



Submission to the Legislative Council Legal and Social Issues Committee's Inquiry into Victoria's Justice System

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Message from the Victims of Crime Commissioner

I welcome the opportunity to make a submission to the Legislative Council Legal and Social Issues Committee's Inquiry into Victoria's Justice System.

In addition to my regulatory oversight of specified justice agencies and victims' services, and managing complaints under the *Victims' Charter Act 2006* (Vic) (Victims' Charter), I am empowered to advocate for the respect, recognition and inclusion of victims of crime in the justice system.

I am committed to advocating for systemic reforms that bring about cultural change that recognises victims' inherent interests in the justice system.

Sadly, I have heard from too many victims that they feel victimised twice. Firstly, by the crime, then by the justice and victims' services system that fails to adequately acknowledge them, support them, provide them with information, and uphold their right to participate at key points in the justice process.

Victims have many and varied needs. For some victims, their priority is practical support, information and financial assistance. Other victims require emotional and psychological support to help in their recovery from crime. For some victims, participation in the criminal trial process is central to their recovery journey.

A victim-centred and trauma-informed justice and victims' services system should be able to recognise, and respond to, these many and varied needs and interests.

The justice system is too often a site of re-victimisation and this must be remedied. Some victims have told me that the criminal justice process is worse than the crime they experienced.

Reducing the risks of harm to victims caused by engaging with the justice system (also known as secondary victimisation) is everyone's responsibility including police, courts, prosecutors, and victim support services. It is the reason the Victims' Charter was introduced, and it guides the work I do advocating for greater recognition and respect for victims.

I welcome the Committee's consideration of key issues arising for victims of crime in Victoria's criminal justice system.

Fiona McCormack
Victims of Crime Commissioner

1. About the Victims of Crime Commissioner and the Victims' Charter

1.1. The Victims of Crime Commissioner

The Victorian Victims of Crime Commissioner is an independent statutory officer who advocates for victims of crime. The Commissioner has a role in holding justice agencies and victims' services to account for their treatment of victims of crime.

Under the *Victims of Crime Commissioner Act 2015* (Vic) (VOCC Act), the Commissioner is empowered to advocate for the respect, recognition and inclusion of victims of crime in the justice system by:

- investigating complaints made by victims about their treatment by justice agencies and victims' services¹
- monitoring the compliance of justice agencies and victims' services with the Victims' Charter²
- conducting inquiries into systemic issues that affect victims of crime³
- representing the concerns of victims to government and providing advice to the Attorney-General, the Minister for Victim Support and government departments and agencies about improvements to the justice system to meet the needs of victims of crime.⁴

1.1.1. Advocating for victims' interests—the Commissioner's approach

The Commissioner is committed to ensuring that victims of crime are heard and respected by justice agencies and victims' services, and that these agencies and services provide safe, inclusive and trauma-informed responses to all victims of crime.

While victims' voices and experiences underpin all the Commissioner's work and the Commissioner can receive complaints from individual victims about their individual circumstances, the Commissioner is unable to undertake individual advocacy. Individual Advocacy could prejudice criminal investigations, civil or criminal proceedings, or the work of other statutory entities like the Independent

¹ *Victims of Crime Commissioner Act 2015* (Vic) s25A.

² *Victims of Crime Commissioner Act 2015* (Vic) s28(1A).

³ *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(b-c), 23(1).

⁴ *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(a),(d).

Broad-based Anti-corruption Commission. It would also be in breach of the VOCC Act.⁵

While the Commissioner does not undertake individual advocacy, engaging directly with individual victims of crime is central to the Commissioner's systemic advocacy. Victims' experiences and voices inform how the Commissioner identifies persistent themes in victims' experiences, which is central to her policy development to strengthen law, policy and practice reform.

Through the Commissioner's victim engagement methodology, and her complaint's function, she hears about victims' experiences, the impact of their victimisation, and how changes to the justice system can prevent secondary victimisation and increase their safety, choice and control.

1.2. The Victims' Charter

1.2.1. The Victims' Charter obligates better treatment of victims

The Victims' Charter sets cultural and behavioural obligations for justice and victims' services agencies when they interact with victims of crime. Victims are afforded special treatment by these agencies and are allowed to participate in certain parts of the justice process.

The Victims' Charter applies to a diverse and large number of agencies,⁶ including Victoria Police, the Office of Public Prosecutions, community legal centres and government-funded sexual assault, family violence and victims' support services.

Specifically, these agencies are required to:

- treat victims with courtesy, respect and dignity
- have regard to victims who experience specific barriers to the justice system
- provide information about services, entitlements and assistance
- communicate with and respond to victims in a way that recognises their preferences and needs
- protect victims' personal information
- respond to complaints from victims who believe an agency has breached the Victims' Charter.

⁵ *Victims of Crime Commissioner Act 2015 (Vic)* s22.

⁶ These agencies are prescribed under the *Victims of Crime Commissioner Regulations 2020 (Vic)* and may also be referred to as 'prescribed agencies'.

Some agencies, such as prosecuting and investigatory agencies, have additional information provision and consultation obligations under the Victims' Charter.

Prescribed agencies' compliance with the Victims' Charter directly impacts how victims of crime will experience both the justice and service system.

1.2.2. The Victims of Crime Commissioner oversees the operation of the Victims' Charter

The Commissioner has been provided powers to publicly report agency compliance with the Victims' Charter and to consider complaints from victims who believe an agency has breached the Victims' Charter.

While the approach to monitoring agency compliance will be developed and implemented over a number of years, it aims to achieve the following goals:

- show how the justice and victim support systems are and are not working for victims
- identify compliance challenges with the Victim's Charter and where the experience of victims could be improved
- support agencies to improve compliance with the Victims' Charter by identifying and sharing good practice
- enable victims to better understand their right to complain about their treatment and seek appropriate remedies
- prioritise victims who face systemic barriers to accessing justice and victim support services.

It is vital the Victims' Charter results in the implementation of victim-centred practice within justice agencies and victims' services agencies as well as increased confidence for victims to know their interests are protected in legislation.

1.2.3. Regard to the Victims' Charter in policy development

In addition to justice and victim service agencies, the Victims' Charter also applies more generally to policy development and criminal justice administration in Victoria. A person or body responsible for the development of criminal law policy, the development of victims' services policy, the administration of criminal justice or the administration of victims' services must, where relevant, have regard to Victims' Charter principles.⁷

⁷ *Victims' Charter Act 2006* (Vic) s18 (2).

2. About this submission

2.1. Placing victims' needs at the centre of Victoria's criminal justice system

The Terms of Reference relating to this Inquiry do not refer specifically to victims of crime. However, the operation of Victoria's justice system cannot be considered without assessing its operation for victims of crime.

Victims of crime are integral to the successful operation of the criminal justice system. Without victims coming forward to report crimes, and acting as witnesses for the prosecution, there can be no criminal justice system. However, victims' preparedness to cooperate with the investigation and prosecution of crime has been taken for granted for too long.⁸ It is not enough to consider matters of prison populations, rates of recidivism, sentencing and judicial appointments without considering what effects these aspects of the justice system have on victims of crime.

Progress in relation to victims' rights means it is now accepted that a victim's role is beyond that of a passive observer to the justice process. Since 2018, victims in Victoria have been legislatively recognised under the Victims' Charter as participants in criminal proceedings.

These reforms to recognise victims of crime do not always translate into tangible improvements in victims' experience of the justice process. There continues to be a chasm between the entitlements of victims 'on paper' and their experiences of the justice system.

This Inquiry, and the justice system, must place victims' needs at the centre.

Accordingly, this submission outlines the Commissioner's vision for a victim-centred justice system, with consideration of victim interests, needs and entitlements. Its vision is that a victim-centred justice system can chart a trauma-informed and safe path for victims through the justice process.

2.1.1. What is a 'victim-centred' justice system?

The notion of 'victim-centred' justice systems has been around since at least the 1990s.⁹ The Victorian Government has gone further, committing to 'putting victims first'.¹⁰

⁸ Robyn L Holder and Tyrone Kirchengast, 'Crime Victims' Rights Commissioners: Public Interest Entities in a Regulatory Regime' (2021) 45(1) *International Journal of Comparative and Applied Criminal Justice* 67, 16 ('Crime Victims' Rights Commissioners').

⁹ Elaine Wedlock and Tapley, Jacki, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth, March 2016) 6.

¹⁰ Australian Labor Party (Victorian Branch), *Platform 2018* (2018) 76.

'Victim-centred' justice is an important principle and objective. A victim-centred justice system ensures a focus on victim rights in parallel (not opposition) with rights of the accused.

However, the current failings of our justice system to adequately uphold victim entitlements and support victims of crime suggests there remains a gap between what victims need and want, and what the justice system is currently providing.

Despite the reforms that have been introduced to improve the criminal justice system for victims of crime, the justice system remains a site of re-traumatisation for many victims of crime.

3. Recognising victims as participants in the justice process

In 2016, the Victorian Law Reform Commission (VLRC) comprehensively reviewed the role of victims in the criminal trial process. It found that many victims expressed profound dismay in the way they were treated by the criminal justice system, including the courts.

The VLRC identified that a common theme in the inquiry was the disparity between the victim's role as conveyed in legislation and victims' experiences in practice. Despite the introduction of legislation and programs to protect, include and support victims during the justice process, many victims reported not being treated the way they expected to be.

Victims told the VLRC that they felt disempowered and excluded from the criminal trial process. They described being a 'passive receiver of information', an 'observer' and an 'outsider'.

Victims also described a court process that was unjustifiably demeaning, disrespectful, intimidating and re-traumatising. Some victims told the VLRC that the judicial officer presiding over the case did nothing, or too little, to protect their legitimate interests.

Victims describe a court process that is unjustifiably demeaning, disrespectful, intimidating and re-traumatising

The VLRC recommended more had to be done to elevate the role of victims in the justice process and that the justice system needed to be more responsive to victims' interests. They said victims should be seen as insiders, rather than outsiders.

The VLRC recommended that the role of the victim as a participant in criminal proceedings be legislatively and operationally recognised.

Following the VLRC's review, the Victims' Charter was amended in 2018 to create:

- a new object of the Victims' Charter recognising that a victim of crime has an inherent interest in the response by the criminal justice system to that crime, giving rise to the rights and entitlements set out in this Act, and to acknowledge the victim's role as a participant, but not a party, in proceedings for criminal offences
- a requirement for investigatory, prosecuting and victims' services agencies to respect the rights and entitlements of victims as participants in proceedings for criminal offences.

Little is known about how victims in Victoria are experiencing these new participatory entitlements and whether, as envisaged by the VLRC, these entitlements are resulting in tangible improvements to victims' status as a participant in the justice process. However, it is concerning to hear from victims and their advocates that the status of victims in criminal trial process may not have improved since the VLRC's 2016 review.

At the recent public hearing for this Inquiry, Ms Carolyn Wallace, General Manager of Merri Health Hume Region Victims Assistance Program (VAP) told committee members that VAP clients continue to feel 'invisible, overlooked, frustrated, angry, hurt and anxious throughout the court proceedings'.

In speaking to this Inquiry, Ms Lee Little made reference to the Director of Public Prosecutions (DPP), stating that:

...the DPP—they were not forthcoming with a lot of information. We never got the information we thought we would get. You are going in to a trial...blindfolded, and this is the best way I can put this. You do not know the process. You do not know the justice system. You get told very little.¹¹

The Commissioner recently announced a systemic inquiry into victim participation in the justice system which, amongst other things, will seek victim's views on how current participatory entitlements under the Victims' Charter translate to meaningful participation at key stages of the justice system, including any barriers experienced by victims. However, this should not preclude this Inquiry considering the evidence before the Committee that victims continue to experience secondary victimisation by the criminal justice system, face barriers to meaningful participation during the trial process, and may not receive the support they need to recover from crime.

