

# Part 3:

## Building authentic victim participation

Part 3 of this report sets out the Victims of Crime Commissioner's recommendations for building a justice system that enables authentic participation by victims.

Recommendations are based on the key issues raised by victims and stakeholders outlined in detail in Part 2 of the report.



## Overview of Chapter 12: Rights

In 2016, the Victorian Law Reform Commission (VLRC) articulated the victim's role as one of 'participant'. In 2018, the Victorian Government introduced amendments to the *Victims' Charter Act 2006* (Victims' Charter) to recognise victims as participants.

The Victims of Crime Commissioner (VOCC) has found that more needs to be done to recognise victims as participants.

### Ensuring equity in the Victims' Charter

Currently, a victim's rights and entitlements vary depending on which prosecuting agency conducts the case and the court in which the case is prosecuted. In acknowledgement of the victim's role as a participant, but not a party, the VOCC recommends that the Victims' Charter be amended to treat victims equally by providing all victims with the same entitlements to information and consultation, regardless of court jurisdiction or prosecuting agency.

### Enhancing Victims' Charter compliance

The VOCC notes that a victim's priority is having their rights respected and participating in the criminal proceeding. Victims should not have to rely on complaints mechanisms to have their rights respected. The VOCC recommends there be a role for the courts during proceedings in ensuring that victims' rights and entitlements under the Victims' Charter and other laws are respected. This would reflect the triangulation of interests in a fair trial and recognises victims as participants in a more meaningful way.

### Accountability and transparency in decision making

The VOCC considers that there are ways to introduce independent review mechanisms that do not interfere with the duties of police or prosecutors or erode their independence. The VOCC recommends that an independent victim right to review scheme be introduced. A review scheme should be underpinned by new rights in the Victims' Charter and enable certain decisions at both the investigatory and prosecutorial stages of the process to be reviewed after internal mechanisms have been exhausted.

### Victims' rights as human rights

Legal authorities recognise and respond to those who possess rights. Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter) does not specifically recognise victims in the justice system.

The VOCC recommends that the Human Rights Charter be amended to include victims' high-level rights such as a victim's right to be acknowledged as a participant, to be treated with respect and to be protected as a witness.

### Protecting victims from unreasonable delay

The VOCC repeatedly heard from victims who had been further traumatised because of court delay. While the Human Rights Charter states that a person charged with a criminal offence is entitled to be tried without unreasonable delay, there is no equivalent right afforded to victims, such as the right to give evidence at trial without unreasonable delay.

The VOCC recommends that the Human Rights Charter be amended to include a right for a victim of a criminal offence to be protected from unreasonable trial delay. The VOCC also recommends that courts and other justice agencies (including Victoria Police, the Office of Public Prosecutions and Victoria Legal Aid) be adequately funded to reduce delays in criminal trials without eroding victims' participatory rights.

### Improve awareness of victims' rights

Being unaware of the Victims' Charter makes it difficult for victims to understand their rights and entitlements, advocate for these rights and entitlements to be upheld, and identify Victims' Charter breaches. The Department of Justice and Community Services' (DJCS) *Victim's Guide to Support Services and the Criminal Justice System* does not recognise victims' role as participants and does not provide victims with comprehensive guidance about participation at key points of the process. The VOCC recommends that the DJCS review and revise *A Victim's Guide to Support Services and the Criminal Justice System* to provide victims with more comprehensive guidance about their participation.

### Review of the Victims' Charter

A statutory review of the Victims' Charter must be commenced by the VOCC by no later than 4 November 2024. The VOCC recommends that this review include a broader examination of the enforceability of victims' entitlements, including reviewing section 22 of the Victims' Charter.

# 12

## Chapter 12: **Rights**



## Introduction

In 2016, the Victorian Law Reform Commission (VLRC) recommended that victims of crime be seen as 'participants' in the criminal justice system. The VLRC did not define what it meant to be a participant. Instead, the VLRC considered this term reflected the evolving role of victims in the criminal justice system. In 2018, the Victims' Charter was amended to recognise victims as participants.

The Victims of Crime Commissioner (VOCC)'s engagement with victims and stakeholders laid out in Part 2 of this report found that while a more nuanced understanding of victims' needs – and of their status as participants – is developing, more needs to be done to foster the cultural change envisaged by the VLRC when it articulated the victim's role as one of 'participant'.

One part of this cultural change is strengthening victims' rights and entitlements.

In this chapter, the VOCC proposes an enhanced rights-based framework for victim participation, building on the changes already made following the VLRC's 2016 report *The Role of Victims of Crime in the Criminal Trial Process*.

This chapter makes recommendations in relation to:

- securing equal entitlements for victims under the Victims' Charter
- expanding accountability measures under the Victims' Charter by introducing:
  - a judicial role in checking compliance with victims' rights and entitlements
  - independent review of certain justice agency decisions
- recognising victims' rights as human rights in Victoria's *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Human Rights Charter).

In this chapter, the VOCC also maintains that lack of funding and resourcing cannot continue to be used as a justification for keeping victims' rights below an acceptable standard. Any changes to extend and enhance victims' entitlements should be accompanied by appropriate investment so that these entitlements can be met in a meaningful way.

The VOCC also makes recommendations to improve awareness of victims' rights and considers what should be included in a statutory review of the Victims' Charter, which is required to be commenced by the VOCC before November 2024.

## An enhanced rights-based framework

Seventy-four per cent of victims surveyed by the VOCC said they were either never treated as a participant (50 per cent) or only treated as a participant sometimes (24 per cent). Too many victims and stakeholders described a justice system where victims:

- feel excluded from processes
- are not a part of decision making and do not having a voice
- are not getting the information needed, or not getting information often enough, to participate meaningfully
- are not included in the prosecution and court process
- lose choice and agency through the justice process.

Almost half of the victims surveyed by the VOCC (45 per cent) indicated they would not want to participate in the justice process again.

More needs to be done to foster the cultural change envisaged by the VLRC when it articulated the victim's role as one of 'participant'.

# Ensuring equity in the Victims' Charter

## Information and consultation are key to participation

A major theme underpinning lack of participation for victims was not getting the information they needed to participate. This included from police and prosecution and spanned the investigation, prosecution and court processes.

Victims told the VOCC about being 'blind-sided' due to lack of information, resulting in victims missing court dates, not being advised of plea negotiation outcomes and missing opportunities to make Victim Impact Statements (VISs).

Similarly, many victims spoke about a lack of participation during decision-making processes and feeling like their voice was unimportant or ignored.

A substantial body of literature demonstrates that a lack of timely and accurate information during the justice process remains one of the biggest causes of victim frustration and dissatisfaction.<sup>1</sup> However, while access to information and consultation are key to victim participation, these enablers of participation are not equally or consistently available to all victims of crime under the Victims' Charter.

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## Information and consultation entitlements are not equal

As outlined in detail in **Chapter 6**, not all victims are treated equally in Victoria.

Under the Victims' Charter, victims in the indictable stream (prosecuted by the Director of Public Prosecutions (DPP)) are entitled to more specific information and consultation than victims in the summary stream (prosecuted by Victoria Police).<sup>2</sup> The differing information and consultation requirements under the Victims' Charter effectively create two tiers of victims in Victoria.

Victims told the VOCC that they had experienced this disparity:



*'I have also heard from other victims who were harmed as a result of summary offences and who feel like the court system has completely ignored them altogether. These people wanted a chance to give a Victim Impact Statement but were told they weren't able to do so for that type of offending. They therefore felt that their suffering was ignored and not taken into account.'*<sup>3</sup>

A number of victims' professionals surveyed by the VOCC were also concerned about the treatment of victims whose cases are heard in the summary jurisdiction (Magistrates' Court), where the VOCC was advised that victim participation is particularly lacking.

As noted in the Department of Justice and Community Safety (DJCS) 2021 report *Improving Victims' Experience of Summary Criminal Proceedings*, 'victim experience [in summary proceedings] is often secondary to the need to ensure cases are finalised efficiently'.<sup>4</sup>

Consistent with that research, the VOCC has found that the interests and entitlements of victims in the summary jurisdiction are often considered as an 'afterthought' or left to the 'good will' of certain justice personnel.

<sup>1</sup> Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth, March 2016) 13. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).

<sup>2</sup> The DPP must seek the views of a victim before making a decision to modify charges, discontinue the prosecution, accept a guilty plea to a lesser charge, appeal a sentence or acquittal. These requirements do not apply in the summary jurisdiction where Victoria Police prosecutes. See *Victims' Charter Act 2006* (Vic) s 9B (1).

<sup>3</sup> Consultation Meeting 20 – Victim Representatives – Victims of Crime Consultative Committee.

<sup>4</sup> Department of Justice and Community Safety, *Improving Victims' Experience of Summary Criminal Proceedings* (Final Report, November 2021) 17.

While reforms to secure enhanced victim entitlements over the years are promising, victims' entitlements to information and consultation under the Victims' Charter have not been based on notions of fairness and equity – or even on the Victims' Charter objective of reducing secondary victimisation.<sup>5</sup> If this was the case, all victims would be entitled to the same entitlements. Instead, victims' information and consultation entitlements under the Victims' Charter have been based on matters of funding, resourcing and efficiency – primarily reducing prosecution and court delay. This is evident from the DJCS 2021 report *Improving Victims' Experience of Summary Criminal Proceedings*. In that report, the DJCS acknowledges that the Victims' Charter consultation obligations were not extended to all types of cases in previous Victims' Charter reforms 'due to time constraints of summary proceedings and a desire to avoid measures that could cause further delay'.<sup>6</sup> In 2018, when introducing *The Victims and Other Legislation Amendment Bill 2018* to strengthen the rights of victims of crime as participants in the criminal justice system, the then-Attorney-General stated that expanded entitlements to information and consultation should not be provided to victims in the summary jurisdiction because this would 'compromise the early resolution of matters'.<sup>7</sup>

Once again, in 2021, the DJCS did not recommend that all victims have the same information and consultation rights under the Victims' Charter, prioritising the efficiency of the system over victims.<sup>8</sup>

When approaching Victims' Charter entitlements from a trauma-informed and victim-centred lens, and having regard to the participatory objectives outlined in section 4(1)(ba) of the Victims' Charter, it is difficult to identify a sound policy rationale for maintaining different tiers of entitlements for victims under the Victims' Charter.

## Creating equity in the Victims' Charter

A lack of consultation with victims during the justice process is associated with victims' disenchantment. Victims describe having limited or no opportunity to participate or have their voice heard during the criminal justice process.<sup>9</sup> On the other hand, with increased participation and voice in the criminal justice process, victims perceive a more equitable justice system.<sup>10</sup>

In acknowledgement of the victim's role as a participant, but not a party, the Victims' Charter should place all victims on an equal footing, providing all victims with the same opportunity to be provided with information and to be consulted, 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 experienced as 'less serious' by victims (or cause 'less harm' to victims) than those crimes heard in the indictable jurisdiction.<sup>11</sup>

**The Victims' Charter should place all victims on an equal footing, providing every victim with the same opportunity for to be provided with information and to be consulted, regardless of jurisdiction or prosecuting agency.**

All victims, regardless of the jurisdiction in which their matter is progressed, should have the same rights and entitlements enshrined in the Victims' Charter.

One of the few participatory entitlements granted to victims is that the DPP must consult with a victim of crime during the criminal justice process. Sections 9A–9C of the Victims' Charter set out the DPP's obligations to provide additional information to the victim about court proceedings and the progress of the case, to seek the victim's views before making certain key decisions (e.g. to accept a plea to a lesser charge), and to give the victim reasons for making certain key decisions.

5 *Victims' Charter Act 2006* (Vic) s 4(c).

6 Department of Justice and Community Safety (Victoria), *Improving Victims' Experience of Summary Criminal Proceedings* (Final Report, November 2021) 22.

7 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 July 2018, 2321 (Martin Pakula, Attorney-General).

8 Department of Justice and Community Safety (Victoria), *Improving Victims' Experience of Summary Criminal Proceedings* (Final Report, November 2021) 25.

9 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 44 <<http://link.springer.com/10.1007/978-3-030-61383-9>>.

10 Centre for Innovative Justice, *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.

11 Research suggests that the impacts of crime do not always correlate with crime types. 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: Bree Cook, Fiona David and Anna Grant, 'Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia' (Research and Public Policy Series No 19, Australian Institute of Criminology, 1999) x.

It is unjust that such basic entitlements as consultation with the prosecution are limited to a small proportion of victims in Victoria.<sup>12</sup>

A victim's entitlement to participate by receiving information and being consulted at key stages of the criminal justice process should be extended to all victims, including those whose matters are heard in the Magistrates' Court.

Victims' entitlements, particularly in the summary jurisdiction, are too often regarded as 'aspirational' or 'best practice' – adherence to them is contingent on them not inconveniencing the court, prosecution or defence (or affecting case throughput).

It is not unreasonable – or disproportionate – for victims of a serious crime to be provided the same rights and dignity as other victims of crime through provision of basic information about a case and having the right to be heard in relation to key prosecution decisions. As noted by the recent Victorian Parliamentary inquiry into Victoria's justice system:

victims of crime should have *equitable entitlements under the Victims' Charter regardless of the type of offending. All experiences of victimisation or crime is traumatising for victims.* Victims' interests are focussed on ensuring an appropriate response from the justice system. Therefore, the Committee recommends that the Victorian Government amends the Victims' Charter so that victims of crime have the same entitlements to information, regardless of whether a prosecuting agency is dealing with a summary or indictable offence.<sup>13</sup> (emphasis added)

Prosecutions, and the courts, must continue to adapt and evolve to better accommodate victims. The speed and nature of a court proceeding should not erode victims' entitlements to be consulted, just as the speed and nature of a proceeding should not impinge on an accused's right to a fair trial. As noted by the Victorian Parliamentary inquiry, section '9B(3)(b) of the Victims' Charter is an unnecessary roadblock for victims of crime to be engaged properly and consistently through the prosecution process'.<sup>14</sup>

The VOCC recommends that existing information and consultation requirements outlined in the Victims' Charter (as applicable to the DPP) should be extended to the summary jurisdiction.

Additionally, the Victims' Charter should be amended to remove the consultation exception in section 9B(3)(b) that relates to the DPP not having to seek the views of a victim if 'it is not practical to contact the victim given the speed or nature of the proceeding'.



## RECOMMENDATION 1

**The Victorian Government should introduce amendments to the Victims' Charter Act 2006 (Vic) to extend information and consultation requirements to the summary jurisdiction and remove the consultation exception in section 9B(3)(b).**

Amendments to the Victims' Charter should:

- extend the information and consultation requirements in sections 9A–9C so these obligations apply to all prosecuting agencies
- remove the consultation exception in section 9B(3)(b) that removes the obligation on the Director of Public Prosecutions to seek the views of a victim if 'it is not practical to contact the victim given the speed or nature of the proceeding'.

## Resourcing information and consultation rights

The DJCS in its 2021 report *Improving Victims' Experience of Summary Criminal Proceedings*, stated that extending a consultation obligation to victims in the summary jurisdiction, 'without a substantial system change and substantial increase in resourcing' would 'risk system failure'.<sup>15</sup> Significantly, Victoria Police members also told the VOCC during consultation that the logistics of managing victim liaison and consultation in the Magistrates' Court are already 'simply impossible'.<sup>16</sup>

<sup>12</sup> Issues experienced by victims in the summary jurisdiction can affect the highest proportion of victims in Victoria, given that the Magistrates' Court of Victoria deals with approximately 90% of all crimes against the person in Victoria. Magistrates' Court of Victoria, *Annual Report 2021–22* (Report, 2022) 6.

<sup>13</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 281 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

<sup>14</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 280 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

<sup>15</sup> Department of Justice and Community Safety (Victoria), *Improving Victims' Experience of Summary Criminal Proceedings* (Final Report, November 2021) 25.

<sup>16</sup> Consultation Meeting 18 – Victoria Police – Session 2.

One police member told the VOCC 'If you ask anyone I work with how is their day? We are at full steam every day and it's impossible for us to be under more pressure.'<sup>17</sup>

Similarly, in June 2023, staff at the Office of Public Prosecutions (OPP) were reported as saying that they were 'at breaking point', warning that 'the quality of their work is declining, meaning lesser outcomes for victims of crime'<sup>18</sup> as courts tackle the backlog of cases.

The VOCC acknowledges that enhancing and extending victims' rights requires resourcing, just as protecting the rights of the accused has resource and funding implications.<sup>19</sup> The VOCC also acknowledges that the Victorian Government has committed more than \$100 million since the 2019–20 budget towards improvements for victims such as the new Financial Assistance Scheme for victims and for the Intermediary Program.<sup>20</sup> The VOCC welcomes the government's investment in these areas to support victims. However, as this report demonstrates, victims have many needs and interests and require a wide range of supports to be able to participate in the justice system, protect them from secondary trauma and to help them recover from the effects of crime.

Lack of funding and resourcing cannot continue to be used as a justification for keeping victims' rights below an acceptable standard. All victims, regardless of jurisdiction or speed of the process, should be offered the same opportunity to participate.

The Victorian justice system must adapt to better accommodate victims. Practices of the court, prosecution and defence must evolve so that victims' entitlements are respected and implemented in practice.

The VOCC expects any changes to victims' entitlements would be met by appropriate resourcing and investment in the relevant agencies, who would be required to uphold victims' rights. Victims' rights should not just exist 'on paper' – agencies must be provided with sufficient funding and resourcing to make these rights a reality.

However, the VOCC notes that bringing about fostering significant change for victims is not just a matter of funding or resourcing. Significant change requires:

- courts and agencies to change their procedures and practices
- adapting processes and business systems to support new procedures and practices
- cultural change in the understanding, attitudes and behaviours of the people responsible for supporting and upholding victims' rights and participation.

Given advances in technology, communication methods and IT infrastructure, particularly since the introduction of the Victims' Charter (and more specifically, since COVID-19), the VOCC considers that targeted work should be prioritised within justice agencies to explore how victims can be better accommodated during decision-making processes in the summary jurisdiction without unduly delaying the court.

While it is beyond the scope of this inquiry to examine individual agency responsibilities under the Victims' Charter, and the funding levels or arrangements of these agencies, it is clear that funding and appropriate resourcing of justice agencies is key to the successful implementation of victims' entitlements and the sustainability of recommendations in this report, including the recommendations outlined above.

The VOCC recommends that the Victorian Government assess funding levels and arrangements for relevant justice agencies, ensuring any changes to extend and enhance information and consultation requirements under the Victims' Charter are accompanied by appropriate investment to uphold victims' rights.

Funding and resourcing alone are also not sufficient – agencies must also adapt their business, operations and policies to realise these rights and continue to focus on cultural change.

**Funding and resourcing alone is also insufficient – agencies must also adapt their business, operations and policies to realise these rights and continue to focus on cultural change.**

<sup>17</sup> Consultation Meeting 18 – Victoria Police – Session 2.

<sup>18</sup> Shannon Deery 'Alarm Over the Office of Public Prosecution's Capacity to Tackle Court Backlogs', *Herald Sun* (online, 14 June 2023) <<https://www.heraldsun.com.au/truecrimeaustralia/police-courts-victoria/alarm-over-the-office-of-public-prosecutions-capacity-to-tackle-court-backlogs/news-story/8eee8f83e944744960aa17512a956d01>>.

<sup>19</sup> For example, Victoria Legal Aid and Community Legal Centres assist those who cannot afford legal representation, ensuring the rights of the accused are protected and upheld during criminal hearings and trials.

<sup>20</sup> Enver Erdogan (Minister for Victim Support), 'Public Accounts and Estimates Committee: Budget Estimates Hearings' (15 June 2023) <<https://new.parliament.vic.gov.au/4a0020/contentassets/214a6d967d5f44a080307eb19a120e48/victim-support.pdf>>.



**RECOMMENDATION 2**

**The Victorian Government should assess funding levels and arrangements for justice agencies with statutory obligations under the *Victims' Charter Act 2006 (Vic)*, ensuring any changes to extend and enhance information and consultation requirements under the *Victims' Charter* are accompanied by appropriate resourcing.**

In assessing agencies' ability to meet victims' rights and entitlements, the Government and agencies should consider:

- ways in which agencies could adapt their business, operations and policies to better realise victims' rights
- advances in technology, communication methods and IT infrastructure and how improved IT infrastructure could better accommodate victims during decision-making processes while not unduly delaying the courts.

## Enhancing Victims' Charter compliance

### Victims' charter breaches are not always detected

As noted above, a major theme underpinning lack of participation for victims was not getting the information needed, or not getting information often enough or in ways that assisted victims to participate. This included from police and prosecution and spanned the investigation, prosecution and court processes, including in circumstances where victims are entitled to information and participation under the Victims' Charter.

An overwhelming majority (75 per cent) of respondents to the VOCC's Victims' Survey advised that agencies had not told them about the Victims' Charter. Being unaware of the Victims' Charter makes identifying Victims' Charter breaches difficult for victims, if not impossible.

Stakeholders told the VOCC that in addition to victims lacking awareness of the Victims' Charter, the Charter 'lacks teeth' and its remedies are ineffective for victims, including the VOCC's complaints powers. As one respondent to the Victims' Professional Survey stated in relation to the Victims' Charter: 'Effective how? If Police don't update on proceedings, victims can't make a complaint until the end of the process. The Charter doesn't actually do anything to correct victims' individual experiences.'

While victims can initiate a Victims' Charter complaints process via the VOCC, these complaints options are limited. Specifically, the VOCC cannot investigate a complaint where there is an ongoing criminal investigation, hearing or trial.<sup>21</sup> The VOCC cannot set aside decisions or refer decisions back to the original decision maker for review.<sup>22</sup> This limits the extent to which the VOCC can intervene in a substantial way. For example, if a victim was not advised of a plea hearing and missed the opportunity to make a Victim Impact Statement (VIS), the VOCC cannot intervene to require that courts provide a victim with the opportunity to make a VIS prior to sentencing.

Because of challenges in securing effective remedies for victims via a complaints process alone, the VOCC considers more needs to be done to uphold victims' rights at the time of a potential Victims' Charter breach.

<sup>21</sup> *Victims of Crime Commissioner Act 2015 (Vic)* s 25I.

<sup>22</sup> For example, the VOCC cannot review a decision involving the exercise of prosecutorial discretion: *Victims of Crime Commissioner Act 2015 (Vic)* s 25I(3)(a).

## Upholding victims' rights when breached

Regardless of complaints options or remedies following a breach of the Victims' Charter, a victim's priority is having their rights respected and participating in the proceeding from the outset.

Complaints pathways should not be the sole option for breaches of individuals' Victims' Charter entitlements.

The VOCC considers that timelier 'checks and balances' during the justice process would ensure victims do not carry the burden of instigating a complaints process after a Victims' Charter breach has occurred, particularly as this means practical remedies are limited.

As noted by Wemmers, 'it is not enough to give rights to victims; one must also consider how these rights are implemented'.<sup>23</sup>

A victim's priority is having their rights respected and participating in the proceeding in the first place.

## Ensuring agencies comply with their duties towards victims

When a case is heard in court, judges and magistrates are well placed to prevent breaches of victims' rights and entitlements. At an application, or during a hearing or trial, judicial officers have the ability and authority to check whether the prosecution has met its statutory obligations towards the victim.

The VOCC considers that courts can, and should, proactively ensure that victims' rights and entitlements under the Victims' Charter are respected. Checking that a victim's rights and entitlements have been met would help to ensure that victims' rights and entitlements are respected throughout criminal justice processes.

This reflects the triangulation of interests in a fair trial and recognises victims as participants in a more meaningful way.

Courts can, and should, proactively ensure that victims' rights and entitlements under the Victims' Charter are respected.

In practice, this might mean, for example, that judicial officers would, at relevant times, ask the prosecution whether:<sup>24</sup>

- they have provided information to the victim(s) about hearings and/or other court and prosecution processes and the outcome of such notification
- they have provided information to the victims about their options to attend hearings<sup>25</sup>
- they have consulted the victim before accepting a plea to lesser charges<sup>26</sup>
- a victim has been notified about an application to access the victim's confidential communications, asked whether they wish to be heard on the application, and notified about their right to legal assistance in relation to this application
- a victim has been advised of the availability of special protections or alternative arrangements for giving evidence
- the victim wishes to make a VIS and if so, the outcome of this.

If courts proactively focused on ensuring that victim's rights and entitlements were respected before certain proceedings are finalised or progressed, this would also provide a clear demonstration to victims that they are relevant to criminal proceedings and that their rights and entitlements matter. It would enable any failures to be addressed quickly and without significant delay to the proceeding. These preventative steps would provide victims with substantive redress for an agency's failure to uphold victims' rights and entitlements without relying on victims to instigate a complaints process.

<sup>23</sup> Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and Their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221, 230.

<sup>24</sup> These examples are based on victims' entitlements as currently set out in the Victims' Charter or other relevant legislation. The court's enquiry would necessarily change if the victim's rights and entitlements changed.

<sup>25</sup> The Judicial College Victoria's guide to judicial officers states judicial officers should accommodate victims' needs in the court room: Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide, 2019) 7 - [https://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20the%20Courtroom\\_WholeDoc.pdf](https://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20the%20Courtroom_WholeDoc.pdf).

<sup>26</sup> The prosecution would not need to say whether the victim agreed or disagreed with the plea as the victim's entitlement is to be consulted.

As raised in the VLRC's 2016 report *The Role of Victims of Crime in the Criminal Trial Process*, an enforcement mechanism incorporated into the court process might improve prosecuting agencies' compliance.<sup>27</sup> Knowing that a court will check what they have done – or not done – might make prosecuting agencies and their lawyers more accountable.

Judicial checking would not provide victims with independent standing to commence an action to enforce their rights and entitlements. However, by taking preventative steps, courts could play a critical role in ensuring that victims can exercise their participatory rights and entitlements. This reflects the triangulation of interests in a fair trial and recognises victims as participants in a more meaningful way.

To ensure that victims' rights and entitlements are respected throughout criminal justice processes, the VOCC recommends changes be made to the Victims' Charter – and any other relevant legislation – to require courts to make enquiries that the prosecution has met its obligations concerning victims' participatory rights at key points in the criminal trial and hearing process.

Introducing a form of judicial checking of those rights and entitlements that affect victims' ability to participate in a proceeding would also address concerns raised by prosecutors that they are unable to meet their statutory obligations towards victims because of the pressure imposed by courts to expedite and resolve cases. During consultation, the VOCC was told that time pressures are 'primarily driven by the courts'<sup>28</sup> and 'the court's number one issue is their time'.<sup>29</sup> Victoria Police members advised the VOCC that there is pressure on prosecutors and defence to progress matters and that to redress participation for victims around plea negotiations 'would require a level of engagement that is entirely at odds with the pressure coming from the courts'.<sup>30</sup> Victoria Police members told the VOCC:

It is a dynamic environment in the court, things can change quickly and quite often the victim isn't there. Decisions get made quickly and that's not to say we don't consider the victim, but it's a very dynamic environment...There's a whole heap of matters backed up with COVID so there's pressure to keep things moving along. Quite often we're told to go outside and reconsider [the prosecution position], so there's pressure to resolve.<sup>31</sup>

It is important that cases are not unnecessarily delayed. This may require police, defence lawyers and the courts to consider how best to address delays while improving the way in which they respect the rights and entitlements of victims. Continuing to adapt to new environments and challenges is essential and should not come at the expense of victims' rights and entitlements.

In this context, a form of judicial checking to ensure that agencies have met a victim's rights and entitlements would ensure courts and prosecutors are working together to facilitate victim participation, with both having to turn their mind to the rights and entitlements of victims before matters are progressed.

<sup>27</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 60.

<sup>28</sup> Consultation Meeting 18 – Victoria Police – Session 2.

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

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

**RECOMMENDATION 3**

**The Victorian Government should introduce amendments to the *Victims' Charter Act 2006* (Vic) – and any other relevant legislation – to require courts to ensure that the prosecution meets its obligations concerning victims' participatory rights at key points in the criminal trial and hearing process.**

Where a victim has a right or entitlement that is relevant to their ability to participate in a court proceeding, courts should proactively check whether the prosecution has met its obligations concerning victims' participation rights. This would include, for example, the judicial officer checking whether:

- the victim has been provided with information about their options to attend hearings
- prosecutors have consulted the victim before accepting a plea
- the victim has been notified about an application to access the victim's confidential communications and asked whether they wish to be heard on the application
- the victim has been notified about an application to question them about their sexual history or to subpoena personal information about them
- the victim has been advised of the availability of any special protections or alternative arrangements for giving evidence
- the victim wishes to make a Victim Impact Statement.

## Accountability and transparency in decision making

As outlined above, the VOCC considers that stronger systems are required to uphold victims' entitlements and improve outcomes for victims. There needs to be a range of accountability measures to encourage improved compliance with the Victims' Charter and to strengthen victims' participatory rights.

While research indicates many victims do not want 'veto' or ultimate decision-making power, many victims are still dismayed by the finality of certain police and prosecution decisions.<sup>32</sup> As noted by Dr Mary Iliadis and Associate Professor Asher Flynn in relation to prosecution decisions specifically, such decisions involve 'a high level of discretion' and 'have not traditionally been subject to external scrutiny or review'.<sup>33</sup>

**While research indicates most victims do not want 'veto' or ultimate decision-making power, many victims are dismayed by the finality of certain police and prosecution decisions.**

In the VOCC's 2021-22 Annual Report, it was noted that a systemic trend emerging from enquiries and complaints data was victim dissatisfaction concerning investigatory and prosecutorial decisions, such as failure to investigate or prosecute. Victims raised concerns that these decisions lacked transparency and accountability and that there were limited avenues to have such decisions independently reviewed.<sup>34</sup>

<sup>32</sup> Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 93–6 <<http://link.springer.com/10.1007/978-3-030-61383-9>>.

<sup>33</sup> Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victim's Right to Review Reform' (2018) 58(3) *British Journal of Criminology* 550, 550.

<sup>34</sup> Victims of Crime Commissioner, *Annual Report 2021-22* (Report, December 2022) 35.

The VLRC noted in its 2021 report *Improving the Response of the Justice System to Sexual Offences*, with any exercise of public power, there are benefits in processes of review and accountability which include:

- improving the quality of decision making
- providing transparency and accountability
- ensuring that people can provide their views before key decisions are made.<sup>35</sup>

## Victim participation in decision making

Victims have told the VOCC about not being able to get an appropriate response from police, including not being given any information about why matters had not progressed and feeling confused as to why cases had been ‘dropped’ or ‘dismissed’. In some cases, victims told the VOCC about being dismissed, dissuaded, or prevented from reporting entirely.

Victims raised concerns with the VOCC that police had not investigated their reports appropriately and that there had been a lack of rigour in the investigation process. For certain victims, there were additional barriers, including:

- where a Victoria Police member had perpetrated a crime
- where victims of sexual assault were made to feel unsafe, trivialised or treated with scepticism
- where a victim had been misidentified as the predominant aggressor in a family violence matter
- where police in rural and regional communities know each other and the community.

Victims also told the VOCC of their dismay at the way in which certain prosecution decisions were made and the lack of consultation with victims, despite entitlements under the Victims’ Charter.

Section 9B of the Victims’ Charter requires the DPP to seek the views of victims before making certain key decisions (e.g to discontinue charges or to accept a plea of guilty to a lesser charge). Victims raised concerns that consultation with victims is not meaningful or is merely a ‘tick the box’ exercise.

In 2023, victim-survivors raised their concerns in the media about prosecution decision making and victim consultation.<sup>36</sup>



### **Issues raised in ABC News article *Survivors of sexual abuse and victims’ families raise concerns over dealings with Victoria’s state prosecutors***

- After watching their abuser plead guilty to reduced charges and receive a non-custodial sentence, victim-survivors Ms Parsons and Ms Goss ‘say their experiences at the hands of Victoria’s Office of Public Prosecutions (OPP) has left them feeling “abandoned” and “ignored”’.
- When the OPP called Lee Little’s ‘family in for a meeting one week before Alicia’s killer was to be tried for murder, she says they were told that he had agreed to plead guilty to dangerous driving causing death instead ... Lee Little said the representatives in the room made it clear that the decision had been made, and there was nothing the family could do. “We were gobsmacked. Our views weren’t considered,” she said.’
- Mr and Mrs Forrest were asked by the OPP ‘to attend a meeting to discuss a potential plea before the trial and ask any questions they had. “When we got there, they’d already made their minds up and they said ‘We’re going to plead [to three counts of arson causing death] ... and that’s the way it’s going to be,’” Mr Forrest said.’

<sup>35</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 381.

<sup>36</sup> Jessica Longbottom, ‘Survivors of Sexual Abuse and Victims’ Families Raise Concerns over Dealings with Victoria’s State Prosecutors’, ABC News (online, 6 March 2023) <<https://www.abc.net.au/news/2023-03-06/child-sexual-abuse-survivors-office-of-public-prosecutions-court/102031750>>.

## Victims' right to review schemes

In the United Kingdom, victims have a right to seek a review of certain decisions, including where police have decided to charge or where a prosecution has not proceeded.<sup>37</sup> This is called a Victims Right to Review (VRR) scheme. The VRR involves an internal review by a separate unit within the Crown Prosecution Service (the Appeal and Review Unit), rather than an independent review (conducted by someone employed or engaged by another body).

A review of 2833 cases between 1 June 2013 and March 2015 found that 372 decisions (13 per cent) had been overturned under the UK's VRR scheme.<sup>38</sup> While the numbers are smaller, in 2021–22 the Victorian Office of Public Prosecutions handled 478 new sexual offence matters.<sup>39</sup> Victoria Police prosecutes a much larger number of matters.<sup>40</sup>

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'.<sup>41</sup> Academics have referred to the potential for increased satisfaction and empowerment for victims with review mechanisms.<sup>42</sup> Dr Mary Iliadis has argued that there may also be further benefits if the review process operates independently. It avoids the review process being conducted by close colleagues of the original decision maker, it is more likely to identify 'gaps in decision-making processes and offer more transparency and accountability to victims'.<sup>43</sup>

While Victoria does not have a scheme that provides victims with a right to an independent (external) review of police and prosecutorial decisions,<sup>44</sup> the possibility of a review scheme in Victoria has been raised in a number of inquiries.

In its 2016 report *The Role of Victims of Crime in the Criminal Trial Process*, the VLRC discussed, but ultimately did not recommend, an independent VRR scheme for Victoria. It did, however, consider such a scheme should be revisited in five years after further work had been done to reform internal review mechanisms within the OPP.<sup>45</sup>

In its 2021 report, *Improving the Response of the Justice System to Sexual Offences*, the VLRC stated it was concerned that 'we do not know enough about the quality of [police and prosecution] decision-making processes'.<sup>46</sup> The VLRC stated that, specifically in relation to sexual assault:

We continue to be concerned that victim survivors do not feel confident in the validity, transparency and accountability of the decision-making process. Too many are left without a good enough explanation or understanding of why the case did not proceed.<sup>47</sup>

The VLRC stated: 'We need to understand more about why police and prosecution cases do not progress and introduce more independence and accountability into decision making by police and prosecution'.<sup>48</sup>

The VLRC recommended that an independent panel be established to review police and prosecution decisions in sexual offence cases, either individually or systemically. The VLRC recommended a model of independent review that would:

- review the quality of decision making
- make recommendations to the police and prosecution to continue with charges
- make recommendations to address other issues identified as part of that review
- leave the final decision to the police and prosecution.<sup>49</sup>

37 In the United Kingdom, victims can seek a review of certain Crown Prosecution Service decisions, including where a prosecution has not proceeded: Crown Prosecution Service, *Victims' Right to Review Scheme*, (Web Page, 27 May 2021) <<https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme#a02>>. 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 Crown Prosecution Service: *Rights of Women, A Guide to the Victim's Right to Review Scheme* (Web Page) <<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.

38 Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victim's Right to Review Reform' (2018) 58(3) *British Journal of Criminology* 550, 564.

39 Office of Public Prosecutions, *Annual Report* (Report, 2021–22), 13.

40 The Crime Statistics Agency reported that in the year ending 31 December 2016, Victoria Police recorded 12,956 sexual offences: Crime Statistics Agency, *Spotlight: Sexual Offences*, (Web page) <<https://www.crimestatistics.vic.gov.au/index.php/crime-statistics/download-crime-data/year-ending-31-december-2016/spotlight-sexual-offences>>.

41 Claire Waxman, *Review of Compliance with the Victims' Code of Practice: Findings, Recommendations and Next Steps* (Report, March 2019) 16.

42 Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victim's Right to Review Reform' (2018) 58(3) *British Journal of Criminology* 550, 566.

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

44 The DPP has a 'Discontinuance Review Framework'. A decision to discontinue a prosecution is considered by at least two of the OPP's most senior decision makers. Only the DPP, or a Senior Crown Prosecutor (SCP) with a power delegated by the DPP, can discontinue a proceeding. If a Crown Prosecutor and a SCP reach different conclusions, the decision is reviewed by the DPP and the final decision is made by the DPP. Under the Victims' Charter, the prosecution must seek the views of the victim before making a decision to discontinue a case. The OPP's policy is to seek the victim's views before a Crown Prosecutor provides their advice. If the Crown Prosecutor recommends discontinuing, the OPP's policy is to seek the victim's views again so that victims can provide any further views before a final decision is made: Kerri Judd KC, Director of Public Prosecutions (Victoria), *Discontinuance Review Framework* <<https://www.opp.vic.gov.au/Home/Resources/Discontinuance-Review-Framework>>.

45 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 76.

46 *Ibid* 381.

47 *Ibid*.

48 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 348.

49 *Ibid* 382.

Put simply, the independent review mechanism would ‘review cases with fresh eyes to assess if cases should be progressed further’.<sup>50</sup>

Under the VLRC’s proposed model, there would also be a ‘systemic review’ function which would involve:

- conducting thematic reviews of cases and assessing the standard of casework
- identifying ways of improving procedures, including how prosecutors treat victims and improve procedural justice for victims
- identify any legal issues that act as barriers to decision making.<sup>51</sup>

A 2021 parliamentary inquiry recommended that the Victorian Government introduce a VRR scheme under the Victims’ Charter which would allow victims of sexual offences<sup>52</sup> to request an internal review of decisions made by police or a prosecuting agency to not file charges or to discontinue a prosecution.<sup>53</sup>

The parliamentary inquiry also recommended that the Victorian Government direct the Victorian Auditor-General’s Office to evaluate existing internal review schemes for all victims of crime (not just victims of sexual offences) to determine if an independent external right to review scheme should be open to all victims of crime.<sup>54</sup>

## A right to review certain decisions

Victims’ participation increasingly involves holding agencies accountable for their conduct. The VOCC considers that accountability includes a victim being able to seek some form of external review of significant decisions, particularly decisions made with a high degree of discretion.

For example, when deciding whether to prosecute a person, the Victorian DPP’s Policy states that prosecution may only proceed if:

- there is a reasonable prospect of conviction, and
- a prosecution is in the public interest.<sup>55</sup>

The DPP’s Policy then sets out several pages of criteria that are relevant, or not relevant, to determining these two matters. For example, in relation to whether a prosecution is in the public interest, the prosecution must consider:

- offence-related factors (e.g. the seriousness of the offence)
- offender-related factors (e.g. the offender’s culpability, antecedents and background)
- victim-related factors (e.g. the attitude of the victim to a prosecution), and
- other factors (e.g. the likely sentence, the prevalence of the offence, the likely length of a trial).<sup>56</sup>

In each case, prosecutors must decide the importance of each of these many factors. As Jonathan Doak says, ‘the weight attributed to each of these factors in establishing whether or not there is a sufficient public interest to prosecute is a matter of subjective assessment’.<sup>57</sup>

As in judicial decision making, where judges can overturn the decisions of other judicial officers, ‘reasonable minds often differ on prosecutorial decisions’.<sup>58</sup> The OPP has recently noted in the context of crimes involving ‘recklessness’ that ‘Crown Prosecutors and the Director of Public Prosecutions are commonly faced with difficult choices, including whether to discontinue a charge, or resolve a prosecution on a basis that does not necessarily adequately reflect the gravity of the harm done to victims’.<sup>59</sup>

50 Ibid.

51 Ibid.

52 The inquiry did not recommend this right to review extend beyond sexual offences.

53 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria’s Criminal Justice System* (Final Report, 2022) 396 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSI\\_C\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSI_C_59-10_Vic_criminal_justice_system.pdf)>.

54 Ibid.

55 Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria*, <<https://www.oppvic.gov.au/wp-content/uploads/2022/10/DPP-Policy.pdf>> 3. The Victorian DPP’s policy is very similar to policies in many other common law jurisdictions.

56 Ibid 3–4.

57 Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconciling the Role of Third Parties* (Hart Publishing, 2008) 121.

58 Kellie Toole, ‘Lehrmann Inquiry: What’s a Director of Public Prosecutions or DPP? A Legal Expert Explains’, *The Conversation* (online, 26 May 2023) <<https://theconversation.com/lehrmann-inquiry-whats-a-director-of-public-prosecutions-or-dpp-a-legal-expert-explains-206194>>; David Estcourt and Chris Vedelago, ‘Top Legal Minds Urge DPP to let Jury Decide Gobbo and Police Guilt’, *The Age* (online, 22 June 2023) <<https://www.theage.com.au/politics/victoria/careful-and-realistic-public-prosecutor-defends-lack-of-lawyer-x-charges-20230622-p5dijj.html>>.

59 Office of Public Prosecutions (Victoria), Submission No 10 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 5.



Significant work has been done within the DPP/OPP to provide victims with better access to reasons for prosecutorial decisions,<sup>60</sup> and a discontinuance review framework has been established.<sup>61</sup> However, the VOCC considers that an independent right to review scheme in Victoria is needed to provide victims with an avenue to seek independent review of certain police and prosecutorial decisions after proper internal review processes have been exhausted.

Police and prosecutors make many and difficult decisions. In any exercise of public power, there are benefits in processes of review and accountability. These include improving the quality of decision making and providing transparency and accountability.<sup>62</sup>

The VLRC said that resistance to a model of independent review of police and prosecution decisions was based on concerns that an independent review process might interfere with the independence of police and prosecution decision making (for example, if the DPP were required to prosecute a case that the DPP had decided should not be prosecuted).<sup>63</sup> However, as noted by the VLRC, assessments made in relation to evidence, reliability and credibility 'should be subject to scrutiny, so that we can be sure that flawed reasoning about a person's credibility or reliability is not the reason a case has been discontinued'.<sup>64</sup>

The VOCC considers that there are ways to introduce independent review mechanisms that do not disrupt the duties of police or prosecutors or erode their independence.

An independent review model would allow for 'the testing of assumptions that might be held by the police and prosecution'.<sup>65</sup> A model of review would help to address concerns about whether misconceptions and biases are affecting decision making.

The VOCC considers that there are ways to introduce independent review mechanisms that would not disrupt or interfere with the duties of police or prosecutors or erode their independence. For example, the model proposed by the VLRC accepts that the review process should leave the final decision to the police and prosecution.<sup>66</sup>

The VOCC recommends that an independent victim right to review scheme in Victoria should be introduced.<sup>67</sup> 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.

The VOCC considers the structure and make-up of the review mechanism to be a matter for government following extensive victim and stakeholder consultation.

The types of decisions that can be reviewed, and the trigger for a matter to be eligible for independent review, would also need to be determined after comprehensive consultation with victims, victims' professionals, Victoria Police members and the OPP. However, the VOCC considers it would be appropriate for the independent review mechanism to:

- enable individual case reviews at the request of victims
- review cases without a request from a victim for the purposes of enabling a broader oversight, review and advisory mechanism to address systemic issues relating to certain decision making
- enable review in circumstances where police have:
  - failed to take a complaint or report from victims and have failed to provide sufficient information on why, and have failed to provide information on how to request an internal review of such a decision
  - decided not to file charges and have failed to provide sufficient information on why a matter cannot proceed, and have failed to provide information on how to request an internal review of such a decision.
- enable review of prosecution decisions:
  - after a victim has exhausted avenues under the (internal) DPP's Discontinuance Review Framework

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

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

62 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 381.

63 *Ibid* 380.

64 *Ibid* 381.

65 *Ibid* 383.

66 *Ibid* 382.

67 Academics point to the importance of independent review schemes operating separately from the original decision-making body. See, e.g., 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: Overlooked and Unimpressed* (Springer International Publishing, 2021) 71 <<http://link.springer.com/10.1007/978-3-030-61383-9>>



- where a prosecutor has failed to meet their obligations under the Victims' Charter to seek the victim's views before making certain key decisions.

It is also essential that the process be developed in a way that is trauma-informed and victim-centred. Most victims seeking independent review will (at a minimum) be upset, disappointed, confused, and feeling powerless. Victims who have a case considered as part of a broader review (rather than because they have requested a review), may need support because a review may find that problems existed which affected their case. It is therefore important that review processes are developed in ways that are consistent with, and promote, Victims' Charter principles.

Further, to ensure victims can participate meaningfully in any new review process, victims should also have access to independent legal advice and assistance to facilitate their participation. Access to legal assistance is discussed further in **Chapter 15**.



#### RECOMMENDATION 4

**The Victorian Government should establish an independent review mechanism enabling victims to seek a review of certain police and prosecution decisions once internal review mechanisms have been exhausted.**

Victims should have an avenue of independent review in circumstances where police have:

- failed to take a complaint or report from victims and have failed to provide sufficient information on why, and on how to request an internal review of such a decision
- decided not to file charges and have failed to provide sufficient information on why a matter cannot proceed, and on how to request an internal review of such a decision.

Victims should have an avenue of independent review of prosecution decisions in circumstances where:

- a victim has exhausted avenues under the DPP's Discontinuance Review Framework
- a prosecutor has failed to meet their obligations under the Victims' Charter to seek the victim's views before making certain key decisions.

## Victims' rights as human rights

### Why are rights important?

As noted by academics Holder, Kirchengast and Cassell, rights matter because legal authorities recognise and respond only to those who possess them.<sup>68</sup> Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter) does not specifically recognise victims in the justice system, whether as participants in the justice system or in other ways.

The Human Rights Charter does recognise victims as having 'general' rights such as the right to life, the right to protection from cruel, inhuman or degrading treatment and the right to privacy and reputation.

Holder, Kirchengast and Cassell argue that jurisdictions should recognise victims' rights and entitlements as human rights. They argue that this could help to change our understanding of victims' rights in the following ways:

- **Human rights provide a normative basis for victims' rights.** While a person's status as a victim may be transitional, their interests are not peripheral to the state's obligations to its citizens, they are 'intrinsic and inalienable'.<sup>69</sup>
- **Characterising victims' rights as human rights changes the relationship investigatory and prosecuting agencies have with victims.** The relationship moves from one of respect (where victims' rights are essentially unenforceable) to one of agencies being 'duty-bearers' in relation to the rights of victims.<sup>70</sup>

<sup>68</sup> 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, 3.

<sup>69</sup> *Ibid* 7.

<sup>70</sup> *Ibid*.

- **Identifying that victims' have human rights helps to separate the interests of victims from the interests of the prosecution.** It asserts that victims' interests are not simply against offenders but exist in relation to the state. It also shows that victims, like the accused, have rights.
- **Human rights can provide a robust structure, language and jurisprudence for rigorous examination of the tension that exists between rights that different persons and groups may have.**<sup>71</sup> Using a human rights framework to recognise victims' rights focuses on the tension between rights and finding ways of resolving or reconciling those tensions rather than disregarding victims' interests.

If a person has a right, then a 'duty-bearer' (such as investigatory and prosecuting agencies and potentially courts) would have an obligation to respect that person's right. This is consistent with the view that the harm caused by a crime is not simply an act against the state but violates the human rights of victims, and that the law should separately recognise victims' rights. Wemmers argues that:

victims' rights are human rights and that crime constitutes a violation of their rights as well as an act against the state and, in turn, that victims require recognition as persons before the law.<sup>72</sup>

Holder, Kirchengast and Cassell suggest that there has been a pervasive view that state entities only hold duties towards offenders because there has been a belief that the interests of victims were the same as the interests of the state. They suggest that '[u]nderstanding victims as independent actors in criminal justice processes underscores the distinct status of victims' rights'.<sup>73</sup>

Holder, Kirchengast and Cassell also assert that categorising victims' rights as human rights reconceptualises a failure to afford victims rights not merely as 'unfortunate', 'unintentional', or the result of 'voluminous workloads' of justice agencies, but rather that 'these everyday administrative omissions are an oppressive, even intrusive, abuse of power'.<sup>74</sup>

## Victims' rights as human rights in Victoria

In its 2016 report *The Role of Victims of Crime in the Criminal Trial Process*, the VLRC observed that while the Human Rights Charter 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 the Human Rights Charter would add to the integrity of what constitutes a fair trial in Victoria.<sup>75</sup>

In 2016, the VLRC recommended that the Human Rights Charter be amended to include a right for a victim of a criminal offence to be:

- acknowledged as a participant (but not a party) with an interest in the proceedings
- treated with respect at all times
- protected from unnecessary trauma, intimidation and distress when giving evidence.<sup>76</sup>

These rights would not be the only rights that victims could have in Victoria. The VLRC envisaged that these rights would act as minimum guarantees of victims' rights. Therefore, legislation such as the Victims' Charter could provide additional rights to victims, and agencies providing services to victims could provide better services than those required by these minimum guarantees.

The VLRC said that incorporating the interests of victims into the Human Rights Charter would:

- be relevant to the drafting and interpretation of legislation
- place obligations on the court to protect and secure the interests of victims
- be relevant to the policy development of legislative reforms to the criminal justice system because victims' rights and interests would need to be considered by Cabinet and by parliament in the statement of compatibility.<sup>77</sup>

In its 2021 *Inquiry into Victoria's Criminal Justice System*, the Legislative Council Legal and Social Issues Committee (the Committee), said the rights of victims are implicitly protected under the Human Rights Charter because the accused's fair hearing rights involve a triangulation of interests.

<sup>71</sup> Ibid.

<sup>72</sup> Jo-Anne Wemmers, 'Victims' Rights Are Human Rights: The Importance of Recognizing Victims as Persons' (2012) 15 *Temida* 71, 72.

<sup>73</sup> 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.

<sup>74</sup> Ibid 7.

<sup>75</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 48.

<sup>76</sup> Ibid: recommendation 2.

<sup>77</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 35, 40.

While it may be correct that the rights of victims are implicitly protected under the Human Rights Charter, victims' rights are broader than those protected (implicitly) under the Human Rights Charter.

Furthermore, the Human Rights Charter's 'fair hearing' provisions only refer to the accused's rights. Sections 24 and 25 expressly state that they apply to 'a person charged with a criminal offence', that is, they are the accused's rights. As a result, victims' rights only exist as far as they are relevant to understanding the accused's rights. However, victims' interests often concern the relationship between victims and the state rather than victims and the accused. The Human Rights Charter therefore does not recognise all victims' rights and interests.

The Human Rights Charter is based on the International Covenant on Civil and Political Rights which was created in 1966 and the European Convention on Human Rights which was created in 1953. These human rights instruments developed in the context of a binary understanding of fair trial requirements. This explains why the Human Rights Charter only envisages victims' rights indirectly through the accused's rights. The notion of a triangulation of fair trial interests only developed (or was recognised by a court) in the last 25 years. As a result, victims' rights and the triangulation of interests are not fully recognised in the Human Rights Charter.

Victims' rights and the triangulation of interests are not fully recognised in the Human Rights Charter.

## Victims should be recognised in the Human Rights Charter

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'.<sup>78</sup> Rather than destabilising concepts such as the right to a fair hearing, articulating victims' entitlements as human rights would ensure a focus on victims' rights in parallel to – not opposition with – rights of the accused. It would provide a strong framework for public authorities to make fairer decisions and balance competing interests.<sup>79</sup>

Legal authorities recognise and respond to those who have legal rights. In the Human Rights Charter, victims' human rights are only recognised in a narrow way, namely to the extent that they are relevant in understanding the accused's rights.

Associate Professor Tyrone Kirchengast told the VOCC that victims' rights are ambiguous and unenforceable:

everyone is left confused by this ambiguous standing of victim rights that don't fit with conventional rights discourse. Where if you look at offender rights, they're always presented in the context of being substantive and enforceable. There aren't any rights for offenders that can't be enforced. They might be levels of enforcement, but they're all real and substantive rights. But victims have not shared in that history of rights development.<sup>80</sup>

Amending the Human Rights Charter would recognise that victims have their own rights and status which are not only relevant in understanding the accused's fair hearing rights. That means victim's rights would be relevant irrespective of whether they affect the accused's rights.

The incorporation of victims' rights into the Human Rights Charter 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, Victoria's Human Rights Charter helps public authorities 'make fairer decisions', 'balance competing interests' and 'is a tool to humanise the bureaucracy'.<sup>81</sup> For example, the *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*<sup>82</sup> which outlines the attributes the government, courts and community expect from judicial

Amending the Human Rights Charter would recognise that victims have their own rights and status which are not only relevant in understanding the accused's fair hearing rights.

<sup>78</sup> Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (2019) 7 <[https://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20the%20Courtroom\\_WholeDoc.pdf](https://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20the%20Courtroom_WholeDoc.pdf)>.

<sup>79</sup> Victorian Ombudsman, *The Ombudsman for Human Rights: A Casebook* (August 2021) 6.

<sup>80</sup> Consultation Meeting 3 – Dr Robyn Holder and Associate Professor Tyrone Kirchengast.

<sup>81</sup> Victorian Ombudsman, *The Ombudsman for Human Rights: A Casebook* (August 2021) 6.

<sup>82</sup> Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* (September 2008) <<https://www.judicialcollege.vic.edu.au/sites/default/files/2022-06/Judicial%20Abilities%20and%20Qualities%20Framework.pdf>>.

appointees,<sup>83</sup> makes reference to the abilities and qualities that are necessary to ensure fair treatment under Victoria's Human Rights Charter, but does not refer to the Victims' Charter.<sup>84</sup>

Recognising victims' rights in the Human Rights Charter could also improve the development of criminal law policy. Section 18(2) of the Victims' Charter already provides that:

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 the Charter Principles.

However, there is no method for making a person or body accountable for whether they have had regard to the Victims' Charter principles.

The Human Rights Charter provides that when introducing a Bill to parliament, a Minister must also introduce a Statement of Compatibility. A Statement of Compatibility must discuss whether a Bill is compatible with human rights, and if so, how it is compatible. It must also set out the nature and extent of any incompatibility.<sup>85</sup> This is to ensure that human rights are considered in the policy development of legislation.

If victims' rights were referred to in the Human Rights Charter, Ministers introducing Bills into parliament would need to provide a Statement of Compatibility indicating whether the Bill is compatible with victims' rights and/or identify the extent to which it is not.

As noted by the Federal Human Rights Commission in its consideration of a Federal Human Rights Act, the integration of human rights considerations into the decision-making processes of public authorities is important because it 'should make public servants more aware of the impacts of their decisions, and therefore help to prevent human rights breaches in decision making and policy design'.<sup>86</sup>

For example, in the 2021 report *Improving Victims' Experience of Summary Criminal Proceedings*, the accused's rights under the Human Rights Charter were used to justify not enhancing victims' information and consultation rights.<sup>87</sup> Given victims' rights are not articulated in the Human Rights Charter, there was no requirement to equally balance competing rights or consider fairness to victims on the same level as accused rights.

