistrate must consider matters very similar to those set out in the Victorian Criminal Procedure Act, and additionally, whether a witness has a ‘mental, intellectual or physical disability’.<sup>42</sup>

### Prohibitions and limits on cross-examination of certain victims and regarding certain offences

- 6.30 As noted above, in Victoria, child and cognitively impaired victims and witnesses in sexual offence cases cannot be compelled to give evidence in a committal hearing. In the Australian Capital Territory this prohibition extends to all victims in sexual offence cases.<sup>43</sup> In South Australia, a magistrate may only grant leave for a victim of sexual assault or child to be cross-examined if ‘the interests of justice cannot be adequately satisfied by leaving cross-examination to the trial’.<sup>44</sup>
- 6.31 In New South Wales, magistrates may only give leave for victims of a broad range of offences, including some sexual offences, attempted murder, grievous bodily harm, abduction, kidnapping and robbery,<sup>45</sup> to be cross-examined at a committal if there are ‘special reasons why the alleged victims should, in the interests of justice, attend to give oral evidence’.<sup>46</sup>
- 6.32 In the Northern Territory, there is no blanket prohibition on certain witnesses being cross-examined, although for child witnesses, certain additional factors must be taken into account when determining whether cross-examination is justified.<sup>47</sup>
- 6.33 In contrast, Queensland does not prohibit any victim from being called to give evidence at a committal hearing.

### New Zealand

- 6.34 New Zealand has abolished committal hearings.<sup>48</sup> This occurred in 2011 after New Zealand conducted a lengthy and comprehensive review of its criminal justice system, which included re-categorising all criminal offences and then prescribing a suite of new procedures, which are contingent on offence-categorisation. Under these reforms, the use of jury trials has been substantially reduced: only the most serious offences, which include murder, infanticide and judicial corruption, automatically go before a jury.<sup>49</sup> For most other serious offences, an accused person may elect to have a jury trial, otherwise the trial is held before a judge alone.<sup>50</sup>

38 *Magistrates’ Court Act 1930* (ACT) s 90AB(2).

39 *Criminal Procedure Act 1986* (NSW) s 91(3); *Justices Act 1886* (Qld) s 110B(1).

40 *Criminal Procedure Act 1986* (NSW) s 91(2); *Justices Act 1886* (Qld) s 110A(5).

41 *Justices Act* (NT) s 105H(2).

42 *Justices Act* (NT) s 105H(5)(h).

43 *Magistrates’ Court Act 1930* (ACT) s 90AB(1).

44 *Summary Procedure Act 1921* (SA) s 106(3).

45 *Criminal Procedure Act 1986* (NSW) ss 93, 94.

46 *Ibid* s 93.

47 *Justices Act* (NT) s 105H(5). These factors include: the need to minimise the trauma the child might experience from giving evidence; any conditions or characteristics of the child, such as age, education, personality and level of understanding; how important the child’s evidence is for the prosecution case; and whether the child’s evidence contradicts the evidence of other witnesses.

48 Cabinet Business Committee, *Minute of Decision: Proposals to Simplify Criminal Procedure: Reform Package (Paper One)* (30 August 2010) [44]–[45].

49 *Criminal Procedure Act 2011* (NZ) s 6, sch 1.

50 *Ibid* ss 6, 50.

- 6.35 New Zealand's reforms are based on a formalised system of case management. Cases that must be dealt with in the higher courts proceed through a case review. Before the case review, the prosecution and the accused are expected to engage in discussions with a view to resolving the matter or determining whether the case will proceed to a trial.<sup>51</sup> Following the case review, the matter is transferred to the appropriate higher court for sentence, or for trial before a judge or a judge and jury. There is no scope for witnesses to be cross-examined as part of the case review process.
- 6.36 If an accused seeks to examine a witness before the trial, the accused must apply directly to the judge that will hear the trial.<sup>52</sup> This application is for an 'oral evidence order'. Oral evidence orders for victims can only be made if the accused elects to have a jury trial, and only if the victim's evidence is necessary to determine a pre-trial issue, or otherwise required in the interests of justice.<sup>53</sup> For victims of sexual offences, the judge must also consider the vulnerability of the victim and the impact on the victim of giving evidence before it makes an order for pre-trial examination.<sup>54</sup>
- 6.37 This set of reforms was designed to reduce 'disruption' caused to witnesses and victims by giving evidence multiple times (and to reduce delays and costs).<sup>55</sup>

### **Preliminary proceedings in inquisitorial systems**

- 6.38 There is no equivalent of the committal hearing process in jurisdictions with inquisitorial criminal trial processes. Rather, the preliminary examination phase of the proceedings, which is more like an investigation than a court hearing, dominates the criminal trial process. This preliminary examination phase is overseen by a judicial officer, who examines witnesses and gathers evidence. The prosecutor, the accused's lawyer and the victim are involved in this phase, which is not a public process. Witnesses, including victims, are often examined by the judicial officer in his or her office, at which time the accused's lawyer and the prosecutor have the opportunity to ask questions.
- 6.39 The evidence gathered as part of this preliminary investigation forms the record of evidence (also described as the case file or dossier) which goes before the judge making the ultimate decision about the accused's guilt. In the Netherlands, Belgium, some Swiss regions and Austria, the judge relies heavily on the case file.
- 6.40 From the perspective of victims, the emphasis on preliminary examination processes in inquisitorial criminal trials has several distinct advantages:
- Witnesses, and in particular victims, are rarely required to give evidence during the trial phase.
  - Victims are not required to give evidence in a public forum, but in the more informal environment of the examining magistrate's office.
  - Victims can give evidence in the absence of the accused.<sup>56</sup>

51 Ibid ss 54–57. See also Ministry of Justice, *Case Management Process* <<http://www.justice.govt.nz/services/service-providers/information-for-legal-professionals/criminal-court-processes/case-management-process>>.

52 See generally *Criminal Procedure Act 2011* (NZ) ss 57(3)–(4), 81–90. See also Ministry of Justice and Law Commission, *Criminal Procedure (Simplification) Project: Reforming Criminal Procedure* (21 December 2009) [148]–[152].

53 *Criminal Procedure Act 2011* (NZ) ss 90, 92.

54 Ibid s 93.

55 Ministry of Justice and Law Commission, *Criminal Procedure (Simplification) Project: Reforming Criminal Procedure* (21 December 2009) [152].

56 Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia: Report of the National Child Sexual Assault Reform Committee* (National Child Sexual Assault Reform Committee, 2010) [6.72].

- 6.41 Witnesses are also questioned more informally, there are fewer rules of evidence, and the examination of witnesses, including victims, does not involve cross-examination. In Austria, witnesses, including victims, can refuse to answer questions if doing so would 'disgrace' the witness, or, in the case of victims of sexual violence, if the question concerns his or her private life or details of the offence that they do not want to describe.<sup>57</sup> In Zurich, Switzerland, victims of sexual offences can:
- request that the court examining their case have at least one member of the same sex
  - request that a person of the same sex conduct the questioning
  - refuse to answer questions about their private life.<sup>58</sup>

## Discussion and options for reform

- 6.42 The Commission encourages consideration of whether some or all of the procedures canvassed above for committal proceedings in other jurisdictions should be adopted in Victoria.
- 6.43 Victim-oriented reform proposals specific to the committal phase of the criminal trial process tend to focus on increasing victim participation (other than as a witness); reducing the number of times victims are required to give evidence; and protecting victims from the more traumatic aspects of giving evidence. Reforms directed towards protecting victim-witnesses are discussed in Chapter 8.

### The victim as participating or prosecuting witness

- 6.44 Reforms to increase victim participation in committal proceedings might involve requiring the prosecutor to consult with victims before making certain decisions, and perhaps imposing a complementary obligation on the magistrate to ensure, when making a ruling, that victims have been consulted. Consideration could be given to which prosecutorial decisions should include victim consultation, and which ones should not. Arguably, decisions such as whether to oppose an application to cross-examine a witness are core prosecutorial decisions. As such, decisions of this nature should be made in accordance with prosecutorial duties to be fair, impartial and act in the public interest, rather than based on victims' views or wishes.
- 6.45 In contrast, an application to cross-examine the victim at the committal hearing has clear, and potentially distressing, implications for the victim if granted. Given the substantial personal interest that victims have in such an application, the view of the victim could be given greater prominence in determining the prosecutor's position, and the magistrate's decision.
- 6.46 As discussed in Chapter 5, an obligation to consult with victims when negotiating a plea already exists in the policy of the Victorian Director of Public Prosecutions and a court certification process supports a similar obligation in New South Wales. A decision by the prosecutor to make or consent to an application for charges to be dealt with by way of summary procedure has some parallels to a decision to accept a plea, because of the difference in the way charges are dealt with and the restricted sentencing range available.
- 6.47 An additional or alternative measure could be to include the views of victims, or matters personal to the victim, as part of the test the magistrate must apply when determining applications to cross-examine victims or to grant summary jurisdiction.

- 6.48 A more radical participating-witness reform could involve granting victims standing to put their views or interests before the magistrate in relation to an application for the victim to be cross-examined at committal. Consideration might be given to whether victims should be allowed to make submissions or submit evidence, for example that they should not have to give evidence at the committal hearing because of a particular vulnerability. Such a proposal has the potential to lengthen and complicate committal proceedings and impose a greater burden on the accused to respond to both the prosecution and victim's submissions. Equity concerns also arise. Some victims may be unable to afford legal representation, which could compromise their ability to participate meaningfully.<sup>59</sup>
- 6.49 If the role of victims should include introducing prosecuting-witness rights, similar to those afforded to the victim in inquisitorial trials and the International Criminal Court, this might involve giving victims the right to be heard in relation to an accused's application to cross-examine any witness. It might also involve victims having the right to ask questions of witnesses at the committal hearing and make submissions on matters of law and evidence. As with the more limited proposal for victim participation above, consideration should be given to whether a prosecuting-witness role for victims would have unacceptable consequences for the fair trial of an accused, the cost and length of committal hearings, and impose undue obligations and burdens on victims.

### **Reducing the number of times victims have to give evidence**

- 6.50 As noted in Chapter 2, research has shown that the process of cross-examination can be distressing for victims and can lead to re-traumatisation or secondary victimisation.
- 6.51 The Commission encourages consideration of whether the number of times victims are required to be cross-examined should be restricted, and how this might be achieved. Potential approaches include:
- expanding the prohibition on cross-examining child and cognitively impaired victims in sexual offence matters at committal to all victims, victims with particular vulnerabilities, or victims of particular offences
  - placing greater limitations on the accused's right to cross-examine victim-witnesses
  - removing committal hearings from the Magistrates' Court.
- 6.52 The Commission notes that prohibiting the cross-examination of any witness or the testing of any evidence at committal hearing is a significant step. In Western Australia and New Zealand, committal hearings were only abolished after reviews of each jurisdiction's criminal justice system. In New Zealand, the elimination of committal processes was accompanied by an integrated set of reforms across the entire criminal justice system.<sup>60</sup> In contrast, reviews in both Queensland and the Northern Territory recommended that rather than committal hearings being completely abolished, they should be retained in a more limited form.<sup>61</sup>
- 6.53 Not only can cross-examination cause victims trauma, committals can also delay the criminal trial process, adding to victims' stress and uncertainty. However, removing committal hearings, or completely prohibiting the cross-examination of all victims at committal hearings, could result in these issues having to be dealt with by the trial judge, with increased applications for pre-trial cross-examination and more complicated pre-trial hearings.<sup>62</sup>

59 Proposals for victims' legal advice and advocacy are considered at Chapter 13 of this consultation paper.

60 Ministry of Justice and Law Commission, *Criminal Procedure (Simplification) Project: Reforming Criminal Procedure* (21 December 2009) preamble [2] (describing the proposals as part of an integrated package of reforms).

61 See generally Northern Territory Law Reform Committee, *Report on Committals*, Report No. 34 (2009) 9; The Hon. Martin Moynihan, *Review of the Civil and Criminal Justice System of Queensland* (Queensland Government, 2008) 181–2, describing the review as covering the following 'key areas' of Queensland's justice system: the range of indictable offences heard by magistrates, possible reforms to committal proceedings, sentencing discounts for early guilty pleas, case conferencing and monetary limits for civil matters heard in the District and Magistrates' Courts.

62 The Hon. Martin Moynihan, *Review of the Civil and Criminal Justice System of Queensland* (Queensland Government, 2008) 181, noting that one of the consequences of abolishing committals in Western Australia was an increased need for pre-trial judicial involvement.

- 6.54 Removing committal hearings, or completely prohibiting cross-examination of victims at committal hearings, may increase the risk that trials will have to be abandoned part way through if evidence that could have been discovered at a committal hearing, and which has consequences for the conduct of the trial, is uncovered when witnesses give evidence before the jury. Arguably, any such reform would need to be accompanied by significant structural reforms, which would allow trial judges to case-manage a greater range of pre-trial matters, including assessing the sufficiency of evidence against the accused and whether pre-trial examination of victims or other witnesses should be permitted.

### **Use of video-recorded statements and evidence**

- 6.55 More modest proposals to reduce the number of times a victim has to give an account of the offending and be cross-examined relate to the way in which evidence is gathered, and the use of pre-recorded evidence. For example, video-recording the evidence of victims of rape before the trial has been proposed as 'the measure most likely to provide courts with the best evidence and to meet the needs of vulnerable and intimidated witnesses'.<sup>63</sup> In a similar vein, in New South Wales, video statements taken from domestic violence victims by police as soon as possible after the incident has occurred are admissible as the evidence-in-chief of the victim (at committal and trial). This is considered further in Chapter 8.
- 6.56 Reforms such as these involve changes to the way evidence is collected during the investigatory stage of proceedings, and have clear implications for committal and trial processes. Witness statements taken in this form may satisfy a key rationale for committal hearings, which is to allow the accused (and the prosecution) an opportunity to evaluate the victim's evidence prior to trial, thus supporting proposals to remove victim cross-examination from the committal process.
- 6.57 A possible adaptation of this proposal is that, if victims are to be cross-examined at the committal hearing, this evidence be recorded and played during the trial. Any such procedure would need to adequately safeguard the accused's fair trial rights.
- 6.58 For these types of reform, consideration should be given to whether the cogency, impact and effect of direct presentation of victims' evidence before a jury may be substantially reduced by the use of recorded statements and pre-recorded evidence.

## Questions

### Consultation

- 13 Should the prosecution be required to consult with victims before taking a position on a summary jurisdiction application or an application to cross-examine a witness, including the victim?
- 14 Are measures required to ensure that the prosecution fulfils consultation obligations?

### The role of the victim in proceedings

- 15 Should victims have a role in relation to applications for summary jurisdiction or applications to cross-examine witnesses at a committal hearing?
- 16 Should victims have a role during the committal hearing? If so, what should this role be?
- 17 Should victims' views be a relevant factor in the magistrate's determination of an application to cross-examine the victim, or other witnesses? If so, how might victims' views be communicated to the magistrate?

### Protected-witness measures

- 18 Should the prohibition on child and cognitively impaired victims giving evidence at committal hearings in sexual offence matters be extended to all, or certain other, victims? If so, what criteria should this be based on?
- 19 Should the evidence of victims at committal hearings be video-recorded so that it can be played at the trial instead of victims giving oral evidence?
- 20 Should cross-examination of victims and other witnesses at committal hearings be replaced by earlier transfer of serious indictable offences to superior courts, with the examination of witnesses taking place in advance of the trial and before a trial judge?

# The role of victims in pre-trial proceedings

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## 7. The role of victims in pre-trial proceedings

### Introduction

- 7.1 This chapter examines the next stage in the criminal trial process: pre-trial procedures. Matters determined during the pre-trial phase of the criminal trial process can have a substantial impact on the formal trial. Because of this, the pre-trial phase can also significantly impact on how victims experience the trial itself. In Victoria, recent reforms allow victims to play a limited role in some pre-trial proceedings, or aim to protect victims from cross-examination about their sexual history.
- 7.2 After reviewing Victoria's system, this chapter turns to consider provisions from several other jurisdictions that involve victims in pre-trial proceedings in different, or broader, ways. The chapter concludes with a discussion of issues and reform proposals.

### The current system in Victoria

- 7.3 Once an accused is committed by a magistrate to stand trial, the case will be transferred to either the Supreme Court or County Court. If the accused has entered a plea of guilty at the committal proceeding, the case will be listed for a plea and sentencing hearing in the appropriate superior jurisdiction. The role of the victim in sentencing is considered in Chapter 9.
- 7.4 If the matter is to proceed to trial, the court may conduct one or more directions hearings. Typically, two directions hearings are held: one immediately after an accused has been committed for trial and a second in the lead-up to the trial. Arguments about access to or the use of particular types of evidence are generally determined prior to the trial commencing before a jury, either in a separate pre-trial hearing, or more commonly at the commencement of the trial before the jury is empanelled.
- 7.5 The purposes of the directions hearings are to make any necessary orders for the fair and efficient conduct of the proceedings.<sup>1</sup> These pre-trial procedures play an important role in shaping the future conduct of the trial by narrowing the issues and evidence in dispute and setting the limits on what evidence can be used.
- 7.6 There are differences in the practice rules relating to pre-trial matters in the Supreme Court and County Court, which complement the *Criminal Procedure Act 2009* (Vic) and govern the procedures leading up to a criminal trial. These differences do not impact significantly on the role of victims in directions hearings. The following section sets out the key documentary and evidentiary matters that are commonly dealt with between the committal and the commencement of the trial.

## Initial directions hearing

- 7.7 The purpose of the initial directions hearing is for the prosecution and the defence to answer a series of questions from the judge about the way the case is to be run, including:
- factual issues in dispute and not in dispute
  - plea negotiations
  - outstanding disclosure
  - the number of witnesses to be called
  - special arrangements or facilities for witnesses
  - whether suppression orders or similar orders will be sought
  - whether any subpoenas will be sought, including for confidential communications
  - whether the defence will seek leave to cross-examine the victim in a sexual offence trial about the victim's sexual history
  - any defence objection to the prosecution's evidence (for example, hearsay and tendency evidence).<sup>2</sup>
- 7.8 If the matter is in the County Court and involves a sexual offence and the victim is a child or has a cognitive impairment, the prosecution must file additional materials, including a summary of the opening that the prosecution intends to make to the jury at the trial and the prosecution's list of witnesses. The court will also address whether the prosecution intends to rely on recorded evidence and whether the victim will give evidence by way of the alternative arrangements set up for child and cognitively impaired victims in the Criminal Procedure Act.<sup>3</sup>
- 7.9 Victims have no role in initial directions hearings.

## Final directions hearing

- 7.10 The timing of the final directions hearing differs in the Supreme and County Court. The County Court's practice note is more prescriptive in terms of setting out when documents must be filed and what matters are to be addressed at the final directions hearing. In general, however, the following documents need to be filed and provided to the other party before a final directions hearing:<sup>4</sup>
- the signed indictment with the charges that the Director of Public Prosecutions (DPP) or Crown Prosecutor is proceeding with
  - a summary of the prosecution opening<sup>5</sup>
  - the defence response to the summary of the prosecution opening<sup>6</sup>
  - the prosecution and defence lists of pre-trial issues
  - matters admitted as evidence<sup>7</sup>

2 County Court of Victoria, *County Court Criminal Division Practice Note* (PNCr 1-2015, 14 April 2015). The Supreme Court of Victoria *Practice Note No. 6 of 2014 – Criminal Division: Case Management by Post-Committal Directions Hearings* (26 September 2014) sets out 20 questions in addition to the matters contained in s 181(2) of the *Criminal Procedure Act 2009* (Vic).

3 County Court of Victoria, *County Court Criminal Division Practice Note* (PNCr 1-2015, 14 April 2015) [3.10].

4 See County Court of Victoria, *County Court Criminal Division Practice Note* (PNCr 1-2015, 14 April 2015) [4.3]; Supreme Court of Victoria, *Practice Note No. 4 of 2010 – Criminal Division: Case Management Procedure for Criminal Trials* (21 December 2009), which states that 'the court may make orders in respect of filing and serving documents including the summary of prosecution opening, defence response and evidentiary notices at the initial directions hearing'. At the final directions hearing, the trial judge will 'ensure all orders regarding the filing of documentation are complied with and that the trial is ready to proceed on the trial date'.

5 *Criminal Procedure Act 2009* (Vic) s 182(2).

6 *Ibid* s 183(2).

7 Including a person's age, the accuracy of a plan or that photographs were taken at a certain time: *ibid* s 182(3)(3).

- notice of the evidence the prosecution or defence wants to rely on, and for which the *Evidence Act 2008* (Vic) sets out rules regarding admissibility (hearsay, tendency, previous representations, coincidence and opinion evidence)<sup>8</sup>
  - the statement of any expert witness the defence intends to call at trial.<sup>9</sup>
- 7.11 The parties should inform the court of any matter that may affect whether the trial can start on time, including:<sup>10</sup>
- ongoing plea discussions
  - the fulfilment of requirements to disclose evidence
  - any pre-trial applications yet to be made
  - special arrangements for the trial (such as video links and interpreters)
  - the length of any pre-trial hearing, such as a special hearing for a child victim in a sexual offence trial.<sup>11</sup>
- 7.12 Victims have no role in final directions hearings.

### The prosecution's ongoing disclosure obligation

- 7.13 The right of the accused to know what evidence will be used by the prosecution in the proceedings, as well as material that is relevant but not being used, is a longstanding principle in adversarial criminal justice systems.<sup>12</sup> It is linked to the accused's right to a fair trial and the prosecution's duty to act fairly.
- 7.14 The prosecution has an ongoing obligation to disclose to the accused any 'information, document or thing' that comes into its possession after an accused is committed for trial.<sup>13</sup> The DPP's disclosure policy requires timely disclosure of material which is relevant or possibly relevant to an issue in the case, raises a new issue or the possibility of a new issue, or has real prospects of leading to new evidence.<sup>14</sup> Disclosure must be made as soon as practicable.
- 7.15 The prosecution must notify an accused of any additional evidence it intends to adduce from witnesses it intends to call at trial, including expert witnesses.<sup>15</sup>
- 7.16 There is no equivalent obligation to disclose evidence to the victim.

### Pre-trial applications

- 7.17 Matters identified at the directions hearings that require pre-trial resolution or rulings by the judge are generally addressed at the commencement of the trial, before the jury is empanelled. Such matters might include:
- arguments about whether multiple charges or charges against co-accused should be heard within the same trial or in separate trials
  - general evidentiary applications
  - evidence of the victim's prior sexual history
  - publication of the identity of the victim
  - confidential communications
  - special hearings.

8 *Evidence Act 2008* (Vic) ss 67, 97, 65, 98 and 177 respectively.

9 *Criminal Procedure Act 2009* (Vic) s 189.

10 County Court of Victoria, *County Court Criminal Division Practice Note* (PNCr 1-2015, 14 April 2015) [4.5].

11 See Chapter 8 for further discussion about special hearings for child victims in sexual offence trials.

12 Christopher Corns, *Public Prosecutions in Australia Law, Policy and Practice* (Thomson Reuters, 2014) 129–30.

13 *Criminal Procedure Act 2009* (Vic) s 185. See also ss 110, 111, 416.

14 Director of Public Prosecutions Victoria, *Director's Policy: Disclosure* (24 November 2014) [7], citing *R v Farquharson* (2009) 26 VR 410; [2009] VSCA 307; *R v Spiteri* (2004) 61 NSWLR 369; [2004] NSWCCA 321. See generally Christopher Corns, *Public Prosecutions in Australia Law, Policy and Practice* (Thomson Reuters, 2014), 129–137.

15 *Criminal Procedure Act 2009* (Vic) ss 188, 189.

- 7.18 Applications to have multiple charges or charges against co-accused heard in separate trials rather than in the one trial<sup>16</sup> can have significant consequences for victims. This is particularly so if holding separate trials means that the victim has to give evidence more than once. In addition, some evidence will only be admissible in one of the trials. This means that when giving evidence victims may be required to avoid information about offences that are to be determined in a separate trial. This can make the elicitation of evidence from victims, and especially young victims, difficult and ultimately unpersuasive, because the victim must disrupt their account of the offending to avoid material ruled inadmissible in that trial.
- 7.19 There is no provision in the Criminal Procedure Act for the victim to have a role other than as a witness during any pre-trial application for separate trials.

### Evidentiary applications

- 7.20 The evidence relied on by the prosecution and defence must comply with rules contained in the *Evidence Act 2008* (Vic) and other relevant legislation. Common pre-trial evidentiary applications concern the use of the following types of evidence:
- tendency and coincidence<sup>17</sup>
  - hearsay<sup>18</sup>
  - opinion/expert<sup>19</sup>
  - credibility<sup>20</sup>
  - identification<sup>21</sup>
  - admissions.<sup>22</sup>
- 7.21 Pre-trial matters may require witnesses to be called to give evidence.<sup>23</sup> This most commonly occurs when:
- a witness was not available for cross-examination at the committal hearing<sup>24</sup>
  - a relevant witness has been identified or has made a statement since the committal hearing
  - the accused challenges the admissibility of a piece of evidence (for example, the recording of his or her interview with the police) on the basis of some unfairness or impropriety
  - evidence is required to support legal submissions.
- 7.22 Victims have no role in any of these pre-trial matters, apart from applications relating to confidential communications (discussed below), and if relevant, as a witness. If a victim is required to give evidence during a pre-trial hearing, there is no provision in the Criminal Procedure Act for the victim to object to having to do so, or to address the court in relation to any of the matters the evidence might relate to.

16 Ibid ss 193, 194, 195.

17 *Evidence Act 2008* (Vic) ss 94–101.

18 Ibid ss 59, 60, 61, 62, 65, 66, 66A, 67, 69–75.

19 Ibid ss 76–80.

20 Ibid ss 101A–108B.

21 Ibid ss 113–116.

22 Ibid ss 81–90.

23 A pre-trial hearing where evidence is called is called a 'voir dire'. A voir dire may also occur during the trial, in the absence of the jury.

24 This type of pre-trial hearing is referred to as a 'Basha' hearing, following the ruling in *R v Basha* (1989) 39 A Crim R 337.

## Evidence of sexual activities

- 7.23 Evidence of a victim's sexual history has historically relied upon discriminatory gender stereotypes to undermine the credibility of the victim or suggest the accused was reasonable in believing the victim consented.<sup>25</sup> As a result of relatively recent reforms, however, the accused's lawyer now requires the judge's leave to ask the victim questions during cross-examination or lead evidence about their sexual history.<sup>26</sup>
- 7.24 The judge may only allow cross-examination or evidence about a victim's sexual activities (other than those to which the charge relates) if it is substantially relevant to a fact in issue in the trial and is in the interests of justice.<sup>27</sup> When considering whether it is in the interests of justice to allow cross-examination or admit evidence about sexual activities, the judge must have regard to:
- whether the probative value of the evidence outweighs the potential distress, humiliation and embarrassment of the victim (taking into account the victim's age and the number and nature of the questions)
  - the risk that it might arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility
  - the need to respect the victim's personal dignity and privacy, and
  - the right of the accused to fully answer and defend the charge.<sup>28</sup>
- 7.25 Applications to cross-examine or admit evidence about the victim's sexual activities must be made at least 14 days before the trial.<sup>29</sup> There is no obligation to serve the notice on the victim or for the victim to be informed that the application is being made.
- 7.26 The accused can request that the victim not be present in court when the application is heard. If this occurs, the judge must order that the victim not be present.<sup>30</sup>

## Confidential communications

- 7.27 Records of communications between sexual assault victims and the professionals counselling or treating them are referred to in Victorian law as 'confidential communications'. Confidential communications may be sought by an accused in preparation for, and for use in, all stages of a criminal trial.<sup>31</sup> The confidential communications provisions in Victorian law provide for some degree of victim participation and recognise the need to protect the privacy of victims from unjustified interference and thereby encourage the use of counselling and the reporting of sexual offences to police.<sup>32</sup>
- 7.28 The *Evidence (Miscellaneous Provisions) Act 1958* (Vic) (EMPA) restricts access to, and use of, records of communications made in confidence by a victim of a sexual offence to a registered medical practitioner or counsellor in the course of a professional relationship.<sup>33</sup> Leave of the judge is required at three stages:
- before a party (typically the accused) seeks to compel (usually by subpoena) a medical practitioner or counsellor to produce documents containing confidential communications

25 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Final Report* (2004) 198. Much of the early victimology literature focused on victim-offender relationships and the contributory role of victims in the commission of crime. Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series No.19, Australian Institute of Criminology, 1999) 81–2.

26 *Criminal Procedure Act 2009* (Vic) s 341.

27 *Ibid* ss 342, 349.

28 *Ibid* s 349.

29 *Ibid* s 344. An application for leave may be heard out of time if it is in the interests of justice to do so: s 345.

30 *Ibid* s 348.

31 Including the committal hearing.

32 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Final Report* (2004) 211, [4.71]. Similar legal protections exist around Australia but use different terminology and safeguards.

33 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt II, div 2A. The question of whether a broader range of documents should be covered was considered by the Victorian Law Reform Commission in *Sexual Offences: Law and Procedure Final Report* (2004) at [4.93] and is a question below.

- before a document is produced for inspection by a party
  - before use at trial.<sup>34</sup>
- 7.29 The judge must not grant leave unless satisfied of each of the following matters:
- The evidence will have substantial probative value to a fact in issue.
  - Other evidence of similar or greater probative value relating to the matter contained in the confidential communication is not available.
  - The public interest of preserving confidentiality and of protecting the victim from harm is substantially outweighed by the public interest in allowing evidence of substantial probative value to be introduced.<sup>35</sup>
- 7.30 In balancing the public interests above, the judge must take into account:
- the likelihood, nature and extent of harm that may be caused to the victim
  - the extent to which the evidence is necessary to allow the accused to make a full defence
  - the need to encourage victims of sexual offences to seek counselling
  - the extent to which victims may be discouraged from seeking counselling, or the effectiveness of counselling diminished, if the confidential communications were accessed or used
  - whether a discriminatory belief or bias is behind the application
  - whether the victim objects to the disclosure
  - the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.<sup>36</sup>
- 7.31 Any party who seeks to subpoena, produce or use a confidential communication must give each party in the proceedings, the informant and the medical practitioner or counsellor, at least 14 days' notice.<sup>37</sup> The informant must give a copy of the notice to the victim (referred to as the 'protected confider') within a reasonable time.<sup>38</sup> There is no requirement on the accused to give a copy of the application to the victim directly or to ensure the victim is informed.
- 7.32 The victim may seek permission from the judge to appear in court and make submissions in relation to any confidential communications. As the recipient of the subpoena, the medical practitioner or counsellor may also appear and make submissions.<sup>39</sup>
- 7.33 An important issue when considering this procedure is how often victims have used these provisions, and whether the Office of Public Prosecutions or police have processes in place to ensure that victims are aware that access to confidential communications has been sought and that they have a right to seek leave to appear.
- 7.34 While the victim is permitted to seek leave to appear, the victim is still not a party to the proceedings as a whole. This means that a victim cannot appeal the decision of a judge to allow an accused to access or use evidence from a confidential communication.<sup>40</sup>
- 7.35 The EMPA provides some protection for victims where leave has been granted to the defence or prosecution to use their confidential communication during the trial process. The judge may order that evidence be heard in camera, that evidence be subject to a suppression order or make other orders necessary to protect the identity of a victim.<sup>41</sup>

34 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 32C, 32D.

35 *Ibid* s 32D(1).

36 *Ibid* s 32D(2). Reasons must be given for any determination to grant or refuse leave: s 32D(4).

37 *Ibid* s 32C(2). A judge may waive the requirement to give notice or shorten the 14-day timeframe: s 32C(3).

38 *Ibid* s 32C(4).

39 *Ibid* s 32C(5).

40 *Criminal Procedure Act 2009* (Vic) s 295 details when an interlocutory decision may be appealed and refers specifically to 'a party to a proceeding'.

41 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32F.

## Alternative processes and procedures

- 7.36 Many common law jurisdictions have in place rules relating to confidential communications and evidence about a victim’s sexual history. The purpose of the following section is to outline provisions in other jurisdictions that are distinctly different from or broader in application than the measures in place in Victoria.

### Confidential communications

#### New South Wales

- 7.37 The sexual assault communications privilege in the *Criminal Procedure Act 1986* (NSW) is broader than Victoria’s confidential communications provisions. It also provides greater safeguards to ensure that victims are aware of, and can assert, their rights in respect of confidential communications.
- 7.38 A ‘protected confidence’ is defined as including any counselling communication made by, to or about a victim of a sexual offence.<sup>42</sup> A counselling communication occurs in any situation where a person trained in, or with experience relevant to, counselling victims has listened to and given encouragement to a victim, or has advised, provided therapy or treated the victim.<sup>43</sup> Thus, it may extend beyond medical practitioners and counsellors to include social workers’ records or school records.<sup>44</sup>
- 7.39 The New South Wales legislation also contains a blanket prohibition on a protected confidence being sought or used for the purposes of preliminary proceedings, such as bail or committal proceedings.<sup>45</sup>
- 7.40 In subsequent stages of the criminal trial process, the judge’s leave is required to issue a subpoena, produce a document to the court in response to a subpoena, or use evidence of a protected confidence.<sup>46</sup>
- 7.41 Where leave of the judge is sought, section 299A grants a victim standing to appear.<sup>47</sup> This means that a victim has a right to appear, and is not required to first seek leave of the judge, as is required in Victoria. Further, the judge has the duty to ensure that the victim is aware of his or her rights in relation to protected confidences and has had reasonable opportunity to obtain legal advice.<sup>48</sup>
- 7.42 The party making the application must give notice to the other party and to the victim (or their nominee).<sup>49</sup> If the accused is making the application, a copy of the notice—which must advise the victim that they may appear in the proceedings—may be given to the prosecutor to pass on to the victim.<sup>50</sup>
- 7.43 In response to the application, the victim is permitted to provide a sworn confidential statement to the court which details the harm likely to be experienced if leave is granted.<sup>51</sup> In *PPC v Williams*,<sup>52</sup> the Court of Criminal Appeal noted that the victim, through her lawyer, was able to provide the trial judge with both confidential submissions (detailing objections to the disclosure of certain medical documents) and a confidential

42 *Criminal Procedure Act 1986* (NSW) s 296(1). A counselling communication is protected even if it was made before the sexual offence was alleged to have occurred or if it has no connection to the sexual offence or a condition arising from the sexual offence: s 296(2).

43 *Criminal Procedure Act 1986* (NSW) ss 296(4)–(5).

44 New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2010, 6 (John Hatzistergos).

45 *Criminal Procedure Act 1986* (NSW) s 297. Confidential communications are also prohibited in preliminary proceedings in South Australia: *Evidence Act 1929* (SA) s 67F(1)(a); the Australian Capital Territory: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 57; and in the Northern Territory: *Evidence Act 1939* (NT) s 56B.

46 *KS v Veitch (No 2)* [2012] NSWCCA 266 [23] (Basten JA); *PPC v Williams* [2013] NSWCCA 286 [24] (Gleeson JA); *Criminal Procedure Act 1986* (NSW) s 298.

47 This right extends to preliminary proceedings, for example where a protected confidence is inadvertently returned in response to a subpoena issued as part of preparation for a committal.

48 *Criminal Procedure Act 1986* (NSW) s 299. In Western Australia, the court is required to provide the victim with a copy of an application for leave to disclose a protected communication, together with information about the hearing and the right to appear in the hearing of the application, either in person or with representation: see *Evidence Act 1906* (WA) ss 19C(4), 19D(1).

49 *Criminal Procedure Act 1986* (NSW) s 299C.

50 *Ibid.* Note that the requirement to provide notice may be waived in certain circumstances, such as when a victim provides written consent: see ss 299C(5), 300.

51 *Ibid* s 299D(3). This statement is not available to the defence or the prosecution: s 299D(4).

52 [2013] NSWCCA 286.

affidavit (setting out the harm the victim considered she would suffer if the accused was granted access to the documents).<sup>53</sup> This was facilitated by the judge allowing the victim's lawyer to access the documents in question prior to the hearing of the application, so as to formulate the victim's response.<sup>54</sup>

- 7.44 The legal test in New South Wales for whether a judge should grant leave to a party to access or use a protected confidence is similar to Victoria's.<sup>55</sup> However, the balancing the judge must engage in before granting leave is arguably weighted more towards protecting the victim, as the list of factors the judge must take into account does not specifically include the accused's interests (such as the extent to which the evidence is necessary to allow the accused to make a full defence).<sup>56</sup>
- 7.45 Victims in Victoria do not have a right to appeal the interlocutory decision of a judge to allow the disclosure of confidential communications. In contrast, the *Criminal Appeal Act 1912* (NSW) provides a right for a non-party, such as a victim to whom the protected confidence relates, to seek leave to appeal to the Court of Criminal Appeal. A victim may appeal against a decision to allow access to or use of a protected confidence, and against a ruling that a document or evidence does not contain a protected confidence.<sup>57</sup>
- 7.46 The above procedural rights for victims in New South Wales gave rise to the need for victims to have access to legal advice and representation. To facilitate this, Legal Aid New South Wales established the Sexual Assault Communications Privilege Service as part of its Civil Law Division. While the service provides legal advice and representation, most victims are referred to private lawyers who have received relevant training.<sup>58</sup>

### Tasmania

- 7.47 Tasmania's *Evidence Act 2001* arguably provides the greatest degree of empowerment to victims in relation to confidential communications. It prohibits a 'counselling communication' from being produced to court, disclosed in any criminal proceedings or admitted into evidence. The only exception is where the victim consents.<sup>59</sup>
- 7.48 However, the definition of counselling communication is narrower than that of protected confidence in New South Wales and confidential communication in Victoria. It only covers communications during the course of counselling or treatment with a professional whose work includes the provision of psychiatric or psychological therapy to sexual assault victims.<sup>60</sup>

### Canada

- 7.49 Canada's *Criminal Code* contains similar, although broader, provisions to Victoria.<sup>61</sup>
- 7.50 The Canadian provisions capture any record that contains personal information 'for which there is a reasonable expectation of privacy'.<sup>62</sup> Examples provided in the legislation include education, employment, child welfare and social services records, personal diaries and journals.