¹¹ Evidence to Legal and Social Issues Committee's Inquiry into Victoria's Criminal Justice System, Legislative Council, Wangaratta, 30 June 2021, 25 (Ms Lee Little).

4. Recognising victims' rights as human rights

Academics are increasingly advocating for victims' rights to be accepted as human rights—or conceptualised within a human rights framework.¹²

Holder et al state that:

*For too long, there has been a view that state entities only had duties to offenders, because the interests of victims were one and the same as interests of police and prosecutors against offenders. Understanding victims as independent actors in criminal justice processes underscores the distinct status of victims' rights.*¹³

Holder et al also assert that categorising victims' rights as human rights reconceptualises failings to afford victims' rights not merely as 'the unfortunate, even unintentional, side-effects of voluminous workloads' of justice agencies, but rather that 'these everyday administrative omissions are an oppressive, even intrusive, abuse of power'.¹⁴

Academic Jonathan Doak contends that there are several key human rights standards victims should be entitled to, including the right to protection and the right to participation.¹⁵

In its 2016 report, *Victims of Crime in the Criminal Trial Process*, the VLRC observed that while Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter of Human Rights and Responsibilities) provides guarantees to the accused during the trial process (for example, to be informed of the nature and reason for the charge and to be afforded the right to a fair hearing), there are no rights enshrined for victims of crime. The VLRC concluded that incorporating the interests of victims into section 25 of the Charter of Human Rights and Responsibilities would add to the integrity of what constitutes a fair trial in Victoria.¹⁶

The incorporation of victims' rights in the Victoria's Charter of Human Rights and Responsibilities would elevate victims' status and improve consideration of their status and interests. It would also provide increased recognition of the Victims' Charter across public institutions and help guide decision making, training and development of policies and procedures. As noted by the Victorian Ombudsman,

¹² Robyn Holder, Tyrone Kirchengast and Paul Cassell, 'Transforming Crime Victims' Rights: From Myth to Reality' (2021) 45(1) *International Journal of Comparative and Applied Criminal Justice* 1.

¹³ *Ibid* 7.

¹⁴ *Ibid*.

¹⁵ Kerstin Svensson and Carina Gallo, 'Saying or Doing Human Rights A Study of Victim Support Sweden' (2020) 45(1) *International Journal of Comparative and Applied Criminal Justice* 127, 128.

¹⁶ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 48.

Victoria's Charter of Human Rights and Responsibilities helps public authorities 'make fairer decisions', 'balance competing interests' and 'is a tool to humanise the bureaucracy'.¹⁷ For example, the *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*¹⁸ which outlines the attributes the government, courts and community expect from judicial appointees,¹⁹ references the necessary abilities and qualities that are required to ensure fair treatment under Victoria's Charter of Human Rights and Responsibilities, but does not reference the Victims' Charter.²⁰

Additionally, while the Victims' Charter requires consideration of Victims' Charter principles in the development of policy, administration of criminal justice and the administration of victims' services,²¹ unlike Victoria's Charter of Human Rights and Responsibilities, the Victims' Charter does not require law makers to acquit against its principles when making or passing law.²²

The increased recognition of the legitimate rights and interests of victims through the Victims' Charter requires the justice system to continue to evolve in order to 'reconcile victim participation with legal, institutional and professional demands'.²³ Rather than destabilising concepts of 'the right to a fair hearing', articulating victim entitlements as human rights would ensure a focus on victim rights in parallel (not opposition) with rights of the accused. It would provide a strong framework for public authorities to make fairer decisions and balance competing interests.²⁴

The Commissioner consistently hears from victims that both the accused and victims' rights should be given equal status

The Commissioner consistently hears from victims that the rights of both the accused and victims should be given equal status.

¹⁷ Victorian Ombudsman, *The Ombudsman for Human Rights: A Casebook* (August 2021) 6.

¹⁸ Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* (September 2008).

¹⁹ 'Judicial appointments', *Department of Justice and Community Safety Victoria* (Web Page) <<https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments>>

²⁰ While courts and tribunals are not prescribed agencies under the Victims' Charter, some Victims' Charter provisions include court processes or criminal procedure that are overseen by courts. For example, section 12 of the Victims' Charter requires 'a prosecuting agency and the courts' to minimise a victim's exposure to unnecessary contact with the accused. Section 13 of the Victims' Charter reflects a victim's entitlement to make a victim impact statement 'to the court sentencing the person found guilty of the offence'.

²¹ *Victims' Charter Act 2006* (Vic) s18 (2).

²² *Victoria's Charter of Human Rights and Responsibilities Act 2006* (Vic) requires that any Member of Parliament who introduces a Bill into Parliament must table a statement of compatibility. It must also be presented with a Bill at Cabinet. The statement must state whether in the member's opinion the Bill is compatible with human rights, and if so, how it is compatible, and if not, the nature and extent of any incompatibility. See, for example, Victorian Government Solicitor's Office, *Statements of Compatibility* (2017) <<https://humanrights.vgso.vic.gov.au/legislation-development/developing-leg-policy/statements-compatibility>>

²³ Judicial College of Victoria, 'Victims of Crime in the Courtroom: A Guide for Judicial Officers' (2019) <https://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20the%20Courtroom_WholeDoc.pdf>.

²⁴ Victorian Ombudsman, *The Ombudsman for Human Rights: A Casebook* (August 2021) 6

Consistent with the VLRC's previous recommendation in its report *Victims of Crime in the Criminal Trial Process*, Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) should be amended to recognise the interests of victims in the criminal trial process as articulated in the Victims' Charter.

Recommendation 1: The Victorian Government should amend Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) to recognise the interests of victims in the criminal trial process as articulated in the Victims' Charter.

5. Strengthening the Victims' Charter

5.1. Equity in victim entitlements

Under the Victims' Charter, victims in the indictable stream (prosecuted by the DPP) are entitled to more specific information and consultation than victims in the summary stream (prosecuted by Victoria Police).²⁵

The differing information and consultation requirements under the Victims' Charter effectively create two tiers of victims in Victoria.

When approaching the Victims' Charter entitlements from a trauma-informed and victim-centred lens, there is no sound policy rationale for maintaining two tiers of victim entitlements. The Commissioner advocates for consistency and equity in victim entitlements under the Victims' Charter, regardless of jurisdiction or prosecuting agency.

Given the seriousness of crimes heard in the Magistrates' Court (which can include sexual assault, stalking and serious cases of assault), it is simplistic to suggest such crimes are perceived as 'less serious' by victims (or cause 'less harm' to victims) than those crimes heard in the indictable jurisdiction.²⁶

While appreciating the differing volume and speed of cases in the summary jurisdiction, the Victorian justice system must adapt to better accommodate victims. Practices of the court, prosecution and defence must evolve so that

²⁵ For example, the DPP must seek the views of a victim before the DPP makes a decision to modify charges, discontinue the prosecution, accept a guilty plea to a lesser charge, appeal a sentence or acquittal. These requirements don't apply in the summary jurisdiction where Victoria Police prosecutes. See *Victims' Charter Act* (Vic) 9B (1).

²⁶ Research also suggests that the impacts of crime do not always correlate with crime types. For example, Cook et al note that the impacts of crime victimisation vary with the individual and that each victim will react differently according to their life experience. See, for example, 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.

victims' entitlements are respected and implemented in practice, regardless of jurisdiction or speed of the process.

Recommendation 2: The Victorian Government should amend the Victims' Charter to provide for consistency and equity in victim entitlements, including entitlements to information and consultation at key stages of the criminal justice process, regardless of jurisdiction or prosecuting agency.

5.2. Victims of crime are meaningfully consulted during the criminal trial process

Too often, victims of crime feel ignored, silenced and excluded from the criminal justice process. Victims of crime often describe having limited or no opportunity to participate or have their voice heard during the criminal justice process.²⁷

This sense of disconnection from the justice system results in victims feeling that their experience does not matter.

Victims have described their role in the justice system as that of an outsider or passive observer. Victims have told the Victims of Crime Commissioner that they are often not clearly communicated with or provided sufficient and timely information throughout the court process.

With increased participation and voice in the criminal justice process, victims perceive a more equitable justice system.²⁸

When victims are excluded from decisions, such as plea resolutions, the trauma of crime victimisation can be exacerbated. Research demonstrates that victims want to be appropriately consulted during key stages of the process, not simply 'told' of prosecutorial decisions.²⁹

The Victims' Charter enshrines a number of key participatory rights for victims in relation to prosecutorial decision making. These go beyond information provision and include a positive obligation on the DPP to seek the views of a victim before making a decision. Under section 9B of the Victims' Charter, the DPP must seek the views of a victim before deciding to:

Victims have told the Victims of Crime Commissioner that they are often not clearly communicated with or provided sufficient and timely information throughout the court process

²⁷ Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Palgrave MacMillan, 2021) 44.

²⁸ Centre for Innovative Justice, RMIT University, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions, Victoria, April 2019) 9.

²⁹ *Ibid* 10.

- substantially modify the charges
- discontinue the prosecution of the charges
- accept a plea of guilty to a lesser charge
- appeal a sentence
- appeal an acquittal.

While the Victims' Charter enshrines a victim's right to be meaningfully consulted about plea resolutions, the Charter also provides an exception under section 9B(3)(b) where 'it is not practical to contact the victim given the speed or nature of the proceeding'.

This exception in the Victims' Charter creates a tension between the intent of the Victims' Charter and the actual experience of victims in the trial process. It also places undue pressure on prosecutors to meet their Victims' Charter obligations while facing pressure from defence counsel and judicial officers to quickly resolve a matter without consulting with victims.

Consultation during the criminal justice process is one of the few rights granted to victims of crime. A victim's right to participate and be consulted at key stages of the criminal justice process should not be impacted by a perceived need (or real pressure) to expedite cases.

The Victorian justice system must adapt to better accommodate victims' participatory rights as provided for by the Victims' Charter. Practices of the court, prosecution and defence must evolve so that victims' participatory rights are respected and implemented in practice. Section 9B(3)(b) of the Victims' Charter should be removed so that a victim's right to be consulted under the Victims' Charter at key stages of the prosecution process is an unrestricted entitlement.

Recommendation 3: The Victorian Government should amend the Victims' Charter to remove section 9B(3)(b) so that a victim's right to be provided information and consulted is not overridden

6. A trauma-informed justice system

One of the objectives of the Victims' Charter is to help reduce the likelihood of secondary victimisation by the criminal justice system.³⁰ Trauma-informed responses are key to reducing the risk of secondary victimisation by the criminal justice system.

Victims have told the Victims of Crime Commissioner that the justice system often adds to the trauma they've already experienced and some state clearly that the trauma caused by the system is as worse or worse than the crime they experienced.

Victims have told the Victims of Crime Commissioner that the justice system often adds to the trauma they've already experienced and some state clearly that the trauma caused by the system is worse than the crime they experienced

To the maximum extent possible, the justice and service system should adopt a trauma-informed approach, uphold victims' rights and entitlements *and* ensure a fair process for the accused.

A trauma-informed justice system does not aim to undermine notions of procedural fairness for the accused. Instead, a trauma-informed justice system accommodates, and makes space for, the ways in which trauma may manifest and impact on a person's ability to participate in processes.