## Amending the Human Rights Charter

Academic Jonathan Doak contends that there are several key human rights standards that victims should be entitled to, including the right to protection and the right to participation.<sup>88</sup>

The VOCC recommends that the Human Rights Charter be amended to include victims' high-level rights such as acknowledging the victim as a participant, treating the victim with respect, and protecting victims as witnesses.

This broader recognition of the need to protect victims throughout criminal proceedings – rather than limiting it to when a witness is called to give evidence – is consistent with other human rights instruments. For example, the EU directive on Victims' Rights focuses on protecting victims from 'secondary and repeat victimisation' court processes.<sup>89</sup> This recognises the need to protect victims because giving evidence more than once can be traumatising. The VLRC's recommendations to protect victims from harm when giving evidence should therefore be extended to protecting victims when a court is considering whether a victim should be required to give evidence.

The Human Rights Charter should also require that a Statement of Compatibility include an assessment of whether a Bill is compatible with victims' rights and entitlements as set out in the Victims' Charter and, if any part of a Bill is incompatible with a victim's rights and entitlements, the nature and extent of the incompatibility. This would provide a mechanism for improving accountability in persons or bodies responsible for developing criminal law policy by having regard to Victims' Charter principles.

<sup>83</sup> Department of Justice and Community Safety (Victoria), *Judicial appointments* (Web Page) <<https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments>>.

<sup>84</sup> While courts and tribunals are not prescribed agencies under the *Victims' Charter Act 2006* (Vic), some provisions under the Act include court processes or criminal procedure that are overseen by courts. For example, section 12 of the Act requires 'a prosecuting agency and the courts' to minimise a victim's exposure to unnecessary contact with the accused. Section 13 of the Act reflects a victim's entitlement to make a victim impact statement 'to the court sentencing the person found guilty of the offence'.

<sup>85</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28(3).

<sup>86</sup> Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, 2022) 268 <[https://humanrights.gov.au/sites/default/files/document/publication/free\\_equal\\_hra\\_2022\\_-\\_main\\_report\\_rgb\\_0.pdf](https://humanrights.gov.au/sites/default/files/document/publication/free_equal_hra_2022_-_main_report_rgb_0.pdf)>.

<sup>87</sup> In considering why it was not appropriate to extend information and consultation rights to all victims under the Victims' Charter, the Department of Justice and Community Safety noted that the system must provide accused persons with a right to be tried without unreasonable delay: Department of Justice and Community Safety (Victoria), *Improving Victims' Experience of Summary Criminal Proceedings* (Final Report, November 2021) 24.

<sup>88</sup> 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.

<sup>89</sup> *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*, para 9 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029>>.

The Human Rights Law Centre has said that Statements of Compatibility improve government processes because:

- departmental officers must consider human rights and justify any limitations to human rights in Cabinet documents
- ministers must make a statement to parliament about the compatibility of a Bill with human rights legislation.<sup>90</sup>

Once a Bill is in parliament, the Scrutiny of Acts and Regulations Committee (SARC) examines Statements of Compatibility and provides a report detailing its findings. SARC's reports analyse whether a Bill affects human rights and whether there is sufficient information and explanatory material in relation to any rights and freedoms affected by a Bill. SARC's reports enable parliament to be better informed when debating a Bill.

Recognising victims' rights in this way would improve the status of victims' human rights, improve parliamentary consideration of Bills that affect victims' rights, and provide additional (albeit limited) pathways for enforcing victims' rights.



#### RECOMMENDATION 5

**The Victorian Government should introduce amendments to the Charter of Human Rights and Responsibilities Act 2006 (Vic) to recognise victims' unique status in the criminal justice system and uphold specific rights for victims of crime.**

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter) should be amended to include a right for a victim of a criminal offence to be:

- acknowledged as a participant (but not a party) with an interest in the proceedings
- treated with dignity and respect
- protected from unnecessary trauma, intimidation and distress when giving evidence and throughout criminal proceedings.

The Human Rights Charter should also require that a Statement of Compatibility include an assessment of whether a Bill is compatible with victims' rights and entitlements as set out in the Victims' Charter.

Where any part of a Bill is incompatible with victims' rights and entitlements, the nature and extent of the incompatibility should be set out in the Statement of Compatibility.

## Protecting victims from unreasonable delay

### Delays impact victim participation

Justice system delay is widely recognised and understood as a significant issue for an accused person. Victoria's Charter of Human Rights states that a person charged with a criminal offence is entitled to be tried without unreasonable delay.<sup>91</sup>

There is no equivalent right afforded victims under the Charter of Human Rights, such as the right to give evidence at trial without unreasonable delay. Similarly, the Victims' Charter is silent on matters of delay for victims of crime. However, as noted by the Australian Institute of Criminology, delay 'affects everyone', including 'the victims and their family who have been aggrieved by the offences against them, and the community who demand justice, safety and protection'.<sup>92</sup>

<sup>90</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Department of Justice & Regulation, September 2015) 181.

<sup>91</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(c).

<sup>92</sup> Jason Payne, 'Criminal Trial Delays in Australia: Trial Listing Outcomes' (Research and Public Policy Series No 74, Australian Institute of Criminology, 2007) 2.

The VOCC repeatedly heard from victims who had been further traumatised because of court delay. The VOCC heard from victims who had experienced varying lengths of delay within the court system, some up to five years. Victims frequently described how the court process was slow and traumatic, with uncertainty about whether the case would proceed at court events, and that the waiting for some kind of finalisation was difficult.

The VOCC heard from victims who described perpetrators using delay as a tactic to manipulate the court process and cause harm to the victim, as noted by this respondent to the Victims' Survey:



*'The Accused was granted a 12 month delay to start the trial after another successful attempt by the [a]ccused to play the system. I was in court with my children when that judge just accepted those pathetic excuses by Defence and with flick of the pen put the trial back over 12 months. My children just broke down in silence. What am I supposed to tell them when this type of things happens?'*

- Victims' Survey respondent

A member of the Victim Survivors' Advisory Council told the VOCC that delays meant victims must 'continually tap into their trauma'.<sup>93</sup> This was confirmed by Court Network who said delays require victims to 'hold their story for long periods of time while they are awaiting going to court'.<sup>94</sup>

Research has also found that trial delays, particularly in sexual assault matters, cause victims to live in 'limbo' and feel 'stuck'.<sup>95</sup> Researchers Michele Burman and Oona Brooks-Hay found that a:

range of adverse consequences will likely be precipitated by inordinate delays, impacting on the personal, domestic and professional lives of victim-survivors which prevent them resuming working or studying, and which will likely include difficulties in maintaining close relationships (let alone establishing new ones); developing mental and physical health problems, including anxiety, night terrors, confusion, suicidal thoughts, depression, and trauma.<sup>96</sup>

Devastatingly, the VOCC was told that delays had contributed to the suicide of one victim of crime. Another victim described the delays as 'four years of constant distress'. Other victims described how delay had affected their ability to participate meaningfully in the court process and give their best evidence.

Victoria Police and the OPP both advised the VOCC that court delay causes attrition, impacting on victim participation,<sup>97</sup> with Victoria Police telling the VOCC that this is where victims 'want to give up'.<sup>98</sup>

Victoria Police told the VOCC they go to 'great lengths to keep complainants in a good place' but that waiting three or four years for a trial is too long for people to have that burden in their life.<sup>99</sup>

Police also advised the VOCC that adjournments are difficult to secure if applied for by the prosecution but suggested there are examples where the courts are too lenient towards the defence and do not consider the impact on victims and witnesses.<sup>100</sup>

## Reducing court delays

Delay significantly impacts victims' ability to participate in the justice process.

The VOCC acknowledges the challenges faced by the courts and all justice agencies during COVID-19. The VOCC also notes the specific legislative and funding initiatives introduced during this time to help courts reduce and address backlogs. The VOCC also notes that there were significant delays in cases being completed before COVID-19.

There are also time limits for commencing trials.<sup>101</sup> These time limits help to prioritise sexual offence trials. However, the time limits have been in place for many years and have not solved the problem of delays.

The VOCC recommends that the Victorian Government amend the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to include a right for a victim of a criminal offence to be protected from unreasonable trial delay. This right would build on victims' rights discussed above.

<sup>93</sup> Consultation Meeting 11 – Victim Survivors' Advisory Council.

<sup>94</sup> Consultation Meeting 12 – Court Network.

<sup>95</sup> Michele Burman and Oona Brooks-Hay, 'Delays in Trials: The Implications for Victim-Survivors of Rape and Serious Sexual Assault' (Briefing Paper, The Scottish Centre for Crime & Justice Research, July 2020) 3 (references omitted).

<sup>96</sup> Ibid 4.

<sup>97</sup> Consultation Meeting 24 – Victoria Police – Session 4; Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 15 September 2022, 2.

<sup>98</sup> Consultation Meeting 17 – Victoria Police – Session 1.

<sup>99</sup> Ibid.

<sup>100</sup> Consultation Meeting 17 – Victoria Police – Session 1.

<sup>101</sup> *Criminal Procedure Act 2009* (Vic) ss 211, 212.



Victims should be protected from unnecessary trauma and distress arising from the way in which the criminal justice system operates. Delay can add to a victim's trauma, prevent a victim from focusing on recovering from the effects of crime, or limit the ability of a victim to participate, as the quality of their evidence may diminish over time.

Some reforms have already been introduced to address court backlog and delay, such as the expansion of sentence indications. However, the VOCC is concerned that too often these efforts focus on speeding up the process at the expense of victims' participatory rights rather than boosting the ability of the system to address delays while preserving victims' participatory rights. This is discussed further in Chapter 18 in relation to the impacts of the increased use of sentence indications to expedite cases.

In addition to including a right for a victim of a criminal offence to be protected from unreasonable trial delay in the Human Rights Charter, the VOCC recommends the Victorian Government adequately fund courts and other justice agencies (including Victoria Police, OPP and VLA) to reduce delays in criminal trials without eroding victims' participatory rights.

The VOCC notes that because victims are participants and not parties to a proceeding, they will not have standing in trials and summary hearings to enforce this right by opposing an adjournment. However, the existence of this right to be protected from unreasonable trial delay will be a relevant factor that the court must consider when determining, for example, whether to grant an adjournment and for how long. Courts often do consider the interests of the community and victims in having cases resolved as quickly as possible. However, including this right for victims formally recognises the victim's status as a participant with a legitimate interest in the resolution of court proceedings.

Including a right for victims to be protected from unreasonable trial delay formally recognises the victim's status as a participant with a legitimate interest in the resolution of court proceedings.



#### RECOMMENDATION 6

**The Victorian Government should introduce amendments to the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* to provide victims with a right to be protected from unreasonable trial delay.**

**The Victorian Government should adequately fund courts and other justice agencies to reduce delays in criminal trials without eroding victims' participatory rights.**

The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Human Rights Charter) should include a right for a victim of a criminal offence to be protected from unreasonable trial delay.

The Victorian Government should continue to focus on reducing delays in criminal trials. However, the Victorian Government should adequately fund courts and other justice agencies to reduce delays in criminal trials without eroding victims' participatory rights such as:

- the right to be consulted about certain decisions
- the right to make a Victim Impact Statement.

## Improving awareness of victims' rights

Research suggests that when members of the community become a victim of crime, they need better information to understand victims' rights and entitlements, and better information about where to get help to navigate the justice system.<sup>102</sup>

An overwhelming majority (75 per cent) of respondents to the VOCC Victims' Survey advised that agencies had not told them about the Victims' Charter. The Victims' Charter clearly specifies that in addition to providing information about the justice system to victims, investigatory, prosecuting and victims' services agencies are to provide victims with information about the agency's complaints system and the victim's right to have their complaint reviewed by the VOCC.<sup>103</sup> Being unaware of the Victims' Charter makes it difficult if not impossible for victims to understand their rights and entitlements, advocate for these rights and entitlements to be upheld, and identify Victims' Charter breaches.

Being unaware of the Victims' Charter makes it difficult, if not impossible, for victims to understand their rights and entitlements, advocate for these rights and entitlements to be upheld and identify Victims' Charter breaches.

As noted by the Canadian Office of the Federal Ombudsman for Victims of Crime in relation to their equivalent of the Victims' Charter:

While it is important that those working in the criminal justice system are familiar with the [Victims] Bill and its implications, it is equally important that Canadians are aware of the rights contained in the Bill in order to exercise them.<sup>104</sup>

### Better information

The VOCC considers *A Victim's Guide to Support Services and the Criminal Justice System* (the Victim's Guide), which is published by the DJCS, should provide victims with more comprehensive guidance about participation at key points of the process and what victims' specific rights are. There is no mention in the Victim's Guide about victims having a right to be treated as a participant. The Victim's Guide is also not explicit about participatory rights in relation to certain phases in the justice process, such as the requirement under the Victims' Charter for the DPP to seek the views of victims before making certain decisions.

The VOCC considers that specific rights and entitlements should be clearly identified along the justice journey and classified or clearly identified as rights to 'information', rights to 'consultation' or the right to have a 'voice' or 'role'.

The Victim's Guide should make it clear how participation should be facilitated at each step of the process by the different agencies or services involved, including who is responsible and how to advocate for their participation. The Victim's Guide should provide examples of participation by way of case studies or case/practical examples. This work should be undertaken in collaboration with the Victims of Crime Consultative Committee so that it is informed by the lived experience of those who have encountered different aspects of the justice system.

The Victim's Guide should clearly outline – at each step of the process – what a victim should do if they think their participatory rights are not being upheld. For example, victims should be clearly advised about whether they can request a review of a decision via an internal process (such as the DPP's Discontinuance Review Framework).

The Victim's Guide should also clearly outline the VOCC's role, including when a victim may make a complaint to the VOCC if they believe a Victims' Charter principle has been breached. The updated Victim's Guide should be available in a range of accessible formats.

<sup>102</sup> Illinois Criminal Justice Information Authority, *2016 Victim Needs Assessment* (Summary Report, April 2017) 1.

<sup>103</sup> *Victims' Charter Act 2006* (Vic) s 19A(3).

<sup>104</sup> Office of the Federal Ombudsman for Victims of Crime, *Progress Report: The Canadian Victims Bill of Rights* (November 2020) 9 <<https://www.victimsfirst.gc.ca/res/pub/prcvbr-reccdv/index.html>>.



**RECOMMENDATION 7**

**The Department of Justice and Community Safety should, in collaboration with the Victims of Crime Consultative Committee, review and revise *A Victim's Guide to Support Services and the Criminal Justice System* to provide victims with more comprehensive guidance about participation at key points of the process.**

*A Victim's Guide to Support Services and the Criminal Justice System* should provide victims with more comprehensive guidance about their participation at key points of the process by clearly articulating:

- that a victim has a right to be treated as a participant
- the parts of the justice process where victims have specific rights and entitlements to participate
- how participation should be facilitated at each step of the process by the different agencies, including who is responsible and how to advocate for their participation
- examples of participation by way of case studies or case/practical examples
- what a victim should do if they think their participatory rights are not being upheld at each step of the justice journey.

The updated Victim's Guide should be available in a range of accessible formats.

## Review of the Victims' Charter

The VOCC has heard during this inquiry that the Victims' Charter 'lacks teeth' and its remedies are ineffective for victims.

The Victims' Charter as introduced by parliament did not intend that the Victims' Charter create 'any legal right or give rise to any civil cause of action'. Section 22 of the Victims' Charter (which provides that the Victims' Charter does not affect legal rights) precludes victims from using the courts or other legal avenues to remedy a breach of the Victims' Charter.

In its *Inquiry into Victoria's Criminal Justice System*, the Legislative Council Legal and Social Issues Committee (the Committee) recommended that the Victorian Government consider ways of improving the enforceability of victims' entitlements, including reviewing section 22 of the Victims' Charter.<sup>105</sup>

In this chapter, the VOCC has made other recommendations to address the issues with the enforceability of victims' entitlements, including introducing a role for courts to check for compliance with Victims' Charter rights where relevant to court proceedings.

However, the VOCC agrees with the Committee that there should be a broader examination of ways to improve the enforceability of victims' entitlements, including reviewing section 22 of the Victims' Charter. Having regard to the significance of this issue, the VOCC suggests comprehensive analysis of and consultation on this issue should form part of the statutory review of the Victims' Charter which is required to be commenced by the VOCC no later than 4 November 2024.<sup>106</sup>

<sup>105</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 274 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

<sup>106</sup> The Victims of Crime Commissioner is required to review the *Victims' Charter Act 2006* (Vic) and provide a report to the Attorney-General on or before 7 September 2025: *Victims of Crime Commissioner Act 2015* (Vic) s 29A.

The VOCC undertakes to consider the scope and operation of section 22 of the Victims' Charter as part of the statutory review of the Victims' Charter. The VOCC will also consider:

- the appropriateness of current complaints pathways for victims, including whether there is a need for expanded legal remedies
- whether the Victims' Charter should provide for an administrative review mechanism of certain decisions connected with alleged breaches of Victims' Charter principles
- whether the VOCC's complaints powers can be expanded to intervene in certain cases to restore a victims' rightful entitlement where it would not prejudice legal proceedings
- how restorative justice, mediation or conciliatory practices could be used when breaches of the Victims' Charter occur
- the scope and implications of section 25I of the Victims' Charter which relates to prosecutorial decisions, proceedings or investigations for criminal offences and the jurisdiction of the court.<sup>107</sup>

<sup>107</sup> *Victims of Crime Commissioner Act 2015* (Vic) s 25I.



## Overview of Chapter 13: Reporting and investigation

For many victims, reporting to police marks the start of their participation in the criminal justice system and the initial response of police can influence their willingness to participate. The *Victims' Charter Act 2006* (Vic) (Victims' Charter) includes rights that span the reporting and investigation process, such as the right to be treated with courtesy, respect and dignity.

This chapter has found that participation at the reporting and investigation stage requires improvement. Key issues include:

- lack of trust to report crimes to police
- reporting processes that were not trauma-informed
- victims not getting enough information to participate at the investigation stage.

### Lack of trust to report to police

The Victims of Crime Commissioner (VOCC) has found that more needs to be done to increase community confidence to report crimes to police. The VOCC recommends that Victoria Police conduct a review of its programs, policies and initiatives aimed at engaging with the community and building confidence to report crime. Victoria Police should design and oversee the implementation of campaigns targeted at increasing the confidence of priority groups in the community to report.

### Trauma-informed reporting processes

The VOCC heard from victims who had experienced a reporting process that lacked a trauma-informed approach. Issues ranged from concerns with the physical reporting environment to serious allegations of police dismissing reports by victims.

The VOCC recommends that Victoria Police undertake work to ensure there are appropriate, accessible, private areas for a victim of crime to safely disclose a crime in police stations. The VOCC also recommends that the Victorian Government expand the existing work being undertaken to create an online reporting option for sexual assault victims and to broaden this project to consider its applicability across different crime types, having regard to the systemic barriers faced by some victims of crime in reporting to police.

Later in the chapter, the VOCC also recommends a cultural review assessing Victoria Police's approach to victim-liaison.

### Culturally safe ways for Aboriginal people to report crimes

The Aboriginal Justice Caucus told the VOCC that Aboriginal peoples mistrust of the system and remain reluctant to report crime.

The VOCC recommends that the Victorian Government include as part of its forthcoming Aboriginal Victims of Crime Strategy:

- alternative, culturally safe ways to report crimes, including reporting via an Aboriginal Community-Controlled Organisation (ACCO)
- an Aboriginal Social Justice Commissioner who would address systemic barriers to participation for Aboriginal and Torres Strait Islander peoples.

### Getting enough information to participate

Receiving sufficient information from police was identified as a specific barrier to participation for victims. This inquiry has found that Victoria Police cannot meet its obligations under the Victims' Charter to provide information to all victims of crime.

Victoria Police has a corporate responsibility in meeting Victims' Charter obligations to victims. The VOCC recommends that Victoria Police review its policies, procedures and IT capabilities in relation to obligations under the Victims' Charter to assess its capability and capacity in relation to meeting victims' statutory entitlements. The VOCC also recommends that Victoria Police undertake a cultural review assessing its organisation-wide approach to victim liaison.

# 13

Chapter 13:  
**Reporting and  
investigation**



## Introduction

For many victims, reporting to police marks the start of their participation in the criminal justice system and the initial response of police can influence their willingness to participate.

The *Victims' Charter Act 2006* (Vic) (Victims' Charter) includes rights that span the reporting and investigation process, such as the right to be treated with courtesy, respect and dignity. Under the Victims' Charter, victims also have a right to be provided with information at key points of the investigation.

This chapter makes recommendations in relation to:

- building trust in police among the community so that victims feel safe to report crimes to police
- improving the reporting environment so that when victims do approach police to make a report, they feel safe and feel treated with courtesy, respect and dignity
- enhancing reporting options for Aboriginal and Torres Strait Islander communities to address systemic barriers to participation.

This chapter also makes recommendations to address Victoria Police's capability and capacity in relation to meeting victims' statutory entitlements to information, as per obligations under the Victims' Charter.

## Lack of trust to report to police

Close to 40 per cent of respondents to the Victims of Crime Commissioner's (VOCC's) Victims' Survey who did not report to police said they did not feel safe talking to police (21 per cent), or they thought they would not be taken seriously (17 per cent). These concerns about making a report to police are consistent with previous research.<sup>1</sup>

The VOCC also heard about a lack of trust in police on the part of particular victim cohorts, as outlined in detail in **Chapters 5** and **7**, and summarised in **Table 3** below.

**Table 3: Barriers to reporting to police**

	What VOCC was told	What the research says
<b>Aboriginal and Torres Strait Islander communities</b>	The Aboriginal Justice Caucus told the VOCC that Aboriginal people mistrust the system, remain reluctant to report crime and that agencies 'need to work harder at responding to Aboriginal people'. <sup>1</sup>	A 2021 parliamentary inquiry found that a significant proportion of crimes committed against Aboriginal and Torres Strait Islander peoples go unreported. <sup>2</sup> Djirra suggested to the parliamentary inquiry that 90 per cent of violence committed against Aboriginal and Torres Strait Islander women is not reported. <sup>3</sup>

<sup>1</sup> See, e.g., Kate Fitz-Gibbon et al, *National Plan Victim-Survivor Advocates Consultation* (Final Report, 2022) 76 <[https://bridges.monash.edu/articles/report/National\\_Plan\\_Victim-Survivor\\_Advocates\\_Consultation\\_Final\\_Report/16947220](https://bridges.monash.edu/articles/report/National_Plan_Victim-Survivor_Advocates_Consultation_Final_Report/16947220)>.

<sup>1</sup> Consultation Meeting 29 – Aboriginal Justice Caucus (AJC Meeting 1).

<sup>2</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 335 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

<sup>3</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 335 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

<p><b>Disability</b></p>	<p>Of the respondents to the VOCC's Victims' Survey who identified as having a disability, 60 per cent of this cohort did not tell police when they experienced crime because they did not feel safe talking to police.</p> <p>Victims with disability told the VOCC how negative past experiences involving police, both in the context of reporting crime and more generally, have led to them feel unable to report crime. This is consistent with previous research which has found previous negative contact with police can negatively affect reporting rates for people with disability.<sup>4</sup></p>	<p>A research report for the Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has noted that there is variability in 'strategic approaches to policing and disability' and that very few initiatives are evaluated, with almost nothing available publicly.<sup>5</sup> The research report notes that 'while some individual police demonstrate good practices and approaches, on a systemic basis police do not respond effectively to promote safety and protect people with disability who are victims'.<sup>6</sup></p>
<p><b>LGBTIQ+</b></p>	<p>The VOCC heard that victims of crime in the LGBTIQ+ community still face barriers to reporting to police and that '[w]hat communities have been seeking for a long time is an acknowledgement that as a system "we messed up". We need to address that legacy and make a change in how we proceed.'<sup>7</sup></p> <p>A Lived Experience Consultant with Berry Street Y-Change explained that as a trans person and a victim of family violence and sexual assault, reporting crime 'is not an option' and is 'not safe'.<sup>8</sup> They queried the safety of reporting to police, noting that reporting options are very limited and can result in victims feeling alienated from police. They also felt that inclusion and training around diversity for police 'still needs to go a long way', noting that you 'need to question why a system built to protect people is feared by so many of them'.<sup>9</sup></p>	<p>In 2021, the Victorian Pride Lobby published a report that found low levels of trust in police:<sup>10</sup></p> <ul style="list-style-type: none"> <li>• Two in three LGBTIQ+ Victorians do not think police are generally helpful and supportive.</li> <li>• Three in four LGBTIQ+ Victorians do not think police can be trusted to use their powers reasonably.</li> <li>• Four in five LGBTIQ+ Victorians do not think the police understand the issues that impact them.</li> <li>• Three in five LGBTIQ+ Victorians believe the police show an inherent lack of respect toward LGBTIQ+ people.</li> </ul> <p>A 2021 Victorian parliamentary inquiry found that people from LGBTIQ+ communities are less likely to report violence due to a lack of trust in police.<sup>11</sup> Recent research relating to the lived experience of sexual violence among trans women of colour reported feelings of judgement, blame, mistrust and a lack of acknowledgment when interacting with police and legal professionals.<sup>12</sup></p>

4 Jude McCulloch, JaneMaree Maher and Kate Fitz-Gibbon, 'Justice Perspectives of Women with Disability: An Australian Story' (2021) 27(2) *International Review of Victimology* 196, 199.

5 Leanne Dowse, Simone Rowe and Michael Baker, *Police Responses to People with Disability, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Research Report, October 2021) 145.

6 Leanne Dowse, Simone Rowe and Michael Baker, *Police Responses to People with Disability, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Research Report, October 2021) 111.

7 Consultation Meeting 13 – Commissioner for LGBTIQ+ Communities.

8 Consultation Meeting 27 – Berry Street Y-Change Lived Experience Consultant – Session 2.

9 Ibid.

10 Victorian Pride Lobby, *Upholding our rights: LGBTIQ+ attitudes towards and experiences of policing in Victoria* (Report, 2021) 8.

11 Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-vilification Projects* (Report, March 2022) <[https://www.parliament.vic.gov.au/images/stories/committees/lsc-LA/Inquiry\\_into\\_Anti-Vilification\\_Protections\\_/Report/Inquiry\\_into\\_Anti-vilification\\_Protections\\_002.pdf](https://www.parliament.vic.gov.au/images/stories/committees/lsc-LA/Inquiry_into_Anti-Vilification_Protections_/Report/Inquiry_into_Anti-vilification_Protections_002.pdf)>.

12 Jane M Usher et al, *Crossing the Line: Lived Experience of Sexual Violence among Trans Women of Colour from Culturally and Linguistically Diverse (CALD) Backgrounds in Australia* (Research Report, Issue 14, June 2020) 10.

<p><b>Culturally and linguistically diverse communities</b></p>	<p>Key issues identified by culturally and linguistically diverse populations included difficulty navigating the justice system due to language barriers and barriers to culturally safe participation, particularly where there are intersectionalities. For example, one VOCC Victims' Survey respondent spoke about how her culture and her identity as a woman meant dealing with police was intimidating. Another Victims' Survey respondent stated that: 'Police are not safe ppl who understand cultural and religious issues.'</p>	<p>Research suggests victims from culturally and linguistically diverse populations still face barriers to reporting to police, including 'feeling dismissed, disbelieved, blamed and discriminated against by police officers'.<sup>13</sup></p>
<p><b>Children and young people</b></p>	<p>The Principal Commissioner for Children and Young People spoke about the challenges encountered by children and young people when reporting to police, such as not receiving an empathetic response or not being believed. The Commissioner for Aboriginal Children and Young People noted that this can be compounded for some children and young people whose interactions with police may already be negative.</p>	<p>A 2010 Victoria University report surveying young people in Victoria found young people would feel more comfortable calling the police if the police were friendlier, if the police were more respectful, if they could be more confident that they would be assisted or if they could report in a more private or anonymous way.<sup>14</sup></p>

## Building trust in police

As discussed in the VLRC's recent report in relation to sexual offences, the aim of policy and law reform should not just be to increase reporting – reporting a crime is a personal decision and there are many reasons why a victim may not report. However, for those victims who do want to report to police, barriers to reporting must be reduced.

Some victims the VOCC spoke with described positive experiences of reporting to police, including being treated with empathy, care and professionalism. Victoria Police members told the VOCC about initiatives to improve confidence to report, particularly for certain priority groups.

An example of the way in which Victoria Police has made changes to improve community confidence to report is the introduction of over 450 LGBTIQ+ liaison officers who serve as contact points when a victim wishes to report a crime.<sup>15</sup> LGBTIQ+ liaison officers also:

- make recommendations to Victoria Police about the policing needs of LGBTIQ+ people
- consider LGBTIQ+ community perspectives in the review and development of Victoria Police policies, processes, and initiatives
- conduct training and communicate about emerging issues.<sup>16</sup>

These initiatives are promising and point to improved culture and acknowledgement of the need to enhance strategies to build community trust and confidence. Research suggests that the:

presence of liaison services is a significant sign to LGBTI communities that policing organisations recognise diversity in the community and among the police. These programs also provide a meaningful way in which good policing practice towards LGBTI communities can be exemplified.<sup>17</sup>

<sup>13</sup> Dr Cathy Vaughan et al, *Promoting Community-Led Responses to Violence against Immigrant and Refugee Women in Metropolitan and Regional Australia. The ASPIRE Project: Key Findings and Future Directions* (December 2016) 4.

<sup>14</sup> Michele Grossman and Jenny Sharples, *Don't Go There: Young People's Perspectives on Community Safety and Policing* (May 2010) xiii-xiv.

<sup>15</sup> Victoria Police, *LGBTIQ+ Liaison Officers* (Web Page) <<https://www.police.vic.gov.au/LGBTIQ-liaison-officers>>.

<sup>16</sup> Ibid.

<sup>17</sup> Angela Dwyer et al, *Exploring LGBTI Police Liaison Services: Factors Influencing Their Use and Effectiveness According to LGBTI People and LGBTI Police Liaison Officers* (Report to the Criminology Research Advisory Council, July 2017) 44.



However, the VOCC considers that more still needs to be done to increase community confidence to report crimes to police. This was identified in the VOCC's own research and confirmed by findings in other recent reviews and inquiries as summarised in **Table 3** above.

The VOCC recommends that Victoria Police conduct a review of its programs, policies and initiatives aimed at engaging with the community and building confidence to report crime. There should be a particular focus on priority groups that have faced disadvantage and discrimination.

Within Victoria Police there is a Priority and Safer Communities Division. It is part of Victoria Police's Capability Department and meets with peak bodies and community stakeholder organisations on a quarterly basis through formal 'Portfolio Reference Groups'. These Portfolio Reference Groups cover priority communities through the following groups:

- Aboriginal Portfolio Reference Group
- Disability Portfolio Reference Group
- LGBTIQ+ Portfolio Reference Group
- Mental Health Portfolio Reference Group
- Multicultural Portfolio Reference Group
- Seniors Portfolio Reference Group
- Youth Portfolio Reference Group.

The VOCC considers these existing groups would be best placed to drive initiatives to enhance community confidence to report to police. These groups should lead the design and implementation of targeted campaigns to increase community confidence to report.



#### RECOMMENDATION 8

**Victoria Police should conduct a review of its programs, policies and initiatives aimed at engaging with the community and building confidence to report crime, with a particular focus on priority groups that have faced disadvantage and discrimination.**

**This work should be informed by lived-experience expertise and be guided by the relevant Portfolio Reference Groups in Victoria Police's Priority and Safer Communities Division.**

Targeted campaigns to increase community confidence to report crimes should include consideration of the need for:

- more strategic promotional activities or advertising campaigns
- partnerships between Victoria Police and community-based organisations that have existing, trusted relationships with members of priority cohorts
- training and education opportunities across a police member's career aimed at addressing myths, misconceptions, bias or prejudice.

Consideration should also be given to:

- how dedicated liaison positions, like LGBTIQ+ liaison officers, may enhance community confidence to report
- whether there is scope to enhance or expand existing liaison programs.

## Trauma-informed reporting process

For many victims, reporting to police is their first contact with the justice system and the initial response of police can influence their willingness to participate.<sup>18</sup>

Some respondents to the VOCC's Victims' Survey said that feeling heard, being believed and being treated respectfully resulted in positive reporting experiences for them. A number of victims praised specialist police responses such as the Sexual Offences and Child Abuse Investigation Team (SOCIT). Victims of sexual offences felt particularly safe when they felt believed and that the crime was not minimised.

The VOCC also heard from victims who had experienced a reporting process that lacked a trauma-informed or sensitive approach. Issues ranged from concerns with the physical reporting environment, to serious allegations of police dismissing reports by victims or persuading victims not to pursue a complaint.

Victims told the VOCC about:

- police trying to engage with them at inappropriate times or in inappropriate locations
- having to disclose sexual victimisation in the public reception area of a police station
- having to engage with police in environments that were not accessible or appropriate for people with disability
- feeling rushed through the reporting process without adequate support or empathy
- receiving police responses that were belittling, condescending, dismissive or unsupportive
- police attending incidents and not conducting comprehensive investigations
- police refusing to take statements or dissuading victims from reporting
- being subjected to inappropriate comments from police members, including questions or comments that victim-blame or perpetuate rape myths.

These issues fall under two broad reform areas:

- improving the reporting environment
- improving police responses when victims report crimes.

### Improving the reporting environment

A number of victims of crime described having to disclose personal details in the public reception area of a police station. Other victims noted that not all people can physically attend police stations, whether due to disability, age or the nature of their victimisation.

There are a number of key issues to consider in relation to improving the reporting environment for victims:

- whether all police stations have appropriate, accessible, private areas for a victim of crime to safely disclose a crime
- whether a victim would reasonably be aware when approaching the front counter of a police station of the availability of private areas (if they are available) and whether they feel safe to request access to it
- whether there is scope to expand the ways in which victims can safely disclose a crime.

There is no single approach to improving the reporting environment for victims of crime. The VOCC recommends that a range of approaches be implemented.

#### Safe spaces in police stations

It is not clear whether all police stations have appropriate, accessible, private areas for a victim of crime to safely disclose a crime. It is also not clear whether, when approaching the front counter of a police station, a victim would be aware of the availability of private areas and whether they feel safe to request access to it.

In **Chapter 16**, the VOCC makes recommendations to ensure minimum standards for safety and accessibility in Victorian courts. The VOCC considers Victoria Police should also undertake work to identify any gaps in availability of appropriate, accessible, private areas for a victim of crime to safely disclose a crime.

<sup>18</sup> See, e.g., Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (Report, 2017) 194 <<https://hla.gov.au/hla.obj:2821501433>>.

Where there already is access to appropriate, accessible, private areas for a victim of crime to safely disclose a crime, it is important victims know about this, and feel safe to request access to these areas. In this regard, Victoria Police should ensure clear signage and information is available in public areas of police stations regarding the availability of victim-centred spaces. This is a simple, practical step that can be taken with minimal resourcing implications for Victoria Police.

VOCC also recommends that all front-line police be directed in training, policies and procedures to enquire about a person's needs, safety and comfort when they make an initial approach to police. Victoria Police should also advise victims that they can request access to victim-centred spaces. This should be regarded as 'best practice' in encouraging reporting and confidence in police. Taking these steps would also ensure police are compliant with the Victims' Charter requirements to ensure people adversely affected by crime are treated with courtesy, respect and dignity and that police are responsive to the particular needs of persons adversely affected by crime. This includes needs relating to:

- race or indigenous background
- sex or gender identity
- cultural or linguistic diversity
- sexual orientation
- disability
- religion
- age.



#### RECOMMENDATION 9

##### **Victoria Police should undertake work to:**

- **identify any gaps in the availability of appropriate, accessible, private areas for a victim of crime to safely disclose a crime**
- **ensure police take steps to ensure victims are aware that they can request access to safe spaces**
- **ensure police members enquire about a person's needs, safety and comfort when they make an initial approach to police.**

Victoria Police should:

- audit police stations to identify any gaps in availability of appropriate, accessible, private areas for a victim of crime to safely disclose a crime
- develop plans to close any gaps in access to appropriate victim-centred areas including:
  - undertaking internal modifications to improve access
  - assessing alternative locations for conducting safe conversations where modifications are not possible
- install clear signage and information in the public areas of police stations about the availability of victim-centred spaces
- train all front-line police to enquire about a person's needs, safety and comfort as good practice in encouraging reporting and confidence in police.

#### Online reporting

Victims need flexibility and the ability to engage in the reporting process at their own pace. Given the individual and structural barriers faced by some victims of crime to reporting a crime, outlined above in detail, the VOCC considers online reporting options should be available to more victims of crime.

Previous research has found that alternative reporting options, in the context of sexual assault, serve as a pathway for survivors who may be hesitant to engage with police: 'These options allow survivors to tell their story in their own words, providing autonomy and control. They also assist police with intelligence gathering in unique ways.'<sup>19</sup>

<sup>19</sup> Collaborative Research Team, *Alternative Reporting Options for Sexual Assault* (Web Page), <<https://alternativereportingproject.com/about-the-research-project/>>.

Victims of sexual assault are not the only victim cohorts who could benefit from options that allow victims to have more choice, autonomy and control.

Victoria Police already have online reporting options for theft and property damage.<sup>20</sup> Historical sexual abuse involving institutional or religious organisations can be reported via email.<sup>21</sup> The Victorian Government has recently contracted a team of academics to provide advice on designing an online reporting pathway for sexual violence, as recommended by the Victorian Law Reform Commission in its 2021 report into the justice system response to sexual assault.<sup>22</sup>

During consultations with the VOCC, some Victoria Police members were sceptical about the benefits of alternative reporting mechanisms, such as online reporting, raising concerns around:

- delays in reports coming to the attention of police if submitted online
- inability for police to provide immediate support
- loss of evidence in the aftermath of sexual assault.

The VOCC notes these concerns, but given the low reporting rates, particularly for certain victim cohorts, the current approaches to reporting crimes are not meeting all victims' needs.

Victims told the VOCC that not all people can physically attend police stations, whether due to disability or the nature of their victimisation. Some victims the VOCC engaged with experienced a crime perpetrated by a Victoria Police member. For these victims, they encountered specific barriers to reporting to police and participating in the justice process. Research suggests young people also want different reporting options.

Given the low reporting rates, particularly for certain victim cohorts, the current approaches to reporting crimes are not meeting all victims' needs.

An online reporting process may better support victims who face additional barriers and may provide some victims with a safer first step towards reporting.

This may be particularly important for some victims of crime who may be fearful of police or face structural or physical barriers to attending a police station. Alternative pathways to reporting could have particular benefits for people with disability, male victims of sexual assault, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people who identify as LGBTIQ+, people experiencing homelessness, mental illness and young people, including young people in out-of-home care.

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### RECOMMENDATION 10

**The Victorian Government should expand the existing work being undertaken to create an online reporting option for sexual assault victims to consider its applicability across different crime types and victims who face systemic barriers in reporting to police.**

Alternative reporting mechanisms should have regard to the systemic barriers faced by particular victims in reporting crime to police, whether by crime type or due to an individual's characteristics.

20 Victoria Police, *Police Assistance Line and Online Reporting* (Web Page), <[https://www.police.vic.gov.au/police-assistance-line-and-online-reporting?gclid=EA1aIQobChM10Irs07rO\\_wlVgZlmAh2YhAihEAMYAiAAEgLU\\_PD\\_BwE-](https://www.police.vic.gov.au/police-assistance-line-and-online-reporting?gclid=EA1aIQobChM10Irs07rO_wlVgZlmAh2YhAihEAMYAiAAEgLU_PD_BwE-)>

21 Victoria Police, *Reporting Sexual Offences and Child Abuse* (Web Page), <<https://www.police.vic.gov.au/reporting-sexual-offences-child-abuse->>

22 Collaborative Research Team, *Alternative Reporting Options for Sexual Assault* (Web Page), <<https://alternativereportingproject.com/about-the-research-project/>>

## Improving police responses when victims report crimes

As noted above, while some victims described positive experiences of reporting to police, the VOCC heard that victims encountered varying police responses when reporting crime.

Several respondents to the VOCC's Victims' Survey felt that police were dismissive of their experiences or felt they were being discouraged from reporting crime.

The VOCC was told by some Victims' Survey respondents about police refusing to take statements.

A number of respondents to the Survey stated that they did not feel believed by police members when reporting crime. One Victims' Survey respondent advised that police told them '[m]aybe you imagined it' and refused to investigate the matter further. Some victims reported being asked victim-blaming questions such as whether they had been drunk or 'what did they expect going on a dating service'?

One victim interviewed by the VOCC stated: 'I can't tell you how often I have been turned away, dismissed, ignored, ridiculed, embarrassed in my dealings with police over the years. I've been laughed at, even by a group of police.'<sup>23</sup>

This variability in police responses was also confirmed by stakeholders. Community Legal Centre (CLC) representatives told the VOCC that victims 'frequently can't get beyond the front desk of a police station to report their injury or report evidence of a crime'<sup>24</sup> and that police dismiss some victims because they are not viewed as 'credible'.<sup>25</sup>

A number of victims told the VOCC that police require further training to respond better to victims in a trauma-informed way, particularly in relation to sexual offences, family violence and stalking:



*'The key area to focus on would be adequate training, support and recruitment of specialised police and detectives to respond to sexual assault and DV/Family violence offences.'*

*'Police...no training or understanding in family violence and narcissistic behavior'*

*'There is an urgent need for greater trauma informed training across police.'*

– Victims' Survey respondents

Similarly, a victim who was interviewed by the VOCC noted that appropriate trauma-informed training is essential for informants engaging with victims.<sup>26</sup>

A member of the Women with Disabilities Victoria Experts by Experience Advocacy Team advised that further training is required in relation to disability:



*'But even if I said I was autistic, I'm not sure police or a court would know what to do. I think we need more training, specialist support officers, advocates to help unpack this and consider people's needs.'*<sup>27</sup>

The VOCC recommends that Victoria Police undertake a cultural review to assess its organisation-wide approach to victim liaison (see Recommendation 13, below). As part of this recommendation, the VOCC suggests the cultural review consider what training is required to better meet the diverse needs of victims. This training should consider areas of improvement such as:

- ensuring police engage with victims at appropriate times and in appropriate spaces
- not rushing victims through reporting processes without adequate support or empathy
- addressing any persistent biases or prejudices that police have that may prevent or discourage victims from participating further in the reporting or prosecution process.

<sup>23</sup> Interview 10 – Victim of family violence.

<sup>24</sup> Consultation Meeting 22 – Community Legal Centres – Session 1.

<sup>25</sup> Consultation Meeting 23 – Community Legal Centres – Session 2.

<sup>26</sup> Interview 10 – Victim of family violence.

<sup>27</sup> Consultation Meeting 15 – Experts by Experience Advocacy Team – Women with Disabilities Victoria.

In **Chapter 14**, we also recommend providing extra support for victims when reporting a crime. This initiative would provide a link to the victim support system and ensure victims have sufficient support when they first engage with police.

As discussed in **Chapter 12**, we also recommend that certain police decisions should be able to be externally reviewed. This would provide victims with an appropriate, independent pathway to have certain police decisions reviewed, particularly where action has not been taken and victims have not been provided with reasons in writing for certain police decisions.

## More options for Aboriginal and Torres Strait Islander peoples

The Aboriginal Justice Caucus (AJC) told the VOCC that Aboriginal people experience a mistrust of the system, remain reluctant to report crime and that '[r]acism will be the first barrier for Aboriginal people who report a crime'.<sup>28</sup>

The AJC also said that '[w]e need to educate our mob to use their voices' but noted that this is an 'an arduous and traumatising process with little outcome'. The AJC told the VOCC that ultimately agencies 'need to work harder at responding to Aboriginal people'.<sup>29</sup>

To address the systemic barriers to reporting crime, the AJC told the VOCC that culturally safe approaches for reporting crime should be available through Aboriginal Community-Controlled Organisations (ACCOs):

Alternative reporting is also not currently available through an Aboriginal Community-Controlled Organisation (ACCO). It could be helpful to have ACCO as a site to report and then for the ACCO to liaise with Victoria Police and have a plain clothed police member attend the ACCO and speak with the victim, allowing them to report a crime in a safe space.<sup>30</sup>

The AJC also told the VOCC that to address systemic barriers to participation for Aboriginal and Torres Strait Islander peoples, it was important that government introduce an Aboriginal Social Justice Commissioner. The VOCC was told about a recent serious incident involving the assault of a young person where police advised they had no staff to deal with the complaint. Following the involvement of a Regional Aboriginal Justice Advisory Committee (RAJAC), the young person was supported to report the assault to police. This was highlighted to the VOCC as an incident which, without community involvement, would have remained unreported, despite its seriousness.<sup>31</sup>

The AJC also emphasised the importance of an Aboriginal Social Justice Commissioner during the 2021 parliamentary inquiry into the criminal justice system, and pointed to the need for increased accountability given that the:

justice system exerts a lot of control over Aboriginal lives through legislation, policies and processes that rarely include the voices of Aboriginal people in their design and development.<sup>32</sup>

The AJC told the parliamentary inquiry that they had:

been asking for an Aboriginal social justice commissioner for, I think, nearly 12 to 16 years, and that is just so we have Aboriginal oversight and an authority body for Aboriginal people when it comes to the justice system.<sup>33</sup>

The 2021 parliamentary inquiry into the criminal justice system recommended that the Victorian Government appoint an Aboriginal Social Justice Commissioner to monitor the implementation of recommendations made by the Royal Commission into Aboriginal Deaths in Custody (1987–1991) and to ensure the criminal justice system responds appropriately to Aboriginal Victorians.<sup>34</sup>

In 2021, the Chief Commissioner of Victoria Police told the same parliamentary inquiry that 'improving Aboriginal Victorians' trust in the criminal justice system, particularly Victoria Police, requires direct engagement with communities about reform to the current system'.<sup>35</sup>

As outlined above, the VOCC recommends that Victoria Police conduct a review of its programs, policies and initiatives aimed at engaging with the community and building confidence to report crime with a particular focus on priority groups, such as Aboriginal and Torres Strait Islander peoples, who have faced disadvantage and discrimination.

28 Consultation Meeting 29 – Aboriginal Justice Caucus (AJC Meeting 1).

29 Ibid.

30 Consultation Meeting 29 – Aboriginal Justice Caucus (AJC Meeting 1).

31 Consultation Meeting 30 – Aboriginal Justice Caucus (AJC Meeting 2).

32 (Mr) Christopher Harrison (Co-chair Aboriginal Justice Caucus), Evidence to Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System*, Melbourne, 21 October 2021, 46).

33 Ibid.

34 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022), recommendation 79, lix <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

35 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 337 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

Victorian Police should draw on the expertise and leadership of members of the Aboriginal Portfolio Reference Group which is overseen by Victoria Police's Priority and Safer Communities Division.

### Aboriginal Victims of Crime Strategy

In December 2021, the Victorian Government released its *Victim Support Update*. In that update, the government committed to consulting with Aboriginal victims of crime on a strategy for addressing their specific needs in 2022 and developing an Aboriginal Victims of Crime Strategy.<sup>36</sup> This work will involve comprehensive consultation with the Aboriginal community.

As part of this strategy, the VOCC recommends that the Victorian Government introduce:

- alternative, culturally safe ways to report crimes, including but not limited to reporting via an Aboriginal Community-Controlled Organisation (ACCO)
- an Aboriginal Social Justice Commissioner who would address systemic barriers to participation for Aboriginal and Torres Strait Islander peoples.



#### RECOMMENDATION 11

**As part of the dedicated work already underway to develop an Aboriginal Victims of Crime Strategy, the Victorian Government should include introduction of:**

- **alternative, culturally safe ways to report crimes**
- **an Aboriginal Social Justice Commissioner to address systemic barriers to participation for Aboriginal and Torres Strait Islander peoples.**

Alternative, culturally safe ways to report crimes should include, but should not be limited to, consideration of reporting via an Aboriginal Community-Controlled Organisation (ACCO).

## Information provision

Receiving sufficient information from police was identified as a specific barrier to participation for victims. Almost 70 per cent of victims surveyed by the VOCC stated that they did not get any useful information, or not enough information, from police to participate.

Victims told the VOCC about:

- not receiving any contact at all after making an initial report, continually calling Victoria Police and leaving messages, with calls left unreturned
- having to continually chase up actions, such as whether an intervention order had been served
- police failing to provide victims with key information such as court dates
- failures to provide information about, or referrals to, relevant support services.

Victims told the VOCC that having to chase information from police 'to no avail' caused great distress and anxiety.

Consultation with victims' professionals echoed the issues raised by victims, with victims' professionals describing a lack of proactive communication from police resulting in victims missing out on opportunities to participate.

<sup>36</sup> Victorian Government, *Victim Support Update* (Web Page, December 2021) <<https://www.vic.gov.au/victim-support-update>>.



The VOCC was also told by operational police that it is impossible with current resources to meet information obligations under the Victims' Charter for all victims of crime.<sup>37</sup> Victoria Police members told the VOCC about overwhelming workloads and being unable to meet Victims' Charter requirements in the vast majority of cases:

With 300 000 cases a year, more than 200 000 of which have victims, and there are 12,000 of us, it's not physically possible to deliver statutory rights for all victims. It's just not physically possible.<sup>38</sup>

We don't have physical barriers to be able to make phone calls or attend a home but it is just lack of time and the volume of the workload. In the [one region] at the moment we have 220 active investigations and 160 active court cases. So you can imagine just the sheer volume of cases.<sup>39</sup>

The VOCC was told that from 'a general duties perspective the workload is huge'.<sup>40</sup>

It is particularly significant that Victoria Police members struggle to meet their Victims' Charter obligations because Victoria Police is both the investigating and prosecuting agency for most crimes prosecuted in Victoria.<sup>41</sup> Accordingly, most victims in Victoria are relying on information to be provided by Victoria Police either in relation to the investigation, or in most cases, both the investigation and prosecution.

Lack of sophistication in police case management and information technology systems was raised as a barrier to police being able to stay on top of case progression, and in turn, to update victims. Victoria Police told the VOCC that once a matter proceeds to prosecution, Victoria Police does not have an efficient way for informants to stay abreast of the progress of a prosecution even when Victoria Police prosecutes the case meaning that 'the informant might forget about the matter being at court until they get notification that there's been a conviction or that charges are dropped'.<sup>42</sup> The VOCC was told that informants are frequently only aware a matter has progressed to court once the proceeding is finalised.<sup>43</sup>

During consultations with Victoria Police members, it was evident that there are many dedicated police members who are victim-centred and wish to prioritise victims' needs and provide much-needed information and support. However, it is clear that Victoria Police members cannot meet their obligations under the Victims' Charter for all victims of crime.

## Victoria Police review

Research has found that how the police treat victims is more important for victims' perceptions of procedural justice than how victims are treated by other criminal justice authorities such as the prosecutor or the judge.<sup>44</sup> This is unsurprising given police are the gateway to the justice system, and for most victims, the primary source of case information.

This inquiry has found that Victoria Police cannot meet its obligations under the Victims' Charter for all victims of crime. At present, timely and adequate information provision seems to rely on a combination of good will and good luck: good will on the part of dedicated police officers and good luck when information manages to flow from prosecutions to the police informant in a timely way.

Victoria Police must urgently review its approach to meeting Victims' Charter obligations.

Victoria Police's existing approach appears to place responsibility for meeting Victims' Charter obligations primarily with individual police officers. However, Victoria Police also has a corporate responsibility in meeting Victims' Charter obligations to victims. As holders of information, Victoria Police needs to adopt a more victim-centred approach to the corporate information that it holds, in order to provide better support for victims.

For example, there are problems with information flows between Victoria Police's prosecutors and informants. Informants often have to work shifts, making it more difficult for victims and victim support workers to contact the informant.

Other agencies have reformed their approach to victim consultation and engagement, including the Office of Public Prosecutions (OPP) which has introduced the Records of Victim Engagement (ROVE). The OPP's system reflects its corporate responsibility for supporting victims.

37 Consultation Meeting 17 – Victoria Police – Session 1; Consultation Meeting 18 – Victoria Police – Session 2.

38 Consultation Meeting 18 – Victoria Police – Session 2.

39 Consultation Meeting 17 – Victoria Police – Session 1.

40 Ibid.

41 More than 90% of Victoria's criminal and civil cases are heard in the Magistrates' Court of Victoria: Magistrates' Court of Victoria, *Annual Report 2021–2022* (February 2023) 6.

42 Consultation Meeting 17 – Victoria Police – Session 1.

43 Ibid.

44 Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221, 229.





### Office of Public Prosecution's Records of Victim Engagement (ROVE)<sup>45</sup>

The ROVE is updated by either the solicitor or VWAS to record any engagement with the victim, and also any correspondence regarding case management such as referrals to other agencies such as a Victims Assistance Program and Court Network, or the discussion of welfare checks with police informants. The ROVE and all previous case notes can be accessed by any new solicitor or VWAS worker allocated to a matter. The ROVE includes details such as a victim's preferred contact method and any important notes, such as the need for an interpreter. The ROVE can also be used to proactively ensure a victim is provided with all necessary information, as it contains checkpoints for each stage of the prosecution.

There are always going to be resourcing challenges but Victoria Police has obligations under the Victims' Charter to provide victims with information.<sup>46</sup>

There are different models and approaches for meeting victim liaison and information requirements including:

- victim liaison/dedicated unit models<sup>47</sup>
- automated notification systems.<sup>48</sup>

During consultations, some Victoria Police members suggested a range of improvements that could be made to enhance the provision of information to victims, including:<sup>49</sup>

- victim liaison officers
- a case management system
- automated notifications
- an 'end to end' victims' portal with information from a range of justice agencies.

Other stakeholders suggested:

- having more police staff so more time can be dedicated to victim liaison
- dedicated victim liaison units.

Victoria Police should review its policies, procedures and IT capabilities in relation to its obligations under the Victims' Charter, examining its capability and capacity to meet victims' statutory entitlements to information, in line with its obligations under the Victims' Charter.

In reviewing its policies, procedures and IT capabilities in relation to its obligations under the Victims' Charter, Victoria Police should consider:

- case management and/or IT solutions that would better enable police to manage victim liaison effectively, having regard to the high caseloads of police
- Victoria Police's capability to record and report on victim liaison, similarly to the OPP's Records of Victim Engagement (ROVE)
- how different models and approaches might better enable Victoria Police to meet their obligations, considering initiatives such as victim liaison models, dedicated unit models and automated notification systems
- how the shift-based nature of police work impacts continuity for victims of crime in the provision of information<sup>50</sup>
- the need for a dedicated funding bid to ensure it can meet Victims' Charter obligations.

<sup>45</sup> Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 12 September 2022, 3.

<sup>46</sup> *Victims' Charter Act 2006* (Vic) ss 7, 7B, 8, 9, 10, 11.