53 Two sets of confidential submissions were provided: see *PPC v Williams* [2013] NSWCCA 286 [13], [15].

54 *Ibid* [12].

55 *Criminal Procedure Act 1986* (NSW) s 299D.

56 *Ibid* s 299D(2). If a judge grants leave, the judge may seek to limit the potential harm to the victim by ordering evidence be heard in camera or produced in camera, or make any other order relating to the production and inspection of the document that is 'necessary to protect the safety and welfare' of a victim: s 302(1).

57 *Criminal Appeal Act 1912* (NSW) ss 5F(3AA), (3AB). An appeal can only be made if the Court of Criminal Appeal gives leave or if the trial judge certifies that the decision is a proper one for determination on appeal. For cases involving an appeal by a victim as a protected confider, see *KS v Veitch* [2012] NSWCCA 186; *KS v Veitch (No 2)* [2012] NSWCCA 266; *PCC v Williams* [2013] NSWCCA 286. An agency or organisation in possession of documents containing a protected confidence can also seek leave to appeal.

58 Legal Aid NSW, *Sexual Assault Communications Privilege Service* <<http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>>.

59 *Evidence Act 2001* (Tas) ss 127B(3)–(4).

60 *Ibid* s 127B(1). Section 126 sets out the circumstances in which other types of protected confidence may be used in court proceedings.

61 *Criminal Code*, RSC 1985 C-46, ss 278.1–278.91. The Canadian provisions involve two stages of judicial decision-making: first, whether confidential records should be produced to the court for the judge to review in response to an accused's application; and second, whether the records should then be produced to the accused.

62 *Ibid* s 278.1.

- 7.51 The accused must apply to the trial judge, and is required to serve an application for the production of confidential records on the victim, the prosecutor and the person or organisation with possession of the documents.<sup>63</sup>
- 7.52 A victim can appear in court and make submissions about the production of a document, but is not compellable as a witness to the hearing of the application.<sup>64</sup> A recent legislative amendment requires the judge to inform a victim who participates in a hearing relating to a confidential record that they have a right to be represented by a lawyer.<sup>65</sup>
- 7.53 The judge hearing the application must consider and balance a number of specified factors.<sup>66</sup> While the Victorian provisions refer to the public interest in preserving the confidentiality of confidential records and in protecting a victim from harm, the Canadian provisions use the language of rights and direct a judge to balance the right of an accused to 'make a full answer and defence' against the victim's rights to privacy, personal security and equality.<sup>67</sup>
- 7.54 Any record that is disclosed cannot be used in any other proceeding,<sup>68</sup> and publication of an application, evidence, information or submissions is prohibited.<sup>69</sup> This is in contrast to Victoria, where suppression orders and orders in relation to the disclosure of identity information may be made but do not operate as a presumption.<sup>70</sup>

## Evidence of sexual history or activities

- 7.55 The United States *Federal Rules of Evidence* restrict the use of evidence about a victim's sexual history. As in Victoria, evidence about sexual reputation is prohibited, and evidence about sexual history is permitted only in limited prescribed circumstances.<sup>71</sup> However, the victim has a greater role in a defence application for leave to adduce such evidence.
- 7.56 The defence must notify the victim or the victim's representative of a pre-trial application to have sexual evidence admitted at trial.<sup>72</sup> The victim has a right to attend and be heard at the pre-trial hearing, which is held in closed court.<sup>73</sup> The right to be heard appears to extend to actively participating in the hearing.
- 7.57 An example of this is the case of *United States of America v Stamper*,<sup>74</sup> where a pre-trial hearing was held to determine whether the defence could lead evidence of the victim making prior false claims of sexual abuse. The victim was able to participate in this hearing through her lawyer, who was permitted to cross-examine witnesses and make legal submissions.
- 7.58 There has been at least one case in the United States in which a victim was allowed to appeal against a pre-trial order permitting the use of evidence of sexual history.<sup>75</sup>

63 Ibid s 278.3(5). The accused must also serve any other person to whom the accused is aware the records relate.

64 Ibid ss 278.4(2), 278.6(3). The victim's right to appear and participate occurs at the application stage and when the judge is considering whether to allow the accused access to the records.

65 See *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, C-32 (assented to 23 April 2015) 10 [7] (comes into force 90 days after the date of assent).

66 See *Criminal Code*, RSC 1985 C-46, s 278.5(2). A list of assertions that are insufficient on their own to justify access is listed at s 278.3(4) and includes assertions that the record relates to: treatment a victim has received; the incident in question; the presence or absence of a recent complaint; the sexual activity of the victim; past sexual abuse; the victim's sexual reputation; the reliability of the victim in light of psychological treatment.

67 Ibid ss 278.5(2), 278.7(1), 278.7(3). The requirement to consider the victim's (or witness's) right to personal security was added by amendment in 2015. See *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, C-32 (assented to 23 April 2015) 11 [8], [10] (comes into force 90 days after assent). For practical application prior to the 2015 amendment, see *R v Mills* [1999] 3 SCR 668.

68 *Criminal Code*, RSC 1985 C-46, s 278.7(5).

69 Ibid s 278.9(1)(a)–(b). The determination of the judge in relation to a confidential record is also prohibited from publication, unless the judge orders that publication is permitted: s 278.9(1)(c).

70 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32F (ancillary orders).

71 *Federal Rules of Evidence* 28 USC § 412(a)–(b). These provisions apply beyond criminal trials and encompass 'civil or criminal proceeding involving alleged sexual misconduct'.

72 *Federal Rules of Evidence* 28 USC § 412(c).

73 Ibid.

74 766 F Supp 1396 (US Dist, 1991).

75 *Doe v United States* 666 F 2d 43, 45 (4th Cir, 1981).

## International Criminal Court (ICC)

- 7.59 Victims can participate in pre-trial proceedings before the ICC. Specifically, they are permitted to ‘submit observations’ in proceedings about whether a case falls within the ICC’s jurisdiction (‘jurisdiction proceedings’).<sup>76</sup> A recent review of victims’ participation in pre-trial jurisdiction proceedings noted that observations submitted by victims ‘had little impact’ and generally supported the prosecution’s position.<sup>77</sup>
- 7.60 Victims also have a general right to ‘present’ their ‘views and concerns’ at any stage of ICC proceedings where their ‘personal interests’ are affected, including pre-trial hearings.<sup>78</sup> The court has interpreted personal interests of victims broadly as flowing from their rights to truth, justice and reparation.<sup>79</sup>
- 7.61 Although victims are permitted to raise their views and concerns, the court has repeatedly stated that victims are not parties to proceedings before the ICC.<sup>80</sup>
- 7.62 Victims must apply to participate. If a victim is granted the right to participate, a lawyer is usually appointed.<sup>81</sup> The participation of victims is subject to the court determining that it is appropriate and not prejudicial to the rights of the accused to a fair trial.
- 7.63 The way in which victims participate in the trial process, including their ability to introduce evidence and question witnesses, is canvassed in Chapter 8 of this consultation paper.

## Discussion and options for reform

- 7.64 The Commission encourages consideration of whether and how any current Victorian pre-trial procedures should be amended to accommodate the justice needs of victims identified in Chapter 2. In doing so, the processes in other jurisdictions described above should be considered, together with proposals for reforms that do not currently exist in the jurisdictions identified.

### Participating-witness reforms

#### Standing to appear when interests are affected

- 7.65 Victims in Victoria have a right to seek leave to appear in pre-trial applications relating to confidential communications only. In New South Wales, victims have standing, and can seek leave to appeal if dissatisfied with the ruling. The rationale underlying these provisions is the importance of personal privacy and the harm that access to confidential records could cause.

76 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 19(3) (Rome Statute).

77 Benjamin Perrin, ‘Victim Participation at the International Criminal Court: Examining the First Decade of Investigative and Pre-Trial Proceedings’ (2015) 15 *International Criminal Law Review* 298, 332.

78 Rome Statute art 68(3). See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 3: The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process* (May 2015).

79 *Prosecutor v. Bahr Idriss Abu Garda* (Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, Doc No ICC-02/05-02/09) [3].

80 See, eg, *Prosecutor v. Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled ‘Decision on the Modalities of Victim Participation at Trial’) (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [39].

81 International Criminal Court, *Rules of Evidence and Procedure*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) rr 89, 90.

- 7.66 One reform option is to extend these provisions to grant victims standing to participate in all pre-trial applications where the victim has a demonstrable personal interest, such as privacy.<sup>82</sup> For example, the privacy of a victim in a sexual offence trial is directly impacted by the outcome of an application for leave to cross-examine about, or use evidence relating to, the victim's sexual history. Similarly, the privacy of a victim in an assault trial is impacted by the outcome of an application for access to their medical records.
- 7.67 A broader reform would be to grant victims standing based on a wider interpretation of 'victims' interests'. At the ICC, the personal interests of victims extend to their interest in 'truth and justice'. Applied in Victoria, this could underpin victim participation in all or most pre-trial applications relating to the admissibility of evidence. Further, standing might be given where a victim has an interest in the outcome of a particular pre-trial application but is also in a position to provide information that is relevant to the determination of that application.
- 7.68 The Commission notes that if victims are given the right to participate in pre-trial evidentiary matters, the prosecutor could not be expected to represent victims or present their views to the court; such an expectation conflicts with the prosecutor's role as an independent and impartial representative of the state. Victims may require their own legal representation to participate properly in pre-trial proceedings. This has the potential to increase the complexity of proceedings and may also increase the burden on both the prosecution and the accused.
- 7.69 A greater role for the victim in pre-trial proceedings also gives rise to the following considerations:
- whether a victim should automatically be permitted to participate, or whether the court's permission should be required (and if so, based on what criteria)
  - whether participation should extend to standing to appeal pre-trial rulings
  - whether participatory rights should be accompanied by obligations such as disclosure.
- 7.70 If victims are allowed to appear or to have standing in all or some pre-trial applications, it may be necessary to ensure victims have access to legal advice and representation, including those who are not able to pay for private legal representation. Thus, consideration would also need to be given to funding a service similar to the Sexual Assault Communications Privilege Service that currently exists within Legal Aid NSW.

### Increased obligations on judges and prosecutors

- 7.71 More modest reform proposals involve imposing a statutory obligation on the prosecutor and/or the judge to ensure victims are informed of and consulted about pre-trial applications in which they have an interest. One option is to require that, before hearing any pre-trial application in which a victim is likely to have an interest, the judge must be satisfied that the victim has been made aware of the application, received legal advice, and/or participated in consultation with the prosecution.<sup>83</sup> This obligation would be in addition to any obligation on the judge to take into account the victim's views, or any potential impact on the victim, when making a ruling.

82 The South Australian Commissioner for Victims' Rights has been able to fund legal advice and representation for victims in pre-trial evidence applications. One example cited by the Commissioner involved an application by an accused for a copy of all data on a victim's computer hard drive. The lawyer funded by the Commissioner provided advice to the victim, made representations to the prosecutor and appeared on behalf of the victim in court. See Michael O'Connell, *Victims' Rights: Integrating Victims in Criminal Proceedings* <[www.ajja.org.au](http://www.ajja.org.au)>.

83 The proposal is similar to the obligation that exists in New South Wales in the context of protected confidences in sexual offence matters.

- 7.72 Consideration should also be given to whether it would be ethically appropriate for the prosecution to be responsible for providing victims with legal advice about a pre-trial application and communicating victims' views to the judge, in addition to simply notifying victims of the application. Issues are likely to arise if a victim's position is in conflict with the prosecution. One of the functions of a Victims of Crime Commissioner might be to play an intermediary role between the prosecutor and the victim, and to provide or fund independent legal advice for victims for pre-trial procedures in appropriate circumstances. Such a function is currently performed by the South Australian Victims of Crime Commissioner.<sup>84</sup>

### Alternative dispute resolution and restorative justice pre-trial procedures

- 7.73 An arguably more significant change would involve giving victims the choice to participate in restorative justice processes in the pre-trial phase, with adequate safeguards. Pursuing restorative justice in the pre-trial phase need not preclude a matter proceeding to a criminal trial. Such processes might provide an innovative measure to address victims' needs for agency and empowerment.
- 7.74 Alternative procedures, including restorative justice, are widely used in non-criminal jurisdictions. In contrast to criminal prosecutions, trials for non-criminal legal disputes are typically direct contests between the aggrieved party and the person or entity alleged to be responsible.<sup>85</sup> Non-criminal legal conflicts can involve people who have been injured or traumatised and are seeking compensation or redress from those they hold responsible. As such, these people share many of the experiences and needs of victims of crime (and may in fact be victims of crime). In these types of legal disputes, pre-trial processes known as 'alternative dispute resolution' (ADR) aim to resolve the conflict between the parties without the need for a trial, thereby reducing the cost, time and stress often associated with legal proceedings. ADR procedures share some similarities with restorative justice.<sup>86</sup> In particular, ADR commonly involves an independent third person mediating or facilitating discussions between the parties in an attempt to reach an agreed resolution of the case.<sup>87</sup>
- 7.75 Pre-trial victim–offender engagement is available in New Zealand, where the Victims' Rights Act 2002 (NZ) gives all victims the right, in principle, to request a restorative justice conference at any time during the criminal proceedings.<sup>88</sup> In 2014, the Centre for Innovative Justice also proposed a model of restorative justice that included a pre-trial restorative justice option.
- 7.76 Proposals to incorporate restorative justice at the pre-trial stage can be controversial. As the Parliament of Victoria's Law Reform Committee has noted:

[Restorative justice] raises complex legal and social issues about the aims of the criminal justice system, the rights of offenders, the rights and needs of victims and how to address causes of offending.<sup>89</sup>

84 Michael O'Connell, *Victims' Rights: Integrating Victims in Criminal Proceedings* <[www.aija.org.au](http://www.aija.org.au)>. Section 16(3)(b) of the *Victims of Crime Act 2001* (SA) states that one of the Commissioner's functions is to 'assist victims in their dealings with prosecuting authorities and other government agencies'.

85 These disputes are dealt with in the civil jurisdiction of Victoria's justice system (not to be confused with the civil law legal systems of many of the countries in Europe).

86 For discussion of the use of ADR and restorative justice in Victoria, see Parliament of Victoria Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice: Final Report of the Victorian Parliament Law Reform Committee* (May 2009).

87 See *Supreme Court Act 1986* (Vic) s 24A; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Order 50.07; *County Court Act 1958* (Vic) s 47A; *County Court Civil Procedure Rules 2008* (Vic) Order 50.07.

88 *Victims' Rights Act 2002* (NZ) s 9.

89 Parliament of Victoria Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice: Final Report of the Victorian Parliament Law Reform Committee* (May 2009) xlvi.

- 7.77 If a prosecution were to be diverted to a process which involves an agreed resolution between the accused and the victim, rather than continuing to trial and verdict, the public interest in seeing offenders dealt with in open criminal proceedings may be undermined. It may also conflict with some of the principles that underpin sentencing, such as proportionality, and the need for community denunciation to deter future offending.
- 7.78 Further, if a prosecution is ongoing, the accused may have limited incentive to properly engage in restorative justice processes by accepting responsibility or expressing remorse. This increases the likelihood that a victim will be dissatisfied or even further traumatised, particularly if the mediation fails.<sup>90</sup>
- 7.79 The capacity of some victims to make truly independent and informed decisions may also be compromised, particularly when the offending involves family violence or sexual offending and the perpetrator is known to the victim. If restorative justice procedures were available as a pre-trial option, there are certain offences, victims and offenders for which such procedures may be assessed as unsuitable.
- 7.80 Some of these concerns might be resolved by requiring that any restorative justice conference involve the prosecutor as the representative of the public interest, as well as the victim and offender. This could ensure that public interest considerations are properly taken into account in any proposed outcome arising from a restorative justice conference. However, the presence of a prosecutor might also inhibit the involvement of the accused or the victim.

### Prosecuting-witness reforms

- 7.81 Reforming the role of victims during the trial to allow victims to make essentially prosecutorial decisions, such as calling witnesses and leading evidence (see Chapter 8), would necessarily involve expanding the role for the victim during pre-trial proceedings.
- 7.82 The period leading up to a trial usually involves the prosecution and accused filing multiple documents with the court and providing each other with copies. If victims are given an expanded, more prosecutorial role, consideration should be given to the extent to which victims would also be required to engage in these pre-trial procedures.
- 7.83 Consideration should also be given to whether victims should have obligations as prosecuting witnesses. A key prosecutorial duty is disclosure, which involves disclosing all relevant material to the accused.<sup>91</sup> Disclosure is particularly important in adversarial criminal trials, where the parties decide what evidence is placed before the court. In the ICC, where victim participation in an essentially adversarial trial has extended to calling witnesses and submitting evidence, the absence of disclosure obligations for victims has been the subject of criticism.<sup>92</sup>

90 Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002); Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (May 2014) 58–9.

91 See *Criminal Procedure Act 2009* (Vic) and Director of Public Prosecutions Victoria, *Director's Policy: Disclosure* (24 November 2014).

92 *Prosecutor v Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled 'Decision on the Modalities of Victim Participation at Trial') (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [72], [85]–[86]; Bridie McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness' (2011) 18 *Australian International Law Journal* 105, 115.

## Questions

### Role of victims—confidential communications

- 21 Are victims exercising their right to appear in relation to confidential communications applications? If not, why not and how might that be addressed?
- 22 Having regard to the practices in other jurisdictions, should victims have a greater role in pre-trial proceedings regarding confidential communications? Should the types of communications and the offences these proceedings relate to be expanded?

### Role of victims—pre-trial proceedings generally

- 23 Should victims have a role in other pre-trial proceedings in which they have an interest? If so, what should be the test for determining whether victims have an interest?
- 24 If victims are given a greater role in pre-trial proceedings, should disclosure obligations be imposed on victims? What other obligations might be imposed?
- 25 How might any role for victims in pre-trial proceedings impact on or relate to the role of victims during the jury trial?
- 26 If victims are to have a participating-witness or prosecuting-witness role, should the state provide legal representation for victims?

### Pre-trial restorative justices procedures

- 27 Should restorative justice procedures be available in the pre-trial phase of proceedings? If so, should any limits be placed on the use of such procedures?



# The role of victims in the trial

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## 8. The role of victims in the trial

### Introduction

- 8.1 For many victims, the trial is the focal point of their journey through the criminal justice system. Despite the implementation of a range of reforms over the last two or more decades, the trial process continues to be a source of dissatisfaction and distress for many victims.
- 8.2 This chapter starts by outlining the proceedings in a typical criminal trial, focusing on the ways in which victims are, or are not, involved in that process. This outline canvasses recent innovations applicable to victims, many of which have been directed towards reducing trauma and distress for vulnerable victims, children and victims of sexual assaults.
- 8.3 This chapter then turns to examine some examples of recent innovations and alternative procedural roles for victims from other jurisdictions. Finally, a range of reform proposals are canvassed and questions posed.

### The current system in Victoria

- 8.4 The following sets out the procedures followed at each stage of a criminal trial in Victoria. As discussed in Chapter 2, the role of victims in Victoria's common law adversarial trial process is that of witness for the prosecution.

### Entering a plea

- 8.5 Once the pre-trial matters detailed in the preceding chapter are completed, the trial commences. The first step in the formal trial is when the charge(s) on the indictment are read out to the accused, who pleads not guilty<sup>1</sup> in the presence of a panel of potential jurors.<sup>2</sup>

### Jury selection

- 8.6 A jury of 12 people is then selected from the panel of potential jurors.<sup>3</sup> At this time, the accused and the lawyers for the prosecution and the accused are in the courtroom. The victim is not present.
- 8.7 The accused and the prosecution both play an active role in selecting the jury, with the right to exclude without cause six potential jurors each.<sup>4</sup> Both parties can also challenge an unlimited number of potential jurors 'for cause'.
- 8.8 Victims have no right to have input into the selection of the jury.

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1 This is called an arraignment: *Criminal Procedure Act 2009* (Vic) s 215.

2 *Ibid* s 217.

3 *Juries Act 2000* (Vic) ss 30, 36. The process for jury selection is set out in the Act.

4 *Ibid* ss 38, 39. In the case of the prosecution, challenging a juror is described as 'standing aside'.

## The jury trial

- 8.9 At the start of the trial before the jury the judge will often make an order that all witnesses are to remain outside the courtroom until they have given their evidence. This is to prevent witnesses from being influenced by what is said by the judge, prosecutor, accused's lawyer or other witnesses.
- 8.10 This general order does not apply to victims. Rather, judges may only exclude victims at this stage if they consider it 'appropriate to do so'.<sup>5</sup> The judge can order the victim to leave the court at any time after he or she has given evidence.<sup>6</sup>
- 8.11 The Victorian criminal trial is structured as follows:
- The judge gives preliminary instructions to the jury about the trial process and procedures.
  - The prosecutor gives an opening address to the jury setting out the prosecution case against the accused.<sup>7</sup>
  - The accused's lawyer presents to the jury a response to the prosecution's opening.<sup>8</sup>
  - The prosecution case is presented to the jury, through the evidence of witnesses and exhibits.
  - Each witness for the prosecution, including the victim, gives evidence in three stages:
    - First, open-ended questions are asked by the prosecutor to elicit the witness's account of the alleged offence. This is known as evidence-in-chief.
    - Second, the accused's lawyer can cross-examine the witness. Cross-examination usually (but not always) involves asking closed questions ('leading questions'), designed to elicit short responses, such as 'yes' or 'no'. The questions are usually directed to challenging the credibility or reliability of the witness, eliciting evidence favourable to the accused, and putting the accused's case to the witness.
    - Third, the prosecutor has the opportunity to re-examine a witness by asking open-ended questions about topics that arose during cross-examination.<sup>9</sup>
  - Any legal issues that arise during the trial are dealt with by the judge making a ruling after hearing submissions from the prosecutor and accused's lawyer, usually in the absence of the jury. The prosecutor and the accused's lawyer may appeal a ruling made by the trial judge to the Court of Appeal in certain circumstances.
  - At the close of the prosecution case, the accused's lawyer may make a submission that the evidence before the jury is flawed in some way and that, as a matter of law, there is no case for the accused to answer.<sup>10</sup> If this submission is accepted, the judge will direct the jury that they do not need to reach a verdict.<sup>11</sup> In such circumstances, the accused is found not guilty.
  - If there is a case to answer, the accused may elect to give evidence and call other witnesses to give evidence. The accused is not required to give evidence or call witnesses.<sup>12</sup>
  - After the jury has heard all the evidence, the prosecutor and accused's lawyer make submissions to the judge about what directions of law should be given to the jury.<sup>13</sup>

5 *Criminal Procedure Act 2009* (Vic) s 336A(1). Section 336A is the only section of the *Criminal Procedure Act* which uses the word victim in the context of the trial proper. All other relevant provisions use the term 'complainant'.

6 *Ibid* s 336A(2).

7 *Ibid* s 224.

8 *Ibid* s 225.

9 David Ross, *Ross on Crime* (Lawbook Co, 2nd ed, 2004) [18.900].

10 *Criminal Procedure Act 2009* (Vic) s 226.

11 *Ibid* s 241.

12 *Ibid* s 226.

13 *Jury Directions Act 2015* (Vic) ss 11, 12.

- The prosecutor, followed by the accused's lawyer, then make closing addresses to the jury 'for the purpose of summing up the evidence'.<sup>14</sup>
- The trial judge gives directions of law to the jury, 'so as to enable the jury to properly consider its verdict'.<sup>15</sup>
- Finally, the jury deliberates before deciding whether the verdict is guilty or not guilty.

8.12 There is no provision in the *Criminal Procedure Act 2009* (Vic) or the *Jury Directions Act 2015* (Vic) for the victim to have a role or input at any of these stages of the trial, other than as a witness for the prosecution.

### Prosecutorial decisions and obligations

8.13 Prosecutors make numerous decisions in the lead-up to and throughout the trial. These decisions generally relate to what evidence to put before the jury, which witnesses to call and how to respond to defence cross-examination questions, legal applications and witnesses.<sup>16</sup>

8.14 In making these decisions, the prosecutor has considerable discretion, which is limited by general principles of fairness. In Victoria, victims have no say in these decisions.

8.15 As discussed in Chapter 7, the prosecutor has an ethical obligation to act fairly and impartially. Flowing from this is the duty to disclose all relevant evidence held by the prosecution. The prosecution has an ongoing obligation to disclose to the accused any 'information, document or thing' that comes into its possession after an accused is committed for trial.<sup>17</sup> The DPP's disclosure policy requires timely disclosure of material which is relevant or possibly relevant to an issue in the case, raises a new issue or the possibility of a new issue or has real prospects of leading to new evidence.<sup>18</sup> In addition, the prosecution must notify an accused of any additional evidence it intends to adduce from witnesses it intends to call at trial, including expert witnesses.<sup>19</sup>

8.16 As witnesses, victims have no disclosure obligations.

### Powers of the judge and evidentiary protections relevant to the victim

8.17 There is no general obligation on the judge to treat the victim differently to any other witness during the trial. However, judges are obliged by the *Criminal Procedure Act 2009* (Vic) to order that various protective procedures be put in place for victims of sexual offences and other vulnerable witnesses.

8.18 The judge also has the power to control the way the prosecutor and the accused's lawyer question a victim while giving evidence.

### Protective procedures for sexual assault victims when giving evidence

8.19 Where the trial is for a sexual offence, and the victim is an adult, the judge must order that the victim's evidence be given by closed circuit television from a remote witness facility.<sup>20</sup> This evidence must be recorded.<sup>21</sup> The judge may however, make an order allowing the victim to give evidence in the courtroom on application of the prosecutor, but only if the judge is satisfied the victim is aware of the ability to give evidence by closed-circuit television and nonetheless is able and willing to give evidence in the courtroom.<sup>22</sup>

14 *Criminal Procedure Act 2009* (Vic) ss 234, 325.

15 *Ibid* s 238.

16 Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (Federation Press, 2015) 69–70. See also Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Ethics* (24 November 2014) [13]: 'The prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the prosecution.'

17 *Criminal Procedure Act 2009* (Vic) s 185. See also ss 110, 111, 416.

18 Director of Public Prosecutions Victoria, *Director's Policy: Disclosure* (24 November 2014) [7], citing *R v Farquharson* (2009) 26 VR 410; [2009] VSCA 307; *R v Spiteri* (2004) 61 NSWLR 369; [2004] NSWCCA 321.

19 *Criminal Procedure Act 2009* (Vic) s 188. A similar obligation is imposed on the accused: s 189.

20 *Ibid* ss 359, 360(a), 363.

21 *Ibid* s 362.

22 *Ibid* ss 359, 360(a), 363.

- 8.20 If the victim is to give evidence in the courtroom, the judge must direct that a screen is used to remove the accused from the direct line of vision of the victim, unless satisfied that the victim is aware of this right and does not wish a screen to be used.<sup>23</sup>
- 8.21 The judge must direct that the victim have a support person beside them while giving evidence, unless satisfied that the victim is aware of this right and does not wish to have a support person. This provision applies whether the victim is giving evidence in the courtroom or from a remote witness facility.<sup>24</sup>
- 8.22 There is no legislated procedure in the Criminal Procedure Act for how the victim is to communicate his or her wishes directly to the judge.

### Protective procedures for family violence victims when giving evidence

- 8.23 If the offence involves conduct that falls within the definition of family violence,<sup>25</sup> the judge may order that the victim give evidence by closed-circuit television or behind a screen, and with a support person present.
- 8.24 Unlike trials for sexual offences, in trials that involve family violence, the judge has a discretion as to whether to make an order for protective measures for the victim.<sup>26</sup>

### Protective procedures for children and cognitively impaired victims in sexual offence trials

- 8.25 If the victim is a child<sup>27</sup> or has a cognitive impairment<sup>28</sup> and the trial is for a sexual offence, the entire evidence of the victim must be given at a 'special hearing'.<sup>29</sup>
- 8.26 During a special hearing, the accused and his or her lawyer are in the courtroom and the victim is in a remote facility, linked by closed-circuit television.<sup>30</sup>
- 8.27 The victim's evidence-in-chief takes the form of a previously recorded video of the victim recounting the allegations and being asked questions by a police officer.<sup>31</sup> That video is played in the presence of the victim. The victim is then cross-examined by the accused's lawyer and re-examined by the prosecutor over the closed-circuit television link.
- 8.28 The special hearing is video-recorded.<sup>32</sup> The recording becomes the entirety of the evidence of the victim in the trial and in any subsequent retrial or civil proceeding.<sup>33</sup>
- 8.29 The judge may direct that the special hearing be held before or after the jury has been empanelled. If it is held before, the recording of the special hearing is played to the jury as the evidence of the victim.<sup>34</sup> In deciding whether to hold the special hearing before or during the trial, the judge must have regard to:
- the age and maturity, or the severity of the cognitive impairment of the victim
  - any preference expressed by the victim
  - whether holding the special hearing during the trial is likely to intimidate or have an adverse effect on the victim
  - the need to complete the victim's evidence expeditiously

23 Ibid ss 360(b), 364.

24 Ibid ss 360(c), 365.

25 Contained in the *Family Violence Protection Act 2008* (Vic) s 5.

26 *Criminal Procedure Act 2009* (Vic) s 360.

27 Defined as under the age of 18 years at the commencement of the proceeding: ibid s 369(2)(a).

28 Cognitive impairment includes impairment because of mental illness, intellectual disability, dementia or brain injury: ibid s 3.

29 *Criminal Procedure Act 2009* (Vic) ss 369–370.

30 Ibid s 372.

31 Ibid ss 367–368.

32 Ibid s 370.

33 Ibid s 374.

34 Ibid ss 373–374.

- the likelihood that the evidence given by the witness will include inadmissible evidence that may result in the discharge of the jury
  - any other matter that the court considers relevant.<sup>35</sup>
- 8.30 There is no legislated procedure for the way in which the victim is to put their preference or any other relevant matter before the court.
- 8.31 If a victim's evidence has been taken by special hearing, the accused's lawyer must apply to the judge for permission if the accused wishes to further cross-examine the victim at the trial. This application will only be granted if the judge is satisfied that:
- the accused became aware of a matter after the special hearing that they could not reasonably have been aware of at the time of the recording, or
  - if the victim were giving evidence in court, the victim could be recalled in the interests of justice, or
  - it is otherwise in the interests of justice to allow the victim to be cross-examined or re-examined.<sup>36</sup>
- 8.32 The prosecutor may apply for the victim's evidence to be given in court instead of in a special hearing. The judge may grant this application if satisfied that the victim is aware of the right to have a special hearing and is able to, and wishes to, give evidence in court.<sup>37</sup>
- 8.33 There is no legislated procedure for the victim to make an application or to address the court on these matters.

### Victim not to be cross-examined by accused

- 8.34 In a trial for a sexual offence or an offence involving family violence, the judge may declare the victim a protected witness.<sup>38</sup> This applies to adult and child victims.
- 8.35 The accused is prohibited from personally cross-examining a protected witness.<sup>39</sup> Cross-examination must be done by a lawyer. If the accused does not have a lawyer, the judge must order Victoria Legal Aid to represent the accused, but only for the purpose of cross-examining the protected witness.<sup>40</sup>

### Use of recorded trial evidence of a victim in other proceedings

- 8.36 If the victim is an adult in a sexual offence trial, the special hearing provisions of the Criminal Procedure Act do not apply. However, a recording of the victim's trial evidence may be played instead of the victim having to give evidence again where:
- A retrial is required because the jury was discharged without verdict, or there was a successful appeal against conviction.
  - There is another proceeding for a related offence.
  - Civil proceedings are pursued.<sup>41</sup>

35 Ibid s 370(1B).

36 Ibid s 376.

37 Ibid s 370(2).

38 Ibid ss 353–355. Other witnesses who may be declared protected witnesses are family members of the victim and the accused, and any other witness the judge declares to be protected: s 354. Family violence is defined in the *Family Violence Protection Act 2008* (Vic) s 5.

39 *Criminal Procedure Act 2009* (Vic) s 356.

40 Ibid s 357.

41 Ibid ss 378–379.

- 8.37 The decision as to whether to apply to the court for permission to rely on a recording of the victim's evidence is made by the prosecution.<sup>42</sup> The judge has the discretion to allow the recording to be played if it is 'in the interests of justice to do so'. The factors the judge must consider are:
- whether the recording contains evidence-in-chief, cross-examination and re-examination
  - the effect of editing out any inadmissible evidence
  - whether the accused would be unfairly disadvantaged by admitting the recording
  - any other matter the court considers relevant.<sup>43</sup>
- 8.38 If the recording is admitted in evidence, the victim only has to come to court if they are required to give further evidence.<sup>44</sup> The prosecutor may apply to the judge for a direction that the victim give further evidence, which the judge can only grant if satisfied that the victim is able and wishes to do so, and that it is in the interests of justice.<sup>45</sup>
- 8.39 The victim can only be cross-examined in addition to the recording with the permission of the court. The judge must not grant leave unless satisfied that:
- the accused has become aware of a matter that they could not reasonably have been aware of at the trial
  - if the victim were giving evidence in court, they could be recalled in the interest of justice to give further evidence
  - it is otherwise in the interest of justice to allow cross-examination or re-examination.<sup>46</sup>
- 8.40 The Criminal Procedure Act does not provide a process for the victim to make submissions or have their views put before the judge on any of the above matters relating to using the victim's recorded trial evidence in a subsequent criminal proceeding.

### Questions and questioning of victims during the trial

- 8.41 The judge has the power to control the way witnesses, including the victim, are treated by the prosecutor and the accused's lawyer when they are giving their evidence. In fact, the judge may make any order which the judge 'considers just' about the way a witness is questioned, and the presence and behaviour of any person in connection with the questioning of the witness.<sup>47</sup>
- 8.42 The judge also has the power to prevent specific types of questioning and questions on specific topics.

42 Ibid s 380.

43 Ibid s 381.

44 Ibid s 383.

45 If the application is granted, the victim may be cross-examined in relation to any direct testimony: ibid s 384.

46 Ibid s 385.

47 Evidence Act 2008 (Vic) s 26.

## Improper questions and questioning

- 8.43 The *Evidence Act 2008* (Vic) gives the trial judge the power and the duty to ensure that questioning of all witnesses, including victims, during the trial is respectful and proper.<sup>48</sup>
- 8.44 The judge may stop lawyers from asking an improper question or questioning the victim in an improper way during cross-examination.<sup>49</sup>
- 8.45 Improper questions or improper questioning are questions or a series of questions which are:
- misleading or confusing
  - unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
  - put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
  - based only on a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).<sup>50</sup>
- 8.46 For vulnerable victims, the judge must stop lawyers from asking improper questions in cross-examination, unless the court is satisfied that, in all the relevant circumstances of the case, it is necessary for the question to be put.<sup>51</sup>
- 8.47 Vulnerable victims are defined as persons:
- under 18 years of age, or
  - with a cognitive impairment or an intellectual disability, or
  - who the court considers to be vulnerable having regard to any personal conditions or characteristics, such as:
    - age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding, and personality
    - mental or physical disability
    - the context in which the question is put, including the nature of the proceedings, the offence and the relationship between the victim and the accused.<sup>52</sup>
- 8.48 Australian courts have emphasised the importance of taking into account the effect of cross-examination on a victim when deciding whether to prohibit a particular question or line of questioning.<sup>53</sup>

## Questions about reputation and sexual activities

- 8.49 In a trial for a sexual offence, the accused's lawyer is prohibited from asking about 'the general reputation of the victim with respect to chastity'.<sup>54</sup>
- 8.50 In addition, cross-examination about a victim's sexual activities (other than those to which the charge relates) is prohibited, unless the judge rules that the evidence is of substantial relevance to a fact in issue and is in the interests of justice.<sup>55</sup> These rulings are generally made before the trial commences, and are discussed in more detail in Chapter 7.

48 Ibid s 41. The duty imposed by section 41 applies whether or not an objection is raised to a particular question by the prosecutor: s 41(7).

49 Ibid s 41(1). Section 41 applies to all witnesses, including victims.

50 Ibid s 41(3).

51 Ibid s 41(2).

52 Ibid s 41(4).

53 See, eg, *R v TA* (2003) 57 NSWLR 444, 445–447 (Spigelman CJ).

54 *Criminal Procedure Act 2009* (Vic) ss 339, 341.

55 Ibid ss 342, 349.

## Giving evidence: narrative form and leading questions

- 8.51 A concern often raised is that the rules of evidence guiding the adversarial trial considerably limit the way that victims can describe what happened to them. Victims have voiced frustration about being unable to tell the full story and being precluded from explaining what happened to them, in their own way.
- 8.52 In Victoria, some measures are available to address this issue. Specifically, the trial judge has the power to allow a victim to give evidence ‘wholly or partly in narrative form’.<sup>56</sup> The judge can make such an order on the judge’s own initiative, or after receiving an application from the prosecutor.<sup>57</sup> The order can also specify the ‘way in which evidence is to be given’ in narrative form.<sup>58</sup>
- 8.53 There is also scope to limit the use of leading questions by the accused’s lawyer. Leading questions, as the name suggests, tend to suggest a particular answer, and are often designed to elicit short ‘yes’ or ‘no’ responses.<sup>59</sup> Prosecutors are not permitted to ask leading questions of witnesses in examination-in-chief or re-examination.<sup>60</sup> However, leading questions are commonly used in cross-examination.<sup>61</sup> Asking children questions in this way has been criticised as confusing and potentially misleading.<sup>62</sup>
- 8.54 The judge has the discretion to prevent leading questions being asked in cross-examination in circumstances where ‘the witness’s age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness’s answers’.<sup>63</sup> The judge can also stop leading questions being used if satisfied that the evidence would be better ascertained without leading questions being used.<sup>64</sup>

## Alternative processes and procedures

### Common law jurisdictions

- 8.55 Across common law jurisdictions, the role of the victim at trial is as a witness for the state’s prosecution.
- 8.56 All Australian jurisdictions have in place some measures to protect witnesses, including victims, who may find the experience of giving evidence during a trial particularly challenging or distressing.<sup>65</sup> All Australian jurisdictions also have in place rules that prohibit questioning that might cause victims distress, embarrassment, humiliation or difficulty.
- 8.57 The purpose of this section is to consider procedural and evidentiary safeguards distinctly different to, or of broader application than, the protective measures in place in Victoria.