Research suggests that trauma-informed law, policy and practice:³¹

- realises the impact of trauma and recognises the signs of trauma
- actively seeks to reduce re-traumatisation
- emphasises physical, psychological, and emotional safety for victims
- provides victims with voice and choice, including different ways to engage to minimise harm

³⁰ *Victims' Charter Act 2006* (Vic) s4(1)(c)

³¹ For discussion of aspects of trauma-informed practice, see generally: Holly Ramsey-Klawnsnik and Erin Miller, 'Polyvictimization in later life: Trauma-informed best practices' (2017) 29 (5) *Journal of Elder Abuse & Neglect*, 339-350; Nicole C. McKenna & Kristy Holtfreter, 'Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness' (2020) *Journal of Aggression, Maltreatment & Trauma* (published online); Blue Knot Foundation, *Trauma-informed Practice: How important is this for domestic and family violence services?* (2016) <<https://www.blueknot.org.au/Home/Front-Page-News/ID/46/Trauma-informed-Practice-in-Domestic-and-Family-Violence-Services>>; Orygen, The National Centre of Excellence in Youth Mental Health, *Clinical practice in youth mental health: What is trauma-informed care and how is it implemented in youth healthcare settings* (2018) <http://orygen.org.au/Training/Resources/Trauma/Clinical-practice-points/What-is-trauma-informed-care-and-how-is-it-implemented/orygen_Trauma_informed_care_CPP?ext=>>.

- creates opportunities for victims to rebuild a sense of control and empowerment
- recognises that trauma may impact victims' engagement with the process
- is responsive to victims' diversity
- promotes trust and transparency in process and decision making.

Having regard to most major Victorian (and Australian) reviews that relate to victims' experience of the justice process over the past decade, it is evident that a consistent theme arising is the need for all justice personnel—police, lawyers, judicial officers—to receive specialised training in relation to victim-centred policy and practice to reduce the risk of secondary victimisation.³²

A trauma-informed justice system relies on robust and accountable training and education mechanisms across the justice and victims' services system incorporating training and education for defence and prosecution lawyers, police and victim support workers. The Commissioner's submission to the VLRC's *Improving the Response of the Justice System to Sexual Offences* inquiry recommended collaborative work be undertaken by responsible bodies, including the Law Institute of Victoria, Judicial College of Victoria, Victorian Bar, Criminal Bar Association, Victorian Legal Services Board and Commissioner, Victoria Legal Aid and the DPP to improve victim-centric legal practice.³³

Due to this Inquiry's specific reference to judicial appointments in its Terms of Reference, this submission focuses on the appointment and training of judicial officers.

6.1. Training of judicial officers

The attitude and conduct of judicial officers are of particular significance for victims because they:

- interact directly with victims of crime, often when victims are at their most vulnerable (e.g. being cross-examined in a sexual assault trial)
- play an integral role in acknowledging and validating victims' experiences (e.g. during Victims of Crime Assistance Tribunal hearings, during

³² See, for example, Centre for Innovative Justice, RMIT University, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions, Victoria, April 2019) 14; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 47.

³³ Victims of Crime Commissioner, Submission No 45 to Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (January 2021) 63.

sentencing decisions, facilitating victims reading their Victim Impact Statement aloud)

- have a role in protecting victims in the courtroom (e.g. protecting victims from improper questioning, providing for alternative arrangements to give evidence)
- make decisions that protect victim's immediate safety (e.g. bail, intervention orders, sentencing).

There have been some important and significant improvements in relation to recognising the importance of judicial training and education with respect to trauma-informed court craft.³⁴ However, the Commissioner continues to hear, particularly in sexual assault trials, about inappropriate conduct by defence counsel and variable levels of intervention by judicial officers to protect witnesses despite the protections available under the *Evidence Act 2008* (Vic).

The VLRC's 2016 report *Victims of Crime in the Criminal Trial Process* found that many victims felt the judicial officer presiding over their case did nothing, or too little, to protect their legitimate interests.³⁵ It was suggested that in some cases, judges have permitted 'practices that further humiliate and traumatise victims, as well as wasting time.'³⁶

At the time, the VLRC was told by the Law Institute of Victoria, the Victorian Bar and Criminal Bar Association that improper questioning of witnesses was rare and that judicial officers are adequately enforcing existing protections.³⁷ In contrast, victims, victim support workers, legal professionals and some members of the judiciary told the VLRC that judicial intervention is not always adequate and improper questioning still occurs.³⁸ The VLRC concluded there was 'clearly a gap between what victims and the legal profession consider appropriate questioning'.³⁹

In the VLRC 2016 report *Victims of Crime in the Criminal Trial Process*, the VLRC stated:

Training and education about victims **should be directed towards everyone within the criminal justice system, in particular judicial officers**, defence and prosecution lawyers, police and victim support workers. Information about victim-oriented laws, and the impacts

³⁴ For example, the Judicial College of Victoria has created *Victims of Crime in the Courtroom: A Guide for Judicial Officers* which details considerations for judicial officers and court staff to limit re-traumatisation of victims.

³⁵ Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 34.

³⁶ *Ibid* 45.

³⁷ *Ibid* 96.

³⁸ *Ibid*.

³⁹ *Ibid*.

and contexts of victimisation should be widely publicised to police, lawyers and judicial officers.⁴⁰ [emphasis added]

The roadmap for achieving cultural change in relation to victims' role in the justice process was set out in the VLRC's report *Victims of Crime in the Criminal Trial Process* however, there has been insufficient focus on truly embedding trauma-informed approaches and practices across the justice system. As noted by Ms O'Neill, VAP Team Leader during the recent public hearing for this Inquiry, 'Every opportunity to limit further trauma to victims of crime should be seriously considered within court practice in each and every criminal matter.'⁴¹

Trauma-informed principles should guide this Parliamentary Inquiry as it reviews the criminal justice system, just as it should also guide all justice agencies in the delivery of services, responses and programs that intersect with victims.

Some progress has been made. In 2019, the Judicial College of Victoria (JCV) delivered a program on how trauma manifests in the court environment.⁴² There are also online written resources on how to work with vulnerable witnesses and victims of crime in the courtroom.⁴³ However, engagement with these opportunities and resources are optional.

Comprehensive trauma-informed training for judicial officers is essential to achieving cultural change and improving victims' recognition in the justice process.

Heads of jurisdiction are responsible for directing the professional development and continuing education of judicial officers and may direct all judicial officers to participate in a specified professional development or continuing education program.⁴⁴

Recommendation 4: The Judicial College of Victoria should provide comprehensive, trauma-informed training for judicial officers featuring:

- **victim-survivor voices and their lived experience of the criminal justice system**

⁴⁰ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 48.

⁴¹ Evidence to Legal and Social Issues Committee's Inquiry into Victoria's Criminal Justice System, Legislative Council, Wangaratta, 30 June 2021, 1 (Ms Jane O'Neill)

⁴² 'Insight into Trauma', *Judicial College of Victoria* (Web Page, 2019)

<<https://www.judicialcollege.vic.edu.au/programs-and-events/insight-trauma>>

⁴³ 'Resources', *Judicial College of Victoria* (Web Page, 2019)

<https://law.unimelb.edu.au/__data/assets/pdf_file/0005/3181325/AGLC4-with-Bookmarks-1.pdf>

⁴⁴ Dr Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Appendix 3 Judicial Independent, accountability and the role of the Heads of Jurisdictions, February 2021) 12.

- **the views and experiences of victim support workers and advocates**
- **in depth guidance in relation to legislative provisions designed to protect victims, specifically protections relating to giving evidence and duty of the court to minimise a victim's contact with the accused and their supporters**
- **examination of defence counsel questioning, including where such questioning is improper or inappropriate**
- **trauma-informed ways to acknowledge victims during sentencing and incorporate Victim Impact Statement processes**

6.2. Oversight of judicial conduct

Victoria's Judicial Commission of Victoria (Judicial Commission) is an independent body established under the *Judicial Commission of Victoria Act 2016* (Vic) to investigate complaints about judicial officers and VCAT members.⁴⁵

The Judicial Commission has already played an important role in ensuring victims of crime are treated with dignity and respect. A case study from the Judicial Commission's 2019-20 Annual Report outlines a complaint received from a victim of crime who raised concerns about comments a judicial officer made in relation to a claim for compensation arising out of a serious sexual assault.⁴⁶ The Judicial Commission found that:

- several of the judicial officer's comments were inappropriate and reinforced outdated misconceptions associated with sexual offending
- some comments could reasonably be construed as victim-blaming
- some comments indicated a closed mind and a lack of impartiality.

The Judicial Commission referred these allegations to the Head of Jurisdiction on the grounds that the conduct of the Officer infringed the standards of conduct generally expected of judicial officers, recommending that the judicial officer:⁴⁷

- be counselled by the Head of Jurisdiction in appropriate judicial conduct including the need to exercise sensitivity, courtesy and respect in the courtroom towards all court users, including victims of crime

⁴⁵ Judicial Commission of Victoria, *How to make a complaint about a judicial officer or VCAT Member* (Fact sheet, 2021) 1.

⁴⁶ Judicial Commission of Victoria, *Annual Report 2019-2020* (2021) 32.

⁴⁷ Judicial Commission of Victoria, *Annual Report 2019-2020* (2021) 32.

- be directed to undertake necessary coaching and mentoring as the Head of Jurisdiction considers appropriate, including peer supervision
- be directed to engage in such judicial education programs as the Head of Jurisdiction considers appropriate including, but not limited to, engaging in programs offered by the Judicial College of Victoria with a focus on the experiences of victims of crime, including victims of sexual offences, and programs focusing on courtroom management.

This case study demonstrates the importance of victims having an independent avenue for complaints about judicial conduct.

In 2021, a review titled *Preventing and Addressing Sexual Harassment in Victorian Courts* found that changes should be made to the Judicial Commission's processes so that victims and members of the community have awareness of the Judicial Commissioner's role, and confidence in its processes.⁴⁸

The Judicial Commission 'has resolved to conduct a review of its operations in 2020/2021 with the aim of improving effectiveness and efficiency while fulfilling its statutory functions.'⁴⁹ The review *Preventing and Addressing Sexual Harassment in Victorian Courts* recommended that as part of the Judicial Commission's review, improvements should be made to information powers and confidentiality for complainants as well as an 'own motion' power in cases of sexual harassment, discrimination or 'other related misconduct'.⁵⁰

6.3. Appointment of judicial officers

The Terms of Reference for this Inquiry require the Committee to examine the judicial appointment processes and 'how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime'.

While a judicial officer's skills and capabilities with respect to sentencing offenders and understanding recidivism are significant and important, consideration of judicial officers' skills during this Inquiry should also extend to their knowledge and expertise in trauma-informed approaches to victims in the courtroom.

Judicial court craft should include demonstrated skills and capabilities to meaningfully effect the 'triangulation of interests'—the accused, the victim and

⁴⁸ Dr Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Final Report, February 2021) 70.

⁴⁹ Judicial Commission of Victoria, *Annual Report 2019-2020* (2021) 3.

⁵⁰ Dr Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Final Report, February 2021) 70.

their family, and the public—⁵¹highlighted by the VLRC in its report *Victims of Crime in the Criminal Trial Process*.

When appointing judicial officers, regard should be given to a person's knowledge, skills and capabilities to:

- understand trauma and engage appropriately with victims, witnesses and families in the courtroom, including a demonstrated understanding of different types of victimisation, including the gendered nature of certain crime types
- accommodate diversity, including victims, witnesses and families who may have diverse cultural or religious backgrounds or face particular challenges in accessing and navigating the justice system
- facilitate a safe court environment for victims to give evidence, including the use of special protections and alternative arrangements and prevent undue contact with the accused and their supporters
- intervene during cross-examination when questioning of witnesses is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; where questions are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or where a question has no basis other than a stereotype⁵²
- appropriately and sensitively balance plea and sentencing hearings to accommodate defence counsel's pleas in mitigation of sentence, as well as consideration of victim impact, including accommodating the range of Victim Impact Statement entitlements (e.g. to read a statement aloud, have a support person present to read a statement aloud).