<sup>47</sup> See generally Dean Wilson and Marie Segrave, 'Police-based Victim Services: Australian and International Models' (2011) 34(3) *Policing: An International Journal of Police Strategies & Management* 479. In South Australia, 'Victim Contact Officers' who are police officers, offer information to victims when a victim's investigator is not available: Victims of Crime South Australia, *Getting Updates on the Investigation* (Web Page) - <https://www.voc.sa.gov.au/police-investigation/getting-updates-on-the-investigation>.

<sup>48</sup> Rhiannon Davies and Lorana Bartels, 'Challenges of Effective Communication in the Criminal Justice Process: Findings from Interviews with Victims of Sexual Offences in Australia' (2020) 9(4) *Laws* 31, 19.

<sup>49</sup> Consultation Meeting 18 – Victoria Police – Session 2; Consultation Meeting 19 – Victoria Police – Session 3.

<sup>50</sup> Research has found that 'the rotations of shift work construct a tangible obstacle to continuity and the appropriate timing of communication with victims': Dean Wilson and Marie Segrave, 'Care Bears and Crime-Fighters: Police Operational Styles and Victims of Crime' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 133, 156.



## RECOMMENDATION 12

**Victoria Police should review its policies, procedures and IT capabilities in relation to its obligations under the Victims' Charter Act 2006 (Vic) (Victims' Charter).**

**This review should examine Victoria Police's capability and capacity in relation to meeting victims' statutory entitlements to information, as per obligations under the Victims' Charter.**

In reviewing its policies, procedures and IT capabilities in relation to its obligations under the Victims' Charter, the review should consider:

- case management and/or IT solutions that would better enable police to manage victim liaison effectively
- Victoria Police's capability to record and report on victim liaison, similar to the Office of Public Prosecution's Records of Victim Engagement (ROVE)
- how different models and approaches might better enable Victoria Police to meet their obligations, considering initiatives such as victim liaison models, dedicated unit models and automated notification systems
- the need for a dedicated funding bid to ensure Victoria Police can meet its Victims' Charter obligations.

## Funding, resourcing and cultural change

The VOCC notes that stakeholders, including Victoria Police, frequently raised lack of funding and resourcing as a barrier to police fulfilling their Victims' Charter obligations. Research also confirms this.<sup>51</sup>

The VOCC acknowledges concerns about funding and resourcing. As noted in **Chapter 12**, the Victorian Government should assess funding levels and arrangements for justice agencies with statutory obligations under the Victims' Charter. In addition, as outlined above, Victoria Police's review should include assessment of the need for a dedicated funding bid to ensure it can meet Victims' Charter obligations.

However, lack of funding and resourcing cannot continue to be used as a justification for keeping victims' rights below an acceptable standard. The need for continued and ongoing cultural change also needs to be acknowledged – agencies must also adapt their business, operations and policies to realise victims' rights.

Cultural change must continue to be a focus of justice agencies to ensure victims' status as participants is respected in day-to-day operations.

As stated above, it is evident that there are many dedicated police members who are victim-centred and wish to provide victims with information and support. Police officers are not social workers and should not have primary responsibility for victim support. As discussed in **Chapter 14**, victims need better support from an adequately funded victims' services system. However, victim feedback suggests there are instances where cultural change and improved practices are needed in police interactions with victims. In these instances, victims are not expecting to be counselled or case-managed. However, victims do wish to be treated with dignity and respect and provided with up-to-date information about the progress of their case.

### Victim liaison must be seen as 'real' work

Research has previously found that not all Victoria Police members view victim liaison work as 'real' work. This view can limit communication with victims and undermine Victims' Charter principles obligations to update victims on the progress of a case. As well as being an issue raised by victims in our inquiry, inconsistent police communication with victims was raised in the VLRC's 2021 report *Improving the Justice System Response to Sexual Offences*.<sup>52</sup>

Research by academics Dean Wilson and Marie Seagrave has found that some police view dealing with victims of crime as a distraction from 'real' police work: over half of police respondents to a survey about

<sup>51</sup> Dean Wilson and Marie Seagrave, 'Care Bears and Crime-Fighters: Police Operational Styles and Victims of Crime' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 133, 154.

<sup>52</sup> Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) 358.

their work with victims said that dealing with victims' needs 'impeded regular police duties'. One survey respondent said, 'We have enough to do without ensuring victims' needs are met.'<sup>53</sup>

Although Wilson and Seagrave's research identified some police who viewed victims as the primary responsibility of police,<sup>54</sup> the majority of police interviewed by Wilson and Seagrave defined their role according to a 'crime-fighting mandate',<sup>55</sup> as typified by this respondent's view of their role:

I'm here to investigate a crime. I'm here to see well if someone has committed that crime, identify the person, charge them and put them before a magistrate. Where does it come in now that I suddenly have to be a social worker and I have to liaise with this victim and refer them to that person and ring them up a week later and see what they've done next? It's just increasing the workload of general duties members or any member.

Police in the study who identified as 'crime-fighters' repeatedly asserted that victims were a low priority in contrast to the 'real' police work of catching offenders.<sup>56</sup>

At the same time, the existence of victim-centred policing was also identified in the study, as illustrated by this study participant:

We have a duty to obviously keep them up to date, ensure that if they require counselling, if they require assistance in court, if they require any other needs, that they're taken care of. Every victim should be treated obviously as best that we can.<sup>57</sup>

Provision of information cannot be viewed as optional or 'nice to have'.  
Victim liaison is police work.

This victim-centred approach to police work needs to be harnessed and embedded as part of Victoria Police's culture.

Wilson and Seagrave's research concluded that ensuring that victims of crime have more satisfactory encounters with police is inextricably linked to cultural transformation within police organisations.<sup>58</sup>

The VOCC recommends that Victoria Police undertake a cultural review assessing their organisation-wide approach to victim liaison.

The cultural review should consider:

- how victim liaison can be culturally ingrained in police work, from the point of academy training throughout a police member's career
- how the principles of the Victims' Charter can be elevated within Victoria Police so that victim liaison is not viewed as a distraction from 'real' police work or an optional process
- what training is required to better meet victims' diverse needs.



### RECOMMENDATION 13

**Victoria Police should undertake a cultural review assessing its organisation-wide approach to victim liaison and adherence to obligations under the *Victims' Charter Act 2006* (Vic).**

The cultural review should consider:

- how victim liaison is culturally ingrained in police work, from the point of academy training throughout a police member's career
- how the principles of the Victims' Charter can be elevated within Victoria Police so that victim liaison is not viewed as a distraction from 'real' police work or an optional process
- what training is required to better meet victims' diverse needs
- how to best address biases or prejudices that police have that may prevent or discourage victims from participating further in the reporting or prosecution process.

53 Dean Wilson and Marie Seagrave, 'Care Bears and Crime-Fighters: Police Operational Styles and Victims of Crime' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 133, 138.

54 Ibid 146.

55 Ibid 150.

56 Dean Wilson and Marie Seagrave, 'Care Bears and Crime-Fighters: Police Operational Styles and Victims of Crime' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 133, 150.

57 Ibid 146.

58 Ibid 156.

## **Overview of Chapter 14: Support and information**

Access to timely and appropriate victim support is key to victims' participation in the justice system. Under the *Victims' Charter Act 2006* (Vic) (Victims' Charter), justice agencies and victims' services are to provide clear, timely and consistent information about relevant support services and if appropriate, refer victims to relevant support services.

The Victims of Crime Commissioner (VOCC) has found that the victim support system is not functioning in a way that enables victims to participate meaningfully.

### **Connecting victims to support**

Victims told the VOCC that they find it difficult to locate the right victim support services and are referred 'in circles'.

The VOCC recommends that the Victorian Government conduct a comprehensive, independent review of the e-referral system to improve referral practices.

The VOCC also notes that further support needs to be available at the point of reporting to police. The VOCC recommends more work be done to embed the use of the Independent Third Person Program (ITP Program) for victims with cognitive impairment when they report to police.

The VOCC also recommends that victims have access at the reporting stage to an independent support person who can provide victims with immediate, urgent support, together with a more formalised link to the victims' service system. The VOCC recommends that the Victorian Government introduce an 'Independent Victim Support Person' (IVSP) model.

### **Enhancing the victim support system**

The VOCC notes there have been sufficient reviews and inquiries demonstrating that the current approach to victim support is not meeting victims' needs. The Victorian Government must commit to rebuilding and properly funding a comprehensive victim support system that responds to the diverse needs of victims of crime.

The VOCC recommends that the Victorian Government design, implement and properly fund an enhanced victim support system in Victoria, drawing on the findings of this inquiry and previous Victorian reviews and inquiries.

### **Getting information**

This inquiry, and other research, has highlighted the need for enhanced information systems to assist justice agencies to meet their obligations to provide victims with relevant information. The idea of a 'Victims' Portal' or online information gateway has been raised in previous inquiries and was raised again during this inquiry. The VOCC recommends that the Victorian Government undertake an independent feasibility study to explore the viability of a Victims' Portal.

### **Improving awareness of victim support**

A third of victims surveyed by the VOCC (33 per cent) did not know how to access victims' services or what services to use.

Given anyone can become a victim of crime, it is imperative that there is a basic level of knowledge, awareness and brand recognition of victims' services among the general community. The VOCC recommends that the Victorian Government develop a comprehensive branding and community awareness campaign for victims' services.

# 14

Chapter 14:  
**Support and  
information**



## Introduction

Access to timely and appropriate victim support is key to victims' participation in the justice system. Under the *Victims' Charter Act 2006* (Vic) (Victims' Charter), justice agencies and victims' services are to provide clear, timely and consistent information about relevant support services and possible entitlements and legal assistance, and, if appropriate, refer victims to relevant support services.<sup>1</sup>

Receiving victim support increases victims' participation as well as perceptions of procedural fairness.<sup>2</sup> In **Chapter 6**, victims told the VOCC about not being able to get the support they needed to participate in the justice process and recover from a crime.

This chapter makes recommendations to:

- improve the victim support referral process
- improve the victim support system
- enhance the support immediately available to victims at the point of first contact with police
- improve the information provided to victims of crime
- improve victims' awareness of available support services.

## Connecting victims to support

This inquiry did not focus on reviewing the provision of victim support in detail given this has been comprehensively examined in recent reviews and inquiries.<sup>3</sup>

However, in examining victims' participation in the justice system, the provision of support to victims has inevitably arisen when engaging with victims and stakeholders. This is because access to appropriate support is fundamental to victims' participation.

In a functional victim support system,<sup>4</sup> victim support workers act as a guide for victims of crime, steering victims through the justice process and enabling their participation. Without tailored, specialist support, victims cannot participate in the justice process.

In a functional victim support system, victim support workers act as a guide for victims of crime, steering victims through the justice process and enabling their participation.

However, it is clear from the VOCC's engagement with victims and stakeholders that the victim support system is not functioning in a way that enables victims to participate meaningfully. Many victims do not receive enough information about relevant support services, or adequate referrals to these services.

### Accessing support a 'lottery'

Those victims who did access sufficient and appropriate support discussed positive experiences. It was clear that some victims had received a level of support that had significantly assisted them to participate in the justice process. This confirms that when the victim system works as intended, victims are more likely to participate in a meaningful way.

However, as outlined in detail in **Chapter 6**, many victims advised the VOCC that they had found it difficult to locate appropriate victim support, with one respondent to the Victims' Survey describing it as 'a lottery'.

Victims frequently described how either they were unaware of support options available or referrals were not made. Victims often described being referred 'in circles' or from one agency to the next. For other victims, referrals were made but victims did not receive any follow-up contact from the relevant agency.

<sup>1</sup> *Victims' Charter Act 2006* (Vic) s 7.

<sup>2</sup> Jo Bryce et al, 'A Qualitative Examination of Engagement with Support Services by Victims of Violent Crime' (2016) 22(3) *International Review of Victimology* 239, 241.

<sup>3</sup> See generally Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020); Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system)>.

<sup>4</sup> In Victoria, the victim support system is comprised of a range of government and non-government services. They include services overseen by the Department of Justice and Community Safety (such as the Victims of Crime Helpline and the Victims Assistance Program) as well as sexual assault and family violence services funded by government and delivered by community organisations (such as Centres Against Sexual Assault). See, e.g., Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 28; Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Supplementary Consultation Paper, 2017) 12.

## Referrals are not working

Referrals are a key step in victims getting access to the right support at the right time, which is in turn fundamental to their participation. However, stakeholders advised the VOCC that referrals systems are flawed and 'clunky'.

Victims Services staff told the VOCC that it is essential that victims are referred from police to victim support services via the Victoria Police e-Referrals system (VPeR<sup>5</sup>) at the earliest opportunity. However, Victims Services staff said that police practices were inconsistent.

Victims Services staff also suggested that the fact that VPeR referrals are consent-based acts as a barrier to victims receiving timely support:

One of the barriers in relation to VPeR referrals is that they are consent based. So even if the conversation happens initially, the victim may be in shock, be feeling over-whelmed or not able to take the information in. Therefore, it needs to be revisited further along in the process with the victim in cases where they do not take up the offer initially.<sup>6</sup>

Victims' professionals surveyed by the VOCC explained the importance of early referrals for victims' participation:

If VAP [Victims Assistance Program] receive referrals early on in the criminal process we can ensure that the client is given every opportunity to participate. When referrals are received late in the process, the clients have missed out on nearly all participation opportunities and feel unheard and not respected.

For a victim to participate, they must be aware there is a pathway for them to do so. I find there is still a significant number of victims that are never referred to VAP for assistance in the first instance, so how can they make a choice as to whether they want support to 'participate'?

If VAP receive the referral of a victim in a timely manner, they are able to provide many more options for the victim to participate than if they receive the referral when a Victim Impact Statement is due next week. Early referrals to appropriate services is critical for victims to be made aware of their rights to participation.

However, victims' professionals surveyed by the VOCC advised that early referrals were made inconsistently or not made:

There is a lot of inconsistency with making e-referrals

I feel there are many opportunities that VPeR referrals are missed in the early stages and victims would benefit greatly from VAP early intervention.

It should be compulsory for police to offer a VPeR referral to VAP for each victim. Police should be held accountable if they do not do this.

Windermere VAP described the e-referral system as 'clunky' and lacking role clarity.<sup>7</sup>

The referral pathway to victims' services has been raised as an issue in previous reports and inquiries which found:

- police referral policies are too restrictive, not tailored to victims' needs and do not reflect contemporary understandings of trauma<sup>8</sup>
- an overreliance on self-referrals, as well as police referrals, with lack of alternative referral pathways for victims of crime.<sup>9</sup>

These previous reviews and inquiries made recommendations to improve referral pathways to victim support.

<sup>5</sup> Victoria Police, *Future Directions for Victim-Centric Policing* (Web Page, August 2015) <[https://www.police.vic.gov.au/sites/default/files/2019-01/Victim-Centric-Policing-Booklet\\_web\\_0.pdf](https://www.police.vic.gov.au/sites/default/files/2019-01/Victim-Centric-Policing-Booklet_web_0.pdf)>.

<sup>6</sup> Consultation Meeting 14 – Victims Services staff.

<sup>7</sup> Consultation Meeting 21 – Windermere Victims Assistance Program.

<sup>8</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 70.

<sup>9</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 404 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.





### Previous recommendations in relation to improving referrals to victims' services

Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* recommended:

- **establishing a wider range of access pathways**, including through additional structured referral pathways, improved interfaces between VSSR services and other key victim services, and strategic community engagement and education
- **enhancing Victoria Police's capacity to ensure effective and consistent use of the e-referral system**, including building the confidence and capacity of Victoria Police members to identify needs, secure victim consent and offer referrals at multiple points in time
- **establishing an online referral portal for referrals from other professionals and key services** (beyond Victoria Police), focusing on emergency departments and key victim services, including Centres Against Sexual Assault, The Orange Door and broader specialist family violence services.

The Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* recommended:

- **that the Victorian Government provide training and guidance to key referral agencies** on referring victims of crime to Victims Assistance Programs (VAPs) sooner.

## Reforming referrals

Improvements are still needed to the referral pathways for victims. Victims told the VOCC that they:

- find it difficult to locate the right victim support services
- feel the onus is on them to locate services
- are referred 'in circles'.

Data suggests only a small proportion of victims of crime against the person are receiving a service through the Victims Assistance Program (VAP).<sup>10</sup> This alone suggests that victims are not necessarily finding the services they need to help them participate in the justice system.

The VOCC recommends that the Victorian Government conduct a comprehensive, independent review of the VPeR system. The review should be independent of police and the victim support system and should examine how to reduce the gap between the number of victims of crime in Victoria and the number of victims receiving a victim support service.

The review should examine the process for obtaining victims' consent for referral given the number of victim support workers who have raised this as a key barrier for early referral to VAPs for support. Benefits and risks of 'opt-in' and 'opt-out' referral models should be examined, particularly looking at learnings from the family violence sector and referral models in other jurisdictions, having regard to trauma-informed practice and information privacy.

The review should also consider ways to enhance Victoria Police's capability to:

- secure victims' consent to refer them to victims' services
- offer referrals at different (and multiple) points in time, consistent with a victim's needs.

As discussed in **Chapters 5 and 7**, particular victim cohorts lack trust in police, making it less likely that they will report crimes to police and therefore making it more difficult for them to access victims' services. The review should consider ways to establish a wider range of access and referrals pathways, including through enhancing capability for structured referral pathways for other professionals supporting victims of crime, such as health and social services who may wish to refer a victim into the victim support system.

<sup>10</sup> For the year ending June 2022, Crime Statistics Agency data indicated that 66,180 victim reports (not necessarily related to unique victims) had been recorded in relation to crimes against the person: Crime Statistics Agency, Year ending 30 June 2022, *Crime Statistics* (Web Page) <<https://www.crimestatistics.vic.gov.au/crime-statistics/download-crime-data/year-ending-30-june-2022>>. In 2021–22, 9,972 victims received a service from the Victims Assistance Program: Department of Justice and Community Services, *Annual Report 2021–2022* (2022).



## RECOMMENDATION 14

**The Victorian Government should conduct an independent review of the victim support e-referral system by 30 June 2025. Following this review, the government should implement any necessary changes to ensure victims are being routinely referred to victim support at relevant points of the justice process.**

A review of the victim support e-referral system should:

- examine how to reduce the gap between the number of victims of crime in Victoria and the number of victims receiving a victim support service, including examining the process for obtaining a victim's consent for referral
- consider whether the current system is sufficiently flexible given victims are likely to be in acute stress at the default point of referral (point of first contact with police)
- consider ways to enhance Victoria Police's capability to secure victims' consent to refer to services and offer referrals at different (and multiple) points in time, consistent with a victim's needs
- enable victims to engage with referrals at different points in their justice journey, from point of first contact with police to other points in the process, including investigation, prosecution, court, post- court and when interfacing with other supports, such as health and other non-justice services
- explore how the e-referral process can be expanded to provide an online referral portal for other professionals, including specialist victims' services (sexual assault, family violence) and other health and social services.

## Using the Independent Third Person Program

During consultation for this inquiry, the VOCC was told about barriers to reporting to police for people with disability.<sup>11</sup> Respondents to the VOCC's Victims' Survey who self-identified as having a disability raised the following concerns about reporting to police:



*'I don't feel safe talking to police.'*

*'Police refused to take my statement.'*

*'I tried to report but was dismissed despite ample evidence.'*

*'I stopped reporting crimes to police because they did nothing.'*

– Victims' Survey respondent

The Independent Third Person Program (ITP Program) provides support to people with a cognitive impairment or mental impairment if they are being interviewed or having a statement taken by police whether as a suspect, an accused, an offender, a victim or a witness.<sup>12</sup>

The Office of the Public Advocate oversees the ITP Program, but ITPs are trained volunteers who are independent of police and the investigation. ITPs act as a safeguard to ensure a person with disability is not disadvantaged when communicating with police.<sup>13</sup>

<sup>11</sup> Interview 1 – Victim of crime, Consultation Meeting 15 – Experts by Experience Advocacy Team – Women with Disabilities Victoria, Consultation Meeting 11 – Victim Survivors' Advisory Council.

<sup>12</sup> Office of the Public Advocate, Submission No 41 to the Victorian Law Reform Commission Inquiry, *Improving the Response of the Justice System to Sexual Offences* (January 2021) 9.

<sup>13</sup> Office of the Public Advocate, Submission No 41 to the Victorian Law Reform Commission Inquiry, *Improving the Response of the Justice System to Sexual Offences* (January 2021) 9.



### Role of Independent Third Persons (ITPs) overseen by the Office of the Public Advocate

- Facilitate communication
- Ensure the person understands their rights
- Ensure the person understands procedures
- Provide emotional support
- Address immediate welfare needs

An ITP is an independent and objective support person.<sup>14</sup> ITPs are 'available 24 hours a day to attend any police station in Victoria, and do not have to be booked in advance'.<sup>15</sup>

ITPs play a vital role in supporting victims of crime at the point of reporting to police, but previous research has found some key issues:

- **ITPs are not always being used when they should be.** In 2021, the Victorian Law Reform Commission (VLRC) in its report *Improving the Response of the Justice System to Sexual Offences* concurred with the findings of previous reviews 'that ITPs are not always used in interviews when they could be'.<sup>16</sup> This was also raised by the Office of the Public Advocate (OPA) in its submission to the VLRC's same inquiry.
- **ITPs cannot meet demand.** In the same report, the VLRC concurred with the findings of research, and with the submission of the OPA, that the ITP Program needed to be better funded to meet demand.<sup>17</sup>
- **ITPs are not providing links to the victim support system.** The VLRC report also found that ITPs were not playing a role in linking victims to the broader victim support system.<sup>18</sup>
- **There is no reference to a victim's right to an ITP in the Victims' Charter.** While victims have a general right to be given information about relevant supports and where appropriate, a referral to a support service,<sup>19</sup> there is no mention of the right to an ITP to support a victim when communicating with police at the reporting stage. The OPA has advocated for a legislated right to ITPs, stating 'legislative protection for people needing an ITP would be consistent with the legislative right for young people to have access to the support of an independent person in police interviews'.<sup>20</sup>

The VOCC agrees with the overarching findings in relation to ITPs identified in the VLRC's 2021 report *Improving the Response of the Justice System to Sexual Offences*. ITPs need to be fully utilised and become part of the routine response for victims with cognitive impairments or mental illness who wish to report to police. ITPs also need to be better utilised as a link to the victim support system at the point of reporting to police.

<sup>14</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 325.

<sup>15</sup> *Ibid* 326.

<sup>16</sup> *Ibid* 327.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* 329.

<sup>19</sup> *Victims' Charter Act 2006* (Vic) s 7.

<sup>20</sup> Office of the Public Advocate, Submission No 41 to the Victorian Law Reform Commission Inquiry, *Improving the Response of the Justice System to Sexual Offences* (January 2021) 16.

**RECOMMENDATION 15**

**The Department of Justice and Community Safety should develop a time-limited working group with the Office of the Public Advocate, Victoria Police, victim support services and other stakeholders as required to develop an action plan to ensure the Independent Third Person Program (ITP) is properly used for eligible victims when reporting to police.**

The action plan should:

- identify how the use of ITPs use can be embedded in Victoria Police policies and practices
- develop policies or protocols to ensure ITPs become a crucial link to the broader victim support system, including establishing formal (warm) referral pathways
- consider the need to enhance the legislative framework with respect to ITP access, including whether a right to an ITP should be enshrined in the Victims' Charter or other legislation.

## A new link to the support system

Too many victims are falling through the gaps and not receiving the support they need. Victims need urgent support and information at the point of reporting a crime and they are not always being referred to services like the Victims Assistance Program (VAP) in a timely way.<sup>21</sup>

Victims Services staff told the VOCC that the 'reporting stage is critical, because ... that is the first interface that a victim is having with the system'.<sup>22</sup> Victim support professionals surveyed by the VOCC told the VOCC that timely referral to support is vital – but was not happening. One victims' support professional told the VOCC that VAPs should be on call to provide support at the police report stage.

Increased capacity in the victim support system to properly embed co-location of VAPs at police stations and other key services, including specialist and culturally safe services, is important. This should continue to be focused on as part of an enhanced victim support system. A comprehensive, independent review of victim referrals, as outlined above, should also identify ways to improve the system so fewer victims fall through the gaps.

However, the VOCC considers there are other ways to enhance the link between police and the victim support system.

After reporting a crime, too many victims are unaware of available victims' services, do not know how to access services or do not know what services to use.

The VOCC recommends that there be more support for victims at the police reporting stage. This support should be provided by an independent person who can provide victims with immediate, urgent support, together with a more formalised link to the substantive victims' service system.

The VOCC recommends that the Victorian Government introduce an 'Independent Victim Support Person' (IVSP) model. Like the ITP model outlined above, an IVSP would enable police to call an IVSP when victims attend a police station, providing immediate, urgent, place-based support and assistance, including after-hours when other victim support professionals are unavailable.

**The VOCC recommends that there be more support for victims at the police reporting stage. This support should be provided by an independent person who can provide victims with immediate, urgent support, together with a more formalised link to the substantive victims' service system.**

<sup>21</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 310 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system)>.

<sup>22</sup> Consultation Meeting 14 – Victims Services staff.

An IVSP could:

- provide immediate emotional support and address any welfare needs (e.g. calling a friend or family member, making practical arrangements relating to transport, clothing, phone-calls etc.)
- identify whether an ITP is required if a victim has a cognitive impairment or mental illness
- help victims to liaise with police in relation to making a report and facilitating communication in a safe way, including addressing immediate trauma responses that might inhibit a victim's ability to report
- assist police with a victim's specific needs, including providing advice in relation to cultural safety, disability and other accessibility matters
- promote the rights and dignity of a victim, including helping victims or the police understand victims' rights, including their rights under the Victims' Charter
- provide support to ensure victims are able to make disclosures in a way that is safe for them, including in a private, comfortable space
- provide victims with advice about other supports and services that could assist them before, during or after reporting to police, such as specialist sexual assault or family violence services
- make warm referrals to appropriate services including Victims Assistance Programs, Centres Against Sexual Assault for longer-term case management, support or counselling.

A further benefit of an IVSP program would be the ability to address concerns raised by victims and stakeholders about any additional barriers experienced in reporting to police, by building training, competencies and specialisation in relation to cultural safety, diversity and working with older or younger victims or other victims with specific needs into the program.

The VOCC does not propose that an IVSP be a substitute for existing programs or comprehensive victim support case management. Crucially, an IVSP would not:

- replace the role of ITPs, who are specially trained and crucial to enhancing participation for individuals with cognitive impairments and mental illness
- replace the role of Victims Assistance Program (VAP) workers or other victims' professionals such as sexual assault or family violence professionals.

An IVSP would be used where a VAP service is not co-located, or after-hours when VAP workers are unavailable. An IVSP would not perform any ongoing case management. Their role would be to provide immediate, urgent support and formal referrals to the victim support system.

It is possible that IVSPs could also be used in other settings (e.g. health, legal, educational) to enhance connections and referrals from other professionals and organisations to the victim support system. They could also be deployed urgently in the community where a critical incident occurs and many victims or witnesses need urgent support.

While it is beyond the scope of this inquiry to address the funding, governance or oversight of an IVSP-type model, the VOCC notes that the DJCS currently funds a range of victim support programs, as well as oversees a range of volunteer programs that provide essential services to the community, including Justices of the Peace and Bail Justices (collectively called Honorary Justice Volunteers). Similarly, the OPA oversees a range of volunteer programs, including the ITP program.

Consideration could be given to leveraging off existing victim support programs or other volunteer-based programs. Development of the IVSP program should be done in close collaboration with lived experience experts, victims' professionals and Victoria Police.



## RECOMMENDATION 16

**The Victorian Government should introduce an Independent Victim Support Person program to provide immediate place-based support and assistance to victims reporting crime when other victim support professionals are unavailable. The program should be available 24 hours a day, 7 days a week.**

An Independent Victim Support Person program would:

- provide immediate emotional support and address any welfare needs
- identify whether an Independent Third Person is required if a victim has a cognitive impairment or mental illness
- help victims to liaise with police and facilitate communication in a safe way
- provide assistance to police regarding specific needs of a victim, including advice in relation to cultural safety, disability and other accessibility matters
- promote the rights and dignity of a victim, including helping victims or the police understand victims' rights, including their rights under the *Victims' Charter Act 2006* (Vic)
- support victims to make disclosures in a way that is safe for them, including in a private, comfortable space
- provide victims with appropriate advice about other supports and services that could assist them before, during or after reporting to police
- make warm referrals to appropriate services including Victims Assistance Programs, Centres Against Sexual Assault for longer-term case management, support or counselling.

## Enhancing the victim support system

### Support is not meeting participation needs

For some victims consulted by the VOCC, it was clear that they had received a level of support that had significantly assisted them to participate in the justice process. However, close to 60 per cent of Victims' Survey respondents who used a victims' service told the VOCC that they either did not get any support from that victims' service to participate in the justice system, or only got limited support to participate.

Part 2 of this report outlined in detail victims' concerns with the current provision of victim support. In summary, victims told the VOCC that:

- services felt like referral agencies, rather than providing meaningful assistance
- service provision did not meet the immediate needs of victims, including after serious crimes like homicide
- service provision was not tailored to the victims' needs, whether based on the type of crime or personal circumstances with key gaps for children and young people, Aboriginal and Torres Strait Islander peoples, people with disability
- there was not a consistent support worker/case management approach
- victims who were unable to find the support they needed were re-traumatised by having to continually re-tell their story to different professionals
- there were lengthy waiting periods for services and then they felt like they were being rushed through the system when they finally did receive support
- it can be challenging finding support that addresses victimisation appropriately with an intersectional lens, including disability, LGBTIQ+ and cultural diversity.

Victims' concerns are consistent with issues raised in relation to Victoria's victim support system in previous reports and inquiries, including that:

- the victim support system is a 'one-size-fits-all' system that is falling short of what victims need<sup>23</sup>
- many victims struggle to access specialist services<sup>24</sup>
- many victims struggle to get the appropriate support they needed to recover from crime<sup>25</sup>
- victims may receive disjointed or disconnected support due to the absence of a case management approach with a single source of information through an entire support period<sup>26</sup>
- the current victims' services system is not adequately structured or resourced to provide the level of support bereaved families need<sup>27</sup>
- there is a lack of culturally safe support options available to victims of crime who are Aboriginal Victorians or from culturally and linguistically diverse communities<sup>28</sup>
- victims need access to legal advice and assistance.<sup>29</sup>

Subsequent inquiries have urged the government to implement the recommendations of previous reviews and inquiries to enhance the victim support scheme in Victoria.<sup>30</sup> For example, the VLRC recently recommended in its report on stalking that:

The Victorian Government should implement the victim support recommendations in the Centre for Innovative Justice *Strengthening Victoria's Victim Support System: Victim Services Review* report and recommendations in the Legislative Council Legal and Social Issues Committee *Inquiry into Victoria's Criminal Justice System*, especially recommendations 36, 37, 40, 42, 49 and 50.<sup>31</sup>

## Meeting victims' needs

There have been sufficient reviews and inquiries, including reviews examining the existing system in depth, to demonstrate that the current approach to victim support is not meeting victims' needs.

In December 2021, the Victorian Government released its *Victim Support Update* which stated that the review by the Centre for Innovative Justice (CIJ) envisages an 'ambitious' and 'once in a generation' reform agenda that will take time to fully consider and implement.<sup>32</sup> At the time of publication of this report, the Victorian Government has not responded fully to the CIJ's report.

**The current victim support system has already been found to be inadequate and falling short. Victims need, and deserve, a properly resourced victim support system.**

Victims need, and deserve, a properly resourced victim support system that can provide the type of support they need, including in duration, intensity and specialisation. The current victim support system has already been found to be inadequate and falling short.

The Victorian Government must commit to rebuilding and properly funding a comprehensive victim support system that responds to the diverse needs of victims of crime. The victim support system should be grounded in research relating to victims' needs, including the need for a service system that is:

- flexible
- tailored
- timely and ongoing (where needed)
- holistic

<sup>23</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 12.

<sup>24</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 13.

<sup>25</sup> Ibid.

<sup>26</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 375 (Finding 34) <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system)>.

<sup>27</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 139.

<sup>28</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 375 (Finding 34) <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system)>.

<sup>29</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 386-90; <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system)>; Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 147-50.

<sup>30</sup> In 2022, the Victorian Government recommissioned the Victims Assistance Program: Victorian Government, *Victims Assistance Program Grants (RFA 002/22-23)* (Web Page, 16 August 2022) <<https://www.vic.gov.au/victims-assistance-program-grants-rfa-002/22-23>>.

<sup>31</sup> Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022) 88.

<sup>32</sup> See Victorian Government, *Victim Support Update* (Web Page, 2021) <[www.vic.gov.au/victim-support-update](https://www.vic.gov.au/victim-support-update)>; Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020).



- victim-centred and trauma-informed.<sup>33</sup>

There have been sufficient reviews and inquiries to demonstrate the essential elements of a comprehensive victim support system.<sup>34</sup> These components include:

<b>Single point of contact/single advocate</b>	<p>Victims consistently point to the need for a single point of contact throughout the justice process but the system is not currently configured to provide this consistency. Although the base components of a service system that can provide a single point of contact already exist, this is not how most victims of crime experience the support.</p> <p>Victims want a single point of contact/single advocate who can help them navigate the justice and support system from the start of their justice journey to post-justice procedure care. While some services, like witness support may be limited to a specific period, a single advocate should travel with a victim throughout their whole journey.</p>
<b>Specialist streams of assistance</b>	<p>Victims need access to more specialised streams of support, whether by crime type or need, including sexual assault, stalking, bereavement, mental impairment matters under the <i>Crimes (Mental Impairment or Unfitness to be Tried) Act 1997</i> or road trauma.</p> <p>Victim cohorts with particular needs, such as children and young people, older victims of crime, people with disability and people who identify as LGBTIQ+, need more targeted and specialised support as victims of crime.</p>
<b>Culturally safe support</b>	<p>Victims need more culturally safe support options, particularly victims of crime who are Aboriginal or from culturally and linguistically diverse communities.</p>
<b>Connected and integrated support</b>	<p>Increased co-location and sector partnerships would:</p> <ul style="list-style-type: none"> <li>• enhance referrals and reduce referral 'drop-out' rates</li> <li>• meet victims' immediate needs, including as they access other services such as health, legal, cultural or wellbeing supports</li> <li>• enable combined approaches to victim support, while maintaining a single point of contact/advocate.</li> </ul>
<b>Intensive support for high or specific needs</b>	<p>Intensive support needs to be able to be provided for those victims who require it.</p>
<b>Independent legal advice and assistance</b>	<p>Victims need access to legal information from an independent, trusted source (separate to the prosecution), with that independent advice available from the initial reporting stage.</p>

<sup>33</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 223.

<sup>34</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020); Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016); Victims Support Agency (Victoria), *Information and support needs of victims and witnesses in the Magistrates Court of Victoria* (Report, January 2013).

The Victorian Government should design, implement and properly fund an enhanced victim support system in Victoria, drawing on the findings of this inquiry and previous Victorian reviews and inquiries.



### RECOMMENDATION 17

**The Victorian Government should design, implement and properly fund an enhanced victim support system in Victoria, drawing on the findings of this inquiry and previous Victorian reviews and inquiries**

An enhanced victim support system should include the following essential components of a comprehensive victim support response:

- a single point of contact/single advocate
- specialist streams of assistance, including for sexual assault, stalking, road trauma, bereavement and specialist assistance for victims with matters dealt with under the *Crimes (Mental Impairment or Unfitness to be Tried) Act 1997*
- culturally safe support, including funding culturally appropriate agencies and community-based organisations to provide Victims Assistance Programs
- more connected and integrated support, including co-location and integration with other generalist and specialist services and key sector partnerships
- more intensive support for high needs or specific needs
- comprehensive legal assistance (see also Recommendation 21).

## Getting information from different agencies

Research has highlighted the need for more automated notification systems to assist justice agencies to meet their obligations to provide victims with relevant information on an ongoing basis.<sup>35</sup> The idea of a 'Victims' Portal' or online information gateway has been raised in previous inquiries<sup>36</sup> and was raised by key stakeholders again during consultation on this inquiry.

### Victims' 'hub' or 'portal'

The Department of Justice and Community Safety's 2021 report *Improving Victims' Experience of Summary Criminal Proceedings* discussed the possibility of an 'online gateway' that would 'operate as an online hub for all victims' and provide:

- a single and easy-to-navigate place for victims to find the information they need
- information about typical court processes and how to access support
- specialised information for particular offence types or groups of victims automatic communication of court dates via an opt-in system of alerts
- a mechanism for victims to access information about their own case in real time
- a mechanism for victims to contact the prosecutor currently handling their case
- functionality that allows for the electronic submission of VISs.<sup>37</sup>

The VOCC notes that the Department of Justice and Community Safety already operates a general victims of crime website which provides information about support and the justice process.<sup>38</sup> However, consistent with the report *Improving Victims' Experience of Summary Criminal Proceedings*, the VOCC agrees that a more

<sup>35</sup> Rhiannon Davies and Lorana Bartels, 'Challenges of Effective Communication in the Criminal Justice Process: Findings from Interviews with Victims of Sexual Offences in Australia' (2020) 9(4) *Laws* 31, 19.

<sup>36</sup> See, e.g., Department of Justice and Community Safety (Victoria), *Improving Victims' Experience of Summary Criminal Proceedings* (Final Report, November 2021).

<sup>37</sup> See, e.g., *Ibid* 28.

<sup>38</sup> Victorian Government, *Victims of Crime* (Web Page, 24 May 2023) <<https://www.victimsofcrime.vic.gov.au>>

comprehensive and 'interactive' portal would be useful for victims of crime, particularly for victims who may not want to engage with a victim support service or who would like more autonomy in engaging with the progress of their case.

Such a portal would need to be appropriately funded, resourced and would require the 'buy-in' of all relevant justice and service agencies if it was to operate successfully. It would need to be a multi-agency portal providing key information from police, prosecutions, court, victim support services and corrections, providing victims with a single source of information and link to their case.

If established well, a victims' hub or portal could significantly improve victims' participation through providing more accurate and up-to-date information about their matter. Such a portal could also integrate with other 'e-information' systems such as e-referrals, case management systems and court listings.

However, if such an initiative were not properly resourced or supported by all relevant justice agencies, it could be a further source of discontent for victims – for example, if information were not kept up to date by one or more agencies.

For this reason, the VOCC recommends that the Victorian Government undertake an independent feasibility study to explore the viability of establishing a victims' hub or portal. The feasibility study should explore:

- whether a victims' hub or portal could enhance victim participation at key stages of the justice process
- successful models of multi-agency hubs or portals providing key information to members of the public
- privacy and information sharing risks
- possible efficiency gains for justice agencies and victims' services personnel, as well as any resourcing implications
- whether a victims' hub or portal could be configured to accommodate interactivity for victims (e.g. to enable victims to lodge their Victim Impact Statements<sup>39</sup>).



#### RECOMMENDATION 18

**The Victorian Government should undertake an independent feasibility study, to be completed by 30 June 2025, to explore the viability of a Victims' Portal. The feasibility study should be made public.**

The feasibility study should explore:

- whether a victims' hub or portal would enhance victim participation at key stages of the justice process
- successful models of multi-agency portals providing key information to members of the public
- privacy and information sharing risks
- possible efficiency gains for justice agencies and victims' services personnel, as well as any resourcing implications
- whether a victims' hub or portal could be configured to accommodate interactivity for victims, such as submitting Victim Impact Statements electronically.

## Case management in the Magistrates' Court

A new Case Management System (CMS) is being developed for the Magistrates' Court of Victoria (Magistrates' Court) and the Children's Court of Victoria (Children's Court) which will replace ageing IT systems and strengthen 'the ability to capture and share appropriate information across the courts and key external parties'. The project aims to 'bring enhanced access to justice for Victorians, through stronger information sharing and improving court processes'.<sup>40</sup>

Court Services Victoria told the VOCC that the new CMS is predicated on the concept of unique identifiers that will allow people to track themselves through the system.<sup>41</sup>

<sup>39</sup> Whether victims should be able to lodge their VIS electronically is discussed in more detail in Ch 18.

<sup>40</sup> Court Services Victoria, *Case Management System Project* (Web Page, 8 May 2023) < <https://courts.vic.gov.au/projects/case-management-system-project> >.

<sup>41</sup> Consultation Meeting 31 – Court Services Victoria.

The VOCC considers that every victim should have a unique identifier assigned so that they can log-in and access 'real time' information about their case. This is particularly important in the Magistrates' Court jurisdiction where victims are:

- more likely to miss out on crucial updates from police informants and prosecutors about the progress of a case
- less likely to be supported by a witness support service.

The VOCC recommends that Court Services Victoria ensure the new CMS for the Magistrates' and Children's Courts enables victims to access up-to-date information on the progress of a court matter.



#### RECOMMENDATION 19

**Court Services Victoria should ensure the new Case Management System for the Magistrates' and Children's Courts enables victims to access up-to-date information on the progress of a court matter.**

The new Case Management System (CMS) for the Magistrates' and Children's Courts should enable victims to access 'real time' information about their case.

The CMS should accommodate the language and accessibility needs of a diverse range of victims and ensure there is sufficient information about how to get additional support and information.

## Improving awareness of support

### Improving awareness of victim support

A third of victims surveyed by the VOCC (33 per cent) did not know how to access victims' services or what services to use. The implementation of recommendations in this report in relation to enhanced referrals should partially address this lack of awareness. However, not enough members of the community know about victims' services.

Anyone can become a victim of crime. It is imperative that there is a basic level of knowledge, awareness and brand recognition of victims' services among the general community. This awareness should enable victims to recall branding or names of key agencies or organisations more readily when they need to.

As noted in the CIJ's review of the victim support system, the Victorian Government must increase community knowledge and awareness of the victim support system by 'creating brand recognition that is identifiable by victims of crime'.<sup>42</sup>

The VOCC has also been told about the confusion experienced by victims because of the number of organisations, agencies and programs that have 'victim' in the title. It can be difficult to understand the difference, for example, between the Victims of Crime Commissioner, the Victims of Crime Helpline and the Victims of Crime Assistance Tribunal.

During consultations, the VOCC was told that:

Many victims feel confused by all of the services that start with 'victim' and the criminal justice process can be confusing, so it is really important that information being provided to victims gets conveyed in the simplest and most meaningful way.<sup>43</sup>

The VOCC recommends that the Victorian Government develop a comprehensive branding and community awareness campaign for the victim support system. As part of this work, the government should review the language used in communications products and the appropriateness of agency and program names, having regard to the likelihood of confusion for victims when first engaging with the victim support system.

<sup>42</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 55.

<sup>43</sup> Consultation Meeting 14 – Victim Services staff.

**RECOMMENDATION 20**

**The Victorian Government should develop a comprehensive branding and community awareness campaign for the victim support system.**

A comprehensive community awareness campaign should present unifying branding to enhance the awareness of government-funded programs, including the Victims of Crime Helpline, the Victims Assistance Program (VAP), Victims Register, Restorative Justice programs and the Victims Legal Service.

The government should review the language used in communications products and the appropriateness of agency and program names, having regard to the likelihood of confusion for victims when they first engage with the victim support system.

## Overview of Chapter 15: Legal assistance

For many victims consulted by the Victims of Crime Commissioner (VOCC), enhanced participation in the justice system is directly linked to a need for independent legal advice and assistance.

Victims highlighted the logical disconnect between having legislative entitlements to participation under the *Victims' Charter Act 2006* (Vic) (Victims' Charter) while lacking access to independent legal advice about these entitlements.

### **A comprehensive state-funded legal service**

In March 2023, the Victorian Government established the Victims Legal Service. This initiative is welcome. However, victims have a wide range of legal rights, interests and needs. Given the narrow scope of legal assistance given to victims in Victoria, most of victims' legal needs remain unmet. Legal assistance is an important component of the comprehensive support that victims need in order to participate effectively in the justice system.

The VOCC recommends that the Victorian Government expand the Victims Legal Service to provide specialist state-funded legal assistance to meet the comprehensive range of legal issues that victims face as a result of crime.

### **Legal representation for sexual offence matters**

Addressing the gaps in legal advice and assistance should address many of the legal challenges faced by victims of crime. However, a comprehensive Victims Legal Service alone will not resolve all issues for victims of sexual offences in the adversarial criminal trial process. Victims in sexual offence trials often face significant, varied, and difficult challenges during the criminal trial process which require a targeted and dedicated legal response.

The VOCC recommends that the Victorian Government establish a sexual offences legal representation scheme. Independent legal representation should be available to protect and represent victims' legal interests in certain applications and hearings such as applications concerning confidential communications, sexual history evidence, ground rules hearings, cross-examination at a committal hearing and subpoenas for information containing private information about the victim.

The scheme would also include limited independent legal representation at hearings involving sexual offences (including committal hearings, summary hearings and trials) when the victim is giving evidence to ensure compliance with the court's rulings and to protect witnesses from improper questions or questioning.

# 15

Chapter 15:  
**Legal assistance**





## Introduction

For many victims consulted by the Victims of Crime Commissioner (VOCC), enhanced participation in the justice system is directly linked to a need for independent legal advice and assistance.<sup>1</sup>

Victims' rights and entitlements often span many pieces of legislation and may also be contained in organisational policies.<sup>2</sup> Victims have highlighted the logical disconnect between having legislative entitlements (for example, to participation under the *Victims' Charter Act 2006* (Vic) (Victims' Charter)), while lacking access to independent legal advice about these entitlements and to enforce them when they are breached. One Victims' Survey respondent told the VOCC: '[t]he one thing I needed was the legal advocate, and I know it's been recommended so many years ago and it still hasn't happened.'

This chapter discusses the need for major reforms in relation to state-funded legal assistance for victims to improve their participation in the justice system.

This chapter outlines the need for a state-funded:

- comprehensive legal service for victims of crime – expanding the existing provision of legal support through the government's 'Victims Legal Service'
- sexual offences legal representation scheme.

As discussed further below, while complementary, these two initiatives are distinct, and would each require dedicated funding, resources and implementation plans.

While this chapter focuses on providing legal assistance to victims, legal assistance should be viewed as part of the overall support that victims need to participate in the criminal justice system and to assist them in recovering from the effects of crime. Enhanced legal assistance would complement enhanced victim support, as discussed in **Chapter 14**. Together, these measures would enhance victims' ability to participate in the justice system.

## Current approach to legal assistance

A number of different bodies and organisations provide specialist legal services to victims of crime in Victoria. For example:

- knowmore provides a free service to survivors of institutional child sexual abuse<sup>3</sup>
- Women's Legal Service Victoria operates the Legal Advice Line for Victim-Survivors of Sexual Assault<sup>4</sup>
- Djirra's Aboriginal Family Violence Legal Service supports Aboriginal people who are experiencing family violence.<sup>5</sup>

Victims may obtain legal advice and assistance from Community Legal Centres (CLCs) and Victoria Legal Aid (VLA). However, the ability of CLCs to assist victims will depend on the resources and capacity of individual CLCs (which differ from area to area). VLA adopts both means and merit tests which would exclude many victims from receiving legal advice.<sup>6</sup>

Victims may also engage their own lawyer privately. However, identifying firms that specialise in victim-related legal services may be difficult and expensive.<sup>7</sup>

In March 2023, the Victorian Government established a Victims Legal Service with a limited service offering. The Victims Legal Service is delivered by a partnership between VLA, CLCs and Aboriginal legal services across the state.<sup>8</sup> It is the first dedicated legal service for victims in Victoria. The Victims Legal Service provides legal information or advice on how to make an application for financial assistance with the Victims of Crime Assistance Tribunal<sup>9</sup> or to make an application for restitution and compensation from

1 Under the Victims' Charter, investigatory agencies, prosecuting agencies and victims' services agencies are to provide clear, timely and consistent information about relevant support services, possible entitlements and legal assistance available to persons adversely affected by crime: *Victims' Charter Act 2006* (Vic) s 7(a).

2 Including *Sentencing Act 1991* (Vic), 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). See also Kerri Judd KC, Director of Public Prosecutions (Victoria), *Discontinuance Review Framework* <<https://www.opp.vic.gov.au/Home/Resources/Discontinuance-Review-Framework>>.

3 knowmore, *What is the National Redress Scheme* (Web Page) <<https://knowmore.org.au/for-survivors/redress-scheme/>>.

4 Women's Legal Service Victoria, *Legal Advice Line for Victim-Survivors of Sexual Assault* (Web Page) <[womenslegal.org.au](http://womenslegal.org.au)>.

5 Djirra, *Aboriginal Family Violence Legal Service* (Web Page, 2020) <<https://djirra.org.au/what-we-do/legal-services/#afvls>>.

6 Victoria Legal Aid notes the following on its website: 'We use eligibility tools to ensure that resources are targeted to those most in need of legal assistance. Financial eligibility, measured by the means test, is the first hurdle of eligibility for a grant of legal assistance.'; Victoria Legal Aid, *Means Test Review* (Web Page, 31 August 2021) <<https://www.legalaid.vic.gov.au/about-us/our-organisation/how-we-are-improving-our-services/means-test-review>>.

7 The Law Institute of Victoria has a 'Find a Lawyer Referral Service'. Using the search term 'victim' does not identify any law firms specialising in victim-related issues although a number of law firms are listed under 'VOCAT – Crimes Compensation' or 'Civil – Crimes Compensation'.

8 Victoria Legal Aid, *Victims Legal Service* (Web Page, 14 March 2023) <<https://www.legalaid.vic.gov.au/victims-legal-service>>.

9 Applications will be made to the new Financial Assistance Scheme when it is operational in 2023.

the person who committed the crime.<sup>10</sup> The Victims Legal Service is not able to assist victims with any other victim-related legal matters.

Apart from these limited options for victims to seek legal assistance, there is no specialised, central pathway to legal advice or assistance for victims of crime. This means victims may:

- struggle to find appropriate legal advice or assistance
- be ineligible for VLA's services
- be unable to access CLCs' limited services
- encounter costly private legal fees.

There is no specialised, central pathway to legal advice or assistance for victims of crime.

Beyond issues of access and cost, where legal service providers do not specialise in victims' services, victims may be re-traumatised by legal advice and assistance that is not delivered in a trauma-informed or holistic way.

## Victims' unmet legal needs

### Findings of previous reports and inquiries

Findings relating to victims' unmet legal needs are not new.

The Centre for Innovative Justice (CIJ), which completed a large review of victims' services in Victoria in 2020,<sup>11</sup> told the VOCC that although exploring access to independent legal advice and assistance was not a part of its research methodology, most victims identified this as a significant unmet need. CIJ told the VOCC that this was the 'number one recommendation', with its strength 'coming from the fact we didn't ask victims about it – it was spontaneous and emerging in each of those 37 interviews...[u]nmet needs for legal issues arising from the impact of the crime were being compounded over and over again.'<sup>12</sup>

Since 2016, seven Victorian reports and inquiries have recommended a model of legal advice and assistance for victims of crime. While the scope of the proposed models differs across these reports, often reflecting the specific focus of each inquiry and its terms of reference, all advocated for enhanced access to state-funded legal advice and assistance for victims. Their recommendations are summarised in **Table 4** below.

Since 2016, seven Victorian reports and inquiries have recommended a model of legal advice and assistance for victims of crime.

**Table 4: Victims' legal needs: findings of previous reviews and inquiries**

Year	Report	Findings/recommendations
2022	The Legislative Council Legal and Social Issues Committee of the Parliament of Victoria's <i>Inquiry into Victoria's Criminal Justice System</i>	Recommended that the Victorian Government's Victims Legal Service include legal support to victims of crime on procedural matters such as: <ul style="list-style-type: none"> <li>• the role of victims in criminal proceedings, including giving evidence and any entitlements for alternative arrangements or special protections</li> <li>• making Victim Impact Statements</li> <li>• a victim of crime's right to be consulted during criminal proceedings.<sup>1</sup></li> </ul>

<sup>10</sup> Victoria Legal Aid, *Victims Legal Service* (Web Page, 14 March 2023) <<https://www.legalaid.vic.gov.au/victims-legal-service>>.

<sup>11</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020).

<sup>12</sup> Consultation Meeting 10 – Centre for Innovative Justice, RMIT University.

<sup>1</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) recommendation 44 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

<b>2022</b>	Victorian Law Reform Commission – <i>Stalking</i>	Recommended that legal advice be provided for victims in relation to personal safety intervention orders. <sup>2</sup>
<b>2021</b>	Victorian Law Reform Commission – <i>Improving the Justice System Response to Sexual Offences</i>	Recommended extending the Victims Legal Service (recommended in its 2016 report <i>The Role of Victims of Crime in the Criminal Trial Process</i> ) to include legal advice and representation for victims of sexual assault to protect their rights to privacy. <sup>3</sup>
<b>2020</b>	Centre for Innovative Justice – <i>Strengthening Victoria’s Victim Support System: Victim Services Review</i>	Recommended establishing a dedicated victims legal advice service for victims with specialist knowledge of victims’ legal issues. It argued that access to specialist, tailored legal advice for victims would provide for early intervention by way of legal ‘issues spotting’. <sup>4</sup>
<b>2018</b>	Sentencing Advisory Council – <i>Restitution and Compensation Orders</i>	Recommended that the Victorian Government consider establishing a specialist victims legal service to provide advice to victims about seeking restitution and compensation orders. <sup>5</sup>
<b>2017</b>	Coronial Council Appeals Review	The review concluded that a centralised approach to coronial legal advice should be developed (within Victoria Legal Aid) to provide legal services to victims’ families before, during and after a coronial investigation. <sup>6</sup>
<b>2016</b>	Victorian Law Reform Commission – <i>The Role of Victims of Crime in the Criminal Trial Process</i>	Identified the need for a dedicated, specialist victims legal service, recommending that Victoria Legal Aid be funded to establish a legal advice and assistance service for victims of violent indictable crimes. <sup>7</sup>

## What the VOCC was told

When asked in the VOCC’s Victims’ Survey what extra help would have made it easier for them to participate in the justice system, 58 per cent of survey respondents selected ‘my own lawyer to advocate for my rights.’ As articulated by this victim interviewed by the VOCC, victims want someone independent, acting only in the victim’s best interests:

<sup>2</sup> Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022), recommendations 23 and 24.

<sup>3</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021), recommendation 46.

<sup>4</sup> Centre for Innovative Justice, *Strengthening Victoria’s Victim Support System: Victim Services Review* (Final Report, November 2020) 149.

<sup>5</sup> Sentencing Advisory Council, *Restitution and Compensation Orders: Report* (October 2018) 99, recommendation 8.

<sup>6</sup> Coronial Council of Victoria, *Coronial Council of Victoria – Reference 4 – November 2017: Coronial Council Appeals Review* (November 2017), recommendation 6.

<sup>7</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) recommendation 23.