56 *Evidence Act 2008* (Vic) s 29(2). Almost identical provisions exist in New South Wales: *Evidence Act 1995* (NSW) s 29(2); Tasmania: *Evidence Act 2011* (Tas) s 29(2); Australian Capital Territory: *Evidence Act 2011* (ACT) s 29(2).

57 *Evidence Act 2008* (Vic) s 29(2).

58 *Ibid* s 29(3).

59 *Ibid* s 3, dictionary, pt 1. A ‘leading question’ asked of a witness is a question which directly or indirectly suggests a particular answer to the question; or assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked. ‘The car was red, wasn’t it?’ is a leading question. ‘What colour was the car?’ is not.

60 *Ibid* s 37. Leading questions are permitted with the leave of the court and in limited other circumstances.

61 *Ibid* s 42.

62 Adrian Keane, ‘Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re-Professionalism’ (2012) 16 *International Journal of Evidence and Proof* 175, 176–80.

63 *Evidence Act 2008* (Vic) s 42(2)(d).

64 *Ibid* s 42(3).

65 See generally Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 539.

## Video-recorded statements

- 8.58 On 1 June 2015, amendments to the *Criminal Procedure Act 1986* (NSW), which set out the circumstances in which video-recorded interviews between police and victims of domestic violence offences are admissible as the victims' evidence-in-chief, came into effect.<sup>66</sup> A person is a domestic violence victim if the offence involves personal violence<sup>67</sup> and the victim and the accused are in a domestic relationship.<sup>68</sup>
- 8.59 A recorded statement from a domestic violence victim must be recorded with 'the consent of the victim and as soon as practicable after the commission of the offence'.<sup>69</sup>
- 8.60 In deciding whether to use the recorded statement as the victim's evidence-in-chief, the prosecutor must take into account the wishes of the victim, any evidence of intimidation of the victim by the accused, and the objects of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).<sup>70</sup>
- 8.61 If the recorded statement is used as the victim's evidence-in-chief, the victim must then be available for cross-examination and re-examination.<sup>71</sup>
- 8.62 In the Australian Capital Territory, audiovisual recordings of police interviews with child victims and intellectually impaired victims of sexual offences and offences involving violence are admissible as victims' evidence-in-chief at trial.<sup>72</sup>

## Special arrangements generally

- 8.63 In South Australia, special arrangements such as the use of screens, closed-circuit television, and support people apply to a wider group of vulnerable victims than in Victoria.<sup>73</sup> Vulnerable witnesses are defined as:
- witnesses under 16 years
  - witnesses with a cognitive or mental impairment
  - victims of 'serious offences against the person' (further defined as including attempted murder, attempted manslaughter, sexual offences, stalking and kidnapping)
  - witnesses who experience a 'special disadvantage' because of personal circumstances or the circumstances of the case
  - witnesses who have been threatened, subject to, or who have reasonable grounds to fear retaliation or retribution.<sup>74</sup>
- 8.64 If the party calling the vulnerable witness (usually the prosecutor) makes an application for special measures, the judge must make the order, subject to a series of fair trial considerations.<sup>75</sup>

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66 See *Criminal Procedure Act 1986* (NSW) s 76A, pt 4B. The NSW legislation uses the term 'domestic violence complainants'.

67 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4 lists the offences which are 'personal violence offences', which include serious assaults and murder, some sexual offences and certain public order and weapons offences.

68 As defined by the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

69 *Criminal Procedure Act 1986* (NSW) s 289D. It must include the victim stating her or his age and that the statement is true: s 289F.

70 Ibid s 289G. The objects of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) are set out in ss 9–10 and include: preventing domestic violence and ensuring the safety of all persons who experience or witness domestic violence, or who experience personal violence outside a domestic relationship.

71 *Criminal Procedure Act 1986* (NSW) s 289F(5).

72 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 37, 40A–40M.

73 *Evidence Act 1929* (SA) s 13–13A.

74 Ibid s 4.

75 Ibid s 13A(1), (4).

- 8.65 Judges should also, on their own initiative and where it is desirable to protect any witness (including victims) from embarrassment, distress, intimidation by the atmosphere of the courtroom, or for any other reason, put in place special arrangements for taking evidence.<sup>76</sup> This differs from Victoria, where the Criminal Procedure Act more generally provides that unless the context otherwise requires, a judge may exercise a power or discretion on their own initiative.<sup>77</sup>
- 8.66 The Australian Capital Territory's provisions regarding special arrangements also apply to a broader group of victims than Victoria's. Specifically, these provisions apply to victims of sexual offences and offences involving violence, including grievous bodily harm, assault occasioning bodily harm, wounding, culpable driving, robbery and aggravated robbery.<sup>78</sup>

### Special hearings for taking trial evidence

- 8.67 The Victorian provisions for pre-recording the trial evidence of child and cognitively impaired victims in sexual offence trials (at special hearings) are substantially replicated in all other Australian jurisdictions.<sup>79</sup> Notably, South Australia and the Australian Capital Territory apply this protective measure more broadly.
- 8.68 South Australia permits the evidence of all victims to be pre-recorded, where the judge considers it necessary to protect the victim from distress, embarrassment or intimidation by the courtroom.<sup>80</sup> The order to have the evidence pre-recorded should be made on the judge's own initiative. As noted above, if the prosecutor makes an application for an order for special arrangements for a vulnerable victim, the judge must make an order for one or more special arrangements, which includes the pre-recording of the victim's evidence.<sup>81</sup>
- 8.69 The Australian Capital Territory's provisions for recording the victim's evidence prior to trial extend to adult victims of a range of sexual offences, where the judge considers the victim should give evidence as soon as practicable because they are likely to suffer severe emotional trauma or be intimidated or distressed.<sup>82</sup>

### Use of the recorded evidence of victim in other proceedings

- 8.70 New South Wales has a stricter regime protecting victims of sexual offences from having to give evidence at any retrial. Victims of certain sexual offences cannot be compelled to give evidence at the retrial, where that retrial follows a successful appeal against conviction by an accused. Instead, the recording of the evidence given by the victim in the original trial is used and edited if necessary.<sup>83</sup>
- 8.71 The judge cannot order the victim to give evidence at the retrial, whereas in Victoria the judge can make such an order.
- 8.72 A victim in New South Wales may seek permission from the judge to give evidence again in the retrial. Before granting approval, the judge must be satisfied that further oral evidence by the victim is necessary to clarify something, to cover new matters or in the interests of justice.<sup>84</sup> If the victim does then give further evidence, the victim can also be cross-examined.<sup>85</sup>

76 Ibid s 13.

77 *Criminal Procedure Act 2008* (Vic) s 337.

78 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 38C–38E, 39, 43. See section 37 for the list of offences to which the protective measures apply.

79 Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 567.

80 *Evidence Act 1929* (SA) ss 13–13A. The judge must be satisfied that the order can be made without prejudice to the parties: ss 13(1)(c), s 13A(1)(c).

81 Ibid ss 13A(1), (2)(b).

82 See *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 40N–40U.

83 *Criminal Procedure Act 1986* (NSW) ss 306B, 306C. Note that the prosecutor must give written notice to the accused and to the court of his or her intention to tender the record of the victim's original evidence, at least 21 days before the new trial: s 306B(3). The best available record should be relied on, with preference being given to an audiovisual recording, then an audio-recording and finally, a written transcript: s 306E.

84 Ibid s 306D(1)–(2).

85 Ibid s 306D(4).

## Intermediaries

- 8.73 There is a wealth of evidence that the way that cross-examination has traditionally been conducted is particularly unfair to child victims and other vulnerable victims.<sup>86</sup>
- 8.74 Some common law jurisdictions have introduced, or are considering introducing, intermediaries to assist with the process of questioning vulnerable witnesses during the trial.<sup>87</sup> The intermediary's role can take a number of forms, although the central function is to facilitate communication between the vulnerable victim and the prosecutor or the accused's lawyer, so that questions are asked in a way that the victim can understand. Intermediaries are not victim-advocates or support people; their primary purpose is to ensure the court receives the best evidence from these victims.<sup>88</sup>

## United Kingdom

- 8.75 Intermediaries have been used in the United Kingdom since 2008, following the introduction of a pilot in 2004.<sup>89</sup> They can be used in any criminal proceedings for witnesses, including victims, who:
- are under 18 at the time of the hearing
  - have a 'mental disorder', which includes a learning difficulty
  - have a 'significant impairment of intelligence of social functioning'
  - have a physical disability or other physical disorder.<sup>90</sup>
- 8.76 The use of intermediaries is well established in England and Wales. As at January 2014, intermediaries had been used 6500 times since 2004.<sup>91</sup> The scheme includes registering and training intermediaries drawn from a range of professions, including speech and language therapists, occupational therapists, psychologists, social workers, nurses and teachers.<sup>92</sup>
- 8.77 The prosecutor or the accused's lawyer can apply to the judge to use an intermediary, or the judge can order the use of an intermediary on his or her own initiative. The judge must assess whether the quality of the witness's evidence would be improved by the use of an intermediary.<sup>93</sup>
- 8.78 As part of an application, the intermediary will prepare a report for the court outlining how they would question the witness to obtain the best possible evidence. If the accused opposes the appointment of an intermediary, a hearing is held to determine the issue, during which the intermediary gives evidence.<sup>94</sup> Notably, when making a decision to appoint an intermediary, the judge should take the views of the victim-witness into account.<sup>95</sup>
- 8.79 If the court allows the use of an intermediary, a 'ground rules hearing' occurs, during which 'communication techniques will be discussed and rules established as to the form and type of questions to be asked'.<sup>96</sup>

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86 The evidence applies to all child and cognitively impaired witnesses, although this reference is concerned with victim-witnesses. See Emily Henderson, 'All the Proper Protections—the Court of Appeal Rewrites the Rules for the Cross-examination of Vulnerable Witnesses' (2014) 2 *Criminal Law Review* 93, 93–94, citing Joyce Plotnikoff and Richard Woolfson, 'Kicking and Screaming: The Slow Road to Best Evidence' in J R Spencer and M E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (2012) 26–30.

87 See Amy Watts, *To Investigate Models of Intermediaries for Child Victims/Witnesses in the Criminal Justice System in England, Ireland, Austria and Norway* (Report by 2013 Churchill Fellow, 2 January 2014) <<https://www.churchilltrust.com.au/fellows/>>.

88 Ibid 19.

89 Ibid 15; Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 571.

90 *Youth Justice and Criminal Evidence Act 1999* (UK) s 16(1)–(2).

91 Amy Watts, *To Investigate Models of Intermediaries for Child Victims/Witnesses in the Criminal Justice System in England, Ireland, Austria and Norway*: Report by 2013 Churchill Fellow (2 January 2014) 15, 20 <<https://www.churchilltrust.com.au/fellows/>>.

92 Ibid 16.

93 *Youth Justice and Criminal Evidence Act 1999* (UK) s 19(1)–(2).

94 Amy Watts, *To Investigate Models of Intermediaries for Child Victims/Witnesses in the Criminal Justice System in England, Ireland, Austria and Norway* (Report by 2013 Churchill Fellow, 2 January 2014) <<https://www.churchilltrust.com.au/fellows/>>.

95 *Youth Justice and Criminal Evidence Act 1999* (UK) s 19(3)(a).

96 Amy Watts, *To Investigate Models of Intermediaries for Child Victims/Witnesses in the Criminal Justice System in England, Ireland, Austria and Norway* (Report by 2013 Churchill Fellow, 2 January 2014) <<https://www.churchilltrust.com.au/fellows/>>.

- 8.80 In the lead-up to and during the trial, intermediaries may assist the prosecution and the accused's lawyer to:
- formulate questions to put to a victim-witness
  - relay questions from the prosecutor and the accused to the victim-witness, and the victim's response to the parties
  - provide assistance with communication aids when necessary
  - alert the court to issues such as fatigue.<sup>97</sup>

### Intermediaries in Australia

- 8.81 Western Australia and New South Wales both allow the use of intermediaries.
- 8.82 Western Australia's scheme has been used several times since its first application in 2011.<sup>98</sup> It is only available for child witnesses (including victims) and relies on the judge taking the initiative to appoint an intermediary.<sup>99</sup> The intermediary's role is to 'communicate and explain' the following:
- questions put to the child
  - the evidence given by the child in response to the court.<sup>100</sup>
- 8.83 There is no 'ground rules hearing' contemplated as part of the scheme, nor are intermediaries expected to play an advisory function.<sup>101</sup>
- 8.84 The *Criminal Procedure Act 1986* (NSW) provides that witnesses who have difficulty communicating can use a person for assistance while giving evidence, 'but only if the witness ordinarily receives assistance to communicate from such a person or persons on a daily basis'.<sup>102</sup>
- 8.85 It appears the provision has never been applied in practice, and there are no procedures or guidelines in place for its administration. It is not clear from the provision if parties are entitled to seek assistance on behalf of the witness, or if it is for the judge to invoke the provision.
- 8.86 There is also provision for vulnerable witnesses (defined as children or persons with a cognitive impairment)<sup>103</sup> to have a support person present, who may be used as an interpreter 'for the purpose of assisting the vulnerable person with any difficulty in giving evidence associated with an impairment or a disability'.<sup>104</sup> However, it appears this provision is not interpreted as permitting the support person to act in an intermediary-type role.<sup>105</sup> This provision also gives rise to concerns about the independence of a support person interpreting for a witness.

97 Ibid 19; J Plotnikoff and R Woolfson, 'Kicking and Screaming: The Slow Road to Best Evidence' in J R Spencer and M E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (2012).

98 Harriet Ketley, 'A Witness Intermediary Scheme in NSW—Issues and Challenges' (Paper presented at Intermediary Programs and Communication Models Symposium, Melbourne, 18 February 2015) 22–3. The scheme was introduced in 1992.

99 *Evidence Act 1906 (WA)* s 106F: 'the court may appoint'; Harriet Ketley, 'A Witness Intermediary Scheme in NSW—Issues and Challenges' (Paper presented at Intermediary Programs and Communication Models Symposium, Melbourne, 18 February 2015) 22–3.

100 *Evidence Act 1906 (WA)* s 106F.

101 Harriet Ketley, 'A Witness Intermediary Scheme in NSW—Issues and Challenges' (Paper presented at Intermediary Programs and Communication Models Symposium, Melbourne, 18 February 2015) 22–3.

102 *Criminal Procedure Act 1986* (NSW) s 275B.

103 Ibid s 306M(1). Cognitive impairment is defined as including an intellectual disability, a developmental disorder, a neurological disorder, dementia, a severe mental illness or a brain injury: s 306(2).

104 Ibid s 306ZK(3)(b).

105 Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 574.

## Inquisitorial criminal trials

- 8.87 In civil law inquisitorial criminal trials in Europe, victims tend to play a more active role than in common law adversarial trials. As outlined in Chapter 3, victims are generally involved in one of three main ways: as a civil party, auxiliary prosecutor or as a legally represented victim-witness.
- 8.88 The following section considers victims' roles as auxiliary prosecutors and legally represented victim-witnesses. As the role of civil party is specifically directed towards the victim making a claim for compensation during the trial, civil party procedures are considered in Chapter 10.<sup>106</sup>

### The victim as an auxiliary prosecutor

- 8.89 In some inquisitorial criminal justice systems, including Germany, Austria, Norway and Sweden, victims can appear as auxiliary prosecutors during the criminal trial.<sup>107</sup> Auxiliary prosecutors have been described as being in 'a position comparable to that of the public prosecutor',<sup>108</sup> although they are independent from the public prosecutor.<sup>109</sup>
- 8.90 Germany's criminal justice system contains an archetype of the auxiliary prosecution model (*Nebenkläger*). The Commission has therefore decided to use Germany as a case study.
- 8.91 In German law, victims of serious crimes, including sexual offences, assaults, kidnapping, attempted murder, manslaughter and murder, are entitled to appear as auxiliary prosecutors.<sup>110</sup>
- 8.92 To become an auxiliary prosecutor, a victim must submit a written request to the court.<sup>111</sup> After receiving the victim's written request, the court will seek the prosecutor's views, before deciding whether the victim can be joined.<sup>112</sup> Victims can join as auxiliary prosecutors at any stage of the proceedings.<sup>113</sup>
- 8.93 Trials in Germany centre strongly on the judge, who directs and controls the proceedings. The trial starts with the judge examining the accused.<sup>114</sup> Following the accused's examination, witnesses are called and questioned by the judge. The prosecution and defence can also ask questions of these witnesses, with the judge's permission.<sup>115</sup> Questioning in the style of cross-examination is permitted, but occurs rarely in practice.<sup>116</sup> Because the judge directs the evidence, little distinction is made between the prosecution and the defence case.<sup>117</sup>

106 Jo-Anne Wemmers, 'Victim Policy Transfer: Learning From Each Other' (2005) 11(1) *European Journal on Criminal Policy and Research* 121, 125.

107 Jonathan Doak, 'Victims' Rights in the Criminal Justice System' in G Bruinsma and D Wesiburd (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer, 2014) 5497, 5504.

108 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 28.

109 Kerstin Braun, 'Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure' (2013) 14 *German Law Journal* 1889, 1896; Helmut Kury and Michael Kichling, 'Accessory Prosecution in Germany: Legislation and Implementation' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2011) 41, 44.

110 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 363-64; Christoph Safferling, 'The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?' (2011) 11 *International Criminal Law Review* 183, 192.

111 *Strafprozeßordnung* [German Code of Criminal Procedure] (Germany) s 396(1).

112 *Ibid* s 396(2).

113 *Ibid* s 395(4).

114 Renata Lawson Mack, *Comparative Criminal Procedure: History, Processes and Case Studies* (William S Hein & Co, 2008) 425, citing *Strafprozeßordnung* [German Code of Criminal Procedure] (Germany) s 243.

115 *Ibid* citing *Strafprozeßordnung* [German Code of Criminal Procedure] (Germany) s 240.

116 Lorraine Wolhuter, 'German and Swedish Procedures as Models for the Empowerment of Racial Minority Women in Rape Trials' (2010) 38 *International Journal of Law, Crime and Justice* 1, 9.

117 *Ibid*.

- 8.94 Within the German trial process, auxiliary prosecutors are entitled to:
- inspect the case file
  - be legally represented throughout the criminal trial
  - be present during the trial (regardless of whether or not the victim is appearing as a witness)
  - challenge a judge, if partiality is suspected
  - object to orders made by the judge
  - question witnesses, including the accused and experts
  - apply for evidence to be heard by the court
  - make statements in court, including a closing statement.<sup>118</sup>
- 8.95 For vulnerable victims, including victims of sexual offences, the court will order that they be provided with a government-funded lawyer. Other victims can apply for legal aid to cover the costs of their legal representation.<sup>119</sup>

### Independent lawyers for victims

- 8.96 In several European jurisdictions, including Sweden, Denmark, Iceland and Norway, victims are permitted to have lawyers to assist them throughout the criminal trial process.<sup>120</sup>
- 8.97 Generally speaking, legal representation is available for victims of crimes involving sexual violence and other crimes against the person, such as assaults, murder, manslaughter and attempted murder.
- 8.98 The level of assistance provided by victims' lawyers varies between jurisdictions, although two common functions are to provide support and to protect the victim's interests.
- 8.99 Norway has a robust form of legal representation for victims, relative to other jurisdictions. In Norway, victims' lawyers can be present in court throughout the trial. When the victim is being questioned, the victim's lawyer can pose additional questions to clarify the victim's evidence, and can object to questioning that is irrelevant or not appropriate.<sup>121</sup> According to Hege Salomon, a Norwegian lawyer who represents victims, the victim's lawyer might also call witnesses and submit evidence such as a doctor's report, although they are not permitted to speak to the guilt or not of the accused.<sup>122</sup> Victims' lawyers are permitted to make submissions regarding procedural matters that concern the victim, including asking for the accused to leave the room during the victim's evidence, and requesting that the court be closed to the public.<sup>123</sup>
- 8.100 In Sweden, the role of the victim's lawyer is more limited than in Norway. The *Counsel for Injured Party Act* provides that victims' lawyers 'shall look after the injured party's interests in the case and also provide support and assistance to the injured party'.<sup>124</sup> In practice, this involves preparing victims for the trial process, including canvassing the type of questioning that might take place. During the trial process, the victim's lawyer can object to offensive or inappropriate questions.<sup>125</sup>

118 Kerstin Braun, 'Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure' (2013) 14 *German Law Journal* 1889, 1896; Susanne Walther, 'Reparation in the German Criminal Justice System: What Is, and What Remains to be Done' (2000) 7 *International Review of Victimology* 265, 267. See also *Strafprozeßordnung* [German Code of Criminal Procedure] (Germany) s 397.

119 Kerstin Braun, 'Legal Representation for Sexual Assault Victims—Possibilities for Law Reform' (2014) 25(2) *Current Issues in Criminal Justice* 819, 826.

120 See generally Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 218–20 (Denmark), 441–2 (Iceland), 738–40 (Norway), 891–2 (Sweden).

121 Hege Salomon, 'Victim Lawyers in Norway' in Holly Johnson, Bonnie Fisher and Véronique Jacquier (eds), *Critical Issues on Violence Against Women: International Perspectives and Promising Strategies* (Routledge, 2015) 118, 121.

122 Ibid.

123 Ibid.

124 Maria Scheffer Lindgren, Barbro Renck and Christian Diesen, 'Criminal Justice for Assaulted Women in Sweden—Law Versus Practice' (2012) 4(1) *Review of European Studies* 167, 168.

125 A 2012 study of women in the Swedish criminal justice system who report 'intimate partner violence' found that 'in many cases, the victims made it clear that they did not wish to have an injured party counsel': *ibid* 172.

- 8.101 In Denmark, victims' lawyers are expected to support a victim throughout the trial process, including by providing information. Victims' lawyers can also access case evidence before the trial.<sup>126</sup> During the trial, the victim's lawyer is technically only permitted to be present in court while the victim gives evidence, although practice suggests that lawyers are often present for most of the trial.<sup>127</sup> The victim's lawyer can object to questions put to the victim and can request that the victim give evidence in the absence of the accused or in a closed court.<sup>128</sup> They are not permitted to call witnesses, question witnesses or the accused, or make submissions to the court on the law or the guilt of the accused.<sup>129</sup>

## Evidentiary principles relevant to questioning victims

### General evidentiary principles

- 8.102 As outlined in Chapter 3, different rules of evidence apply to trials in inquisitorial systems. Victims are not subject to robust cross-examination and there are generally fewer constraints on the way victims are permitted to describe what happened to them. In some inquisitorial jurisdictions, judges 'rarely condone inconsiderate examination of victim-witnesses, vulnerable or not'.<sup>130</sup>
- 8.103 This approach to evidence is related to the fact that professional judges determine whether the accused is guilty or not guilty.<sup>131</sup> In contrast, in adversarial criminal systems, a jury of lay people decides whether the accused is guilty or not. Cross-examination and rules limiting the evidence of witnesses in adversarial systems exist because juries are expected to make objective, and sometimes complicated, assessments of evidence, and the judge rules unreliable and irrelevant evidence inadmissible. This consideration does not arise in inquisitorial criminal systems, where judges are the primary adjudicators.<sup>132</sup>
- 8.104 The structure of the inquisitorial trial is often said to reduce the likelihood that victims will have a negative experience giving evidence.<sup>133</sup> However, commentators have urged caution in drawing conclusions about the advantages to victims of giving evidence in inquisitorial systems because studies have rarely been based on close comparative analysis.<sup>134</sup>

### The reduced need to give evidence at trial

- 8.105 In some inquisitorial jurisdictions, most notably Belgium, the Netherlands and Switzerland, victims are rarely required to give evidence during the trial at all.<sup>135</sup> This is because these jurisdictions place considerable reliance on evidence gathered during the preliminary investigation, which is conducted by a judicial officer. Generally speaking, the prosecutor and the lawyer for the accused are also involved in the preliminary phase and have an opportunity to question the victim in the presence of the judicial officer.
- 8.106 The European Court of Human Rights has examined whether circumstances in which an accused is given no opportunity to question a witness during a trial infringe the accused's right under the European Convention of Human Rights to 'examine or have examined witnesses against him'.<sup>136</sup> It has held that while using statements made by witnesses

126 Dublin Rape Crisis Centre, *The Legal Process and Victims of Rape* (Dublin Rape Crisis Centre, 1998) 199.

127 Ibid 199–200.

128 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 219–20. See also Law Commission, *Alternative Pre-Trial and Trial Processes: Possible Reforms* (New Zealand Law Commission, 2012) 92.

129 Dublin Rape Crisis Centre, *The Legal Process and Victims of Rape* (Dublin Rape Crisis Centre, 1998) 199–200.

130 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 1118, citing Belgium, Luxembourg, Dutch, Norwegian, Swedish and Swiss judges; Law Commission, *Alternative Pre-trial and Trial Processes: Possible Reforms* (New Zealand Law Commission, 2012) 55.

131 Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2002) 147.

132 Ibid.

133 Ibid 141.

134 Ibid.

135 Ibid (referring to the Netherlands); Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 95 (Austria, regarding witnesses under the age of 14 or related to the accused); 156 (Belgium); 700–1 (the Netherlands); 945 (Switzerland).

136 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(3)(d). See, eg, *S N v Sweden* (ECHR, First Section, Application No. 34209/96, 2 July 2002) [43]–[54].

during the investigative stage of the proceedings does not violate the accused's right to examine witnesses, the accused must have at least one opportunity to examine a witness, either at the investigation stage or at trial.<sup>137</sup> In the absence of this opportunity, the accused's fair trial rights will be infringed.<sup>138</sup>

### Protective measures and alternative arrangements

- 8.107 For those civil jurisdictions where victims do routinely give evidence during the trial phase, there are evidentiary rules and procedures designed to reduce the trauma, distress or upset caused by that experience.
- 8.108 Where these rules and procedures mirror rules already in place in Victoria and other Australian jurisdictions, they will not be repeated. The purpose of this section is to consider procedural and evidentiary safeguards distinctly different to, or of broader application than, the protective measures in place in Victoria.

### Rules specific to child witnesses

- 8.109 In a number of inquisitorial jurisdictions, children can only be questioned by the judge overseeing the trial, and not by the prosecutor or the accused.<sup>139</sup>
- 8.110 In the Swiss region of Zurich, children are not required to answer all questions asked by the accused's lawyer.<sup>140</sup>

### Rules for vulnerable witnesses, including victims of sexual assault and/or family violence

- 8.111 In a number of jurisdictions, victims can request the accused leave the court while the victim is giving evidence, rather than the victim giving evidence from a remote location.<sup>141</sup>
- 8.112 In Switzerland, victims of serious crimes (not limited to sexual offences) can give evidence by closed-circuit television.<sup>142</sup>
- 8.113 Austria has a version of pre-recording evidence, in which victims of sexual offences (adults and children) may be questioned prior to the trial proceedings, by a judge alone.<sup>143</sup> The accused's lawyer and the prosecutor may be in separate rooms (this is mandatory for victims of sexual offences under the age of 14), but can see and hear the judge and the victim. First, the victim recounts his or her version of the offence in narrative form. The judge can then ask additional questions if necessary. Following this, the judge will ask the accused's lawyer and the prosecutor what questions they want asked. Disputes about the appropriateness of questions are resolved at this stage, and the judge may elect not to ask inappropriate questions.<sup>144</sup> This evidence is video-recorded and played at the trial.<sup>145</sup>

137 See, eg, *S N v Sweden* (ECHR, First Section, Application No. 34209/96, 2 July 2002) [50]–[52].

138 *Bocos Cuesta v the Netherlands* (ECHR, Third Section, Application No. 54789/00, 10 November 2005) [68]–[71]; *PS v Germany* (ECHR, Third Section, Application No. 33900/96, 20 December 2001) [21]–[31].

139 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 1111, referring to Belgium, French, German, Italian, Luxembourg and Turkish courts; Law Commission, *Alternative Pre-trial and Trial Processes: Possible Reforms* (New Zealand Law Commission, 2012) 67, regarding Germany.

140 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 1112.

141 *Ibid* 1118.

142 *Ibid* 1119.

143 Law Commission, *Alternative Pre-trial and Trial Processes: Possible Reforms* (New Zealand Law Commission, 2012) 81.

144 *Ibid*.

145 *Ibid* 83.

- 8.114 In Norway, victims of sexual offences, and other offences ‘when the interests of the witness so indicate’, are questioned using an intermediary.<sup>146</sup> Intermediaries either assist the vulnerable witness during the questioning, or conduct the questioning, subject to the guidance of a judicial officer.<sup>147</sup> The victim and intermediary sit in a room separate to the prosecutor, accused’s lawyer and the judge.
- 8.115 The intermediary first elicits an account of events from the victim. The prosecutor, the accused’s lawyer and the judge can ask that certain lines of questioning be pursued by the intermediary on their behalf.<sup>148</sup> This process is continued until the parties are satisfied adequate evidence has been gathered.<sup>149</sup> A video of the intermediary’s questioning is then used in court as the victim’s evidence.<sup>150</sup>

### Victim participation at the International Criminal Court

- 8.116 In May 2015, the Commission published an information paper discussing the role of victims in proceedings before the International Criminal Court (ICC).<sup>151</sup> The following section draws on the Commission’s earlier information paper, focusing on the practices of the ICC that are most relevant to the Victorian context. The Commission encourages readers to review the Commission’s information paper as a companion to this consultation paper.

#### Legal framework for participation in the trial

- 8.117 The Rome Statute and the Rules of Procedure set out the legal framework for victim participation in the Pre-trial, Trial and Appeals Chambers of the ICC.
- 8.118 Victims are not parties to proceedings in the ICC.<sup>152</sup> Victims are permitted participatory status:
- Where the personal interests of the 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.<sup>153</sup>
- 8.119 The ‘personal interests’ of victims flow from their interest in establishing the truth, and obtaining justice and reparations.<sup>154</sup>

#### Manner and form of participation

- 8.120 Victims must apply to be granted participation.<sup>155</sup> The Court has repeatedly emphasised that victims should only be permitted to participate if they can ‘make a relevant contribution to the determination of the truth’ and their participation ‘does not prejudice the principles of fairness and impartiality of the proceedings before the Court’.<sup>156</sup>

146 Phoebe Bowden, Terese Henning and David Plater, ‘Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?’ (2014) 37 *Melbourne University Law Review* 539, 578.

147 Ibid.

148 Ibid.

149 Ibid.

150 Ibid 578–9.

151 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 3: The International Criminal Court: A Case Study of Victim Participation in an Adversarial Trial Process* (May 2015)

152 See, eg, *Prosecutor v Katanga and Chui* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled ‘Decision on the Modalities of Victim Participation at Trial’) (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [39] (*Katanga and Chui Appeal Decision*).

153 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 68(3) (Rome Statute).

154 See, eg, *Prosecutor v Bahr Idriss Abu Garda* (Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case) (International Criminal Court, Pre-Trial Chamber I, Doc No ICC-02/05-02/09, 25 September 2009) [3].

155 International Criminal Court, *Rules of Evidence and Procedure*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 89(1) (ICC Rules).

156 See, eg, *Prosecutor v Katanga and Chui* (Decision on the Modalities of Victim Participation at Trial) (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [65] (*Katanga and Chui Decision*).

- 8.121 If their application to participate is approved, victims are entitled to the appointment of a legal representative.<sup>157</sup> In practice, nearly all victims have had legal representation (almost always on a group basis).
- 8.122 Victims' legal representatives sit at a table next to the prosecutor and across from the accused. It has been suggested that the regular presence of victims' legal representatives can impact on courtroom dialogue and 'can continually exercise influence on the legal discourse' such that '[v]ictims and their concerns become an integral part of the criminal justice process'.<sup>158</sup>
- 8.123 Victims, through their legal representatives, can:
- access 'the public record of the proceedings', subject to confidentiality restrictions<sup>159</sup>
  - attend the trial
  - participate in proceedings, except where in the Court's view, 'the representative's intervention should be confined to written observations or submissions'<sup>160</sup>
  - make opening and closing statements<sup>161</sup>
  - question witnesses, experts and the accused.
- 8.124 To question witnesses, victims must apply in writing to the Court, and may have to specify the questions they seek to ask.<sup>162</sup> If the Court decides to permit questioning,<sup>163</sup> the judge may elect to ask the witness the question on behalf of the victims' legal representative.<sup>164</sup> Questions must be:
- expressed neutrally and not repetitively
  - limited to issues affecting the victims<sup>165</sup>
  - aimed at clarifying or supplementing the evidence of other witnesses<sup>166</sup>
  - directed at establishing the truth.<sup>167</sup>
- 8.125 The Court has said that questioning by victims, given their local knowledge and social and cultural background, can help the Court understand the evidence.<sup>168</sup>

### Tendering evidence and calling witnesses

- 8.126 Although not expressly provided for in the Rome Statute, victims have been allowed to tender evidence and call witnesses during trials. This flows from the Court's power to request all evidence necessary to determine the truth,<sup>169</sup> and the victims' right to express their views and concerns.<sup>170</sup>

157 ICC Rules r 90.

158 Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims A Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395, 411.

159 ICC Rules r 131(2); *Prosecutor v Ruto and Sang* (Decision on victims' representation and participation) (International Criminal Court, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [64]–[69], including a discussion of when access to confidential material should be permitted (*Ruto and Sang Decision*).

160 ICC Rules r 91(2). See also *Katanga and Chui Decision* (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [69]–[71].

161 *Ruto and Sang Decision* (International Criminal Court, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [73], affirming the practice of Trial Chambers I, II and III.

162 ICC Rules r 91(3)(a). See also *Katanga and Chui Decision* (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [72]; *Ruto and Sang Decision* (International Criminal Court, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [74].

163 ICC Rules r 91(3)(a): 'taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial'.

164 ICC Rules r 91(3)(b). See also *Katanga and Chui Decision* (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [73].

165 *Ruto and Sang Decision* (International Criminal Court, Trial Chamber V, Doc No ICC-01/09-01/11, 3 October 2012) [75]–[76].

166 *Katanga and Chui Decision* (International Criminal Court, Trial Chamber II, Doc No ICC-01/04-01/07, 22 January 2010) [78].

167 Ibid.

168 Ibid.

169 Rome Statute, art 69(3).

170 See, eg, *Katanga and Chui Appeal Decision* (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [37]–[40], also ruling on whether evidence presented by victims needs to be disclosed to the accused prior to the trial; *Prosecutor v Lubanga* (Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) [86]–[105] (affirming the Trial Chamber's decision) (*Lubanga Appeal*).

8.127 Victims are only permitted to submit evidence or call witnesses after they have demonstrated, through a written application, the relevance of the evidence they plan to submit and how it will assist in determining the truth.<sup>171</sup> Allowing victims to participate in this way has been contentious. The potential impact on the rights of the accused is explored below.

### Criticism of ICC model of victim participation

8.128 As in Victorian criminal trials, accused persons before the ICC are entitled to a fair trial.<sup>172</sup>

8.129 A principal criticism of victim participation at the ICC is that it may undermine the presumption of innocence.<sup>173</sup> It has been argued that allowing victims to participate in proceedings presumes that a crime has occurred, when this is in fact something the prosecutor should prove beyond reasonable doubt.<sup>174</sup>

8.130 The ability of victims to call and question witnesses and submit evidence has also been subject to criticism for being in conflict with principles underpinning adversarial criminal trials, in which only the parties to the proceedings are entitled to introduce evidence.<sup>175</sup>

8.131 Some commentators argue that the ICC's framework for victim participation allows victims to act as 'secondary prosecutors'.<sup>176</sup> This, it is argued, undermines the principle of equality of arms, because it is unfair if the defence has to respond to two sets of accusations: those made by the prosecutor and those by the victim's legal representative.<sup>177</sup> Others argue that even if victims cannot be characterised as secondary prosecutors, victim participation still risks generally undermining the right of the accused to a fair and impartial trial.<sup>178</sup>

8.132 In addition, the Rome Statute does not impose any disclosure obligations on victims.<sup>179</sup> Victims can tender evidence and call witnesses, but they are not required to disclose this evidence to the defence prior to the trial. The Court has held that its supervision of matters means that adequate safeguards exist to ensure the accused's fair trial rights.<sup>180</sup> There is still a risk, though, that the accused's lawyer will not have adequate time to review the material and prepare or amend their defence accordingly.

8.133 Victims are also not obliged to disclose exculpatory evidence in their possession, although the Court can require victims to disclose evidence they have, particularly potentially exculpatory evidence.<sup>181</sup> Nevertheless, unless the parties are aware victims possess such evidence, they are not able to request the Court make such an order, and so such evidence may never come to light.

171 See, eg, *Lubanga Appeal* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 11 July 2008) [98]-[100].

172 For a more detailed explanation of fair trial rights, particularly as they exist in Victoria, see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 1: History, Concepts and Theory* (May 2015).

173 See, eg, Salvatore Zappala, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137, 146-7.

174 See, eg, Bridie McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness' (2011) 18 *Australian International Law Journal* 105, 118-19.

175 Håkan Friman, 'The International Criminal Court and the Participation of Victims: A Third Party to the Proceedings' (2009) 22 *Leiden Journal of International Law* 485, 492.

176 Bridie McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness' (2011) 18 *Australian International Law Journal* 105, 114-15, 119.

177 See, eg, Christine Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 *Case Western Reserve Journal of International Law* 475, 488.

178 Bridie McAsey, 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness' (2011) 18 *Australian International Law Journal* 105, 115.

179 *Katanga and Chui Appeal* (International Criminal Court, Appeals Chamber, Doc No ICC-01/04-01/07 OA 11, 16 July 2010) [72].

180 *Ibid* [52]-[53].

181 *Ibid* [85]-[86].