The skills and capabilities required of judicial officers exceed traditional expectations of knowledge, application of the law and skills in fact-finding.⁵³ Emotional intelligence and interpersonal skills are also important parts of judicial roles.⁵⁴ Academic Michael King suggests that a judicial officer's failure to 'consider emotional dimensions can compromise court processes. For example [allowing] extensive and sometimes intimidating cross-examination of child complainants'.⁵⁵

⁵¹ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) vii.

⁵² As per *Evidence Act 2008* (Vic) s41(3).

⁵³ Department of Justice, *Reviewing the Judicial Appointments Process* (Discussion Paper, 2010) 3.

⁵⁴ Michael S King, 'Restorative Justice and Therapeutic Jurisprudence and the Rise of the Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1097.

⁵⁵ *Ibid* 1119.

The *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* (Judicial Framework), developed by the Judicial College of Victoria,⁵⁶ outlines the attributes the government, courts and community expect from judicial appointees.⁵⁷ The Framework references the necessary abilities and qualities that judicial officers are expected to demonstrate in performing their judicial role and each section contains a description of key judicial abilities and provides examples of how the abilities and associated qualities would be demonstrated in practice in all Victorian jurisdictions. There is only one mention of victims in the Judicial Framework.⁵⁸

Although it is noted that the examples provided in the Judicial Framework are intended to be illustrative rather than exhaustive, the Judicial Framework should be reviewed and revised to articulate the expectations of the contemporary judicial role in upholding victims' interests in the criminal trial process.

Recommendation 5: The Victorian Government should amend the judicial appointments process to require consideration of a person's knowledge, skills and capabilities to:

- **understand trauma and engage appropriately with victims, witnesses and families in the courtroom, including demonstrated understanding of different types of victimisation, including the gendered nature of certain crime types**
- **consider, understand and accommodate diversity and access**
- **facilitate a safe court environment for victims to give evidence, including the use of special protections and alternative arrangements and during cross-examination when questions breach the *Evidence Act 2008 (Vic)***
- **appropriately and sensitively balance victims' interests and entitlements during sentencing with the needs of the court, prosecution and defence.**

⁵⁶ The Framework, developed by the Judicial College of Victoria, contains a description of key judicial abilities and provides examples of how the abilities and associated qualities would be demonstrated in practice in all Victorian jurisdictions. See Judicial College of Victoria (n 21).

⁵⁷ 'Judicial Appointments', *Department of Justice and Community Safety* (Web Page) <<https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments>>

⁵⁸ 'Appropriately deals with parties, witnesses, victims, representatives, the public, press and court/tribunal staff'. See Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* (September 2008).

Recommendation 6: The Judicial College of Victoria should amend the *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* to articulate the expectations of the contemporary judicial role in upholding victims' interests in the criminal trial process.

6.4. Judicial wellbeing

As noted above, the attitude and conduct of judicial officers are of particular significance for victims because judicial officers play an important role in acknowledging and validating victims' experiences and upholding victims' entitlements in the courtroom. The extent to which judicial officers can provide a victim-centred response is, however, dependent on whether they are able to 'actively manage their own wellbeing and [are] alert to the impact of vicarious trauma'.⁵⁹

Recent research 'has established that Australian judicial officers have a "stress problem" manifesting as elevated rates of non-specific psychological distress, burnout, secondary traumatic stress and alcohol use'.⁶⁰ Schrever et al's research found that vicarious trauma—broadly defined as psychological distress resulting from exposure to information about the trauma experienced by others—is a significant occupational hazard for judicial officers.⁶¹ Amongst Schrever et al's research conclusions was that a range of structural, cultural and educational initiatives should be introduced by courts to improve judicial wellbeing, including:

- facilitating peer supervision or reflective practice groups among judicial colleagues
- increasing opportunities for fostering 'belongingness' and 'positive and authentic connections' in the workplace for judicial officers.

Given the importance of judicial wellbeing—for individual judicial officers and for all participants in a criminal trial—it is vital that there be an ongoing focus on judicial wellbeing and addressing vicarious trauma. Judicial officers should be:

- adequately inducted and supported when first appointed, including inducted in relation to trauma-informed practice, judicial wellbeing and vicarious trauma

⁵⁹ Judicial College of Victoria, 'Victims of Crime in the Courtroom: A Guide for Judicial Officers' (2019) <https://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20the%20Courtroom_WholeDoc.pdf>.

⁶⁰ Carly Schrever et al, 'Where stress presides: Predictors and correlates of stress among Australian judges and magistrates' (2021) *Psychiatry, Psychology and the Law* 1, 2.

⁶¹ Carly Schrever et al, 'Where stress presides: Predictors and correlates of stress among Australian judges and magistrates' (2021) *Psychiatry, Psychology and the Law* 1, 4.

- provided opportunities for peer supervision and reflective practice
- regularly encouraged to engage with the Judicial Officers Assistance Program.

Recommendation 7: The Judicial College of Victoria should be funded to:

- **provide comprehensive induction and support to new judicial officers, including in relation to trauma-informed practice, judicial wellbeing and vicarious trauma**
- **develop a framework for peer supervision and reflective practice amongst judicial officers**
- **provide regular communications and engagement opportunities in relation to the Judicial Officers Assistance Program.**

6.5. Improving trauma-informed responses through specialist sexual assault court responses

Consideration should also be given to the need for increased court specialisation in sexual assault matters in recognition of the specific barriers experienced by sexual assault victims in accessing justice and receiving a trauma-informed court response. In the Commissioner's submission to the VLRC's *Improving the Response of the Justice System to Sexual Offences* inquiry, the Commissioner recommended that the Victorian Government introduce specialised court responses for sexual offences to provide for:

- specially trained and dedicated court staff
- mandatory judicial education for judicial officers presiding over sexual assault cases
- victim-centric court environments, including safe entries and exits and safe waiting areas.

As suggested in the Commissioner's submission to the VLRC, mandatory judicial education for judicial officers presiding over sexual assault cases may be best enabled through the creation of a dedicated specialist sexual assault court. The legislation establishing the specialist court could mandate minimum training and experience for judicial appointments, similar to the appointment of Magistrates to

the Family Violence Court Division who must have 'relevant knowledge and experience' in relation to family violence.⁶²

Recommendation 8: The Victorian Government should fund the establishment of a specialist sexual assault court. The legislation establishing the specialist court should mandate minimum training and experience for judicial appointments, similar to the appointment of Magistrates to the Family Violence Court Division.

7. A strengthened victim support system

One of the objectives of the Victims' Charter is that victims 'should be offered information to enable them to access appropriate services to help with the recovery process'.⁶³

In 2020, RMIT's Centre for Innovative Justice published a review of Victoria's victim support system: *Strengthening Victoria's Victim Support System: Victim Services Review* (Victim Services Review). The Victim Services Review found that Victoria's victim support system was a 'one-size-fits-all' system and 'falling short' for most victims of crime.⁶⁴

Victims consistently point to the need for a single point of contact throughout the justice process⁶⁵ but the system is not currently configured to provide this consistency. The Victims of Crime Commissioner has heard from victims that they often have to repeat their story multiple times in the process of seeking support to recover from trauma.

The Victims of Crime Commissioner has heard from victims that they often have to repeat their story multiple times in the process of seeking support to recover from trauma

In recent research, one victim suggested a solution would be access to a 'one stop shop' to help them navigate the justice system:

*That was probably the most frustrating bit, understanding that process for someone that never had to be in that situation before. And understanding who to call and who was responsible for what. The police were good in terms of pointing us in the right direction, but there wasn't a one stop shop.*⁶⁶

⁶² *Magistrates' Court Act 1989* (Vic) s41A.

⁶³ *Victims' Charter Act 2006* (Vic) s4(1)(b)

⁶⁴ Centre for Innovative Justice, RMIT University, *Improving Support for Victims of Crime: Key Practice Insights* (2020) 45, 7.

⁶⁵ Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (November 2020) 9.

⁶⁶ *Ibid* 34.

The Victim Services Review found that many victims struggled to access specialist services, such as specialist sexual assault services, and also struggled to get the appropriate support they needed to recover from crime through victims' services.⁶⁷ The Victim Services Review also found that the current victims' services system is not adequately structured or resourced to provide the level of support required for bereaved families.⁶⁸

While not a criticism of the dedicated and hardworking victim support workers in Victoria, it is shocking to hear that families bereaved by homicide may only be receiving ' cursory contact and interaction from services' under the current system.⁶⁹ As noted by Ms Lee Little to this Inquiry, the service provision under the current approach is not adequate:

But there was no follow-up. I think there should be a follow-up one week down the track, two weeks down the track, just a ring: 'Are you okay? Do you still need help?'. Because that was not there, and they did not get followed up. I am not talking about one person; I am talking about families. I am one of 15 children. I have a big family, and the rolling effect that this has done to every one of my family is unbelievable.⁷⁰

Victims have told the Victims of Crime Commissioner that they cannot always access support services in a timely way or in a way that supports their needs.

Victims have told the Victims of Crime Commissioner that they cannot always access support services in a timely way or in a way that supports their needs.

Amongst its findings, the Victim Services Review suggested the need for:

- ongoing access to a single point of contact for victims as their needs change over time
- stronger connections with, and referrals between, victim services and other specialist responses within the family violence and sexual assault sectors
- a strengthened victims' case management system
- access to independent legal advice.

The Victim Services Review articulates a vision for a fully integrated victim support model which includes:⁷¹

⁶⁷ Ibid 13.

⁶⁸ Ibid 139.

⁶⁹ Ibid 13.

⁷⁰ Evidence to Legal and Social Issues Committee's Inquiry into Victoria's Criminal Justice System, Legislative Council, Wangaratta, 30 June 2021, 24 (Ms Lee Little).

⁷¹ Centre for Innovative Justice, RMIT University, 'Strengthening Victoria's Victim Support System: Victim Services Review' (n 65) 56.

- an enhanced phone-based Victim Support Centre (VSC) that provides a core response to victims of crime including case coordination and proactive, phone-based outreach and integrates the Victims Register
- a more intensive, case management model to be delivered through a network of community-based agencies across the state (an enhanced VAP model)
- a highly specialised service to support families bereaved by homicide, recognising that these families have unique needs and interactions with criminal justice and coronial processes that will typically require the most intensive support
- a new, dedicated legal service for victims of crime providing specialised information, advice and referrals to victims of crime.

It is vital the Victorian Government commit to funding the implementation of the enhanced victim support service model outlined in the Victim Services Review.

Recommendation 9: The Victorian Government should commit to funding the enhanced victim support service model outlined in *Strengthening Victoria's Victim Support System: Victim Services Review* including the enhanced response for bereaved families and a new, dedicated legal service for victims of crime.

7.1. A comprehensive review of victim, witness and court support in Victoria

In addition to a strengthened victim support system, there is a need for a broader review⁷² of victims' access to parallel support systems, including witness support⁷³ and at-court support.⁷⁴

⁷² The Centre for Innovative Justice review focused on the client-facing services provided by Victim Services, Support and Reform (VSSR).