*'It is absolutely necessary to appoint a legal advocate independent of the OPP, and for victims to be able to request one if required. It needs to be a legal person that understands this system, as some solicitors won't deal with this sort of thing. Victims are usually traumatized. We need to be able to go to somebody we can trust, that can give us legal advice and who we know will act in our best interest. The OPP are a law unto themselves and from a victims point of view there needs to be a few more checks and balances.'*<sup>8</sup>

Ingrid Irwin, Lawyer, Child Sexual Abuse Survivor and Advocate highlighted the range of legal representatives who can be involved in child protection matters, all paid for by the state, as an example of how state-funded legal assistance can be operationalised:



*'In child protection matters, children have an independent children's lawyer. Everyone who has a separate legal interest in a case has a lawyer. In child protection, do you know how many lawyers are at the bar table in those matters – sometime 10? One for the child at risk of harm, a lawyer for the department, then we have a separate lawyer for the sibling of the child, and then the lawyer for mum and dad, and so on. And the State pays for that. And we still have the State saying that a victim can't have the right to a lawyer.'*<sup>9</sup>

Respondents to the VOCC's Victims' Survey said that a lawyer for victims was crucial to their participation:



*'My top priority is the need for independent legal support for victims of crime as children and as adults.'*

*'I should have been assigned a lawyer to assist me in the preparation of the victims of crime statement and to inform me that I would be asked by the court what I sought from sentencing and what these options actually meant in practice.'*

– Victims' Survey respondents

Some Victims' Survey respondents said their future participation in the justice system would be contingent on the availability of legal representation:



*'If i had to i would never be left alone and i would want a legal representative with me at all times when dealing with police.'*

*'I would demand the right to a lawyer.'*

*'Yes, by having my own lawyer in the criminal matter. Yes, by being a recognised party (not just a participant) in the criminal matter.'*

*'Yes I would demand the right to a lawyer.'*

*'yes, with proper legal advice and a lawyer like he had.'*

– Victims' Survey respondents

A number of stakeholders advised of victims' sense of confusion and dismay when realising they don't actually have their own lawyer.<sup>10</sup> Dr Mary Iliadis said: 'Victims often question where their lawyer is and have often referred to police or prosecutors as their lawyer and are quite confused when that person doesn't

8 Interview 15 – Victim of crime.

9 Interview 4 – Ingrid Irwin, Lawyer, Child Sexual Abuse Survivor and Advocate.

10 Consultation Meeting 5 – Dr Mary Iliadis; Consultation Meeting 6 – Victims of Crime Commissioner – Australian Capital Territory; Consultation Meeting 10 – Centre for Innovative Justice, RMIT University.

fundamentally uphold their rights and interests.<sup>11</sup> Associate Professor Kerstin Braun queried the rationale of affording victims certain rights, but not allowing legal representation to enforce the rights.<sup>12</sup>

The VOCC heard that without access to legal advice from an independent, trusted source (separate to the prosecution), participation in the justice system can be difficult. Further, trauma can impact on a victim's ability to voice their opinions and adequately participate during the criminal justice process without an independent lawyer. The VOCC heard from victims and stakeholders about victims' many unmet legal needs, summarised below.



### Summary of victims' unmet legal needs

The VOCC heard from victims and stakeholders that victims need independent legal advice:

- when making a report to police, having an 'options talk' with police and making a statement to police
- when police do/do not file charges, including assistance to understand decisions not to charge or to withdraw charges
- to provide informed views to the Director of Public Prosecutions (DPP) before the DPP makes certain decisions, such as modifying charges, discontinuing the prosecution or accepting a plea of guilty to a lesser charge
- to ensure that if bail is granted, conditions are imposed to protect victims and victims are informed of the outcome of any application
- to understand their rights and entitlements, including entitlements under the Victims' Charter and how to make a complaint if the Victims' Charter is breached
- in relation to subpoenas for their personal or medical records
- to seek leave to appear and make submissions in response to applications to access confidential medical or counselling records ('confidential communications')
- to better understand their role, responsibility, and rights as a witness
- to withdraw or amend their witness statement(s)
- whether they need immunity for evidence they will give
- to advocate to the prosecutor and court for safe spaces while attending court and to access special protections/arrangements while giving evidence
- to understand ground rules hearings
- to assist children with their legal rights separately from a parent/guardian
- when making a Victim Impact Statement (VIS) and/or reading it aloud in court, including advice on admissibility and arrangements for reading a VIS aloud
- to ensure that victims understand their participatory rights when diversion is recommended for an offender
- to be included on the Victims Register and make submissions to the Adult Parole Board
- to have court orders and records corrected where a victim is misidentified as the offender in family violence cases
- in relation to applying for leave to appear as an interested party in a coronial proceeding.

It is important to recognise that most victims do not have just one unmet legal need. Victims often have a constellation of related legal issues that flow directly from victimisation. Many of these legal issues or processes require interaction with a range of legal entities, including different courts and tribunals, sometimes at both the state and federal level, as well as different government agencies.

<sup>11</sup> Consultation Meeting 5 – DrMary Iliadis.

<sup>12</sup> Consultation Meeting 1 – Associate Professor Kerstin Braun.

CLC representatives told the VOCC that victims often have multiple, compounding legal issues and lack timely, holistic advice:

victims often don't have one legal issue, there's a pile of issues and there isn't the funding to deal with that. Sometimes victims get legal advice from someone who tells them 'don't worry about the custody matter', then the IVO ends and the dad knocks on the door and takes the child. If these clients had holistic advice from the start, then they would be a true participant in the system.<sup>13</sup>

Victoria Legal Aid also emphasised the need for a comprehensive, dedicated, trauma-informed legal service:

It's been a gap for a long time and creates significant barriers to victims participating in the process. It's something that has been raised many times along the way by a number of different reviews and inquiries. Victims have rights on paper, but they also need to know how to realise them in practice. The recently commenced Victims Legal Service delivered jointly by Victoria Legal Aid, Victorian Aboriginal Legal Service and Community Legal Centres provides a victim-centred, trauma-informed and collaborative model that could be expanded to services beyond assistance with financial compensation.<sup>14</sup>

## A comprehensive state-funded legal service

Over a number of years, the VOCC has advocated for enhanced legal advice and assistance for victims of crime.<sup>15</sup> Victims' views, consultations with experts and stakeholders, and the overwhelming evidence from previous reviews and inquiries, support the VOCC's conclusion that enhanced legal advice and assistance is fundamental to victim participation in the justice system.

Engagement with victims and stakeholders has indicated clear support for access to state-funded legal advice and representation across all stages of the criminal process as well as processes adjacent to it such as intervention orders, family law proceedings, compensation and coronial proceedings.

While the recent establishment of the first dedicated Victims Legal Service by the Victorian Government is a welcome and crucial first step in Victoria, a more comprehensive Victims Legal Service, which expands upon the current limited service, is required to assist victims with the full range of complex legal issues that arise as a result of victimisation.

Victims' views, consultations with experts and stakeholders, and the overwhelming evidence from previous reviews and inquiries, support the VOCC's conclusion that enhanced legal advice and assistance is fundamental to victim participation in the justice system.

The Victorian Government should fund a comprehensive specialist state-funded legal service for victims. It should expand the Victims Legal Service to provide victims with specialist, state-funded legal assistance in relation to a comprehensive range of matters relevant to crime victimisation spanning the relevant legislative provisions across criminal, administrative, and civil law.<sup>16</sup> The legal service should provide standardised and structured referrals to existing victims' services like the Victims of Crime Helpline, Victims Assistance Program and other community-based and specialist services.

As a centralised service, victims and other professionals should be able to identify the Victims Legal Service as the single pathway to specialist legal advice for victims.

A Victims Legal Service could provide advice to victims about a wide range of matters. Below is a non-exhaustive list of matters a comprehensive Victims Legal Service could assist victims with.

### Victims' Charter rights and entitlements

**ensuring victims receive information about an investigation and prosecution from relevant agencies, along with appropriate referrals to support consistent with their rights and entitlements under the Victims' Charter**

**ensuring agencies consult with victims and seek their views at key parts of the process consistent with their rights and entitlements under the Victims' Charter**

<sup>13</sup> Consultation Meeting 22 – Community Legal Centres – Session 1.

<sup>14</sup> Consultation Meeting 16 – Victoria Legal Aid.

<sup>15</sup> See, e.g., Victims of Crime Commissioner, Submission No 99 to Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (1 September 2021) 36–8; 41–4; Victims of Crime Commissioner, Submission No 45 to Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (May 2022) 34–41.

<sup>16</sup> Including the Sentencing Act 1991 (Vic), 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), Open Courts Act 2013 (Vic), and Victims of Crime (Financial Assistance Scheme) Act 2022 (Vic).

<p><b>Reporting a crime, understanding charges, withdrawing or amending witness statements</b></p>	<ul style="list-style-type: none"> <li>• providing independent advice regarding making a statement to police</li> <li>• providing independent advice and liaising with police/prosecution to understand why charges are not filed or are withdrawn by police/prosecution and advising on any internal or external review processes<sup>17</sup></li> </ul>
<p><b>Advocating for bail conditions that prioritise victim safety</b></p>	<ul style="list-style-type: none"> <li>• providing legal assistance to ensure that a prosecuting agency is aware of a victim's views about bail</li> <li>• if bail is granted, providing legal advice on bail conditions that are imposed to protect victims</li> </ul>
<p><b>Subpoenas and immunities</b></p>	<ul style="list-style-type: none"> <li>• advocating for pre-trial applications, including reviewing application material and engaging legal representation<sup>18</sup> to ensure victims' privacy and legal rights are respected in court</li> </ul>
<p><b>Giving evidence and alternative arrangements</b></p>	<ul style="list-style-type: none"> <li>• advocating for alternative ways of giving evidence and ensuring these are provided by the court where relevant</li> </ul>
<p><b>Children as victim- witnesses</b></p>	<ul style="list-style-type: none"> <li>• assisting children with their legal and Victims' Charter rights (as separate and distinct to those of a parent/guardian)</li> </ul>
<p><b>Suppression Orders and the media</b></p>	<ul style="list-style-type: none"> <li>• advising a victim-survivor of sexual abuse or as a bereaved family member wishing to seek a Victim Privacy Notice</li> <li>• providing victims with legal advice relating to media intrusion or media engagement and any legal implications</li> </ul>
<p><b>Plea negotiations</b></p>	<ul style="list-style-type: none"> <li>• legal assistance to ensure the prosecution seeks the victim's views during certain prosecutorial decision-making processes</li> <li>• providing independent advice and liaising with the prosecution to understand plea decisions and advising on any internal or external review processes<sup>19</sup></li> </ul>
<p><b>Sentence indications</b></p>	<ul style="list-style-type: none"> <li>• assistance with ensuring the impact on a victim is considered at the sentence indication stage, including liaison with prosecution as necessary</li> </ul>
<p><b>Diversion</b></p>	<ul style="list-style-type: none"> <li>• legal assistance to ensure that victims understand their participatory rights when diversion is recommended for an offender</li> </ul>
<p><b>Victim Impact Statements</b></p>	<ul style="list-style-type: none"> <li>• providing advice on the admissibility of a VIS</li> <li>• legal assistance where the defence applies to question a victim on the contents of their VIS</li> </ul>

<sup>17</sup> In Chapter 12 of this report, the VOCC recommends the establishment of a new external review mechanism for certain police decisions.

<sup>18</sup> Access to legal representation is discussed in detail below.

<sup>19</sup> In Chapter 12 of this report, the VOCC recommends the establishment of a new external review mechanism for these kinds of prosecutorial decisions.



<b>Cases of perpetrator misidentification/systems abuse</b>	<ul style="list-style-type: none"> <li>• legal assistance where a victim is incorrectly identified as the offender/respondent, particularly in family violence or stalking matters</li> </ul>
<b>Coronial matters</b>	<ul style="list-style-type: none"> <li>• applying for leave to appear as an interested party in a coronial proceeding and preparing submissions</li> </ul>
<b>Victim Right to Review scheme</b>	<ul style="list-style-type: none"> <li>• if implemented (see <b>Recommendation 4</b>) advising a victim about and applying to the Right to Review scheme</li> </ul>
<b>Mental impairment decisions, parole and other post-sentencing decisions</b>	<ul style="list-style-type: none"> <li>• being heard in relation to certain treatment matters where a person has been found not guilty or unfit to stand trial due to mental impairment under the <i>Crimes (Mental Impairment and Unfitness to be Tried Act 1997</i> (Vic)</li> <li>• understanding rights and entitlements relating to the Victims Register, and legal assistance with making submissions to the Adult Parole Board<sup>20</sup></li> <li>• understanding rights and entitlements relating to post-sentencing decisions, and legal assistance with making submissions to the Post Sentence Authority.<sup>21</sup></li> </ul>
<b>Restorative justice</b>	<ul style="list-style-type: none"> <li>• advising victims about entitlements to seek a restorative justice process</li> <li>• providing legal advice to victims about any legal ramifications of participation in a restorative justice process.</li> </ul>

<sup>20</sup> *Corrections Act 1986* (Vic) ss 30A, 30B, 30, 47DA, 74AABA, 74A, 74B, 104ZY; *Victims' Charter Act 2006* (Vic) s 17.

<sup>21</sup> In Victoria, serious sex offenders and serious violent offenders who present an unacceptable risk to the community can be made subject to ongoing supervision or detention after they have served their prison sentence. See Post Sentence Authority, *Post sentence scheme* (Web Page, 31 February 2022) <<https://www.postsentenceauthorityvic.gov.au/post-sentence-scheme>>.



## RECOMMENDATION 21

**The Victorian Government should expand the Victims Legal Service to provide victims with specialist, state-funded legal assistance in relation to the comprehensive range of legal issues that victims face.**

Key areas of legal assistance would include:

- Victims' Charter rights and entitlements
- reporting a crime, understanding charges, withdrawing or amending witness statements
- advocating for bail conditions that prioritise victim safety
- subpoenas and immunities
- giving evidence and alternative arrangements
- children as victim-witnesses
- suppression orders and the media
- plea negotiations
- sentence indications
- diversion
- Victim Impact Statements
- cases of perpetrator misidentification/systems abuse
- coronial matters
- parole and other post-sentencing decisions (including leave decisions under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic))
- restorative justice.

The service should be sufficiently resourced and identifiable so that victims and professionals can identify the service as the pathway to specialist legal advice.

The legal service should provide standardised and structured referrals to existing victims' services such as the Victims of Crime Helpline, Victims Assistance Program and other community-based and specialist services.

## Legal representation for sexual offence matters

Addressing the gaps in legal advice and assistance outlined above should address many of the legal challenges faced by victims of crime. However, a comprehensive Victims Legal Service alone will not resolve all issues for victims of sexual offences in the adversarial criminal trial process.

Victims in sexual offence trials often face significant, varied, and difficult challenges during the criminal trial process which require a targeted and dedicated legal response.

The impacts of not having access to independent legal representation are particularly pronounced in sexual assault cases. Victims in sexual offence cases are subject to some of the most invasive and traumatising aspects of our adversarial trial process.

Given the current challenges experienced by victims of sexual assault during the criminal trial process, this inquiry has focused on the merits of independent legal representation for sexual assault victims because of the specific barriers to accessing justice for this cohort. However, if independent legal representation is introduced for sexual assault victims, the VOCC notes that this will provide an opportunity to pilot the approach and consider its broader merits and application in the future.

## Sexual offence victims face significant challenges

Victim advocates have pointed to the challenges faced by victims who do not have independent legal representation:

It is not defence lawyers who create the legal havoc for victim survivors, it's the fact that there is no lawyer for the victim that makes them legal fodder...[p]olice and OPP lawyers are not your legal reps, nor can they be.<sup>22</sup>

**'All survivors must have a lawyer in court.'**

VOCC Victims' Survey respondent

Academic Fiona E Raitt has described victims' disadvantage during sexual offence trials:

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.<sup>23</sup>

As complainants, victims in sexual offence cases are subject to some of the most invasive and traumatising aspects of our adversarial trial process. This includes rigorous cross-examination, applications to access private or confidential records (including medical and counselling records) and applications to introduce sexual history evidence. The lack of independent legal support leaves many victims feeling alone, unsupported and without a voice, resulting in secondary trauma. This is illustrated by this powerful observation by a member of the Victim Survivors' Advisory Council:

**Victims in sexual offence cases are subject to some of the most invasive and traumatising aspects of our adversarial trial process.**

*'nobody represents victims. This is so problematic because this experience for victims can impact on their entire life. Nobody is standing in that space and representing victims and answering for victims. Without legal representation, victims become a passenger in somebody's journey with no say over the destination.'*<sup>24</sup>

Many victims mistakenly assume prosecutors are 'their lawyers' and can prioritise their rights and needs.<sup>25</sup> Victims can be shocked to then learn that although a state's case would not proceed without their evidence, they are not afforded the same access to independent legal representation as an accused.

In the absence of direct victim legal representation, the victim is powerless to assert their rights and interests. Leaving 'protection of victims' rights up to the parties or the judge means allowing third parties, and not the victim, to determine the scope of victim protection in light of their own agenda'.<sup>26</sup>

For this reason, some academics and legal experts have said that effective participation in the criminal justice system for sexual offence complainants may never be achieved without some degree of independent legal representation.<sup>27</sup>

### Prosecution and victim interests are not always the same

The prosecution is often seen to be aligned with the victim and their interests can often overlap. The prosecution may provide information to victims and in some circumstances, consult with them about important decisions. However, the prosecution's interests do not necessarily align with victims' interests. The prosecution cannot act for the victim or solely in the victim's best interests. The prosecution must act in accordance with its public duty. In a criminal trial, the prosecution is unable to assist victims in asserting substantive entitlements if doing so conflicts with its duty to act impartially and independently.

22 Ingrid Irwin, Submission No 68 to the Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 387. <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

23 Fiona E Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials* (Research Report, 2010) 729–49, 739.

24 Consultation Meeting 11 – Victim Survivors' Advisory Council.

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

26 Kerstin Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Palgrave MacMillan, 2019) 252.

27 Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) 9 *Criminal Law Review*, 729–49, 749; Sir John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (May 2019) 173 <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>; Hildur Fjola Antonsdottir, 'A Witness in My Own Case': Victim-Survivors' Views on the Criminal Justice Process in Iceland' (2018) 26 *Feminist Legal Studies*, 326.

In addition to its duties, a prosecutor may make their own assessment of the weight to give the victim's interests resulting in the victim's interests not being canvassed in court. For example, a prosecutor might not object to questioning about sexual history evidence because they are unaware of the distress that certain questions may cause the victim and such questioning does not impact their prosecutorial strategy.

Regardless of their reasons for not intervening to protect a victim's rights and interests, the prosecution's decision can significantly shape a trial and the victim's experience of the process. For example, in a recent County Court trial highlighted in the media, neither the judge nor the prosecutor intervened when defence counsel asked the victim about the clothes she was wearing or about her kissing someone earlier in the evening of the alleged rapes. On retrial in 2019, a new judge considered the evidence again and ruled that these questions were inadmissible because the questions were improper and involved sexual history evidence and leave had not been granted to admit the evidence.<sup>28</sup>

### **Judicial oversight is not sufficient**

As discussed in **Chapter 12**, one way of improving recognition of victims' interests and rights is for judicial officers to check whether the prosecution has upheld a victims' participatory entitlements under the Victims' Charter and other legislation during a relevant criminal procedure.

However, leaving protection of victims' rights up to the parties or the judicial officer means allowing third parties, and not the victim, to determine the scope of victim protections.<sup>29</sup>

If victims of sexual offences do not have their own legal representation, they are reliant on prosecutors and judges enforcing legislative protections, such as ensuring improper questions from defence counsel are stopped.

Academics Robyn Holder, Tyrone Kirchengast and Paul Cassell have said that for victims, '*rights matter precisely because legal authorities recognise and respond only to those who possess them*'.<sup>30</sup> However, it is not just having a right that matters, there must be a mechanism for enforcing rights, or having rights considered and respected.

### **Legal representation would facilitate victim participation**

Laws must strike an appropriate balance between ensuring a fair trial for the accused and facilitating victim participation in the criminal justice system.

While there are concerns that introducing a right for victims to participate via legal representation would disrupt the current adversarial system, the VOCC contends that a targeted approach to legal representation for sexual offence victims based on specific participatory rights is consistent with fair trial principles.

There are ways to introduce a sexual offences legal representation scheme that would provide an effective avenue for upholding the interests and entitlements of victims without impinging on the rights of the accused.

The recommendations in this chapter would extend when a victim may be legally represented. However, it is not proposed that victims become a party to proceedings. Instead, victims of sexual offences would have standing to appear and be entitled to state-funded legal representation at specific stages of proceedings to meaningfully participate where they have standing.

**Victims would have standing to appear and be entitled to state-funded legal representation at specific stages of proceedings to meaningfully participate.**

Sometimes legal representation for victims has been objected to on the grounds that victims may use this new ability improperly, for example the hearing could become 'a substitute for private vengeance not an expression of it'.<sup>31</sup> However, this misconstrues the role of legal representation for victims. Legal representation is intended to protect victims' rights. The victim would not play any role in prosecuting the accused. That responsibility would remain squarely, and exclusively, with the prosecution. Improving the victim's role and level of participation in the justice system would not come at the expense of the accused's interests.<sup>32</sup>

28 Elise Kinsella, 'In the Witness Box', *ABC News* (online, 8 September 2021) <<https://www.abc.net.au/news/2021-07-18/how-a-court-case-put-the-spotlight-on-sexual-assault-trials/100281894>>.

29 Kerstin Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Palgrave MacMillan, 2019) 252.

30 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, 3.

31 Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (September 2001) [11.74] <<https://www.criminal-courts-review.org.uk/auldconts.htm>>.

32 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 110–13 <<http://link.springer.com/10.1007/978-3-030-61383-9>>.

Many victims support a form of independent legal representation. Some stakeholders consulted by the VOCC support the introduction of a *form* of legal representation although opinions differ regarding the scope and approach of independent legal representation. There are also other stakeholders who may oppose the introduction of a form of legal representation for victims. For example, in previous inquiries, the Criminal Bar Association of Victoria and the Law Institute of Victoria have not supported separate legal advice or representation for victims.<sup>33</sup> The Office of Public Prosecutions (OPP) told the VOCC that ‘appropriate measures are already in place’ and introducing legal representation would:

pose a challenge to the legal system more broadly. As outlined above, there is a risk that the intervention of an independent legal representative compromising the prosecution case or leading to a miscarriage of justice.<sup>34</sup>

At the same time, the OPP considered ‘that there are particular points during the court process that independent legal advice and representation could be of significant benefit’, specifically applications to subpoena confidential communications of the victim.

The VOCC accepts that introduction of legal representation for victims challenges traditional conceptions of a fair trial. Ensuring that there is an ‘equality of arms’ between the state and the accused is often central to ensuring a fair trial. However, this is not the only requirement of a fair trial. This kind of binary conception of a fair trial has been superseded by conceiving of a fair trial as involving a ‘triangulation of interests’.<sup>35</sup> This triangulation involves the state and the accused but recognises that victims’ rights and interests also play a role in determining whether a trial is fair.

The proposals in this chapter do not undermine the equality of arms. They do not involve the victim’s legal representative operating as a prosecutor. The purpose of legal representation for victims would be to protect victims’ rights and interests. Without a legal representation scheme, victims of sexual offences will continue to struggle to participate meaningfully, even where they have substantive participatory rights. For this reason, the VOCC recommends that the Victorian Government establish a sexual offences legal representation scheme.

The introduction of a sexual offences legal representation scheme, like other initiatives before it, may be objected to by some. However, the VOCC notes similar concerns have been held in the past when changes have been introduced that assist victims, for example, in relation to the introduction of intermediaries and VISs.<sup>36</sup> These changes are now well accepted. In New South Wales, the Office of the Director of Public Prosecutions ‘described the ability to refer victims to a specialised legal service [for confidential communications] as positive’.<sup>37</sup> Further, the recommended form of victim legal representation is consistent with fair trial principles. The VOCC considers that as with other past initiatives, once a sexual offences legal representation scheme is established in Victoria, its role will be accepted.

**The purpose of legal representation for victims of sexual offences would be to protect victims’ rights and interests. It would not involve the victim’s legal representative operating as a prosecutor.**

As discussed in **Chapter 12**, the VOCC recommends that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) be amended to provide victims with victim-specific rights (or minimum guarantees), including for victims to be:

- acknowledged as a participant (but not a party) with an interest in the proceedings
- treated with dignity and respect
- protected from unnecessary trauma, intimidation and distress when giving evidence and throughout criminal proceedings.

Independent legal representation would help uphold these minimum guarantees.

<sup>33</sup> In its submission to the VLRC’s Consultation Paper for its inquiry into *the role of victims of crime in the criminal trial process*, the Criminal Bar Association of Victoria stated that victims should not be entitled to separate legal advice or representation during consultations with the prosecution. They argued that the cost of legally aiding indigent victims would be high. The Criminal Bar Association also opposed the suggestion that victims be allowed to be represented by their own lawyer during the plea or sentencing hearing. The Law Institute Victoria stated that victims should not be given legal representation by the state. The Law Institute of Victoria argued that to provide for such a role would have the capacity to distort the fundamental nature of the criminal process, resulting in potential injustice and wrongful convictions: Victorian Bar and Criminal Bar Association, Submission No 29 to the Victorian Law Reform Commission Inquiry, *The Role of Victims of Crime in the Criminal Trial Process* (14 October 2015) 3, 4; Law Institute Victoria, Submission No 25 to the Victorian Law Reform Commission Inquiry, *The Role of Victims of Crime in the Criminal Trial Process* (9 October 2015) 10.

<sup>34</sup> Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 15 September 2022, 7.

<sup>35</sup> *R v A* (No 2) [2002] 1 AC 45, 65 [38] (Lord Steyn).

<sup>36</sup> Natalia Antolak-Saper and Hannah MacPherson, ‘Vulnerable Witnesses and Victoria’s Intermediary Pilot Program’ (2019) 43(5) *Criminal Law Journal* 325, 334–5.

<sup>37</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 125.

# Scope of a sexual offences legal representation scheme

## Legal representation where there is no jury

This section discusses providing victims, often described as ‘complainants’ in sexual offence proceedings, with independent legal representation for applications made in the absence of the jury.<sup>38</sup> Victims already have standing to appear at applications to produce/adduce information about a victim’s confidential communications. **Chapter 17** recommends providing standing to victims to appear in other types of applications, such as sexual history evidence applications.

These applications usually occur before the trial commences. Legal representation schemes in some jurisdictions are specifically limited to pre-trial applications.<sup>39</sup> However, sometimes applications are made after the trial has commenced. For example, an application may be made to question the victim/complainant about their sexual history. The fact that an application is made after the trial has commenced should not disadvantage a victim. Further, because no jury is present for such applications, providing victims with legal representation in this situation would not change the dynamics of the trial. Therefore, the absence of the jury, rather than ‘pre-trial’, better limits when legal representation should be available for applications.

Providing victims with legal representation could help to empower and inform victims and help to identify and resolve any issues relating to disclosure and admissibility of their sensitive personal information. It would also ensure that the court has all relevant information and arguments regarding the victims’ privacy rights, that applications for confidential information are appropriately scrutinised, and that these difficult, sensitive decisions are appropriately informed by the victim’s experience.<sup>40</sup>

## Confidential communications

In sexual offence cases, victims can seek leave to appear and make submissions in response to applications to access their confidential communications, including medical or counselling records.<sup>41</sup>

This is one of the few times during a criminal proceeding where a victim has standing to appear and make submissions to the court. However, research has found that not all victims in sexual offence cases are being advised of their right to seek leave to appear in court in response to an application.<sup>42</sup> Few victims engage their own lawyers to participate in these applications<sup>43</sup> and evidence indicates that victims’ ‘entitlements to protection of confidential communications and their sexual history are still not being fulfilled’.<sup>44</sup>

The VOCC heard directly from victims about traumatic and protracted experiences in dealing with subpoenas from defence counsel to access confidential information.



*‘For 18 months there were legal arguments for the Defence seeking my psychologist full file. I thought there was legislation to protect [victims in] sexual assault cases but turns out anything can have exemptions applied for. It is wrong and hugely distressing. There have been multiple times throughout this legal process where I have considered taking my own life and I mean seriously considered and planned.’*

– Victims’ Survey respondent

Another Victims’ Survey respondent shared their experience of having their records subpoenaed, which they concluded ultimately had no relevance to the trial, and feeling unsupported during the process:

38 A ‘sexual offence’ is defined in the *Criminal Procedure Act 2009* (Vic) s 4.

39 See, e.g., Sir John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (May 2019) 714, 173–4 <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

40 Law Commission United Kingdom, *Evidence in Sexual Offences Prosecutions: Summary of Consultation Paper* (2023) 37.

41 Under section 32C(5) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) the victim (called the ‘protected confider’) may with the leave of the court, appear in the proceeding and make submissions.

42 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 109.

43 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 143; *Evidence Miscellaneous Provisions Act 1958* (Vic) s 32C(4).

44 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 264.



*'I was subpoenaed at an earlier time for my personal emails and texts. I was told if I wanted legal advice I would have to seek that independently and I was not given any contacts etc to seek said advice. I have never intersected with the justice system until reporting these cases so I had no idea. I eventually found a firm and had a brief conversation with a very dismissive woman who had no interest in assisting me so it left me feeling defeated and alone. I attended the hearings relevant to the subpoena and the defence gained them. It was purely a fishing expedition to attempt to discredit me and none of the information was relevant to the assaults themselves.'*

– Victims' Survey respondent

The VOCC heard from a range of stakeholders in support of legal representation in relation to confidential communications.<sup>45</sup> Stakeholders perceived legal representation for victims whose confidential material is sought by defence as an important step in both the participation of victims and protection of their rights.<sup>46</sup>

In 2022, legislative provisions were introduced to provide additional protections for victims regarding disclosure of their confidential communications.<sup>47</sup> These include:

- requiring the prosecuting party to ensure victims are notified about applications to access their information, and that they have a right to appear and may wish to consider obtaining legal advice<sup>48</sup>
- providing victims with a clear right to appear in applications, and permitting them to provide a confidential statement describing the harm they are likely to suffer if the application is granted<sup>49</sup>
- expanding protections to include 'health information' (such as personal information about a victim of a sexual offence that is collected as part of provision of a health service).<sup>50</sup>

Victims already have a right to legal representation and to seek leave to appear in relation to confidential communications applications. However, without the implementation of a sexual offences legal representation scheme, these protective provisions will continue to be ineffective. This risks creating a 'two-class' system where only those victims with sufficient financial means will be able to exercise, or protect, their rights.<sup>51</sup> Victims should not be required to pay to protect their rights and to avoid or minimise the harm caused to them by performing their public duty to attend court and give evidence.<sup>52</sup>

Victims of sexual offences need access to a dedicated and specialised legal representation scheme that can represent their best interests when there are applications to access confidential communications. This scheme should be state-funded and specialised, as in other Australian jurisdictions.<sup>53</sup> State-funded legal services were introduced in New South Wales in 2011 and in Queensland in 2017.

45 Consultation Meeting 5 – Dr Mary Iliadis; Consultation Meeting 1 – Associate Professor Kerstin Braun; Consultation Meeting 10 – Centre for Innovative Justice, RMIT University; Consultation Meeting 16 – Victoria Legal Aid; Consultation Meeting 23 – Community Legal Centres – Session 2; Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 15 September 2022.

46 Consultation Meeting 5 – Dr Mary Iliadis; Consultation Meeting 1 – Associate Professor Kerstin Braun; Consultation Meeting 10 – Centre for Innovative Justice, RMIT University; Consultation Meeting 16 – Victoria Legal Aid; Consultation Meeting 23 – Community Legal Centres – Session 2; Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 15 September 2022.

47 These legislative amendments put into effect recommendations from the Victoria Law Reform Commission's report *Improving the Justice System Response to Sexual Offences* (2021) and its report on *The Role of Victims in the Criminal Trial Process* (2016).

48 Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 32CD inserted by Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic) s 85, which commenced on 7 September 2022.

49 Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 32CE inserted by Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic) s 85, which commenced on 7 September 2022.

50 Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 32BA inserted by Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic) s 83, which commenced on 7 September 2022.

51 Kerstin Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Palgrave MacMillan, 2019) 257.

52 Eamon PH Keane and Tony Convery, *Proposal for Independent Legal Representation in Scotland for Complainers Where an Application Is Made to Lead Evidence of Their Sexual History or Character* (2020) 34 <<https://www.law.ed.ac.uk/sites/default/files/2020-09/ILR%20Report%20Final%20Version%20June%200%20-%20Acc.pdf>>; see also Dame Vera Baird QC quoted in Sir John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (May 2019) 181 <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

53 See, e.g., Women's Legal Service New South Wales and Legal Aid New South Wales, *Subpoena Survival Guide* (2016) <<https://publications.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/753.pdf>>; Legal Aid Queensland, *Protecting Sexual Assault Counselling Records* (2020) <<https://www.legalaid.qld.gov.au/Find-legal-information/Factsheets-and-guides/Factsheets/Counselling-Notes-Protect-Service>>.



The VOCC envisages that under a sexual offences legal representation scheme, an independent legal representative could:

- ensure complainants understand their legal rights to protect their privacy and reputation
- assist complainants to prepare a confidential statement describing the harm they are likely to suffer if an application to access confidential information is granted
- help complainants to claim the communications privilege when their confidential records are subpoenaed
- take instructions from the complainant in a completely confidential manner (without having the disclosure obligations that the prosecution has)
- help protect the complainant's privacy and reputation by representing their interests as the complainant in court proceedings to access counselling notes and other confidential therapeutic records about the complainant.

### Sexual history evidence

In the past, sexual history evidence was commonly relied on to attack the victim's credibility based on rape myths. These myths were that sexual history evidence supported 'the inference that the complainant was more likely to have consented to the sexual activity or that they were less worthy of belief'.<sup>54</sup>

This led to the development of what are often called 'rape shield' laws. A person's sexual history is not usually relevant to the facts in the case and laws now require the accused to apply to the court to cross-examine the victim about the victim's sexual history.<sup>55</sup> This application is generally heard prior to the trial commencing.

Victims do not currently have standing to appear and be legally represented in applications to question victims about their own sexual history. **Chapter 17** recommends that victims be provided with these participatory rights.

The VOCC envisages that under a sexual offences legal representation scheme, an independent legal representative could:

- advise the complainant about their legal rights in relation to the application
- take instructions from the complainant in a completely confidential manner (without having the disclosure obligations that the prosecution has)
- help protect complainants' privacy, dignity, and reputation by representing the interests of the complainant in court proceedings
- inform the court about the harm likely to be caused if the defence is granted leave to cross-examine the complainant about the complainant's sexual history.

### Ground rules hearings

Ground rules hearings address the comprehension capacity and communication needs of particular vulnerable witnesses and assist parties to plan their questions, including the manner and content of cross-examination. Victims do not have standing to appear or to have independent legal representation during ground rules hearings.<sup>56</sup> Following the passing of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*, ground rules hearings are now mandatory in all sexual offence cases where the vulnerable witness is a complainant (this includes summary hearings, trials, appeals and rehearings).

During consultation, the VOCC was told that complainants could benefit from independent legal representation during ground rules hearings.<sup>57</sup>

The VOCC agrees that complainants in sexual offence trials could benefit from having legal representation during ground rules hearings to advocate for their interests, separately from the prosecution.

The VOCC envisages that under a sexual offences legal representation scheme an independent legal representative could:

- represent a complainant's best interests in relation to ground rules hearings

<sup>54</sup> Tyrone Kirchengast, 'Victim Legal Representation and the Adversarial Criminal Trial: A Critical Analysis of Proposals for Third-Party Counsel for Complainants of Serious Sexual Violence' (2021) 25(1) *The International Journal of Evidence & Proof* 53, 62.

<sup>55</sup> *Criminal Procedure Act 1986* (Vic) s 342.

<sup>56</sup> Ground rules hearings are now mandatory in all sexual offence cases under the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

<sup>57</sup> Consultation Meeting 23 – Community Legal Centres – Session 2.



- assist the court in determining the manner and content of questioning
- ensure cross-examination and the structure of questioning will not cause undue trauma
- assist a complainant to better prepare for giving evidence and understand the type of questioning.

### Application to cross-examine a complainant at a committal hearing

In Victoria, a complainant may only be cross-examined at a committal hearing in a sexual offence case with the leave of the court. However, if the complainant is a child or person with a cognitive impairment, they cannot be cross-examined at a committal hearing.<sup>58</sup>

In its examination of committal proceedings in 2020, the Victorian Law Reform Commission (VLRC) noted that cross-examination at a committal hearing can be much more difficult for victims than at a trial. This is because counsel is not constrained by the presence of a jury<sup>59</sup> and because cross-examination is likely to be less targeted than at trial because counsel may explore different case scenarios from the one that counsel uses at trial.<sup>60</sup>

Recent amendments to the *Criminal Procedure Act 2009* (Vic) provide additional protections to complainants during committal hearings. The court must provide reasons outlining why it is granting leave to cross-examine a complainant in a case involving a sexual offence.<sup>61</sup> The Magistrates' Court must have regard to a number of factors before granting leave to cross-examine,<sup>62</sup> including:

- the need to minimise the trauma that might be experienced by the complainant in giving evidence
- relevant conditions or characteristics of the complainant, including age, culture, personality, education and level of understanding
- any mental, intellectual or physical disability 'to which the witness [complainant] is or appears to be subject and of which the court is aware'.

These factors are matters which a complainant and/or their legal representative are best placed to inform the court about. However, a complainant does not have standing to appear and to be legally represented at these applications to cross-examine.

If provided with standing to appear and to be legally represented, a complainant's legal representative could assist:

- the court in weighing up factors for consideration under the *Criminal Procedure Act 2009* (Vic) in relation to granting leave to cross-examine
- the court in determining special protections required when the complainant gives evidence
- complainants to understand the reasons provided by the court as to why it has granted leave to cross-examine
- a complainant to better prepare for giving evidence.

### Legal representation at committals, trials and summary hearings

There are other situations where victims' legal needs and interests could be better protected by providing victims in sexual offence cases with legal representation.

During consultation, some judicial representatives told the VOCC they saw a role for independent legal representation at the committal hearing, because victim-witnesses:

are being asked questions ... that are fishing, that are designed to get information as to whether they have had counselling and from whom in order to provide a springboard for the third party subpoenas. That's an area where there is a proper basis for thinking that complainants or victims should be given independent legal advice before answering such questions, and about whether to object, because their interests may be different from the interests of the prosecution. The knowledge of the victim about their rights in respect of confidentiality of counselling records or about where a line of questioning is leading may also be different from the knowledge that the prosecution has about it.<sup>63</sup>

A victim's legal representative could intervene to prevent inappropriate cross-examination of a victim at a committal hearing. While this rationale is tied to preventing 'fishing' that might lead to applications (e.g. to access confidential communications), victim legal representation should not be limited to that purpose.

<sup>58</sup> See section 123(1) of the *Criminal Procedure Act 2009* (Vic) which provides that the Magistrates' Court cannot grant leave to cross-examine any witness in a proceeding that relates (wholly or partly) to a charge for a sexual offence if, when the criminal proceeding commenced, a complainant in relation to a charge for a sexual offence was a child or a person with a cognitive impairment. This clarifies that cross-examination of a witness under this section cannot occur if the complainant is 18 years or older when the case reaches the committal stage, provided they were a child when the proceeding commenced.

<sup>59</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 123.

<sup>60</sup> *Ibid* 124.

<sup>61</sup> *Criminal Procedure Act 2009* (Vic) s 124(5A) which came into force on 30 July 2023.

<sup>62</sup> *Ibid* s 124(5).

<sup>63</sup> Consultation Meeting 28 – Judicial Representatives – Magistrates' Court of Victoria, County Court of Victoria, Supreme Court of Victoria.

In any criminal proceeding in Victoria, courts must disallow an 'improper' question, being a question that:

- is misleading or confusing
- is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
- is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
- has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).<sup>64</sup>

However, as victims of sexual offences do not have their own legal representation, they depend on prosecutors or judicial officers enforcing legislative protections against improper questions by defence counsel. Evidence suggests not all prosecutors and judicial officers object or stop inappropriate questions asked during the cross-examination of a complainant.

In 2010, the Australian Law Reform Commission found that in criminal trials, judges were reluctant to intervene to protect witnesses.<sup>65</sup> In 2021, the VLRC said that there has been a 'positive shift' in this regard but that good practice is not consistent.<sup>66</sup> The VLRC found that despite reforms, victims continue to experience 'brutal' cross-examination.<sup>67</sup> As discussed above, in a recent County Court trial highlighted in the media, neither the judge nor the prosecutor intervened when defence counsel asked inappropriate and inadmissible questions. On a retrial in 2019, a new judge considered the evidence and ruled these questions inadmissible because the questions were improper and because leave had not been granted to admit prior sexual history evidence.<sup>68</sup>

In some circumstances, it may be difficult for judges to identify all improper questioning while considering other matters, particularly if the prosecution has decided for strategic reasons not to object to cross-examination. A judge may also be reluctant to intervene too much in case they appear to a jury to be biased against the accused and counsel is generally given some leeway concerning how they choose to conduct their defence.<sup>69</sup>

Associate Professor Kerstin Braun advised the VOCC that victims should have representation at trial 'because out of all the reports that you hear and anecdotal evidence, that is really the stage where most victims feel re-traumatised by the questions that are being asked'.<sup>70</sup> Assoc. Professor Braun noted that questions asked during cross-examination may not comply with evidentiary protections and prosecutors and judicial officers may not intervene. Assoc. Professor Braun told the VOCC that '[t]o have a legal representative there makes sense as the rules are already there. The evidence already contains those rules, it's just that nobody is there to act exclusively on behalf of the victim who will enforce their rights.'<sup>71</sup>

The VOCC agrees with this observation. For this reason, the VOCC recommends a model where a legal representative can assert the victim's interests in sexual offence cases by:

- assisting the court in ensuring compliance with evidentiary protections during cross-examination (i.e. that the victim is not asked improper questions)
- ensuring that questioning complies with the court's directions made at a ground rules hearings
- ensuring that sexual history evidence laws are complied with
- in a committal hearing, ensuring that questioning concerns a matter on which the court has granted leave to cross-examine at a committal hearing.

The victim's legal representative would essentially have a protective role, asserting the victim's rights and court rulings by way of submissions to the court. Protections – legislative and procedural (such as Practice Directions) – would prescribe the ways in which a legal representative could assist the court and intervene where victims' rights are not being upheld, and in such a way that the adversarial nature of the trial would not be prejudiced.

The victim's legal representative would not detract from the accused's right to ask relevant and proper questions and test the prosecution case. The victim would remain a participant and not a party to the proceedings. The victim's legal representative would not be able to call evidence or witnesses and would only be present when the witness gives evidence.

<sup>64</sup> Evidence Act 2008 (Vic) s41(3).

<sup>65</sup> Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report No 114, November 2010) 1336.

<sup>66</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 389.

<sup>67</sup> The Victorian Law Reform Commission found in 2021 that despite reforms, victims continue to experience 'brutal' cross-examination: Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 455.

<sup>68</sup> Elise Kinsella, 'In the Witness Box', *ABC News* (online, 8 September 2021) <<https://www.abc.net.au/news/2021-07-18/how-a-court-case-put-the-spotlight-on-sexual-assault-trials/100281894>>.

<sup>69</sup> Sir John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (May 2019) 177 <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>>.

<sup>70</sup> Consultation Meeting 1 – Associate Professor Kerstin Braun.

<sup>71</sup> Ibid.

It is important that there do not appear to be two prosecutors in the trial. The role of the victim's legal representative should not change the role of the prosecutor. Consideration would need to be given to how a victim's legal representative could be accommodated in court (e.g. where the victim's legal representative would sit in court), the manner in which they can assist the court or intervene, and how their presence is explained to the jury.



## RECOMMENDATION 22

**The Victorian Government should fund a sexual offences legal representation scheme and introduce necessary legislative amendments to provide sexual offence victims with standing to appear and be entitled to state-funded legal representation at specific stages of proceedings.**

A sexual offences legal representation scheme should provide independent legal representation for sexual offence complainants in relation to applications, involving:

- confidential communications
- sexual history evidence
- subpoenas for information that contains private information about the victim
- cross-examination at a committal hearing.

A sexual offences legal representation scheme should provide independent legal representation at ground rules hearings and when the victim is giving evidence at a committal hearing, summary hearing, trial or appeal, to ensure compliance with the court's rulings and to protect witnesses from improper questions or questioning.

## **Overview of Chapter 16: Court support and safety**

In order to meet the *Victims' Charter Act 2006* (Vic) (Victims' Charter) objective of incorporating victims as participants, supporting victims at court is critical. Court support underpins victim participation. It enables those victims who are required to give evidence to give their best evidence and it can reduce the likelihood of victim-witnesses experiencing secondary victimisation.

### **Closing the gaps in witness support**

Access to witness support has been identified as a critical need for victim-witnesses during the justice process. Victoria has two witness support schemes, and these services provide valuable support for victims. However, neither service is able to meet demands on it and there are many victims who are not eligible for these services.

The VOCC recommends that the Victorian Government close the gaps in witness support by providing sufficient funding for existing witness support services to meet demand, including enabling services to provide a comprehensive level of service for high-needs victim-witnesses (including support during the entire court phase) and across regional Victoria.

The VOCC also recommends that the Victorian Government establish a witness support scheme for adult victims of crimes against the person in the summary jurisdiction.

### **Expanding the Intermediary Program**

The Intermediary Program is widely praised by stakeholders as enhancing participation for witnesses who might otherwise not have sufficient support or accommodations to give evidence. The VOCC recommends expanding the Intermediary Program so that it is not limited by jurisdiction or court location.

### **Closing the gaps in victim support at court**

Research confirms the need for victims to have support before, during and after court. Unlike witness support, victim support is not focused on the facilitation of giving evidence. Many victims will want to attend court – and participate in proceedings where relevant – without being a witness.

Victims told the VOCC that lack of support at court had made for particularly distressing experiences that often resulted in secondary victimisation.

The VOCC recommends that the Victorian Government establish a dedicated and specialised victim liaison service in each court to ensure victims are supported before, during and after attending court.

### **Court safety and accessibility**

Attending court is often critical to a victim being able to participate in the justice system. Lack of safety during the court process emerged as a significant issue for victim participation. Victims raised concerns with the lack of safe and separate seating options in court common areas such as entrance ways, hallways and foyers.

Many court venues do not meet best practice for all court users, including victims of crime. The VOCC recommends that the Victorian Government establish minimum standards for safety and accessibility in Victorian courts and develop a multi-year plan to upgrade facilities to meet minimum safety and accessibility standards.

# 16

Chapter 16:  
**Court support  
and safety**



## Introduction

In order to fulfil the *Victims' Charter Act 2006* (Vic) (Victims' Charter) objective of including victims as participants, supporting victims at court is critical.

The VOCC conceptualises court support broadly. Court support can be provided by a range of services or agencies<sup>1</sup> and may include:

- witness support services which, as discussed below, are a specialised type of support that help victims prepare to give evidence
- victim liaison based in or around the court system (e.g. providing a point of contact in a court so that victims can access certain spaces or special protections)
- one-on-one support, such as providing victims with practical and emotional support to attend court hearings (whether or not a victim needs to give evidence).

Appropriate court support enables those victims who are required to give evidence to give their best evidence and can reduce the likelihood of victim-witnesses experiencing secondary victimisation. Supporting victims at court also enables victims who are not witnesses to participate in a safe way, such as being able to observe proceedings safely and also participate at critical stages of the justice process, such as by making a Victim Impact Statement (VIS).

This chapter makes recommendations in relation to:

- closing the gaps in witness support so that more witnesses in Victoria are eligible for, and can receive, appropriate witness support
- expanding the availability of the Intermediary Program
- enhancing victim liaison in courts so that victims are not left unsupported in the court environment
- ensuring courts meet minimum safety and accessibility standards so that victims can participate equally and safely.

## Witness support

Witness support services assist victim-witnesses through the justice process, including the process of participation in the trial when a victim is required to give evidence.

Access to witness support has been identified as a critical need for victim-witnesses during the justice process.<sup>2</sup> Researchers Nicole Bluett-Boyd et al describe the introduction and expansion of witness assistance programs 'as the most integral reform in enhancing victim/survivors' experiences of the court process'.<sup>3</sup>

There are two dedicated witness support services in Victoria:

- the Victims and Witness Assistance Service (VWAS) which is part of the Office of Public Prosecutions (OPP)
- the Child Witness Service (CWS) which is part of the Department of Justice and Community Safety.

The role of each service is outlined below.

<sup>1</sup> As discussed in this chapter, there are already some, albeit limited, programs and services that assist victims and witnesses at court.

<sup>2</sup> Nicole Bluett-Boyd, Bianca Fileborn and Australian Institute of Family Studies, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No 27, April 2014) 27.

<sup>3</sup> Ibid 33.



### Victorian Office of Public Prosecutions – Victims and Witness Assistance Service

VWAS social workers and OPP solicitors work together to provide information and support to adult victims and witnesses during the court process.<sup>4</sup>

VWAS social workers can provide:

- information about the prosecution process
- information about rights and entitlements
- information about the progress of the case
- support during meetings with lawyers about the case
- support to go to court (for example, helping with arrangements for giving evidence and being in court).

### Department of Justice and Community Safety – Child Witness Service

The CWS's team of qualified social workers, psychologists and practitioners can:<sup>5</sup>

- support child witnesses and their families throughout the criminal proceedings
- familiarise child witnesses with the court processes, remote witness rooms and court personnel
- liaise with police and the prosecution teams, attend meetings and provide case updates
- prepare children and young people for the role of being a witness and support them when they give evidence
- provide debriefing and make referrals to community agencies
- help children, young people and their families to complete Victim Impact Statements and attend plea or sentence hearings.

VWAS is only available for victims and witnesses in the indictable stream (heard in the County and Supreme Courts). The Child Witness Service is not limited by jurisdiction but is only available for children and young people.

## Witness support assists victims' participation

Engagement with victims showed that for those victims who received witness assistance, this support significantly assisted their participation in the justice system, as noted by these respondents to the VOCC's Victims' Survey:



*'Once Witness Assistance got in touch, I felt like I had someone to ask all the 'stupid' questions of. Nothing was too much trouble, and they addressed all my fears, mostly around giving evidence and being in close proximity to the offender. WAS organised visiting court beforehand, provided emotional support, kept me up-to-date, supported before, during and after giving evidence remotely ... I wouldn't have coped without everyone's amazing knowledge, experience and support.'*

*'I received invaluable support from social workers through the Witness Assistance Program with face to face meetings explaining proceedings, always answering my questions, offering kindness and encouragement and accompanying me to court hearings.'*

– Victims' Survey respondents

<sup>4</sup> Office of Public Prosecutions, *Victims and Witness Assistance Service (VWAS)*, (Web Page) <<https://www.oppvic.gov.au/victims-witnesses/how-we-can-support-you/#:~:text=The%20Victims%20and%20Witness%20Assistance%20Service%20%28VWAS%29%20is,adult%20victims%20and%20witnesses%20during%20the%20court%20process>>.

<sup>5</sup> Victims of Crime, *Child Witness Service* (Web Page) <<https://www.victimsofcrime.vic.gov.au/going-to-court/child-witness-service>>.

The OPP told the Victims of Crime Commissioner (VOCC) that 'VWAS support lowers the barriers to participation' and also supports 'victims to provide their evidence in court'.<sup>6</sup>

Judicial representatives also praised the work of the CWS, with one representative stating that the CWS 'plays an extraordinary part for children in summary contests in indictable sexual offences – they are sophisticated and highly trained and really help children and young people to give evidence'.<sup>7</sup>

### Issues with witness support

While both the VWAS and the CWS are frequently praised by victims and stakeholders,<sup>8</sup> both services are limited by cohort or jurisdiction. The demand for these services also outstrips their resourcing.

Sixty-three per cent of victims surveyed by the VOCC felt they did not get enough information about their role as a witness to help them participate in the process.

This suggests more victim-witnesses need access to witness support.



### Gaps in witness support

During stakeholder engagement, the VOCC was told that there is unequal access to services.<sup>9</sup> Support for adult witnesses in the Magistrates' Court of Victoria was highlighted as a particular gap.<sup>10</sup>

Respondents to the Victims' Professionals Survey suggested victims need access to more dedicated in-court support.

Victoria Police members told the VOCC there was insufficient witness support for summary matters heard in the Magistrates' Court. Police described some witnesses missing out on support because they fall through the gaps of the existing witness support system – that is, those witnesses who are not children, do not have a cognitive impairment and whose matters are not being heard in the indictable stream.<sup>11</sup>

Similarly, the Centre for Innovative Justice (CIJ) noted gaps for witnesses who are not eligible for VWAS or the CWS:

There are gaps for certain types of victims because of the eligibility criteria. For example, VWAS is available for indictable matters prosecuted by the OPP. But an increasing number of matters are classified as indictable, triable summarily, but there isn't an equivalent service for the summary jurisdiction. This means that if you are 18 years and 3 days with an indictable offence triable summarily, you fall through the gaps as you're not eligible for the CWS or VWAS. This includes a lot of family violence offences that can be incredibly serious.<sup>12</sup>

A recent case example highlighted in the media illustrates the precarious nature of supporting victim-witnesses without dedicated witness support services in the Magistrates' Court where some sexual offences are heard. The article outlining the case describes a magistrate granting an accused diversion 'after prosecutors abandoned a sexual assault charge ... moments before a contested hearing was about to begin'. The article states that police prosecutors had told the court that 'the victim had become "overwhelmed with the thought of having to give evidence"'.<sup>13</sup> While it is not known what support the victim had been given, if they were an adult victim of crime, they would not be eligible for witness support

6 Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 12 September 2022, 9–10.

7 Consultation Meeting 28 – Judicial Representatives – Magistrates' Court of Victoria, County Court of Victoria, Supreme Court of Victoria.

8 Consultation Meeting 18 – Victoria Police – Session 2; Consultation Meeting 10 – Centre for Innovative Justice, RMIT University.

9 Consultation Meeting 14 – Victims Services staff; Consultation Meeting 10 – Centre for Innovative Justice, RMIT University.

10 Consultation Meeting 18 – Victoria Police – Session 2.

11 Consultation Meeting 18 – Victoria Police – Session 2. The Child Witness Service assists children and young people, regardless of jurisdiction. The Intermediaries Program applies to relevant criminal proceedings at a participating venue of a court if the witness is a person under the age of 18 years or a person with a cognitive impairment: Supreme Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Program: Intermediaries and Ground Rules Hearing* (Web Page, February 2022) <<https://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/multi-jurisdictional-court-guide-for-the-intermediary-program>>. The OPP's Victims and Witness Assistance Service only assists victims/witnesses in matters prosecuted by the DPP.

12 Consultation Meeting 10 – Centre for Innovative Justice, RMIT University.

13 Genevieve Alison, 'Musician Admits to Assault', *Herald Sun* (online, 2 October 2021) 2.



and would unlikely have been provided specialised witness support such as:

- familiarisation with court processes, remote witness rooms and court personnel
- assistance to prepare for the role of being a witness
- support on the day to give evidence
- advice on alternative arrangements for giving evidence.