## Discussion and options for reform

### Protected-witness reforms

- 8.134 The Commission encourages discussion of whether some or all of the protected-witness procedures in place in other jurisdictions should be adopted or expanded upon in Victoria—and whether there are further innovations that should be considered.
- 8.135 The possibility of using victims' pre-recorded evidence-in-chief to minimise the number of times they need to give evidence was raised in Chapter 6 in relation to committal hearings. Pre-recording evidence-in-chief could be done as soon as possible by police after an offence has occurred or it could be done in the lead-up to the trial as part of the court's procedures. The former has been adopted in New South Wales for domestic violence victims, and occurs in Victoria for child victims and victims with a cognitive impairment in sexual offence trials. Related options for reform might include:
- permitting video-recorded statements taken by police as soon as possible after the report of all or certain offences, to be used as evidence-in-chief
  - extending the availability of special hearings to other vulnerable victims or to all victims who request a special hearing.
- 8.136 The use of video-recorded statements taken by police from adult victims requires careful consideration of a number of related issues, including:
- whether a video-recorded statement is made at the point of first contact with police or subsequently in a more controlled environment
  - whether the special hearing provisions of the Criminal Procedure Act should extend to victims who make a video-recorded statement with police
  - how such a procedure might impact on committal proceedings
  - whether the fair trial rights of an accused would be unduly infringed
  - whether there are resource implications for the police and the court system.
- 8.137 In relation to other existing protected-witness procedures, consideration could be given to whether:
- the use of protective measures, such as the use of closed-circuit television, has improved victims' experiences of giving evidence and whether the use of these measures has had any unintended impacts on the conduct or outcome of trials
  - current protective measures for vulnerable witnesses should be extended to apply to other categories of victims, or to victims of other types of offences
  - existing evidentiary provisions are being used, and enforced by judges, to prevent inappropriate questioning or to allow victims to give evidence in narrative form
  - any other evidentiary reforms are necessary to make the experience of giving evidence less stressful or traumatic for victims.
- 8.138 One protected-witness reform option not generally available in Australia is the use of intermediaries for vulnerable witnesses. Proponents of the use of intermediaries argue that they 'improve the trial process for victims and preserve the defendant's right to a fair trial by allowing the defence adequate opportunity to test the witness's account'.<sup>182</sup> Others view the use of intermediaries as irredeemably incompatible with the principle that a fair trial requires 'oral testing of evidence during a trial' without interpretation.<sup>183</sup>

182 Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 545. See also Emily Henderson 'All the Proper Protections—the Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses' (2014) 2 *Criminal Law Review*, 93, 93–94, citing Joyce Plotnikoff and Richard Woolfson, 'Kicking and Screaming: The Slow Road to Best Evidence' in J R Spencer and M E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (2012) 26–30.

183 See the dissenting views of Helen O'Sullivan (former Judge of the Queensland District Court) and Nick Cowdery (then Director of the NSW DPP) to Recommendations 4.5 and 6.2 in Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (National Child Sexual Assault Reform Committee 2010) 36.

- 8.139 If an intermediaries scheme were to be introduced in Victoria, the scope of such a scheme could depend on whether:
- intermediaries are to be used only for the evidence of children and cognitively impaired witnesses in trials for sexual offences,<sup>184</sup> or used more extensively
  - intermediaries should construct and conduct the questioning of the victim,<sup>185</sup> or simply communicate the questions the lawyers want to ask using appropriate language and pre-prepared questions.<sup>186</sup>

### Participating and prosecuting-witness reforms

- 8.140 Proposals for greater victim participation during the trial generally involve the exercise of victim participation through a legal representative or advocate. Proponents argue that legal representation for victims can be consistent with the structure of the adversarial criminal trial, provided their role is clearly expressed and they are properly integrated into the criminal justice process.<sup>187</sup>
- 8.141 Legal representation for victims is not a new issue. Legal representation for victims was considered, but not adopted, by several inquiries into victims of crime in the 1980s and early 1990s.<sup>188</sup> Since then, significant changes have occurred in the legal landscape, and in political and social attitudes about the way the criminal justice system can and should provide for victims.
- 8.142 A limited role for lawyers representing victims could involve facilitating victims' participation outside the courtroom, through for example, providing legal advice, information and assistance, and consulting with the prosecutor.
- 8.143 A broader proposal might allow victims to be represented by a lawyer or a 'victim advocate' both outside and inside the courtroom, but only on matters that demonstrably affect their interests or rights. Proponents of this form of victim participation argue that victims should be entitled to intervene during the trial, including in front of the jury, to ensure that their interests and rights are enforced or protected.<sup>189</sup> For example, the victim's lawyer could object to improper questioning of the victim by the accused's lawyer if the prosecutor or the judge have taken no action. Alternatively, a victim's lawyers might be granted standing only to raise matters with the judge in the absence of the jury. This type of reform poses less of a challenge to the two-party contest that underpins criminal trials in Victoria.
- 8.144 Limiting the intervention of victims during the trial to matters where the victim has a demonstrable personal right or interest may mean that victims avoid exercising quintessentially prosecutorial functions, such as cross-examining witnesses or introducing evidence.
- 8.145 The role of the victim is then closely tied to how personal interests are defined. A wide definition of 'personal interests' allows victims to participate in more parts of the process, and could amount to more far-reaching reform. At the ICC, for example, the personal interests of victims extends to their interest in truth and justice. Relying on this, the Court's chambers have held that victims, through their lawyers, can cross-examine witness and submit evidence.

184 Proposed by Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (National Child Sexual Assault Reform Committee, 2010) [4.129]–[4.130].

185 Proposed by Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 582–583.

186 For a proposal regarding the use of intermediaries, see Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (National Child Sexual Assault Reform Committee, March 2010) rec 4.5.

187 See, eg Tyrone Kirchengast, 'Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial' (2012) 16(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 568, 593; Kirsten Braun, 'Legal Representation for Sexual Assault Victims—Possibilities for Law Reform' (2014) 25(2) *Current Issues in Criminal Justice* 819, 829–830; Jonathan Doak, *Victims Rights, Human Rights and Criminal Justice* (Hart Publications, 2008) 135, 137.

188 See, eg, Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure: Interim Report*, Report No 42 (1991) 32–5. See also Sam Garkawe, 'The Role of Victims During Criminal Court Proceedings' (1994) 17 *University of New South Wales Law Journal* 595, 607.

189 Issues relating to the enforcement of victims' rights are considered in Chapter 12.

- 8.146 Any reforms to the role of the victim that resemble the victim participation scheme at the ICC, or the role of auxiliary prosecutors in some European inquisitorial trials, would see victims taking on a role more akin to a prosecuting witness. Consideration should then be given to whether victim participation during the trial could involve the victim engaging in some or all of the following:
- selecting the jury
  - challenging the admissibility of evidence
  - cross-examining witnesses (including the accused)
  - calling witnesses
  - tendering evidence
  - making legal submissions
  - making opening and closing statements to the jury.
- 8.147 The victim participation scheme of the ICC provides one template for the integration of victims into the heart of Victoria's adversarial trial process. As previously noted, the ICC has sought to retain fair trial rights for the accused and the adversarial roles of prosecution and defence lawyers. It has also aimed to provide some measure of restorative justice for victims through participation.
- 8.148 There are, however, key distinctions between the ICC and Victoria's criminal jurisdiction which should be borne in mind, including:
- Crimes falling under the ICC's jurisdiction are of a fundamentally different nature, as they are crimes of mass victimisation carried out by state actors.
  - The ICC does not have a jury system; instead, a panel of judges presides over the trial and hands down the verdict.
  - The ICC is a hybrid of procedures and values reflecting the justice systems of the countries involved in drafting the Rome Statute. The ICC is not therefore part of a culture and legal tradition in the same way as the criminal trial is in Victoria.
- 8.149 When examining such proposals, consideration might be given to:
- whether victims would need to apply to the court to be permitted to participate
  - when such applications should be made
  - whether the victims would need legal representation to effectively exercise such a participatory role, and how legal representation would be funded
  - whether granting victims prosecutorial-style participatory rights may also require imposing prosecutorial obligations on victims.<sup>190</sup>
- 8.150 In addition, a victim's interests in participation are likely to depend on the victim's circumstances and the nature of the crime. Participatory rights could reflect this, with different modes of participation for victims depending on the particular crime or the characteristics of the victim. For example, should the family of a deceased victim have the same participatory status as a primary victim of assault or sexual assault in a trial?
- 8.151 When considering any proposals for reform, and especially those that relate to the formal trial, it is important to bear in mind research that suggests that while most victims desire greater involvement in the criminal trial process, they do not necessarily want the responsibility of taking on prosecutorial decision-making functions.

- 8.152 There are various arguments against permitting victims a greater role in the criminal trial. Many criticisms focus, for good reason, on the consequences to the accused of adding a third party to the two-party contest of the adversarial criminal trial. Allowing victims to play a greater role in the trial is likely to impose additional burdens on the accused, and may lead to unfairness. The accused may have to respond to material placed before the court by the victim, which could include additional evidence and witnesses and legal submissions. Further, victim participation may undermine the jury's ability to reach an objective verdict by creating the perception, which may be realistic, that the trial is a three-way contest with two parties—the victim and the prosecutor—both acting against the accused.

## Questions

### Protective measures

- 28 Are the protective procedures for the taking of evidence from vulnerable victims appropriate and effective?
- 29 Should the current protective measures for vulnerable witnesses be extended to other categories of victim, or to victims of other types of offence?
- 30 Are the existing evidentiary provisions being used, or enforced by judges, to prevent inappropriate questioning or to allow victims to give evidence in narrative form? Are there any further evidentiary reforms which might reduce victim re-traumatisation?
- 31 Should Victoria introduce an intermediary scheme? If so, for which victims? What functions should an intermediary perform?

### Participatory and prosecutorial roles for victims

- 32 Should victims be able to participate during trial proceedings? If so, how and when might this participation be exercised? Who should provide representation?
- 33 Could victims be given a participatory or prosecuting role in Victoria similar to that provided for by the victim participation scheme of the International Criminal Court?
- 34 Are there aspects of inquisitorial trial procedures which could be adopted in Victoria?

# The role of victims in sentencing

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## 9. The role of victims in sentencing

### Introduction

- 9.1 Once an accused has been found guilty by jury verdict or has pleaded guilty, his or her matter must proceed to a sentencing hearing.<sup>1</sup>
- 9.2 Of the 89 criminal matters finalised in the Supreme Court in 2013–14, 55 resolved as a guilty plea and 34 went to a jury verdict.<sup>2</sup>
- 9.3 In the County Court, 1684 criminal matters resolved as a guilty plea, including 255 matters that were listed for trial but resolved before a jury was empanelled.<sup>3</sup> Only 358 trials went to jury verdict.<sup>4</sup>
- 9.4 As these statistics highlight, a significant proportion of matters resolve by way of a plea of guilty and proceed to a sentence hearing. This is true of most common law jurisdictions.
- 9.5 This chapter begins with an examination of sentencing hearings in Victoria, with a particular focus on victim impact statements. This is followed by consideration of different approaches in the victim impact statement schemes of other Australian jurisdictions, alternative processes and procedures in other countries, and the use of restorative justice processes. Finally, some key issues and reform proposals are discussed, and a number of questions are posed.

### The current system in Victoria

- 9.6 Sentencing hearings in Victoria’s superior courts have the following general structure:
- Unless the judge orders otherwise, sentencing hearings are conducted in open court. The victim and any of their support people may be present, as may support people for the offender, members of the public and the media.
  - If the offender is pleading guilty, the charge(s) are read out to the accused (seated at the back of the court, in the dock), who enters a plea of guilty to each charge and then becomes known as the ‘offender’ or ‘prisoner’. If the offender has been found guilty by a jury, this step does not occur.
  - If the offender has any prior convictions, they are presented to the court.
  - For cases that have resolved in a plea without a trial, the prosecutor reads out an opening, which contains the agreed facts upon which the plea of guilty is based. If the sentencing hearing follows a guilty verdict after a trial, there may be some discussion between the judge, the prosecutor and the offender’s lawyer about what facts the jury must have found in order to return the guilty verdict.

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1 Sometimes also referred to as a plea hearing. For consistency, the phrase ‘sentencing hearing’ will be used throughout this chapter.  
2 Supreme Court of Victoria, *Annual Report 2013–14* (2015) 45.  
3 County Court of Victoria, *Annual Report 2013–2014* (2015) 4.  
4 *Ibid* 4, 10–11.

- The prosecutor informs the court of the maximum sentence for the offence(s), any relevant sentencing laws, and whether there are any related orders to be made, such as for restitution, compensation and forfeiture.
  - If the victim has prepared a victim impact statement, it is presented to the court.
  - The offender’s lawyer then makes submissions, and may call evidence about:
    - the personal circumstances of the offender, including any psychiatric, psychological, medical or other issues
    - the offender’s history and antecedents
    - any factors that mitigate or explain the offending
    - any personal, character, family and work referees willing to speak for the offender
    - any matters that may go to the purposes of sentencing (set out below)
    - the applicable law.
  - The offender is not required to give evidence at the sentencing hearing, but may do so. If the offender does give evidence, the prosecutor has the right to cross-examine the offender, and any other witness called at the sentencing hearing.
  - The judge may deliver his or her sentence and provide reasons immediately following the sentencing hearing, or may adjourn to consider. If further reports are required, or if the judge is contemplating imposing a sentence which includes a rehabilitative or community-based component, the sentencing hearing may be adjourned for such reports to be obtained.
- 9.7 The *Sentencing Act 1991* (Vic) sets out the purposes of sentencing as punishment, deterrence, rehabilitation, denunciation and the protection of the community.<sup>5</sup> Notably absent from the purposes of sentencing is the restoration of, and reparations to, the victim of the offending.<sup>6</sup>
- 9.8 Although absent from the purposes of sentencing, victims are relevant to the sentencing process. Specifically, in imposing a sentence, a court must have regard to a range of factors including:
- the impact of the offending on any victim
  - the personal circumstances of any victim
  - any injury, loss or damage resulting directly from the offence.<sup>7</sup>
- 9.9 A victim is defined in the Sentencing Act as:
- a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender.<sup>8</sup>
- 9.10 The family and friends of a person who is the immediate victim of a crime (including a homicide victim) are also victims where they suffer injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the crime.
- 9.11 Witnesses to an offence may be victims if they have suffered injury, loss or damage as a direct result of the offence.<sup>9</sup> Similarly, the local community may be a victim.<sup>10</sup>

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

6 The purposes of the *Sentencing Act 1991* (Vic) include ‘to ensure that victims of crime receive adequate restitution and compensation’: s (1) (i). Restitution and compensation are considered in Chapter 10.

7 *Sentencing Act 1991* (Vic) s 5(2)(daa)–(db).

8 *Ibid* s 3.

9 *Berichon v The Queen; Houssein v The Queen* [2013] VSCA 319 [19] (Redlich JA and Robson AJA); *R v Silver* [2006] VSC 154.

10 *R v Miller* [1995] 2 VR 348 (Southwell, Ormiston and MacDonald JJ) (effect on regional community of notorious murder).

- 9.12 Any direct consequences of an offender’s criminal conduct can be held against him or her in sentencing, even if the offender could not reasonably have foreseen those consequences.<sup>11</sup>

### Victim impact statements

- 9.13 In Victoria, victims can participate in the sentencing hearing through the provision of a victim impact statement. Victim impact statements can be provided in relation to all offences.
- 9.14 A victim impact statement is a sworn statement to the court, made by statutory declaration, that outlines ‘the impact of the offence on the victim and ... any injury, loss or damage suffered by the victim as a direct result of the offence’.<sup>12</sup>

### Form and presentation

- 9.15 Victims are able to include photographs, drawings, poems, or any other material that relates to injury, loss or damage in their victim impact statement.<sup>13</sup> This includes a medical report and related documents.<sup>14</sup>
- 9.16 At the sentencing hearing, the victim can choose how the victim impact statement is presented to the court. The victim may read it aloud, or may request that it be read by another person, or by the prosecutor. Photographs or drawings may be displayed during the sentencing hearing.<sup>15</sup> Alternative arrangements may be made for the presentation of the victim impact statement, including the use of remote witness facilities and allowing a support person for the victim.<sup>16</sup> If the victim wishes, they may also give sworn evidence at the sentencing hearing.<sup>17</sup>
- 9.17 The content of victim impact statements can be tested. The prosecution or the offender can request the judge to order that the victim give evidence and be cross-examined about the content of their statement.<sup>18</sup> This also applies to any person who made a victim impact statement on behalf of the victim, or any medical expert whose report is attached to the victim impact statement.<sup>19</sup>
- 9.18 Victims can also call witnesses to provide evidence in support of information contained in a victim impact statement.<sup>20</sup> These witnesses can be cross-examined by the prosecutor or the offender.
- 9.19 Victim impact statements and any attached documents must, within a reasonable time before the sentencing hearing, be filed with the court, and provided to the offender (and their lawyer) and the prosecution.<sup>21</sup> In most cases, victim impact statements thus become part of the court’s public record.
- 9.20 In some circumstances, the details of a victim impact statement can be kept private. Specifically, if the publication of a victim impact statement will cause ‘undue distress or embarrassment’ to a child victim, or to a victim in proceedings involving a sexual offence or family violence, orders can be made to prohibit or restrict the publication of information contained in a victim impact statement.<sup>22</sup> Applications may be made on the initiative of the judge, the prosecutor, the offender or ‘any other person considered by the court or tribunal to have a sufficient interest’ in the order being made.<sup>23</sup>

11 *SD v The Queen* [2013] VSCA 133 [17]; *Eade v R* [2012] VSCA 142 [31].

12 *Sentencing Act 1991* (Vic) s 8L(1).

13 *Ibid* s 8L(2).

14 *Ibid* s 8M.

15 *Ibid* s 8Q.

16 *Ibid* s 8R.

17 *Ibid* s 8K(2)(b).

18 *Ibid* s 8O.

19 *Ibid*. Alternative witness facilities may be used for this evidence, including remote witness facilities: s 8S.

20 *Ibid* s 8P.

21 *Ibid* s 8N.

22 *Open Courts Act 2013* (Vic) s 18(1)(d)–(e).

23 *Ibid* s 19(1).

- 9.21 The court may also, on its own initiative, close the court to the public for all or part of the proceedings, in order to avoid causing undue distress and embarrassment to a child victim or the victim of a sexual or family violence offence.<sup>24</sup>

### Admissibility, content and purposes

- 9.22 The court has the power to rule inadmissible any part of a victim impact statement, including part of a medical report.<sup>25</sup> The court can also restrict the parts of the victim impact statement read aloud to those parts which are ‘appropriate and relevant to sentencing’.<sup>26</sup>
- 9.23 Matters which are inadmissible include:
- information about the effects of the crime on people other than the person making the statement
  - information about the offender or the circumstances of the offender
  - opinions or arguments about what kind of sentence should be imposed or the length of any sentence.<sup>27</sup>
- 9.24 The policy of the Director of Public Prosecutions (DPP) states that it is the responsibility of victims to prepare the victim impact statement and that prosecutors have no formal role in the process, except to provide information and referrals.<sup>28</sup> Conversely, where a prosecutor identifies clearly inadmissible content, the DPP’s policy requires that the prosecutor ‘bring it to the attention of the court to prevent sentencing error’.<sup>29</sup>
- 9.25 In determining what is admissible, Victorian courts have encouraged a flexible approach, balanced against the need to ensure fairness to the offender.<sup>30</sup> Even taking a flexible approach, however, Victorian courts have emphasised that judges must ensure that only admissible parts of the victim impact statement are taken into account, in particular when they are read aloud.<sup>31</sup> Information that is not directly relevant to the offence, even if useful for background and context, is not permitted.<sup>32</sup>
- 9.26 The Victorian Court of Appeal has held that the purpose of victim impact statements is to ensure that the courts are aware of the impact of the crime on the victim and to ‘involve victims in the workings of the criminal justice system’.<sup>33</sup>
- 9.27 While victim impact statements should not make representations about the sentence the offender should receive, the Victorian Court of Appeal has acknowledged that, just as information contained in a statement may ‘justify a more severe sentence’, expressions of forgiveness and support may have weight in moderating the sentence.<sup>34</sup> Nonetheless, while the victim’s attitude towards the offender is relevant, it should not ‘govern’ the judge’s approach to sentencing.<sup>35</sup>

24 Ibid s 30(2)(d)–(e) (closed court orders). See also *Judicial Proceedings Report Act 1958* (Vic) s 4(1A); *Children, Youth and Families Act 2005* (Vic) s 534(2).

25 *Sentencing Act 1991* (Vic) s 8L(3).

26 Ibid s 8Q(2)–(3).

27 *DPP v QPX* [2014] VSC 133.

28 Director of Public Prosecutions Victoria, *Director’s Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [47].

29 Ibid [48].

30 *R v Dowlan* [1998] 1 VR 123. See also *York (a Pseudonym) v The Queen* [2014] VSCA 224 (recognising the need for flexibility).

31 *York (a Pseudonym) v The Queen* [2014] VSCA 224 [25].

32 Ibid [26].

33 *R v Dowlan* [1998] 1 VR 123 [140].

34 *R v Skura* [2004] VSCA 53 [13]. The moderating effect arises from the link between victim support and forgiveness and the remorse and rehabilitation of the offender.

35 Ibid.

- 9.28 The Victorian Court of Appeal recently ruled that while ‘the admissibility of victim impact statements should be approached with a degree of flexibility, nonetheless such statements must be relevant in the manner contemplated by s 8L(1) of the Act in order to be admissible’.<sup>36</sup> While the judge should ensure that only admissible portions of victim impact statements are read out in court, a failure of the offender’s lawyer to object to inadmissible or irrelevant material will have consequences if an appeal is subsequently pursued. On appeal the offender will need to show that ‘the judge in fact relied upon that inadmissible material’<sup>37</sup> and in a manner that ‘wrongly infected the sentencing process’.<sup>38</sup>
- 9.29 An evaluation of victim impact statement reforms, conducted by the Victorian Department of Justice in 2014, concluded that it remains a challenge to ensure that victim impact statements contain only admissible material.<sup>39</sup>

## Alternative processes and procedures

### Australian jurisdictions

- 9.30 Generally speaking, the victim impact statement schemes of all other Australian jurisdictions contain similar elements and operate in similar ways.
- 9.31 The purpose of this section is to consider aspects of victim impact statement schemes in other Australian jurisdictions that are distinctly different to or more broad in application than the measures in place in Victoria.

### Types of offence

- 9.32 Some jurisdictions limit the provision of victim impact statements to certain offences. In New South Wales, victim impact statements can only be provided for offences that have resulted in the death of a person or physical injury, or which involved actual or threatened violence or sexual violence.<sup>40</sup> In Tasmania, victim impact statements are limited to victims of indictable offences.<sup>41</sup>

### Who can provide victim impact statements

- 9.33 There is some variation between jurisdictions with respect to who should be able to provide a victim impact statement.
- 9.34 In Tasmania, for cases involving a death, only the immediate family members of the deceased can provide a victim impact statement.<sup>42</sup>

36 *York (a Pseudonym) v The Queen* [2014] VSCA 224 [25], where the sentencing judge took a victim impact statement which referred to matters not related to the offence for which the judge was passing sentence, into account as providing ‘background and setting a context’ when imposing sentence. The Court of Appeal found this to be an error of law and set aside the sentence that had been imposed. See also *Mok v R* [2011] VSCA 38 [12].

37 *Luciano v The Queen* [2015] VSCA 173 [14].

38 *Ibid* [13]. The Court of Appeal stated ‘[e]ven if the judge did take into account inadmissible material, which we doubt, there was ample admissible evidence and material introduced on the plea ... that led inexorably to the conclusion.’

39 Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (Victorian Government, 2014) 5–6, 20, 44, 62–4.

40 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27. South Australia also limits the offences for which a victim impact statement may be submitted by a victim to indictable offences and summary offences in which the victim died, suffered total incapacity or serious harm. See *Criminal Law (Sentencing) Act 1988* (SA) s 7A.

41 *Sentencing Act 1997* (Tas) s 81A(2)

42 Defined to mean spouse, partner, parent, guardian, step-parent, child, step-child, brother, step-brother, sister or step-sister: *Sentencing Act 1997* (Tas) s 81A(1).

9.35 In New South Wales, until recently, the family of deceased victims were not permitted to make a victim impact statement.<sup>43</sup> However, an amendment in 2014 to the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires the judge to receive a victim impact statement from a family victim.<sup>44</sup> On application from the prosecutor, the judge may take the family victim's statement into account in determining punishment:

on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.<sup>45</sup>

### Provision of victim impact statement to parties

- 9.36 The 2014 Department of Justice review noted that victims have a range of privacy-related concerns about the content of their victim impact statements being disclosed to the offender or otherwise becoming part of the public record.<sup>46</sup>
- 9.37 Victoria is the only jurisdiction that requires victim impact statements to be disclosed to the prosecution and defence within a 'reasonable time' before the sentencing hearing.<sup>47</sup>
- 9.38 In New South Wales and Western Australia, the judge retains a discretion about whether to make a victim impact statement available to the prosecutor and the offender.<sup>48</sup>

### Cross-examination and sworn statements

- 9.39 Unlike in Victoria, victim impact statements in Queensland and New South Wales are not sworn statements,<sup>49</sup> and there is no provision in the legislation in either state for victims to be examined or cross-examined about the content.

### Contents of the victim impact statement

- 9.40 Like Victoria, most jurisdictions permit victim impact statements to address the physical, mental and financial harm caused to the victim as a result of the offence.
- 9.41 South Australia and the Northern Territory allow victims to make representations in their victim impact statement about the sentence that should be imposed on the offender.<sup>50</sup>
- 9.42 This is in distinct contrast to other Australian jurisdictions, including Victoria, which specifically prohibit victims from including suggestions about the sentence that should be imposed on the offender.
- 9.43 Whether victims should be able to provide input into an offender's sentence and how this input is taken into account by a sentencing court is particularly contentious. As outlined in Chapter 1, the Commission is not considering the quantum of sentencing in its review of the role of victims. However, the Commission acknowledges that the question of whether or not victims should be permitted to make representations about what sentence they believe the offender should receive is relevant to the consideration of the victim's role in sentencing hearings.

43 *R v Previtera* (1997) 94 A Crim R 76 (Hunt CJ).

44 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3). A family victim is defined as including spouse, partner, fiancé(e), parent, grandparent, child and siblings: s 26.

45 *Ibid* s 28(4).

46 Victorian Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (Victorian Government, 2014) 75.

47 *Sentencing Act 1991* (Vic) s 8N. See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) [14.30].

48 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5); *Sentencing Act 1995* (WA) s 26(1).

49 *Victims of Crime Assistance Act 2009* (Qld) s 15A(9); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30 and *Crimes (Sentencing Procedure) Regulation 2010* (NSW) s 10.

50 *Criminal Law (Sentencing) Act 1988* (SA) s 7C(2): 'Nothing prevents a statement being furnished to a court under section 7A or 7B from containing recommendations relating to the sentence to be determined by the court'; *Sentencing Act* (NT) s 106B (5A): 'A victim impact statement ... may contain a statement as to the victim's wishes in respect of the order that the court may make in relation to the offence...'

9.44 In Queensland, the prosecutor is to decide ‘what (if any) details are appropriate to be given to the sentencing court’.<sup>51</sup> In deciding what details are not appropriate, the prosecutor may have regard to the victim’s wishes.<sup>52</sup> This is not the responsibility of the Victorian prosecutor.

### Community impact statements

9.45 In South Australia, community impact statements may be provided. A prosecutor or the Commissioner for Victims’ Rights may submit a community impact statement to the court.<sup>53</sup> Any person may make a submission to the Commissioner for Victims’ Rights if they wish to provide information to the Commissioner from which a community impact statement may be compiled.<sup>54</sup> A community impact statement may be:

- a neighbourhood impact statement, which details the ‘effect of the offence, or of offences of the same kind, on people living or working in the location in which the offence was committed’<sup>55</sup>
- a social impact statement, which details the ‘effect of the offence, or of offences of the same kind, on the community generally or on any particular sections of the community’.<sup>56</sup>

9.46 South Australia is the only jurisdiction in Australia in which a community impact statement may be heard in a sentencing hearing. It appears that a community impact statement has only been made once, as a social impact statement in the context of a family violence-related homicide. The intention of the social impact statement was said to be to highlight the complexity of the issue and the serious consequences for society, and not to affect the ultimate sentence.<sup>57</sup>

### Other common law jurisdictions

#### New Zealand

9.47 New Zealand’s scheme for victim impact statements differs from the Victorian scheme in two key respects: the distribution and publication of victim impact statements; and the role of the prosecutor.

9.48 In New Zealand, offenders are explicitly prohibited from keeping a copy of the victim impact statement.<sup>58</sup> While offenders are generally entitled to view the statement, an order can be made by the sentencing judge (on his or her own initiative, or the prosecutor’s application) to prohibit the offender or his or her lawyer from seeing part of it.<sup>59</sup> Any part of the victim impact statement the offender is prohibited from seeing cannot be taken into account in sentencing.<sup>60</sup>

9.49 A sentencing judge may also, on his or her own initiative or following an application from the prosecutor, impose conditions on the disclosure or distribution of a victim impact statement, including that its contents not be published.<sup>61</sup>

51 *Victims of Crime Assistance Act 2009* (Qld) s 15(3).

52 *Ibid* s 15(4).

53 *Criminal Law (Sentencing) Act 1988* (SA) s 7B.

54 *Ibid* s 7B(1).

55 *Ibid* s 7B(2)(a).

56 *Ibid* s 7B(2)(b).

57 Loukas Founten, ‘Lana Towers Murder: Impact of Domestic Violence Extends to Community, Court Told’, *ABC News* (online), 7 November 2014 <<http://www.abc.net.au/news/2014-11-07/victims-of-crime-commissioner-social-impact-statement/5874916>>.

58 *Victims’ Rights Act 2002* (NZ) s 23.

59 *Ibid* s 25.

60 *Ibid* s 26.

61 *Ibid* s 27.

- 9.50 The role of the prosecutor in preparing victim impact statements is recognised explicitly in New Zealand’s legislative scheme. The prosecutor is obliged to:
- ‘make all reasonable efforts’ to ascertain from the victim the information necessary to prepare a victim impact statement,<sup>62</sup> and ensure that the victim is first informed that the information is being gathered for the victim impact statement and that any information given must be true,<sup>63</sup> and
  - advise the victim about the disclosure and distribution of the victim impact statement and find out the victim’s views in relation to any orders to prohibit publication generally or disclosure to the offender.<sup>64</sup>

## Canada

- 9.51 The *Canadian Criminal Code* mandates sentencing judges to take into account the contents of any victim impact statement when determining a sentence.<sup>65</sup> Recent amendments to the *Canadian Criminal Code* allow for the provision of community impact statements.<sup>66</sup>
- 9.52 Under these amendments, the judge:
- shall consider any statement made by an individual on a community’s behalf ... describing the harm or loss suffered by the community as a result of the commission of the offence and the impact of the offence on the community.<sup>67</sup>
- 9.53 While the details of the processes for providing a community impact statement are left to Canada’s provinces, the amendments include a statutory pro forma which asks for information about the emotional, economic and physical impact of an offence on the community, as well as any resulting safety or security fears arising from the offence.<sup>68</sup> This form also prohibits the following information from being included:
- statements that are not related to the harm suffered by the community
  - unproven allegations
  - comments about offences that the offender has not been convicted of
  - complaints about individuals involved in the investigation or prosecution
  - an opinion or recommendation about the sentence ‘except with the court’s approval’.<sup>69</sup>
- 9.54 Community impact statements may be submitted in writing, read out, including with a support person or behind a screen, or ‘presented in any other manner that the court considers appropriate’.<sup>70</sup>

62 Ibid s 17.

63 Ibid ss 17, 18(a). The prosecutor must also inform the victim that the information given has to be recorded and may be verified through one of two procedures outlined in s 19.

64 Ibid s 18(b)–(c).

65 *Canadian Criminal Code* s 722(1). In Canada, criminal law is a federal matter but the processes related to victim impact statements are a matter for each province. The Commission has not conducted an exhaustive review of how each province administers its victim impact statement scheme.

66 See *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, C-32 (assented to 23 April 2015) 24 [26] (comes into force 90 days after the date of assent).

67 Ibid [26].

68 Ibid 33, Form 34.3.

69 Ibid 33, Form 34.3.

70 Ibid 25, [26].

## United States

- 9.55 Under the federal *Crime Victims' Rights Act* (CVRA) victims have a right to 'be reasonably heard' at a public proceeding relating to sentencing.<sup>71</sup> This system mirrors the system in Victoria in that victims can make a statement at the sentencing hearing and may choose to do so orally.
- 9.56 The distinguishing feature of the CVRA is that it provides victims with access to relief if they believe their right to be heard has been violated. Specifically, if during a sentencing hearing a victim is denied the right to be heard, the victim can apply to the Court of Appeals for a review and seek to have a sentence re-opened.<sup>72</sup>
- 9.57 In *Kenna v United States District Court*<sup>73</sup>, the Ninth Circuit of the Court of Appeals found that a victim had not been reasonably heard at the sentencing hearing for one of two co-offenders. The Court of Appeals considered that the only way to give effect to the victim's right to be heard would be to vacate the sentence already handed down and conduct a new sentencing hearing.<sup>74</sup>
- 9.58 In contrast, in Victoria, if a court refuses to admit some or all of a victim impact statement, or to permit a victim to deliver their victim impact statement orally in court, the victim is not able to seek a review of the court's decision on this point. The Director of Public Prosecutions may appeal the sentence handed down if it is considered that the failure to take into account the contents of the victim impact statement resulted in an error of law such that the sentence imposed was manifestly inadequate. However, the victim has no role in the prosecutor's decision to seek an appeal in these circumstances.

## Jurisdictions with inquisitorial criminal trial processes

- 9.59 There are some fundamental differences between civil and common law systems that make direct comparison of the role of victims in sentencing difficult.
- 9.60 First, in inquisitorial trial processes, the trial and the sentencing proceedings run concurrently. Information is placed before the court during the trial that is relevant to sentencing.<sup>75</sup>
- 9.61 This has implications for the role that victims play in sentencing. As outlined in Chapters 3, 8 and 10, victims can introduce information and make submissions during the inquisitorial trial in their capacities as either civil parties, auxiliary prosecutors or as legally represented victim-witnesses. Sometimes, this information will have a bearing on the sentence. In particular, victims appearing as civil parties can introduce evidence pertaining to the financial impact of the crime.<sup>76</sup>
- 9.62 Beyond their roles as civil parties, auxiliary prosecutors or legally represented victim-witnesses, victims rarely have a role in the sentencing aspect of the proceedings. No civil law jurisdiction permits victims to make recommendations about the type or level of sentencing.<sup>77</sup>

71 18 USC § 3771(a)(4).

72 18 USC §§ 3771(d)(3), (d)(5). The application for review must occur within 10 days.

73 435 F 3d 1011 (9th Cir, 2006).

74 Ibid [1017]. Note that the Court of Appeals considered that the application to have the sentence re-opened needed to first be considered by the District Court, but stated that the District Court needed to be 'cognizant that the only way to give effect to Kenna's right to speak ... is to vacate the sentence and hold a new sentencing hearing'.

75 Thomas Weigend, 'Sentencing and Punishment in Germany', in Michael Tonry and Richard Fraser (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2005) 188.

76 Jo-Anne Wemmers, 'Victim Policy Transfer: Learning From Each Other' (2005) 11(1) *European Journal on Criminal Policy and Research* 121, 125.

77 Ibid 125–6. See also Susanne Walther, 'Victims' Rights: Procedural and Constitutional Principles for Victim Participation in Germany' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2012) 97, 104–5.

- 9.63 In addition, only a small number of civil law jurisdictions permit victims to make a victim impact statement. In her academic work, Kerstin Braun suggests that the general absence of victim impact statements is due to the belief that, as the roles of civil party or auxiliary prosecutor afford victims relatively robust mechanisms for participation in the criminal process, victims have no need to subsequently make victim impact statements.<sup>78</sup>
- 9.64 The Netherlands has allowed victims to make impact statements since 2004.<sup>79</sup> As in Victoria, victims in the Netherlands can present their victim impact statements orally or in writing. Also similar to Victoria, victims may be questioned by the defence about the content of their victim impact statement, although this rarely occurs.<sup>80</sup>
- 9.65 However, due to the nature of inquisitorial proceedings, the victim impact scheme differs from Victoria's. Victim impact statements are placed on the case file before the trial.<sup>81</sup> This means that, unlike in adversarial trials, the judge has access to the victim impact statement before a finding of guilt has been made. Oral victim impact statements are delivered before the prosecutor's closing address.<sup>82</sup> Finally, victims can only be questioned about the content of their victim impact statement with the permission of the judge.<sup>83</sup> Judges will not permit questioning that risks re-traumatising the victim.<sup>84</sup>
- 9.66 In 2014, there was debate in the Netherlands about extending victim impact statements to allow victims to express their opinion about the strength of the evidence and what the sentence should be.<sup>85</sup> The proposal contemplated that a victim's representations could influence the outcome of the trial and the sentence imposed on the accused.<sup>86</sup> The Commission understands that those proposals have not been adopted.<sup>87</sup>

## Restorative justice

- 9.67 Restorative justice procedures see 'all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.<sup>88</sup> In appropriate circumstances, restorative justice has the potential to address many of the justice needs of victims that are not catered for by traditional sentencing procedures. Restorative justice procedures are widely used across Australia for less serious crimes, as outlined below.
- 9.68 When part of the sentencing process, restorative justice usually takes one of two main forms. Sometimes a restorative justice process, such as a mediation or a conference, occurs separately to the formal sentencing hearing, and a report of its outcome is taken into account when determining a sentence. In other cases, the sentencing process itself incorporates restorative justice principles.

78 Kerstin Braun, 'Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure' (2013) 14 *German Law Journal*, 1889, 1891.

79 Renée Kool and Georgianna Verhage, 'The (Political) Pursuit of Victim Voice: (Comparative) Observations on the Dutch Draft of the Adviesrecht' (2014) 10(4) *Utrecht Law Review* 86, 90.

80 *Ibid.*

81 *Ibid.*

82 *Ibid.* 91.

83 *Ibid.* 90.

84 *Ibid.*

85 *Ibid.* 91.

86 *Ibid.* 91–2.