⁷³ Witness support services provide support to those required to give evidence at trial. In Victoria, witness specific support is only available to child witnesses (by the Child Witness Service overseen by VSSR) and witnesses in the indictable stream (by the Victims and Witness Assistance Service overseen by the OPP). Witness support may be more time-limited than 'victim support' because it is focused on the process of giving evidence. However, it is usually more intensive than 'court support' which is often limited to practical or emotional support 'on the day' at court.

⁷⁴ At-court support is support specifically targeted to court-users but is often generalist in nature, rather than provided specifically for victims or witnesses. 'Court support' is often limited to practical or emotional support 'on the day' at court. An example includes support provided by Court Network volunteers.

As outlined above, Victoria's victim support system has been found to be 'falling short' for most victims of crime.⁷⁵ Additionally, witness support and at-court support for victims in Victoria is fragmented.

Witness support and at-court support services are overseen by different organisations and agencies, with varying levels of service provision, specialisation, eligibility and scope. This results in:

- some service provision entirely separate from victim support⁷⁶
- different types of support integrated in one service⁷⁷
- crossover between different types of support⁷⁸
- support services being limited by jurisdiction, court location or cohorts.

Specific cohorts of victims need targeted services that ensure cultural safety, age-appropriate support or context-specific support (e.g. family violence support in a specialist family violence court). At the same time, it is critical that targeted approaches minimise fragmentation in service delivery, inconsistency in level and scope of support and do not result in gaps in service provision for victims and witnesses.

For example, witness support for adults in the Magistrates' Court of Victoria is a key gap. Although adult witnesses can access Court Network, this is a volunteer-based, generalised service provided to all court users and is not a witness support service.⁷⁹ Despite the value provided by Court Network, it aims to complement other services within the court system.⁸⁰ Court Network does not provide the level of service provided by a witness support service. This places an increased onus on police prosecutors to directly support vulnerable victims and witnesses, including in serious sexual assault cases.

This has been raised with the Commissioner as a significant cause for concern, with some victims experiencing significant distress giving evidence in the summary jurisdiction without the witness support available in the higher courts.

⁷⁵ Centre for Innovative Justice, RMIT University, *Improving Support for Victims of Crime: Key Practice Insights* (2020) 7.

⁷⁶ For example, the Child Witness Service supports child witnesses only.

⁷⁷ For example, the OPP's Victims and Witness Assistance Service assists both victims and witnesses, but is only available in matters prosecuted by the Director of Public Prosecutions.

⁷⁸ For example, VAPs, who provide generalised victim assistance can also provide at-court support for clients required to give evidence. But this is also distinct from 'witness support' which is a specialised type of service targeted at providing support related to the task of giving evidence.

⁷⁹ Although, it is noted that Court Network may be funded by the Victorian Government to deliver more targeted victim-related support, such as the 'Enhanced Family Violence Support Model' which operates in some specialist family violence courts. See Court Network, *Court Network Annual Report 2019/20* (2020) 16.

⁸⁰ Court Network, *Court Network Annual Report 2019/20* (2020) 7.

Service fragmentation, gaps and inconsistency cause confusion for victims. Victims of crime have expressed a desire for a single point of contact—they do not want to transfer from service to service as their case progresses through the justice process.⁸¹

Victims want a single point of contact—they do not want to transfer from service to service as their case progresses through the justice process

There needs to be a balance between targeted service delivery and a coordinated approach to support through a single point of contact. The Victorian Government should undertake a comprehensive review of witness and at-court service provision to identify opportunities to create a more holistic, streamlined and comprehensive network of support and eliminate service gaps.

Recommendation 10: The Victorian Government should undertake a comprehensive review of witness and at-court service provision across Victoria with a view to identifying opportunities to create a more holistic, streamlined and comprehensive network of support and eliminating service gaps.

8. Crimes (Mental Impairment and Unfitness to be Tried) Act

A 2014 Victorian Law Reform Commission review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) raised concerns about the way in which victims were experiencing matters dealt with under the CMIA.

The VLRC's report raised issues relating to:

- victims not receiving sufficient information about CMIA processes
- victims needing support throughout the CMIA process, particularly by those with expertise in the CMIA
- the need for the CMIA process to provide for some acknowledgment that the accused's actions have a significant effect on a victim's life.

Since that review, victims have raised further issues with respect to:

- gaps in information provision throughout the criminal justice and offender treatment process

⁸¹ Centre for Innovative Justice, RMIT University, *Strengthening Victoria's Victim Support System: Victim Services Review* (November 2020) 128.

- a perceived lack of consideration of victims' safety and wellbeing in treatment decisions, and limited avenues for victims' voices to be heard or considered
- a perceived lack of rigour and independence regarding assessment processes for mental impairment matters.

Victims of crime dealing with mental impairment matters who have spoken with the Commissioner have said they feel that they are not adequately informed or consulted, and that there is little transparency in decision making.

Two bills have been introduced into the Victorian Parliament since the VLRC's review in 2014.⁸² The most recent bill is the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020 (the Bill). It was introduced in March 2020 and is yet to be debated.

While the Bill includes some positive reforms for victims of crime, the Bill does not include a positive obligation on the Mental Health Tribunal, the proposed decision maker regarding forensic patients' leave, to seek a victim's views before making significant leave decisions. The Bill makes no changes to strengthen victims' information or participatory entitlements under the Victims' Charter with respect to CMIA matters.

The Commissioner advocates for a strengthened victim notification and participation framework embedded within the CMIA and the Victims' Charter. This legislative framework should ensure decisions are made with more consideration and acknowledgement of the harm caused to victims of crime and their ongoing fears for their safety.

To supplement improved victim notification and participatory rights under the CMIA and the Victims' Charter, the Victorian Government should also establish a dedicated, specialised victim support service for victims dealing with mental impairment matters. A specialised service would ensure victims are adequately supported throughout the court and leave process, including having sufficient specialised support to meaningfully participate in the forensic leave decision-making process.

Victims dealing with mental impairment matters have told the Commissioner that they feel that they are not adequately informed and consulted, and that there is little transparency in decision making

⁸² The Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 was introduced in December 2016. The Bill lapsed at the end of the 58th Parliament in 2018.

Recommendation 11: The Victorian Government should amend the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* to provide for a strengthened victim notification and participation framework, with victims' information and participatory entitlements incorporated into the Victims' Charter.

Recommendation 12: The Victorian Government should establish a dedicated, specialised victim support service for victims dealing with mental impairment matters to ensure victims are adequately supported throughout the court and leave process, including having sufficient specialist support to meaningfully participate in the forensic leave decision-making process.

9. A trauma-informed financial assistance scheme

9.1. Issues with access to the current financial assistance scheme

In 2018, the VLRC concluded in its review of the *Victims of Crime Assistance Act 1996 (Vic)* (VoCAA) that the current approach to state-funded financial assistance for victims was 'not victim-centred or beneficial in its approach'.⁸³ The VLRC made 100 recommendations, including removing financial assistance for victims from Victoria's court system and establishing a new administrative model focused on assisting victims in their recovery.

The Government accepted all 100 recommendations contained in the VLRC's report in principle.⁸⁴

The Victorian Government is progressing work to develop a new Financial Assistance Service (FAS) for victims of crime in response to the VLRC's review.⁸⁵ Commitment to this significant reform is welcomed. However, in the interim, victims of crime are still required to engage with a financial assistance scheme

⁸³ Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, July 2018) xxi.

⁸⁴ Victoria, Parliamentary Debates, Legislative Council, 2 February 2021, 96 (Natalie Hutchins, Minister for Crime Prevention, Minister for Corrections, Minister for Youth Justice, Minister for Victim Support)

⁸⁵ The 2019–20 State Budget provided \$3.297 million over three years to establish a dedicated team within DJCS to progress the development of the new financial assistance scheme. The 2021–22 State Budget provided a further \$54.6 million towards a range of victim initiatives, with a proportion of that funding 'provided to start transformation of the victim service system through establishing the foundations for a new Financial Assistance Scheme for victims of crime'

that has been found to be counter to the aims of both the VoCAA⁸⁶ and the Victims' Charter.⁸⁷

One of the key issues relating to victims' experience of VOCAT is delay. In October 2020, the Second Reading Speech introducing the Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020,⁸⁸ noted the inability of VOCAT to provide timely assistance to victims of crime:

Increased demand at the Tribunal has resulted in delays in determining applications and an increase in the number of 'pending' applications (known as the 'backlog'). Notwithstanding the significant efforts of the Tribunal and the introduction of several efficiency measures, the backlog compromises the Tribunal's efforts to provide timely assistance to victims.⁸⁹

On 26 May 2021, a motion was introduced in the Victorian Legislative Council calling on the Government to 'urgent[ly] overhaul' the current model of financial assistance for victims of crime. Given the delays in implementing the recommendations of the VLRC's 2018 VoCAA report, Ms Tania Maxwell MP⁹⁰ called for urgent implementation of chapter 13 of the VLRC's report relating to the establishment of new and reconceived forms of financial assistance.⁹¹ In raising her concerns to Parliament, Ms Maxwell made the following observations:

Overall the system is far too cumbersome. Its response times and processes are laborious, with waiting periods of Victims of Crime Assistance Tribunal claim approvals historically averaging around nine months and some even lasting four years. It is also underpinned by some strange rules that leave it poorly geared to account for victims' level of pain and suffering, their current circumstances or their future requirements.⁹²

Ms Maxwell stated that VOCAT has 'become so bewildering and created such instant and high barriers to surmount that victims typically need to hire lawyers, including at their own substantial expense, to help them understand and navigate many of its complexities and difficulties.'⁹³

⁸⁶ *Victims of Crime Assistance Act 1996* (Vic) 1(1). The Hon. Jan Wade MP stated in her Second Reading Speech that the policy intend was to 'maximise the potential for a victim's recovery': Victoria, Parliamentary Debates, Legislative Assembly, 31 October 1996, 1024 (Jan Wade, Attorney-General).

⁸⁷ *Victims' Charter Act 2006* (Vic) s4(1)(c)

⁸⁸ The Bill included reforms to VOCAT to enable a new class of tribunal staff to make decisions under the VoCAA. The government has invested \$9.9 million in recruiting new tribunal officers to VOCAT to reduce the backlog of VOCAT applications. Victoria, Parliamentary Debates, Legislative Council, 26 May 2021, 1863 (Ms Taylor, Member for Southern Metropolitan)

⁸⁹ Victoria, Parliamentary Debates, Legislative Assembly, 14 October 2020, 2662 (Jill Hennessy, Attorney-General).

⁹⁰ It is noted that Tania Maxwell MP is a member of the Legal and Social Issues Committee.

⁹¹ Victoria, Parliamentary Debates, Legislative Council, 26 May 2021, 1858 (Tania Maxwell, Member for Northern Victoria).

⁹² Victoria, Parliamentary Debates, Legislative Council, 26 May 2021, 1859 (Tania Maxwell, Member for Northern Victoria).

⁹³ Victoria, Parliamentary Debates, Legislative Council, 26 May 2021, 1859 (Tania Maxwell, Member for Northern Victoria).

A further issue relates to oversight and complaints. While judicial officer conduct relating to VOCAT matters falls within the jurisdiction of the Judicial Commission of Victoria, if a victim of crime has concerns about the conduct of a VOCAT staff member, these matters fall under the Magistrates' Court of Victoria complaints process. Given issues victims experience with a VOCAT matter may cross issues relating to both staff and judicial officer conduct, this is an added layer of complexity for victims of crime to navigate.

9.1.1. Improving VOCAT operations pending implementation of the FAS

The Victims of Crime Commissioner does not have jurisdiction to oversee VOCAT's compliance with the Victims' Charter or receive complaints about how it treats victims under the Charter principles. Despite this, victims of crime often contact the office to raise issues about the operation of both the VoCAA and VOCAT.