Victoria Police members told the VOCC that the OPP's VWAS model works very well and should be replicated in the Magistrates' Court.<sup>14</sup> Similarly, CIJ advocated for all vulnerable witnesses to be supported by a witness assistance service, suggesting an expansion of existing services that are already proven to work.<sup>15</sup>

## Stretched resources

Concerns were also raised that existing witness support services could not meet demand under current eligibility criteria. One victim representative of the Victims of Crime Consultative Committee told the VOCC about the negative consequences of the lack of support services:



*'I felt that other victims were prioritised over us in terms of court support. There were times we really needed that support, but we couldn't access it. For example, our WAS worker had to make decisions about whether to attend court with us versus a victim of sexual violence who was giving evidence. They are prioritised above us. There were times that I really need that support, but to be told you're not a priority is not great.'*<sup>16</sup>

Respondents to the VOCC's Victims' Professionals Survey told the VOCC that existing witness support services are 'often unavailable due to the number of cases they manage, leaving clients alone'.

Regional victims' professionals in particular raised concerns about witness support availability in regional areas. One survey respondent stated that witness support services 'often ask the VAP teams to provide court support at very late notice due to the complexities of the circuit but the VAPs are not always able to provide the support needed'. Another Victims' Professionals Survey respondent said that VWAS very rarely attend their region.

The OPP told VOCC that VWAS resources are 'finite' and that certain types of crime are typically prioritised but that all identified victims receive some level of service:

As OPP VWAS resources are finite, those matters that are identified as not requiring a high degree of involvement and support from OPP VWAS would be referred to other community services operating in this area, such as the Victim Assistance Program ... Matters where a person is a victim of sexual assault or family violence and those matters where a death has occurred are typically prioritised.<sup>17</sup>

The OPP also told the VOCC that even within the priority cohorts of sexual assault, family violence and death, VWAS 'simply cannot invest the time and resources that [they] would like to for each and every victim in this higher-needs group'.<sup>18</sup>

VWAS told the VOCC that high caseloads and insufficient resources mean that less support may be provided during evidence or critical hearings in matters involving deceased victims because 'there is insufficient capacity in VWAS to be physically present at each hearing for every victim'.<sup>19</sup>

The OPP also advised that the 'extent of unmet need is greater in regional areas, such as Mildura'.<sup>20</sup> The OPP told the VOCC that VWAS will attend regional areas for court circuits to provide support to the most vulnerable victims and witnesses, but those other victims identified as lower-needs will be referred to local agencies delivering the Victims Assistance Program (VAP) for support.<sup>21</sup>

## Closing the gaps in witness support

Witness support is crucial to victim participation. The VOCC is concerned about gaps in eligibility for witness support services, as well as the resource-stretched environment in which existing services are operating.

<sup>14</sup> Consultation Meeting 24 – Victoria Police – Session 4.

<sup>15</sup> Consultation Meeting 10 – Centre for Innovative Justice, RMIT University.

<sup>16</sup> Consultation Meeting 20 - Victim Representatives – Victims of Crime Consultative Committee.

<sup>17</sup> Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 12 September 2022, 10.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 11.

Of critical concern is the fact that there are some high-needs victim-witnesses who are not eligible for witness support at all – namely victim-witnesses in the summary jurisdiction who are not young or cognitively impaired. This places an increased onus on police prosecutors to attempt to manage support for vulnerable witnesses, including in serious sexual assault cases where they may not have the skills or resources to properly support high-needs witnesses.

The VOCC is also concerned that existing witness support services cannot meet demand. The OPP has indicated that it cannot provide a service to all eligible witnesses, nor provide sufficient support to priority (high-needs) victim-witness cohorts. Witness support in regional areas is even more limited.

While some gaps in witness support can be (and are) filled by VAPs or Court Network volunteers, neither VAPs nor Court Network can provide the level of service provided by a specialised witness support service. Witness support services are tailored around the needs of a witness required to give evidence. Witness support is different to victim support.

The VOCC recommends that the Victorian Government close the gaps in witness support by:

- providing sufficient funding for existing witness support services to meet demand
- establishing a witness support scheme for adult victims of crimes against the person in the summary jurisdiction.

Funding for existing witness support services should enable:

- service provision to all eligible victim-witnesses
- a comprehensive level of service provision for high-needs victim-witnesses, including support during the entire court phase and at all key hearings
- existing witness support services to service regional areas.

A witness support scheme for adult victims of crimes against the person in the summary jurisdiction should be modelled on the existing services in Victoria and include specialist advice and assistance, including:

- support and information about the role of being a witness
- support to go to court (including assisting with special arrangements for giving evidence and safely attending court) including pre-court familiarisation processes (e.g. 'walk throughs')
- debriefing following court hearings
- referrals to victim support services for longer-term case management or to other services (e.g. trauma or bereavement counselling, lawyers for assistance with state-funded financial assistance).

The VOCC considers that the most appropriate 'host' agency, department or organisation for a witness support scheme for adult victims of crimes against the person in the summary jurisdiction is a matter for government. In considering the best location for such a service, regard should be had to factors such as whether a model of victim and witness support is best integrated with prosecutions, as per the VWAS model, or whether a stand-alone witness support service, as per the CWS, provides better outcomes for witnesses. Consideration should also be given to which model would lead to better integration with existing services – including existing witness, court and victims' support services and any enhancements made to the victim support system as recommended in **Chapter 14** of this report. Opportunities to expand or extend existing approaches may be preferable over the establishment of new stand-alone services where this creates more seamless support for victims of crime.



### RECOMMENDATION 23

**The Victorian Government should close the gaps in witness support by:**

- providing sufficient funding for existing witness support services to meet demand
- establishing a witness support scheme for adult victims of crimes against the person in the summary jurisdiction.

Funding for existing witness support services should enable:

- service provision to all eligible victim-witnesses
- a comprehensive level of service provision for high-needs victim-witnesses, including support during the entire court phase at all key hearings
- existing witness support services to service regional areas.

A witness support scheme for adult victims of crimes against the person in the summary jurisdiction should provide:

- support and information about the role of being a witness
- support to go to court (including assisting with special arrangements for giving evidence and safely attending court) including pre-court familiarisation processes
- debriefing following court hearings
- referrals to victim support services for longer-term case management or to other services (e.g. trauma or bereavement counselling, lawyers for assistance with state-funded financial assistance).

## Intermediary Program

The intermediary scheme was introduced in 2018 as a pilot program.<sup>22</sup> Intermediaries are skilled communication specialists who assist vulnerable witnesses to give their best evidence.<sup>23</sup> Intermediaries are neutral officers of the court and as such are not victim ‘support workers’ but assist in ensuring victims can provide their best evidence safely.

The intermediaries scheme is available to a witness or complainant who is under 18 years of age when the proceeding commences, or has a cognitive impairment, and where the criminal proceeding takes place in a participating court.<sup>24</sup>

Participating courts at present are the Magistrates’ and Children’s Courts and the County and Supreme Courts in Melbourne, Geelong, Bendigo, Warrnambool and Wodonga.

The *Multi-jurisdictional Court Guide for the Intermediary Program* states that the Intermediary Pilot Program for the use of intermediaries has operated more narrowly than the scheme set out in the *Criminal Procedure Act 2009* (Vic), and currently applies only to:

- complainants in sexual offences matters who are vulnerable witnesses
- vulnerable witnesses, apart from the accused, in homicide matters
- vulnerable witnesses in all court jurisdictions, but in limited geographic locations
- police sexual offence and child abuse investigative team (‘SOCIT’) sites in Bendigo, Box Hill, Fawkner, Frankston, Geelong, Knox, Melbourne and Warrnambool, or as nominated by the Intermediary Pilot Program from time to time.<sup>25</sup>

Intermediaries are only available in limited circumstances, so victim experiences of the Intermediary Program were unable to be covered in detail during VOCC’s engagement with victims. However, the VOCC notes that the Intermediaries Program was widely supported by stakeholders and highly praised by one victim the VOCC spoke with.

<sup>22</sup> The legislative scheme relating to intermediaries and ground rules hearings is set out in Part 8.2A of the *Criminal Procedure Act 2009* (Vic) which commenced on 28 February 2018.

<sup>23</sup> Department of Justice and Community Safety, *Victorian Intermediaries Pilot Program* (Web Page) <<https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program>>.

<sup>24</sup> *Criminal Procedure Act 2009* (Vic) s 389F. Participating courts can be gazetted: *Criminal Procedure Act 2009* (Vic) s 389G.

<sup>25</sup> Supreme Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Program: Intermediaries and Ground Rules Hearing* (Web Page, February 2022) <<https://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/multi-jurisdictional-court-guide-for-the-intermediary-program>>.

A number of stakeholders indicated during consultations with VOCC that the intermediary scheme has been a positive reform for witnesses who might otherwise not have sufficient support or accommodations to navigate giving evidence.<sup>26</sup> Victoria Police members praised the Intermediaries Program as ‘fantastic’<sup>27</sup> and ‘the most magnificent improvement in the system ... in a long time’.<sup>28</sup>

Community Legal Centre representatives were also supportive of the Intermediaries Program, although the VOCC was told it might be more effective if victims had independent legal representation to advocate for their interests during the process.<sup>29</sup>

## Expanding the Intermediary Program

Research has heralded the intermediary program as ‘a significant milestone in Victoria’s efforts to ensure that the criminal justice system accommodates and protects those with limited comprehension and communication skills’.<sup>30</sup>

The Victorian Law Reform Commission (VLRC) found in 2021 that the intermediary program:

- increases access to justice and drives positive change in the practice and attitudes of police, lawyers and judges
- results in more cases making it to court
- is mostly supported by police, lawyers and judicial officers.<sup>31</sup>

However, as noted above, the Intermediary Pilot Program for the use of intermediaries has operated more narrowly than the scheme set out in the *Criminal Procedure Act 2009* (Vic) and only operates in certain court locations.

Having regard to the positive outcomes for victim participation, the VOCC recommends that more victim-witnesses have access to the Intermediaries Program, including by expanding its availability to all victim-witnesses with communication difficulties and to all courts in Victoria.

The VOCC’s recommendation is similar to the VLRC’s recommendation in its 2021 report, *Improving the Justice System Response to Sexual Offences*. The VLRC also recommended amending the Criminal Procedure Act to ensure that all witnesses with communication difficulties in sexual offence matters have access to the intermediary scheme.

The VLRC noted that the Magistrates’ Court of Victoria supported ‘embedding the intermediary scheme permanently in all court venues as a high priority’.

The VOCC agrees with the Magistrates’ Court of Victoria and sees no reason why the intermediaries program should not be a statewide service available across all court locations for victim-witnesses. All victim-witnesses should be given the same opportunity to participate equally in the justice process, regardless of where they live, and regardless of the offence the accused has been charged with committing.

All victim-witnesses should be given the same opportunity to participate equally in the justice process, regardless of where they live, and regardless of the offence the accused has been charged with committing.

As with many other recommendations in this report, implementing recommendation 24 would require appropriate investment by the Victorian Government. While the need to test approaches by way of pilots is a well-established path in law reform and service innovation in Victoria, when successful initiatives are not properly rolled-out across the state, too often victims and witnesses experience ‘postcode justice’.

<sup>26</sup> Consultation Meeting 10 – Centre for Innovative Justice, RMIT University; Consultation Meeting 31 – Court Services Victoria.

<sup>27</sup> Consultation Meeting 24 – Victoria Police – Session 4.

<sup>28</sup> Consultation Meeting 18 – Victoria Police – Session 2.

<sup>29</sup> It is noted that ground rules hearings can be conducted with or without an intermediary: *Criminal Procedure Act 2009* (Vic) div 1.

<sup>30</sup> Natalia Antolak-Saper and Hannah MacPherson, ‘Vulnerable Witnesses and Victoria’s Intermediary Pilot Program’ (2019) 43(5) *Criminal Law Journal* 325, 338.

<sup>31</sup> Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) 322.

**RECOMMENDATION 24**

**The Victorian Government should ensure equity in the availability of the intermediary scheme by expanding its availability across all Victorian courts.**

All victim-witnesses should be given the same opportunity to participate in the justice process equally, regardless of where they live, and regardless of the offence the accused has been charged with committing.

More victim-witnesses should have access to the Intermediaries Program through the extension of its availability to all victim-witnesses with cognitive impairment or disability that results in communication difficulties, and to all courts in Victoria.

## Enhanced victim support in courts

Research confirms the need for victims to have support before, during and after court.<sup>32</sup> Unlike witness support, discussed above, court support is not focused on the facilitation of giving evidence. Many victims will want to attend court – and participate in proceedings where relevant – without being a witness.

Victim support at court is provided in a range of ways in Victoria, although there is no single, statewide and cross-jurisdictional service available to all victims of crime. At-court support is provided by a patchwork of services, many of whom deliver good services to those victims who can access them. They include:

- VWAS – where the OPP is prosecuting the matter – where resourcing/demand enables support to be provided
- Victims Assistance Program (VAP) workers – where funding and resourcing levels enable them to provide at-court services
- Court Network volunteers – where volunteers are available across court areas and where demand enables support to be provided.

Court Network told the VOCC that appropriate court support is an integral component of enhancing victim participation, particularly where the outcomes of criminal processes may not always validate victims' experiences:

Bearing witness, being alongside people, validating the importance of what they did or their being there; this all plays a role in creating meaningful participation. People can walk away feeling like they have had meaningful participation, even if the system itself cannot enable that to occur.<sup>33</sup>

### Gaps in court support

Victims told the VOCC that lack of support at court had made for particularly distressing experiences that often resulted in secondary victimisation. Victims discussed traumatising court attendances where they were unsupported and unprepared. For example, this respondent to the Victims' Survey stated:



*'The court attendance was awful. I had the choice between sitting near the family of the defendant or sitting near the estranged family of my deceased partner. There was no court support.'*

– Victims' Survey respondent

One respondent to the Victims' Survey stated that they received 'zero support during the court phase' while another described how they had attended court and been found, by chance, by a court support worker: '[I] praise so highly the court support worker who found me alone and crying in the waiting room.'

<sup>32</sup> Tamar Dinisman and Ania Moroz, *Understanding Victims of Crime: The Impact of the Crime and Support Needs* (Victim Support, United Kingdom, 2017) 26.

<sup>33</sup> Consultation Meeting 12 – Court Network.

Victims with disability highlighted that lack of court support was also a barrier to them being able to access arrangements that would facilitate their access and safe participation, such as safe waiting rooms.<sup>34</sup>

Victims without support described being unaware of court processes and etiquette, with one respondent to the Victims' Survey commenting: 'At one point, I wanted to ask the judge a question and I raised my hand but the judge looked at me but did not ask what I wanted.' A victim-survivor of sexual assault told the ABC in 2021 that they 'would have liked access to a liaison officer at the court who could have been a point-of-contact and a person who could answer questions about the court processes and what to expect'.<sup>35</sup>

Only 11 per cent of victims' professionals surveyed by the VOCC agreed that victims have enough in-person court support to help them participate in the process in the Magistrates' Court. In comparison, 41 per cent of respondents agreed that victims have enough in-person court support to help them participate in the process in the higher courts, where there is a dedicated Victims and Witness Support service run by the OPP.

Victims' professionals surveyed by the VOCC raised concerns about the level and availability of at-court support which can be provided within the current victim support system particularly in regional areas:

We often find victims wanting support in court and seldom able to access it via e.g. court social work. We end up using volunteer based services.

Funding cuts have made it difficult to support clients the way we should, eg. we aren't supposed to do full days of court support anymore.

Disenfranchised victims like the family members of victims who aren't required to be in court don't get funded to come and don't necessarily have workers to support them – more funding is needed for this.

Victims in outlying regional areas have less options for court support.

There is not court support in some regional courts operating at present.

The VOCC was also told that victims are not getting the necessary debriefing or post-court care that they need.<sup>36</sup>

Court Services Victoria (CSV) told the VOCC that:

We need to look at trauma informed approaches and ask 'how do you support the whole person?' In mainstream courts how do we support someone who is experiencing levels of trauma but they don't fit certain categories for therapeutic courts? How do we get the best outcome for someone in that highly stressful environment where many things are outside of their control and assist them to advocate for themselves and exercise choice?<sup>37</sup>

## Closing the gaps in victim support

As outlined above, research confirms the need for victims to have support before, during and after court.<sup>38</sup> Many victims will want to attend court – and participate in proceedings where relevant – but will not be eligible for a witness assistance service. As noted by Court Network, appropriate court support is an integral component of enhancing victim participation.<sup>39</sup>

While a number of different services and programs can, and do, provide at-court support, there is a need for a consistent service response across Victoria. Existing services do not have sufficient resourcing or eligibility criteria to provide much needed at-court support.

In 2021, the parliamentary inquiry into Victoria's criminal justice system recommended that the Victorian Government undertake a trial use in the Magistrates' Court of Victoria of Victim Peer Support Workers to assist victims of crime attending court proceedings.<sup>40</sup>

The VOCC advocates for the establishment of a dedicated and specialised victim liaison service in courts, with sufficient resources to provide support to victims in each court location across Victoria. The use of victim peer support workers should be considered as part of such a service.

The liaison service should provide support before, during and after victims attend court, providing a central contact point for:

- information about accessibility in the court space, including for people with disability, children and young people and making arrangements to ensure relevant supports are in place, including safe spaces, accessibility aides, interpreters etc.

<sup>34</sup> Consultation Meeting 15 – Experts by Experience Advocacy Team – Women with Disabilities Victoria.

<sup>35</sup> Elise Kinsella, Tabitha and Michelle Spent Years Seeking Justice, Now They Want the Legal System to Change how it Treats Sexual Assault Survivors', ABC News (online, 20 April 2021) <<https://www.abc.net.au/news/2021-04-21/sexual-assault-complainants-look-change-to-justice-system/13296644>>.

<sup>36</sup> Consultation Meeting 12 – Court Network.

<sup>37</sup> Consultation Meeting 31 – Court Services Victoria.

<sup>38</sup> Tamar Dinisman and Ania Moroz, *Understanding Victims of Crime: The Impact of the Crime and Support Needs* (Victim Support, United Kingdom, 2017) 26.

<sup>39</sup> Consultation Meeting 12 – Court Network.

<sup>40</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

- information about safety in the court space, including safe entries, exits, waiting areas and making safety plans prior to a victim attending court
- information about the set-up of courtrooms and basic information about courtroom etiquette and procedures
- referrals to onsite and offsite support services such as specialist victims' services or culturally safe programs or services
- information about how to find updates about hearing dates and times.

The liaison service should have skills and expertise to help a range of victims, including victims with disability, children and victims from culturally diverse populations.

Victims should be able to easily identify the liaison service so that those victims who are not supported by a witness support service or a victim support service (like a VAP) can identify the liaison service easily. There should be an online presence so that victims can begin to engage with the service early, such as ask questions about safety, court facilities and court proceedings/etiquette.

As with expanding the availability of witness support services, the VOCC considers that the most appropriate 'host' agency, department or organisation for a victim liaison service across Victorian courts is a matter for government. Regard should be had to factors such as:

- the existing programs and services already providing a form of victim liaison or support in courts
- how victims can be holistically managed throughout the justice journey and not made to continually re-tell their story to receive different services
- what approach would enable best integration with existing services, including existing witness, court and victim support services.

Opportunities to expand, extend or integrate existing approaches may be preferable over the establishment of new stand-alone services where this enhances the support able to be provided to victims of crime.



#### RECOMMENDATION 25

**The Victorian Government should establish a dedicated and specialised victim liaison service in each court location across Victoria to ensure victims are supported before, during and after attending court.**

Specialised victim liaison in courts should include providing:

- information about accessibility in the court space, including for people with disability, children and young people, and making arrangements to ensure suitable supports are in place, including safe spaces, accessibility aides, interpreters etc.
- information about safety in the court space, including safe entries, exits, waiting areas and making safety plans prior to a victim attending court
- information about the set-up of courtrooms and basic information about courtroom etiquette and procedures
- referrals to onsite and offsite support services such as specialist victims' services or culturally safe programs or services
- information about how to find updates about hearing dates and times.



## Court safety and accessibility

Under the Victims' Charter, so far as is reasonably practicable, a prosecuting agency and the courts should, during the course of a court proceeding and within a court building:<sup>41</sup>

- 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.

### Findings of previous reviews and inquiries

Court safety has been described as a 'perennial issue'.<sup>42</sup> As noted by the then-Department of Justice in 2013, 'creating a safe [court] environment can take time as it often requires physical changes to the built environment and significant resources.'<sup>43</sup> It is unsurprising that so many victims of crime and stakeholders raised concerns about court safety during this inquiry.

A 2021 report into the administration of Victorian courts found that many courts across Victoria are not fit for purpose and do not meet the needs of all court users.<sup>44</sup> This echoes findings in previous reports and inquiries.



#### Court safety issues raised in previous reports and inquiries

***Beyond Doubt: The Experiences of People with a Disability in Reporting Crime (2014)*** report recommended that Court Services Victoria:

- prioritise disability accessibility and drive implementation consistently across jurisdictions
- provide for hearing loops and space for mobility aides in courtrooms across jurisdictions.

***The Role of Victims of Crime in the Criminal Trial Process (2016)*** report recommended that Court Services Victoria, in consultation with investigatory, prosecuting and victims' services agencies, implement measures to protect victims attending court proceedings on indictable criminal matters by:

- ensuring that victims can enter and leave courthouses safely, including, where possible, allowing them to use a separate entrance and exit
- making separate rooms available for victims to wait in at court and ensuring victims know where they are
- establishing remote witness facilities that are offsite or accessed via a separate entry to that used by other court users
- using more appropriate means to screen victims from the accused when giving evidence in the courtroom.

***Inquiry into Victoria's Criminal Justice System (2021)*** recommended:

- that the Victorian Government fund Victorian courts to update their facilities to improve standards in victim safety and wellbeing.

***Improving the Justice System Response to Sexual Offences (2021)*** report recommended that the Victorian Government fund the courts to strengthen measures to protect complainants in sexual offence cases by:

- ensuring victims can enter and leave courthouses safely, including, where possible, allowing them to use a separate entrance and exit
- using appropriate means to screen complainants from the accused when they are giving evidence in the courtroom
- ensuring technology is reliable to support complainants to present their best evidence.

41 Victims' Charter Act 2006 (Vic) s 12.

42 Victims Support Agency (Victoria), *Information and Support Needs of Victims and Witnesses in the Magistrates' Court of Victoria* (Report, January 2013) 18.

43 Ibid.

44 Victorian Auditor-General's Office, *Administration of Victorian Courts* (Report, October 2021) 58.

## Courts not meeting standards

Lack of safety during the court process emerged as a significant issue for victims' participation. Inability to participate at court fully or safely was raised by victims in relation to both their physical safety in the court precinct, and their psychological and emotional safety during court proceedings.

Forty per cent of respondents to the VOCC's Victims' Survey who attended court indicated that they never felt safe in court and 35 per cent indicated that they only felt safe sometimes. Taken together, 75 per cent of respondents were concerned about their safety while attending court.

Lack of safety during the court process emerged as a significant issue for victims' participation.

Forty per cent of respondents to the VOCC's Victims' Survey who attended court indicated that they never felt safe in court.

Victims raised concerns with the lack of safe and separate seating options in court common areas such as entrance ways, hallways and foyers. Due to there being too few safe spaces for victims at court, victims frequently encountered the accused and/or their supporters in the general waiting areas. One Victims' Survey respondent, who required further counselling after encountering the perpetrator in court, described the impact on them as highly distressing. One victim expressed their view to the VOCC that victims 'should be able to just walk in and feel like you're sitting in a special space. It's yours, you know, while you're in there, that's where your family sit.'<sup>45</sup> Lack of appropriate and safe court infrastructure was noted by a number of stakeholders.<sup>46</sup> Victoria Police expressed concerns about the physical infrastructure of some courts in Victoria, describing some as 'physically past their use by date. They are unsafe.'<sup>47</sup>

The VWAS at the OPP supported Victoria Police members' concerns about single-entry courts, stating that '[o]ne entry and exit point for all court users remains an ongoing problem'.<sup>48</sup> VWAS also identified that single-entry courts create situations in which 'victims then run the risk of unwanted contact with the Accused either entering or exiting the building'.<sup>49</sup>

Court Network and Victims Services staff told the VOCC that whether court environments across Victoria are victim-friendly and safe is extremely variable. Court Network noted that while some courts have been redesigned and upgraded, others are 'a disaster' with unsafe entries/exits and waiting spaces. The VOCC was told the lack of safe spaces in court creates challenges for Court Network staff, who 'have to find nooks and crannies and ways to make sure the two parties don't come together', otherwise risk victims 'experiencing "walk-bys" by the other side checking them out'.<sup>50</sup>

CSV told the VOCC that the:

development of the Bendigo court has created some pressure in terms of stakeholders in different regions asking 'what about us' in terms of similar developments. Bendigo court has an adaptable layout. It asks: what would Victoria look like if we had six or seven of these similar facilities?<sup>51</sup>

## Minimum standards for safety and accessibility

### Transparency in standards

The VOCC was told that because some courts have been updated, redesigned or rebuilt, it 'creates greater disparity in terms of victim experience'.<sup>52</sup>

The disparity across court locations in Victoria is not fair or equitable. Although refurbishment of courts and upgrading of technology is commendable, victims, witnesses – and all other court users – should have access to similar standards of safety, comfort and amenity when attending court.

Victims, witnesses – and all other court users – should have access to similar standards of safety, comfort and amenity when attending court.

<sup>45</sup> Interview 5 – Victim of crime.

<sup>46</sup> Consultation Meeting 9 – Alannah and Madeline Foundation; Consultation Meeting 12 – Court Network; Consultation Meeting 14 – Victims Services staff; Consultation Meeting 17 – Victoria Police – Session 1; Consultation Meeting 19 – Victoria Police – Session 3; Consultation Meeting 21 – Windermere Victims Assistance Program; Consultation Meeting 24 – Victoria Police – Session 4; Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 15 September 2022, 2.

<sup>47</sup> Consultation Meeting 24 – Victoria Police – Session 4.

<sup>48</sup> Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 15 September 2022, 12.

<sup>49</sup> Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 15 September 2022, 12.

<sup>50</sup> Consultation Meeting 12 – Court Network.

<sup>51</sup> Consultation Meeting 31 – Court Services Victoria.

<sup>52</sup> Consultation Meeting 14 – Victims Services staff.

It is clear that many court venues do not meet best practice for all court users, including victims of crime.

However, it is difficult for courts in Victoria to be measured against an acceptable or minimum standard for safety and accessibility as there are no minimum standards available.

The Victorian Government should establish minimum standards for safety and accessibility in Victorian courts. CSV should develop minimum standards in consultation with victims and other key stakeholders but should, as a minimum, set standards relating to:

- safe court entrances and exits, including for victims with a range of accessibility needs
- safe waiting spaces and interview rooms, including child-friendly spaces, sensory spaces and culturally safe spaces, ensuring victims with a range of accessibility needs can also access these spaces
- availability of remote witness facilities to meet demand
- infrastructure for alternative arrangements (such as protective screens shielding victims from the accused)
- sufficient assets and infrastructure to implement special arrangements at the request of victims, including screens in court.

After establishing minimum standards for safety and accessibility in Victorian courts, Victoria’s court infrastructure should be independently audited against these minimum standards and each court should be provided a ‘scorecard’ of compliance. This scorecard should be published annually.

### **A commitment to upgrading courts over time**

Infrastructure upgrades take time and are costly. With around 70 courthouses across Victoria, it is clear that not all courts will meet minimum standards in the short term. Some newer courts have been purpose-built with safety embedded in their design, while others have been retrofitted or are still waiting for safety improvements, with Melbourne, Werribee, Frankston and Sunshine Magistrates’ Courts all identified by stakeholders as requiring substantial improvements to provide more, safe ways for victims to participate at court.

There should be a commitment to courts being progressively upgraded via a medium- to long-term infrastructure plan. The Victorian Government should develop a multi-year plan to upgrade facilities to meet minimum safety and accessibility standards.

✓

RECOMMENDATION 26

<p><b>The Victorian Government should establish minimum standards for safety and accessibility in Victorian courts. These standards should be publicly available and all courts should be independently audited against these minimum standards.</b></p> <p><b>The Victorian Government should develop a multi-year infrastructure plan to upgrade facilities to meet minimum safety and accessibility standards.</b></p>	<p>Minimum standards for safety and accessibility in courts should, at a minimum, provide:</p> <ul style="list-style-type: none"> <li>• safe court entrances and exits, including for victims with a range of accessibility needs</li> <li>• safe waiting spaces and interview rooms, including child-friendly spaces, sensory spaces and culturally safe spaces, ensuring victims with a range of accessibility needs can also access these spaces</li> <li>• availability of remote witness facilities to meet demand</li> <li>• infrastructure for alternative arrangements (such as protective screens shielding victims from the accused).</li> </ul> <p>All courts should be independently audited against minimum standards and given a compliance ‘scorecard’, which should be updated and published annually.</p>
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## Overview of Chapter 17: Protections for victim-witnesses

One of the objects of the *Victims' Charter Act 2006* (Vic) (Victims' Charter) is to reduce the likelihood of secondary victimisation. Reducing secondary victimisation is key to victim participation – it helps victims to participate safely and helps them participate in a way that meets their justice needs.

Part 2 of this report provides compelling victim voices which suggest the criminal trial process is still causing many victims secondary victimisation.

This chapter aims to address specific areas of the criminal trial process for victim-witnesses where changes could be made to help reduce the likelihood of secondary victimisation.

The Victims of Crime Commissioner (VOCC) recommends reforms to:

- limit, or abolish, committal hearings in certain circumstances
- expand the 'protected witness' category in the *Criminal Procedure Act 2009* (Vic) to prevent personal cross-examination by an accused where a witness is likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.
- expand the availability of alternative arrangements to a broader class of witnesses
- more closely manage cross-examination by counsel for co-accused to avoid repetitive questioning
- introduce additional legislative protections in relation to confidential communications, sexual history evidence and access to third-party information.

The VOCC recommends amending interlocutory appeals processes to provide victims with a substantive remedy to correct legal errors in relation to some decisions made that affect a victim's privacy.

# 17

Chapter 17:  
**Protections for  
victim-witnesses**



## Introduction

One of the objects of the *Victims' Charter Act 2006* (Vic) (Victims' Charter) is to reduce the likelihood of secondary victimisation. Reducing secondary victimisation is key to victim participation – it helps victims to participate safely and helps them participate in a way that meets their justice needs.

Part 2 of this report provides compelling victim voices which suggest the criminal trial process is still causing many victims secondary victimisation. This chapter aims to address specific areas of the criminal trial process where changes could be made to help reduce the likelihood of secondary victimisation.

Many of the recommendations in this chapter, if implemented, would help give practical effect to the Victims' Charter objective of acknowledging the victim's role as a participant, but not a party, in proceedings for criminal offences.<sup>1</sup> They would also give effect to the rights the Victims of Crime Commissioner (VOCC) has recommended be included in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (discussed in **Chapter 12**), including rights for a victim of a criminal offence to be:

- acknowledged as a participant (but not a party) with an interest in the proceedings
- treated with dignity and respect
- protected from unnecessary trauma, intimidation and distress when giving evidence and throughout criminal proceedings.

This chapter makes recommendations in relation to:

- limiting when a victim may be cross-examined more than once
- protecting victims when the accused seeks to personally cross-examine
- alternative arrangements for giving evidence
- protections where there are multiple accused
- protections relating to access to a victim's personal information.

## Cross-examination more than once

Cross-examination can be highly distressing to victims of crime. Research has found cross-examination to be humiliating, distressing, brutal, traumatising, offensive, aggressive, insensitive and confusing.<sup>2</sup>

Because of the risk of re-traumatising victims when they are required to give evidence, it is essential to limit the situations in which a victim may have to give evidence more than once.

Both committal proceedings and 'de novo' appeals are processes which can result in victims giving evidence twice. This section discusses ways to limit cross-examination at committal and for de novo appeals.

### Cross-examination at committal

Before a trial is conducted for an indictable offence, the Magistrates' Court will usually conduct a committal proceeding.<sup>3</sup>

The defence may apply to cross-examine witnesses at a committal proceeding. In 2017–18, leave to cross-examine at least one witness was granted in 46 per cent of cases in Victorian courts.<sup>4</sup> This is much higher than in any other Australian jurisdiction. For example, in New South Wales, courts granted leave to cross-examine witnesses in fewer than 6 per cent of cases.<sup>5</sup>

It is difficult to conduct committal proceedings in a manner that protects victims from unnecessary trauma, intimidation and distress because:

- committals involve a victim-witness giving evidence on more than one occasion (i.e. in addition to a trial)
- cross-examination at a committal hearing can be 'worse than at the trial' because defence counsel is 'not constrained by the presence of a jury' and so cross-examination may be 'more oppressive or intimidating'<sup>6</sup>

<sup>1</sup> *Victims' Charter Act 2006* (Vic) s 4(1)(ba).

<sup>2</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 93.

<sup>3</sup> Committal proceedings are heard in the lower courts before the accused has been ordered ('committed') to stand trial in a higher court. A 'committal' is the decision by a magistrate to commit an accused for trial or sentence in a higher court: Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 6.

<sup>4</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 122.

<sup>5</sup> New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (Report No 141, December 2014) 208.

<sup>6</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 123.



- cross-examination is likely to be less targeted because counsel may explore different case scenarios from the one that counsel uses at trial.<sup>7</sup>

As outlined in **Chapter 8**, many victims who spoke with the VOCC were dissatisfied with the committal process. Victoria Police members also expressed concern to the VOCC about the number of times a victim may be required to give evidence and the negative impact these experiences can have on victims:

A victim can give evidence on two, even three occasions. And that's not even counting appeals. If they spend a day or two in the box giving evidence at a committal and then we get another adjournment, it's hard trying to explain to a victim, "you're going to have to go through this whole process again". It's a lot for them to take in and if there is any sort of jury that's knocked out, or there's another legal argument, we have to start the trial again and they're going to do it all again.<sup>8</sup>

As stated in the Victorian Law Reform Commission's (VLRC) 2020 report *Committals*, 'it is accepted that in most cases witnesses find it stressful and distressing to be cross-examined more than once during criminal proceedings.<sup>9</sup> During the VLRC's review of committals, victims and stakeholders described being cross-examined as 're-traumatising and offensive' and 'as bad as the ... abuse they suffered'.<sup>10</sup> The Office of Public Prosecutions (OPP) told the VLRC that cross-examination at committal should be avoided wherever possible.<sup>11</sup>

In a 2023 *ABC News* article, victim-survivor Alex Case described the committal process, including cross-examination, as 'severely traumatic'.<sup>12</sup>

### **New laws have been introduced to limit cross-examination**

Recent laws have been introduced to address cross-examination at the committal stage. The *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) now means:<sup>13</sup>

- **The court must have regard to additional considerations when determining whether to allow the pre-trial cross-examination of certain witnesses.** These additional considerations apply to a child, a witness who has a cognitive impairment, or is a complainant in a proceeding that relates to a charge for a sexual or family violence offence. The court must consider the need to minimise the trauma that might be experienced by the witness in giving evidence and conduct a more detailed assessment of the importance of the witness's evidence in the case and the characteristics of the witness (e.g. age, culture, level of understanding).<sup>14</sup>
- **Magistrates must provide reasons for granting leave to cross-examine a witness and identify each issue on which the witness may be cross-examined.** This reform requires a magistrate to consider the test for granting leave and explain why leave is justified if granted. This is intended to address concerns that some magistrates were granting leave almost automatically and without applying the statutory test for leave.

These reforms only commenced on 30 July 2023. They should be monitored to ensure they are achieving their objectives. As part of this monitoring process, consideration should be given to whether the categories of witnesses protected under these reforms should be expanded to include victims of other offences against the person.

In addition, and as recommended in **Chapter 15**, the VOCC considers that for victims of sexual offences, a sexual offences legal representation scheme should be available to:

- assist the court in weighing up factors for consideration under the *Criminal Procedure Act 2009* (Vic) (Criminal Procedure Act) in relation to granting leave to cross-examine at committal
- assist the court in determining special protections required when giving evidence at committal
- assist victims to understand the reasons provided by the court as to why a leave to cross-examine at committal is granted
- assist a complainant to better prepare for giving evidence at committal.

<sup>7</sup> Ibid 124.

<sup>8</sup> Consultation Meeting 19 – Victoria Police – Session 3.

<sup>9</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) vii.

<sup>10</sup> Ibid 123.

<sup>11</sup> Ibid 124.

<sup>12</sup> Elise Kinsella, 'Life Sentence', *ABC News* (online, 27 February 2023) <<https://www.abc.net.au/news/2023-02-27/alex-case-child-sexual-abuse-jeffrey-joffa-corfe-court/101991600>>.

<sup>13</sup> *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 63 inserts a new s 124A in the *Criminal Procedure Act 2009* (Vic) effective as of 30 July 2023.

<sup>14</sup> Before the 2022 amendments, a magistrate only considered these additional factors if the witness was a child under 18 years of age.

## Abolish committal hearings for certain cohorts

Currently, if a sexual offence case involves a complainant who is a child or a person with a cognitive impairment, there is no committal hearing. In its 2020 review of committals, the VLRC recommended that this limited category of sexual offence cases be expanded to include family violence cases in which the victim is a child or person with a cognitive impairment.<sup>15</sup>

However, the VOCC considers there are other victim-witnesses who may be traumatised by having to be cross-examined at both committal and trial.

Abolishing committal hearings for certain cohorts should not be limited to sexual offence or family violence cases involving a complainant who is a child or a person with a cognitive impairment. For example, given the many problems identified in sexual offence cases in this inquiry and in others,<sup>16</sup> consideration should be given to committal hearings in all sexual offence cases being abolished.

In 2021, the Director of Public Prosecutions (DPP) called for committal hearings to be abolished entirely in sexual offence cases to prevent victims having to be cross-examined twice.<sup>17</sup> Research has also suggested this as a way of improving victims' experiences of the justice system in sexual offence cases.<sup>18</sup>

The VOCC agrees that committal hearings should be abolished for certain cohorts, commencing with sexual offence and family victims as a priority.

The VOCC recommends that the Victorian Government should:

- monitor reforms introduced in July 2023 to control cross-examination more tightly at committal to ensure they are achieving their objectives. As part of this monitoring process, consideration should be given to whether the categories of witnesses protected under these reforms should be expanded to include victims of other crimes against the person.
- abolish committal hearings for certain cohorts, commencing with sexual offence and family violence cases as a priority. Expanding abolition of committal hearings to other categories should be considered following a review of implementation in sexual offence and family violence cases. In expanding to other categories, regard should be had to reducing unnecessary trauma, intimidation or distress for victim-witnesses.

Reforms to committals remains an area requiring targeted and sustained attention. The VLRC's comprehensive 2020 *Committals* report contains many recommendations that will improve committal proceedings. The Victorian Government has implemented some, but not all the recommendations.

In circumstances where committals remain, the Victorian Government should continue to improve committal processes based on the recommendations made by the VLRC in its 2020 *Committals* report, including:

- changing case-management practices
- involving experienced practitioners for the prosecution and defence at an earlier stage
- improving police charging practices, with the DPP conducting an early review of charges
- addressing delay with forensic reports.

<sup>15</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) recommendation 42.

<sup>16</sup> See, e.g., Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021).

<sup>17</sup> Tammy Mills, 'Top Prosecutor Calls for Jail Discounts for Guilty Pleas to Slash Massive Court Backlog', *The Age* (online, 28 February 2021) <<https://www.theage.com.au/national/victoria/top-prosecutor-calls-for-jail-discounts-for-guilty-pleas-to-slash-massive-court-backlog-20210226-p5760r.html>>.

<sup>18</sup> Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Research Report No 27, Australian Institute of Family Studies, April 2014). 61



## RECOMMENDATION 27

### The Victorian Government should:

- review reforms introduced in July 2023 to control cross-examination more tightly at committal hearings to ensure they are achieving their objectives
- continue to improve committal proceedings based on recommendations made by the Victorian Law Reform Commission in its 2020 *Committals* report
- abolish committal hearings for certain cohorts, commencing with sexual offence and family violence cases as a priority.

The Department of Justice and Community Safety should be required to review the operation of the government's recent changes to limit the cross-examination of victims at committal hearings within three years of the reforms commencing, to ensure they are achieving their objectives.

Committal hearings should be progressively abolished, commencing with sexual offence and family violence cases as a priority.

In circumstances where committals remain, the Victorian Government should continue to improve committal processes based on the recommendations made by the Victorian Law Reform Commission in its 2020 *Committals* report including:

- changing case-management practices
- involving experienced practitioners for the prosecution and defence at an earlier stage
- improving police charging practices with the Director of Public Prosecutions conducting an early review of charges
- addressing delay with forensic reports.

## Cross-examination for de novo appeals

The most common form of appeal in criminal cases decided in Victoria's summary jurisdiction – being the Magistrates' Court and the Children's Court – is a 'de novo' appeal. This means the appeal court re-hears all the evidence and decides the case afresh. This involves witnesses giving their evidence and being cross-examined again.

Although the victims who spoke to the VOCC did not discuss de novo appeals, an appeals system that involves victims giving evidence twice bears similarities to witnesses having to give evidence at a committal hearing and then at a trial. Each time a victim is required to give evidence, there is a risk that victims will be re-traumatised.

To avoid witnesses giving evidence twice (unless there are special reasons to do so), the Victorian Government introduced legislation to abolish de novo appeals and replace them with a more modern system of appeals in 2019.<sup>19</sup> Instead of a fresh hearing, appeals will be decided using a transcript of the evidence given by witnesses from the original hearing in the Magistrates' or Children's Courts.

The County Court will only require a witness (including a victim) to give evidence a second time if the court considers this to be in the interests of justice.<sup>20</sup> As a result, under the new appeals system, victims will normally only need to give evidence once in summary cases. As the then-Attorney-General said when introducing these reforms:

De novo appeals of summary matters have a significant impact on victims and witnesses, as they must give evidence twice: first at the original hearing and then again, on appeal. This may re-traumatise the person, or the case may not proceed if they are not willing, or able, to give their evidence again. Sometimes, appeals are used to harass the victim. These outcomes are inconsistent with the objectives of a modern criminal justice system.<sup>21</sup>

<sup>19</sup> Justice Legislation Amendment (Criminal Appeals) Act 2019 (Vic).

<sup>20</sup> Justice Legislation Amendment (Criminal Appeals) Act 2019 (Vic) s 24; see ss 265A, 265E to be inserted in the *Criminal Procedure Act 2009* (Vic). Further restrictions apply where the evidence is protected, that is, the evidence is given by a complainant and the charge involves certain offences.

<sup>21</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3687 (Jill Hennessy, Attorney-General).

These appeal reforms were meant to commence no later than 3 July 2021 but the government has delayed their commencement twice. The modernised appeals regime is now due to commence no later than 5 July 2025, four years later than the original commencement date.

The government initially delayed commencement of the Act to allow courts and the legal profession more time to prepare. In February 2022, the government stated that the reforms needed to be delayed until July 2025 because of ‘the ongoing effects of COVID-19 on the court system and the significant time and resources required to implement the reforms’. The government stated that the delay would ensure that efforts can remain focused on managing the impacts of COVID-19 and addressing the backlog of cases in the court system.<sup>22</sup>

These reforms will help to protect victim-witnesses from the possibility of re-traumatisation from court processes. Delaying the commencement of the new appeals system means that victims will continue to be re-traumatised by the current de novo appeals system. It is essential that there be no further delay to the commencement of the de novo appeals reforms.



#### RECOMMENDATION 28

**The Victorian Government should bring forward its de novo appeals reforms contained in the *Justice Legislation Amendment (Criminal Appeals) Act 2019 (Vic)* to commence as soon as possible to reduce the number of times a victim has to give evidence.**

Commencement of the new appeals regime has been delayed until 2025. This delayed commencement should be brought forward to commence as soon as possible.

## Giving evidence

In its 2016 report, *The Role of Victims of Crime in the Criminal Trial Process*, the VLRC considered victims that might benefit from further protections while giving evidence.

The VLRC concluded that the guiding principle for expanding protections for witnesses should be to protect victims from unnecessary trauma, intimidation and distress, and ensure they are able to give their best evidence.<sup>23</sup>

The protections discussed in this section concern:

- protecting victims where the accused seeks to personally cross-examine the victim
- providing special arrangements for victims when giving evidence
- limiting cross-examination where there are co-accused.

### Accused personally cross-examining

In most cases, an accused will be represented by a lawyer who asks questions on their behalf. However, in some cases, an accused will not have a lawyer – they will be self-represented. When an accused is self-represented and personally cross-examines a victim of crime, this increases the risk of re-traumatising victims.

The Criminal Procedure Act provides that an accused cannot personally cross-examine a ‘protected witness’.<sup>24</sup> A ‘protected witness’ is a complainant, family member of a complainant or family member of an accused in a sexual offence or family violence case.<sup>25</sup> The court may then take steps to arrange for a legal representative to cross-examine the protected witness.<sup>26</sup>

<sup>22</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 23 February 2022, 397 (Natalie Hutchins, Minister for Victim Support).

<sup>23</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 203.

<sup>24</sup> *Criminal Procedure Act 2009* (Vic) s 356.

<sup>25</sup> *Ibid* ss 353,354.

<sup>26</sup> *Ibid* s 357.

The 'protected witness' category helps to protect a victim from unnecessary trauma and intimidation and limits the risk that an accused may use legal processes to perpetuate the abuse.<sup>27</sup>

### Expanded protected witness category

The protected witness scheme in the Criminal Procedure Act is limited to sexual offence or family violence cases. However, there are other offences and circumstances where victim-witnesses need protection. When consulting for its 2022 *Stalking* report, the VLRC heard that being able to cross-examine the victim gives the perpetrator what they are seeking in controlling or making the victim fearful.<sup>28</sup>

Judicial representatives told the VOCC that the need to ensure self-represented people do not personally cross-examine victims is urgent, particularly with stalking cases. This is because a self-represented accused can use proceedings to further abuse a victim through cross-examining them and there is very little courts can do in such circumstances.<sup>29</sup>

The VOCC considers the 'protected witness' category in the Criminal Procedure Act should not be limited to certain crimes but should be based on whether a victim-witness is likely to experience unnecessary trauma, intimidation or distress as a result of being cross-examined by the accused.

An accused should be prohibited from personally cross-examining a victim-witness who is likely to experience unnecessary trauma, intimidation or distress as a result of being cross-examined by the accused.

The 'protected witness' category in the Criminal Procedure Act should not be limited to certain crimes but should be based on whether a victim-witness is likely to experience unnecessary trauma, intimidation or distress.



### RECOMMENDATION 29

**The Victorian Government should introduce amendments to the *Criminal Procedure Act 2009* (Vic) to prevent personal cross-examination by an accused where a victim-witness is likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.**

The definition of a 'protected witness' in the *Criminal Procedure Act 2009* (Vic) should be amended to expand the circumstances in which a court can prevent personal cross-examination by an accused to any time where a victim-witness is likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.

### Alternative arrangements for giving evidence

The Criminal Procedure Act provides that a court may direct that 'alternative arrangements' be made for giving evidence. The alternative arrangements include the use of remote witness facilities (giving evidence via closed-circuit television), using screens to remove the accused from the witness's line of vision, allowing a person to sit with a witness for the purpose of giving emotional support, and specifying who may be in the court when a witness gives evidence.<sup>30</sup>

Alternative arrangements help to reduce unnecessary trauma, intimidation or distress that a witness may experience as a result of giving evidence.

<sup>27</sup> Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022) 114.

<sup>28</sup> Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022) 114.

<sup>29</sup> Consultation Meeting 28 – Judicial Representatives – Magistrates' Court of Victoria, County Court of Victoria, Supreme Court of Victoria.

<sup>30</sup> *Criminal Procedure Act 2009* (Vic) s 360.

However, a court may only make alternative arrangements orders in sexual offence and family violence cases and summary offences involving obscene behaviour or 'sexual exposure'.<sup>31</sup> This raises the same kinds of problems as discussed in the previous section concerning 'protected witnesses'. Alternative arrangements for giving evidence help to protect a victim from unnecessary trauma and intimidation when giving evidence.<sup>32</sup> Sexual offences, family violence cases, and the two summary offences outlined above are not the only offences or circumstances where victim-witnesses need, or would benefit from, alternative arrangements for giving evidence.

The VOCC has also been advised of instances where the courts do not have the infrastructure to put alternative arrangements in place. For example, the VOCC has been told about screens being unavailable, and courts instead using whiteboards to screen victims from the accused.<sup>33</sup> This is confirmed by recent VLRC research in sexual offence cases.<sup>34</sup> A recent media article also reported that a bereaved family member was told a screen would be made available when they gave evidence but it was not provided on the day.<sup>35</sup>

### **Expanding access to alternative arrangements**

Alternative arrangements should be available for a broader class of victim-witnesses, regardless of offence. The purpose of ordering alternative arrangements to be used should be to prevent unnecessary trauma, intimidation or distress to a victim-witness as a result of giving evidence.

Alternative arrangements should be available for a broader class of victim-witnesses, regardless of offence.

The Criminal Procedure Act also sets out circumstances in which the court *must* direct that a witness give evidence using a remote witness facility unless certain circumstance apply (e.g. in a sexual offence case where the complainant is able and wishes to give evidence from the courtroom). These provisions should remain. However, the Victorian Government should amend the Criminal Procedure Act to provide for alternative arrangements for any victim-witness who is likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.

### **Ensuring alternative arrangements are available**

Alternative arrangements, particularly those involving remote witness facilities, need to be available where courts order their use.

In **Chapter 16** we recommend that the Victorian Government should establish minimum standards for safety and accessibility in Victorian courts and that all courts should, at a minimum, have sufficient:

- remote witness facilities to meet demand
- assets and infrastructure to implement special arrangements at the request of victims, including screens in court.

The Victorian Government should provide additional funding to support this recommendation.

<sup>31</sup> Ibid s 359.

<sup>32</sup> Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022) 114.

<sup>33</sup> Consultation Meeting 12 – Court Network.

<sup>34</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 465.

<sup>35</sup> Adam Cooper, 'Plea Deals and Sitting Next to the Killer's Family: Victims Say Courts Must Change', *The Age* (online) (9 September 2021) <<https://www.theage.com.au/national/victoria/you-don-t-have-power-crime-victims-traumatised-by-court-process-20210830-p58n4h.html>>.



### RECOMMENDATION 30

**The Victorian Government should amend the *Criminal Procedure Act 2009 (Vic)* to provide for alternative arrangements for any victim-witness who is likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.**

**All Victorian courts should have sufficient:**

- remote witness facilities to meet demand
- assets and infrastructure to implement special arrangements at the request of victims, including screens in court.

The *Criminal Procedure Act 2009 (Vic)* should:

- continue to set out circumstances in which the court *must* direct that a witness give evidence using a remote witness facility unless certain circumstance apply (e.g. where the complainant is able and wishes to give evidence from the courtroom)
- extend the circumstances in which a court can require alternative arrangements to be used for any victim-witness who is likely to experience unnecessary trauma, intimidation or distress as a result of giving evidence.

As recommended in Chapter 16, the Victorian Government should establish minimum standards for safety and accessibility in Victorian courts and all courts should, at a minimum, have:

- sufficient remote witness facilities to meet demand
- sufficient assets and infrastructure to implement special arrangements at the request of victims, including screens in court.

## Multiple co-accused

Another situation in which victims need better protection to minimise the trauma, intimidation, or distress as a result of giving evidence is where there are co-accused, and counsel for each accused cross-examines a victim. In this circumstance, a victim could be cross-examined twice and must endure cross-examination by two counsel, possibly with vastly different approaches and style about the same matters.

While technically victims are only giving evidence 'once', repeated cross-examination and cross-examination by two counsel may present additional challenges for victims.

An example of this occurred in a recent Victorian rape trial. The victim in this case spoke publicly about the trauma caused by the trial process. In this case, the victim was cross-examined twice (by counsel for each of the two accused) about the same matters.<sup>36</sup> Both counsel cross-examined the victim about what she was wearing and about kissing someone earlier on the night of the alleged rapes.<sup>37</sup> Understandably, the victim found the questioning very upsetting and distressing.

### Cross-examination with multiple co-accused

At a ground rules hearing in Victoria, a court may give 'a direction about the allocation among the accused of the topics about which a witness may be asked'.<sup>38</sup> This enables a court to prevent repeat cross-examination by counsel of co-accused for the 'fair and efficient' conduct of the proceeding.<sup>39</sup> The court's power to do this is limited to where there is a ground rules hearing. Following the commencement of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*, ground rules hearings are now mandatory in all sexual offence cases.

<sup>36</sup> Elise Kinsella, 'In the Witness Box', *ABC News* (online, 8 September 2021) <<https://www.abc.net.au/news/2021-07-18/how-a-court-case-put-the-spotlight-on-sexual-assault-trials/100281894>>.

<sup>37</sup> At a subsequent trial, the ABC reported that Judge Sexton ruled both of these lines of questioning inadmissible because they were based on, respectively, a stereotype that what a woman wears means she is more likely to consent and sexual history; Elise Kinsella, 'In the Witness Box', *ABC News* (online, 8 September 2021) <<https://www.abc.net.au/news/2021-07-18/how-a-court-case-put-the-spotlight-on-sexual-assault-trials/100281894>>.

<sup>38</sup> *Criminal Procedure Act 2009 (Vic)* s 389E(2).

<sup>39</sup> See, County Court, *Multi-jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (June 2018) <<https://www.countycourt.vic.gov.au/files/documents/2018-08/multi-jurisdictional-court-guide-intermediary-pilot-program-2806180.pdf>>.



While the justification for controlling cross-examination is strong in sexual offence cases, there are many cases where cross-examination by more than one counsel about the same matters risks re-traumatising victims. For example, victim-witnesses in armed robbery or murder trials may find repetitive questioning by counsel for co-accused to be traumatising, intimidating and/or distressing.

For the ‘fair and efficient’ conduct of the proceeding, the court should have a general power to allocate topics of cross-examination between counsel for co-accused to avoid repetitive questioning. This power would enable a court to prevent repeat cross-examination by different counsel for each co-accused.

This power should not be limited to where the court conducts a ground rules hearing. A court should be able to exercise this power in any case where it may prevent (or reduce) re-traumatisation of a witness as a result of giving evidence.



### RECOMMENDATION 31

**The Victorian Government should introduce amendments to the *Criminal Procedure Act 2009 (Vic)* to provide courts with a general power to allocate topics of cross-examination between counsel for co-accused to avoid repetitive questioning to protect victims from unnecessary trauma, intimidation and distress when giving evidence.**

For the ‘fair and efficient’ conduct of a proceeding, the court should have a general power to allocate topics of cross-examination between counsel for co-accused to avoid repetitive questioning.

This power would enable a court to prevent repeat cross-examination by different counsel for each co-accused.

This power should not be limited to where the court conducts a ground rules hearing. A court should be able to exercise this power in any case where it may prevent (or reduce) re-traumatisation of a witness as a result of giving evidence.