87 Government of the Netherlands, *Teeven Elects Unrestricted Rights for Victims to be Heard* (13 November 2014) <<http://www.government.nl/news/2014/11/13/teeven-elects-unrestricted-rights-for-victims-to-to-be-heard.html>>.

88 T Marshall, 'The Evolution of Restorative Justice in Britain (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37 cited in Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Reports Research and Public Policy Series, 2014) vi, and described as 'widely accepted'. See Chapter 3 of this paper for discussion of restorative justice principles.

## Restorative justice procedures for adult offenders in Australia

### Victoria

- 9.69 The only restorative justice procedure for adult offenders in Victoria's superior jurisdictions is the Koori Court Division of the County Court, which is designed specifically for sentencing Indigenous offenders.<sup>89</sup>
- 9.70 The sentence is determined through a flexible, culturally sensitive 'sentencing conversation' between the offender, Koori Elders (one of whom is often known to the offender or his or her family), the judge and the County Court Koori Officer.<sup>90</sup>
- 9.71 While victims can participate in the process,<sup>91</sup> a 2011 evaluation noted that since the Koori Court was established in 2008, only one victim had participated in a sentencing procedure.<sup>92</sup>
- 9.72 Restorative justice processes are also available as part of summary proceedings in the Neighbourhood Justice Division of the Magistrates' Court. An explicit aim of the Neighbourhood Justice Court is to increase the participation of the community, including victims, in the administration of justice.<sup>93</sup> The Neighbourhood Justice Court has less prescriptive and formal procedures, and the presiding magistrate is expected to have experience in, and use, restorative justice techniques.<sup>94</sup>

### Other Australian jurisdictions

- 9.73 Restorative justice procedures are generally available in the lower courts of other Australian jurisdictions.
- 9.74 New South Wales has a process known as 'forum sentencing', in which magistrates can refer eligible matters to a restorative justice conference before imposing sentence.<sup>95</sup> More serious violent offences are excluded.
- 9.75 Forum sentencing has a victim focus. The purposes of forum sentencing include increasing the victim's satisfaction with the justice process, and providing offenders, victims and other members of the community with an opportunity to participate in the criminal justice system.<sup>96</sup> Forum sentencing is also guided by the principle that it 'should enhance the rights and place of victims in the justice process and have due regard to their interests'.<sup>97</sup>

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89 Koori courts operate at both the Magistrates' Court and County Court.

90 Note that the Koori Court 'imprisons offenders at about the same rate and for the same length of time as other cases in the general criminal jurisdiction'. County Court of Victoria, *Annual Report 2013–2014* (2015) 13.

91 The Australian Institute for Criminology and the Centre for Innovative Justice both note that while Indigenous courts employ restorative practices, their purposes focus on ensuring culturally relevant sentencing processes for Indigenous offenders, and are not necessarily focused on restoring the victim: see Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Reports Research and Public Policy Series, 2014) 15; Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (May 2014) 26.

92 County Court of Victoria and Department of Justice, *County Koori Court: Final Evaluation Report* (September 2011) 35. Victims are not included in the description of the 'sentencing conversation' of Judge Smallwood in 'Report of the Judge in Charge of the County Koori Court', in County Court of Victoria, *Annual Report 2013–2014* (2015), 13.

93 Neighbourhood Justice Centre, *Evaluating the Neighbourhood Justice Centre in Yarra: 2007–2009* (Victorian Government Department of Justice, 2010), 2. The Neighbourhood Justice Division sits in Collingwood only and deals with criminal matters in the summary procedures jurisdiction of the Magistrates' Court.

94 Richard Fox, *Victorian Criminal Procedure* (Federation Press, 2015) 95–6.

95 Meredith Rossner et al, *The Process and Dynamics of Restorative Justice: Research on Forum Sentencing* (University of Western Sydney, 2013) 7. Offences not eligible include serious offences involving violence, murder, manslaughter, offences involving family violence and offences involving a weapon: *Criminal Procedure Regulation 2010* (NSW) regs 63(2)–(4).

96 *Criminal Procedure Regulation 2010* (NSW) regs 61(a), (d).

97 Ibid reg 62(a)

- 9.76 During a forum the offender and victim meet face to face, in the presence of a facilitator, support persons and police officers. An intervention plan is prepared, which is then considered by the referring court for approval.<sup>98</sup> The terms of the intervention plan either form part of the sentence, or the plan's successful completion is taken into account at sentencing.<sup>99</sup> If the offender fails to complete the intervention plan, he or she is 'returned to court for the court to deal with the offender'.<sup>100</sup>
- 9.77 Queensland's restorative justice scheme, described as 'justice mediation', involves a mediator assisting the victim and the offender to reach a written agreement. Justice mediation is only available in the Magistrates' Court and is typically used for less serious offences such as theft, minor assaults, minor property damage and unlawful use of a motor vehicle, although it may be available for more serious offences.<sup>101</sup> The police, prosecution or a magistrate may refer a matter to justice mediation. The outcome of the mediation may be that the offender is diverted from the criminal justice system or, if the court makes the referral, the agreement may be placed before the court to be taken into account during sentencing.<sup>102</sup>
- 9.78 In Western Australia and Tasmania, victim-offender mediation may be ordered by the court as part of the sentencing process.<sup>103</sup> In Western Australia, this process is available for a range of offences including robbery, assault, burglary, property damage and fraud, but not for murder, sexual offences or offences involving family violence.<sup>104</sup> Mediation outcomes may include an apology, the return of goods, or compensation. The mediator's report is taken into account by the court when determining the sentence.<sup>105</sup>

## New Zealand

- 9.79 Restorative justice plays a much greater role in New Zealand's criminal justice system when compared to Australia. In New Zealand, restorative justice can be used for all offences that are heard in the District Court, which includes sexual offences and cases involving family violence.<sup>106</sup>
- 9.80 The *Sentencing Act 2002* (NZ) has recently been amended to stipulate that in all District Court cases where an offender pleads guilty, a restorative justice process has not taken place, and the judge is aware that an appropriate restorative justice process is available, the judge must adjourn the sentencing proceedings for an assessment of suitability for restorative justice, 'taking into account the wishes of the victims'.<sup>107</sup> Assessments are conducted by 'specialist restorative justice teams', which may include a facilitator, a 'victim-survivor specialist', an 'offender specialist' and a psychologist.<sup>108</sup>

98 Ibid regs 58(1)(i)–(j). See regulation 58(1) generally for 'summary of process for participation in program'.

99 Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Reports Research and Public Policy Series, 2014) 7.

100 *Criminal Procedure Regulation 2010* (NSW) reg 58(1)(l).

101 Queensland Government, *Justice Mediation* <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/justice-mediation/>>.

102 Ibid.

103 *Sentencing Act 1997* (Tas) ss 84–86; *Sentencing Act 1995* (WA) ss 16(1)(d), 27–30.

104 Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Reports Research and Public Policy Series, 2014) 20.

105 Ibid. See also *Sentencing Act 1995* (WA) s 28.

106 For discussion, see generally Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (May 2014) 30–1.

107 *Sentencing Act 2002* (NZ) s 24A. These amendments were introduced by the *Sentencing Amendment Act 2014* (NZ).

108 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (May 2014) 31–2.

- 9.81 If a conference does occur prior to sentencing,<sup>109</sup> a report of the outcomes is prepared by the facilitator, which the judge takes into account in sentencing. Such outcomes may include:
- whether there has been any offer by the offender to make amends
  - any agreement reached about how the offender can make amends
  - any efforts made to compensate the victim and to apologise
  - any other remedial action.<sup>110</sup>
- 9.82 The facilitator also keeps the victim informed of what sentence the offender received, and the offender's progress with respect to any agreed outcomes.<sup>111</sup>

## Discussion and options for reform

- 9.83 Victim impact statements represent a participating-witness mechanism already in existence in Victoria for victims at the sentencing stage of the criminal trial process. This section therefore focuses on options for changing different aspects of the victim impact statement process. It then discusses alternative and complementary forums for victim participation after an offender has been found guilty.

### Victim impact statements

- 9.84 Victim impact statements are often described as having the following advantages:
- They allow victims to be involved in the criminal justice process, which may lead to therapeutic, emotional or psychological benefits for victims and improve their satisfaction with the criminal justice system.
  - They afford victims dignity and respect by providing a form of official acknowledgment and recognising them as having a legitimate interest in the criminal trial process.
  - They ensure sentences take into account the effect of the crime on the victim, and reflect community expectations.
  - They provide a mechanism to confront offenders with the consequences of their conduct, thereby promoting deterrence and rehabilitation.<sup>112</sup>
- 9.85 Not all victims report therapeutic or positive experiences in relation to victim impact statements. Rather, some victims report feeling confused about the role the victim impact statement plays in sentencing and feel that their statement should have been given greater weight by the judge.<sup>113</sup> The Commission notes that empirical evidence is not conclusive about whether providing a victim impact statement increases victims' satisfaction or leads to therapeutic or psychological benefits for victims.<sup>114</sup>
- 9.86 While there remain some objections to victim impact statements, the practice is now well entrenched in Victoria and across the common law world.<sup>115</sup>

109 *Sentencing Act 2002* (NZ) s 24A(2)(b).

110 *Ibid* s 10(1).

111 Ministry of Justice New Zealand, *Pre-sentence Restorative Justice Court Process* <<http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/restorative-justice-process-pre-sentence>>.

112 For commentary, see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, (Report No 103, 2006) [14.9]; Edna Erez and Julian V Roberts, 'Victim Input at Sentencing' in G Bruinsma and D Wesiburd (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer, 2014) 5425, 5428; Jonathan Doak et al, 'Victims and the Sentencing Process: Developing Participatory Rights?' (2009) 29(4) *Legal Studies* 651.

113 Jonathan Doak et al, 'Victims and the Sentencing Process: Developing Participatory Rights?' (2009) 29(4) *Legal Studies* 651, 672–3.

114 See, eg, Edna Erez et al, *Victim Impact Statements in South Australia* (Australian Institute of Criminology, 1996) 213. This study found that half of the survey participants stated that providing victim impact statement material made no difference, while a small number of participants said it 'upset or disturbed' them.

115 A review of the use of victim impact statements conducted by the Victorian Department of Justice in 2014 describes the current system of victim impact statements in Victoria as 'important in enabling victims to have a greater voice at sentencing': Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (Victorian Government, 2014) 80.

## Who can make a victim impact statement

9.87 Reforms could expand the availability of victim impact statements to a broader group of non-immediate victims, or introduce community impact statements. Such reforms raise questions about equality and proportionality in sentencing and the matters which are relevant to determining a sentence. Victims who have strong community ties may be more able to show that the crime caused harm to their community than a victim without close connections to their community. This may result in a more severe sentence for those who offend against ‘much-loved’ victims, which in turn risks undermining equality in sentencing.

## The content of victim impact statements

9.88 A potential change to the current Victorian scheme is to grant victims greater influence on the sentencing outcome, by allowing them to make submissions about the type and duration of sentence which they believe should be imposed. This would represent a shift in the role of the victim, from providing information about the impact of the crime to having a say in the resolution of the case. This gives rise to some important considerations, including:

- whether a victim’s opinion about what punishment an offender should receive is relevant to the sentencing decision
- whether victims might be influenced by non-objective considerations when making submissions about sentencing, and therefore urge that a sentence be too harsh or too lenient
- whether this might mean recognising victims as parties to the sentencing proceedings, contrary to the two-party structure of Victoria’s adversarial system.

## Privacy

9.89 Victims have raised concerns about the implications for their privacy when their victim impact statement forms part of the court’s public record, is read aloud in court or given to the offender. As noted above, some protections exist for child victims or victims of sexual offences. One option is to expand these existing protections to other victims.

9.90 Another option is to adopt broader provisions restricting the publication of victim impact statements as part of the court’s public record and/or disclosure to the offender, similar to New Zealand’s scheme. In line with principles of fairness and open justice, any reform proposal that restricts an offender’s access to a victim impact statement would need to consider the implications of the sentencing judge taking into account information that the offender has not seen.

## Representation for victims during sentencing proceedings.

9.91 One proposal which may address some concerns raised by victims is to allow a victim to be represented by their own lawyer during the sentencing hearing. An evaluation of victim impact statement reforms in Victoria by the Department of Justice in 2014 noted that:

Considering some of the difficulties faced by prosecutors in advancing the interests of both the State and of the victim, and the associated tensions that have arisen with respect to [victim impact statements] and victims’ expectations that prosecutors would ‘advocate’ for their rights, it might be timely to explore the role of victim advocates or victim representatives at the sentencing phase of the criminal trial ...<sup>116</sup>

- 9.92 The victim’s lawyer could carry out a range of functions, including:
- assisting in the preparation of the victim impact statement to ensure its contents are admissible
  - providing legal advice to victims to help them understand the role and use (and limits) of victim impact statements
  - making submissions during the sentencing hearing to explain or supplement the material contained in the victim impact statement
  - calling any witnesses the victim wishes to call and leading the victim through the evidence they may give
  - cross-examining any witnesses called as part of the offender’s plea (potentially limited to the evidence of those witnesses that is relevant to the victim).
- 9.93 Giving victims a legal advocate during sentencing is arguably less contentious than legal representation during the pre-trial and trial phases of the criminal trial process because the guilt of the offender and the ‘victimhood’ of the victim has been proved.
- 9.94 Victim impact statements sometimes contain material that is not admissible in the sentencing hearing. Victims reported distress at having their statements edited by the prosecutor, the offender’s lawyer or the judge, sometimes in open court. The process of editing victim impact statements, whether before or during the sentencing hearing, also highlights a tension between the victim and the prosecutor. The DPP’s policy states that prosecutors have no formal role in preparing the victim impact statement and requires the prosecutor to bring any clearly inadmissible material to the judge’s attention.<sup>117</sup> Prosecutors may find it difficult to balance the interests of the victim against the need to ensure only admissible material is taken into account at the sentencing hearing.<sup>118</sup> If the victim has a separate lawyer, this tension may be resolved, while ensuring that a victim receives legal advice about admissibility.
- 9.95 Nevertheless, the introduction of victims’ representatives in the sentencing phase still encroaches on the two-party structure of the adversarial criminal trial process. The introduction of a third participant in this way may undermine the ‘equality of arms’ between the defence and the prosecution.
- 9.96 The Commission notes that any reform proposals to enhance victim participation should take into account the consequences of raising victims’ expectations about the therapeutic benefits or impact of participation and then not meeting those expectations, which may further traumatise or disillusion victims.<sup>119</sup>

### Restorative justice sentencing procedures

- 9.97 Restorative justice procedures, such as those already used in magistrates’ courts across Australia, present an alternative or complementary sentencing path to the traditional sentencing hearing. The adoption of restorative justice procedures in domestic and international jurisdictions<sup>120</sup> reflects mounting evidence that restorative justice practices can be effective in meeting the needs and interests of victims.

117 Director of Public Prosecutions Victoria, *Director’s Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [47]–[48].

118 Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (Victorian Government, 2014) 70.

119 Christine Englebrecht, ‘The Struggle for “Ownership of Conflict”’: An Exploration of Victim Participation and Voice in the Criminal Justice System’ (2011) 36(2) *Criminal Justice Review* 129.

120 For a domestic example, see the *Sentencing Act 2002* (NZ) ss 10, 24A–31; for an international example, see the International Criminal Court (discussed in detail in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 3: The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process* (May 2015)).

- 9.98 In New Zealand, the use of restorative justice for offences involving sexual or family violence has been particularly contentious.<sup>121</sup> Among other concerns, detractors highlight the risks that restorative justice can reinforce gendered power imbalances and that confronting an offender can leave vulnerable victims more traumatised. More general concerns relate to whether the processes and sentencing outcomes from restorative justice conferences understate the seriousness of offending, limit public scrutiny of the criminal justice system, or lead to inadequate punishment.<sup>122</sup>
- 9.99 The 2014 report of the Centre for Innovative Justice (CIJ) recommended that restorative justice could be used at the sentencing phase in sexual offence matters.<sup>123</sup> As part of its recommendation, the CIJ outlined a robust referral scheme (aimed at addressing the above-mentioned concerns), which includes two separate assessments to ensure that only appropriate cases reach a conference. It also recommended a requirement that all restorative justice conferences be facilitated by multidisciplinary teams of trained specialists.
- 9.100 Consideration could therefore be given to legislative reforms that integrate restorative justice into sentencing in Victoria. If such reforms were adopted, careful consideration should be given to the institutional structures, protocols and procedures necessary to protect and empower victims and preserve the integrity of the sentencing process. These include:
- whether there are offences or victims inherently unsuitable for restorative justice
  - how to assess the circumstances of the offender and the offender's suitability for restorative justice
  - whether there should be limits on the content and types of agreements that victims and offenders could reach as part of the restorative justice process
  - whether the sentencing hearing should incorporate restorative justice principles, or whether the restorative justice process should be separate to, although taken into account at, the formal sentencing hearing
  - how the outcomes of any conference or mediation (including any agreement) might influence or be taken into account in sentencing
  - what training of facilitators, accreditation, oversight and membership of professional bodies is necessary.

121 Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009), 50–2.

122 Ibid.

123 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (May 2014). The proposals from this report are also considered in Chapters 5 and 7.

## Questions

### The victim's role in sentencing and the purposes of sentencing

- 35 Should the victim have a greater role in sentencing? If so, what should that role be?
- 36 Should the purposes of sentencing explicitly include the needs and interests of victims?

### Victim impact statements

- 37 Should further limits be placed on the publication and distribution of victim impact statements?
- 38 Should a broader group of victims be permitted to make victim impact statements?
- 39 Should community impact statements be introduced?
- 40 Should victims be permitted to make submissions in relation to sentencing?
- 41 What should be the role of the prosecutor in preparing victim impact statements?

### Restorative justice sentencing procedures

- 42 Should restorative justice procedures be available as either an alternative or supplementary part of the sentencing process? If not, why not? If so, in what circumstances?

# Compensation and restitution

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## 10. Compensation and restitution

### Introduction

- 10.1 The impacts of crime are diverse and can be long term. Common effects of crime include psychological injury, emotional harm, physical injury and financial loss.<sup>1</sup> Victims may have to pay for psychological treatment, counselling, medical treatment and incur costs related to security or relocation. They may also need to take time off work and therefore lose earnings or leave entitlements.
- 10.2 The modern adversarial trial was not designed to be reparative or compensatory. Rather, reflecting the characterisation of crime as a wrong against society, criminal laws and trials have been focused on determining guilt and meting out just punishment. Traditionally, where a person suffers an injury or loss caused by another, his or her recourse is through the civil jurisdiction of the Victorian courts as a private action for damages.
- 10.3 Part 4 of the *Sentencing Act 1991* (Vic) provides victims with a right to apply for an order for compensation or restitution against the offender as part of the sentencing process but separate to the offender's punishment. It is in effect a civil remedy 'tacked on' to the end of a criminal trial for the benefit of victims.<sup>2</sup>
- 10.4 In addition, the *Victims of Crime Assistance Act 1996* (Vic) (VCAA) establishes a state-funded compensation scheme, designed to provide financial assistance to victims of violent crime to help with recovery where adequate compensation cannot be obtained from the offender or another source.<sup>3</sup>
- 10.5 An award of compensation or financial assistance<sup>4</sup> can have a validating effect on victims, especially where an offender has not been convicted. There is evidence to suggest that some victims prefer to receive compensation from offenders rather than the state,<sup>5</sup> and that victims place value on what offenders can do to repair harm, rather than how much compensation they can pay.<sup>6</sup> This is connected to victims' need for offenders to recognise the impact of their crime.

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

2 *Kaplan v Lee-Archer* [2007] VSCA 42, [25] (Buchanan JA; Vincent and Nettle JJA agreeing).

3 See *Victims of Crime Assistance Act 1996* (Vic) s 1(2). Jo Goodey suggests that there are four key rationales behind state-based compensation schemes for victims of crime: legal duty, moral duty, distribution of loss and benefit to the state: Jo Goodey, *Victims and Victimology: Research, Policy and Practice* (2005) 141.

4 The *Sentencing Act 1991* (Vic) uses the terminology 'compensation' or 'restitution', while the *Victims of Crime Assistance Act 1996* (Vic) uses the terminology 'financial assistance'. The words 'reparation' and 'restoration' are used interchangeably throughout this chapter to reflect the different ways in which practical, financial and symbolic compensatory measures are termed in law in different jurisdictions, both in Australia and internationally.

5 David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change (2014) 20(1) *International Review of Victimology* 145, 148.

6 Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002) 8–24; Joanna Shapland et al, *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield, 2006) 72.

- 10.6 This chapter looks at the system for obtaining compensation and restitution orders directly against an offender under the Sentencing Act. Consistent with the terms of reference and the general approach in this consultation paper, the focus will be on procedural matters, both in respect of how and when applications are made in conjunction with the trial process, and a victim's options for enforcement. Limited consideration is given to the role of victims in applying for financial assistance from the state through the VCAA.<sup>7</sup>

## The current system in Victoria

- 10.7 Victims in Victoria may seek compensation, restitution or financial assistance orders through three avenues:
- compensation or restitution orders against the offender pursuant to Part 4 of the Sentencing Act
  - state-funded financial assistance through the Victims of Crime Assistance Tribunal (VOCAT)
  - civil proceedings in court against the offender.
- 10.8 The first two options fulfil the requirements of the *Victims' Charter Act 2006* (Vic).<sup>8</sup>

### Sentencing Act restitution and compensation orders

- 10.9 One of the purposes of the Sentencing Act is 'to ensure that victims of crime receive adequate compensation and restitution'.<sup>9</sup>
- 10.10 Restitution and compensation orders under the Sentencing Act are not sentencing orders. This means that they cannot form part of a judge's determination of the appropriate punishment for an offender. Rather, Sentencing Act restitution and compensation orders are non-punitive orders that can be made in addition to sentencing orders. The purpose is to provide a quick, efficient and cheap means 'for the recovery of civil recompense by victims'.<sup>10</sup>
- 10.11 In addition, if a compensation or restitution order is made, this cannot act as a mitigating factor in the determination of a sentence.<sup>11</sup> The rationale for this is that wealthy offenders should not be able to buy their way out of more punitive penalties.<sup>12</sup>
- 10.12 A victim can seek orders for restitution or compensation for loss or injury caused as a direct result of the offence. This means that a broad category of victims may make applications, including witnesses and parents.
- 10.13 Sentencing Act restitution or compensation orders can only be made if an offender has pleaded guilty or been found guilty. This reflects the public interest in using the sentencing process to ensure that those who have been found guilty are held financially accountable.<sup>13</sup>
- 10.14 Further, for each type of restitution and compensation order described below, there needs to be sufficient evidence from the hearing of the charges, admissions or from prescribed available documents before a judge can make an order.<sup>14</sup> This reflects the intention for such orders to be made through a relatively straightforward and accessible procedure.

7 The amount of compensation, restitution or financial assistance awards are outside the Commission's terms of reference.

8 *Victims' Charter Act 2006* (Vic) s 16.

9 *Sentencing Act 1991* (Vic) s 1(i).

10 *R v Ross* (2007) 17 VR 80, [19] (Vincent JA; Chernov JA and Whelan AJA agreeing); *Director of Public Prosecutions v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [2] (Buchanan JA).

11 *R v Ross* (2007) 17 VR 80, [19] (Vincent JA; Chernov JA and Whelan AJA agreeing).

12 *Brooks v Police* [2000] SASC 66, [43].

13 *Director of Public Prosecutions v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [26] (Vincent JA).

14 *Sentencing Act 1991* (Vic) ss 84(7) (in relation to restitution orders), 85F (in relation to compensation for injury), 86(8) (in relation to compensation for property loss). Note that s 85F mandates a court to hear and determine an application for compensation for injury unless the relevant facts do not sufficiently appear from a list of prescribed sources.

## Restitution for loss of property

- 10.15 Restitution orders under the Sentencing Act relate specifically to restoration of stolen goods connected to theft. A restitution order may require an offender to:
- return stolen goods to a victim entitled to them
  - transfer goods representing the proceeds of the disposal or sale of stolen goods to a victim
  - pay money to a victim representing not more than the sum of the value of the goods.<sup>15</sup>
- 10.16 The application for restitution may be made by the victim, or by the Director of Public Prosecutions (DPP) on behalf of the victim.<sup>16</sup>

## Compensation for loss of property

- 10.17 The court may also make a compensation order against the offender for the value of any loss, destruction or damage to property as a result of an offence.<sup>17</sup> Unlike restitution orders, compensation orders are not limited to offences connected to theft.
- 10.18 Such an order may be made on the application of the victim, the DPP or on the court's own motion.<sup>18</sup>

## Compensation for injury

- 10.19 Compensation orders may also be made against an offender for any injury directly caused to a victim by an offence.<sup>19</sup>
- 10.20 The offence has to be a direct cause of the injury, but does not have to be the sole cause.<sup>20</sup> Injury is defined as one of, or a combination of:
- bodily harm
  - mental illness or disorder
  - pregnancy
  - grief, distress, trauma or other adverse shock.<sup>21</sup>
- 10.21 A compensation order may be made for:
- pain and suffering
  - expenses incurred, and future expenses reasonably likely to be incurred, for medical treatment or counselling
  - other expenses incurred, and reasonably likely to be incurred in the future, as a direct result of the offence.<sup>22</sup>

15 *Sentencing Act 1991* (Vic) s 84(1).

16 *Ibid* s 84(5).

17 *Ibid* s 86(1).

18 *Ibid* ss 86(1A), 86(5)(b). Section 86(1B) sets out the circumstances in which the court can make a compensation order for property loss, destruction or damage of its own motion.

19 *Ibid* s 85B. The only limit to the type of offence is where it appears to a court that the victim has an entitlement to compensation under the *Accident Compensation Act 1985* (Vic) and *Transport Accident Act 1986* (Vic), or where injury arises from an event that constitutes an offence only against the *Dangerous Goods Act 1985* (Vic); *Occupational Health and Safety Act 2004* (Vic); *Equipment (Public Safety) Act 1994* (Vic); *Road Safety Act 1986* (Vic) or any regulations made under those Acts. For details, see *Accident Compensation Act 1985* (Vic) s 138B; *Transport Accident Act 1986* (Vic) s 107A.

20 *Kaplan v Lee-Archer* [2007] VSCA 42, [24] (Buchanan JA; Vincent and Nettle JJA agreeing).

21 *Sentencing Act 1991* (Vic) s 85A(1).

22 *Ibid* s 85B(2). This does not include expenses relating to the loss of, or damage to, property: s 85B(2)(d). In *Kaplan v Lee-Archer* [2007] VSCA 42, Buchanan JA noted that 'compensation under the section should extend no further than that recoverable at common law': at [28].

- 10.22 A compensation application may be made up to 12 months after the conviction of the offender.<sup>23</sup> The application may be made by the victim or by the DPP on the victim's behalf.<sup>24</sup> The victim and offender may appear in person or be represented by a lawyer.<sup>25</sup>
- 10.23 In assessing the amount of compensation to be ordered, the judge may be guided by principles that apply when a person sues for damages in the civil jurisdiction.<sup>26</sup> However, in *Director of Public Prosecutions v Energy Brix Australia Corporation Pty Ltd*, Justice of Appeal Vincent alluded to the need for caution to ensure that any differences arising from the way that a crime impacts on an individual, compared to a non-criminal action (such as a negligent wrong), are taken into account.<sup>27</sup> In addition, if the victim has been awarded financial assistance by VOCAT, this amount is to be deducted.<sup>28</sup>
- 10.24 The victim and the offender can call witnesses or give evidence at the hearing of the compensation application.<sup>29</sup> The court must give an offender a reasonable opportunity to be heard in relation to an application for compensation for injury.<sup>30</sup>

### Director of Public Prosecutions policy

- 10.25 The Director of Public Prosecutions (DPP) will only apply for a restitution or compensation order on behalf of a victim if all of the following are satisfied:
- The offender pleads guilty or is found guilty.
  - There is sufficient evidence to justify the application.
  - The quantum can be readily determined.
  - The application is not opposed by the offender.
  - The offender's financial circumstances are such that there is a reasonable prospect that at least a substantial amount of the order could be enforced against the offender.
  - In the case of a child or a person incapable of managing their affairs, a suitable person is available to act as a litigation guardian.<sup>31</sup>
- 10.26 If the DPP decides not to pursue a restitution or compensation order on behalf of a victim, the victim must be given a referral to another service for help.<sup>32</sup>
- 10.27 For compensation applications, the Sentencing Act requires each party to bear their own legal costs, unless the judge orders otherwise. Thus, if an application is made by the DPP for the victim as part of the sentencing hearing, the victim benefits from not having to bear the costs of the application.<sup>33</sup>

### Comparison with civil proceedings

- 10.28 The only other option for pursuing compensation for loss and injury directly from an offender (as opposed to state-funded assistance from VOCAT) is to sue for tortious damages in the civil jurisdiction of the court. This would require commencing separate proceedings and retaining a private lawyer, potentially at significant cost. Civil litigation can be a difficult process, requiring understanding of rules of evidence, legal principles, disclosure obligations and costs rules.

23 *Sentencing Act 1991* (Vic) s 85C(1)(a). An extension of time may be granted if it is in the interests of justice in accordance with s 85D.  
 24 *Ibid* s 85C. A person may apply on behalf of the victim if the victim is a child or is incapable of making the application by reason of injury, disease, senility, illness or physical or mental impairment: s 85C(1)(b)(ii).  
 25 *Ibid* s 85E. The victim may be represented by a person who is not a lawyer with the leave of the court.  
 26 *Director of Public Prosecutions v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [31] (Vincent JA). For commentary, see Ian Freckelton, 'Compensation Applications Require a Watching Brief' (2009) *Monash University Law Research Series* 5.  
 27 *Director of Public Prosecutions v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [31], [40] (Vincent JA).  
 28 *Sentencing Act 1991* (Vic) s 85I.  
 29 *Ibid* s 85G(1).  
 30 *Ibid* s 85G(2).  
 31 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [67].  
 32 *Ibid* [68].  
 33 *Sentencing Act 1991* (Vic) ss 85K: in relation to compensation applications for injury; 86(9D): in relation to compensation applications for property loss.

- 10.29 The Sentencing Act compensation provisions are intended to provide a faster and less expensive alternative to civil proceedings.<sup>34</sup> The Sentencing Act does not specify procedures that must be followed by a party making an application.<sup>35</sup> This has been stated to allow for flexible and fair procedures.<sup>36</sup>
- 10.30 A victim who receives an order for compensation or restitution under the Sentencing Act can still pursue civil action against the offender for any amount of loss or damage that was not met by the Sentencing Act orders.<sup>37</sup>

### Financial circumstances of the offender

- 10.31 In determining an application for compensation for property loss or personal injury (but not for a restitution order), the judge may take the financial circumstances of the offender into account as far as practicable, and ‘the nature of the burden’ that the amount and method of payment of compensation would cause if ordered.<sup>38</sup>
- 10.32 Compensation orders are not intended to constitute punishment. They are intended to restore the damage or loss experienced by a victim.<sup>39</sup> There is a clear tension between the interests of the offender in not being left with a crushing financial burden (a punishment in effect rather than intent), and the interests of victims in accessing adequate compensation through the sentencing process and avoiding the necessity of starting separate civil court proceedings.<sup>40</sup>
- 10.33 While the judge should deliberate on the extent to which a compensation order may detrimentally affect the offender’s ‘prospects of rehabilitation’,<sup>41</sup> the judge can still make an order of compensation that might affect the offender’s rehabilitation.<sup>42</sup> The courts have recognised that in some cases, the victim’s interests in receiving an appropriate order for compensation take priority.<sup>43</sup>
- 10.34 The Australian Law Reform Commission (ALRC) considered this issue in 2006. The ALRC noted that if a victim were to seek compensation through separate proceedings in the court’s civil jurisdiction, the financial circumstances of the offender would be irrelevant to the court’s assessment of damages.<sup>44</sup> The ALRC considered that judges should not be permitted to take into account an offender’s financial circumstances with a view to reducing the quantum of an award. Doing so was seen as undermining the central purpose of compensation and restitution orders, which is to ensure that victims of crime receive adequate compensation for the loss they have suffered.<sup>45</sup>

34 *Kaplan v Lee-Archer* [2007] VSCA 42, [25] (Buchanan JA); *RK v Mirik and Mirik* [2009] VSC 14, [11] (Bell J).

35 The County Court Practice Note sets out requirements for applications for compensation under s 85B of the *Sentencing Act 1991* (Vic). See County Court of Victoria, *County Court Criminal Division Practice Note* (PNCR 1-2015, 14 April 2015) ch 17.

36 *RK v Mirik and Mirik* [2009] VSC 14 [15] (Bell J). In *DPP v Ezzo Australia Pty Ltd (No 16)* [2001] VSC 401, Cummins J noted ‘it is undesirable that s 85B proceedings be burdened down by substantial complex or technical rules of procedure as may properly apply on the civil side’: [23].

37 *Sentencing Act 1991* (Vic) ss 85L (in relation to compensation orders for injury), 86(10) (in relation to compensation orders for property loss).

38 *Sentencing Act 1991* (Vic) ss 85H(1) (in relation to compensation for injury), 86(2) (in relation to compensation for property loss). The judge is not prevented from making a compensation order because the financial circumstances of the offender cannot be discerned: s 85H(2). See *Josefski v Donnelly* [2007] VSCA 6, [8] (Nettle JA; Buchanan and Vincent JJA agreeing).

39 *Director of Public Prosecutions v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [30] (Vincent JA). See also *Director of Public Prosecutions v Ezzo Australia Pty Ltd* [2004] VSC 440, [7], [20] (Cummins J).

40 See discussion of Cummins J in *Gregory v Gregory* [2000] VSC 190, [28].

41 *R v Ross* (2007) 17 VR 80, [18] (Vincent JA; Chernov and Whelan AJA agreeing), citing *Josefski v Donnelly* [2007] VSCA 6; and *Gregory v Gregory* (2000) 112 A Crim R 19 (Cummins J).

42 *Josefski v Donnelly* [2007] VSCA 6, [17]–[19] (Nettle JA; Buchanan and Vincent JJA agreeing); *RK v Mirik and Mirik* [2009] VSC 14, [137]–[139] (Bell J). See also *Shepherd & anor v Kell & Dey* [2013] VSC 24, [30] (Lasry J) (citations omitted).

43 See for example, *RK v Mirik and Mirik* [2009] VSC 14, [138], [141].

44 Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders* (Report 103, 2006) [8.27].

45 *Ibid* [8.33]–[8.35]. The Law Reform Committee of the Parliament of Victoria considered this issue in 1994 and recommended that an offender’s financial circumstances continue to be taken into account. See Law Reform Committee of the Parliament of Victoria, *Restitution for Victims of Crime: Final Report* (1994) [3.20].

## Enforcement

- 10.35 As noted above, restitution and compensation orders are not sentencing orders. They are not intended to be punitive although they may cause financial hardship.
- 10.36 The difference between a sentencing order and a restitution or compensation order is also reflected in the way in which such orders are enforced. The failure by an offender to comply with a sentencing order, such as a fine, will attract a punitive response. In contrast, the failure of an offender to fulfil a compensation order or a restitution order that requires payment of a sum of money, results in a judgment debt.<sup>46</sup> The failure to fulfil a compensation or restitution order will not impact on the offender's sentence.
- 10.37 A judgment debt can then be enforced through the civil jurisdiction of the court that made the order.<sup>47</sup> In *Josefski v Donnelly*,<sup>48</sup> Justice of Appeal Nettle noted that options for enforcement include instalment orders under the *Judgment Debt Recovery Act 1984* (Vic) or petitioning for bankruptcy under the *Bankruptcy Act 1966* (Cth).<sup>49</sup>

## Appeals against restitution and compensation orders

- 10.38 An appeal of a restitution or compensation order can only be made by the DPP and only in cases where the DPP is satisfied that an error has occurred and that it is in the public interest to appeal.<sup>50</sup> Victims themselves do not have a statutory right to appeal. Rather, a dissatisfied victim can commence proceedings for damages in the court's civil jurisdiction.<sup>51</sup>
- 10.39 A victim 'may be heard' in an appeal if the Court of Appeal has set aside an offender's conviction and is considering whether a compensation or restitution order made as a result of that conviction should not take effect.<sup>52</sup>

## Victims of Crime Assistance Tribunal (VOCAT)

- 10.40 VOCAT was established by the *Victims of Crime Assistance Act 1996* (Vic) (VCAA).<sup>53</sup> The VCAA in turn sets out a financial assistance scheme for victims of crime, administered by VOCAT.
- 10.41 The VCAA provides victims of violent crimes with an avenue for state-funded financial assistance to assist with recovery where victims cannot obtain financial assistance from an offender or another source. Awards of financial assistance also act as a symbolic expression of the community's sympathy and recognition of the adverse effects of crime.<sup>54</sup>

46 *Sentencing Act 1991* (Vic) ss 85(1) (in relation to restitution orders involving the payment of money), 85M (in relation to compensation orders for injury), 87 (in relation to compensation orders for property). Restitution orders requiring the restoration, transfer or delivery of goods by the offender to a person do not result in a judgment debt but are orders enforceable through the civil jurisdiction of the court in which they were made: s 85(2).

47 Only the provisions relating to restitution orders refer specifically to the use of civil enforcement mechanisms (ibid s 85(2)), but the Victorian case law appears to accept that this course is open to compensation orders: see *Josefski v Donnelly* [2007] VSCA 6.

48 Ibid [12] (Nettle JA, Buchanan and Vincent JJA agreeing).

50 *Criminal Procedure Act 2009* (Vic) s 287 provides for the right of the Crown to appeal a sentence. Section 3 of the Act defines sentence to include restitution and compensation orders made under Part 4 of the *Sentencing Act 1991* (Vic).

51 In *Director of Public Prosecutions v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [2], Buchanan JA noted 'Consistently with the aim of providing a cheap, expeditious remedy, which builds upon a criminal proceeding, the victim has no right of appeal from an award or a refusal of compensation. If unsatisfied with the decision by the court trying the offence, a victim may bring proceedings to recover damages.'

52 *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 2.47. A compensation or restitution order made under ss 84, 85B or 86 of the *Sentencing Act* is usually stayed (suspended) for the duration of the appeal. If a conviction is set aside, the compensation or restitution order will not take effect unless the Court of Appeal orders otherwise. See *Criminal Procedure Act 2009* (Vic) s 311.