Given the ongoing issues experienced by victims accessing financial assistance under current arrangements, there are a range of matters concerning the operation of the VoCAA and VOCAT that should be addressed, pending implementation of the new FAS, including consideration of the following issues:

- **Delay:** while the introduction of new dedicated Tribunal Officers and an investment of \$9.9 million in the 2021-22 budget⁹⁴ will hopefully go some way to addressing delay, further investment is likely to be required to reduce the backlog of VOCAT applications. The most recent data relating to delay in VOCAT's Annual Report for 2019-20 stated there were (at the time) 8,169 pending applications.⁹⁵ This represents a large number of victims of crime waiting to receive funding to enable them to receive vital counselling, medical treatment or home security to keep them safe. VOCAT's Annual Report for 2019-20 also stated that the number of pending cases has continued to grow over the past six years⁹⁶ suggesting a continued upwards trend in delay. The Victorian Government should continue to monitor VOCAT delays and further investment should be made if needed to reduce the backlog of VOCAT applications.

Victims of crime often contact the Victims of Crime Commissioner's office raising issues with the operation of both the *Victims of Crime Assistance Act 1996* (Vic) and the Victims of Crime Assistance Tribunal (VOCAT)

⁹⁴ The government has invested \$9.9 million in recruiting tribunal officers to VOCAT to reduce the backlog of VOCAT applications. Victoria, Parliamentary Debates, Legislative Council, 26 May 2021, 1863 (Ms Taylor, Member for Southern Metropolitan)

⁹⁵ Victims of Crime Assistance Tribunal, *Annual Report 2019-20* (2020) 1.

⁹⁶ Victims of Crime Assistance Tribunal, *Annual Report 2019-20* (2020) 27.

- **Time limits for processing of applications:** although timeframes are imposed on victims for making applications and providing supporting documentation, VOCAT is not required to process applications according to any prescribed timelines. Pending implementation of the new FAS, the Victorian Government should introduce regulations to prescribe time limits for the processing of VOCAT applications. While regulations could provide for exceptions to standard processing times (where delays are caused by exceptional circumstances), it is vital victims have more certainty about the timeframes for receiving awards.
- **Communication with applicants:** VOCAT should review the language used to communicate with applicants, consistent with a trauma-informed and plain English approach. For example, the VOCAT website currently states 'The Tribunal requests that the applicant file all documentation in support of their application and a completed Statement of Claim form within three months of the date of this letter. The applicant must notify the Tribunal in writing within this time that the application is ready to proceed or the application *may be struck out*.⁹⁷ The use of overly legalistic phrases such as 'struck out', and its blunt connotation, suggests little regard has been given to the trauma experienced by many victims of crime.
- **Removing perpetrator notification and appearance provisions:** The VLRC's 2018 VoCAA report comprehensively outlined issues associated with the perpetrator notification and 'right to appear' provisions in the VoCAA. The VLRC stated that these provisions were counter-productive to a victim's recovery and fundamentally unnecessary in the context of state-funded financial assistance.⁹⁸ The VLRC also suggested that removal of perpetrator notification provisions regardless of 'other technical or procedural reforms implemented', stating that removing these provisions alone would 'be a significant step in prioritising victims' safety and wellbeing needs and placing victims' needs at the centre of state-funded financial assistance'.⁹⁹ Regardless of the timeframe for implementation on the new FAS, the Government should urgently amend the VoCAA to remove the perpetrator notification and 'right to appear' provisions.
- **Removing consideration of a victim's 'character and behaviour':** The VLRC's 2018 VoCAA report comprehensively outlined issues with the

⁹⁷ Victims of Crime Assistance Tribunal, *Supporting Documentation* (2021)

<<https://www.vocat.vic.gov.au/determining-application/supporting-documentation>>

⁹⁸ Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, July 2018) 103. The VLRC stated: '...it is a scheme established to assist victims of crime to recover from a criminal act. It is not a scheme that makes determinations about the guilt or innocence of an alleged offender': Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, July 2018) 104.

⁹⁹ Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, July 2018) 104.

VoCAA's requirement to consider an applicant's general character and behaviour. The VLRC determined it was no longer appropriate, or consistent with the purpose and objectives state-funded financial assistance, to have regard to the broad character and behaviour of the applicant 'at any time'.¹⁰⁰ Regardless of the timeframe for implementation on the new FAS, the Government should amend the VoCAA to limit consideration of an applicant's character and behaviour to criminal behaviour with a nexus to the criminal act the subject of the VOCAT application.

Recommendation 13: Interim improvements should be made to the existing state-funded financial assistance scheme (pending implementation of the new financial assistance scheme). Specifically, the Victorian Government should:

- **evaluate the extent to which recent VOCAT funding has reduced the backlog of VOCAT applications**
- **continue to monitor VOCAT delays with a view to providing further funding to VOCAT if backlogs have not been reduced over financial year 2020-21**
- **introduce regulations to prescribe time limits for the making of VOCAT awards to address delays experienced by applicants**
- **address the Victorian Law Reform Commission's recommendations from its review of the *Victims of Crime Assistance Act 1996 (Vic)* and urgently amend the *Victims of Crime Assistance Act 1996 (Vic)* to remove:**
 - **perpetrator notification and appearance provisions**
 - **consideration of a victim's 'character and behaviour' when determining an award.**

Recommendation 14: The Victims of Crime Assistance Tribunal (VOCAT) should review the language used to communicate with applicants, consistent with a trauma-informed and plain English approach.

¹⁰⁰ Ibid 409.

9.2. Implementing the new Financial Assistance Scheme

The VLRC provided a comprehensive roadmap for a trauma-informed financial assistance scheme that:

- places victims' needs at the centre
- meets financial and practical needs
- prioritises victims' safety and wellbeing
- provides a forum for acknowledgement and recognition
- removes financial assistance from Victoria's court system.

In view of the issues the Commissioner has identified victims continue to experience with delays and communication in their interactions with VOCAT, it is vital these reforms are fully implemented in the proposed new FAS. To implement the new scheme, it is also critical that the new scheme is appropriately funded.

In recommending a new model of financial assistance, the VLRC also considered it vital that the scheme be consistent with the Victims' Charter. The VLRC observed that the complaints process for the new scheme should not only be distinct from a victims' right to review or appeal a (substantive) decision, but should be consistent with the principles governing responses to victims of crime under the Victims' Charter.¹⁰¹

Currently, the Victims of Crime Commissioner does not have jurisdiction to regulate or receive complaints about VOCAT. As noted, however, the Commissioner continues to hear from victims of crime who have experienced inadequate support from VOCAT staff, delays and concerns about perpetrator notification.

Victims' experiences are out of step with community expectations and the intent of the Victims' Charter. Victims of crime currently experiencing issues with the way they are treated when seeking to access state-funded financial assistance do not have recourse to the complaints mechanisms under the Victims' Charter.

The administering body for financial assistance should be compliant with the Victims' Charter to ensure victims are treated in the way the Victims' Charter intended under its objects.

¹⁰¹ Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, July 2018) 431-432.

Until the new scheme is implemented, administrative staff and new Tribunal officers do not fall within the Commissioner's regulatory jurisdiction enabling appropriate oversight of Victims Charter compliance.

It is vital that the new FAS be a prescribed agency under the *Victims of Crime Commissioner Regulations 2020*, and that victims of crime can pursue remedies under the Victims' Charter.

Recommendation 15: The Victorian Government should ensure the new Financial Assistance Scheme falls within the Commissioner's regulatory and complaints jurisdiction to enable appropriate oversight of Victims' Charter compliance

10. Victims' Legal Service

The need for a victims' legal service has been consistently raised in Victoria in a range of recent reviews and inquiries. Most notably:

- In the 2020 report *Strengthening Victoria's Victim Support System: Victim Services Review* (Victims Services Review), the review found considerable unmet demand for specialist, independent legal advice for victims of crime.¹⁰² The Victims Services Review suggested that access to specialist, tailored legal advice for victims would provide for early intervention by way of legal 'issues spotting' and help link victims to suitable organisations for ongoing legal support.¹⁰³
- In the 2016 report *Victims of Crime in the Criminal Trial Process*, the VLRC identified the need for a dedicated, specialist victims' legal service.

The models in the VLRC's 2016 *Victims of Crime in the Criminal Trial Process* report and in the Victims Services Review were different, although, both reports advocated for the establishment of a publicly funded dedicated victims' legal service.¹⁰⁴

¹⁰² RMIT Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 13.

¹⁰³ *Ibid* 152.

¹⁰⁴ *Strengthening Victoria's Victim Support System: Victim Services Review* suggested the legal advice service should integrate with the existing victims' services system operated by the Department of Justice and Community Safety and would be delivered by a 'publicly funded legal service provider co-locating with existing victims' services': Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 151. In *Victims of Crime in the Criminal Trial Process*, the VLRC recommended Victoria Legal Aid should be funded to establish a service for victims of violent indictable crimes: Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, 2016) xxiv.

The Victorian Government has recently announced funding¹⁰⁵ for a limited victims' legal service, providing a service to victims seeking state-funded financial assistance, restitution and compensation orders.¹⁰⁶

While the establishment of a victims' legal service for this purpose is welcomed (and much needed), a more comprehensive victims' legal service is required to assist victims with the full range of complex legal issues that arise as a result of victimisation.

Victims of crime often find themselves facing a range of legal issues as a result of victimisation and engaging with the justice system. These legal needs may include matters relating to financial assistance, restitution and compensation orders, but may also relate to parallel legal issues such as civil law issues (defamation, intervention orders), child protection, family law and criminal law issues that may intersect with their victimisation.¹⁰⁷

Victims also have several participatory entitlements at key points in the criminal justice process where legal advice would enable victims to be more aware of and exercise their entitlements. These points include:

- making a Victim Impact Statement and /or reading it aloud in court
- in sexual offence cases, seeking leave to appear and make submissions in response to applications to access confidential medical or counselling records
- providing views before the DPP makes certain prosecutorial decisions, like modifying charges, discontinuing the prosecution or accepting a plea of guilty to a lesser charge.¹⁰⁸

The trauma caused by victimisation, compounded by complex legal processes, means many victims may not be aware of their entitlements or are unable to meaningfully advocate for them to be upheld during the criminal trial process. In practice, this means that although victims may have rights 'on paper', they may not be meaningfully realised for many victims.

For this reason, the Commissioner advocates for a dedicated, state-funded legal service for victims of crime. Advice would be provided by specialist legal

¹⁰⁵ Funding for a victims' legal service was announced as part of a broader victims' funding package. Funding of \$54.6 million was provided for replacing VOCAT with a new FAS, creating a new Victims Legal Service and continuing the Intermediaries Program. See The Hon Daniel Andrews, 'Better Outcomes for Victims and Young People', Premier of Victoria (Media release, 20 May 2021) <<https://www.premier.vic.gov.au/better-outcomes-victims-and-young-people>>

¹⁰⁶ Victoria, *Parliamentary Debates*, Legislative Council, 23 June 2021, 2465 (Ms Sonja Terpstra, Member Legislative Council)

¹⁰⁷ Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report, 2018) 204.

¹⁰⁸ *Victims' Charter Act 2006* (Vic) s9B.

professionals who have a trauma-informed and culturally safe approach. The legal service would need to be staffed by specialist lawyers who have completed training and education (and ongoing professional development) in victims' rights and entitlements spanning the relevant provisions across criminal, administrative, and civil law.¹⁰⁹

Recommendation 16: The Victorian Government's proposed new victims' legal service should be expanded—in addition to supporting victims seeking state-funded financial assistance, restitution and compensation orders, the proposed new victims' legal service should provide assistance with the full range of complex legal issues that arise as a result of victimisation.