## Victims’ personal information

The accused is generally entitled to access any material that is relevant to their case to enable them to make a full defence.<sup>40</sup> However, the accused’s rights are not absolute, and they must be balanced against other rights and interests. Victoria’s *Charter of Human Rights and Responsibilities* provides that all people have a right to their privacy and reputation:

A person has the right –

- (a) not to have that person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have that person’s reputation unlawfully attacked.<sup>41</sup>

The law also recognises that there are important public interests in, for example, preserving the confidentiality of communications between a victim and a health professional, and in restricting access to these communications to encourage (or not discourage) victims both to seek health assistance, and to report sexual offences.<sup>42</sup>

There is also a public interest in victims performing a public duty in giving evidence. When performing this public duty, a victim’s right to privacy should be respected.

This section examines when the accused should be able to access (by subpoena), and ask questions about, a victim’s personal information. This issue arises in relation to:

- confidential communications
- sexual history evidence
- any kind of personal information held by a third party (e.g. records held by a government department or a financial institution).

<sup>40</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 471.

<sup>41</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 13.

<sup>42</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 20.

## Confidential communications

Confidential communications are communications made in confidence by a victim to a medical practitioner or counsellor, either before or after the alleged sexual offending occurred.<sup>43</sup>

The accused may seek to produce records of a victim's confidential communications with a doctor or counsellor and then adduce evidence from the records in order to cross-examine the victim about its content (e.g. where the records show that a victim has described the offence in a different way from their evidence in court or a police statement). The records may be extensive. In the case of historic sexual abuse matters, a victim may have medical and counselling records that go back many years.<sup>44</sup>

In 2021, the VLRC's report *Improving the Response of the Justice System to Sexual Offences* found that victims' 'entitlements to protection of confidential communications and their sexual history are still not being fulfilled'.<sup>45</sup> For example, the Gatehouse Centre (a counselling service that works with children) informed the VLRC that even though it regularly challenged applications to produce counselling records, it was 'concerned that vulnerable families and less well-resourced support agencies submit to such applications because they lack the knowledge and wherewithal to assert their rights'.<sup>46</sup> The VLRC made a number of recommendations to improve laws governing confidential communications.

The Victorian Government introduced the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* to implement most of the changes recommended by the VLRC. The amendments expand the coverage of the scheme by broadening the definition of the records that it applies to. The amendments also provide that the victim may appear, give a statement and make submissions concerning whether the court should grant leave to produce or adduce evidence of their confidential communications.<sup>47</sup> The victim may provide a confidential statement (an affidavit) describing 'the harm that is likely to be caused to the protected person if the application is granted'.<sup>48</sup> Further, the victim may be legally represented to make submissions to the court concerning the application. However, as discussed in **Chapter 15**, unlike in other jurisdictions, there is currently no state-funded legal representation scheme in Victoria for victims.

### Strengthening judicial oversight

The 2022 amendments also require the prosecution to inform the victim when an application to access their confidential communications is made.<sup>49</sup>

The VOCC considers this provision could be strengthened by requiring the court to ensure the prosecution has met this obligation by confirming:

- the prosecution has given written notice of the application to the protected person
- that a protected person is aware that they may appear in the proceeding, make submissions on the application and give a confidential statement
- whether the protected person has obtained legal advice in relation to the application.

### Ensuring legal representation

In response to an application to access confidential communications, a protected person (victim) may obtain legal advice, appear in the proceeding, make submissions and give a confidential statement. The 2022 amendments providing these entitlements are not supported by a scheme that provides state-funded legal assistance and representation to victims to assert these rights. Governments in New South Wales<sup>50</sup> and Queensland<sup>51</sup> have recognised the need for free legal representation in relation to confidential communications and have funded their legal aid services specifically to provide this service.

As discussed in **Chapter 15**, without implementation of a sexual offences legal representation scheme, these protective provisions will continue to be ineffective.

<sup>43</sup> *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32B. This is known in other states by other names, such as 'protected confidences' in New South Wales, 'sexual assault counselling privilege' in Queensland, and 'protected communications' in South Australia and Western Australia. See also Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 471.

<sup>44</sup> For example, in an Australian institutional setting, complaints to police by 45% of male children and 25% of female children occurred more than 20 years after the alleged sexual abuse occurred: Judith Cashmore et al, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases* (Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) 32.

<sup>45</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 264.

<sup>46</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 473; Gatehouse Centre, Royal Children's Hospital, Submission No 14 to Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021).

<sup>47</sup> *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32CE(1).

<sup>48</sup> *Ibid* s 32CE(2).

<sup>49</sup> *Ibid* s 32CD.

<sup>50</sup> The NSW Sexual Assault Communications Privilege Service (SACPS) providing free legal representation was established in 2011 and sits within Legal Aid New South Wales: Legal Aid New South Wales, *Sexual Assault Communications Privilege* (Web Page) <<https://www.legalaid.nsw.gov.au/my-problem-is-about/victims-rights/victims-support-scheme/sexual-assault-communications-privilege-service>>.

<sup>51</sup> Queensland established a free legal service for victims in relation to counselling records in 2017: Legal Aid Queensland, *Protecting Sexual Assault Counselling Records* (Web Page, 2020) <<https://www.legalaid.qld.gov.au/Find-legal-information/Factsheets-and-guides/Factsheets/Counselling-Notes-Protect-Service>>.

Under a sexual offences legal representation scheme, an independent legal representative could help protect the privacy of victims' counselling notes and other confidential therapeutic records by representing the interests of the complainant, in contrast to the role of a prosecutor who must represent the interests of the state. A sexual offences legal representation scheme could:

- ensure victims are notified about applications to access their information and that they understand their legal rights in relation to appearing
- assist victims to claim the communications privilege when their confidential records are subpoenaed
- assist victims to prepare a confidential statement describing the harm they are likely to suffer if the application is granted.

Legal representation for victims is also essential for courts to be able to properly consider the test they must apply. A court must consider whether the public interest in 'preserving the confidentiality' of the communication and protecting the person who made the communication from harm, is substantially outweighed by the public interest in allowing the records into evidence because of their 'substantial probative value'.<sup>52</sup> This balancing test requires the court to consider six matters, three of which are matters that a victim has special knowledge about that could assist the court:

- the likelihood, and the nature and extent of harm that would be caused to the victim, if the records were produced or adduced in court
- whether the victim objects to the disclosure of the records
- the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.<sup>53</sup>

The court must also have regard to:

- the need to encourage victims of sexual offences to seek counselling and the extent to which victims may be discouraged from doing so if the records are produced/adduced
- whether the party seeking the records is doing so on the basis of a discriminatory belief or bias.<sup>54</sup>

While the prosecution should be able to adequately address these last two issues, a dedicated legal representative could better assist the court with the three matters that a victim has special knowledge about.

<sup>52</sup> *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(1). Harm includes actual physical bodily harm, financial loss, stress, shock, damage to reputation and emotional or psychological harm (such as shame, humiliation or fear): s 32B(1).

<sup>53</sup> *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(2).

<sup>54</sup> *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(2).



## RECOMMENDATION 32

**The Victorian Government should introduce additional legislative protections in relation to confidential communications by requiring courts to ensure the prosecution has met its obligations under the *Evidence (Miscellaneous Provisions) Act 1958* to notify victims of their rights.**

**Courts need better information about a victim's privacy and other rights and interests when determining confidential communications applications. The specialised, state-funded legal representative for victims should provide that information (see Recommendation 22).**

Courts should ensure the prosecution has met its obligations under the *Evidence (Miscellaneous Provisions) Act 1958* in relation to confidential communications by confirming that:

- the prosecution has given written notice of the application to the protected person
- a protected person is aware that they may appear in the proceeding, make submissions on the application and give a confidential statement
- the protected person has obtained legal advice in relation to the application.

As recommended in Chapter 15, reforms concerning confidential communications should be underpinned by the establishment of a sexual offence legal representation scheme providing specialised, state-funded legal representation for victims in sexual assault cases, including in relation to confidential communications.

## Sexual history

In the past, sexual history evidence was commonly relied on to attack the victim's credibility based on rape myths. These myths were that evidence of a victim's sexual history supported 'the inference that the complainant was more likely to have consented to the sexual activity or that they were less worthy of belief'.<sup>55</sup> Laws developed to restrict the use of sexual history evidence – these laws are often called 'rape shield' laws.

Evidence of a person's sexual history involves a victim's privacy and reputation, is not usually relevant to the alleged offence, and can be misused to support rape myths. Further, cross-examining a victim about their sexual history can be demeaning. Therefore, the law requires the accused to apply to the court for permission to cross-examine a victim about the victim's sexual history.

A number of stakeholders told the VLRC in its 2021 report *Improving the Justice System Response to Sexual Offences* that there were problems with the way in which sexual history was being used. For example, Sexual Assault Services Victoria said that their client's 'sexual history is still being used to diminish their experience, discredit them or cast doubt on their statements and on what has happened'.<sup>56</sup>

The VLRC recommended changes to sexual history evidence laws that would align sexual history procedures with those applying to confidential communications by changing the law to:

- require the prosecution (or informant in summary proceedings) to inform the victim, when an application is made, of their right to appear and the availability of legal assistance in relation to the sexual history evidence application
- provide victims with standing to appear before the court in relation to sexual history evidence applications
- require the court to be satisfied that a victim whose sexual history is the subject of an application for access and use is aware of the relevant provisions and has had an opportunity to obtain legal advice in relation to it

<sup>55</sup> Tyrone Kirchengast, 'Victim Legal Representation and the Adversarial Criminal Trial: A Critical Analysis of Proposals for Third-Party Counsel for Complainants of Serious Sexual Violence' (2021) 25(1) *The International Journal of Evidence & Proof* 53, 62.

<sup>56</sup> Sexual Assault Services Victoria, Submission 17 to Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 476.

- prohibit judges from waiving the notice requirements, except where the victim cannot be located after reasonable attempts, or the victim has provided informed consent to the waiver
- permit victims to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted
- provide that a victim has access to free legal advice and representation in relation to a sexual history evidence application.<sup>57</sup>

The VOCC supports the implementation of these recommendations and has also identified further opportunities to improve the law governing sexual history evidence.

### **Improving the test applied by courts**

In deciding whether to grant an application to question a victim about their sexual history, section 349 of the Criminal Procedure Act provides that the court must not grant leave unless the court is satisfied that ‘the evidence has *substantial relevance* to a fact in issue and that it is in the interests of justice to allow the cross-examination or to admit the evidence’ (emphasis added).

The VOCC considers this test could be strengthened.

First, the words ‘substantial relevance’ should be replaced to focus on what the evidence is capable of proving. The court should be satisfied that the evidence has ‘substantial probative value’ before granting leave to admit sexual history evidence.

Secondly, as part of the ‘interests of justice test’, the court must consider the need to respect the ‘complainant’s personal dignity and privacy’ and the accused’s right ‘to fully answer and defend the charge’. The court should also be required to consider an additional public interest in assessing whether it is in the interests of justice to grant an application, namely: whether granting the application may discourage victims from reporting sexual offences and giving evidence.

Considering public interests of this nature is similar to the requirement in confidential communications to consider whether disclosure of the communications will discourage victims from seeking counselling if records are produced.

Thirdly, the test for granting leave<sup>58</sup> requires the court to consider the ‘distress, humiliation and embarrassment’ that a complainant may experience if their sexual history evidence is admitted. Further, the court must consider the complainant’s ‘personal dignity and privacy’ before deciding whether to grant leave.

In **Chapter 12**, the VOCC proposes that the Charter of Human Rights and Responsibilities be amended to provide that victims have a right to be protected from unnecessary trauma, intimidation and distress when giving evidence. Incorporating this right into the test for granting leave would further buttress the importance of considering the victim’s perspective and interests when a court is deciding whether to grant leave to admit sexual history evidence.

### **Ensuring legal representation**

As with confidential communications, without implementing a sexual offence legal representation scheme, sexual history evidence laws and protections will continue to be ineffective.

Legal representation for victims provides the best means of ensuring that a court is properly informed about a victim’s interests and concerns about disclosure of their sexual history.

Under a sexual offence legal representation scheme, an independent legal representative could:

- ensure victims are notified about applications in relation to sexual history evidence
- help protect victims’ privacy and dignity by representing the interests of the complainant, in contrast to the role of a prosecutor who must represent the interests of the state
- help inform the court about the harm likely to be caused if the defence is granted leave to cross-examine the victim about the victim’s sexual history.

<sup>57</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 478, recommendation 85. These recommendations are presented here in a different order to that used in the VLRC report.

<sup>58</sup> *Criminal Procedure Act 2009* (Vic) s 349.



### RECOMMENDATION 33

**The Victorian Government should implement recommendations of the Victorian Law Reform Commission's 2021 report *Improving the Justice System Response to Sexual Offences* in relation to sexual history evidence and strengthen the test courts apply under the *Criminal Procedure Act 2009* (Vic) when considering whether to grant an application relating to sexual history evidence.**

**The Victorian Government should ensure state-funded legal representation for sexual offence victims to ensure the court is properly informed about a victim's interests and concerns about disclosure of their sexual history.**

The *Criminal Procedure Act 2009* (Vic) should be amended to improve provisions governing the admissibility of sexual history evidence.

The amendments should:

- provide victims with standing to appear before the court in relation to sexual history evidence applications
- provide that a victim has access to state-funded legal representation in relation to a sexual history evidence application
- require the prosecution to inform the victim, when an application is made, of their right to appear at the court hearing
- require the court to check with the prosecution whether the victim has been informed about the application and their right to appear and make submissions at the hearing
- prohibit courts from waiving the notice requirements completely, except where the victim cannot be located after reasonable attempts, or the victim has provided informed consent to the waiver
- provide that any waiver or reduction in the amount of notice provided to the victim must still allow the victim sufficient time to obtain legal advice and representation unless the victim provides informed consent to the waiver
- provide that victims be permitted to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted
- require that, when deciding whether to grant leave in relation to sexual history evidence, the court be satisfied that the evidence has 'substantial probative value'
- require that, when deciding whether it is in the interests of justice to grant an application, the court consider whether granting the application may discourage victims from reporting sexual offences and giving evidence
- incorporate the proposed victim's human right to be protected from unnecessary trauma, intimidation and distress when giving evidence.

## Subpoena of third-party information

Victims' privacy interests also arise when access (usually by the accused) is sought to personal information that is held by a third party. The third party may be a government department, a person or an organisation (such as bank or other financial body). If a third party holds relevant records about a victim, an accused may be able to subpoena the records and use them in evidence.<sup>59</sup> Sometimes the personal data in question is held by the victim (e.g. on their mobile phone).

<sup>59</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 472; see also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 222.

An accused may subpoena information that includes information in which a victim has identifiable privacy interests (e.g. concerning their health, employment or finances). If a subpoena is issued, the third party must produce the information to the court. Some third parties may object to producing the information. However, unlike with confidential communications and sexual history evidence, there is:

- no process requiring notice to be given to the victim that a subpoena has been issued to a third party that may concern personal information about them
- no process enabling a victim to object to the disclosure of the personal information.

Judicial representatives were concerned about the use of third-party information and the lack of rights that complainants have in relation to this information:

A complainant's views must be sought before confidential counselling records are considered for release but that is not so in respect of any other personal information – eg health, banking and employment records. If those records have been sought from a third party there is no obligation to even advise the complainant let alone give them advice or an opportunity to be heard.

That is an area where there should be an automatic notification to a complainant or a victim whose personal information is being sought from a third party. They should then be given the right to be represented if they wish to object.<sup>60</sup>

Victims have a clear privacy interest in information about themselves. This is recognised by section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter).

There is a public interest in victims performing a public duty in giving evidence. When performing this public duty, a victim's right to privacy should be respected.

### **A third-party participation scheme**

To protect a victim's right to privacy, the VOCC considers that a scheme based on the confidential communications scheme should be developed to address subpoenas for information about a victim that is held by a third party. The new scheme should provide that:

- the accused should notify the prosecution about any subpoena issued to a third party that seeks to obtain personal information about the victim
- the prosecution must inform the victim of the subpoena and the victim's right to appear and make submissions about accessing the information
- the court should check whether the prosecution has informed the victim about the application and their right to appear and make submissions concerning access to the information
- the victim should have the right to object to the production of that material
- the victim should be able to appear and make submissions concerning the application
- the victim should be able to give the court a statement (affidavit) describing the harm that is likely to be caused to them if the information is disclosed and they are questioned about it.

As with confidential communications and sexual history evidence, victims should have access to state-funded legal assistance to uphold participatory rights in relation to third-party information.





#### RECOMMENDATION 34

**To protect a victim's right to privacy, the Victorian Government should reform the process around third-party subpoena applications to provide a comprehensive victim notification and participation scheme. Victims should have access to state-funded legal assistance to uphold participatory rights in relation to third-party information.**

The law should be amended to enhance victims' participation regarding third-party subpoena applications including that:

- the accused must notify the prosecution if a subpoena seeks personal information about the victim
- the prosecution must notify the victim about a subpoena issued to a third party to obtain personal information about them
- the court must check with the prosecution whether the prosecution has informed the victim about the application and their right to appear and make submissions at the hearing
- in deciding whether to allow access to the information and to balance the victim's privacy interests, a scheme like that applying to confidential communications should be adapted to set out the decision-making criteria for courts.

As with confidential communications and sexual history evidence, victims should have access to state-funded legal assistance to uphold participatory rights in relation to third-party information.

### Rights to appeal decisions about a victim's personal information

There may be significant consequences for victims if a court grants an application to:

- produce/adduce confidential communications
- allow questioning about a victim's sexual history
- allow access to information about a victim that is held by a third party.

In each case, it is the victim's privacy and reputation that are in issue. Victims are the ones who may be harmed by the disclosure of information or by being required to give evidence. The outcome of the court's decision may significantly impact the complainant's experience and willingness to engage with the proceedings as well as the public confidence in and legitimacy of the prosecution of offences.<sup>61</sup> The legal issues can also be complicated.<sup>62</sup>

In Victoria, victims do not have a right to appeal against these kinds of decisions affecting a victim's privacy and reputation. Although the prosecution could bring an appeal on the complainant's behalf, the prosecution and the complainant's interests do not always align, and there are no tailored appeal processes for this situation. Normally, appeal processes are only available once a matter has been completed. However, by that time, the victim will have already been required to comply with the court's order – documents will have been produced and/or the victim will have given evidence – and it will not be possible to protect a victim's rights in any meaningful way by correcting an erroneous order.

In New South Wales, both the victim and the record holder may appeal against a decision to grant leave to produce/adduce the documents.<sup>63</sup> The victim and the record holder may appeal even if the parties to the proceeding do not appeal, provided that the Court of Appeal grants leave to appeal, or the judge or magistrate certifies that the matter is appropriate for determination as an interlocutory appeal.<sup>64</sup> This process enables a court to correct an erroneous order before a victim is required to comply with it, thereby protecting a victim's rights and interests. As Associate Professor Kerstin Braun advised the VOCC: 'this is a very limited right and it only relates to sexual assault victims, but at least that means there is a right.'<sup>65</sup>

<sup>61</sup> United Kingdom Law Commission, *Evidence in Sexual Offences Prosecutions – Summary* (2023) 45.

<sup>62</sup> See, e.g., Tom O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (Report, July 2020) 69.

<sup>63</sup> *Criminal Appeal Act 1912* (NSW) s 3F(3AA).

<sup>64</sup> An interlocutory appeal allows a party to appeal against a court's ruling before a trial (or hearing) is completed.

<sup>65</sup> Consultation Meeting 1 – Associate Professor Kerstin Braun.



The main concern with pre-trial appeals is that they may delay or fragment criminal proceedings.<sup>66</sup> However, Victoria has had an interlocutory appeals regime since 2010 that permits appeals against pre-trial rulings in limited circumstances.<sup>67</sup> As in New South Wales, it would be possible to ensure that appeals in such circumstances are appropriately limited. Victoria's interlocutory appeals regime applies to proceedings in the County Court and Supreme Court.

As there is no equivalent interlocutory appeals regime for decisions made in the Magistrates' or Children's Courts, consideration should be given to modifying this regime or modifying judicial review procedures (including by providing standing to the victim to bring judicial review), to ensure that a victim's rights are appropriately protected.

The VOCC recommends that victims should have appeal rights (through the interlocutory appeals regime or similar) against decisions affecting their privacy rights in relation to confidential communications, sexual history evidence, and information sought from third parties.



### RECOMMENDATION 35

**Victims should be provided with limited appeal rights regarding decisions around applications for confidential communications, sexual history evidence, and information sought from third parties. Victims should have access to state-funded legal assistance to uphold these appeal rights.**

Victims should be provided with limited appeal rights in relation to decisions affecting their privacy rights regarding confidential communications, sexual history evidence, and information subpoenaed from third parties.

Victoria's interlocutory appeals regime could be modified to provide this right of appeal.

66 Chris Corns, Susan Borg and Adrian Castle, *Criminal Appeals and Reviews in Victoria* (Thomson Reuters, 2016) 46.

67 *Criminal Procedure Act 2009* (Vic) pt 6.3 div 4.



## Overview of Chapter 18: Sentencing

Victims' participation at sentencing is important. It is one of the few times during a victim's justice journey that they have the right to be heard in court – in their own voice – through a Victim Impact Statement (VIS). The *Victims' Charter Act 2006* (Vic) (Victims' Charter) enshrines this right to participate at sentencing through VISs.

### Sentence indications

The purpose of a sentence indication is to inform the accused of the sentence the court is likely to impose if they plead guilty. Like many processes in the justice system, the sentence indication scheme is not centred on victims' participatory needs.

To address concerns about lack of consultation with victims regarding sentence indications, the Victims of Crime Commissioner (VOCC) recommends that the *Criminal Procedure Act 2009* (Vic) be amended to require the Director of Public Prosecutions to seek the views of victims regarding a sentence indication.

The VOCC also recommends that prosecutors be required to:

- advise the court whether there is sufficient, or insufficient, information about the impact on a victim to make a sentence indication
- obtain information about impact on a victim to put before the court at sentence indication stage. The form or format of victim impact information should not be prescribed and should not be required in the format of a formal VIS.

### Victim Impact Statements (VISs)

The VOCC considers more must be done to fulfil the participatory objectives of VISs and protect victims from secondary victimisation. The VOCC recommends that victims be able to prepare a VIS before a plea or finding of guilt and to have their VIS 'quarantined' until required by the court. The feasibility study into the development of an interactive Victims' Portal (see **Chapter 14**) should consider how a Victims' Portal could help victims to prepare VISs and submit them securely until they are required by the court.

The Sentencing Act should also be amended to require the court, prior to sentencing, to make enquiries with the prosecution about a victim's wishes in relation to making a VIS. The court should adjourn proceedings to permit the victim to prepare a VIS or to permit the prosecutor to make further enquiries unless it is not in the interests of justice to do so.

The VOCC also recommends that a new test be introduced to restrict questioning a victim about their VIS. A court should only permit the questioning of a victim about their VIS where the court is satisfied that the questioning is about a matter that has substantial probative value.

To further protect victims at the VIS stage, the *Sentencing Act 1991* (Vic) (Sentencing Act) should be amended to provide that:

- the offender cannot personally cross-examine the victim about their VIS
- if the application to examine a victim is granted, the victim may be legally represented when the victim is examined in court.

# 18

## Chapter 18: **Sentencing**



## Introduction

Victims' participation at sentencing is important. It is one of the few times during a victim's justice journey that they have the right to be heard in court – in their own voice – through a Victim Impact Statement (VIS). The *Victims' Charter Act 2006* (Vic) (Victims' Charter) enshrines this right to participate at sentencing through VISs.<sup>1</sup>

A VIS serves two important purposes. It serves an instrumental purpose in ensuring that the court fully understands the impact the crime committed has had on the victim. It also serves an expressive function by giving victims a voice to talk about the impact that a crime has had on them.

Victims also have an inherent interest in other parts of the sentencing process, including the sentence indication process.<sup>2</sup>

Ensuring that victims participate at the sentencing stage of proceedings is vital to victims' sense of procedural fairness and their overall confidence in the justice system.<sup>3</sup>

This chapter makes recommendations designed to improve outcomes for victims during the sentencing process by enhancing victims' rights:

- at sentence indications
- in relation to VISs.

The recommendations in this chapter aim to:

- encourage prosecutors to consult more with victims about the impact of the crime at an earlier stage, particularly having regard to the increased use of sentence indications or where there is an early plea of guilty and a victim does not have time to prepare a VIS
- enable victims (who want to) to prepare a VIS earlier and put safeguards around the use of the VIS for purposes other than informing the court about the crime's impact on the victim.

## Sentence indications

A sentence indication is where a court indicates the sentence that the court is likely to impose if the accused pleads guilty, prior to a hearing or trial commencing. By giving an accused better information about the likely sentence, sentence indications encourage early guilty pleas. The earlier in the proceedings the offender pleads guilty, the greater the reduction they will receive in their sentence.<sup>4</sup>

If the accused pleads guilty at the first available opportunity after receiving a sentence indication, a court must not impose a sentence that is more severe than the sentence or type of sentence specified in the sentence indication.

A court may give a sentence indication:

- at any time in cases in the Magistrates' Court – no application is necessary.<sup>5</sup> The court may indicate whether it is likely to impose a sentence of imprisonment to be served immediately, or whether it would be likely to impose a sentence of a specified type (e.g. a fine, or a Community Corrections Order).
- following an application made by the accused in the higher courts (the County and Supreme Courts).<sup>6</sup> The court may indicate whether it is likely to impose a sentence of a specified type (e.g. a fine, or a Community Corrections Order) or a specified maximum total effective sentence of imprisonment.

Prior to 2022, the higher courts could only indicate whether a sentence of imprisonment would or would not be given. This information was of little use to an accused person's decision making in cases where it was obvious that the court would impose a sentence of imprisonment. The amendments introduced in 2022 broadened the nature of the sentence indication that a higher court may provide concerning the maximum sentence. The amendments also removed the requirement that the prosecution must consent to the accused making a sentence indication application in the higher courts.<sup>7</sup>

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

2 A sentence indication is where a court indicates the sentence that the court is likely to impose if the accused pleads guilty prior to a hearing or trial commencing. The sentence indication process is governed by the *Criminal Procedure Act 2006* (Vic).

3 Tracey Booth, 'Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 162.

4 Sentencing Advisory Council, *Guilty Pleas and Sentencing* (Web Page) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/guilty-pleas-and-sentencing>>.

5 *Criminal Procedure Act 2009* (Vic) s 60.

6 *Ibid* s 207.

7 Amendments were made to the sentence indication scheme under the *Criminal Procedure Act 2009* (Vic) by the *Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022* (Vic).

Therefore, the 2022 amendments should lead to more sentence indications in the higher courts, although data is not currently available in relation to sentence indications.<sup>8</sup>

Courts do not have the same amount of information at a sentence indication hearing as they do at a sentencing hearing. Courts will have some information, but they will not have heard sentencing submissions from the accused, and they may not have heard how the offence has impacted the victim. If a court considers that it does not have sufficient information to provide an indication, it may refuse to give a sentence indication.<sup>9</sup> There is no publicly available data in relation to how often this is occurring.

## Victims' interests at sentence indications

When introducing the 2022 reforms to the sentence indication scheme, the Attorney-General the Hon Jaclyn Symes MP said that expanding the scheme was designed to:

support the continued effective and efficient functioning of the justice system and its recovery from COVID-19, including helping courts to manage and reduce a significant backlog of cases ... while also providing benefits to victims in providing an outcome and removing the trauma of giving evidence at trial.<sup>10</sup>

Despite these intentions, like many processes in the justice system, the sentence indication scheme is not centred on victims' needs or participatory entitlements. The potential for sentence indications to erode victims' participatory rights was highlighted over 10 years ago. In 2010, Flynn stated that the sentence indication scheme 'creates some concerns in terms of victim consideration, and compatibility with the rights afforded to victims by the ... *Victims' Charter Act 2006* (Vic)'.<sup>11</sup>

During consultations for this inquiry, Victoria Police members raised concerns about the increased use of sentence indications and the adverse impact on victims' participation in the summary jurisdiction:

A common option at the moment to resolve matters is a sentence indication. Sentence indications are often sprung on prosecutors, and when this happens, we've really lost our opportunity to get a Victim Impact Statement. Even if we did come back another day with a Victim Impact Statement, it's not going to be factored into sentence, because the indication has already been made. This is despite the recent amendments to the Charter that prioritises the prosecution's role in seeking victims' opinions.<sup>12</sup>

There are two main issues with the sentence indication scheme:

- lack of consultation with victims regarding sentence indications
- insufficient safeguards to ensure a court considers the impact on a victim when giving a sentence indication.

### Lack of consultation with victims

Neither the *Criminal Procedure Act 2009* (Vic) (Criminal Procedure Act) nor the Victims' Charter require prosecutors to obtain the views of a victim about a sentence indication.

Prosecution consent to a sentence indication was originally included in Victoria's sentence indication scheme so that a sentence indication would only proceed if the prosecution considered that there was sufficient information about the impact on a victim before the court.<sup>13</sup> Prosecution consent was removed by amendments made to the Criminal Procedure Act in 2022 which broadened the sentence indication scheme.<sup>14</sup>

Research conducted in 2008–09 suggests that prosecutors generally consented to sentence indications being given, refusing to consent in only 4 of 31 cases examined.<sup>15</sup>

In the higher courts, the DPP is required to seek the views of the victim only if the DPP is *opposing* a sentence indication.<sup>16</sup> Because the DPP does not often oppose sentence indications, the DPP is rarely required to seek the views of the victim in relation to a sentence indication.

Further, there is no legislative requirement for the prosecution to put information about impact on a victim to the court at a sentence indication hearing. The court may, however, refuse to give a sentence indication if it has insufficient information to give an indication, and this includes victim impact information.

<sup>8</sup> The Attorney-General must review the operation of the amendments to the sentence indication scheme, made to the *Criminal Procedure Act 2009* (Vic) by the *Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022* (Vic), by 1 October 2024.

<sup>9</sup> *Criminal Procedure Act 2009* (Vic) ss 60(2), 208(4), 208(5).

<sup>10</sup> Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4657 (Jaclyn Symes, Attorney-General).

<sup>11</sup> Asher Flynn, 'An Indication of Injustice: An Analysis of the Problems Inherent to Maintaining the Sentence Indication Scheme in Victoria's Higher Courts' (2010) 12(4) *Flinders Law Journal* 68.

<sup>12</sup> Consultation Meeting 18 – Victoria Police – Session 2.

<sup>13</sup> Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme* (Report, February 2010) 44 <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence\\_Indication\\_A\\_Report\\_on\\_the\\_Pilot\\_Scheme.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence_Indication_A_Report_on_the_Pilot_Scheme.pdf)>

<sup>14</sup> *Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022* (Vic).

<sup>15</sup> Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme* (Report, February 2010) 71 <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence\\_Indication\\_A\\_Report\\_on\\_the\\_Pilot\\_Scheme.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence_Indication_A_Report_on_the_Pilot_Scheme.pdf)>

<sup>16</sup> *Victims' Charter Act 2006* (Vic) s 9B(1)(ca).

## Insufficient safeguards for impact on victims

Having information about the impact on a victim is important at the sentence indication stage because after giving an indication, the court must not impose a more severe sentence than the sentence type<sup>17</sup> or maximum total effective sentence indicated.<sup>18</sup>

Considering victim impact at the sentencing stage is challenging for the courts because:

- VISs are generally not available prior to a plea of guilty<sup>19</sup>
- a sentence indication process can occur quickly, particularly in the Magistrates' Court, where it may occur without a victim even being aware of a hearing taking place.

While a court can refuse to give a sentence indication if it considers it has too little information about the impact of the offence on any victim,<sup>20</sup> judicial representatives told the VOCC that there is an inherent tension in the sentence indication process. This is because although a sentence indication is a tool to bring about an early resolution, impact on a victim may not be known at that early stage of proceedings, and it may not be practical to delay or adjourn matters for the purposes of seeking victim impact information.<sup>21</sup>

As one judicial representative told the VOCC, the sentence indication process is designed to 'bring about a resolution but if you don't know about what the [victim] impact is then you're really not informed enough to give the proper indication.'<sup>22</sup>

Victim impact information need not be formalised in a VIS. Courts have introduced practice directions/ notes to assist the prosecution in providing information about the impact on a victim prior to a court making a sentence indication:

- The Supreme Court's practice note requires the prosecution to file and serve on the defence the views of any victim of the offence (if known) and whether the prosecution is of the view there will be sufficient information before the Court regarding the impact of the offence on any victim.<sup>23</sup>
- The County Court requires the prosecution to file and serve on the defence information about whether there will be sufficient information before the Court of the impact of the offence on any victim of the offence.<sup>24</sup>

Despite these initiatives, the VOCC considers there are insufficient legislative safeguards to ensure impact on the victim is considered at the sentence indication stage.

The sentence indication process is designed to 'bring about a resolution but if you don't know about what the [victim] impact is then you're really not informed enough to give the proper indication.'

Judicial representative

## Ensuring victims are consulted

The VOCC is not opposed to sentence indications. There are benefits in securing early guilty pleas in some circumstances, particularly where victims do not wish to endure a trial or give evidence. However, the sentence indication scheme must better incorporate participation by victims and ensure that the prosecution consults with victims before courts give a sentence indication.

As with plea negotiations, victims often do not understand the sentence indication process. Further, sentence indications can occur in the context of 'overcharging' – where the charges filed may include more charges, or more serious offences, than what will be settled on.<sup>25</sup> In its 2020 report *Committals*, the VLRC concluded that the challenges arising from

The sentence indication scheme must better incorporate victim participation and ensure that the prosecution consults with victims before courts give a sentence indication.

<sup>17</sup> In summary jurisdiction: *Criminal Procedure Act 2009* (Vic) s 61.

<sup>18</sup> In indictable jurisdiction: *Criminal Procedure Act 2009* (Vic) s 209.

<sup>19</sup> The reasons for this are discussed in detail in the section of this chapter on victim impact statements.

<sup>20</sup> *Criminal Procedure Act 2009* (Vic) ss 60(2), s 208(5).

<sup>21</sup> Consultation Meeting 28 – Judicial Representatives – Magistrates' Court of Victoria, County Court of Victoria, Supreme Court of Victoria.

<sup>22</sup> *Ibid.*

<sup>23</sup> Supreme Court of Victoria, *Practice Note SC CR 11: Applications for Sentence Indications Pursuant to Part 5.6 of the Criminal Procedure Act 2009* (28 March 2022) <<https://www.supremecourt.vic.gov.au/areas/legal-resources/practice-notes/sc-cr-11-applications-for-sentence-indications>>.

<sup>24</sup> County Court of Victoria, *Criminal Division Practice Note Sentence Indications* (16 February 2022) <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjiuNr5jRD\\_AhW4b2wGHOC4ANwQFnoECAsQAO&url=https%3A%2F%2Fwww.countycourt.vic.gov.au%2Ffiles%2Fdocuments%2F2022-02%2FCriminal-division-practice-note-sentence-indications.docx&usq=AOvVaw0uiqTExnxYTzq8RCtnLg->](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjiuNr5jRD_AhW4b2wGHOC4ANwQFnoECAsQAO&url=https%3A%2F%2Fwww.countycourt.vic.gov.au%2Ffiles%2Fdocuments%2F2022-02%2FCriminal-division-practice-note-sentence-indications.docx&usq=AOvVaw0uiqTExnxYTzq8RCtnLg->)>.

<sup>25</sup> Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 83.

police ‘overcharging’ and then withdrawing many charges as part of a plea negotiation, can be very distressing and traumatic for victims.<sup>26</sup>

The legislative scheme for sentence indications fails to adequately recognise the role of a victim as a participant in the criminal justice system. Therefore, the VOCC recommends amendments, also enshrined in the Victims’ Charter, that would safeguard victims’ participatory rights in relation to sentence indications.

The VOCC is mindful of the challenges faced in the summary jurisdiction and considers enhanced entitlements should focus initially on higher courts, subject to further monitoring of the impacts of sentence indications on victims’ participation in the summary jurisdiction as part of a legislative review into the sentence indication scheme. A legislative review of the sentence indication scheme is discussed in detail below.

The VOCC recommends that to better incorporate victims’ participation in the sentence indication process in the indictable stream, the Criminal Procedure Act should be amended so that the DPP should be required to:

- seek the views of victims regarding a sentence indication
- confirm with the court that the views of victims have been sought
- put information about the crime’s impact on a victim to the court (if the victim wishes to do so).

The court should be required to confirm that the DPP has consulted with the victim prior to the court making a sentence indication and to request information about impact on the victim before a sentence indication is given to the accused. This requirement should also be enshrined in the Victims’ Charter.



### RECOMMENDATION 36

**The Victorian Government should amend the *Criminal Procedure Act 2009 (Vic)* and the *Victims’ Charter Act 2006 (Vic)* to ensure victims are consulted in relation to sentence indications in the higher courts (the County Court and the Supreme Court).**

The VOCC recommends that the Director of Public Prosecutions (DPP) be required to:

- seek the views of victims in relation to sentence indications
- confirm with the court that the views of victims have been sought
- put information about the crime’s impact on the victim to the court if the victim wishes the DPP to do so.

The court should be required to confirm that the DPP has consulted with the victim prior to the court making a sentence indication and to request information about victim impact before a sentence indication is given.

## Ensuring impact on victims is considered

### Gathering information about impact early

There are many reasons why a victim may not prepare a VIS prior to a sentence indication. Strengthening safeguards in relation to VISs, particularly VISs prepared early (such as at the sentence indication stage), are discussed in further detail in the section on VISs below.

However, irrespective of the status or availability of a VIS at the sentence indication stage, the VOCC considers that there should be an onus on the prosecution to gather information on the crime’s impact on the victim in anticipation of a sentence indication occurring.

Sentence indications can be given at any time in the summary jurisdiction, and at any time before the trial commences in indictable crimes.<sup>27</sup> It is important that prosecutors anticipate the possibility of a sentence indication process and liaise with victims early.

<sup>26</sup> Ibid 85.

<sup>27</sup> *Criminal Procedure Act 2009 (Vic)* ss 60(1), 207.



The OPP advised the VOCC that it seeks to ensure that information about the impact of a crime on the victim is available at a sentence indication hearing by consulting with a victim early, before an application is made, and ascertaining whether a victim is likely to make a VIS, and if so, whether that VIS would refer to ‘ongoing physical or psychological impact’.<sup>28</sup>

Victoria Police members have advised the VOCC that sentence indications ‘are often sprung on prosecutors’.<sup>29</sup>

With the increasing use of sentence indications, prosecutors must adapt their processes and prepare for the possibility of a sentence indication being sought or given. This is consistent with the courts’ expectations as reflected in their Practice Notes. Prosecutors should be consulting with victims early and seeking information from them about the crime’s impact and their views on sentence indications. This early information about the impact on the victim would not need to be in the format of a formal VIS. Rather, information about impact should be gathered after consultation with victims and provided to the court either orally or in writing.

Prosecutors should be consulting with victims early and seeking information about victim impact and their views on sentence indications.



### RECOMMENDATION 37

**The Victorian Government should amend the *Victims’ Charter Act 2006 (Vic)* to ensure that:**

- **victims are informed about sentence indication applications or the possibility that a sentence indication may be given**
- **victims have the opportunity to provide earlier victim impact information to the prosecution so that it can be provided to the court at a sentence indication hearing.**

**All prosecution agencies should introduce procedures to enable victims to exercise their role as participants in sentence indication proceedings consistent with amended entitlements under the *Victims’ Charter*.**

The form or format of early information about impact on the victim should not be prescribed and should not be required in the format of a formal Victim Impact Statement.

<sup>28</sup> Correspondence from Office of Public Prosecutions to Victims of Crime Commissioner, 15 September 2022.

<sup>29</sup> Consultation Meeting 18 – Victoria Police – Session 2.

## Where there is insufficient information about impact on a victim

Courts have introduced Practice Directions/Notes to assist them to receive information about impacts on victims prior to making sentence indications. However, the VOCC considers there should be a legislative requirement under the Criminal Procedure Act for prosecutors to advise the court whether there is sufficient, or insufficient, information available about a crime's impact on a victim to make a sentence indication.

Prosecution consent was originally included in Victoria's sentence indication scheme to enable the prosecution to refuse to consent to a sentence indication where there was insufficient information about impact on a victim to conduct a sentence indication.<sup>30</sup> Prosecution consent was removed by amendments made to the Criminal Procedure Act in 2022 to broaden the sentence indication scheme.<sup>31</sup>

Introducing a legislative requirement for the prosecution to advise the court about impact on a victim would increase the accountability of the prosecution to inform and engage with the victim about sentence indications. Requiring the prosecution to consider the impact on victims would make it more likely that it will obtain information from victims and therefore enhance victims' participation at the sentence indication stage.



### RECOMMENDATION 38

**The Victorian Government should amend the *Criminal Procedure Act 2009 (Vic)* to require prosecuting agencies to advise the court whether there is sufficient, or insufficient, victim impact information available to make a sentence indication.**

In advising the court whether there is sufficient, or insufficient, information available about the impact on a victim to make a sentence indication, prosecutors should consider and make known to the court:

- the reasons why comprehensive information about the impact on a victim may not be known or available (e.g. having regard to the seriousness of the offence and the victim's circumstances, such as their current health or wellbeing)
- whether the victim has indicated an intention to make a Victim Impact Statement if there is a plea or finding of guilt.

## Accounting for lack of information on impact on a victim

A recent high-profile case – discussed below – highlighted key issues relating to sentence indications, particularly issues that arise when more detailed information about the impact on a victim comes to light after a sentence indication has been given.<sup>32</sup>

Where the court gives a sentence indication, the court must not impose a more severe sentence than the sentence type<sup>33</sup> or maximum total effective sentence indicated.<sup>34</sup>

The DPP has suggested that the sentence indication scheme in the higher courts should allow courts to give a sentence indication relating to a range of available sentences, rather than just an indication about a maximum sentence, or sentence type. The DPP stated that this would:

ensure that, if any relevant information arose between the sentence indication hearing and the plea hearing – for example, more information about the impact of the offending on a victim – the Court would have greater flexibility in respect of the sentence based on all relevant information.<sup>35</sup>

Improving processes for the early collection of victim impact information and requiring the prosecution to advise the court if there is insufficient information to conduct a sentence indication will help to ameliorate challenges with providing an accurate sentence indication. However, these changes may not be sufficient on their own.

<sup>30</sup> Research conducted in 2008–09 suggests that prosecutors generally consented to sentence indications being given, refusing to consent in only 4 of 31 cases examined: Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme* (Report, February 2010) 71 <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence\\_Indication\\_A\\_Report\\_on\\_the\\_Pilot\\_Scheme.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence_Indication_A_Report_on_the_Pilot_Scheme.pdf)>.

<sup>31</sup> *Criminal Procedure Act 2009 (Vic)* was amended by the *Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022 (Vic)*.

<sup>32</sup> David Estcourt, 'Top Prosecutor Backs Law Change to Protect Victims after Joffa Case', *The Age* (online, 28 February 2023).

<sup>33</sup> In summary jurisdiction: *Criminal Procedure Act 2009 (Vic)* s 61.

<sup>34</sup> In indictable jurisdiction: *Criminal Procedure Act 2009 (Vic)* s 209.

<sup>35</sup> David Estcourt, 'Top Prosecutor backs Law Change to Protect Victims after Joffa Case', *The Age* (online, 28 February 2023).

The VOCC considers it important that the sentence indication scheme does not limit the ability of a judge to properly consider the impact of a crime on a victim when sentencing after a sentence indication.

If the sentence indication scheme is 'locking' a judicial officer into a lower penalty at the sentence indication stage because they do not have detailed or complete information about the impact on a victim, this is a significant erosion of victims' rights and prevents just outcomes.

Providing judges with more discretion to give an indication of a range of available sentences, rather than just an indication about a maximum sentence or sentence type, may address this issue. However, it is also possible that providing a broader range of sentences in a sentence indication would erode the purpose of a sentence indication scheme because there may be less incentive to seek an indication and to plead guilty if the likely outcome is less clear. These are factors that must be carefully balanced.

The VOCC considers this is an important matter that should be part of the required statutory review of the sentence indication scheme discussed further below.

## A review of sentence indication reforms

Section 209A of the Criminal Procedure Act requires the Attorney-General to review the operation of amendments made to the sentence indication scheme introduced in 2022.<sup>36</sup>

The VOCC remains concerned that in the case of sentence indications, procedural expediency may be unduly prioritised over victims' participation.

There has been little research to date that has considered the effect of sentence indications on victims of crime. The Sentencing Advisory Council's 2010 report on Victoria's pilot sentence indication scheme found no adverse effects on victims.<sup>37</sup> However, the sample size was too small to draw conclusions and there were no consultations directly with victims of crime.

The scheme has since been expanded and there are different legislative requirements depending on the jurisdiction in which a sentence indication is heard.

The Attorney-General's Second Reading Speech in 2021 stated that:

The effectiveness of the reforms will be reviewed in two years to ensure it brings promised benefits, victims impact is adequately taken into account at a sentence indication hearing, and that any operational issues are addressed. The review will specifically consider the impact on victims of the amendments to the Victims Charter Act and the availability of information of victim impact at the time of the sentence indication hearing. This is in recognition of the importance of striking the right balance between the reduction of court backlog and victim participation and involvement in the criminal justice process.<sup>38</sup>

The VOCC agrees that the review should ensure the right balance has been achieved in sentence indication processes. Given the issues raised in relation to sentence indications, it is vital that the review:

- include targeted consultation with victims whose matter has been subject to a sentence indication process. Previous reviews did not include victims' views or experiences, meaning a complete review of the sentence indication scheme has not occurred in Victoria.
- examine the extent to which prosecutors are putting victims' views to the court at a sentence indication hearing, including comparing processes across the summary and indictable jurisdictions
- provide data on:
  - rates of sentence indications over time (year-by-year analysis, broken down by jurisdiction)
  - number of times a court has refused to make a sentence indication, broken down by jurisdiction
  - rates of conversion of sentence indications to guilty pleas
  - data on prosecution opposition to sentence indications
- comprehensively examine the impacts of sentence indications on victims' participation in the summary jurisdiction
- consider judicial views on the impacts of sentence indications on the sentencing task, including concerns about whether courts are receiving sufficient information about impact on victims at sentence indication hearings

<sup>36</sup> Criminal Procedure Act 2009 (Vic) was amended by the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022 (Vic).

<sup>37</sup> Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme* (Report, February 2010) 71 <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence\\_Indication\\_A\\_Report\\_on\\_the\\_Pilot\\_Scheme.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Sentence_Indication_A_Report_on_the_Pilot_Scheme.pdf)>.

<sup>38</sup> Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4657 (Jaclyn Symes, Attorney-General).

- consider the DPP's proposal to amend the Criminal Procedure Act to provide judicial officers with discretion to give an indication of a range of available sentences and the extent to which that would better enable impact on victims to be considered at sentencing following a sentence indication.



### RECOMMENDATION 39

**The legislative review of sentence indications under the *Criminal Procedure Act 2009* (Vic) should be independently undertaken by the Sentencing Advisory Council.**

The review of sentence indications should:

- include targeted consultation with victims whose matter has been subject to a sentence indication process
- examine the extent to which prosecutors are putting victims' views to the court at sentence indication hearings, including comparing processes across the summary and indictable jurisdictions
- provide data on:
  - rates of sentence indications over time (year-by-year analysis, broken down by jurisdiction)
  - number of times a court has refused to make a sentence indication, broken down by jurisdiction
  - rates of conversion of sentence indications to guilty pleas
  - rates of prosecution opposition to sentence indications
- comprehensively examine the impacts of sentence indications on victims' participation in the summary jurisdiction
- consider judicial views on the impacts of sentence indications on the sentencing task, including whether courts are receiving sufficient information about the impact on victims at sentence indication hearings
- consider the Director of Public Prosecution's proposal to amend the *Criminal Procedure Act 2009* (Vic) to provide judicial officers with discretion to give an indication of a range of available sentences (and the extent to which that would better enable victim impact to be considered at sentencing following a sentence indication).

## Victim Impact Statements

As discussed in detail in **Chapter 9**, under the *Sentencing Act 1991* (Vic) (Sentencing Act) a victim may make a VIS for the purpose of assisting the court in determining sentence.<sup>39</sup> Section 13 of the Victims' Charter provides that victims have an entitlement to participate in the sentencing hearing by making a VIS.

VISs are an important part of victims' participation, providing victims with a voice at the critical stage of sentencing. VISs serve two principal purposes. First, they provide information to the court about the impact of a crime on the victim. This is something that the court may have regard to for sentencing purposes.<sup>40</sup> Secondly, they can have a communicative and therapeutic purpose for a victim:

The role of VIS is said to be expressive or communicative. Through VIS victims can recount their experiences and express their feelings about the crime to the court, the offender and the wider community.<sup>41</sup>

<sup>39</sup> *Sentencing Act 1991* (Vic) s 8K. Section 13 of the Victims' Charter also provides that a victim may make a Victim Impact Statement (VIS) to the court and that a VIS is to be considered by the court when determining the sentence where a person has been found guilty of an offence: *Victims' Charter Act 2006* (Vic) s 13 (1).

<sup>40</sup> *Sentencing Act 1991* (Vic) s 5(2)(daa).

<sup>41</sup> Tracey Booth, 'Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 162.

In **Chapter 9**, the VOCC heard from both victims and stakeholders about the importance of VISs, and the positive aspects for victims' participation when the process works well. For example, one victim surveyed by the VOCC stated that the 'opportunity to provide a victim impact statement and to read it out in open court was a life changing day for me'.

However, despite the positive ways in which VISs can advance victims' participation, there are practical concerns with the operation of the VIS scheme. Overall, victims surveyed and interviewed by the VOCC described varying experiences of the VIS process. Stakeholders also raised many issues with the operation of the current VIS scheme, as outlined in detail in **Chapter 9**.

Despite the positive ways in which VISs can advance victims' participation, there are practical concerns with the operation of the VIS scheme.

Key issues relating to the VIS scheme include:

- victims wanting (or in practical terms needing) to prepare a VIS 'early',<sup>42</sup> leaving them vulnerable to their VIS being used by the defence
- insufficient time to prepare a VIS after a plea or finding of guilt, particularly in the Magistrates' Court
- the potential for victims to be cross-examined on the contents of their VIS
- VISs being 'edited'<sup>43</sup>
- lack of assistance preparing a VIS.

## Key issues with the timing of VISs

### Preparing a VIS 'early'

A victim may prepare a VIS at any time. The only statutory requirement is that a victim must provide a copy to the prosecutor a 'reasonable time' before sentencing.<sup>44</sup>

Once the prosecutor receives a VIS from a victim, the prosecutor must file the VIS with the court and provide a copy to the defence.<sup>45</sup> It is also possible that a victim will be cross-examined on the contents of their VIS.<sup>46</sup>

The statutory requirements relating to VIS submission present challenges for victims. If a victim prepares their VIS 'early' (e.g. before a finding of guilt), they may be at risk of being cross-examined about its contents by defence counsel. If they wait for a plea of guilty or a guilty verdict, they may then be rushed to prepare their VIS or may not be given the opportunity to prepare a VIS at all, particularly in the summary jurisdiction. These challenges have been raised in Victorian Government reports for nearly fifteen years, without remedy.<sup>47</sup>

The increased use of sentence indications, as discussed in detail above, only exacerbates issues relating to the timing of VIS preparation. This was evident in a recent case highlighted in the media.

In *DPP v Corfe*, the judge referred to the victim making 'a version of his victim impact statement at the sentencing indication hearing'<sup>48</sup> which assisted the judge in making the sentence indication. However, the victim Alex Case told *The Age* that he had not fully described the impact of the abuse on him in a VIS prepared for the sentence indication hearing because he was worried that he would be subjected to aggressive cross-examination on its contents.<sup>49</sup>

Alex Case told journalists that the reason he had not fully described the impact of the abuse on him in the VIS prepared for the sentence indication hearing was because, if Corfe had not accepted the sentence indication, defence counsel would have been able to cross-examine him about the contents of his VIS.<sup>50</sup>

In sexual offence cases in particular, defence counsel focus on inconsistencies in cross-examination because they might indicate that a witness is not telling the truth. A recent analysis of sexual offence

42 Preparing a VIS 'early' means preparing a VIS before a plea or finding of guilt.

43 When the victim (or a nominee) or the prosecutor reads a VIS aloud in court, the court may direct that certain parts of the VIS are inadmissible and cannot be read aloud: *Sentencing Act 1991* (Vic) sub-ss 8Q(1), (2), (3). Many victims refer to this as their VIS being edited.

44 *Sentencing Act 1991* (Vic) s 8N(1).

45 *Ibid* s 8N.

46 With certain alternative arrangements available for victims including giving evidence remotely, screens, a support person, limiting numbers in court, no robes and legal practitioners seated: *Sentencing Act 1991* (Vic) s 8S.

47 Victims Support Agency (Victoria), *A Victim's Voice: Victim Impact Statements in Victoria* (Report, October 2009) 62.

48 *DPP v Jeffrey Corfe* [2023] VCC 253, 11.

49 David Estcourt, 'Top Prosecutor Backs Law Change to Protect Victims after Joffa Case', *The Age* (online, 28 February 2023).

50 *Ibid*.

trials in Victoria found that in 24 of the 25 trials examined, the complainant was cross-examined about inconsistencies.<sup>51</sup> The inconsistencies were 'not only in relation to central facts in issue, but also peripheral details, and even matters of no obvious relevance'.<sup>52</sup> Similarly, a report to the Royal Commission into Institutional Responses to Child Sexual Abuse found that defence counsel asked questions about inconsistencies in the complainant's evidence in more than 90 per cent of cases.<sup>53</sup>

### Insufficient time to prepare a VIS

Because of issues relating to disclosure of a VIS to defence, as outlined above, many victims are advised not to prepare their VIS 'early' (i.e. before a plea or finding of guilt).

Victoria Police members told the VOCC that while VIS use is increasing, there remains 'an issue around when do we prepare them?'<sup>54</sup> Respondents to the VOCC's Victims' Professionals Survey also expressed concern about the defence being able to receive the VIS prior to the plea and to cross-examine a victim on their VIS.

Victims will generally be advised not to prepare their VIS before a plea or finding of guilt because:

- it is not yet clear what charges will or will not proceed
- the VIS may contain highly personal information and victims may be cross-examined about their VIS
- the prosecution must disclose a VIS to the accused once they receive it.

Victoria Police members explained to the VOCC why early VIS preparation is not encouraged:

As a general rule, Victim Impact Statements are not taken from victims before the matter has been finalised, as the Victim Impact Statement, which has been made in good faith by the victim, can end up as part of the material being used in cross-examination in a contested hearing. That is incredibly unfair and offensive for victims. We don't want to facilitate that happening.<sup>55</sup>

However, advising victims not to prepare a VIS before a plea or finding of guilt is problematic. If a victim only prepares their VIS after the accused pleads guilty or is found guilty, there is a limited window of opportunity before sentencing that may not be enough for a victim to prepare their VIS. In the Magistrates' Court, this window of opportunity may be virtually non-existent as the accused may plead guilty and be sentenced on the same day.