53 *Victims of Crime Assistance Act 1996* (Vic) s 19(1).

54 Ibid s 1(2).

- 10.42 Primary victims, witnesses and family members may be eligible for varying levels of financial assistance.<sup>55</sup> For each category of victim, eligibility is dependent on there having been an act of violence. However, it is not required that the offender was convicted or was even charged.<sup>56</sup> An ‘act of violence’ captures ‘a criminal act or series of related criminal acts’ committed in Victoria, which has ‘directly resulted in injury or death of one or more persons’.<sup>57</sup> The criminal acts encompassed by the VCAA scheme are limited to:
- offences punishable by imprisonment that involve an assault, injury or threat of injury
  - prescribed sexual offences
  - stalking, child stealing, and kidnapping offences
  - any offence of conspiracy, incitement or attempting to commit one of the above offences.<sup>58</sup>
- 10.43 The definition of ‘injury’ includes physical and psychological injury and pregnancy.<sup>59</sup> Less serious and non-violent offences are generally excluded. Injury suffered or expenses incurred as a result of loss or damage to property are specifically excluded.<sup>60</sup>
- 10.44 Financial assistance can cover medical and counselling expenses, lost earnings, safety expenses and other expenses, up to a maximum of \$60,000 for primary victims.<sup>61</sup> An additional award of ‘special financial assistance’ between \$130 and \$10,000 can be made to primary victims if VOCAT is satisfied that the victim has suffered ‘significant adverse effect’ as a result of a prescribed act of violence.<sup>62</sup>

### Electing to attend a hearing

- 10.45 When making an application, victims can elect whether they want VOCAT to hold a hearing or have their application determined without a hearing.<sup>63</sup> VOCAT describes the option of a hearing for victims as ‘an opportunity for victims to give voice to the impact of the crime and to receive acknowledgement and validation of their trauma’.<sup>64</sup>
- 10.46 The victim applying for financial assistance (or their lawyer) is considered to be a party to the proceeding. Victims are entitled to appear and be heard by VOCAT at the hearing.<sup>65</sup>
- 10.47 If VOCAT wishes to notify an offender of the time and place of the hearing, VOCAT must first give the victim applying for financial assistance the opportunity to be heard about whether the offender should be given notice.<sup>66</sup>
- 10.48 The VCAA provides alternative ways for victims to give evidence, including by way of closed-circuit television or with a support person.<sup>67</sup> VOCAT can also order that a hearing, or part of a hearing, be conducted in a closed court and can restrict the publication of material.<sup>68</sup> VOCAT is not required to conduct itself in a formal manner and is not bound by the rules of evidence.<sup>69</sup>

55 The three categories of eligibility are primary victim, secondary victim and related victim, which are defined at *Victims of Crime Assistance Act 1996* (Vic) ss 7, 9, 11.

56 *Ibid* s 50(4).

57 *Ibid* s 3.

58 *Ibid* (definition of ‘relevant offence’).

59 *Ibid* (definition of ‘injury’).

60 *Ibid* ss 3 (definition of ‘injury’ and ‘significant adverse effect’), 8(4), 13(3). Expenses relating to safety or loss or damage to clothes worn at the time the offences occurred may be covered by an award of financial assistance: ss 8(2)(d)–(e).

61 *Ibid* s 8. The maximum for secondary victims is \$50,000: s 10(1); and for related victims it is \$50,000 for one related victim, or a total of \$100,000 (less funeral expenses) for all related victims if there is more than one related victim: ss 12(1), 13(1).

62 *Ibid* s 8A. Acts of violence are categorised according to severity. Category A acts of violence are the most serious, whereas Category D acts are the least serious. The offences captured within each category are detailed in *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) sch.

63 *Ibid* s 26(d).

64 See Victims of Crime Assistance Tribunal, *Hearings* <<https://www.vocat.vic.gov.au/determining-application/hearings>>.

65 *Victims of Crime Assistance Act 1996* (Vic) s 35.

66 *Ibid* s 34(3). Victims of Crime Assistance Tribunal, *Practice Direction No. 4 of 2008: Notification of Alleged Offenders and Third Parties* (11 December 2008) details VOCAT’s procedure for consulting with a victim before determining whether to notify an offender of an application.

67 *Victims of Crime Assistance Act 1996* (Vic) s 37(3).

68 *Ibid* ss 42 (in relation to VOCAT’s power to conduct a closed hearing, or part of hearing), 43 (in relation to VOCAT’s powers to restrict publication of material). VOCAT must make a direction under s 42 if requested by certain vulnerable applicants: s 42(3).

69 *Ibid* s 38.

- 10.49 A victim dissatisfied with VOCAT's decision has a right to apply for a review by the Victorian Civil and Administrative Tribunal within 28 days. The victim is a party to those proceedings. VOCAT must take into account any other financial assistance received by the victim and may order a victim to refund assistance already paid if the victim subsequently receives money by way of a compensation order.<sup>70</sup>
- 10.50 The Sentencing Act gives the state the right to recover the amount of any VOCAT payment made to the victim from the offender.<sup>71</sup> This order is made for the benefit of the state, not the victim.
- 10.51 VOCAT made financial assistance orders totalling \$42,315,273 (including special financial assistance awards of \$11,798,837), and legal costs orders totalling \$5,542,800 during 2013–14. The average amount of financial assistance awarded was \$7,336.<sup>72</sup>

## Alternative processes and procedures

- 10.52 Many jurisdictions have schemes allowing victims to obtain compensation from the offender as well as state-funded financial assistance schemes. The following section considers procedures and practices in other jurisdictions that are distinctly different to or more broad in application than those in place in Victoria.

## Compensatory orders against offenders

### Presumption in favour of reparation

#### New Zealand

- 10.53 New Zealand's sentencing laws contain a robust presumption in favour of a reparation order<sup>73</sup> being made by a sentencing court, as follows:
- If a court is lawfully entitled ... to impose a sentence or order of reparation, it must impose it unless it is satisfied that the sentence or order would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate.<sup>74</sup>
- 10.54 A judge is lawfully entitled to make a reparation order where the offender has caused a victim to suffer emotional harm, property loss or damage, or loss or damage that is consequential to any emotional or physical harm or property loss or damage (consequential losses).<sup>75</sup>
- 10.55 As noted in Chapter 9, a reparation order in New Zealand can be made as a sentencing order, which shapes its character as both punitive for the offender and financially restorative for the victim. This has implications for how the reparation order is enforced, discussed below.
- 10.56 In New Zealand, victims of personal injury can seek financial assistance through the *Accident Compensation Act 2001* (NZ). Victims of crime may have entitlements under this Act. Any consequential losses that are covered by the Accident Compensation Act are to be excluded from reparation orders.<sup>76</sup>

70 Ibid ss 16, 62.

71 *Sentencing Act 1991* (Vic) s 87A.

72 Victims of Crime Assistance Tribunal, *Annual Report 2013–14* (2014) 35–8.

73 Reparation order is the term used in the *Sentencing Act 2002* (NZ), under which a variety of outcomes may be achieved to restore or compensate the victim, or otherwise repair harm.

74 *Sentencing Act 2002* (NZ) s 12(1).

75 Ibid s 32. A reparation order cannot include a requirement for an offender to perform work or a service for the victim: s 32(7). Reparation orders can be made where an offender is discharged with or without conviction: ss 106(3)(b), 108(2)(b), 110(3)(b).

76 Ibid s 32(5). In contrast to Victoria, victims in New Zealand cannot sue an offender for compensation in the civil jurisdiction of the courts for injury or death: *Accident Compensation Act 2001* (NZ) s 317. There are some exceptions, and damage to property is specifically excepted. See generally New Zealand Law Commission, *Compensating Crime Victims* (Report 121, 2010) [3.12]–[3.13]

- 10.57 Where an offender has limited financial resources, the judge may elect not to make a reparation order. Alternatively, the judge may reduce the amount and/or order payment by way of instalments.<sup>77</sup> If the judge does not make a reparation order, he or she must provide reasons.<sup>78</sup> Reparation orders must be prioritised by the judge where the offender cannot afford to pay both a fine and reparation.<sup>79</sup>
- 10.58 The sentencing judge can order that a reparation report be provided detailing a range of matters, including the value of the victim's property loss, emotional harm or consequential losses, and the offender's financial capacity to pay reparation.<sup>80</sup> If a reparation report is ordered by the judge, the person preparing it must try to get the offender and victim to agree to the amount the offender should pay.<sup>81</sup> The victim cannot be compelled to meet with the offender or participate in the preparation of the report.<sup>82</sup> If no agreement is reached, the person writing the report has to inform the court about a number of matters, including the offender and victim's respective positions on the question of compensation for emotional harm.<sup>83</sup> The victim must be given a copy of the reparation report and a copy of any subsequent reparation order.<sup>84</sup>

### The impact of restorative justice outcomes

- 10.59 As highlighted in Chapter 9, in New Zealand a judge takes into account the outcomes of a restorative justice conference when determining sentencing orders, including reparation orders. In determining an offender's reparation obligation, the judge must take into account a number of factors, including a proposal by an offender, or agreement reached with the victim, to make amends financially or through the performance of work or a service, or any efforts by the offender to apologise.<sup>85</sup> The judge can adjourn proceedings until an offender completes the actions that he or she committed to, thus leaving open the option of court-ordered reparation.<sup>86</sup>

### Enforcement of compensation and restitution orders

#### New Zealand

- 10.60 A reparation order in New Zealand is enforceable in the same way as a fine.<sup>87</sup> This fundamental distinction, when compared to Victoria, appears to relate to the availability of reparation orders as a sentencing option, rather than as an additional non-sentencing order as in Victoria.
- 10.61 Offenders make payments towards a reparation order to the court. The court then forwards the payment to the victim.<sup>88</sup>
- 10.62 In Victoria, it is left to the victim to enforce a compensation or restitution order made under the Sentencing Act. In New Zealand, the court pursues the offender for outstanding money owed on a reparation order. The court registrar has a range of powers where a reparation order remains outstanding, including to:<sup>89</sup>

77 *Sentencing Act 2002* (NZ) s 35. See also New Zealand Law Commission, *Compensating Crime Victims* (Report 121, 2010) [3.30].

78 *Sentencing Act 2002* (NZ) s 12(3).

79 *Ibid* s 14(2).

80 *Ibid* s 33.

81 *Ibid* s 34(1).

82 *Ibid* s 34(4).

83 *Ibid* s 34(3).

84 *Ibid* ss 34(5), 37. Failure to provide a copy of the reparation report or the conditions of reparation to the victim does not invalidate the proceedings or any sentencing or other order made by the court: ss 34(6), 37(2).

85 *Ibid* ss 10(1), 32(6).

86 *Ibid* s 10(4).

87 Fines are enforced by way of the *Summary Proceedings Act 1957* (NZ) pt 3. The definition of 'fine' includes a reparation order: s 79.

88 Section 38 of the *Sentencing Act 2002* (NZ) requires reparation payments to be paid to the victim, or the victim's insurer with the victim's consent. The New Zealand Ministry of Justice website directs offenders to pay the court. The court forwards the money to victims.

89 These enforcement provisions apply to outstanding fines and offender levy contributions, but repayment of reparations is prioritised: *Summary Proceedings Act 1957* (NZ) s 86E. Older reparation orders are prioritised before more recently made reparation orders: s 86G.

- give the offender more time to pay
  - arrange for the offender to pay by instalments
  - make an order for compulsory deductions from the offender's wages or a bank account
  - issue a warrant to seize the offender's property.<sup>90</sup>
- 10.63 The details of offenders in 'serious default' can be shared with customs and immigration officials for the purposes of enforcement action, including arrest.<sup>91</sup>
- 10.64 If the reparation order remains unsatisfied, or if the court registrar does not consider the reparation order enforceable, the registrar can order an offender to appear and may issue an arrest warrant.<sup>92</sup> In addition to the enforcement options above, a High Court or District Court judge then has a broad range of powers, including to order:
- that the total amount owing be enforced as if it were a civil judgment debt<sup>93</sup>
  - a warrant of commitment that requires the offender to be imprisoned for a specified time
  - home detention
  - community detention
  - community work.<sup>94</sup>
- 10.65 An order for reparation can be cancelled or substituted in situations where an offender's financial circumstances change, or where an offender lied about his or her financial circumstances, rendering the reparation order unenforceable.<sup>95</sup> In such cases, the victim must be notified and provided with the opportunity to be heard by the judge before the judge can make a determination.<sup>96</sup>

## State-funded compensation schemes

### Administrative assistance scheme

#### Northern Territory

- 10.66 The Northern Territory's scheme for state-funded financial assistance to victims provides an example of an administrative scheme which can be contrasted to Victoria's tribunal scheme. Similar to Victoria, different levels of assistance can be sought by primary, secondary, family and related victims. For primary victims, the most that can be received, either to cover expenses or lost earnings, and/or as a symbolic award of special financial assistance for injury, is \$40,000.<sup>97</sup>
- 10.67 Applications for financial assistance are managed by the Crime Victims Services Unit (CVSU) and assessed by legally qualified assessors as an administrative act.<sup>98</sup>
- 10.68 Victims do not need to attend any form of court or tribunal hearing for the assessment of their application. While this might be a relief for some victims, it offers no forum for those who seek to give voice to the impact of the crime on them.

90 Ibid ss 86(1), 87(2).

91 *Customs and Excise Act 1996* (NZ) ss 280C–F; *Immigration Act 2009* (NZ) ss 295–297.

92 *Summary Proceedings Act 1957* (NZ) s 88.

93 Such methods include attachment orders, charging orders, sale orders, possession orders, sequestration orders and arrest orders. See *Judicature Act 1908* (NZ) sch 2 (High Court Rules); *District Courts Act 1947* (NZ); *District Court Rules 2014* (NZ).

94 *Summary Proceedings Act 1957* (NZ) ss 88AE, 88AF. A community magistrate has the same powers, except those relating to a warrant of commitment and home detention: s 88AE(2).

95 *Sentencing Act 2002* (NZ) s 38A.

96 Ibid s 38A(4)(a). A court may proceed to determine the matter if the victim cannot be found after reasonable attempts by the registrar.

97 *Victims of Crime Assistance Act* (NT) s 38.

98 Ibid s 24.

- 10.69 There is no requirement to provide detailed submissions. There is also nothing preventing a victim from providing submissions about the impact of the offence on their life. Submissions can only be made in writing.
- 10.70 The Director of CVSU may elect to send a copy of the application to the offender and alert the offender to the right to make a submission within 28 days.<sup>99</sup> The Director may also send a notice of the final decision to the offender. As at December 2012, CVSU had not given a copy of an application to an offender.<sup>100</sup>
- 10.71 The Northern Territory victim assistance scheme is unique in the way that it deals with monetary awards (called ‘special financial assistance’ in Victoria), in sexual assault cases.<sup>101</sup> A victim of sexual assault can seek an award based only on the fact of their victimisation, without needing to prove additional injury or ‘significant adverse effect’ (as required in Victoria), or attending a medical examination.<sup>102</sup> The fact of victimisation is sufficient. There are three categories of sexual offence. The range of financial assistance available increases from \$7,500–\$10,000 for a Category 1 offence to \$25,000–\$40,000 for a Category 3 offence.<sup>103</sup>
- 10.72 A victim’s application and any document given to CVSU that was ‘prepared solely for the application’ are not admissible as evidence in any civil or criminal proceeding.<sup>104</sup> This is in contrast with Victoria, where VOCAT has discretion whether to release material filed as part of a victim’s VOCAT application in circumstances where an accused seeks access.<sup>105</sup> Such material, if released, could potentially be used by an accused at trial or to appeal a conviction.<sup>106</sup>

## Civil party procedure as part of the trial

### Civil law inquisitorial criminal systems

- 10.73 Victims can appear as civil parties in inquisitorial trials in a number of European jurisdictions.<sup>107</sup> As a civil party, a victim can pursue a civil claim for compensation as part of the criminal trial process. The same court decides both the civil claim and the criminal charges.<sup>108</sup>
- 10.74 Permitting victims to present a civil claim for compensation as part of the trial process aims to provide ‘the victim with a relatively easy, fast, cheap procedure for recovering his [or her] losses’ from the offender.<sup>109</sup> This reflects the aim of Victoria’s Sentencing Act restitution and compensation provisions.
- 10.75 France is the jurisdiction most commonly associated with the civil party procedure.<sup>110</sup> For ease of comparison, the Commission will focus on the civil party procedure in France.
- 10.76 To join the proceedings, the victim must provide a statement to the court setting out the losses and injuries suffered as a result of the alleged crime.<sup>111</sup>

99 Ibid s 33.

100 Department of Attorney-General and Justice, *Issues Raised at Consultation for the Review of the Victims of Crime Assistance Act: Issues Paper* (December 2012) 36.

101 *Victims of Crime Assistance Act* (NT) s 10(4). This is an award separate to any entitlement to financial assistance for financial losses.

102 This is unless a victim also seeks compensation for a specified ‘compensable injury’, such as a physical or psychological injury: *ibid* s 35(5).

103 *Victims of Crime Assistance Regulations* (NT) schs 1, 3. Evidence of an additional injury may be taken into account by the assessor when considering how much financial assistance should be awarded. If no evidence is given of ‘actual injury’, an assessor may award the victim only the minimum’ of the range available for the relevant category: r 17.

104 *Victims of Crime Assistance Act* (NT) s 64. This provision does not apply to a small number of proceedings, including review proceedings in the Northern Territory Civil and Administrative Tribunal, or where a victim consents (and the document principally refers to them), or in criminal proceedings in which the victim is the accused.

105 *Victims of Crime Assistance Act 1996* (Vic) s 42A; Victims of Crime Assistance Tribunal, *Practice Direction No. 9 of 2008: Access to Files* (11 December 2008).

106 Psychological material obtained for the purposes of an application for compensation under s 85B of the *Sentencing Act 1991* (Vic) was used to successfully appeal a conviction in *Coleman v The Queen* [2011] VSCA 301 and *Greensill v The Queen* [2012] VSCA 306.

107 This process is also known as the adhesion procedure or *partie civile*, and is commonly associated with the Netherlands, Belgium, Germany and France. See Chapter 8 of this consultation paper for discussion about what this means in the criminal trial.

108 Jo-Anne Wemmers, ‘Victim Policy Transfer: Learning From Each Other’ (2005) 11(1) *European Journal on Criminal Policy and Research* 121, 125.

109 Marion E Brien and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 27.

110 Jo-Anne Wemmers, ‘Victim Policy Transfer: Learning From Each Other’ (2005) 11(1) *European Journal on Criminal Policy and Research* 121, 125.

111 Marion E Brien and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 319.

- 10.77 Trials for serious crimes are heard by three judges (one of which is the president) and nine lay jurors.<sup>112</sup> Victims are permitted to ask questions of witnesses 'through the intermediary of the president'.<sup>113</sup> Following the presentation of evidence, arguments are heard, first from the victim or the victim's lawyer, then the prosecutor and lastly the accused's lawyer.<sup>114</sup> At this stage, the victim is entitled to present a claim for damages.<sup>115</sup>
- 10.78 The judges and lay jurors decide whether the accused is guilty or innocent, but only the judges (without the jury) decide the claim for compensation, after a finding of guilt.<sup>116</sup>
- 10.79 The civil party procedure affects the way in which the victim can give evidence. Specifically, where victims appear as civil parties, they are not permitted to give evidence on oath. Instead, they can only give their evidence informally. This causes a dilemma because in many cases the evidence of the victim is critical to the case against the accused. Usually, this problem is resolved by having the victim first give evidence on oath as a non-party, before being accepted as a civil party to the proceedings.<sup>117</sup>
- 10.80 Appearing as a civil party can save victims time and money by allowing them to attach their civil proceedings to state-run criminal proceedings. Although the victim's civil claim relies on establishing the accused's guilt, the prosecutor and not the victim is responsible for obtaining a conviction.<sup>118</sup>

### The International Criminal Court (ICC)

- 10.81 The ICC has a regime for providing redress to victims of crimes being prosecuted by the Court. It has two main components:
- orders for reparations made against a particular offender
  - the Trust Fund for Victims, which can provide assistance to victims other than court-ordered reparations.<sup>119</sup>

### Reparations

- 10.82 Orders for reparation are made after the accused has been found guilty, and in favour of the victims who have applied to participate in the case in question.<sup>120</sup>
- 10.83 When making a reparations order, the Court is empowered to 'determine the scope and extent of any damage, loss or injury to, or in respect of, victims' and establish principles for reparation, restitution, compensation and rehabilitation.<sup>121</sup>
- 10.84 To be eligible for reparations, victims must ensure they have provided certain information to the Court's registry. The formal proceedings to determine the principles to be applied when making orders for reparations, and the scope of such orders, generally occur at the end of the trial.<sup>122</sup>

112 Ibid 306; Jacqueline Hodgson, 'Suspects, Defendants and Victims in the French Criminal Process: the Context of Recent Reform' (2002) 51 *International and Comparative Law Quarterly* 781, 809.

113 *Code de Procédure Pénale* [Code for Civil Procedure] (France) art 312.

114 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 306–7.

115 *Code de procédure pénale* [Code for Civil Procedure] (France) art 460.

116 Ibid art 371.

117 Marion E Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, 2001) 323.

118 Ibid 320.

119 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 1–2, 75–6; Linda Keller, 'Seeking Justice at the International Criminal Court: Victim's Reparations' (2007) 29 *Thomas Jefferson Law Review* 189, 190.

120 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 75(2) (Rome Statute).

121 Ibid art 75(1).

122 Ibid art 76(2)–(3). See also Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 188.

- 10.85 It has been suggested that victims may be able to play a greater role in reparations proceedings when compared to trial proceedings. This is in part because there is no need to balance victims' interests against the rights of the accused, the accused having already been found guilty.<sup>123</sup> Participation in reparations proceedings may involve calling witnesses and submitting documentary evidence.<sup>124</sup>
- 10.86 In its limited jurisprudence on reparations proceedings, the Court has indicated that:
- victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.<sup>125</sup>
- 10.87 Reparations proceedings are also part of, and run parallel with, the trial process to some extent.<sup>126</sup> In part, this is because evidence pertinent to reparations, such as the amount and nature of harm caused, can be impossible to detach from questions related to the accused's guilt.<sup>127</sup>
- 10.88 Allowing evidence pertaining to reparations to be introduced during the trial benefits victims by removing the need for them to give evidence in two separate proceedings. However, evidence about the harm caused to victims may also infringe the accused's right to be presumed innocent. In *Prosecutor v Lubanga*, the Trial Chamber considered this issue and ruled that it would be able 'without difficulty, to separate out the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted)'.<sup>128</sup> Nevertheless, some commentators remain concerned that hearing evidence relating to reparations could have the effect of prejudging the guilt of the accused.<sup>129</sup>

### Trust Fund for Victims

- 10.89 As noted above, the Trust Fund for Victims is part of the ICC's framework for providing redress to victims. Reparations may be directed through the Trust Fund to victims, and it can use its own resources to 'supplement' a reparation order. The Trust Fund can also assist in the 'design and implementation of reparations awards'.<sup>130</sup>
- 10.90 An important feature of the Trust Fund is that assistance can be provided to victims who are not eligible for reparations and is not contingent on a finding of guilt.<sup>131</sup>

## Discussion and options for reform

### Evidence about compensation and restitution at the trial

- 10.91 In determining whether to make a compensation order in Victoria, judges can look at a range of evidence and findings of fact, from both the trial and sentencing. In the case of Sentencing Act applications for compensation for injury, the victim and offender can give evidence and call witnesses.

123 Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2014) 163–4.

124 International Criminal Court, *Rules of Evidence and Procedure*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 94(1)(a)–(g).

125 *Prosecutor v Lubanga* (Decision establishing the principles and procedures to be applied to reparations) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 7 August 2012) [203].

126 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 188; International Criminal Court, *Regulations of the Court*, Doc No ICC-BD/01-01-04 (adopted 26 May 2004) reg 56, which explicitly allows for the Trial Chamber to hear witnesses and receive evidence going to reparations during the trial.

127 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 188–9.

128 *Prosecutor v Lubanga* (Decision in victims' participation) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [121].

129 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 190.

130 Ibid 3.

131 Ibid.

- 10.92 An option for reform could be to allow victims to join their application for compensation or restitution at an earlier stage of proceedings, for the purposes of allowing the trial judge to hear evidence relating to compensation as part of the trial process. This would reflect the procedures for civil parties in inquisitorial jurisdictions and the approach taken at the ICC. Consideration would need to be given to whether victims would be permitted to call witnesses and make submissions. Court procedures would also require significant change, in order to incorporate victims' actions for compensation without undermining the right of the accused to be presumed innocent.
- 10.93 This problem is most prominent in adversarial criminal trials, where juries determine whether an accused is guilty. In principle, legally trained judges are more capable of separating evidence relevant only to the consequences of the crime from evidence relevant to guilt.

### **A stronger presumption in favour of compensation and restitution orders against offenders**

- 10.94 In Victoria, an application must be made for compensation for injury or restitution orders before the judge will consider making such an order. A judge cannot make these orders of his or her own motion. However, orders for compensation for property loss or damage can be made on a judge's own motion and the court is required to ask the prosecution if it intends to make an application for such an order.
- 10.95 Creating a statutory presumption in favour of orders for compensation and restitution, as occurs in New Zealand, is an option for reform. This option encourages judges to turn their mind to making a restitution or compensation order in all cases and raising it with the parties. It also avoids victims relying on the DPP making them aware of the possibility of applying for a compensation or restitution order. Instead, it could be a matter raised as part of (but ancillary to) the sentencing proceedings.
- 10.96 This approach would eliminate a separate application having to be made in cases where the DPP elects not to apply on the victim's behalf, which may require the victim to engage private legal representation. The victim could retain the ability to apply for compensation or restitution orders after the sentencing hearing, if further information became available about the victim's loss or the offender's financial circumstances change.
- 10.97 Orders made using this presumption may be subject to the offender's financial circumstances, or such a requirement could be removed completely, as recommended by the ALRC in the context of federal sentencing laws in Australia.<sup>132</sup>

### **Enforcement by the state**

- 10.98 If a victim succeeds in obtaining an order for the payment of money as compensation or restitution, the victim is responsible for taking action to enforce the order where the offender does not pay. Where an offender refuses to pay, a victim's only option is to commence further proceedings in a court's civil jurisdiction to enforce the debt.
- 10.99 An alternative option is to shift the burden of enforcement to the state, as occurs in New Zealand. In considering such an option, it should be noted that in New Zealand compensation and restitution orders are made as part of sentencing orders. Enforcement of compensation and restitution orders is therefore essentially enforcement of the offender's punishment. In Victoria such orders are made in addition to sentencing and are not considered a means for punishing the offender.

- 10.100 If the burden of enforcement is shifted to the state, an additional option would be for the state to advance the victim money from a central fund. The offender would then have an obligation to repay the state. This would ensure that victims could receive compensation quickly and without prolonged contact with the offender.<sup>133</sup> The New Zealand Law Commission deliberated on such a proposal in 2010, but rejected it based on concern about the substantial costs involved and the prospect of judges making compensation orders that could not be enforced against impecunious offenders.<sup>134</sup>

### Appeals by victims

- 10.101 Sentencing Act compensation and restitution proceedings are ancillary to the criminal proceedings. In limited cases, the DPP may make an application on behalf of the victim, but in the absence of the DPP making an application, it is the victim who makes the application to the court.
- 10.102 A possible reform would be to give victims the right to appeal against compensation or restitution orders that they consider to be manifestly inadequate. Permitting victims to appeal such unsatisfactory orders is consistent with the fact that victims are parties to the original application. It also avoids victims having to sue the offender through separate court proceedings.

### Expanding victim eligibility for accessing VOCAT

- 10.103 VOCAT represents an important option for victims to obtain some financial assistance with medical costs, lost earnings and other recovery-related expenses. For victims who meet VOCAT's eligibility requirements, VOCAT may be the only avenue for financial assistance where an offender has no income or assets or was not convicted or charged.
- 10.104 One of the ways in which eligibility for VOCAT is restricted is through the definition of 'relevant offence', which prescribes the offences for which financial assistance may be made available, subject to other eligibility requirements.<sup>135</sup> There are many offences that are excluded, predominantly property-related and non-violent offences.
- 10.105 One justification for excluding non-violent property offences from VOCAT is that the loss or damage to property is something that can be covered by insurance. While not all victims will be in a financial position to insure (or adequately insure) their property, arguably, incorporating non-violent property offences into VOCAT could act as a disincentive to individuals taking out private property insurance. The effect could be to shift the costs of insuring private property to the state.<sup>136</sup>
- 10.106 An argument in support of extending VOCAT to non-violent offences is that recent research suggests that victims of property offences, including online fraud, can and do suffer from the same type of psychological, emotional and social impacts as victims of crimes against the person (albeit usually less severely).<sup>137</sup>

133 See discussion in David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' (2014) 20(1) *International Review of Victimology* 145, 150.

134 New Zealand Law Commission, *Compensating Crime Victims* (Report 121, 2010) 25–6.

135 *Victims of Crime Assistance Act 1996* (Vic) s 3.

136 The New Zealand Law Commission considered this matter in detail in 2010. New Zealand Law Commission, *Compensating Crime Victims* (Report 121, 2010) 27.

137 For discussion of research relating to property crime victimisation see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 2: Who Are Victims and What Are Their Criminal Justice Needs and Experiences?* (May 2015) [18]–[23].

## Restorative pathway

- 10.107 Research suggests that some victims place greater value on what offenders can do as a form of compensation, rather than the amount they can pay. For these victims, a possible reform option would be to promote the use of restorative justice, such as mediation or conferencing, as part of applications for compensation or restitution orders under the *Sentencing Act 1991* (Vic). In cases considered appropriate, a restorative justice process would not be limited to considering what monetary payment an offender can make. Such a process could also consider actions that the offender could take to promote the emotional restoration of victims, as an alternative or in addition to compensation.
- 10.108 This proposal has the potential to remedy the problem of limited financial means in some cases. Limited financial means is a reality for many offenders and can make a compensation order practically unenforceable. The proposal could also have merit where an offender is wealthier, because instead of being able simply to pay the compensation ordered by the court, the offender may be forced to confront the impact of the crime on the victim and consider more emotionally compensatory actions. Non-financial outcomes, such as community work, have value in 'the appropriation of [the offender's] time and labour'.<sup>138</sup>
- 10.109 As occurs in New Zealand, proceedings under the Sentencing Act for compensation or restitution could be adjourned to allow an offender time to agree to and fulfil any reparative actions. A failure to do so could be brought to the court's attention at the later court date, and taken into account in the making of any compensation or restitution orders. The participation of victims in restorative justice processes should always be voluntary and have appropriate safeguards. The challenges associated with restorative justice processes are discussed in more detail in Chapter 3 and at other points throughout this consultation paper.
- 10.110 In addition to making restorative justice processes available in applications for compensation and restitution orders under the Sentencing Act, restorative justice could be incorporated into VOCAT processes. VOCAT is already guided by the objects of the VCAA, which include helping victims recover through the provision of financial assistance and symbolic expression of the community's recognition and sympathy for the victim.<sup>139</sup> In addition, VOCAT aims to provide victims with a forum in which they can have a voice.<sup>140</sup> This function could be enhanced by giving victims the option of attending a victim-offender mediation, in the same room, or separate rooms or via video-link. This would not only allow victims to have a voice, it would require the offender to hear the victim.
- 10.111 A restorative justice pathway within VOCAT would not stop a victim from electing to have VOCAT determine his or her application for financial assistance in the event that the victim did not want to proceed with restorative justice or could not reach agreement with the offender in a restorative justice setting. Consideration would need to be given to the impact that any agreement reached in a restorative justice process would have on VOCAT's decision-making process.

138 David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' (2014) 20(1) *International Review of Victimology* 145, 152.

139 *Victims of Crime Assistance Act 2006* (Vic) s 1(2).

140 *Victims of Crime Assistance Tribunal Annual Report 2012–13* (2013) 5.

## Questions

- 43 Do processes set out in Part 4 of the *Sentencing Act 1991* (Vic) deliver on the aim of a swifter, less complex avenue for victim compensation? Are any changes needed to improve outcomes for victims?
- 44 Should there be a statutory presumption in favour of compensation and restitution in all cases?
- 45 How should the financial circumstances of an offender be taken into account under Part 4 of the *Sentencing Act 1991* (Vic)?
- 46 Should a victim be given the power to commence appeal proceedings in relation to a restitution or compensation order?
- 47 How should restitution and compensation orders be enforced?
- 48 Is there a need for restorative justice pathways as an alternative, or in addition to, *Sentencing Act 1991* (Vic) orders and VOCAT?
- 49 Are there offences not covered by the *Victims of Crime Assistance Act 1996* (Vic) that should be?

# The role of victims in appeal processes

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# 11. The role of victims in appeal processes

## Introduction

- 11.1 In Victoria, the prosecution or the offender may appeal to the Court of Appeal during the trial process against an interlocutory decision made by a trial judge. The prosecution or offender may also appeal against a sentence imposed after conviction. An offender may appeal against a conviction. The prosecution may apply for a fresh trial after acquittal in limited circumstances.
- 11.2 This chapter outlines the procedures under Victorian law for each of those types of appeal, before turning to consider procedures in South Australia, New South Wales and the United States which permit the involvement of the victim. It then canvasses some options for reform.
- 11.3 It should be noted that much of the content in this chapter is also covered in Chapter 7 (pre-trial procedures) and Chapter 9 (sentencing) and that this reference is not concerned with the substantive laws governing appeals.

## The current system in Victoria

### Interlocutory appeals

- 11.4 An interlocutory decision is a decision made either before or during the trial.<sup>1</sup> Interlocutory decisions often relate to evidentiary matters, such as a ruling by a judge that certain evidence is not admissible, or decisions about the conduct of the trial, including a decision to sever charges (which means separate proceedings for one or more charges).
- 11.5 Appeals are only allowed with the permission (leave) of the Court of Appeal. The Court of Appeal will only give leave for an appeal to proceed in the following circumstances:
- If the decision is about the admissibility of evidence, the trial judge certifies (advises the Court of Appeal) that the prosecution case would be eliminated or substantially weakened without the evidence.
  - If the decision is not about evidence, the trial judge certifies that the decision is of sufficient importance to the trial to justify an interlocutory appeal.
  - If the decision is made after the trial commences, the trial judge certifies that either the issue the decision relates to was not able to be identified before the trial, or the party seeking leave was not at fault for failing to identify it.<sup>2</sup>

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1 *Criminal Procedure Act 2009* (Vic) ss 3, 295.

2 *Ibid* s 295(3). A party may make an application to the Court of Appeal to review a decision of the trial judge to refuse certification: s 296.

- 11.6 The Court of Appeal must also be satisfied that the appeal is in the interests of justice, having regard to:
- the disruption or delay that might be caused to the trial process
  - whether the determination of the appeal may render the trial unnecessary or reduce the length of the trial
  - whether the determination of the appeal may ensure the proper conduct of the trial or reduce the likelihood of a successful appeal against conviction.<sup>3</sup>
- 11.7 Victims do not have a role in interlocutory appeals.

### Appeal against conviction

- 11.8 A person convicted of an offence may appeal to the Court of Appeal against conviction but only if the Court of Appeal gives the person leave to appeal.<sup>4</sup>
- 11.9 If the conviction is successfully appealed, the Court of Appeal may:
- order a new trial
  - enter a judgement of acquittal
  - find the accused not guilty by reason of mental impairment.<sup>5</sup>
- 11.10 As noted in Chapter 10, a victim 'may be heard' if the Court of Appeal has set aside an offender's conviction and is considering ordering that a compensation or restitution order made in connection with the conviction should not take effect.<sup>6</sup>
- 11.11 Victims do not have a role in an appeals against conviction.

### Appeal against sentence

- 11.12 An offender may appeal against a sentence but only if the Court of Appeal gives the offender leave to appeal.<sup>7</sup>
- 11.13 Unlike the offender, the Director of Public Prosecutions (DPP) does not need to seek leave to appeal. However, the *Criminal Procedure Act 2009* (Vic) requires that before bringing an appeal, the DPP must:
- consider that there is an error and that a different sentence should be imposed; and
  - be satisfied that an appeal is in the public interest.<sup>8</sup>
- 11.14 The Court of Appeal must grant the appeal if satisfied that there is an error and that a different sentence should be imposed.<sup>9</sup> The Court may impose a more or less severe sentence.<sup>10</sup>
- 11.15 Victims do not have a role in appeals against a sentence.

3 Ibid s 297.

4 Ibid s 274. The grounds on which the Court of Appeal must allow an appeal against conviction are set out at s 276.

5 Ibid s 277. Section 277 sets out what order must be made depending on the circumstances of the successful appeal.

6 *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 2.47. A compensation or restitution order made under ss 84, 85B or 86 of the *Sentencing Act 1991* (Vic) is usually stayed (suspended) for the duration of the appeal. If a conviction is set aside, the compensation or restitution order will not take effect unless the Court of Appeal orders otherwise. See *Criminal Procedure Act 2009* (Vic) s 311.

7 *Criminal Procedure Act 2009* (Vic) s 278. The Court of Appeal may impose a more severe sentence, but must warn the appellant of that possibility as early as possible during the hearing: s 281(3).