11. Victim Right to Review

In the United Kingdom, victims can seek a review of certain Crown Prosecution Service (CPS) decisions, including where a prosecution has not proceeded.¹¹⁰ Victims can also seek a review of police decisions in circumstances where police have interviewed a suspect and decided not to charge the suspect or that the case does not meet the test for referring to the CPS.¹¹¹ Together these are referred to as the Victim's Right to Review (VRR).

The Independent Victims' Commissioner for London, Claire Waxman, has described the VRR as 'an important check and balance, empowering victims to challenge charging decisions that they are not happy with.'¹¹² Academics have referred to the potential for increased satisfaction and empowerment for victims with independent review mechanisms,¹¹³ citing such mechanisms as 'an additional avenue for seeking justice'.¹¹⁴

In its 2016 report, *Victims of Crime in the Criminal Trial Process*, the VLRC discussed, but ultimately did not recommend, an independent VRR scheme. They

¹⁰⁹ Including *Sentencing Act 1991* (Vic), the *Victims of Crime Assistance Act 1996* (Vic), Victims' Charter and relevant protections afforded victims under the *Criminal Procedure Act 2009* (Vic), *Evidence (Miscellaneous Provisions) Act 1958* (Vic), *Evidence Act 2008* (Vic), *Public Prosecutions Act 1994* (Vic), *Judicial Proceedings Reports Act 1958* (Vic), and *Open Courts Act 2013* (Vic).

¹¹⁰ Crown Prosecution Service (CPS) *Victims' Right to Review Scheme* (27 May 2021) <<https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme#a02>>

¹¹¹ Rights of Women, *A guide to the victim's right to review scheme* <<https://rightsofwomen.org.uk/wp-content/uploads/2018/02/A-guide-to-the-victims-right-to-review-scheme.pdf>>. There are a range of police decisions outside the scope of the review scheme.

¹¹² Claire Waxman, *Review of Compliance with the Victims' Code of Practice: Findings, recommendations and next steps* (Report, March 2019) 16.

¹¹³ Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 163.

¹¹⁴ Alison Bird, Dr Katherine Allen and Dr Olumide Adisa, *Examining the Victim's Right to Review by Police in Stalking and Harassment Cases: Report of FOI Findings* (University of Suffolk) 61, 6.

did, however, consider such as scheme should be revisited in five years after further work was done to internal review mechanisms within OPP.¹¹⁵

While significant work has been done within the OPP to provide victims with better access to reasons for prosecutorial decisions,¹¹⁶ and a discontinuance review framework has also been established,¹¹⁷ an independent VRR in Victoria would provide victims with an avenue to seek independent (external) review of both police and prosecution decisions after proper internal review processes have been exhausted.

An independent¹¹⁸ VRR scheme in Victoria should be introduced. It should be underpinned by new rights in the Victims' Charter and have capacity to review decisions made at both the investigatory and prosecutorial stages of the process after internal mechanisms have been exhausted.

Recommendation 17: The Victorian Government should introduce an independent Victim Right to Review scheme, independent of both the police and prosecution underpinned by new rights in the Victims' Charter

12. Safety in Court

Under the Victims' Charter, so far as is reasonably practicable, during the course of a court proceeding and within court settings, prosecuting agencies and the courts should:¹¹⁹

- minimise a victim's exposure to unnecessary contact with the person accused of the criminal offence, defence witnesses and family members and supporters of the accused person
- protect a victim from intimidation by the accused person, defence witnesses and family members and supporters of the accused person.

Safety in court has been raised in several reviews relating to victim and witness experiences in Victoria.¹²⁰ In 2008, the Victims Support Agency, with assistance

¹¹⁵ Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (Report, August 2016) 76.

¹¹⁶ Office of Public Prosecutions, *Requesting reasons for decisions* (2017) <<https://victimsandwitnesses.opp.vic.gov.au/witnesses/requesting-reasons-for-decisions>>

¹¹⁷ Kerri Judd QC, Director of Public Prosecutions Victoria, *Discontinuance Review Framework* <<https://www.opp.vic.gov.au/Home/Resources/Discontinuance-Review-Framework>>

¹¹⁸ Academics point to the importance of independent review schemes operating separately from the original decision-making body. See, for example, Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 163; Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations* (Palgrave Macmillan, 2020) 71.

¹¹⁹ *Victims' Charter Act 2006* (Vic) s12.

¹²⁰ See, for example, Victims Support Agency, *Information and support needs of victims and witnesses in the Magistrates Court of Victoria* (Report, January 2013) 5; RMIT Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 128.

from Victoria Police, conducted a survey of victims who reported crime. The survey found that over one-quarter (151 of 605) of victims and witnesses whose crime was dealt with in the Magistrates' Court did not feel safe in court.¹²¹ A follow up survey in 2013 found that over half of the victim / witness respondents 'did not feel safe' at court.¹²² The importance of safe places for victim-survivors in court spaces was raised again in RMIT's research relating to family violence intervention orders in 2021.¹²³

Significant progress has been made to alter court infrastructure to accommodate the features and dynamics of family violence through specialist and dedicated family violence courts. Specialist family violence courts have been designed with victims' wellbeing and safety in mind, providing separate court entrances for victim-survivors, safe waiting spaces and interview rooms, remote witness facilities, child-friendly spaces and culturally safe spaces. Court staff undertake specialised professional development to ensure they meet the needs of victim-survivors and other court users.

The operation of courts during the COVID-19 pandemic has changed the ways in which victims can participate in court hearings, including participating remotely. However, some victims may still want to attend court in person but due to the current court environment, do not feel safe to do so due to the lack of access to safe entries, exits and separate waiting areas.

Flexible use of online and remote ways of participating in a court hearing should continue based on a victim's choice, victim-centric court environments, including safe entries, exits and safe waiting areas. However, remote participation should not be dependent on crime type or the jurisdiction in which a matter is heard. All court infrastructure should accommodate the needs of victims—regardless of crime type, or what court they are attending.

Recommendation 18: The Victorian Government should audit all Victorian courts to assess their compliance with contemporary standards in victim safety and wellbeing to ensure courts meet contemporary standards including:

- **safe court entrances and exits for victim-survivors**

¹²¹ See, for example, Victims Support Agency, *Information and support needs of victims and witnesses in the Magistrates Court of Victoria* (Report, January 2013) 5.

¹²² See, for example, Victims Support Agency, *Information and support needs of victims and witnesses in the Magistrates Court of Victoria* (Report, January 2013) 18.

¹²³ RMIT Centre for Innovative Justice, *More than Just a Piece of Paper: Getting Protection Orders Made in a Safe and Supported Way* (RMIT University, February 2021) 98.

- **safe waiting spaces and interview rooms, including child-friendly spaces and culturally safe spaces**
- **remote witness facilities.**

13. Independent Legal Representation for victims of sexual assault

Many victims mistakenly, and understandably, believe prosecutors are 'their lawyers' and can prioritise their rights and needs during the criminal trial process.¹²⁴ Victims have told the Victims of Crime Commissioner that it is often not until the court process commences that they realise the DPP does not represent them.

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The impacts of not having access to independent legal representation are particularly pronounced in sexual assault cases. Victims in sexual assault trials often face specific barriers to accessing justice and are often subject to unique challenges during the criminal trial, including rigorous cross-examination (often in relation to very personal and distressing content) as well as applications for access to private medical and counselling records. Academic Fiona E Raitt has described victims' disadvantage during sexual assault trials as follows:

Complainants have only a limited voice: they can give evidence but as they cannot canvass their rights, they depend upon another to do so. As neither prosecutors nor judges are equipped to represent these interests, complainants must look elsewhere.¹²⁵

For this reason, some academics and legal experts have suggested that effective participation in the criminal justice system for sexual assault complainants may never be achieved without some degree of independent legal representation.¹²⁶ The merits of independent legal representation for sexual assault victims are focused on in this submission because of the specific barriers to accessing justice for this cohort.

¹²⁴ Mary Iliadis, *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Taylor & Francis Group, 2020) 35.

¹²⁵ Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) 9 *Criminal Law Review*, 729-749, 739.

¹²⁶ Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) 9 *Criminal Law Review*, 729-749, 749; Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 173.

Independent legal representation for sexual assault victims would be complementary to, but also distinct from, access to a comprehensive victims' legal service, discussed in section 10 above.

The creation of a specialist victims' legal service (for all victims of crime) would not require any modification of current criminal trial processes. Victims would, however, be better informed (by lawyers) of their rights and entitlements and be more aware when their entitlements have not been upheld. It would mitigate many issues that victims of crime generally experience with respect to specific legal issues (for example, understand their entitlements in relation to information and participation, such as during plea negotiations). All victims of crime would benefit from such a victims' legal service, including victims of sexual assault.

However, a legal service alone will not resolve all issues for victims of crime, particularly for victims of sexual assault in the criminal trial process where aspects of the criminal trial process necessitate an independent legal representative which is not accommodated by current criminal trial procedure.

Introducing independent legal representation for victims of sexual assault would involve modifications to some criminal trial processes to accommodate an independent legal representative for victims. For example, it would require criminal procedure changes to accommodate a third legal representative (in addition to the prosecution and defence) to be present (and able to intervene) during aspects of some criminal trial processes. Models and approaches for this differ across jurisdictions.

New South Wales' Sexual Assault Communications Privilege Service (SACPS)¹²⁷ provides a possible model for what Independent Legal Representation could look like in Victoria. SACPS was established to help protect the privacy of sexual assault victims' counselling notes and other confidential therapeutic records. SACPS lawyers support sexual assault victims to claim the communications privilege when their confidential records are subpoenaed.

The establishment of SACPS, and changes to criminal procedure that provide the victim/complainant with standing in relation to the communications privilege, provide a possible model for what Independent Legal Representation could look like. SACPS lawyers have been referred to as a 'third person at the bar table', noting their role as follows:

¹²⁷ SACPS is a separate division of Legal Aid NSW, clearly separate from the in-house defence practice.

The SACP lawyer is an advocate for the protected confider, usually the complainant, and acts on their instructions. Most commonly, the interests of the prosecution are similar to the complainant's, but occasionally the SACP lawyer will be in opposition to the prosecution¹²⁸

The SACPS lawyer 'may remain in court in anticipation of evidence or submissions veering into protected confidences, ready to object on their client's behalf.'¹²⁹

The SACPS model suggests that independent legal representation for sexual assault victims during the criminal trial process—within clearly defined parameters—may not necessarily infringe upon the rights of the accused.¹³⁰

Notably, in considering the context of victims of crime more generally, Arie Freiberg and Asher Flynn suggest that while legal representation for victims might sit 'in contrast to the traditional model of an adversarial system, it may provide a mechanism to better recognise the needs of victims of crime, without encroaching on the rights of the accused or the role of the court'.¹³¹

A comprehensive review of Northern Ireland's response to sexual assault concluded that 'the current arguments in favour of granting a measure of independent separate representation publicly funded [for sexual assault victims] far outweigh the objections'.¹³²

Having regard to the current challenges experienced by victims of sexual assault during the criminal trial process, the Commissioner recommends that victims of sexual assault have the right to independent legal representation at key stages of the criminal trial process.