Moreover, requiring a victim to prepare their VIS in a short time (to meet the court's timetable), may be very difficult for victims and does not reflect a victim-centred or trauma-informed process.

Consistent with previous research,<sup>56</sup> the VOCC also heard that victims in the Magistrates' Court are not able to participate in the VIS process as set out in the Victims' Charter and Sentencing Act because of these timing issues. This is significant, given the Magistrates' Court deals with 90 per cent of all crimes against the person in Victoria.<sup>57</sup>

Court Network told the VOCC that in their experience, VISs are almost non-existent in the Magistrates' Court.<sup>58</sup> Victoria Police members also told the VOCC that magistrates rarely adjourn matters to allow a VIS to be prepared.<sup>59</sup> This respondent to the VOCC's Victims' Professionals survey stated:

The timing of the VIS is also difficult. If a victim completes it to early and submits it, it is then required to be shared with defence. However at the moment, courts – particularly the Magistrates' Court is not giving victims ANY opportunity to complete a VIS when a matter resolves. I have a number of examples of Victims not being given time to submit a VIS... Why are courts excluded from having to comply with the Victims Charter?

## Protecting 'early' VISs

The Victorian Court of Appeal has said that when victims make a VIS, they are performing 'an admirable service to our legal system' and that 'any activities that may inhibit the free flow of information from victim to court are to be deprecated'.<sup>60</sup>

In this context, the VOCC considers that reforms are needed to help victims make a VIS at an earlier stage of proceedings without unduly inhibiting 'the free flow of information from victim to court'.<sup>61</sup>

<sup>51</sup> Julia Quilter and Luke McNamara, *Qualitative Analysis of County Court of Victoria Rape Trial Transcripts: Report to the Victorian Law Reform Commission* (August 2021) 92.

<sup>52</sup> *Ibid* 93.

<sup>53</sup> Martine Powell et al, *An Evaluation of How Evidence Is Elicited from Complainants of Child Sexual Abuse* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) 219.

<sup>54</sup> Consultation Meeting 18 – Victoria Police – Session 2.

<sup>55</sup> *Ibid*.

<sup>56</sup> Department of Justice Victoria, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (2014) 25; Victims Support Agency (Victoria), *A Victim's Voice: Victim Impact Statements in Victoria* (Report, October 2009) 43.

<sup>57</sup> Magistrates' Court of Victoria, *Annual Report 2021–22* (February 2023) 6.

<sup>58</sup> Consultation Meeting 12 – Court Network.

<sup>59</sup> Consultation Meeting 17 – Victoria Police – Session 1.

<sup>60</sup> *Charles v The Queen* [2022] VSCA 166 [78].

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

As outlined above, the challenges relating to 'early' preparation of VISs put victims at a disadvantage. They are fearful of preparing a VIS 'early' (in case defence counsel use it to cross-examine them on inconsistencies) but if they do not prepare a VIS 'early', they may miss their opportunity to have a voice at sentencing.

It is essential for victims that the VIS process provides as much protection as possible to give victims confidence that the process will be safe and not re-traumatising.

However, although it is not likely to arise often, the possibility that a VIS may contain information that is critical to whether an accused receives a fair trial remains.<sup>62</sup> The VOCC notes that strengthening victim protections around VISs being used for any purpose other than a sentencing hearing must be balanced with the need to ensure a fair trial.

### Quarantining the VIS

Some judicial representatives consulted by the VOCC supported a mechanism by which VISs could be 'quarantined' so that it could be prepared 'early' but not disclosed to defence prior to a plea or finding of guilt. One judicial representative said that it is 'artificial' not to enable victims to prepare VISs early and that '[t]he only way around that is to quarantine it'.<sup>63</sup> Another judicial representative queried whether there could:

be a form of legislatively mandated quarantining of the victim impact statement, so it can't be produced until either the sentence indication hearing or the plea has been entered and it can only be used for portrayal of the victim's position but not to be used then destructively at a later stage if the matter doesn't resolve.<sup>64</sup>

This same judicial representative stated that a 'trauma informed solution might be to give victims the opportunity to prepare the Victim Impact Statement but protect them in a victim centric approach from use for any purpose other than that'.<sup>65</sup>

Another judicial representative observed that quarantining the VIS would 'require legislative change – [so] that the Victim Impact Statement could be treated like a confidential communication, which would require a significant reason to be established to permit its release'.<sup>66</sup>

Other judicial officers raised concerns about the feasibility of this approach. For example, one judicial representative noted it would be potentially problematic to quarantine the VIS if it 'contained material that was found after conviction to be false and not disclosed'.<sup>67</sup> Another judicial officer said: 'If the Victim Impact Statement contained material with any version of events that the Crown would feel obliged to hand it over'.<sup>68</sup>

While the VOCC notes that there are occasions where a VIS may contain information that is critical to the defence, more must be done to fulfil VISs participatory objectives and protect victims from secondary victimisation. The VOCC agrees with judicial representatives who favour a quarantining approach for VISs.

Victims should be able to prepare a VIS before a plea or finding of guilt and this VIS should be protected.

While further work would be required with key stakeholders to define the parameters of this and to operationalise it, the VOCC envisages reforms enabling victims to prepare a VIS at any stage and provide this to Victoria Police or the Office of Public Prosecutions (OPP). Victoria Police or the OPP would then be required to either seal or electronically protect the VIS until there is a plea or finding of guilt. The VIS should be treated as a personal document belonging to the victim until a triggering event occurs (e.g. the accused pleads or is found guilty) and the prosecution has permission to access the document. The accused should not be permitted to subpoena a VIS.

**More must be done to fulfil VISs participatory objectives and protect victims from secondary victimisation.**

Once the prosecution is permitted to access the VIS, the existing requirements would still apply and the prosecutor would need to provide a copy of the VIS to the court and the offender.<sup>69</sup>

62 For example, in *R v Lewis-Hamilton* the Victorian Court of Appeal held that a VIS should have been disclosed by the prosecution to the accused before trial. The court concluded that the VIS contained material that could have materially affected the complainant's credibility: *R v Lewis-Hamilton* [1998] 1 VR 630.

63 Consultation Meeting 28 – Judicial Representatives – Magistrates' Court of Victoria, County Court of Victoria, Supreme Court of Victoria.

64 Ibid.

65 Ibid.

66 Ibid.

67 Ibid.

68 Ibid.

69 *Sentencing Act 1991* (Vic) s 8N(2).



## Victims' Portal

As discussed in **Chapter 14**, the VOCC has recommended that the Victorian Government undertake an independent feasibility study to explore the viability of an interactive Victims' Portal.

The Department of Justice and Community Safety (DJCS) has previously discussed incorporating functionality that would allow victims to submit their VIS through a Victims' Portal.<sup>70</sup>

A functional Victims' Portal would help operationalise the quarantining of a VIS in practical terms. A Victims' Portal would enable a victim to submit their VIS online and have it available when required by the prosecution. This would be particularly useful in summary jurisdictions where a case listed for mention might turn into a plea of guilty, or a sentence indication and plea on the one day. It would also allow a victim to prepare and complete their VIS according to their own timetable rather than the court's or prosecution's timetable.

If a VIS sits on the Victim's Portal, the Portal could be structured in a way that the VIS is 'quarantined' and only accessible to the prosecution once certain events occur, for example, when the accused pleads guilty, or the court conducts a sentence indication. If a victim lodges a VIS on the Victims' Portal, the VIS will remain quarantined and may only be accessed:

- once the conditions of its release have been met (e.g. the accused pleads or is found guilty)
- with the victim's consent.

It should also be an offence for anyone to copy, disseminate, or publish a VIS without authorisation.

Once the prosecution is permitted to access the VIS, the existing requirements would still apply and the prosecutor would need to provide a copy of the VIS to the court and the offender.<sup>71</sup> However, as discussed in this chapter below, the VOCC also considers limits should be placed on the cross-examination of VISs.



### RECOMMENDATION 40

**The Victorian Government should introduce amendments to enable victims to prepare a Victim Impact Statement (VIS) before a plea or finding of guilt and have their VIS 'quarantined' until required by the court.**

**The independent feasibility study of an interactive Victims' Portal (see Recommendation 18) should consider how a Victims' Portal could assist victims to prepare a VIS and securely submit and store the VIS until it is required by the court.**

Reforms should enable victims to prepare a VIS at any stage and provide this to Victoria Police or the Office of Public Prosecutions who would be required to protect the VIS until there is a plea or finding of guilt. The VIS should be treated as a personal document belonging to the victim until a triggering event occurs (e.g. the accused pleads or is found guilty) and the prosecution has permission to access the document. The accused should not be permitted to subpoena a VIS.

Once the prosecution is permitted to access the VIS, the existing requirements would still apply and the prosecutor would need to provide a copy of the VIS to the court and the offender.

The independent feasibility study of an interactive Victims' Portal (Recommendation 18) should consider how a Victims' Portal could assist victims to prepare VISs and securely submit and store VISs. For example, if a victim lodges a VIS on the Victims' Portal, the VIS will remain quarantined and may only be accessed once the conditions of its release have been met.

<sup>70</sup> Department of Justice and Community Safety, *Improving Victims' Experience of Summary Criminal Proceedings* (Final Report, November 2021) 28.

<sup>71</sup> *Sentencing Act 1991* (Vic) s 8N(2).



## Giving victims more time to prepare a VIS

In summary proceedings, in particular, the pace of the process often denies victims the opportunity to make a VIS.

While judicial representatives informed the VOCC that they are now increasingly adjourning matters to allow victims to prepare and deliver a VIS,<sup>72</sup> Victoria Police and victim support professionals advised the VOCC that magistrates in particular rarely adjourn matters to allow a VIS to be prepared.<sup>73</sup>

Section 13 of the Victims' Charter provides that victims are entitled to participate in the sentencing hearing by making a VIS. While the VOCC welcomes the fact that courts are increasingly adjourning matters to allow victims to prepare and deliver a VIS,<sup>74</sup> victims' participation requires formalised recognition and protection.

Other jurisdictions recognise the importance of victims' participation through VISs by legislatively enshrining rights to adjourn proceedings to enable VISs to be prepared. For example, in the Australian Capital Territory (ACT) in cases involving an offence punishable by more than five years imprisonment, the prosecution may request an adjournment to allow a victim time to prepare a VIS.<sup>75</sup> The court must grant an adjournment unless there are special reasons for not doing so.

In Canada, under its Criminal Code, on application of the prosecutor or a victim, or on its own motion, the court may adjourn the proceedings to permit the victim to prepare a VIS if the court is satisfied that the adjournment would not interfere with the proper administration of justice.<sup>76</sup>

In Victoria in 2014, the then-Department of Justice suggested further work was needed to increase the number of VISs submitted in the Magistrates' Court. It was noted that a significant amount of flexibility had been incorporated into Magistrates' Court proceedings to implement a range of specialised programs and diversions for offenders. It was observed that in this context, it was common for judicial officers to adjourn a plea of guilty part heard 'for a range of reasons, such as to obtain psychological or other reports, or to enable an offender to commence rehabilitation and demonstrate their commitment to change'.<sup>77</sup>

The then-Department of Justice went on to note that, given there is such flexibility for adjournments to enable consideration of sentencing dispositions appropriate to the offender's prospects of rehabilitation, there is potential for a similar level of flexibility to incorporate the provision of a VIS in serious cases where the impact on the victim is likely to be significant.

### A right of adjournment

The VOCC recommends that the Sentencing Act be amended to require the court, prior to sentencing, to ask the prosecutor whether the prosecution has advised the victim of their right to make a VIS, whether the victim has expressed a wish to make a VIS or whether the victim requires more time to make a VIS.

As discussed in the first section of this chapter, the prosecution should be liaising with victims early in proceedings, particularly in anticipation of a sentence indication occurring. It would be no more onerous on prosecutors to enquire at this stage about a victim's wishes to make a VIS.

If the prosecution advises the court that a victim wishes to make a VIS, the court should adjourn the proceedings to permit the victim to prepare a VIS unless it is not in the interests of justice to do so. If the prosecution is unable to advise the court about these matters, the court should adjourn the proceedings to permit the prosecutor to make further enquiries unless it is not in the interests of justice to do so.

If the court does not adjourn a matter for preparation of a VIS, the prosecution should also be able to apply for an adjournment, as is the case in the ACT and in Canada.

<sup>72</sup> Consultation Meeting 28 – Judicial Representatives – Magistrates' Court of Victoria, County Court of Victoria, Supreme Court of Victoria.

<sup>73</sup> Consultation Meeting 17 – Victoria Police – Session 1.

<sup>74</sup> Consultation Meeting 28 – Judicial Representatives – Magistrates' Court of Victoria, County Court of Victoria, Supreme Court of Victoria.

<sup>75</sup> *Crimes (Sentencing) Act 1999* (ACT) s 51A.

<sup>76</sup> *Criminal Code*, RSC 1985, c C-46, s 722 <<https://laws-lois.justice.gc.ca/eng/acts/C-46/page-114.html?txhl=statement+victim's+victim+impact+s-722>>.

<sup>77</sup> Department of Justice (Victoria), *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (2014) 55. The Department of Justice was quoting Pauline Spencer, 'To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts' (2012) 22 *Journal of Judicial Administration* 9.



#### RECOMMENDATION 41

**The *Sentencing Act 1991* (Vic) should be amended to require the court, prior to sentencing, to ask the prosecution whether the victim wishes to make a VIS.**

**If the prosecution advises the court that a victim wishes to make a VIS, or the prosecution cannot provide sufficient information to the court about victims' wishes, the court should adjourn the proceedings to permit the victim to prepare a VIS or to permit the prosecutor to make further enquiries unless it is not in the interests of justice to do so.**

**If the court does not adjourn a matter for preparation of a VIS, the prosecution should also be able to apply for an adjournment.**

The court should be required to ask the prosecutor whether:

- the prosecution has advised the victim of their right to make a VIS
- the victim has expressed a wish to make a VIS
- whether the victim requires more time to make a VIS.

### Protecting victims from cross-examination

While a VIS informs the court about the impact that a crime has had on the victim, there may be matters in a VIS that the offender disputes. The court may, on the request of either the offender or the prosecutor, call a victim who has made a VIS to give evidence.<sup>78</sup> The *Sentencing Act* does not provide any test for the court to apply in determining whether it is appropriate to allow a victim to be questioned.

Research suggests there are very few instances of victims being cross-examined on their VIS, and that this is because courts are 'generally not favourable towards cross-examination of a victim on their VIS'.<sup>79</sup>

However, victims may be deterred from making a VIS simply because of the possibility that they will be cross-examined about its contents.

Judicial officers may use their discretion and refuse to allow cross-examination of a victim about their VIS. For example, in *Davies v The Queen*, the Court of Appeal said that it was 'understandable' that a judge refused the accused's request to cross-examine the victims about their VISs because it would be 'unduly extensive and may well be directed to issues which are not relevant to the sentencing process'.<sup>80</sup>

In *Charles v The Queen*,<sup>81</sup> the Court of Appeal suggested amending the *Evidence Act 2008* (Vic) to prohibit 'cross-examination derived from the contents of a victim impact statement without the leave of the court'.<sup>82</sup>

<sup>78</sup> *Sentencing Act 1991* (Vic) s 80.

<sup>79</sup> Department of Justice (Victoria), *Victim Impact Statement Reforms in Victoria: Interim Implementation Report*, (2014) 65.

<sup>80</sup> *Davies v The Queen* [2017] VSCA 66 [726].

<sup>81</sup> *Charles v The Queen* [2022] VSCA 166.

<sup>82</sup> *Ibid* [78].

There are many considerations relevant to limiting cross-examination of a victim on the contents of their VIS. For example, as observed in *Charles v The Queen*:<sup>83</sup>

- victims may be very emotional and may express intimate feelings with less restraint in a VIS than when giving evidence in a formal trial setting
- VISs are a victim's only chance of communicating the impact of the crime to the court
- victims perform an admirable service to our legal system by providing such statements
- it is important not to inhibit the free flow of information from victim to court.

Having regard to these policy considerations and the Court of Appeal's observations in *Charles v The Queen*, the VOCC recommends that a court should only permit the questioning of a victim about their VIS in certain circumstances as outlined below.

### **Limiting cross-examination of a VIS**

Victims should not be cross-examined on the contents of a VIS without leave of the court. This restriction should apply regardless of the stage of a matter (e.g. trial or sentencing stage). This would mean, for example, that if a victim prepares a VIS and it is used for a sentence indication hearing, and the accused does not plead guilty, the VIS could not be used to cross-examine a victim without leave of the court.

A new test should be introduced to restrict questioning about VISs. This would provide the court with additional control over whether a victim may be questioned about the content of their VIS. It would also assist the court to transparently balance competing policy considerations when determining whether to grant leave for a victim to be questioned about the contents of their VIS.

The VOCC recommends that a court should only permit the questioning of a victim where there is a clearly demonstrated need for it. That is, the court must be satisfied that the VIS has substantial probative value to a matter in dispute.<sup>84</sup>

Further, a court should only permit questioning of a victim about their VIS if the court is satisfied that the substantial probative value of the evidence outweighs the public interest in:

- victims making VISs and sharing information that is very personal about distressing or traumatising events
- protecting victims from unnecessary trauma, intimidation, and distress through court processes, given the risk of re-traumatisation from giving evidence
- treating victims with respect and respecting their privacy and reputation.<sup>85</sup>

This test should not restrict the prosecution from calling a victim to give evidence at a sentencing hearing. A victim may consent to being questioned about their VIS and giving evidence at a sentencing hearing.

This new test should improve victims' confidence in making a VIS because the chance of it being weaponised against them is substantially reduced. It should also enable more victims to tender complete VISs at the sentence indication stage because victims will be assured that the court would only permit questioning where there is substantial probative value and strong justifications for doing so.

<sup>83</sup> Ibid.

<sup>84</sup> If there is other evidence that already addresses an issue, then the VIS should not become part of questioning. For example, in *Charles v The Queen*, the VIS referred to the victim having spent time in a psychiatric hospital as a result of the offending. That evidence was already known to the accused and the jury, so the VIS did not significantly add to that evidence: *Charles v The Queen* [2022] VSCA 166 [76].

<sup>85</sup> This consideration is based on the VOCC's recommendation in Ch 12 to recognise victim's rights in the Charter of Human Rights and Responsibilities.

**RECOMMENDATION 42**

**A new test should be introduced to restrict questioning of a victim about their Victim Impact Statement (VIS). A court should only permit the questioning of a victim about their VIS where the court is satisfied that there is a clear and strong justification for doing so.**

A court should only permit the questioning of a victim about their VIS where the court is satisfied that questioning the victim about a matter has substantial probative value and outweighs the public interest in:

- victims making VISs and sharing information that is very personal about distressing or traumatising events
- protecting victims from unnecessary trauma, intimidation, and distress through court processes, given the risk of re-traumatisation from giving evidence
- treating victims with respect and respecting their privacy and reputation.

**Prohibiting the offender from personally cross-examining**

As discussed in **Chapter 16**, there are circumstances in which a court may declare a victim to be a 'protected witness'. An accused is not permitted to personally cross-examine a 'protected witness'<sup>86</sup> and a court may direct that 'alternative arrangements' be made for when a protected witness gives evidence (e.g. permitting the witness to give evidence via CCTV).

The Sentencing Act already provides that a court may direct alternative arrangements to be made for any victim giving evidence in relation to a VIS.<sup>87</sup> The court's power under the Sentencing Act applies to any victim and is not limited to a protected victim.

If a court permits questioning of a victim about their VIS at a sentencing hearing, the VOCC recommends that the court also direct that the accused cannot personally cross-examine the victim. Given that victims are not often cross-examined about their VIS, it should be even less likely that an unrepresented offender will seek to cross-examine a victim about their VIS. However, it is possible, and courts should be empowered to protect victims should this situation arise.

If the court makes an order permitting cross-examination of the victim but prohibits the offender from personally cross-examining the victim, the cross-examination will need to be conducted by a legal representative. This could occur based on the model already used under the Criminal Procedure Act where an accused seeks to cross-examine a protected witness. The Victorian Government should provide additional funding to Victoria Legal Aid to support this recommendation.

**RECOMMENDATION 43**

**The Victorian Government should amend the *Sentencing Act 1991 (Vic)* to provide that the offender cannot personally cross-examine a victim about their Victim Impact Statement (VIS).**

A court may order that a victim may be cross-examined about their VIS at a sentencing hearing. To prevent re-traumatising a victim, an offender should be prohibited from personally cross-examining the victim about their VIS.

The Victorian Government should provide additional funding to Victoria Legal Aid to support this recommendation.

**Legal representation for cross-examination**

The VOCC heard from Associate Professor Kerstin Braun that an independent legal representative for victims could also be of assistance if a victim is cross-examined on aspects of a VIS.<sup>88</sup> Although Assoc.

<sup>86</sup> *Criminal Procedure Act 2009 (Vic)* s 357.

<sup>87</sup> *Sentencing Act 1991 (Vic)* s 85.

<sup>88</sup> Consultation Meeting 1 – Associate Professor Kerstin Braun.

Professor Braun acknowledged that cross-examination may not occur very often on a VIS, it would be a very traumatising experience for a victim – ‘perhaps equally as bad as the cross examination during the trial. Perhaps even worse, because it’s all about how someone felt or how impacted they were.’<sup>89</sup>

Providing victims with legal representation during a sentencing hearing which is independent of the prosecution affords victims procedural fairness. During a decision-making process, such as a sentencing hearing, procedural fairness to victims can be:

assessed according to both the quality of the decision-making procedure and the quality of the interpersonal treatment during that procedure. A fair decision-making procedure involves the use of objective information; consistent, neutral decision making; and provision for those involved to present their case – that is, to have a voice in the hearing.<sup>90</sup>

A VIS will often contain personal information that raises significant privacy issues for victims. Victims’ human rights in relation to their privacy interests, and protecting victims from re-traumatisation from court processes, should be better protected in relation to VISs.

Legal representation would enable a victim to better protect their own interests.

Where a victim is cross-examined on the contents of their VIS, it is important that the victim receive the protection of legal counsel to ensure that the questions asked of the victim are appropriate.

Victims should have standing to appear and be legally represented at applications to cross-examine them at a sentencing hearing.

However, the role of a victim’s legal representative should be limited in the following ways:

- The victim would be a participant, but not a party, to the sentencing hearing.
- The victim’s legal representative would not act as a second prosecutor.
- The victim’s legal representative would not be able to make any submissions about sentencing orders.
- The victim’s legal representative would not be able to cross-examine other witnesses, including the offender.

The role of a victim’s legal representative would be to protect the victim’s interests, for example, by objecting to questions that affect a victim’s privacy or reputation. The victim’s legal representative should be able to call evidence if it is in support of their VIS (as is currently permitted).<sup>91</sup>



#### RECOMMENDATION 44

**The Victorian Government should amend the Sentencing Act 1991 (Vic) to provide that:**

- **a victim has standing to appear at an application to examine a victim**
- **a victim may be legally represented at that application**
- **if the application is granted, the victim may be legally represented when the victim is examined in court.**

To prevent re-traumatising a victim, and in recognition of a victim’s rights to privacy, a victim should have standing to appear at an application to examine the victim at a sentencing hearing.

A victim may be legally represented at an application to examine the victim at a sentencing hearing.

If the application is granted, a victim may be legally represented when the victim is examined in court, or to call evidence in support of the victim’s VIS.

If legally represented, a victim’s legal representative must act consistently with the role of the victim as a participant rather than as a party to the proceeding.

<sup>89</sup> Ibid.

<sup>90</sup> Tracey Booth, ‘Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom’ in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 167.

<sup>91</sup> *Sentencing Act 1991* (Vic) s 8P.

## Editing of VISs

Under the Victims' Charter, the prosecuting agency must inform the victim, as soon as reasonably practicable of the victim's entitlement to make a VIS.<sup>92</sup> If a victim wishes to make a VIS, the relevant prosecuting agency is required to refer the victim to a victims' services agency for support with the preparation of their VIS. The prosecution is not obliged to advise victims on the admissibility of the VIS, but is required to provide the victim with general information on material that may be deemed inadmissible by the court, as well as what this means for the relevant VIS.<sup>93</sup>

The Sentencing Act provides that the court may receive the whole of a VIS, even if it contains inadmissible material.<sup>94</sup> However, when the victim (or a nominee) or the prosecutor reads a VIS aloud in court, the court may direct that certain parts of the VIS are inadmissible and cannot be read aloud.<sup>95</sup>

Stakeholders felt that assistance from a specialist victim support service is crucial to the VIS process.<sup>96</sup> However, the vast majority of respondents to the VOCC's Victims' Survey (66 per cent) indicated that they did not get help to understand the process of making a VIS.

Victims have described having offenders or their counsel involved in this editing of their VIS as very distressing.<sup>97</sup> For example, Di McDonald shared her frustration that by the time her VIS reached the courtroom, large sections had been objected to by defence counsel, leading to large sections being removed.<sup>98</sup>

Acknowledging the legitimate procedural reasons for why some parts of a VIS may be deemed inadmissible, more can be done to protect victims' interests and participation during this process.

First, victims need better information and support about what can and cannot be included in a VIS. Managing the expectations of victims is important. If victims believe that they can include certain information in their VIS and then spend considerable time and effort drafting their VIS – which can be emotionally draining and distressing – having their VIS edited in a manner in which they lose control is particularly difficult for victims. In **Chapter 14**, we recommend an enhanced victims' support system which would provide more support to victims making a VIS.

Secondly, a Victims Legal Service as recommended in **Chapter 15** may be able to provide advice to victims about the content of their VIS. Providing advice in a trauma-informed manner in this way is much better than through disempowering editing processes at court.

Thirdly, in a very small number of cases, it might be appropriate for a victim to be legally represented at a court hearing at which the court is considering editing a victim's VIS. Providing victims with legal representation for this purpose would reflect the victim's role as a participant and ensure that their rights and interests are protected and respected at the hearing.

<sup>92</sup> *Victims' Charter Act 2006* (Vic) s 13 (1A).

<sup>93</sup> *Victims' Charter Act 2006* (Vic) ss 13(2), 13(3).

<sup>94</sup> *Sentencing Act 1991* (Vic) s 8L(5)(6).

<sup>95</sup> *Ibid* sub-ss 8Q(1), (2), (3).

<sup>96</sup> Consultation Meeting 28 – Judicial Representatives – Magistrates' Court of Victoria, County Court of Victoria, Supreme Court of Victoria; Consultation Meeting 18 – Victoria Police – Session 2.

<sup>97</sup> Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 382 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

<sup>98</sup> Interview 2 – Di McDonald – victim of stalking.

## Overview of Chapter 19: Non-trial justice processes

The justice system is broader than the criminal trial process and in Part 2 of this report, victims identified that participation in these processes is equally important to those relating to the criminal trial process.

Not all of these areas of participation are underpinned by rights in the *Victims' Charter Act 2006* (Vic) (Victims' Charter).

### Bail

Currently, victims' rights relating to bail are 'passive' information rights. This does not reflect the victim's role as a participant in criminal proceedings. The Victims of Crime Commissioner (VOCC) recommends that the Victorian Government introduce amendments to the Victims' Charter and the *Bail Act 1977* (Vic) to enhance victims' rights in relation to bail.

### Restorative justice

With the expansion of various alternative justice options in Victoria, the VOCC recommends that the Victorian Government develop an overarching framework for 'alternative' or 'parallel' justice options and amend the Victims' Charter to enhance protections for victims in relation to restorative justice programs. The VOCC also recommends that the Victorian Government introducing consistent statewide standards alongside a robust training and accreditation framework. The VOCC also recommends that the Victorian Government make public any previous evaluations of restorative justice programs and commit to an evaluation of its existing restorative justice programs.

### Diversion

The VOCC heard that not all victims felt like participants in the diversion process. Consideration of victims – and their opportunity to participate – varies across diversion programs. The VOCC recommends amendments to the *Children, Youth and Families Act 2005* (Vic), *Criminal Procedure Act 2009* (Vic) and the Victims' Charter to provide for enhanced rights and entitlements for victims during diversion processes in the Children's and Magistrates' Courts.

The VOCC also recommends that Victoria Police update its policies, practices and training to create a clear and transparent best-practice model for consulting with victims in relation to diversion.

### Mental impairment matters

Mental impairment matters are governed by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA).

Although these cases are rare, the impact on victims can be profound because the complex nature of CMIA proceedings can make it difficult for victims to meaningfully engage and participate in proceedings.

The VOCC advocates for a strengthened victim notification and participation framework embedded within both 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 VOCC also advocates for a dedicated and specialised victim support stream for victims dealing with mental impairment matters.

### Parole and post-sentence decisions

The VOCC considers there should be enhanced rights in the Victims' Charter in relation to the Victims Register, including the right for victims to be given tailored information about the Victims Register and referred by a prosecuting agency to the Victims Register. The VOCC considers that more robust information and referral entitlements would address the low awareness of the Victims Register.

There is a lack of publicly available data relating to the Victims Register, including victims' engagement with it and their overall experiences of it. The VOCC recommends that the Victorian Government fund an independent review of the operation and effectiveness of the Victims Register and victims' participation in post-sentencing decisions, with that review being made publicly available.

### **Civil intervention orders**

Concerns raised by victims about their participation during the intervention order process centred on lack of participation, breaches of intervention orders not being taken seriously, misidentification and cross applications. Many of these matters have been addressed in comprehensive reviews and inquiries, such as Victoria's Royal Commission into Family Violence and ongoing whole-of-system monitoring processes.

While the VOCC does not make specific recommendations in this area, the VOCC notes support for actions identified by other agencies and organisations to address these persistent issues.

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

Issues with the current system of state-funded financial assistance are well known following the Victorian Law Reform Commission's 2018 review of the *Victims of Crime Assistance Act 1996* (Vic). The VOCC did not focus extensively on issues relating to the Victims of Crime Tribunal (VOCAT) in its consultation, but issues relating to state-funded financial assistance continue to be raised by victims and stakeholders. Given a new Financial Assistance Scheme (FAS) will replace VOCAT in 2024, the VOCC does not make any recommendations in relation to financial assistance.

### **Coronial matters**

The VOCC heard from some victims that they had found the coronial process to be particularly difficult and distressing. In June 2023, the *Review into improving the experience of bereaved families with the coronial process* report was published. The review provides options on changes that could be made to improve the experience of families in the future. The VOCC does not make any further recommendations in relation to coronial matters, noting the previous reviews highlighting the need for enhanced services for victims of crime. The VOCC supports these recommendations.





# 19

Chapter 19:  
**Non-trial justice  
processes**



## Introduction

The justice system is broader than the criminal trial process and in Part 2 of this report victims identified that participation in non-trial justice processes is as important as participation in the criminal trial process, although not all of these areas for participation are underpinned by rights in the *Victims' Charter Act 2006* (Vic) (Victims' Charter).

This chapter makes recommendations in relation to:

- enhancing victims' rights in relation to bail, diversion and the mental impairment process under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA)
- making restorative justice a safe process for victims
- ensuring victims' rights in relation to parole are working effectively.

This chapter also considers issues raised by victims in relation to civil intervention orders, the Victims of Crime Assistance Tribunal (VOCAT) and the Coroners Court.

## Bail

As discussed in **Chapter 7**, this report has found that:

- victims are not adequately informed or consulted about bail hearings
- bail decisions are being made without adequately considering victims and their safety
- police do not always advise victims about bail decisions or conditions, making it more difficult for victims to manage their own safety and to advise police if the accused has breached their bail conditions.

These are the key issues relating to victims' rights and bail:

- The *Bail Act 1977* (Vic) (Bail Act) does not require the prosecution to seek the views of the victim about bail, bail conditions or whether the victim has any safety concerns.<sup>1</sup>
- The Victims' Charter does not require the prosecuting agency to inform a victim about the outcome of a bail application or about any bail conditions that are intended to protect the victim or family members of the victim unless the victim requests to be informed.
- The Bail Act does not require the bail decision maker to make any enquiries of the prosecution about the victim's views about bail, bail conditions, or whether the victim has any safety concerns.

### Incorporating victims' views

Currently, victims' rights concerning bail under the Victims' Charter are 'passive' rights. Victims are only entitled to be told about bail 'after the fact' and only where they have specifically requested to be told the outcomes of a bail application. This does not reflect the victim's role as a participant in criminal proceedings.

Currently, victims' rights concerning bail under the Victims' Charter are 'passive' rights. This does not reflect the victim's role as a participant in criminal proceedings.

The VOCC recommends that the Victims' Charter be amended to require the prosecuting agency to inform a victim:

- about any bail application that the accused makes
- that if the victim wishes to participate, the prosecution can inform the bail decision maker of the victim's views about:
  - their safety (or a family member's safety)
  - whether bail should be granted
  - conditions that should be imposed if bail is granted.

<sup>1</sup> Under section 3AAA of the *Bail Act 1977* (Vic), a bail decision maker must consider 'any known view or likely view' of a victim about granting bail or any conditions of bail but there is no requirement for this information to be put to the bail decision maker.

## Information about bail

Section 10 of the Victims' Charter provides that a prosecuting agency's obligations to inform the victim about the outcome of a bail application only apply if a victim requests this information.

All victims should have the right to be advised of the outcome of a bail application and, if granted, any conditions imposed that are intended to protect the victim or family members of the victim.

Victims are generally not familiar with the criminal justice system. Therefore, victims should be notified about bail matters without them having to request this information. Accordingly, the Victims' Charter should be amended by removing the words 'on request by a victim' from section 10(1).

Some victims may not want to be contacted about bail applications, or to express views about bail being granted, or to know the outcomes of bail applications. There should be no obligation on prosecuting agencies to inform victims who have indicated that they do not wish to be informed.

## Oversight of victim consultation

While the obligation to inform victims and to seek their views about bail belongs to the prosecution, bail decision makers/courts can perform an important role in ensuring that prosecuting agencies are meeting their obligations towards victims.

Bail decision makers should be required to:

- ask prosecutors whether a victim has been informed about a bail application
- whether the victim has expressed any views about their safety, whether bail should be granted or whether there should be any conditions imposed if bail is granted for the purposes of protecting the victim or a family member.

Prosecutors should be required to provide bail decision makers with victims' views. Reforms should include ways for this information to be provided having regard to victims' safety. For example, victims' views should not be read out publicly.



### RECOMMENDATION 45

**The Victorian Government should introduce amendments to the *Victims' Charter Act 2006 (Vic)* and the *Bail Act 1977 (Vic)* to enhance victims' rights in relation to bail to ensure victims are respected as participants in the bail process.**

The Victims' Charter should be amended to require a prosecuting agency to:

- inform a victim about any bail application
- seek the victim's views about
  - their safety or a family member's safety
  - whether bail should be granted, or any bail conditions imposed
- inform a victim about the outcome of a bail application (without the victim having to request this information).

A victim may indicate to the prosecuting agency that they do not wish to be informed about bail applications or bail outcomes.

The Bail Act should be amended to require the bail decision maker to ask the prosecuting agency whether a victim has been informed about a bail application and whether the victim has expressed any views about:

- their safety or a family member's safety
- whether bail should be granted
- any bail conditions that should be imposed.

## Restorative, parallel or alternative justice

There is now a consistent body of research 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.<sup>2</sup>

Restorative justice<sup>3</sup> can provide victims with enhanced participatory opportunities, including giving victims an opportunity to tell their story on their own terms.<sup>4</sup>

There are several existing restorative justice pathways in Victoria, including:

- the Department of Justice and Community Safety's Victim-Centred Restorative Justice Program<sup>5</sup>
- Family Violence Restorative Justice Service<sup>6</sup>
- the Restorative Engagement and Redress Scheme for former and current Victoria Police employees who have experienced workplace sex discrimination or sexual harassment<sup>7</sup>
- Youth Justice Group Conferencing<sup>8</sup>
- RMIT's Open Circle.<sup>9</sup>

Some victims consulted by the VOCC raised concerns about restorative justice. For example, one victim felt they had been referred to a restorative justice program at a deeply distressing time. Another victim who participated in a restorative justice process felt it was used to perpetrate further abuse.

Other victims consulted by the VOCC expressed support for restorative, alternative or parallel justice options.

### Making restorative justice safe

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. However, concerns raised by victims about restorative justice indicate more needs to be done to ensure restorative justice is a safe option for victims.

With the expansion of various alternative justice options in Victoria, such as redress, apology, restorative and reparative justice, it is imperative that there is clarity and transparency for victims (and the community) about the purpose and objectives of such programs and processes, including the question of whose needs are centred and prioritised.

Concerns raised by victims about restorative justice indicate more needs to be done to ensure restorative justice is a safe option for victims.

While innovation in justice system responses is welcomed, and many victims will benefit from expanded justice options, the development of restorative or alternative justice options should be appropriately structured and formalised. These options should be transparent and clear for victims and the community.

### A framework for alternative justice options

The VOCC recommends the development of a publicly accessible framework for 'alternative' or 'parallel' justice options, providing clear and transparent principles underpinning the various alternative or parallel justice options, as well as outlining the victims' role, entitlements and the service standards expected.

A more coherent and consistent conceptualisation of alternative or parallel justice options will provide a whole-of-system framework and facilitate the establishment of robust approaches to accountability and governance.

2 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.

3 The term 'restorative justice' is predominantly used in this report due to the common use of this word by victims, stakeholders and in the literature. Some programs/processes/services may better be described as 'alternative' or 'parallel justice' rather than 'restorative justice'.

4 Kelly Richards, Jodi Death and Carol Ronken, 'What Do Victim/survivors of Sexual Violence Think about Circles of Support and Accountability?' (2021) 16(6) *Victims and Offenders* 1, 3.

5 This program facilitates restorative justice processes for victims of crime on the Victims Register whose adult offender is serving a sentence of imprisonment or a parole order: Department of Justice and Community Safety (Victoria) *Restorative justice for victims of crime on the Victims Register* (Web Page) <<https://www.justice.vic.gov.au/vcri/restorative-justice-for-victims-of-crime-on-the-victims-register>>.

6 Department of Justice and Community Safety (Victoria) *Restorative justice for victims of crime on the Victims Register* (Web Page) <<https://www.justice.vic.gov.au/vcri/restorative-justice-for-victims-of-crime-on-the-victims-register>>.

7 Victorian Government, *Restorative Engagement and Redress Scheme* (Web Page, 8 December 2021) <<https://www.vic.gov.au/redress-police-employees>>.

8 Department of Justice and Community Safety (Victoria), *Youth Justice Group Conferencing* (Web Page, 27 September 2022) <<https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-group-conferencing>>.

9 Centre for Innovative Justice, *Open Circle* (Web Page) <<https://cij.org.au/opencircle/>>.

In the Victorian Law Reform Commission's (VLRC) report *Improving the Response of the Justice System to Sexual Offences*, the VLRC recommended government pass legislation that creates a clear and comprehensive framework for delivering restorative justice, incorporating guiding principles of:

- voluntary participation
- accountability
- prioritising the needs of the person harmed
- safety and respect
- confidentiality
- transparency
- the process is part of an 'integrated justice response'
- clear governance.<sup>10</sup>

In addition to the VLRC's guiding principles, the VOCC considers the following as key aspects of a framework:

- **Victims' lived experience should be central to the design and evaluation.** Victims' voices and experiences should be centred, not only in the development of new models, programs or services, but also in the independent evaluation of existing programs or services. Independent evaluation of existing restorative justice programs must be made publicly available. Without this, it is difficult to determine victims' satisfaction with the existing pathways.
- **Improved information provision and safe referral pathways for victims.** Victims need clear and consistent pathways to relevant programs or services. Referral processes also need to be streamlined and carefully designed to ensure victims are only referred at appropriate and safe points of the process, and by people with appropriate, trauma-informed training.
- **Models, services and programs should have clear and consistent terminology.** There needs to be clarity and transparency for victims (and the community) about the purpose and objectives of services or programs, including whose needs are prioritised so that victims are aware of what type of service or model is being provided, including the trauma-informed principles underpinning it.
- **Government should lead capability and capacity building in the sector.** This should be done by introducing consistent statewide standards alongside a robust training and accreditation framework. This will ensure all current and future programs meet best practice to minimise the risk of further trauma and harm to victims. Government should also lead in development of the sector to ensure there is a workforce in place that is mature and capable when these programs or processes are offered to victims.

### **Improving victims' knowledge and awareness**

The restorative justice service system is already fragmented and confusing. There is a range of restorative justice programs delivered by various providers across Victoria. Some are government-funded and operated, others are not. There is no single gateway to these various offerings. A simple internet search exploring options for restorative justice in Victoria does not lead victims to a central information point setting out options and supports to engage with alternative justice options.

Victims need to be provided with a clearer sense of pathways to various restorative justice programs. This should be 'future-proofed', noting that new and diverse programs continue to emerge, with different mechanisms and agencies overseeing various programs.

### **Victims' Charter rights should be enhanced**

The VOCC also considers it vital for the Victims' Charter to be amended to ensure that:

- the Victims' Charter applies to all restorative justice programs conducted in Victoria
- victims have the right to be provided with information about available options at a safe time for them
- victims are referred to appropriate support services to engage with restorative justice options.

<sup>10</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 211.



## RECOMMENDATION 46

**The Victorian Government should develop an overarching framework for 'alternative' or 'parallel' justice options and amend the *Victims' Charter Act 2006* (Vic) to enhance protections for victims in relation to restorative justice programs.**

The restorative justice framework should set out clear and transparent principles underpinning the various alternative or parallel justice options, as well outlining the victims' role, entitlements and the service standards expected.

Key principles to underpin a framework include:

- victims' lived experience being centred in design and evaluation
- improved information provision and safe referral pathways for victims
- models, services and programs having clear and consistent terminology
- government leading capability and capacity building in the sector.

The Victims' Charter should be amended to ensure that:

- the Victims' Charter applies to all restorative justice programs conducted in Victoria
- victims have the right to be provided with information about available options at a safe time for them, supported by a statewide entry point
- victims are referred to appropriate support services to engage with restorative justice options.

### Independent evaluation of restorative justice

Evaluations of existing restorative justice programs, in particular examination of the outcomes for victims of crime, must be made publicly available. Without this, it is difficult to determine victims' satisfaction with the existing pathways prior to expanding the range and type of options available.

The government should also commit to an evaluation of its existing restorative justice programs:

- Department of Justice and Community Safety's Victim-Centred Restorative Justice Program<sup>11</sup>
- Family Violence Restorative Justice Service.<sup>12</sup>

These evaluations should be independently conducted, with reports publicly released, and should prioritise both shorter-term and longitudinal studies of victims' satisfaction with restorative justice.<sup>13</sup>

<sup>11</sup> This program facilitates restorative justice processes for victims of crime on the Victims Register whose adult offender is serving a sentence of imprisonment or a parole order: Department of Justice and Community Safety (Victoria), *Restorative justice for victims of crime on the Victims Register* (Web Page, 5 December 2022) <<https://www.justice.vic.gov.au/vcrj/restorative-justice-for-victims-of-crime-on-the-victims-register>>.

<sup>12</sup> Department of Justice and Community Safety (Victoria), *Restorative justice for victim survivors of family violence* (Web Page) <<https://www.justice.vic.gov.au/fvrjservice>>.

<sup>13</sup> There may be gaps in existing research with respect to measuring victims' long-term satisfaction with restorative justice, particularly where an offender fails to complete the agreed undertakings (which may occur months or years after victims provide feedback on the restorative justice process): Jacqueline Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology, Research and Public Policy Series 127, 2014) 27.

**RECOMMENDATION 47****The Victorian Government should:**

- **make public any previous evaluations of restorative justice programs**
- **commit to an evaluation of its existing restorative justice programs.**

## The Victorian Government should:

- publicly release existing evaluations of restorative justice programs
- ensure that future evaluations are conducted independently
- prioritise both shorter-term and longitudinal studies of victims' satisfaction with restorative justice.

## Diversion

In Victoria there are court-based diversionary programs which offer courts alternatives to trial and sentencing.<sup>14</sup>

The diversion stream in the Children's Court enables some young offenders to participate in diversionary programs as an alternative to a custodial sentence.<sup>15</sup>

In the Magistrates' Court, an accused will be eligible for the Criminal Justice Diversion Program if:

- the offence is triable summarily and not subject to a mandatory or fixed sentence or penalty
- the defendant acknowledges responsibility for the offence
- there is sufficient evidence to gain a conviction.<sup>16</sup>

The aim of the program is to enable individuals to avoid a criminal record and to access rehabilitation or treatment.<sup>17</sup>

### Diversion can limit participation

During consultation, the VOCC heard that not all victims felt like participants in the diversion process.

All victims, whether or not the accused is subject to a diversion process, should be respected as participants in line with the Victims' Charter, and be entitled to information and support under the Victims' Charter.

A number of respondents to the VOCC's Victims' Survey indicated that when diversion occurred, this removed their opportunity to tell the court about the impact of the crime. A number of respondents to the VOCC's Victims' Survey also expressed concerns about the availability of diversion for more serious offences.

<sup>14</sup> *Criminal Procedure Act 2009* (Vic) s 59; *Children, Youth and Families Act 2005* (Vic) pt 5.2 div 3A. Court-based diversion occurs after an accused person is charged, so is different to police issuing a caution or not charging someone (e.g. due to their age). These diversion programs are different to restorative justice programs. For example, Youth Justice Group Conferencing is a program based on restorative justice principles: Department of Justice and Community Safety, *Youth Justice Group Conferencing* (Web Page, 27 September 2022) <<https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-group-conferencing>>.

<sup>15</sup> *Children, Youth and Families Act 2005* (Vic) pt 5.2 div 3A.

<sup>16</sup> Magistrates' Court of Victoria, *Criminal Justice Diversion Program* (Information Pamphlet, 16 March 2020) <<https://www.mcvvic.gov.au/sites/default/files/2018-10/Criminal%20Justice%20Diversion%20Program%20brochure.pdf>>.

<sup>17</sup> Magistrates' Court of Victoria, *Criminal Justice Diversion Program* (Information Pamphlet, 16 March 2020) <<https://www.mcvvic.gov.au/sites/default/files/2018-10/Criminal%20Justice%20Diversion%20Program%20brochure.pdf>>.



## Victims' participation in diversion varies

As can be seen in **Table 5** below, consideration of victims – and their opportunity to participate – varies across the Children's and Magistrates' Courts.

**Table 5: Victims' participation in court-based diversion**

	Consideration of victim	Participation of victim
<b>Children's Court Diversion</b>	The <i>Children, Youth and Families Act 2005</i> (Vic) must consider the seriousness of an offence and the impact on the victim in determining whether to grant an adjournment for diversion. <sup>18</sup>	There is no formal mechanism for victims' participation.
<b>Criminal Justice Diversion Program – Magistrates' Court</b>	<p>The <i>Criminal Procedure Act 2009</i> (Vic) does not explicitly require consideration of victims.</p> <p>The Magistrates' Court of Victoria states that its practice is to seek victims' views (consistent with s 59(2)(b) of the <i>Criminal Procedure Act 2009</i> (Vic) which states that the Magistrates' Court may inform itself in any way it considers appropriate in determining whether the accused should participate in a diversion process).</p> <p>Research indicates a letter of apology to a victim is a common condition of diversion.<sup>19</sup></p>	<p>While not legislated, where a charge involves a victim, the court indicates that it seeks the victim's views including:</p> <ul style="list-style-type: none"> <li>• whether the victim agrees with the course of action</li> <li>• the amount of compensation sought for damage to property</li> <li>• how the crime has affected the victim.</li> </ul> <p>Victims are not obliged to respond to the court's contact.<sup>20</sup></p> <p>A diversion hearing is conducted in open court before a magistrate and the magistrate may require the offender/accused to apologise to or compensate the victim.<sup>21</sup></p>

While the *Children, Youth and Families Act 2005* (Vic) requires the court to consider the seriousness of an offence and the impact on the victim in determining whether to grant an adjournment for diversion,<sup>22</sup> Victoria Police members told the VOCC during consultation that in the Children's Court jurisdiction, there are impediments to victims' engagement relating to diversion because the Children, Youth and Families Act is primarily focused on rehabilitation and minimising the harms to young people of criminal intervention.<sup>23</sup>

Victoria Police members advised the VOCC that they have a diversion matrix which requires a prosecutor to take into account the impact of the crime on the victim.<sup>24</sup> However, there is no direct requirement in their matrix for police to engage with the victim and so police consulted by the VOCC described the victim as 'a silent participant'. Victoria Police members also told the VOCC that 'there are issues with victims being party to the diversion process that doesn't legislatively require them to be involved'.<sup>25</sup>

<sup>18</sup> *Children, Youth and Families Act 2005* (Vic) s356D(4).

<sup>19</sup> Sentencing Advisory Council, *The Criminal Justice Diversion Program in Victoria* (Report, October 2008) <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Criminal\\_Justice\\_Diversion\\_Program\\_in\\_Victoria\\_Statistical\\_Profile.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Criminal_Justice_Diversion_Program_in_Victoria_Statistical_Profile.pdf)>.

<sup>20</sup> Magistrates' Court of Victoria, *Criminal Justice Diversion Program* (Information Pamphlet, 16 March 2020) <<https://www.mcv.vic.gov.au/sites/default/files/2018-10/Criminal%20Justice%20Diversion%20Program%20brochure.pdf>>. It is noted that there is no mention of victims in the *Criminal Procedure Act 2009* (Vic) s 59.

<sup>21</sup> Although an individual must acknowledge responsibility for the offence, they have not been found guilty of the offence.

<sup>22</sup> *Children, Youth and Families Act 2005* (Vic) s 356D(4).

<sup>23</sup> *Ibid* s 356C.

<sup>24</sup> Section 356F of the *Children, Youth and Families Act 2005* (Vic) requires the prosecutor to consider the impact on the victim in determining whether to consent to a diversion.

<sup>25</sup> Consultation Meeting 18 – Victoria Police – Session 2.

## Strengthening consultation with victims

The VOCC considers that both the diversion stream in the Children's Court and the Criminal Justice Diversion Program in the Magistrates' Court should be strengthened to provide victims with greater participatory rights.

The VOCC considers that legislation governing the diversion streams in both courts should provide for:

- consideration of the seriousness of an offence and the impact on the victim in determining whether to grant an adjournment for diversion
- requiring the prosecution to seek victim's views including:
  - whether the victim agrees with the course of action
  - the amount of compensation sought for damage to property
  - how the crime has affected the victim.

The court should check whether the prosecution has engaged with the victim and sought their views, to ensure that the prosecution enables victims to participate.

Victoria Police should also update its policies, practices and training to create a clear and transparent best-practice model for consulting with victims in relation to diversion, whether diversion occurs in the Children's or the Magistrates' Courts.

The Victims' Charter should be amended to reflect victims' enhanced rights in relation to diversion.

The Sentencing Advisory Council is currently examining the Magistrates' Court's Criminal Justice Diversion Program and conducting a literature review about the effectiveness of criminal justice diversion programs.<sup>26</sup> The Sentencing Advisory Council should consider the issues raised about diversion in this inquiry for its current projects relating to diversion.



### RECOMMENDATION 48

**The Victorian Government should amend the *Children, Youth and Families Act 2005 (Vic)*, the *Criminal Procedure Act 2009 (Vic)* and the *Victims' Charter Act 2006 (Vic)* to provide for enhanced rights and entitlements for victims during diversion processes in the Children's and Magistrates' Courts.**

**Victoria Police should also update its policies, practices and training to create a clear and transparent best-practice model for consulting with victims in relation to diversion in the Children's and Magistrates' Courts.**

Legislation governing the diversion streams in both courts should provide that:

- the prosecution must seek the victim's views about diversion including:
  - whether the victim agrees with the course of action
  - the amount of compensation sought for damage to property
  - how the crime has affected the victim
- the court checks whether the prosecution has met its obligations towards victims
- the court must consider the seriousness of an offence and the impact on the victim in determining whether to grant an adjournment for diversion.

The Victims' Charter should be updated to reflect victims' enhanced rights in relation to diversion.

The Sentencing Advisory Council should consider the issues raised in this inquiry in relation to diversion for its current projects relating to diversion.

<sup>26</sup> Sentencing Advisory Council, *Projects in Progress* (Web Page, 17 February 2023) <<https://www.sentencingcouncil.vic.gov.au/current-projects/projects-progress>>.

## Crimes mental impairment matters

Mental impairment matters are governed by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA). The CMIA deals with a small but significant number of cases involving people whose capacity or behaviour are so significantly affected by their mental condition that they require a specialised response from the law.<sup>27</sup> The CMIA applies when an accused is found to have been mentally impaired at the time they committed the crime or when an accused is unfit to stand trial.<sup>28</sup> A person who is unfit to stand trial or who is not guilty by reason of mental impairment cannot be held criminally responsible for their actions.<sup>29</sup>

When a person is unfit to stand trial or is found not guilty because of their mental impairment, the person will generally be placed on a Supervision Order.<sup>30</sup> Supervision Orders can be custodial, where the person is detained in a forensic psychiatric hospital, or non-custodial, where the person is supervised while living in the community.<sup>31</sup>

### Challenges for victims

Approximately one per cent of all cases are CMIA cases.<sup>32</sup> Although these cases are rare, the impact on victims can be profound because the complex nature of CMIA proceedings can make it difficult for victims to engage and participate meaningfully in proceedings.<sup>33</sup> Cases involving mental impairment can be very distressing for victims of crime. They can be confusing, procedurally complex and subject to significant delays.

Cases involving mental impairment can be very distressing for victims of crime. They can be confusing, procedurally complex and subject to significant delays.

The lack of engagement and participation can lead to many victims feeling a sense of injustice. Victims have described the CMIA process as causing significant anger,<sup>34</sup> 'great distress'<sup>35</sup> and as a 'major injustice'.<sup>36</sup>

In 2014, a Victorian Law Reform Commission (VLRC) review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) acknowledged that cases that proceed under the CMIA are complex.

The VLRC 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 better support throughout the CMIA process, particularly from those with expertise in the CMIA
- the need for the CMIA process to provide for some acknowledgment that the accused's actions have had a significant effect on a victim's life.

### Insufficient regard for victims

While an accused's mental impairment means that they are not guilty of a criminal offence, the victim is still a victim of a crime.

While very few victims of crime have to encounter the CMIA process, VOCC's engagement with victims of crime demonstrates that the process with mental impairment cases has the potential to cause significant secondary victimisation. Victims of crime dealing with mental impairment matters told the VOCC that they are not adequately informed or consulted and that there is little transparency in decision making.

27 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Report No 28, June 2014) 265.

28 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s1. An accused may be unfit to stand trial because their current mental state is so severely disordered that they cannot understand what they have been charged with, plead guilty or not guilty, understand the trial process or what is happening in court, understand the evidence or instruct their lawyer: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6.

29 30 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Report No 28, June 2014) 265.

30 Forensicare, *Mental illness and the criminal law* (Web Page) <<https://www.forensicare.vic.gov.au/about-us/mental-illness-and-the-criminal-law/>>.