8 Ibid s 287.

9 Ibid ss 281, 289.

10 Ibid ss 282, 290.

## Status of victim impact statement in the appeal

- 11.16 The Department of Justice's 2014 review of victim impact statement reforms highlighted concern by some victims about their inability to provide an updated victim impact statement in an appeal against a sentence.<sup>11</sup> However, appeals relate primarily to matters of law. As a result, there are restrictions on when the Court of Appeal will consider new evidence.<sup>12</sup>
- 11.17 The Criminal Procedure Act prohibits the Court of Appeal from increasing a sentence based on evidence that was not submitted as part of the original trial or sentencing proceedings.<sup>13</sup>
- 11.18 Whether a further victim impact statement could be provided as part of an appeal against sentence has not been considered by the courts.
- 11.19 The Department of Justice report also noted that less than a third of appeals result in a sentence being re-opened.<sup>14</sup> Drawing on interviews with victims about the use of victim impact statements in appeal proceedings, the report concluded:

There is a real risk that providing for and encouraging victims to provide an updated VIS at the appeal stage will create an expectation that the document will be referred to and relied on when, in a significant proportion of cases, this will not occur. The satisfaction provided to some victims may be offset by the disappointment of others. Providing for a further VIS to be tendered and/or read aloud at the appeal stage is problematic.<sup>15</sup>

## Appeal against compensation or restitution order

- 11.20 An appeal of a restitution or compensation order can only be made by the DPP and only in cases where the DPP is satisfied that an error has occurred and that it is in the public interest to appeal.<sup>16</sup> Victims themselves do not have a statutory right to appeal. However, a dissatisfied victim can commence proceedings for damages in the court's civil jurisdiction.<sup>17</sup>

## DPP appeal against an acquittal

- 11.21 Traditionally, the rule relating to double jeopardy meant that a person acquitted of an offence could not be tried again for the same offence. Qualifications have been placed on this rule by the Criminal Procedure Act.
- 11.22 The DPP may apply to the Court of Appeal for an order setting aside a previous acquittal and authorising a new trial on the basis that:
- the previous acquittal was tainted
  - there is fresh and compelling evidence
  - the person should be tried for an administration of justice offence, such as perjury, perverting the course or justice or bribing a judge, related to the trial resulting in the acquittal.<sup>18</sup>
- 11.23 If the DPP's application is successful, a trial will then proceed on charges contained in a direct indictment signed and filed by the DPP in the appropriate trial court.<sup>19</sup>

11 Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (Victorian Government, 2014) 72–5.  
12 New evidence can only be submitted to the Court of Appeal when done so in the 'interests of justice'. See *Criminal Procedure Act 2009* (Vic) ss 317, 318.

13 Ibid s 321 (except in two limited circumstances: when the new evidence relates to the offender's failure to comply with an undertaking to give evidence, or where the court that determined the original sentence was misled).

14 Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (Victorian Government, 2014) 74.

15 Ibid 75.

16 *Criminal Procedure Act 2009* (Vic) s 287 provides for the right of the Crown to appeal a sentence. Section 3 of the Act defines 'sentence' to include restitution and compensation orders made under the *Sentencing Act 1991* (Vic).

17 *Director of Public Prosecutions v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, [2] (Buchanan JA).

18 *Criminal Procedure Act 2009* (Vic) s 327H. See also ss 327D (for meaning of tainted acquittal), 327C (for meaning of fresh and compelling evidence), 327B (for definition of administration of justice offence).

19 Ibid s 327F. See ss 327O, 327P for the powers of the Court of Appeal upon successful appeal. See also Director of Public Prosecutions Victoria, *Director's Policy: Retrials and Reinvestigations After Acquittals* (undated).

## Alternative processes and procedures

11.24 The following section considers some other jurisdictions where victims are given a role in appeal procedures.

### Right to appeal interlocutory decisions

#### New South Wales

- 11.25 Victims in New South Wales have standing in pre-trial applications seeking leave to access or use documents covered by the sexual assault communications privilege provisions of the *Criminal Procedure Act 1986* (NSW). A more detailed discussion of these provisions is contained in Chapter 7 of this consultation paper.
- 11.26 The *Criminal Appeal Act 1912* (NSW) allows a non-party, such as a victim to whom a protected confidence relates, to appeal to the Court of Criminal Appeal against the pre-trial ruling.<sup>20</sup> An appeal can be brought in relation to either:
- a decision to allow access to, or use of, a protected confidence
  - a determination that a document or other piece of evidence does not contain a protected confidence.<sup>21</sup>

#### United States

11.27 As noted in Chapter 7, victims in the United States can appear and be heard as part of an application made by an accused to use evidence relating to the victim's sexual history.<sup>22</sup> There is at least one case in which a victim was permitted to appeal against a pre-trial order permitting the defence to use evidence of sexual history.<sup>23</sup>

### Right to request that the DPP consider an appeal

#### South Australia

- 11.28 In South Australia, the 'Declaration of principles governing treatment of victims' contained in the *Victims of Crime Act 2001* (SA) includes a provision allowing the victim to request that the prosecutor consider bringing an appeal. The victim can make this request in relation to any court determination against which the prosecution is entitled to appeal. The request must be made within 10 days of the court determination in question and must be given 'due consideration' by the prosecutor.<sup>24</sup>
- 11.29 A breach of the declaration of principles does not by itself create a right to commence legal proceedings.<sup>25</sup> However, the Commissioner for Victims' Rights is empowered to help victims in dealing with prosecutors and can require the Office of the Director of Public Prosecutions (ODPP) to consult with the Commissioner about steps that can be taken to further the interests of a victim.<sup>26</sup>
- 11.30 Further, section 32A of the *Victims of Crime Act 2001* (SA) provides that a victim may exercise any right within the Victims of Crime Act or any other law. A victim can opt to exercise his or her rights through a lawyer, the Commissioner, or another prescribed person.
- 11.31 It would appear that a lawyer or the Commissioner, acting on behalf of a victim, could make a request for the ODPP to consider an appeal, and that, if necessary, the Commissioner could intervene and compel the ODPP to consult with the victim.

20 *Criminal Appeal Act 1912* (NSW) s 5F(3AA)–(3AB). For cases involving an appeal by a victim as a protected confider see *KS v Veitch* [2012] NSWCCA 186; *KS v Veitch (No 2)*[2012] NSWCCA 266; *PPC v Williams* [2013] NSWCCA 286. An agency or organisation in possession of documents containing a protected confidence can also seek leave to appeal.

21 An appeal can only be made if the Court of Criminal Appeal gives permission (leave); or if the trial judge or magistrate 'certifies that the decision is a proper one for determination on appeal': *Criminal Appeal Act 1912* (NSW) s 5F(3AB).

22 *Federal Rules of Evidence* 28 USC § 412.

23 *Doe v United States*, 666 F 2d 43 (4th Cir, 1981).

24 *Victims of Crime Act 2001* (SA) s 10A.

25 *Ibid* s 5(3).

26 *Ibid* ss 16(3)(b), 16A(1).

## Discussion and options for reform

- 11.32 The victim's role in interlocutory and other appeals arises as a corollary to the suggestion that victims should be able to participate at various stages of the criminal trial process, or in relation to particular issues.
- 11.33 Permitting victims to make submissions on questions of law before a trial judge, as permitted in the International Criminal Court, gives rise to the question of whether victims should have a role in an appeal against the judge's ruling. Such a role might include the right to commence appeal proceedings, or be limited to a right to participate in an appeal commenced by the DPP. These reforms can be characterised as making victims prosecuting witnesses.
- 11.34 Consideration might be given to whether the procedures in New South Wales and the United States, which permit victims, in limited circumstances, to seek leave to appeal against a pre-trial ruling that impacts on their personal interests, could be adopted in Victoria. There is the possibility that allowing victims to appeal in such contexts may cause delays in the trial process, add complexity to the appeal hearing, and impact on the fair trial rights of the accused. However, allowing victims to appeal rulings where their privacy or other interests are at stake arguably represents a fair balancing of the rights of the accused and the rights of the victim.
- 11.35 Issues discussed Chapters 7–9, associated with giving victims standing to make submissions and introduce evidence at various stages of the criminal trial process, extend to whether victims could or should be involved in subsequent appeal proceedings. As they have been canvassed in some detail already, the arguments will not be repeated here.
- 11.36 Other reform proposals that can be characterised as participatory-witness reforms include:
- permitting updated victim impact statements to be provided where an offender is to be resentenced
  - granting victims the right to request that the DPP consider an appeal, or the right to be consulted in relation to decisions about bringing an appeal. Such proposals may resemble the provisions that exist in South Australia.

## Questions

- 50 Should a victim have standing to seek leave to commence an interlocutory appeal? If so, should this be limited to circumstances where the ruling impacts on the personal interests or rights of the victim?
- 51 Should victims have a right to be consulted by the prosecution or to request that the DPP consider an appeal on any or all matters that the DPP is permitted to seek leave to appeal?
- 52 Should a victim have standing to participate in an interlocutory appeal commenced by the prosecution or the defence? If so, how and in what circumstances?
- 53 Should a victim have standing to participate in a post-verdict appeal commenced by the defence or prosecution?
- 54 Should the victim impact statement scheme, as it applies in sentencing hearings, also apply when the Court of Appeal re-sentences an offender?

**PART THREE: RIGHTS, SUPPORT  
AND CONCLUSION**

# **Victims' rights in the criminal trial process**

**154** Introduction

**155** The breadth and scope of victims' rights

**159** Realising victims' rights

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## 12. Victims' rights in the criminal trial process

### Introduction

- 12.1 The second half of last century saw both an increasing focus on the dissatisfaction of victims with the operation of criminal justice systems around the world and a realisation by the international community that key human rights instruments did not contain any reference to the rights of victims.<sup>1</sup>
- 12.2 The international community responded with the adoption of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>2</sup> (UN Declaration) by the UN General Assembly in 1985. The UN Declaration contains non-binding minimum standards for the treatment of victims of crime within domestic criminal justice systems. More recent UN documents have emphasised the rights of victims to participate in, and to receive restorative outcomes from, domestic criminal systems.<sup>3</sup>
- 12.3 The principles of the UN Declaration have since been incorporated into Australian domestic law through victims' rights charters, policies and/or legislation in each state and territory.
- 12.4 The first section of this chapter compares victims' rights found in Victorian legislation and policy and those that exist in other jurisdictions, both in Australia and overseas.
- 12.5 The second section examines mechanisms and procedures for the enforcement of victims' rights and the investigation of breaches. Questions are posed at the end of this chapter. Whether and how rights to participate at various stages of the criminal trial process might be enforced have also been canvassed in previous chapters.
- 12.6 In May 2015 the Commission published *The Role of Victims of Crime in the Criminal Trial Process Information Paper 4: Victims' Rights and Human Rights: the International and Domestic Landscape*. The Commission recommends reading Information Paper 4 as a companion publication to this chapter.

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1 For example, the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. The focus of these instruments was protecting an accused from the omnipotent power of the state rather than affording rights to victims. For discussion, see Jo-Anne Wemmers, 'Victims' Rights are Human Rights: The Importance of Recognizing Victims as Persons' (June 2012) *Temida* 71, 74.

2 United Nations General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/RES/40/34 (adopted 29 November 1985). See further Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 4: Victims' Rights and Human Rights: the International and Domestic Landscape* (2015) [12]–[14].

3 Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford, 2008) 1. See for example UN Economic and Social Council, *UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UN doc E/RES/2002/12 (24 July 2002).

## The breadth and scope of victims' rights

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

- 12.7 The *Victims' Charter Act 2006* (Vic) (the Charter) sets out non-enforceable principles governing the interaction of Victorian investigating agencies, prosecuting agencies and victims' services with victims of crime.
- 12.8 Investigatory, prosecuting and victims' service agencies 'must have regard to the Charter principles when dealing with' a victim of crime.<sup>4</sup> Any person or body responsible for the development of policy or administration of criminal justice or victims' services must have regard to the Charter principles where relevant.<sup>5</sup>
- 12.9 The Charter principles cover the following:<sup>6</sup>
- ensuring respectful, courteous and dignified treatment and the need to be responsive to the particular needs of different victims of crime<sup>7</sup>
  - providing information about support services, possible entitlements, legal assistance, the progress of an investigation and prosecution, key prosecutorial decisions, and court processes
  - minimising contact between victims and the accused, the accused's family and supporters
  - protecting a victim's personal information from disclosure
  - protecting and returning any property belonging to a victim that is in the possession of an investigatory or prosecutorial agency
  - the right of a victim to provide a victim impact statement in sentencing hearings<sup>8</sup>
  - the right of victims to apply to the court for compensation directly from an offender, and for eligible victims to apply for state-funded financial assistance<sup>9</sup>
  - rights relating to bail and parole determinations and the Victims' Register.<sup>10</sup>

### Victorian prosecutorial policy

- 12.10 The policies of the Victorian Director of Public Prosecutions (DPP), particularly *Victims and Persons Adversely Affected by Crime*<sup>11</sup> (Victims Policy) reflect the practical application of Charter principles to the day-to-day interactions of Office of Public Prosecutions (OPP) staff with victims. The policy also builds on the statutory obligation on the DPP, Crown Prosecutors, Associate Crown Prosecutors and all OPP staff to 'ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime'.<sup>12</sup>
- 12.11 Some DPP policy obligations go further than the obligations imposed by the Charter:
- There is no obligation in the Charter on prosecutors to consult with victims, only an obligation to provide information. In contrast, the DPP's Victims Policy requires prosecutors to ensure that a victim has been consulted before a decision is made to substantially alter charges, not proceed with some or all charges or accept a guilty plea to a lesser charge.<sup>13</sup> While the victim must be consulted, and their views taken into account, their views are not determinative, thereby retaining the primacy of

4 *Victims' Charter Act 2006* (Vic) s 18(1).

5 *Ibid* s 18(2).

6 Sections 6–17 of the *Victims' Charter Act 2006* (Vic) set out the 'Charter principles governing response to victims'.

7 Race or indigenous background, sex and gender identity, cultural or linguistic diversity, sexual orientation, disability, religion and age are identified as examples of differences which may affect the needs of victims of crime: *ibid* s 6(2).

8 This right is recognised in the *Sentencing Act 1991* (Vic) s 8K. See discussion about victim impact statements in Chapter 9 of this consultation paper.

9 These rights are recognised in *Sentencing Act 1991* (Vic) pt 4, and the *Victims of Crime Assistance Act 1996* (Vic) respectively.

10 The rights and role of victims in respect of bail and parole determinations and the Victims' Register are outside the scope of the Commission's terms of reference.

11 Director of Public Prosecutions, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014).

12 *Public Prosecutions Act 1994* (Vic) ss 24(c), 36(3), 38(2), 43(3), 41(2).

13 Director of Public Prosecutions, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [29].

prosecutorial discretion.<sup>14</sup>

- The Charter requires only that prosecutors provide victims with information about how to find out about details of a hearing, whereas the Victims Policy requires prosecutors to ensure that a victim is informed of the date, time and location of a contested committal, trial, plea and sentence.<sup>15</sup>
- The Charter does not expressly impose an obligation on prosecutors to inform all victims of the right to make a victim impact statement at a sentencing hearing. In contrast, the DPP's Victims Policy obliges the prosecutor with carriage of a matter to ensure that a victim has been informed of this right.<sup>16</sup>
- The Victims Policy contains a clearer obligation on prosecutors to ensure that victims are 'informed of their possible entitlement to restitution, compensation or financial assistance'.<sup>17</sup> The OPP must refer a victim to an appropriate organisation for assistance with compensation or restitution orders or a VOCAT application.<sup>18</sup> In contrast, the Charter obligation is a relatively opaque obligation to inform victims about 'possible entitlements and legal assistance' and to refer them where appropriate to 'entities that may provide access to entitlements and legal assistance'.<sup>19</sup> 'Entitlements' is not defined.

## Victims' rights in other Australian jurisdictions

12.12 The victims' rights charters, declarations, principles and guidelines in each Australian jurisdiction are largely analogous with Victoria's Charter.<sup>20</sup>

12.13 The following paragraphs do not set out all of the provisions contained in these documents. Rather, they highlight and discuss differences in approach, rights or obligations which arguably extend beyond Victoria's provisions.

### Information and support

12.14 South Australia's declaration of principles imports a timeliness requirement to the provision of information about a victim's role as a witness, requiring that victims have 'sufficient time to obtain independent advice, and arrange independent support'.<sup>21</sup>

12.15 In Queensland, New South Wales and Western Australia the obligation to provide information about support services and entitlements is more comprehensively detailed to include health, welfare, counselling, medical and/or legal services, and entitlements to compensation and restitution.<sup>22</sup> In Western Australia, victims are to be informed about 'the availability of lawful protection against violence and intimidation by the offender'.<sup>23</sup>

12.16 In addition to the obligation to inform victims of support services, the New South Wales Charter requires that victims have access to 'welfare, health, counselling and legal assistance responsive to the victim's needs'.<sup>24</sup>

14 Ibid [30].

15 Ibid [33]; *Victims' Charter Act 2006* (Vic) s 9(d).

16 Director of Public Prosecutions, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [46]; *Victims' Charter Act 2006* (Vic) s 13. See Chapter 9 of this consultation paper for the role of victims in sentencing.

17 Director of Public Prosecutions, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [65]. See Chapters 9 and 10 of this consultation paper for the role of victims and the making of compensation, restitution and financial assistance orders.

18 Ibid [68], [69].

19 *Victims' Charter Act 2006* (Vic) ss 7(a)–(b).

20 All states and territories have enshrined victims' rights in legislation as principles or guidelines, except Tasmania and the Northern Territory, which have non-legislative charters.

21 *Victims of Crime Act 2001* (SA) s 9(2).

22 In Queensland, government agencies must provide this information in a 'timely' manner, but only to the extent that giving the information is relevant to the agency's functions and it is reasonable and practicable to give the information: *Victims of Crime Assistance Act 2009* (Qld) s 10. In New South Wales, a victim is to be informed 'at the earliest practical opportunity' of services and remedies available: *Victims Rights and Support Act 2013* (NSW) s 6.2. In Western Australia, a victim should be given 'access to counselling about the availability' of such services: *Victims of Crime Act 1994* (WA) sch 1, [2].

23 *Victims of Crime Act 1994* (WA) sch 1, [3].

24 *Victims Rights and Support Act 2013* (NSW) s 6.3. The *Victims' Rights Act 2002* (NZ) also requires that victims have access to services that are responsive to the welfare, health, counselling, medical and legal needs of victims (s 8).

- 12.17 Investigatory and prosecutorial agencies are given more specific obligations in the Australian Capital Territory, South Australia and Queensland. In the Australian Capital Territory, victims should be updated about the police investigation at intervals of 'generally not more than 1 month'.<sup>25</sup> In Queensland, victims are to be told about diversionary programs by both police and prosecutors, if they request it.<sup>26</sup> Victims in Queensland must also be given reasons for decisions by an investigatory agency not to proceed with a charge, to amend a charge or to accept a plea to a lesser charge, but only if they request it.<sup>27</sup>
- 12.18 Victims in Queensland and South Australia have a right to request that they be provided with the name of an alleged offender.<sup>28</sup>
- 12.19 South Australian victims are to be provided with reasons for specified prosecutorial decisions relating to charging and guilty pleas if they so request.<sup>29</sup>

### Participation through consultation

- 12.20 The New South Wales Charter places an obligation on the prosecution to consult with victims of serious crimes involving sexual violence or that caused bodily or psychological harm, before a decision is made to modify charges or to not proceed with charges, including the acceptance of a plea of guilty to a lesser offence.<sup>30</sup> In addition, the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires prosecutors to provide certification to the court that the victim of any offence has been consulted in relation to 'charge negotiations', or reasons for a victim not being consulted.<sup>31</sup>
- 12.21 Victims of serious offences in South Australia also have a right to be consulted before certain prosecutorial decisions are made, such as a decision to charge an offender with a particular offence, to amend a charge or not to proceed with a charge.<sup>32</sup>
- 12.22 South Australian victims are also provided with the right to request, within 10 days, that the prosecution consider an appeal if the victim is dissatisfied with a determination made during criminal proceedings. The prosecution 'must give due consideration' to such a request.<sup>33</sup>

### Protection

- 12.23 Some jurisdictions provide that victims do not have to appear as witnesses at preliminary or committal hearings unless the court orders otherwise.<sup>34</sup>
- 12.24 South Australia's principles include a broad privacy protection, requiring that there be 'no unnecessary intrusion on a victim's privacy'.<sup>35</sup>

### Compensation and restitution

- 12.25 South Australia's governing principles require that a victim have access to information about how to apply for compensation or restitution. Further, if a prosecutor 'is empowered to make an application for restitution or compensation', the prosecutor is required to inform the victim about this and make the application in court on the victim's behalf if the victim so requests.<sup>36</sup>

25 *Victims of Crime Act 1994* (ACT) s 4(b). Disclosures that might compromise a police investigation are excluded.

26 *Victims of Crime Assistance Act 2009* (Qld) ss 11(c), 12(b).

27 *Ibid* s 11(f).

28 *Ibid* s 11(e); *Victims of Crime Act 2001* (SA) s 8(1)(c).

29 *Victims of Crime Act 2001* (SA) s 8(1)(e).

30 *Victims Rights and Support Act 2013* (NSW) s 6.5. This obligation does not apply if the victim has said that he or she does not want to be consulted or if the victim cannot be found.

31 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A(2). See Chapter 5 of this consultation paper for more detailed discussion of s 35A.

32 *Victims of Crime Act 2001* (SA) s 9A. A victim of a serious offence should also be consulted in relation to a decision to investigate an offender's 'mental competence to commit an offence or mental fitness to stand trial'.

33 *Victims of Crime Act 2001* (SA) s 10A.

34 See for example *Victims Rights and Support Act 2013* (NSW) s 6.9; *Victims of Crime Act 1994* (ACT) s 4(j).

35 *Victims of Crime Act 2001* (SA) s 14(1).

36 *Ibid* s 12.

## Victims' rights in overseas jurisdictions

12.26 The following paragraphs highlight some provisions from victims' rights instruments outside Australia that are more expansive than Victoria's Charter. This section is not intended to provide a detailed analysis of the victims' rights instruments in these countries.

### Right to reasons and to have a decision to discontinue a prosecution reviewed

12.27 The European Union *Directive 2012/29/EU*<sup>37</sup> (EU Directive), which is binding on all EU member states, includes:

- a right to be provided with reasons for a decision not to prosecute<sup>38</sup>
- a right to have a decision not to prosecute reviewed<sup>39</sup>
- a right to be informed of the right to seek a review of such a decision.<sup>40</sup>

12.28 The right to a review of a decision not to proceed with a prosecution or to discontinue a prosecution also exists in England and Wales. This right can be exercised internally, through the Crown Prosecution Service's 'Victims' Right to Review Scheme', or externally by way of application to the High Court for judicial review. See Chapter 5 for more detail.

### Right to be heard and provide evidence

12.29 The EU Directive requires member states to ensure victims may be heard and give evidence during criminal proceedings.<sup>41</sup> This broadly worded right is capable of diverse application:

this right may range from basic rights to communicate with and supply evidence to a competent authority to more extensive rights such as a right to have evidence taken into account, the right to ensure that certain evidence is recorded, or the right to give evidence during the trial.<sup>42</sup>

12.30 The federal *Canadian Victims Bill of Rights* states that victims have a right to 'convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under this Act and to have those views considered'.<sup>43</sup>

### Right to protection from secondary victimisation and intimidation

12.31 The EU Directive also provides for a range of rights relating to preventing secondary victimisation, repeat victimisation, intimidation and retaliation, as follows:

- the provision of advice in relation to risks and prevention<sup>44</sup>
- the provision of shelters or safe interim accommodation<sup>45</sup>
- measures to safeguard victims during restorative justice processes<sup>46</sup>
- measures to mitigate the risk of emotional harm, to protect the dignity of victims when giving evidence and to protect victims from physical harm<sup>47</sup>

37 Official Journal of the European Union, *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA (EU Directive)*.

38 *EU Directive* art 6(3).

39 *Ibid* art 11(1).

40 *Ibid* art 11(3).

41 *Ibid* art 10.

42 European Commission, *DG Justice Guidance Document Related to the Transposition and Implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA* (December 2013) 29 (EU Directive Guidance).

43 *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts, C-32* (assented to 23 April 2015) s 14 (comes into force 90 days after the date of assent).

44 *EU Directive* art 9(1)(e).

45 *Ibid* art 9(3)(a).

46 *Ibid* art 12. Guidance on this article explains that 'the interests and needs of the victim, repairing harm to the victim and avoiding further harm' should be the primary considerations. Victim participation should be with voluntary and informed consent and proceedings should generally be confidential unless agreed otherwise by the parties involved (EU Directive Guidance, 30).

47 *Ibid* art 18.

- the provision of timely assessments of individual protection needs, including alternative arrangements for giving evidence during criminal proceedings.<sup>48</sup>

12.32 The *Canadian Victims Bill of Rights* provides for victims' security and privacy to be 'considered by the appropriate judicial authorities in the criminal justice system'.<sup>49</sup>

### Right to legal aid

12.33 Where a victim is a party to a proceeding, which more commonly occurs in inquisitorial trial systems in Europe, Article 13 of the *EU Directive* obliges the state to ensure that legal aid is available to victims.<sup>50</sup>

## Realising victims' rights

### General issues with making victims' rights enforceable

- 12.34 Many victims' rights are directed at changing the way actors in the criminal justice system understand, treat and interact with victims: that is, changing legal culture and practice. The literature suggests that effective oversight or enforcement mechanisms can drive desired changes, and that the threat of sanction encourages a culture of compliance.<sup>51</sup> The absence of procedures for enforcement and remedies for non-compliance has been described as rendering victims' rights 'illusory'<sup>52</sup> and unlikely to lead to change.<sup>53</sup> Matthew Hall has suggested that the actors in the criminal justice system would be more likely to give legitimacy to victims' rights and interests if these rights were enforced within the justice system.<sup>54</sup>
- 12.35 Granting a right to pursue a legal cause of action for breach of victims' rights has the potential to give victims greater leverage when first lodging a complaint and might provide a path for remedying breaches that are not satisfactorily resolved by way of complaint.<sup>55</sup> The threat of legal action may act to deter criminal justice agencies from unjustifiably violating victims' rights in the first place. Such a result would arguably create a greater culture of compliance.<sup>56</sup> The *Crime Victims' Rights Act* in the United States is one of the few victims' rights instruments to provide for any form of legal recourse for breach.
- 12.36 Nonetheless, most common law adversarial criminal systems have hesitated to include enforcement mechanisms which would give victims a cause of action for a breach, or have consequences for the conduct of a criminal trial. In Australia, the United Kingdom and Canada, victims' rights instruments typically contain a section stating that breach of a victims' right or principle does not establish a legal right or provide grounds for a cause of action.<sup>57</sup>

48 Ibid art 22.

49 *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts, C-32* (assented to 23 April 2015) ss 9, 11 (comes into force 90 days after the date of assent).

50 *EU Directive* art 13.

51 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 210; Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264, 281.

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

53 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 41, 210; Marc Groenhuijsen, 'The Development of International Policy in Relation to Victims of Crime' (2014) 20(1) *International Review of Victimology* 31, 41.

54 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 210. Hall's view is that effective enforcement mechanisms should exist during the trial and not through a subsequent complaints procedure.

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

56 Ibid.

57 Some victims' rights are given greater force by being more comprehensively set down in legislation outside a victims' rights instrument, such as the right to provide a victim impact statement, to seek compensation orders at sentencing and to apply for state-funded financial assistance.

- 12.37 As has been highlighted throughout this consultation paper, making victims' rights enforceable raises a number of issues:
- Victims' rights relate to an individual's private interest in the criminal proceedings, which can directly challenge the public interest underpinnings of the adversarial criminal justice process.
  - Related to this, the two-party contest between the state prosecutor, representing the harmed society, and the accused, does not easily create space for a third party.
  - Attempts to enforce rights through legal proceedings may disrupt and delay criminal proceedings.
  - If new legal causes of action are created for victims whose rights are violated, legal aid funding may be needed to ensure equity in the realisation of victims' rights.
  - Different rights might apply differently at different stages of proceedings, requiring various approaches to enforcement.
- 12.38 Reflecting these issues, complaints resolution processes have emerged as the more common pathway given to victims to ventilate their grievances. Robust complaints processes, especially where a mechanism for independent review exists, have the potential to provide victims with fairness, transparency and accountability.

### Enforcement and investigation in Victoria

- 12.39 A breach of the principles in Victoria's *Victims' Charter Act* does not create any legal right or give rise to a cause of action.<sup>58</sup>
- 12.40 The Charter does not include a specific right to make a complaint, but it does require appropriate processes to be established for complaints and for victims to be informed of these processes.<sup>59</sup> The Charter does not prescribe a specific complaints process or designate a body to complain to. This can be contrasted to New South Wales and South Australia, where an independent victims' commissioner can receive and investigate complaints. This is discussed further below.
- 12.41 Similarly, compliance with the Charter must be monitored and reviewed, although the regularity and mechanism for this is not stated.<sup>60</sup>
- 12.42 Victims who want to complain about a Charter right not being respected have the option of contacting the Victims' Charter enquiries and complaints line. Information provided on the Victims Support Agency website states that an enquiries and complaints line officer can mediate between the victim and the agency or person complained about and discuss options for making a more formal complaint.<sup>61</sup>
- 12.43 The *OPP Complaints Policy* states that complaints relating to the OPP can be made via telephone, post or email and will be dealt with 'consistently, expeditiously and fairly'.<sup>62</sup> A complaint will be investigated thoroughly if it cannot be resolved immediately. A victim is to be kept informed and notified of an outcome, and can expect his or her privacy to be protected. No further process for handling the complaint is articulated in the policy.

58 *Victims' Charter Act 2006* (Vic) s 22(1)(a). The Victims Charter is not intended to affect the interpretation of any Victorian law or the validity of any judicial or administrative act or omission, or provide grounds for review: ss 22(1)(b)–(c).

59 *Ibid* ss 19, 20(c).

60 *Ibid* s 20.

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

62 Office of Public Prosecutions Victoria, *OPP Complaints Policy* (April 2015) 1.

12.44 In October 2014, Mr Greg Davies APM was appointed Victoria's first Victims of Crime Commissioner. The Commissioner's role has not yet been finalised.<sup>63</sup> One function might be to conduct or coordinate complaint taking, investigation and resolution processes. The following overview of the way in which victims' commissioners in other Australian states and territories are involved in complaints processes may inform consideration of this proposal.

## Victims' commissioners and complaints processes

### New South Wales

- 12.45 The *Charter of Victims Rights* in New South Wales provides for a right to make a complaint.<sup>64</sup>
- 12.46 The *Victims Rights and Support Act 2013* (NSW) established the New South Wales Commissioner of Victims Rights as a member of the public service.<sup>65</sup> The functions of the Commissioner include:
- receiving complaints from victims about alleged breaches of the *Charter of Victims Rights*, using 'the Commissioner's best endeavours to resolve the complaints'
  - recommending that agencies apologise to victims of crime for breaches of the *Charter of Victims Rights*.<sup>66</sup>
- 12.47 The Commissioner is empowered to undertake such inquiries and investigations as considered necessary to advance the exercise of any of their functions.<sup>67</sup> The Commissioner can compel the provision of information to the Commissioner's office, including documentary information, from a person or government agency within a specified timeframe if relevant to the exercise of the Commissioner's functions.<sup>68</sup>
- 12.48 The Commissioner can also provide a special report to the minister for presentation in Parliament on any matter relating to the *Charter of Victims Rights* or the Commissioner's functions, including in relation to any breach of the Charter by an agency.<sup>69</sup>

### South Australia

- 12.49 The *Victims of Crime Act 2001* (SA) provides for the appointment of an independent Commissioner for Victims' Rights.<sup>70</sup> One of the Commissioner's functions is to assist victims in their dealings with prosecutors and other government agencies.<sup>71</sup>
- 12.50 As noted in Chapter 5, the Commissioner has the power to compel a public agency or official to consult with the Commissioner 'to further the interests of' an individual victim, victims in general or a particular class of victims.<sup>72</sup>
- 12.51 If the Commissioner is satisfied that a public agency or official has failed to comply with the declaration of principles governing the treatment of victims when it would have been practicable to comply, and no apology has been issued or the public agency or official has not dealt with the matter in a satisfactory way, then the Commissioner can recommend in writing that the public agency or official issue a written apology to the victim.<sup>73</sup>

63 The Victorian Victims of Crime Commissioner's mandate, as described by the then Attorney-General, the Hon. Robert Clark, is 'to ensure that the rights and needs of victims are recognised and respected across all government agencies, support services are well-coordinated and effectively directed, and victims are readily able to find or be put in touch with the most appropriate support and advice ... The Commissioner will also be an advocate for the interests of victims of crime in their dealings with government agencies, and provide advice on how the justice system can be further improved to meet the needs of victims.' See Victims of Crime Commissioner, *About Victoria's First Victims of Crime Commissioner* <<http://www.victimsofcrimecommissioner.vic.gov.au/>>.

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

65 *Ibid* s 8.

66 *Ibid* ss 10(e)–(f).

67 *Ibid* s 11.

68 *Ibid* s 12. Section 12(5) states that a government agency is not compelled to comply with the disclosure request if there is an overriding public interest against disclosure or if access would otherwise be denied under the *Government Information (Public Access) Act 2009*.

69 *Victims Rights and Support Act 2013* (NSW) s 13.

70 *Victims of Crime Act 2001* (SA) ss 16(1)–(2), 16E.

71 *Ibid* s 16(3)(b).

72 *Ibid* s 16A(1).

73 *Ibid* s 16A(2). The Commissioner must specify in the Commissioner's annual report how many notices were issued under s 16A(2): s 16F.

- 12.52 A copy of the Commissioner’s recommendation to the public agency or official must be given to the victim. In exercising these powers, the Commissioner must have regard to the wishes of the victim.<sup>74</sup>

### Australian Capital Territory (ACT)

- 12.53 The ACT Victims of Crime Commissioner is also a member of the ACT Victims Advisory Board.<sup>75</sup> The ACT Commissioner’s functions include:
- monitoring and promoting compliance with the governing principles for the treatment of crime victims<sup>76</sup>
  - ensuring that concerns and formal complaints about non-compliance with the governing principles are responded to ‘promptly and effectively’.<sup>77</sup>
- 12.54 The *Victims of Crime Act 1994* (ACT) distinguishes between ‘concerns’ and ‘formal complaints’. If a victim raises a concern with the Commissioner about non-compliance with the governing principles, the Commissioner must try to resolve the concern. In doing so, the Commissioner can request any document or information reasonably required and which could be obtained by the victim, from an agency. The agency must provide the document or information, with the victim’s consent.<sup>78</sup>
- 12.55 Alternatively, a victim may make a formal complaint to the Commissioner about non-compliance with the governing principles. If a formal complaint is made, the Commissioner is required to refer the complaint to a relevant complaints body, such as the human rights commission or the Ombudsman.<sup>79</sup>
- 12.56 The Commissioner may be present at a public or private criminal court hearing in order to exercise the Commissioner’s functions, unless a court orders otherwise.<sup>80</sup>

### Queensland

- 12.57 The Queensland victim services coordinator is a member of the public service.<sup>81</sup> The functions of the coordinator include:
- helping government agencies to develop processes for implementing, and complying with, the fundamental principles of justice for victims, and for resolving complaints
  - referring complaints about conduct inconsistent with Queensland’s fundamental principles of justice for victims
  - facilitating the resolution of complaints, but only if provided for under the complaint resolution processes of a government agency.<sup>82</sup>
- 12.58 The coordinator is empowered to do ‘all things necessary or convenient’ in order to perform the above functions.<sup>83</sup>
- 12.59 A victim has a statutory right to make a complaint where the victim believes that a government agency or official has acted inconsistently with the fundamental principles.<sup>84</sup> The coordinator appears only to be empowered to deal with a complaint where the government agency has a complaints handling process that includes the victim services coordinator. Otherwise the complaint must be referred by the coordinator to the government agency to deal with.<sup>85</sup>

74 *Victims of Crime Act 2001* (SA) ss 16A(3), 16A(5).

75 *Victims of Crime Act 1994* (ACT) s 22C. The Victims of Crime Commissioner is appointed pursuant to s 7.

76 *Victims of Crime Act 1994* (ACT) s 11(c). The ACT’s governing principles for the treatment of crime victims are contained in s 4.

77 *Ibid* s 11(d).

78 *Ibid* ss 12(1)–(2).

79 *Ibid* ss 12(4)–(6).

80 *Ibid* s 13.

81 *Victims of Crime Assistance Act 2009* (Qld) s 138.

82 *Ibid* ss 139(e)–(g).

83 *Ibid* s 138(5).

84 *Ibid* ss 19(1)–(2).

85 *Ibid* s 20.

- 12.60 Where the victim services coordinator is involved in the complaint resolution process, the coordinator's role is to assist the government agency to meet their responsibilities. It is not the coordinator's role to oversee the resolution of complaints.<sup>86</sup> The 2014 *Review of the Victims of Crime Assistance Act 2009: Consultation Paper* discussed the possibility of strengthening the Queensland coordinator's role to permit intervention into complaints, independent investigation or an elevation of the role to that of a Commissioner.<sup>87</sup>

### Enforcement and complaints in other jurisdictions

- 12.61 In the United Kingdom, the *Code of Practice for Victims of Crime* is issued pursuant to the *Domestic Violence, Crime and Victims Act 2004* (UK).<sup>88</sup> Breaches of the Code do not create legal rights. However, the Code is admissible as evidence and a failure to comply with the Code may be taken into account by a court in criminal or civil proceedings.<sup>89</sup> The Code also sets out a complaints process, specifying that complaints may be escalated to the Parliamentary and Health Service Ombudsman.<sup>90</sup>
- 12.62 In the United States, the federal *Crime Victims' Rights Act* (CVRA) provides that a victim, or victim's representative, may assert the rights contained in the CVRA in court.<sup>91</sup> If certain rights to be heard are denied, a victim may apply to a higher court for a plea or sentence to be re-opened.<sup>92</sup> The CVRA does not confer party or intervener status on victims during the criminal trial process, which means that in practice victims are reliant on prosecutors and judges to uphold their obligations to inform and afford victims their rights.<sup>93</sup> The enforceability of the CVRA stems from the right of a victim to seek an order from a district court requiring a CVRA right to be afforded, or to apply to the court of appeals by way of writ of mandamus where the district court is alleged to have denied a CVRA right. This appears to be similar to an application for judicial review in Australia. A practical example of this enforcement mechanism is *Kenna v United States District Court*,<sup>94</sup> where the Court of Appeals upheld a victim's complaint about not being permitted to speak at a sentencing hearing in a district court when he attempted to assert the CVRA right to be heard. It remitted the matter back to the district court but considered that the only way to give effect to the victim's right to speak would be to conduct a new sentencing hearing, in which the victim would be provided with his right to be heard.<sup>95</sup>
- 12.63 The recent *Canadian Victims Bill of Rights* establishes an interpretive obligation, requiring all laws, orders, rules or regulations of Parliament to be 'construed and applied in a manner that is compatible' with the rights in the Victims Bill of Rights, '[t]o the extent that it is possible to do so'.<sup>96</sup> The Victims Bill of Rights prevails where there is inconsistency with most other laws.<sup>97</sup>

86 State of Queensland, *Review of the Victims of Crime Assistance Act 2009: Consultation Paper* (Department of Justice and Attorney-General, October 2014) 22.