Recommendation 19: The Victorian Government should reform criminal law procedure to enable victims of sexual assault to have independent legal representation at key stages of the criminal trial process, including in relation to:

- **applications to subpoena, access or use confidential medical or counselling records**
- **applications to be cross-examined on, or admit evidence about, sexual history**

¹²⁸ Rosemarie Lambert, 'The role of a SACP Lawyer', *Criminal CPD* (Fact sheet, August 2021) 2 <<https://criminalcpd.net.au/wp-content/uploads/2016/09/SACPLawyerssummary.pdf>>

¹²⁹ *Ibid.*

¹³⁰ Mary Iliadis, Submission No 8 to Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process* (30 September 2015) 11. See also Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 173.

¹³¹ Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations* (Palgrave Macmillan, 2020) 105.

¹³² Sir John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (Report April 2019) 173.

- **access and eligibility for the intermediary scheme, special protections, and alternative arrangements for giving evidence**
- **adherence to protections under the *Evidence Act 2008 (Vic)*, including protecting complainants from questions that are unduly annoying, harassing, intimidating, offensive, oppressive, humiliating, repetitive or questions that are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate**
- **victims' rights with respect to Victim Impact Statements at the sentencing phase.**

14. Alternative, parallel and restorative justice options

The Victims of Crime Commissioner consistently hears from victims of crime that:

- each victim's experience is unique to them and that crime impacts everyone differently
- victims need and want different things to achieve justice and recover from the impact of the crime they have experienced
- the justice system often adds to the trauma they've already experienced and some state clearly that the trauma caused by the system is equivalent to or worse than the crime they experienced
- the justice system process does not adequately recognise or demonstrate respect for victims' experiences and the impact of crime.

In view of victims' diversity, the criminal justice system is not the only pathway for all victims of crime.

There is now a consistent body of work suggesting that some victims perceive restorative justice as fairer, more satisfying, more respectful, and more legitimate than what is offered by the traditional criminal justice system.¹³³

Alternative forms of participation or alternative justice responses—such as restorative justice—can meet more of victims' most commonly articulated needs, including participation, voice, validation, vindication and offender accountability. Restorative justice provides an opportunity to hold

Victims have told the Victims of Crime Commissioner that they need and want different things to achieve justice and recover from the impact of the crime

¹³³ Meredith Rossner 'Restorative justice and victims of crime: Directions and developments' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Taylor & Francis Group, 2017), 238.

offenders accountable and provides victims with an opportunity to tell their story on their own terms.¹³⁴

Case studies reveal victims' strong desire to speak openly with the offender in a way that communicates the harm caused to them, and that provides the offender with an opportunity to acknowledge or, in some cases, apologise for the harm. This kind of open dialogue is incompatible with the adversarial trial process.

Not all victims of crime want the same thing. For this reason, it is clear that the conventional criminal justice system, with its single pathway of prosecution through the courts, cannot meet the needs of all victims.

Ensuring that crime is treated appropriately as criminal conduct by the justice system remains paramount. However, creating a trauma-informed and victim-centric criminal justice response to crime should not preclude provision of alternative or parallel restorative pathways where this is a victim's wish.

The provision of alternative or restorative justice pathways within our justice system should not be viewed as sending a signal to the community that crime is not serious or does not result in serious harm. Providing options for victims of crime acknowledges that victims have a variety of justice needs and recognises that not all of these needs can be met by the traditional criminal justice system. However, as discussed further below, the Commissioner considers that further work is required in Victoria to review existing restorative justice pathways.

14.1. Comprehensive review of existing restorative justice pathways

There are several existing restorative justice pathways in Victoria including:

- the Department of Justice and Community Safety's redress and restorative engagement scheme for victims of workplace sexual harassment and sexual assault at Victoria Police
- the Department of Justice and Community Safety's Family Violence Restorative Justice program
- Youth Justice Group Conferencing
- RMIT's Open Circle

¹³⁴ Kelly Richards et al, 'What Do Victim/survivors of Sexual Violence think about Circles of Support and Accountability' (2020) *Victims and Offenders* 1, 3.

- South East Centre Against Sexual Assault's restorative justice practices with sexual assault victims.

Without a comprehensive external review of the current restorative or alternative justice pathways in Victoria—and robust victim-centric research into the outcomes for victims of crime—it is difficult to determine victims' satisfaction with the existing pathways. Victims' views on the 'success' of these programs should be the guide.

Accordingly, a comprehensive, holistic external review of the existing programs should be undertaken to ensure best practice in restorative justice is shared across the justice and service system. It is vital that victims' voices and experiences are at the centre of any reviews and learnings from existing programs

Furthermore, considering the increasing number of alternative justice programs available in Victoria, a more streamlined approach should be developed providing victims with a consolidated, central contact point and a clearer sense of pathways to various restorative justice programs.

Recommendation 20: The Victorian government should undertake a comprehensive review of existing restorative justice programs in Victoria to:

- **ensure victims have a range of justice options and are given choice and control over what pathway best suits their needs**
- **ensure best practice in restorative justice is shared across the justice and service system**
- **ensure victims' voices and experiences of restorative justice are at the centre of learnings and evaluations of existing programs**
- **ensure programs respond to victim diversity, including diversity in language, culture, gender and sexual identity**
- **explore whether these programs should continue to exist as stand-alone programs, or whether a more consolidated, centralised and streamlined approach should be developed providing victims with a central contact point and a clearer sense of pathways to various programs.**

Appendix A: List of recommendations

- Recommendation 1:** The Victorian Government should amend Victoria's *Charter of Human Rights and Responsibilities Act 2006 (Vic)* to recognise the interests of victims in the criminal trial process as articulated in the Victims' Charter.
- Recommendation 2:** The Victorian Government should amend the Victims' Charter to provide for consistency and equity in victim entitlements, including entitlements to information and consultation at key stages of the criminal justice process, regardless of jurisdiction or prosecuting agency.
- Recommendation 3:** The Victorian Government should amend the Victims' Charter to remove section 9B(3)(b) so that a victim's right to be provided information and consulted is not overridden
- Recommendation 4:** The Judicial College of Victoria should provide comprehensive, trauma-informed training for judicial officers featuring:
- victim-survivor voices and their lived experience of the criminal justice system
 - the views and experiences of victim support workers and advocates
 - in depth guidance in relation to legislative provisions designed to protect victims, specifically protections relating to giving evidence and duty of the court to minimise a victim's contact with the accused and their supporters
 - examination of defence counsel questioning, including where such questioning is improper or inappropriate
 - trauma-informed ways to acknowledge victims during sentencing and incorporate Victim Impact Statement processes
- Recommendation 5:** The Victorian Government should amend the judicial appointments process to require consideration of a person's knowledge, skills and capabilities to:

- understand trauma and engage appropriately with victims, witnesses and families in the courtroom, including demonstrated understanding of different types of victimisation, including the gendered nature of certain crime types
- consider, understand and accommodate diversity and access
- facilitate a safe court environment for victims to give evidence, including the use of special protections and alternative arrangements and during cross-examination when questions breach the *Evidence Act 2008 (Vic)*
- appropriately and sensitively balance victims' interests and entitlements during sentencing with the needs of the court, prosecution and defence.

Recommendation 6: The Judicial College of Victoria should amend the *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* to articulate the expectations of the contemporary judicial role in upholding victims' interests in the criminal trial process.

Recommendation 7: The Judicial College of Victoria should be funded to:

- provide comprehensive induction and support to new judicial officers, including in relation to trauma-informed practice, judicial wellbeing and vicarious trauma
- develop a framework for peer supervision and reflective practice amongst judicial officers
- provide regular communications and engagement opportunities in relation to the Judicial Officers Assistance Program.

Recommendation 8: The Victorian Government should fund the establishment of a specialist sexual assault court. The legislation establishing the specialist court should mandate minimum training and experience for judicial appointments, similar to the appointment of Magistrates to the Family Violence Court Division.

Recommendation 9: The Victorian Government should commit to funding the enhanced victim support service model outlined in *Strengthening Victoria's Victim Support System: Victim Services Review* including the enhanced response for bereaved families and a new, dedicated legal service for victims of crime.

Recommendation 10: The Victorian Government should undertake a comprehensive review of witness and at-court service provision across Victoria with a view to identifying opportunities to create a more holistic, streamlined and comprehensive network of support and eliminating service gaps.

Recommendation 11: The Victorian Government should amend the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* to provide for a strengthened victim notification and participation framework, with victims' information and participatory entitlements incorporated into the Victims' Charter.

Recommendation 12: The Victorian Government should establish a dedicated, specialised victim support service for victims dealing with mental impairment matters to ensure victims are adequately supported throughout the court and leave process, including having sufficient specialist support to meaningfully participate in the forensic leave decision-making process.

Recommendation 13: Interim improvements should be made to the existing state-funded financial assistance scheme (pending implementation of the new financial assistance scheme). Specifically, the Victorian Government should:

- evaluate the extent to which recent VOCAT funding has reduced the backlog of VOCAT applications
- continue to monitor VOCAT delays with a view to providing further funding to VOCAT if backlogs have not been reduced over financial year 2020-21
- introduce regulations to prescribe time limits for the making of VOCAT awards to address delays experienced by applicants
- address the Victorian Law Reform Commission's recommendations from its review of the *Victims of Crime Assistance Act 1996 (Vic)* and urgently amend the *Victims of Crime Assistance Act 1996 (Vic)* to remove:

- perpetrator notification and appearance provisions
- consideration of a victim's 'character and behaviour' when determining an award.

Recommendation 14: The Victims of Crime Assistance Tribunal (VOCAT) should review the language used to communicate with applicants, consistent with a trauma-informed and plain English approach.

Recommendation 15: The Victorian Government should ensure the new Financial Assistance Scheme falls within the Commissioner's regulatory and complaints jurisdiction to enable appropriate oversight of Victims' Charter compliance

Recommendation 16: The Victorian Government's proposed new victims' legal service should be expanded—in addition to supporting victims seeking state-funded financial assistance, restitution and compensation orders, the proposed new victims' legal service should provide assistance with the full range of complex legal issues that arise as a result of victimisation.

Recommendation 17: The Victorian Government should introduce an independent Victim Right to Review scheme, independent of both the police and prosecution underpinned by new rights in the Victims' Charter

Recommendation 18: The Victorian Government should audit all Victorian courts to assess their compliance with contemporary standards in victim safety and wellbeing to ensure courts meet contemporary standards including:

- safe court entrances and exits for victim-survivors
- safe waiting spaces and interview rooms, including child-friendly spaces and culturally safe spaces
- remote witness facilities.

Recommendation 19: The Victorian Government should reform criminal law procedure to enable victims of sexual assault to have independent legal representation at key stages of the criminal trial process, including in relation to:

- applications to subpoena, access or use confidential medical or counselling records

- applications to be cross-examined on, or admit evidence about, sexual history
- access and eligibility for the intermediary scheme, special protections, and alternative arrangements for giving evidence
- adherence to protections under the *Evidence Act 2008 (Vic)*, including protecting complainants from questions that are unduly annoying, harassing, intimidating, offensive, oppressive, humiliating, repetitive or questions that are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
- victims' rights with respect to Victim Impact Statements at the sentencing phase.

Recommendation 20: The Victorian government should undertake a comprehensive review of existing restorative justice programs in Victoria to:

- ensure victims have a range of justice options and are given choice and control over what pathway best suits their needs
- ensure best practice in restorative justice is shared across the justice and service system
- ensure victims' voices and experiences of restorative justice are at the centre of learnings and evaluations of existing programs
- ensure programs respond to victim diversity, including diversity in language, culture, gender and sexual identity
- explore whether these programs should continue to exist as stand-alone programs, or whether a more consolidated, centralised and streamlined approach should be developed providing victims with a central contact point and a clearer sense of pathways to various programs.