87 Ibid 22–3. Note that Western Australia has a Commissioner for Victims of Crime within the Department of the Attorney-General. The Commissioner's functions do not appear to be set out in law. One of the Commissioner's functions is to provide 'a mechanism for victims to lodge complaints regarding Government services': Government of Western Australia, Department of the Attorney-General, *Annual Report 2013/14* (2014) 23.

88 Ministry of Justice, *Code of Practice for Victims of Crime* (United Kingdom, October 2013), issued pursuant to s 32 of the *Domestic Violence, Crime and Victims Act 2004* (UK). EU Directive provisions incorporated into the *Code of Practice for Victims of Crime* include information rights, entitlement to a needs assessment, referral to support services, and a right to review of a decision not to prosecute.

89 Ministry of Justice, *Code of Practice for Victims of Crime* (United Kingdom, October 2013), 31, 58.

90 *Crime Victims' Rights Act*, 18 USC § 3771(d)(1), (d)(3) (2004).

91 Ibid §§ 3771 (d)(5). Note § 3771(d)(5) requires that a victim has asserted the right to be heard and was denied; applied to the Court of Appeals by way of writ of mandamus within 10 days; and, in the context of a plea, that the accused did not plead guilty to the highest charge.

92 Erin Blondel, 'Victims' Rights in an Adversary System' (2009) 58 *Duke Law Journal* 237, 259–260, arguing that because the CVRA does not confer party status on victims, it places obligations on prosecutors and trial courts to vindicate victims' rights, often in ways which sit uncomfortably with the obligations of the parties and the court in an adversarial trial; and it does not give victims full exercise of their purported rights or any real influence on the trial.

94 435 F.3d 1011 (9th Cir, 2006).

95 *Kenna v United States District Court* 435 F.3d 1011 (9th Cir, 2006) 1017–18. For commentary see Douglas E Belooof, 'Judicial Leadership at Sentencing under the Crime Victims' Rights Act: Judge Kozinski in *Kenna* and Judge Cassell in *Degenhardt*' (2006) 19(1) *Federal Sentencing Reporter* 36.

96 *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, C-32 (assented to 23 April 2015) s 21 (comes into force 90 days after the date of assent). Note that the application and interpretation of the *Canadian Victims Bill of Rights* is qualified to ensure non-interference with a number of matters, including police or prosecutorial discretion and the administration of justice: s 20.

97 Ibid s 22(1). Section 22(1) does not apply to 'the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, the *Official Languages Act*, the *Access to Information Act* and the *Privacy Act* and orders, rules and regulations made under any of those Acts': s 22(2).

- 12.64 The Canadian Victims Bill of Rights grants a right to victims to complain about breaches. It also requires all federal criminal justice agencies to have a ‘complaints mechanism’ for the review of alleged breaches of the Victims Bill of Rights. Such mechanisms must include the power to make recommendations and an obligation to notify victims of outcomes.<sup>98</sup> Victims are not granted party or intervener status in criminal proceedings by the Victims Bill of Rights and are not afforded recourse to the courts for an alleged breach.<sup>99</sup>

## Questions

- 55 Could the obligations set out in the Director of Public Prosecutions Victoria’s *Director’s Policy: Victims and Persons Adversely Affected by Crime*, particularly obligations to consult, be strengthened by incorporating them into the *Victims’ Charter Act 2006 (Vic)* or other Victorian legislation?
- 56 Should the *Victims’ Charter Act 2006 (Vic)* be amended to include other rights, or broaden existing rights for victims?
- 57 Should victims have a legal right to enforce some or all of the rights contained in the *Victims’ Charter Act 2006 (Vic)*? If so, how might this be achieved, and in what circumstances?
- 58 Should there be a legislatively prescribed process for investigating and resolving complaints about breaches of victims’ rights? If so, what might this process look like? Should the Victims of Crime Commissioner in Victoria have a role in complaints resolution relating to breaches of the *Victims’ Charter Act 2006 (Vic)*?
- 59 What remedies should be available for breach of a victim’s rights?

# Support for victims

**166** Introduction

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## 13. Support for victims

### Introduction

- 13.1 The provision of support for victims during the criminal trial process is closely linked to victims' perceptions of the criminal trial process as fair and to their confidence in the criminal justice system.<sup>1</sup>
- 13.2 As outlined in Chapter 2, victims of crime are diverse, as are their experiences of crime. While crime impacts all victims differently, many victims of crime experience trauma, distress and adverse impacts on their health, finances and personal relationships.<sup>2</sup> These impacts can persist and change over time.
- 13.3 The provision of support for victims is designed to respond to these impacts. Guided by the provisions of the *Victims' Charter Act 2006* (Vic), 'victim support' encompasses the respectful treatment of victims by all actors in the criminal justice system, the provision of information and the referral to and delivery of, therapeutic and psychological assistance, protection and practical help.
- 13.4 This chapter reviews the landscape of victim support in Victoria, before canvassing a number of issues related to the provision of victim support. The focus of this chapter is on victims' need for legal information, advice and assistance. This chapter concludes with discussion of proposals for a victim representative or advocate scheme, and asks what role the Victorian Victims of Crime Commissioner might have regarding victim support.

### The court precinct

- 13.5 In the court precinct itself, appropriate and respectful arrangements for victims are important. In particular, areas where victims and their families can wait, or withdraw to, separate from areas used by accused and their families, materially assist victims during the trial process. Waiting in public court corridors is neither respectful nor appropriate for victims. Courts are progressively addressing this matter.

### The current system in Victoria

- 13.6 Victim support in Victoria is delivered predominantly through government and government-funded agencies, and supported by a range of non-government organisations. Victim support services in other jurisdictions are consistent with practice in Victoria.<sup>3</sup>

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1 Ben Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System' (2011) 11(4) *Criminology and Criminal Justice* 345, 362–3.

2 The impacts of crime on victims are also discussed in more detail in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* (2015) 3–4.

3 Victorian Auditor-General, *Effectiveness of Victims of Crime Programs* (Victorian Government Printer, 2011) 9.

## The Victims Support Agency

- 13.7 The Victims Support Agency (VSA) sits within the Criminal Justice Division of the Department of Justice and Regulation (DJR). The VSA is ‘the official Victorian Government Agency helping people in Victoria manage the effects of violent crime’.<sup>4</sup>
- 13.8 The VSA coordinates the delivery of services to victims of crime, including:
- the Victims of Crime Helpline
  - Victims Assistance Program (VAP)
  - Victims Register
  - Prisoners Compensation Quarantine Fund.<sup>5</sup>
- 13.9 The services provided by VSA are limited to victims of violent crime, including people injured in violent attacks, subject to assault or robbery, family violence, sexual assault, or who have lost a family member to violence or culpable driving.<sup>6</sup>
- 13.10 Most victims gain access to the VAP through the Victims of Crime Helpline.<sup>7</sup> At least 70 per cent of victim calls to the Helpline are as a result of a referral from Victoria Police.<sup>8</sup> Victoria Police’s e-referral service facilitates this referral process at the point of first contact between police and victims.<sup>9</sup> The referral pathway from police also includes the co-location of VAP services at 15 police stations in metropolitan and regional Victoria.<sup>10</sup>
- 13.11 The VAP funds and manages eight community-based services, delivered from over 40 locations. VAP services provide practical support, access to counselling, assistance with VOCAT applications, general information and support in relation to the criminal trial process and assistance with the preparation of victim impact statements. VAP services provide support from the time the crime occurs until the case is finalised by the justice system.
- 13.12 In 2013–14, the Victims of Crime Helpline responded to over 22,000 calls and referrals. The network of VAP services provided support and assistance to a total of 11,650 people.<sup>11</sup>

## The Child Witness Service

- 13.13 The Child Witness Service (CWS), established in 2006 in response to recommendations of the Victorian Law Reform Commission’s *Sexual Offences Final Report*,<sup>12</sup> also sits within the Criminal Justice Division of the DJR.
- 13.14 The CWS employs psychologists and social workers. It supports children giving evidence, including child victims, in all Victorian criminal courts. The service aims to reduce the trauma and stress experienced by a child witness by:
- preparing them for the role of being a witness
  - familiarising them with the court process and personnel
  - supporting them and their family throughout the criminal proceedings
  - providing debriefing and referral to community agencies.<sup>13</sup>

4 Department of Justice and Regulation, *Victims Support Agency* <<http://www.victimsofcrime.vic.gov.au/utility/about+us/victims+support+agency/>>.

5 The Victims’ Register and Prisoner Compensation Quarantine Fund are outside the Commission’s terms of reference.

6 Department of Justice and Regulation, *Types of Crime* <<http://www.victimsofcrime.vic.gov.au/home/the+crime/types+of+crime/>>.

7 Information provided by Victims Support Agency (March 2015).

8 Ibid.

9 A 2010 pilot e-referral program ‘Supportlink’ was adopted statewide in 2013 and has been replaced in October 2014 with VPeR, a referral system developed by Victoria Police: information provided by Victims Support Agency (March 2015).

10 Further co-locations are in progress: information provided by Victims Support Agency (March 2015).

11 Information provided by Victims Support Agency (March 2015).

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

13 Department of Justice and Regulation, *Child witness service information* <<http://www.victimsofcrime.vic.gov.au/home/going+to+court/giving+evidence/child+witness+service/>>.

## Office of Public Prosecutions Witness Assistance Service

- 13.15 The Witness Assistance Service (WAS) is part of the Victims Strategy and Services Directorate of the Office of Public Prosecutions Victoria (OPP).
- 13.16 The Director of Public Prosecutions' (DPP) policy, *Victims and Persons Adversely Affected By Crime*, provides that if appropriate, the OPP must refer victims of crime to relevant support services, such as the Victims of Crime Helpline and WAS.<sup>14</sup>
- 13.17 All victims should be informed by the OPP that they may contact WAS 'to receive information, support and assistance'.<sup>15</sup> However, WAS prioritises the provision of assistance and support to 'families who have lost loved ones; victims and witnesses in sexual assault and family violence matters; and vulnerable victims'.<sup>16</sup>
- 13.18 This prioritisation is mirrored in the DPP's policy, which requires OPP lawyers to refer victims in such matters to WAS '[a]s early as possible in the prosecution process'.<sup>17</sup>
- 13.19 WAS employs social workers whose role is to:
- provide information about the rights and entitlements of victims in relation to court processes
  - provide information about the progress of a victim's matter
  - support victims during pre-court conferences with prosecutors
  - assist victims to understand the legal process, including giving evidence and the process of making a victim impact statement
  - assist with arrangements for attending court
  - refer victims to other specialist support services.<sup>18</sup>
- 13.20 There is a policy obligation on OPP lawyers to offer either pre-committal and pre-trial WAS conferences, or consult with WAS about the appropriateness of a conference, for certain vulnerable victims and in cases involving a death or family violence.<sup>19</sup> All other cases must be assessed on a case-by-case basis by the OPP lawyer to consider whether referral to WAS is needed.<sup>20</sup>
- 13.21 All witnesses who are required to give evidence for the prosecution should be offered a conference with WAS by the OPP lawyer, during which the court process and the witness's role is explained.<sup>21</sup>
- 13.22 In 2013–14, WAS assisted 4,377 victims and witnesses.<sup>22</sup>

## Court Network

- 13.23 Court Network is a state government-funded, volunteer-based service directed and managed by professional staff. Court Network operates in Victoria and Queensland. Court Network's broad remit is to assist all court users by providing support, information and referral services. Court Network does not provide legal advice, assistance or representation.

14 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [15].

15 Ibid [14].

16 Office of Public Prosecutions Victoria, *Witness Assistance Service: We Can Help You* <<http://www.opp.vic.gov.au/Witnesses-and-Victims/Getting-Help-from-the-Witness-Assistance-Service>>.

17 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [16].

18 Office of Public Prosecutions Victoria, *Witness Assistance Service: We Can Help You* <<http://www.opp.vic.gov.au/Witnesses-and-Victims/Getting-Help-from-the-Witness-Assistance-Service>>.

19 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [17]–[19] sets out the different levels of obligation on OPP lawyers to offer a conference with WAS depending on the offence and the victim.

20 Ibid [20].

21 Ibid [28].

22 Director of Public Prosecutions Victoria and Office of Public Prosecutions Victoria, *Annual Report 2013–14* (2014) 24.

- 13.24 Court Network services are offered in all Victorian metropolitan courts and courts in the regions of Bendigo/Castlemaine, Gippsland/Latrobe Valley, Mildura, Shepparton, Wodonga, Wangaratta, Ballarat, Geelong and Warrnambool.
- 13.25 Victims and their families and friends are a core group of court users whom Court Network volunteers support by:
- providing information about court processes
  - being a support person at court
  - familiarising them with the courthouse and courtroom before the hearing commences
  - providing a safe place in the courthouse for the victim to use when not in the courtroom
  - providing referrals to other community services.<sup>23</sup>
- 13.26 The DPP's policy stipulates that all victims should be offered the support of Court Network.<sup>24</sup>

### Court Network Victim Support Unit in Queensland

- 13.27 The Queensland arm of Court Network has established a dedicated Victim Support Unit, which:
- supports adults impacted by indictable crimes such as those involving serious assaults, rape and other sexual assaults, domestic and family violence, attempted murder, murder, manslaughter, stalking, historical sexual abuse, torture, and dangerous driving causing death.<sup>25</sup>
- 13.28 A qualified program manager works with an individual victim to develop a personalised court support plan.<sup>26</sup> Trained volunteers provide support on the day of court. The support plan may include the provision of information, referrals and liaison with prosecution victim services. The support offered is for the duration of the criminal trial process and is cross-jurisdictional.

### Non-government victim support and advocacy groups

- 13.29 Non-government victim support and advocacy groups provide important support to victims of crime in Victoria. These groups, particularly women's groups supporting victims of sexual offences and family violence, and groups supporting the bereaved families of homicide victims, are credited as being the genesis for the broader victims' movement in Australia.<sup>27</sup>
- 13.30 Most operate almost entirely on a volunteer basis. As well as providing direct services to victims, such as advice and emotional support, these organisations conduct advocacy and research on behalf of victims of crime and training.
- 13.31 Community legal centres, both general and specialist, are another source of information, referral and support for victims of crime. They often provide legal advice and representation for victims who wish to apply to the Victims of Crime Assistance Tribunal, or for a family violence intervention order, or need assistance with other legal needs, which may be exacerbated by their criminal victimisation.

23 Court Network, *We Can Help* (brochure) <<http://www.courtnetwork.com.au/CNinformationsheetsBrochure.aspx>>.  
 24 Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) [37].  
 25 Court Network *Annual Report 2013–2014* (2014) <<http://www.courtnetwork.com.au>>.  
 26 Court Network, Victim Support Unit, 'Victims or Witnesses' <<http://victimsupportunit.org/support/>>.  
 27 Paul Rock, 'Aspects of the Social Construction of Victims in Australia' (2006) 1 *Victims and Offenders* 289, 293–4.

## Resources, coordination and integration of service delivery

- 13.32 As with so many government services, adequate resourcing to ensure that all victims of crime are able to access support services is a challenge.
- 13.33 Victim support services tend to prioritise the delivery of services to victims of serious offences, including those that involve the death of a loved one or sexual violence, and other vulnerable victims. This is in part because of the more acute needs associated with violent crime victimisation. It has been emphasised throughout this consultation paper, and is consistent with evidence and victim experience, that the criminal trial process is often particularly difficult for such victims. It is clear however, that victims of other violent offences, as well as victims of non-violent offences, also suffer physical, financial, emotional and psychological injury. There is a risk that these victims will not be able to access the support they need.<sup>28</sup>
- 13.34 Similar issues arise across regions and for particular victims. The support needs of victims in regional and remote areas may be more acute relative to the services available, when compared to metropolitan areas. Koori victims, victims from culturally and linguistically diverse communities and victims with physical or intellectual disabilities or mental illness, have complex needs and may experience a range of intersecting barriers to accessing the criminal justice system and support services.<sup>29</sup>
- 13.35 Studies repeatedly acknowledge that victim support, and victims' experiences of the criminal trial process, are enhanced when support services are coordinated and integrated.<sup>30</sup> Proper coordination and integration optimises the likelihood that support services will be consistently offered to the full range of victims with needs.<sup>31</sup>
- 13.36 A 2012 review of the literature on victims of crime in the adult criminal justice system described Victoria's Witness Assistance Service as an example of a 'single point of contact for victims in the court process'.<sup>32</sup> An example of the coordinated provision of victim support services 'before, during and after court appearances' is the United Kingdom's Independent Victim Advisors (IVA) scheme for victims of sexual assault and domestic violence.<sup>33</sup> IVAs assist victim-witnesses 'from the point of crisis'. In particular, IVAs assist with victims' interactions with other agencies in the criminal justice system.<sup>34</sup>
- 13.37 One service not generally provided by victim support agencies and services is personalised legal advice, assistance or advocacy.

28 Ibid 290.

29 These barriers are discussed in detail in Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* (May 2015) 6–11.

30 See, eg, Elaine Mossman, *Victims of Crime in the Adult Criminal Justice System: A Stocktake of the Literature* (New Zealand Ministry of Justice, 2012) 87–91.

31 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 192.

32 Elaine Mossman, *Victims of Crime in the Adult Criminal Justice System: A Stocktake of the Literature* (New Zealand Ministry of Justice, 2012) 78 (fn 77).

33 Ibid 77–8. See also Amanda Robinson, *Independent Sexual Violence Advisors: A Process Evaluation* (Home Office, 2009); Amanda L Robinson, *Independent Domestic Violence Advisors* (Home Office, 2009).

34 Elaine Mossman, *Victims of Crime in the Adult Criminal Justice System: A Stocktake of the Literature* (New Zealand Ministry of Justice, 2012) 78; Amanda Robinson, *Independent Sexual Violence Advisors: A Process Evaluation* (Home Office, 2009) 28; Amanda L Robinson, *Independent Domestic Violence Advisors* (Home Office, 2009) 15–16.

## The need for personalised legal advice, assistance and advocacy

- 13.38 In addition to victims' more general support needs, studies have shown that a lack of information can be a key contributing factor to victim dissatisfaction during the criminal trial process.<sup>35</sup>
- 13.39 Victims entering the court system are confronted with complex laws defining the criminal offence, regulating the rules of evidence and establishing complicated court procedures. Victims may find it difficult to understand what is happening during the trial, such as why certain lines of questioning are being allowed or why certain decisions are made by the prosecutor, the judge or accused's lawyer. This can contribute to a victim's perception that the trial is unfair. Compounding this is the very restricted role that victims play in adversarial criminal trials, which can leave them feeling 'discounted, silenced and disempowered'.<sup>36</sup>
- 13.40 Providing 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.<sup>37</sup> Accurate, timely and personalised legal information can help ensure victims have realistic expectations about what the criminal justice system can deliver, and what their role in it is, thereby minimising the risk of unmet expectations contributing to dissatisfaction with the system.<sup>38</sup>
- 13.41 *The Victims' Charter Act 2006* (Vic) obliges the DPP to provide victims with information about, and referral to, services that might assist with 'possible entitlements and legal assistance'.<sup>39</sup> Notably (and appropriately) absent is an obligation to provide victims with personalised legal advice or assistance.
- 13.42 Victims may feel the prosecutor should play this role. However, as detailed in Chapter 5, the prosecutor is not the victim's lawyer, and is not necessarily well placed, nor ethically able, to provide victims with all of the information and legal advice they seek or need.
- 13.43 Victim support services tend to be provided by social workers or counsellors. This is critical because these professionals are trained in identifying the emotional, psychological and practical needs of victims and are therefore best placed to assist with addressing these. These professionals provide essential, but more generalised, information about the legal system and the victim's role as part of their invaluable service. Their role is not to provide tailored legal advice or assistance. This should only be done by a lawyer. Arguably even personalised case-specific information (in contrast to legal advice) should be provided by someone with legal training and up-to-date knowledge of criminal laws and procedures.

35 Shapland et al, *Victims in the Criminal Justice Process* (1985). For further discussion see Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 2: Who Are Victims and What Are Their Criminal Justice Needs and Experiences?* (May 2015).

36 Elaine Mossman, *Victims of Crime in the Adult Criminal Justice System: A Stocktake of the Literature* (New Zealand Ministry of Justice, 2012) 76.

37 Joanna Shapland et al, *Victims in the Criminal Justice Process* (Gower Publishing 1985); Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8 *Victims and Offenders* 119, 141; Annemarie ten Boom and Karlijn Kuijpers, 'Victims' Needs as Basic Human Needs' (2012) 18(2) *International Review of Victimology* 155, 163.

38 Edna Erez et al, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169.

39 *Victims' Charter Act 2006* (Vic) ss 7(a)–(b).

## Discussion and options for reform

- 13.44 Reform proposals focused on victims' legal support needs revolve around the provision of a legal advisor or advocate to victims throughout the criminal trial process, or at critical stages of the criminal trial process.
- 13.45 A court-based legal advice service for victims, where victims can access a legal advisor while at court, is one option for reform. This advisor could provide detailed information and advice about a range of matters, including:
- the way the trial is being conducted and the victim's role in it
  - the decisions made by the prosecutor, the accused's lawyer and the judge
  - judicial decision-making in circumstances where the judge must take the victim's view into account (for example, whether to give evidence in court or via closed-circuit television).
- 13.46 A legal advisor could also assist the victim to raise matters of concern with the prosecutor, and assist where the prosecutor seeks to consult a victim about a plea negotiation or decision to discontinue a prosecution.
- 13.47 An alternative proposal would be to establish a scheme for providing victims with individual representation by victims' advocates<sup>40</sup> (also called victims' 'liaisons'<sup>41</sup>). In essence, victims' advocates would take on a victim as their client from the start of that person's journey through the criminal justice system. A legally qualified advocate could act as the victim's lawyer, providing personalised and timely legal advice and assistance.<sup>42</sup> The victim's advocate could assist with the preparation of the victim impact statement, ensuring that victims have received legal advice about matters such as admissibility, format and delivery. Victims' advocates could also provide referrals and assist with applications for compensation and financial assistance within and outside the criminal trial process.
- 13.48 If the advocate was allocated to the victim from their initial contact with the police, they could also perform an important case-management role, assisting in referring the victim to other services depending on their needs.<sup>43</sup>
- 13.49 If victims' advocates were practising lawyers, they might also represent the victim in court when required.<sup>44</sup> In particular, it has been suggested that a victims' advocate at the sentencing phase might resolve a number of issues identified with the victim impact statement scheme.<sup>45</sup> As noted in Chapter 7–9, arguments against these proposals include the potential to add complexity, costs and delays to the trial process. They also risk undermining an accused's fair trial rights and impacting on the structure of the two-party adversarial criminal justice system.
- 13.50 Consideration would need to be given to whether the delivery of a victims' advocate scheme should be independent from, or connected to, the Office of Public Prosecutions. Research suggests that problems may arise when victims' advocates are seen as aligned with the prosecution, particularly when the interests of victims and prosecutors diverge.<sup>46</sup>

40 Edna Erez et al, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169, 184. The value of victim advocates is also discussed in Christine Englebrecht, 'The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System' (2011) 36(2) *Criminal Justice Review* 129, 132, 147.

41 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No. 27, Australian Institute for Family Studies, 2014) xii.

42 For example, many victims of crime are not aware that the *Confiscation Act 1997* (Vic) may be used by the police to freeze an accused's assets, preserving them in the event that the accused is convicted and the victim makes an application for compensation. A victims' advocate could provide this information and act to ensure the victim's interests are protected.

43 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No. 27, Australian Institute for Family Studies, 2014) xii.

44 *Ibid*; Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (Victorian Government, 2014) 71–2.

45 *Ibid* 72; see further discussion at Chapter 9 of this consultation paper.

46 Christine Englebrecht, 'The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System' (2011) 36(2) *Criminal Justice Review* 129, 132.

- 13.51 As noted in Chapter 12, the role of Victoria's Victims of Crime Commissioner is still being finalised. One potential role for the Commissioner could be to oversee the provision or coordination of a victim advocate or liaison service. Alternatively, such a service could sit within the ambit of the Victims Support Agency, which currently coordinates the provision of support to victims.

### The role of the Victims of Crime Commissioner

- 13.52 In Chapter 12, the complaints handling role of the different victims of crime commissioners and coordinators around Australia was explored. These commissioners and coordinators have additional legislative responsibilities that relate to the provision of support services to victims. These functions vary across each jurisdiction:
- In the Australian Capital Territory, the Victims of Crime Commissioner's functions include: managing and determining eligibility for the victims services scheme; overseeing efficient and effective service delivery for victims; ensuring victims receive information and assistance; and facilitating cooperation between agencies.<sup>47</sup>
  - The New South Wales Commissioner of Victims Rights is required to provide information to victims of crime about support services and assistance, co-ordinate the delivery of support services for victims of crime and encourage effective and efficient delivery of services.<sup>48</sup>
  - The South Australian Commissioner for Victims' Rights is mandated to 'marshal available government resources' to be applied efficiently and effectively for the benefit of victims, and monitor the impact of law and procedures on victims of crime.<sup>49</sup>
  - The Queensland victim services coordinator is required to help victim service providers to coordinate effective and efficient services and assist victims to obtain information or assistance.<sup>50</sup>
- 13.53 In addition to contemplating whether the Victorian Victims of Crime Commissioner should have a role in coordinating a legal advocates service for victims, consideration might be given to whether some of the following functions, which are variously vested in the Commissioners of South Australia, Australian Capital Territory and New South Wales, are appropriate for Victoria's Commissioner:
- coordinating, and potentially administering support services for victims, including any legal advocates service
  - developing and informing best-practice resources, policy and law reform relevant to victims of crime
  - monitoring compliance with victims' rights instruments and victim-focused policies and guidelines
  - developing, coordinating and/or overseeing training and certification for those working with victims
  - conducting research, public awareness and systemic advocacy on behalf of victims
  - operating or overseeing a complaints resolution process for victims who feel that their rights have not been respected.<sup>51</sup>

47 *Victims of Crime Act 1994* (ACT) s 11; the Commissioner's functions in respect of the ACT victims services scheme are listed in the *Victims of Crime Regulations 2000* (ACT) reg 22.

48 *Victims Rights and Support Act 2013* (NSW) s 10.

49 *Victims of Crime Act 2001* (SA) s 16(3).

50 *Victims of Crime Assistance Act 2009* (Qld) s 139.

51 See also Elaine Mossman, *Victims of Crime in the Adult Criminal Justice System: A Stocktake of the Literature* (New Zealand Ministry of Justice, 2012) 45, appendix B.

- 13.54 As noted above, the Victims Support Agency already coordinates the provision of services to victims in Victoria. Thus, it may not be necessary or appropriate in Victoria for the Commissioner to take on such a role, particularly in light of the likely costs and disruption to victim support service delivery that would ensue. In addition, if the Commissioner were to have a role in coordinating or administering services, this could undermine the independence of the Commissioner, especially if the Commissioner were to be mandated to receive and investigate complaints from victims.<sup>52</sup>

## Questions

- 60 Are there gaps in the provision of victim support services?
- 61 How should victim support services be prioritised?
- 62 How might the delivery of victim support services in Victoria be improved?
- 63 Do victims need personalised legal advice and assistance? If so, how should such support be delivered?
- 64 What role could the Victorian Victims of Crime Commissioner have in relation to victim support services?

# Conclusion

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## 14. Conclusion

- 14.1 At the start of Part Two of this consultation paper, the Commission outlined three possible roles for victims in the criminal trial process:
- protected witness
  - participating witness
  - prosecuting witness.
- 14.2 The following chapters then considered a range of reform initiatives and proposals, many of which necessarily involve legislative change. However, as has been noted throughout this consultation paper, simply changing the law may not of itself address the underlying causes, nor the symptoms of, victim dissatisfaction with the criminal trial process.
- 14.3 Research and experience has shown that what is also required is a change in culture, practice and attitudes.<sup>1</sup> If legislative reforms are not accompanied by operational and cultural change within the legal profession and the judiciary,<sup>2</sup> they may fail to achieve desired outcomes, and may even exacerbate victim disillusionment and harm.<sup>3</sup> For instance, the prohibition (referred to in [8.45]) on unduly intimidating or humiliating questions to witnesses is informed by judicial and professional attitudes to what constitutes undue intimidation or humiliation.
- 14.4 It is also clear that the broader cultural and societal context in which the criminal justice system is set is integral to the success or otherwise of reform initiatives.<sup>4</sup> If proposed law reform fails to address the broader social and cultural context of the issue it is intended to address, its prospects for success may be compromised from the outset.<sup>5</sup>
- 14.5 The Commission therefore welcomes submissions to this review which consider cultural issues alongside legislative change.
- 14.6 You can provide input into the Commission’s review by responding to the specific questions posed throughout the paper. These questions are also included at the back of this paper. You may also contribute more generally to the overarching question, ‘What should be the role of victims in the criminal trial process?’ To allow the Commission time to consider your views before deciding on final recommendations, **submissions are due by 30 September 2015.**

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1 Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 197, citing Joanna Shapland et al, *Victims in the Criminal Justice System* (Gower Publishing, 1985).

2 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reform to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No. 27, Australian Institute of Family Studies (2014) 15.

3 Edna Erez et al, ‘Outsiders Inside: Victim Management in an Era of Participatory Reforms’ (2014) 20(1) *International Review of Victimology* 169,184.

4 Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reform to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No. 27, Australian Institute of Family Studies, April 2014) 15.

5 Ibid 16. They also note that law reform is inherently limited in its ability to change ‘ingrained social attitudes and behaviours’.

# Questions

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# Questions

## Chapter 4

- 1 Should the role of victims in the criminal trial process be that of protected witnesses, participating witnesses or prosecuting witnesses?
- 2 Could victims have different roles at different stages of the trial?
- 3 If changes to attitudes and behaviour are needed to achieve the intent of legislative reform, how might those changes be achieved?

## Chapter 5

### The role of victims

- 4 Should victims have a greater role in the decision to continue or discontinue a prosecution?
- 5 If a victim wants to withdraw their complaint, should this determine whether the prosecution continues?
- 6 Should a victim be able to require a prosecution to proceed where the DPP decides it should be discontinued?
- 7 Should victims have a greater role in the decision to accept a plea of guilty after plea negotiations?

### Consultation

- 8 Is there adequate consultation with victims before a decision is made to continue with charges, discontinue a prosecution or accept a plea of guilty after plea negotiations? If not, what additional consultation do victims require?
- 9 If the prosecution fails to consult with victims about a decision to discontinue a prosecution, or to accept a plea of guilty after plea negotiations, should this attract consequences? If so, what should those consequences be?
- 10 Should victims be given the opportunity to access legal advice or representation during any consultation with the prosecution?

## Review of decisions

- 11 Should there be a way to review decisions made by the DPP or Crown Prosecutor to discontinue a prosecution or accept a plea after plea negotiations? If so, what mechanism might be used?

## Alternative procedures

- 12 Should victims be able to pursue restorative justice or other alternative processes instead of, or at any point during, a traditional prosecution? Why, or why not?

## Chapter 6

### Consultation

- 13 Should the prosecution be required to consult with victims before taking a position on a summary jurisdiction application or an application to cross-examine a witness, including the victim?
- 14 Are measures required to ensure that the prosecution fulfils consultation obligations?

### The role of the victim in proceedings

- 15 Should victims have a role in relation to applications for summary jurisdiction or applications to cross-examine witnesses at a committal hearing?
- 16 Should victims have a role during the committal hearing? If so, what should this role be?
- 17 Should victims' views be a relevant factor in the magistrate's determination of an application to cross-examine the victim, or other witnesses? If so, how might victims' views be communicated to the magistrate?

### Protected-witness measures

- 18 Should the prohibition on child and cognitively impaired victims giving evidence at committal hearings in sexual offence matters be extended to all, or certain other, victims? If so, what criteria should this be based on?
- 19 Should the evidence of victims at committal hearings be video-recorded so that it can be played at the trial instead of victims giving oral evidence?
- 20 Should cross-examination of victims and other witnesses at committal hearings be replaced by earlier transfer of serious indictable offences to superior courts, with the examination of witnesses taking place in advance of the trial and before a trial judge?

## Chapter 7

### Role of victims—confidential communications

- 21 Are victims exercising their right to appear in relation to confidential communications applications? If not, why not and how might that be addressed?
- 22 Having regard to the practices in other jurisdictions, should victims have a greater role in pre-trial proceedings regarding confidential communications? Should the types of communications and the offences these proceedings relate to be expanded?

### Role of victims—pre-trial proceedings generally

- 23 Should victims have a role in other pre-trial proceedings in which they have an interest? If so, what should be the test for determining whether victims have an interest?
- 24 If victims are given a greater role in pre-trial proceedings, should disclosure obligations be imposed on victims? What other obligations might be imposed?
- 25 How might any role for victims in pre-trial proceedings impact on or relate to the role of victims during the jury trial?
- 26 If victims are to have a participating-witness or prosecuting-witness role, should the state provide legal representation for victims?

### Pre-trial restorative justices procedures

- 27 Should restorative justice procedures be available in the pre-trial phase of proceedings? If so, should any limits be placed on the use of such procedures?

## Chapter 8

### Protective measures

- 28 Are the protective procedures for the taking of evidence from vulnerable victims appropriate and effective?
- 29 Should the current protective measures for vulnerable witnesses be extended to other categories of victim, or to victims of other types of offence?
- 30 Are the existing evidentiary provisions being used, or enforced by judges, to prevent inappropriate questioning or to allow victims to give evidence in narrative form? Are there any further evidentiary reforms which might reduce victim re-traumatisation?
- 31 Should Victoria introduce an intermediary scheme? If so, for which victims? What functions should an intermediary perform?

### Participatory and prosecutorial roles for victims

- 32 Should victims be able to participate during trial proceedings? If so, how and when might this participation be exercised? Who should provide representation?
- 33 Could victims be given a participatory or prosecuting role in Victoria similar to that provided for by the victim participation scheme of the International Criminal Court?
- 34 Are there aspects of inquisitorial trial procedures which could be adopted in Victoria?

## Chapter 9

The victim's role in sentencing and the purposes of sentencing

- 35 Should the victim have a greater role in sentencing? If so, what should that role be?
- 36 Should the purposes of sentencing explicitly include the needs and interests of victims?

Victim impact statements

- 37 Should further limits be placed on the publication and distribution of victim impact statements?
- 38 Should a broader group of victims be permitted to make victim impact statements?
- 39 Should community impact statements be introduced?
- 40 Should victims be permitted to make submissions in relation to sentencing?
- 41 What should be the role of the prosecutor in preparing victim impact statements?

Restorative justice sentencing procedures

- 42 Should restorative justice procedures be available as either an alternative or supplementary part of the sentencing process? If not, why not? If so, in what circumstances?

## Chapter 10

- 43 Do processes set out in Part 4 of the *Sentencing Act 1991 (Vic)* deliver on the aim of a swifter, less complex avenue for victim compensation? Are any changes needed to improve outcomes for victims?
- 44 Should there be a statutory presumption in favour of compensation and restitution in all cases?
- 45 How should the financial circumstances of an offender be taken into account under Part 4 of the *Sentencing Act 1991 (Vic)*?
- 46 Should a victim be given the power to commence appeal proceedings in relation to a restitution or compensation order?
- 47 How should restitution and compensation orders be enforced?
- 48 Is there a need for restorative justice pathways as an alternative, or in addition to, *Sentencing Act 1991 (Vic)* orders and VOCAT?
- 49 Are there offences not covered by the *Victims of Crime Assistance Act 1996 (Vic)* that should be?

## Chapter 11

- 50 Should a victim have standing to seek leave to commence an interlocutory appeal? If so, should this be limited to circumstances where the ruling impacts on the personal interests or rights of the victim?
- 51 Should victims have a right to be consulted by the prosecution or to request that the DPP consider an appeal on any or all matters that the DPP is permitted to seek leave to appeal?
- 52 Should a victim have standing to participate in an interlocutory appeal commenced by the prosecution or the defence? If so, how and in what circumstances?
- 53 Should a victim have standing to participate in a post-verdict appeal commenced by the defence or prosecution?
- 54 Should the victim impact statement scheme as it applies in sentencing hearings also apply when the Court of Appeal re-sentences an offender?

## Chapter 12

- 55 Could the obligations set out in the Director of Public Prosecutions Victoria's *Director's Policy: Victims and Persons Adversely Affected by Crime*, particularly obligations to consult, be strengthened by incorporating them into the *Victims' Charter Act 2006* (Vic) or other Victorian legislation?
- 56 Should the *Victims' Charter Act 2006* (Vic) be amended to include other rights, or broaden existing rights for victims?
- 57 Should victims have a legal right to enforce some or all of the rights contained in the *Victims' Charter Act 2006* (Vic)? If so, how might this be achieved, and in what circumstances?
- 58 Should there be a legislatively prescribed process for investigating and resolving complaints about breaches of victims' rights? If so, what might this process look like? Should the Victims of Crime Commissioner in Victoria have a role in complaints resolution relating to breaches of the *Victims' Charter Act 2006* (Vic)?
- 59 What remedies should be available for breach of a victim's rights?

## Chapter 13

- 60 Are there gaps in the provision of victim support services?
- 61 How should victim support services be prioritised?
- 62 How might the delivery of victim support services in Victoria be improved?
- 63 Do victims need personalised legal advice and assistance? If so, how should such support be delivered?
- 64 What role could the Victorian Victims of Crime Commissioner have in relation to victim support services?







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in the Criminal Trial Process.**

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