31 Ibid.

32 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Report No 28, June 2014) 15.

33 Duncan Chappell, 'Victimisation and the Insanity Defence: Coping with Confusion, Conflict and Conciliation' (2010) 17(1) *Psychiatry, Psychology and Law* 39; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Report No 28, June 2014) xii.

34 A Current Affair staff, 'Loved One Furious After Woman Who Stabbed Neighbour 19 Times Over Parking Dispute Avoids Murder Trial', *Nine News* (online, 21 August 2017) <<https://www.9news.com.au/national/loved-ones-furious-after-woman-who-stabbed-neighbour-over-parking-dispute-avoids-murder-trial/55752e05-6095-492b-b956-77d0a92d7038>>.

35 Mr Konduraci's documented post-traumatic stress disorder, for the purposes of the mental impairment hearing, was found to be relevant at sentencing and reduced his jail term; Laura Turner, 'The Outcry Over The 'Mental Impairment' Defence', *Nine News* (online, 10 January 2018) <<https://www.9news.com.au/national/mental-impairment-defence-attacked-by-former-premier/f8e161c9-fc99-4e22-989c-729666cac224>>.

36 Emily Porrello, 'Explainer: The Mental Impairment Defence In Homicide Cases', *ABC News* (online, 20 June 2016) <<https://www.abc.net.au/news/2016-06-20/the-mental-impairment-defence-explainer/7524324>>.

The main issues raised by victims with respect to mental impairment are:

- gaps in information provision throughout the criminal justice and offender treatment processes
- a perceived lack of consideration for victim's 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 consulted by the VOCC spoke about relocating because of fears for their safety relating to the likelihood of a forensic patient being granted leave and released into the community. Victims described wanting to have some say over possible safety mechanisms, such as location or distance restrictions, but instead having to seek protection via separate intervention order processes.

The VOCC notes that the issues outlined below primarily relate to the legislative framework and that agencies involved in the mental impairment process (including the Office of Public Prosecutions and Forensicare) are bound by the legislation governing information provision or notification (or lack thereof) for victims.

## Improving victims' participation

Under the CMIA, an accused is not found guilty or sentenced for an offence. However, the court may make a Supervision Order in relation to the (accused) person. Instead of a Victim Impact Statement, a victim may make a report to the court about their views 'on the conduct of the person and the impact of that conduct' on the victim.<sup>37</sup>

While a patient is undergoing treatment on a Custodial Supervision Order, periods of leave can be granted to assist with their rehabilitation.<sup>38</sup> The CMIA established an independent body – the Forensic Leave Panel – to be the main decision-making body regarding leave.<sup>39</sup> The Panel may grant:

- special leave of absence
- on-ground leave
- limited off-ground leave.

There is no requirement that the Panel consider the views of victims or families when considering an application for 'special leave of absence'.

There is currently no avenue for victims' voices, including their views on safety, to be considered during the forensic leave process. Victims of crime feel that they are not adequately informed and consulted, and that there is little transparency in decision making.

Strengthened requirements to inform and notify victims, specifically prior to the granting or varying of any leave, should be available to victims in the CMIA scheme. Victims should also be able to make submissions to the Panel in relation to the granting or varying of leave, and decision makers should be required to have regard to the views contained in victims' submissions when granting or varying leave.

The CMIA should be amended to include a positive obligation on the Panel to seek a victim's views before making leave decisions.

The VOCC also advocates for a strengthened victim notification and participation framework to be embedded within both 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.

The VOCC advocates for a strengthened victim notification and participation framework to be embedded within the CMIA so that victims not only have a right to put forward their views on leave, but that they are made aware of this right and can participate where this is their wish.

## Specialised assistance

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 stream for victims dealing with mental impairment matters.

<sup>37</sup> Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 42.

<sup>38</sup> Forensicare, *Mental illness and the criminal law* (Web Page) <<https://www.forensicare.vic.gov.au/about-us/mental-illness-and-the-criminal-law/>>.

<sup>39</sup> Decisions regarding extended leave are made by the court that made the original Supervision Order.

In 2014, the VLRC highlighted the need for specialised support through the mental impairment processes for victims, in particular from those with experience of the complexities of CMIA matters.<sup>40</sup>

Victim Services, Support and Reform (VSSR), a business unit within the Department of Justice and Community Safety, delivers a range of support services for victims of crime, including the Victims of Crime Helpline, Victims Register, Child Witness Service, and Intermediary Program.<sup>41</sup> VSSR also oversees the Victims Assistance Program (VAP) which is contracted to a range of community-based organisations. A specialised stream of victim support should be developed having regard to how such a stream could best support victims through the CMIA court and leave process – which can be ongoing. This will require consideration of long-term case-management requirements, and relevant notification and information schemes, should this be implemented.

A specialised stream of assistance for CMIA victims would ensure victims are adequately supported throughout the CMIA and leave processes, including having enough specialised support to participate meaningfully in the forensic leave decision-making process.



#### RECOMMENDATION 49

**The Victorian Government should amend the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* and the *Victims' Charter Act 2006 (Vic)* to enhance victims' participatory rights in cases where mental impairment issues are raised.**

**A specialised stream of assistance should be integrated into the existing victim support system to ensure victims receive targeted, specialised support in relation to mental impairment cases.**

The Victorian Government should amend the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (CMIA) and the victim support system to enhance victims' participatory rights through:

- embedding strengthened requirements to inform and notify victims, specifically prior to the granting or varying of leave by the forensic leave panel, to address victims' safety concerns
- enabling victims to make submissions in relation to the granting or varying of major leave
- requiring all decision makers to have regard to victims' views when granting or varying leave
- enshrining victims' entitlements to information, notification and consultation in the Victims' Charter
- creating a specialised CMIA stream of assistance as part of the victim support system.

## Parole and post-sentence decisions

### Improving information provision post-sentencing

The Victims Register enables some victims to be placed on a register and receive certain information about a prisoner relevant to their matter.<sup>42</sup>

The Victims Register also facilitates the participation of victims of crime in parole<sup>43</sup> and post-sentence supervision<sup>44</sup> decision-making processes.

<sup>40</sup> Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Report No 28, June 2014) 267.

<sup>41</sup> Department of Justice and Community Safety Victims of Crime Victoria, *Victim Services, Support and Reform* (Web Page) - <https://www.victimsofcrime.vic.gov.au/victim-services-support-and-reform>.

<sup>42</sup> *Corrections Act 1986 (Vic)* s 30A. Section 17 of the Victims' Charter also outlines victims' entitlements with respect to the Victims Register.

<sup>43</sup> A person on the Victims Register can make a submission to the Parole Board: *Corrections Act 1986 (Vic)* s 74A.

<sup>44</sup> Under section 153 of the *Serious Offenders Act 2018 (Vic)*, a victim may make a submission to the Post Sentence Authority for consideration by the Authority in determining any direction it may give to an offender under the conditions of a supervision order or interim supervision order.

## Improving awareness of rights

While the VOCC was told by some stakeholders that the Victims Register facilitates victim participation, and that many victims have positive experiences, the VOCC is concerned that few people are aware of their rights in relation to the Victims Register. This is consistent with previous research.<sup>45</sup>

The VOCC is concerned that few people are aware of their rights in relation to the Victims Register.

Awareness of the Victims Register and eligibility for inclusion on the Victims Register is significant because registration on the Victims Register facilitates the participation of victims of crime in decision-making processes about parole and post-sentence supervision. In this context, the VOCC is concerned that victims' participation in parole and post-sentencing decision making is reliant on their inclusion in the Victims Register.

The VOCC considers there should be enhanced rights in the Victims' Charter in relation to the Victims Register, including the right for victims to be provided with tailored information specifically about the Victims Register by a prosecuting agency<sup>46</sup> and referred by a prosecuting agency to the Victims Register at sentencing.<sup>47</sup>

More robust information and referral entitlements would address the low awareness of the Victims Register.

Consistent with recommendations in **Chapter 15**, the VOCC also considers the parole process to be another important aspect of victims' participation that could be enhanced by access to independent legal assistance. Victims should have access to state-funded legal assistance to assist them with preparing submissions to the Parole Board.

Below, the VOCC also recommends there be an evaluation of the Victims Register. As part of that evaluation, the VOCC considers it appropriate to review whether access to the Victims Register should be based on an initial automatic referral. As noted by academic Stuart Ross, the 'opt-in' nature of victims' registers 'means that notification about release dates or parole conditions is likely to be uneven in its effectiveness'.<sup>48</sup> Issues regarding victim awareness of the Victims Register were raised in recent media.<sup>49</sup>



### RECOMMENDATION 50

**The Victorian Government should enhance victims' rights in the *Victims' Charter Act 2006 (Vic)* in relation to the Victims Register.**

Under the Victims' Charter, eligible victims should be:

- provided with tailored information about their eligibility for the Victims Register
- be referred by a prosecuting agency to the Victims Register at sentencing.

Victims should have access to state-funded legal assistance to assist them with preparing submissions to the Parole Board.

## Reviewing outcomes for victims

There is a lack of publicly available data relating to the Victims Register, including victims' engagement with it and their overall experiences of it.

As noted by academics Dean Wilson and Stuart Ross, consistent with many victim rights or entitlements, 'it is unclear how often and how effectively these parole notification and submission provisions work'.<sup>50</sup>

45 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 204; Victorian Auditor-General, *Effectiveness of Victims of Crime Programs* (2011).

46 Under the *Victims' Charter Act 2006 (Vic)*, there is a general requirement for investigatory agencies, prosecuting agencies and victims' services agencies to provide information about possible entitlements and refer victims to relevant services but there is no specific right to information or a referral with respect to the Victims Register.

47 Where a victim meets eligibility criteria.

48 Stuart Ross, 'Victims in the Australian Criminal Justice System: Principles, Policy and (Distr)action' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 226.

49 Aneeka Simonis and Mitch Clark 'We owe it to this family', *Herald Sun* (online, 23 August 2023).

50 Stuart Ross, 'Victims in the Australian Criminal Justice System: Principles, Policy and (Distr)action' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 226.

Wilson and Ross have suggested the ‘impact of victim submissions is also debatable, with judges and parole boards generally viewing victim submissions as relevant to only the conditions imposed on parolees’.<sup>51</sup>

Overall, it is not clear how many victims:

- are eligible for the Victims Register or are on the Victims Register (either in total or as a percentage of eligible victims)
- make submissions about parole or post-sentencing decisions as a percentage of registered victims.

Combined, this data would assist us to understand victims’ awareness of, and engagement with, the Victims Register and understand how many eligible victims make a submission.

Improved data, combined with an evaluation of victims’ experiences, would provide an enhanced understanding of victims’ engagement and participation. Providing public and transparent data would better indicate whether low participation rates relate to victims not being aware of their right to participate, or whether victims generally do not want to participate in the process.

It is also not clear what victims’ experiences are when they provide submissions.

There needs to be more transparent and publicly available evaluation of victims’ experiences, incorporating feedback from individuals with lived experience of the submission process, including:

- any barriers to participation
- positive aspects of participation
- what aspects of the process could improve victims’ participation.

This review should include engagement with victims who have made submissions and should include questions about their experiences such as:

- Did you understand the process and your role in the process?
- Did you feel safe to participate in the process?
- Did you have sufficient information to participate in the process?
- Did you have sufficient support to participate in the process?
- Did you feel that your views were adequately considered?

A previous review of the parole system in Victoria found that victims ‘felt that the Parole Board did not take sufficient account of their concerns’.<sup>52</sup> The review stated that ‘something does need to be done to ensure that victims’ voices are heard and taken into account’.<sup>53</sup> Concerns were also raised about victims not getting notice (either at all, or in a timely way) about the release of an offender on parole.<sup>54</sup> In 2023, concerns were raised in the media that the Victims Register is not working to keep victims safe.<sup>55</sup>

The VOCC’s engagement with victims and stakeholders suggests that while there are many positives to the Victims Register process, enhancements could still be made.

In 2023, media reports indicated the Victorian Government would consider automatic notification for victims and whether there are ‘practical changes [they] can make’ to the Victims Register.<sup>56</sup>

The Victorian Government should fund an independent review of the operation and effectiveness of the Victims Register and victim participation in post-sentencing decisions, with that review being made publicly available.

51 Ibid.

52 Ian Callinan, *Review of the Parole System in Victoria* (Report, July 2013) 81 <<https://files.corrections.vic.gov.au/2021-06/ReviewAdultParoleBoard%20v1.pdf>>.

53 Ibid.

54 Ibid.

55 Aneeka Simonis and Mitch Clark ‘We owe it to this family’, *Herald Sun* (online, 23 August 2023).

56 Aneeka Simonis and Mitch Clark ‘We owe it to this family’, *Herald Sun* (online, 23 August 2023).





## RECOMMENDATION 51

**The Victorian Government should fund an independent review of the operation and effectiveness of the Victims Register and victim participation in post-sentencing decisions, with that review being made publicly available.**

The review should include:

- comprehensive engagement with victims of crime
- consideration of models in other jurisdictions
- consideration of whether the Victims Register should be based on an initial automatic referral and the benefits of 'opt-in' versus 'opt out' models
- comprehensive data on the percentage of eligible victims who are registered on the Victims Register
- whether victims are satisfied with information provided and consultation facilitated by the Victims Register
- whether the current scope of offences/sentences is sufficient
- whether Victims' Charter entitlements need to be strengthened.

## Civil intervention orders

As discussed in **Chapter 11**, victims who sought safety through intervention orders raised concerns about their participation during the intervention order process.<sup>57</sup>

Victims primarily raised concerns regarding:

- **Lack of participation during the intervention order process:** Some victims advised the VOCC that they did not feel like active participants during the intervention order process. For example, some respondents to the VOCC's Victims' Survey felt ignored and unheard in proceedings crucial to their safety, and as a result felt disempowered. Victims with disability identified ableist barriers to obtaining intervention orders. A number of victims felt they needed a state-funded lawyer to assist them with intervention orders. Some victims surveyed by the VOCC highlighted issues getting or keeping intervention orders in place. Some victims also reported issues of delay and not being given information provision.
- **Breaches of intervention orders not being taken seriously:** Consistent with previous Victorian research,<sup>58</sup> and as demonstrated by many respondents to the VOCC's Victims' Survey, a high number of victims raised concerns about breaches of intervention orders not being taken seriously.
- **Misidentification and cross applications:** Consistent with previous research,<sup>59</sup> some respondents to the Victims' Survey also highlighted concerns about being misidentified as the primary aggressor and the system being used to perpetrate further harm.

Many of these matters have been addressed in comprehensive reviews and inquiries, such as Victoria's Royal Commission into Family Violence and ongoing whole-of-system monitoring processes. For example, in 2021, the Family Violence Reform Implementation Monitor stated that misidentification 'occurs far too often' and 'requires urgent attention'.<sup>60</sup>

These issues are persistent and require targeted and whole-of-government responses. Addressing these issues are beyond the scope of this inquiry.

<sup>57</sup> Intervention orders are civil orders that impose conditions on contact between parties. Intervention orders may be put in place parallel to criminal proceedings or may be the only justice intervention. Family Violence Intervention Orders apply in relation to any family relationships. Under the *Family Violence Protection Act 2008* (Vic) s 8, this includes a current or former spouse, domestic partners, intimate personal relationships, relatives or people who may be regarded as 'like a family member'. Personal Safety Intervention Orders are the most common response by the justice system to non-family violence stalking: Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022) 96.

<sup>58</sup> See, e.g., Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor* (Report, November 2020) 70 <[https://content.vic.gov.au/sites/default/files/2021-05/Report%20of%20the%20Family%20Violence%20Reform%20Implementation%20Monitor%20-%20as%20at%201%20November%202020\\_1.pdf](https://content.vic.gov.au/sites/default/files/2021-05/Report%20of%20the%20Family%20Violence%20Reform%20Implementation%20Monitor%20-%20as%20at%201%20November%202020_1.pdf)>.

<sup>59</sup> *Ibid* 83.

<sup>60</sup> *Ibid* i.



While the VOCC does not make specific recommendations in this area, the VOCC notes that the Family Violence Reform Implementation Monitor provided a blueprint for addressing systemic misidentification in its 2021 report.<sup>61</sup> The report proposes actions for Victoria Police, Courts and Legal Services, Child Protection and across the family violence sector. In 2021, a parliamentary inquiry into the criminal justice system found female victim-survivors of family violence are regularly misidentified by Victoria Police as the primary aggressor/respondent in family violence proceedings. That review recommended that Victoria Police, in collaboration with legal and community stakeholders, implement a review mechanism for family violence matters that could identify instances where a victim-survivor may have been misidentified as the primary aggressor in an incident, and provide information about a process for the withdrawal of criminal charges.<sup>62</sup> The VOCC supports these reforms.

In 2022, the VLRC made a number of recommendations to improve victims' participation in civil intervention matters in relation to stalking. The VOCC also supports these recommendations. In accordance with the recommendations in **Chapter 20**, the government should provide transparent information about its intention to implement these (and other) recommendations.

## State-funded financial assistance

In 2018, the VLRC concluded in its review of the *Victims of Crime Assistance Act 1996* (VOCA Act) that the current approach to state-funded financial assistance for victims was 'not victim-centred or beneficial in its approach'.<sup>63</sup> 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. A new Financial Assistance Scheme (FAS) is replacing the Victims of Crime Assistance Tribunal (VOCAT) in 2024.<sup>64</sup>

Issues with the current system of state-funded financial assistance are well known following the VLRC's 2018 review of the VOCA Act and more recently, the parliamentary inquiry into Victoria's criminal justice system which, among other things, recommended that interim improvements be made to VOCAT pending introduction of the new FAS.<sup>65</sup>

Accordingly, the VOCC did not focus extensively on issues relating to VOCAT during engagement with victims or consultation with stakeholders in this inquiry. However, issues relating to state-funded financial assistance continued to be raised by victims and stakeholders. Many victims interviewed and surveyed by the VOCC experienced a level of dissatisfaction with VOCAT, citing issues relating to:

- accessibility and information provision
- delays in receiving awards
- certain scheme requirements that are not trauma-informed.

Given the new FAS will replace VOCAT in 2024,<sup>66</sup> the VOCC does not make any recommendations in relation to financial assistance. The VOCC will regulate the scheme once established, by monitoring the scheme's compliance with the Victims' Charter and receiving complaints from victims about breaches of the Charter.

## Coronial matters

In **Chapter 11**, the VOCC heard from some victims that they had found the coronial process to be particularly difficult and distressing. While they were a small number, some victims had encountered what they described as insensitive and invalidating practices.

In June 2023, the *Review into improving the experience of bereaved families with the coronial process* (Coronial Review) report was published. The Coronial Review provides options on changes that could be made to improve the experience of families in the future.

61 Family Violence Reform Implementation Monitor, *Monitoring Victoria's Family Violence Reforms: Accurate Identification of the Predominant Aggressor* (Report, December 2021) 6 <[https://content.vic.gov.au/sites/default/files/2021-12/FVRIM%20Predominant%20Aggressor%20December%202021\\_0.pdf](https://content.vic.gov.au/sites/default/files/2021-12/FVRIM%20Predominant%20Aggressor%20December%202021_0.pdf)>.

62 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) recommendation 27 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

63 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 38, July 2018) xxi.

64 Victorian Government, *Victims of Crime Financial Assistance Scheme* (Web Page, 5 July 2023) <<https://www.vic.gov.au/victims-crime-financial-assistance-scheme>>.

65 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) recommendation 32 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

66 Victorian Government, *Victims of Crime Financial Assistance Scheme* (Web Page, 5 July 2023) <<https://www.vic.gov.au/victims-crime-financial-assistance-scheme>>.

The Coronial Review recommended that the Coroners Court of Victoria bolster and strengthen existing services by establishing 'a stepped-care model to provide appropriate levels of support to bereaved families'.<sup>67</sup>

This Coronial Review also notes the intersection of its findings with the 2020 review of victims' services conducted for the Victorian Government by the Centre for Innovative Justice:

The Victorian Government is considering the recommendations from the 2020 CIJ Review of Victim Services, and has acknowledged that the reforms are complex and will require investment over time. Any related recommendations made as part of the current Coronial Council 2021 review will need to consider the Department's commitment to improving services for families bereaved by violent crime across the entire system, and how this can work in a complementary way with the establishment of the proposed Coronial Service for bereaved families regardless of the cause of death.<sup>68</sup>

The VOCC does not make any further recommendations in relation to coronial matters, noting the previous reviews highlighting the need for enhanced services for victims of crime. The VOCC supports these recommendations.

In **Chapter 15**, the VOCC also recommends that victims have access to state-funded legal representation to assist victims dealing with coronial matters.

<sup>67</sup> Coronial Council of Victoria, *Review into Improving the Experience of Bereaved Families with the Coronial Process* (Report, 2022) 10 <<https://files.justice.vic.gov.au/2023-06/Final%20Coronial%20Council%20Bereaved%20Families%20Report%20-%20Full%20Copy%20%40%207%20June%202023.pdf>>.

<sup>68</sup> Coronial Council of Victoria, *Review into Improving the Experience of Bereaved Families with the Coronial Process* (Report, 2022) 34 <<https://files.justice.vic.gov.au/2023-06/Final%20Coronial%20Council%20Bereaved%20Families%20Report%20-%20Full%20Copy%20%40%207%20June%202023.pdf>>.

## Overview of Chapter 20: Creating and measuring change

This inquiry has identified that cultural change in the justice system is still needed to properly recognise and incorporate victims as participants.

Recognising the victim's role as participant – and making changes to accommodate this – requires all justice system agencies, organisations and individuals to reassess how they treat and interact with victims.

### Systemic barriers

In Chapters 12 to 19, the Victims of Crime Commissioner (VOCC) has made recommendations that, if effectively implemented, will address many of the systemic barriers identified in this report. Some recommendations from these previous chapters will address multiple systemic barriers. This chapter summarises how implementing these recommendations will address systemic barriers.

### Enhancing transparency and accountability

Some victims and other stakeholders the VOCC consulted were frustrated about the lack of action taken to address concerns that have been raised countless times in previous reports and inquiries.

In conducting this inquiry, the VOCC found that it is often difficult to identify whether a recommendation from a previous report or inquiry is supported, under review or not supported by government. Lack of transparency and accountability with respect to review and inquiry recommendations creates uncertainty for subsequent reviews. Subsequent inquiries often recommend the government to implement the recommendations of previous reviews and inquiries.

Victims who participate in reviews are often motivated by the desire to improve the system for other victims. However, such selfless acts involve revisiting and reliving what may have been one of the most traumatic experiences of their lives. The lack of certainty relating to the status of recommendations from previous reports and inquiries risks re-traumatising victims. It replicates issues with the victims' services system whereby victims are required to tell and then re-tell their story multiple times.

The VOCC recommends that the Victorian Government publicly report on the implementation of recommendations from all major Victorian and Commonwealth reports and inquiries in relation to victims from the past 10 years in the form of a victims' reforms progress report.

In recognition of the importance of transparency and accountability for all victims of crime in Victoria, the Victorian Government should be required to provide a victims' reforms progress report annually.

### Cultural change through training

Because change for victims is incremental and is often resisted, a continued focus on cultural change is essential. A key barrier to victims' participation is that lawyers have been socialised in a legal culture and structure that, until very recently, has not recognised victims as legitimate participants in criminal proceedings.

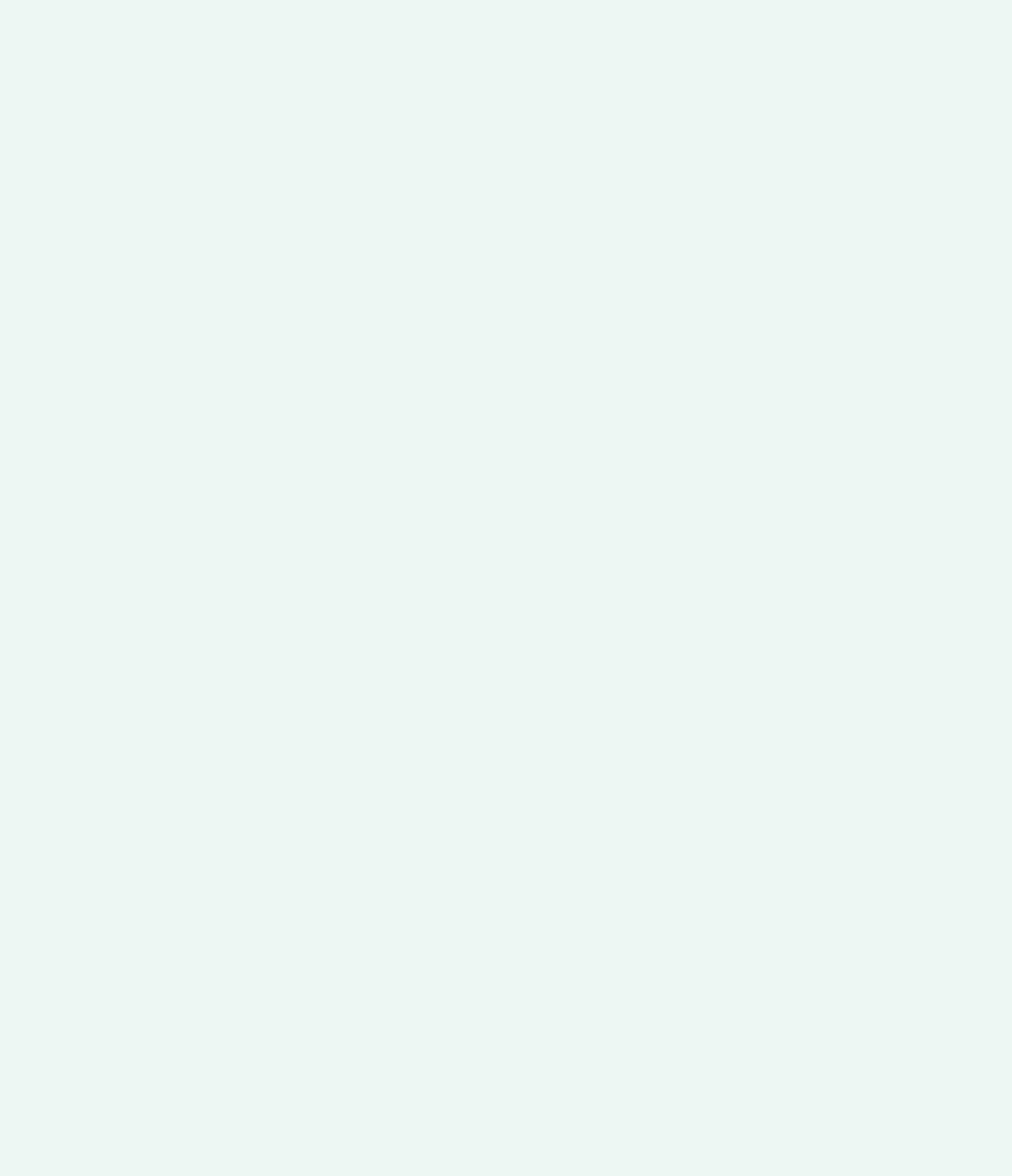
It is therefore essential to focus on the challenge of cultural change. If this is not done, there is likely to be an 'implementation gap' between reforms and what happens for victims in a practical sense. The VOCC makes a number of recommendations aimed at improving cultural change, including that:

- the Judicial College of Victoria develop a training and education framework on victims' rights and entitlements underpinned by trauma-informed principles
- heads of jurisdiction direct all judicial officers to participate in specified victims' training, professional development or continuing education before sitting on criminal cases and appeals
- the Victorian Legal Services Board and Commissioner, Office of Public Prosecutions and Victoria Legal Aid examine ways of improving training and education for all lawyers (prosecution and defence) in relation to victims' rights and entitlements and victim-centred legal practice, with a view to developing a training and education framework for all lawyers (prosecution and defence) in relation to victims' rights and entitlements and victim-centred legal practice.

**The cost of crime**

One of the most consistent challenges identified in reviews and by stakeholders is the need for additional resourcing to uphold victims' rights and entitlements and provide victims with the services and responses they victims need.

Many recommendations from reports and inquiries require new or additional funding. While there are strong justifications for funding for victims given the harm they have experienced, a detailed socioeconomic analysis would provide more comprehensive insight into the true cost of crime to victims, employers, the community, and health systems. It would also provide a stronger platform for determining what investments government should make to support changes concerning the rights of victims of crime and to help victims to recover from the effects of crime. The VOCC recommends that the Victorian Government fund an independent socioeconomic analysis of the costs of crime to victims and the broader community.



# 20

Chapter 20:  
**Creating and  
measuring change**



## Introduction

In Chapters 4 to 11, victims described many examples where they were not treated as participants by justice agencies and the victims' services system.

In Chapters 12 to 19, the Victims of Crime Commissioner (VOCC) has outlined recommendations aimed at improving outcomes for victims and increasing their participation in the justice system, consistent with their participatory entitlements under the *Victims' Charter Act 2006* (Vic) (Victims' Charter). Many of these recommendations include proposed legislative change. However, law reform alone is 'not equipped to address the multitude of challenges that are posed by long ingrained structures, institutions and cultures'.<sup>1</sup>

Recognising the needs and interests of victims is comparatively new in the justice system, especially when compared with traditional responsibilities such as ensuring a fair hearing/trial (for judicial officers), charging an accused (police), acting in the public interest (for prosecutors) and acting in a client's interests (for defence counsel).

This inquiry has identified that cultural change in the justice system is still needed to properly recognise and incorporate victims as participants. Recognising the victim's role as a participant – and making changes to accommodate this – requires all justice system agencies, organisations and individuals to reassess how they treat and interact with victims.

This chapter:

- summarises how recommendations in this report aim to address systemic barriers to participation
- makes recommendations to improve the accountability of government and responsible departments and agencies in responding to reviews and inquiries relating to victims
- makes recommendations aimed at improving cultural change through education and training for lawyers and judicial officers
- makes recommendations relating to the need to ground investment in victims' initiatives through a deeper understanding of the costs of crime to victims and the community.

## Systemic barriers

As outlined in detail in Part 2 of this report, the VOCC identified a number of structural and systemic barriers to victims' participation.

Exploring a broad concept such as 'participation' has necessarily resulted in the identification of many and varied issues relating to victims' experiences of the justice and victims' service systems.

The VOCC notes that many of these issues have been raised in previous reports and inquiries and have been the subject of many recommendations over the past decade. In some cases, the same recommendations have been made in report after report, such as recommendations relating to:

- victims' need for more specialised, targeted and holistic support
- victims' need for independent legal advice and assistance
- the need for police, lawyers and judges to be better trained in trauma-informed practice
- the need for justice agencies and victims' services to increase their sophistication in addressing barriers and meeting the diverse needs of victims, whether arising from their age, gender, sexuality, culture, ethnicity or disability.

### Systemic barriers addressed in this report

In Chapters 12 to 19, the VOCC has made recommendations that, if effectively implemented, would address many of the systemic barriers identified in this report. Some recommendations from these earlier chapters would address multiple systemic barriers. For example, a comprehensive state-funded victims' legal service, if implemented correctly, would provide victims with practical legal advice and assistance, and by doing so, would be likely to also reduce secondary victimisation and minimise the confusion and complexity of the legal process which has been highlighted as a key barrier to participation.

<sup>1</sup> Edna Erez, Julie L Globokar and Peter R Ibarra, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169, 185.

**Table 6** below provides a snapshot of some recommendations from Chapters 12 to 19 and the anticipated benefits of implementing specific recommendations in addressing systemic barriers. Because this is a snapshot only, rather than an exhaustive list, the VOCC notes that other recommendations will also address these systemic barriers to victims' participation.

**Table 6: Recommendations addressing systemic barriers**

Barrier	Recommendations addressing	Anticipated benefits
<p><b>The justice system is not safe or accessible for all victims to participate in.</b></p>	<p>Recommendation 4 – the Victorian Government should establish an independent review mechanism enabling victims to seek a review of certain police and prosecution decisions</p>	<p>Victims experiencing systemic barriers will have access to independent review mechanisms. An independent review model may identify bias or misconceptions held by certain decision makers.</p>
	<p>Recommendation 8 – Victoria Police should conduct a review of Victoria Police programs, policies and initiatives, with the aim of engaging with the community and building its confidence to report crime, with a particular focus on priority groups.</p>	<p>Victims encountering systemic barriers to reporting crime would be considered as part of a community-based approach to building confidence to report crime. Training and education opportunities across a police member's career would address myths, misconceptions, bias or prejudice relating to particular groups in the community.</p>
	<p>Recommendation 10 – the Victorian Government should expand the existing work being undertaken to create an online reporting option for sexual assault to different crime types and victims who face systemic barriers in reporting to police.</p>	<p>Alternative reporting mechanisms would assist victims who face additional systemic barriers in reporting crime to police.</p>
	<p>Recommendation 11 – the Victorian Government should ensure the Aboriginal Victims of Crime Strategy includes alternative, culturally safe ways to report crimes and should establish an Aboriginal Social Justice Commissioner to address systemic barriers to participation for Aboriginal and Torres Strait Islander peoples.</p>	<p>Alternative reporting mechanisms and an independent Aboriginal Social Justice Commissioner would address mistrust of the justice system and reluctance to report crime, and provide a culturally safer way for Aboriginal peoples to participate in the justice system.</p>
	<p>Recommendation 15 – the Victorian Government should ensure the Independent Third Person Program is properly used for eligible victims when reporting to police</p>	<p>More consistent use of the Independent Third Person Program would ensure people with a cognitive or mental impairment are properly supported when reporting to police, reducing secondary victimisation and increasing overall participation in the justice system.</p>



Barrier	Recommendations addressing	Anticipated benefits
<p><b>Participation in the justice system can cause secondary victimisation.</b></p>	<p>Recommendation 9 – Victoria Police should ensure it has appropriate, accessible, private areas where a victim of crime to safely disclose a crime.</p>	<p>Access to appropriate, accessible, private areas for victims of crime to safely disclose crimes will reduce secondary victimisation and address concerns about case attrition as a result of secondary victimisation.</p>
	<p>Recommendation 12 – Victoria Police should review its capability and capacity in relation to meeting victims’ statutory entitlements to information, in line with obligations under the Victims’ Charter.</p>	<p>Increased capacity in Victoria Police to meet its statutory entitlements to information, in line with obligations under the Victims’ Charter, would minimise the secondary victimisation caused by failures to communicate adequately to victims of crime.</p>
	<p>Recommendation 16 – the Victorian Government should introduce an Independent Victim Support Person program to provide immediate place-based support and assistance to victims reporting crime.</p>	<p>Provision of immediate support – and linkages to the victim support system – at the time of reporting a crime will reduce secondary victimisation by providing victims with practical support and a pathway into long-term case management and support.</p>
	<p>Recommendation 17 – the Victorian Government should implement and properly fund an enhanced victim support system in Victoria.</p>	<p>Access to an enhanced victim support system will increase victims’ participation and reduce secondary victimisation by providing victims with tailored and appropriate support when and how they need it.</p>
<p><b>The system can be too complex and confusing for some victims to participate in.</b></p>	<p>Recommendation 1 – the Victorian Government should amend the Victims’ Charter to extend and enhance existing information and consultation requirements.</p>	<p>Ensuring all victims have equal access to information, and are consulted about key decisions, will ensure victims are kept up to date along the justice continuum and better understand their rights and entitlements along the way.</p>
	<p>Recommendation 21 – the Victorian Government should expand its Victims Legal Service to provide funded specialist legal assistance across the range of legal issues faced by victims.</p>	<p>State-funded legal assistance will help demystify confusing legal processes and ensure victims are supported to participate in processes that would otherwise be too legalistic for them to understand, such as plea negotiations, Victim Impact Statements and parole.</p>
	<p>Recommendation 22 – the Victorian Government should fund a sexual offence legal representation scheme and introduce legislative amendments to facilitate legal representation at specific stages of sexual offences proceedings.</p>	<p>A state-funded sexual offence legal representation scheme would ensure victims are adequately informed and protected during complex legal proceedings that arise in sexual offence cases, such as applications for confidential communications or sexual history evidence, and to cross-examine a victim (where an application is required).</p>

Barrier	Recommendations addressing	Anticipated benefits
<b>Dealing with trauma sometimes makes it difficult to participate.</b>	Recommendation 17 – the Victorian Government should implement and properly fund an enhanced victim support system in Victoria.	Access to an enhanced victim support system will increase victims' participation by providing victims with support that is trauma-informed, noting that trauma means victims need different things at different times and that support must be tailored to victims' needs and account for trauma.
<b>Justice system delay impacts the ability or willingness to participate.</b>	Recommendation 6 – the Victorian Government should introduce amendments to the <i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i> to provide victims with a right to be protected from unreasonable trial delay.	Enshrining a victim's right to be protected from unreasonable trial delay formally recognises the victim's status as a participant with a legitimate interest in the resolution of court proceedings.

## Enhancing transparency and accountability

Some victims and other stakeholders the VOCC consulted with were frustrated about the lack of action to address concerns that have been raised countless times in previous reports and inquiries. Victims and stakeholders told the VOCC of the consultation fatigue they experience when yet another inquiry examines barriers experienced by victims of crime, while previous reviews and inquiries are left unacknowledged and unacted on by the government.

Over the last decade, there have been many reports and inquiries relevant to victims of crime. As outlined in **Table 7** below, together these reports contain hundreds of recommendations.

**Table 7: Recommendations made in Victorian reviews since 2014**

Year	Title of Report	Number of recommendations
2014	<i>Beyond Doubt: The Experiences of People with Disabilities Reporting Crime</i> (VEOHRC)	16
2014	<i>Victim Impact Statement Reforms in Victoria: Interim Implementation Report</i> (Department of Justice)	9
2016	<i>Inquiry into Abuse in Disability Services</i> (Parliament of Victoria, Family and Community Development Committee)	49
2016	<i>Victorian Royal Commission into Family Violence</i>	227
2016	<i>The Role of Victims of Crime in the Criminal Trial Process</i> (VLRC)	51
2018	<i>Review of the Victims of Crime Assistance Act</i> (VLRC)	100
2018	<i>Restitution and Compensation Orders</i> (Sentencing Advisory Council)	8
2019	<i>Communicating with Victims about Resolution Decisions</i> (CIJ)	5

Year	Title of Report	Number of recommendations
2020	<i>Victims Services Review</i>	(Proposals only)
2021	<i>Review of Victims' Experiences in the Summary Jurisdiction (DJCS)</i>	12
2022	<i>Improving the Response of the Justice System to Sexual Offences (VLRC)</i>	92
2022	<i>Inquiry into Victoria's Criminal Justice System (Legislative Council Legal and Social Issues Committee)</i>	100
2022	<i>Stalking (VLRC)</i>	45

Commonwealth reports have also contained recommendations where at least some of the recommendations are relevant to Victoria, including:

- *Royal Commission into Institutional Responses to Child Sexual Abuse* (2016) (85 recommendations in the Criminal Justice Report)
- *Commonwealth Inquiry into Family, Domestic and Sexual Violence* (2020) (88 recommendations)

It is often difficult to identify the Victorian Government's (or relevant organisation's) response to a recommendation from a report or inquiry. Established processes for Victorian Government responses involve indicating whether a recommendation is:

- **supported in full** – all elements of the recommendation are supported
- **supported in part** – some elements of the recommendation are supported
- **supported in principle** – the Victorian Government generally supports the intent or merit of the policy underlying the recommendation, but does not necessarily support the method for achieving the policy
- **under review** – further analysis is required for the Victorian Government to determine its position
- **not supported** – the Victorian Government does not support the recommendation.<sup>2</sup>

Sometimes, there is a government response,<sup>3</sup> and in some cases, ongoing tracking and accountability,<sup>4</sup> but this is not universal. Reports by some bodies, such as the Victorian Law Reform Commission (VLRC), Victorian Equal Opportunity and Human Rights Commission or the Sentencing Advisory Council do not require the government to respond to a report or for the government or agencies to report on the implementation status of recommendations.<sup>5</sup>

Lack of transparency and accountability with respect to review and inquiry recommendations creates uncertainty for subsequent reviews. For example, in its 2021 report *Improving the Response of the Justice System to Sexual Offences*, the VLRC endorsed, and sometimes expanded upon, recommendations from its 2016 report *The Role of Victims of Crime in the Criminal Trial Process* but it is not always clear what the government's intentions are in relation to the original recommendations.

<sup>2</sup> These categories are taken from the Victorian Government's guidelines for staff preparing a response to an inquiry: Victorian Government, *Guidelines for submissions and responses to inquiries* (Web Page, 2019) <<https://www.vic.gov.au/guidelines-written-submissions-and-responses-inquiries>>.

<sup>3</sup> Reports by Victorian Parliamentary Committees are tabled in parliament and the government must table a response to the Parliamentary Committee's report within six months: *Parliamentary Committees Act 2003* (Vic) s 36. However, there are sometimes delays in Government responses: Victorian Parliament (Department of the Legislative Council), *President's Report on Overdue Government Responses to Standing Committee Reports, as at 28 February 2023* (7 March 2023) <<https://www.parliament.vic.gov.au/assembly/tailed-documents/search-tabled-documents-database/details/3/12006>>.

<sup>4</sup> For example, the Victorian Government has produced an annual report relating to family violence reforms: Victorian Government, *Ending Family Violence: Annual Report (2021)* (Report, April 2022) <<https://www.vic.gov.au/ending-family-violence-annual-report-2021>>. The Victorian Government also provides an annual report on its actions following the Royal Commission into Institutional Child Sexual Abuse, which is tabled in parliament: Victorian Government, *Victorian Government Annual Report 2022: Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, 2023) <[https://www.parliament.vic.gov.au/file\\_uploads/Attachment\\_B\\_to\\_Brief\\_-\\_Published\\_report\\_-\\_Victorian\\_Government\\_Child\\_Abuse\\_Royal\\_Commission\\_Annual\\_Report\\_2022\\_xRHPk0Zj.pdf](https://www.parliament.vic.gov.au/file_uploads/Attachment_B_to_Brief_-_Published_report_-_Victorian_Government_Child_Abuse_Royal_Commission_Annual_Report_2022_xRHPk0Zj.pdf)>.

<sup>5</sup> The Victorian Law Reform Commission does provide some tracking of its report's implementation but this appears limited to legislative reforms (noting many inquiries make broader systems recommendations): Victorian Law Reform Commission, *Implementation* <<https://www.lawreform.vic.gov.au/all-projects/implementation/>>.

Subsequent inquiries often recommend that the government implement the recommendations of previous reviews and inquiries. For example, the VLRC recently recommended in its *Stalking* final report that the Victorian Government implement multiple recommendations from two separate reports:

The Victorian Government should implement the victim support recommendations in the Centre for Innovative Justice *Strengthening Victoria's Victim Support System: Victim Services Review report* and recommendations in the Legislative Council Legal and Social Issues Committee *Inquiry into Victoria's Criminal Justice System*, especially recommendations 36, 37, 40, 42, 49 and 50.<sup>6</sup>

## Respecting victims' participation in reviews

Most inquiries and reviews involve consultation with victims. Victims' direct experiences form an essential part of determining whether improvements are required to better support victims and uphold their rights and entitlements.

Victims who participate in reviews are often motivated by the desire to improve the system for other victims. However, such selfless acts involve a victim revisiting and reliving what may have been one of the most traumatic experiences of their life.

The lack of certainty relating to the status of recommendations from previous reports and inquiries risks re-traumatising victims. It replicates issues with the victims' services system whereby victims are required to tell and then re-tell their story multiple times.

Recognising and responding to inquiries and their recommendations shows respect for the victims who have selflessly advocated for improvements to the criminal justice system. Many victims only share their stories – sometimes reliving their trauma by doing so – in the hope their voices will be heard and changes made.

In the justice system, procedural fairness for victims includes providing victims with a voice to tell their story and acknowledging their voice. Drawing on these requirements, procedural fairness in relation to a review or inquiry focused on or involving victims requires that:

- serious and genuine consideration will be given to recommendations for change
- victims will be told how their input has been used
- government and criminal justice system agencies will indicate whether they do or do not accept recommendations from a review.

Having a system that tracks progress on reforms may help to reduce the risk that victims will feel that their contribution was not valued. Increasing the accountability of government and agencies in relation to a review's recommendations should form part of the government's overall commitment to respecting victims and their contribution.

## Tracking implementation of recommendations

There have been many valuable reports over the last decade and many of the recommendations remain current and valuable. Some have been superseded by more recent recommendations. Knowing the status of recommendations will provide clarity and reflect the need for procedural fairness to victims.

The VOCC recommends that the Victorian Government publicly report on the implementation of recommendations from all major Victorian and Commonwealth reports and inquiries in relation to victims from the past 10 years in the form of a victims' reforms progress report. This report should be published six months after the publication of this inquiry. This report should include an acquittal against all recommendations in the reports listed in **Table 7** above and should indicate whether a recommendation is supported (in full, part of principle), under review or not supported.<sup>7</sup>

<sup>6</sup> Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022) 88.

<sup>7</sup> These categories are taken from the Victorian Government's guidelines for staff preparing a response to an inquiry: Victorian Government, *Guidelines for submissions and responses to inquiries* (Web Page, 2019) - <https://www.vic.gov.au/guidelines-written-submissions-and-responses-inquiries>.

The VOCC notes that the Victorian Government has produced an annual report on family violence reforms<sup>8</sup> and its actions following the Royal Commission into Institutional Child Sexual Abuse which is tabled in Parliament.<sup>9</sup>

In recognition of the importance of transparency and accountability for all victims of crime in Victoria, the Victorian Government should be required to provide a victims' reforms progress report annually. This annual report would include:

- an overview of any parliamentary or government-initiated (or government-funded) reviews and inquiries relevant to victims of crime
- an overview of recommendations relevant to victims' rights or entitlements contained in these review and inquiry reports
- the status of implementation activities.

This report should be required to be tabled in Parliament. This requirement should be enshrined in the Victims' Charter.



### RECOMMENDATION 52

**The Victorian Government should publicly report on the implementation of recommendations from all major Victorian and Commonwealth reports and inquiries (where relevant) in relation to victims from the past 10 years in the form of a victims' reforms progress report.**

**Thereafter, the Victorian Government should provide a victims' reforms progress report annually. The requirement to table this report in Parliament should be enshrined in the *Victims' Charter Act 2006* (Vic).**

The first victims' reforms progress report should include an acquittal against all relevant recommendations and should indicate whether a recommendation is supported or not.

An annual victims' reforms progress report should include:

- an overview of any parliamentary or government-initiated (or government-funded) reviews and inquiries relevant to victims of crime
- an overview of recommendations relevant to victims' rights or entitlements contained in these review and inquiry reports, and the status of implementation activities.

<sup>8</sup> Victorian Government, *Ending family violence: annual report (2021)* (April 2022) <<https://www.vic.gov.au/ending-family-violence-annual-report-2021>>

<sup>9</sup> Victorian Government, *Victorian Government Annual Report 2022: Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, 2023) <[https://www.parliament.vic.gov.au/file\\_uploads/Attachment\\_B\\_to\\_Brief\\_-\\_Published\\_report\\_-\\_Victorian\\_Government\\_Child\\_Abuse\\_Royal\\_Commission\\_Annual\\_Report\\_2022\\_xRHPk0Z3.pdf](https://www.parliament.vic.gov.au/file_uploads/Attachment_B_to_Brief_-_Published_report_-_Victorian_Government_Child_Abuse_Royal_Commission_Annual_Report_2022_xRHPk0Z3.pdf)>

## Cultural change through training

In 1993, Australia adopted the United Nations' Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power.<sup>10</sup> Implementing these basic principles has proved challenging. This is because

While the principle of treating victims with respect may appear to be straightforward, experience in other jurisdictions has shown it often requires a major cultural shift by criminal justice agencies.<sup>11</sup>

In 2016, the VLRC described changes to the criminal justice system for victims as transformational but observed that progress had been slow and limited. The VLRC identified three key components to driving cultural change:

- 1. Develop a more coherent legislative and policy framework.** The VLRC indicated that a shared vision of the victim's role – as a participant – was essential for everyone in the criminal justice system. The VLRC said that defining the victim as a participant and recognising victims in the Victims' Charter should further assist in developing this shared vision.<sup>12</sup>
- 2. Improve compliance with the Victims' Charter.** By creating a complaints process and regulatory oversight, breaches of the Victims' Charter would be identified.<sup>13</sup>
- 3. Cultural change through improving education and training about victims.** The VLRC said that 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'.<sup>14</sup>

In relation to improving education and training about victims, the VLRC said that 'almost all of the comments made to the [VLRC] about the need for cultural change through education and training were directed at lawyers, judges and magistrates'.<sup>15</sup>

Because change for victims is incremental and is likely to be resisted, a continued focus on cultural change is essential. A key barrier to victims' participation is that lawyers have been socialised in a legal culture and structure that, until very recently, has not recognised victims as legitimate participants in criminal proceedings.<sup>16</sup> It is therefore essential to focus on the challenge of cultural change. If this is not done, there is likely to be 'an "implementation gap" between the reforms as they are written and what happens in practice'.<sup>17</sup>

A key barrier to victim participation is that lawyers have been socialised in a legal culture and structure that, until very recently, has not recognised victims as legitimate participants in criminal proceedings.

In its 2004 report on sexual offences, the VLRC identified that cultural change, including training and education for lawyers and judicial officers, was critical to bringing about meaningful change for victims.<sup>18</sup> The VLRC again recognised the need for cultural change in the legal profession and judiciary in relation to victims of crime more generally in its 2016 report *The Role of Victims of Crime in the Criminal Trial Process*. Only five years later, the VLRC noted that efforts since its 2016 report were 'waning'.<sup>19</sup> Therefore, in 2021 the VLRC recommended further changes to entrench education and training for lawyers and judicial officers in relation to sexual violence.<sup>20</sup>

Training and education to drive cultural change should not be something that only occurs in response to a review, it should be embedded in standard training and education practices. As the VLRC said, '[c]hanging culture is an ongoing process, and we should persist'.<sup>21</sup>

While the roadmap for achieving cultural change was set out in the VLRC's 2016 report, and some progress has been made, further and ongoing work is required.

<sup>10</sup> Adopted by the United Nations General Assembly 29 November 1985. See also Victims Support Agency, Department of Justice Victoria, *Victims' Charter: Community Consultation Paper* (Paper, 2005) 11.

<sup>11</sup> Victims Support Agency, Department of Justice Victoria, *Victims' Charter: Community Consultation Paper*. (Paper, 2005) 12.

<sup>12</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 48.

<sup>13</sup> Marie Manikis, 'Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process' (2017) 1 *Public Law* 63, 67.

<sup>14</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 48.

<sup>15</sup> *Ibid* 49.

<sup>16</sup> Paul G Cassell, 'Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment' (1999) 2 *Utah Law Review* 479, 512. See also 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, 2.

<sup>17</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 395.

<sup>18</sup> Victorian Law Reform Commission, *Sexual Offences* (Final Report, July 2004) recommendations 35–41.

<sup>19</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 402.

<sup>20</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) recommendations 69–74. The VLRC made six further recommendations to entrench training and education in sexual offence cases specifically.

<sup>21</sup> Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 389.



Training and education should not be a one-off event in a legal career. As research continues and as the law changes, professional development of trauma-informed and victim-centred skills requires refreshing and updating. From an organisational perspective, there are always new judges and lawyers who will need training and education.

## Judicial training and education

The need for judicial education and training is now well established in Australia.<sup>22</sup> This includes education and training both on appointment and during a judge's tenure. National standards for Australian judges provide that judges should undertake at least five days of training and education each year.<sup>23</sup> Judicial education and training can include understanding social context, cultural sensitivities, understanding bias, and managing juries and other participants in court proceedings.<sup>24</sup>

Judicial education and training are fundamental to understanding trauma and the systemic barriers and challenges faced by victims of crime,<sup>25</sup> in addition to training about substantive laws concerning victims' rights.

A number of recent reviews and inquiries have emphasised the need for judicial officers to have more targeted training and education in relation to victims of crime.

During the Legislative Council's Legal and Social Issues Committee's Inquiry into Victoria's Justice System in 2021, a concern raised by many victims of crime was the need for greater trauma-informed practice in court proceedings.<sup>26</sup> Hope, a victim-survivor who gave evidence to the inquiry, stated: 'If judges, Crown prosecutors and in fact all court staff are given trauma-informed training, this would be a huge step in having a legal system that is slightly fairer to the victim'.<sup>27</sup>

The inquiry found that while they are highly skilled professionals with significant knowledge and expertise, judicial officers could benefit from improved education and training in relation to:

- trauma-informed practice
- cultural competency, in particular in relation to Aboriginal Victorians and culturally and linguistically diverse communities
- awareness of particular issues experienced by the LGBTIQ+ community
- the experiences of persons with a disability.<sup>28</sup>

In its report on *Improving the Justice System Response to Sexual Offences*, the VLRC recommended that training be required for judicial officers 'to bring about cultural change in courtroom practices and to ensure a respectful and safe environment for complainants'.<sup>29</sup> Consistent with the terms of reference of their inquiry, much of the recommended training concerned sexual offences. However, the VLRC also identified the need for judicial training and education more broadly concerning:

- the effects of trauma and how to reduce the risk of further trauma
- effective communication with and questioning of victim survivors, including children
- limits on improper questioning and judicial intervention
- alternative arrangements for giving evidence, and special hearings for children and people with a cognitive impairment.<sup>30</sup>

The VLRC made further recommendations about the importance of judicial education and training in its 2022 *Stalking* report. The VLRC indicated that training should include a range of matters such as barriers to accessing the justice system and responding to diverse experiences of stalking, the nature and dynamics of stalking, the effects of trauma from being stalked and how to respond in a trauma-informed way.<sup>31</sup>

The Judicial College of Victoria (JCV) is responsible for judicial education and provides resources for judicial

22 Gabrielle Appleby et al, 'Judicial Education in Australia: A Contemporary Overview' (2022) 31(4) *Journal of Judicial Administration* 187, 187-9.

23 National Judicial College of Australia, *National Standards for Professional Development for Australian Judicial Officers* (2006).

24 Gabrielle Appleby et al, 'Judicial Education in Australia: A Contemporary Overview' (2022) 31(4) *Journal of Judicial Administration* 187, 194.

25 Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2021) 771 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Victorias\\_Justice\\_System\\_Report/LCSLIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_Report/LCSLIC_59-10_Vic_criminal_justice_system.pdf)>.

26 Ibid 770.

27 Ibid 771.

28 Ibid.

29 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 409.

30 Ibid 409, 410 (recommendation 69). This recommendation was not limited to judicial officers; it also applies to police and lawyers. The recommendation also included specific competencies only in relation to sexual assault, such as understanding the nature and prevalence of sexual violence in the community, barriers to disclosure and reporting sexual violence, identifying and countering misconceptions about sexual violence and how to respond to diverse experiences and contexts of sexual violence.

31 Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022) xxii.

officers. The JCV's website includes a suite of resources for judicial officers in relation to victims and witnesses. The website states that:

Understanding the diverse experiences, characteristics and needs of victims and witnesses, and reconciling these with legal and professional requirements, will assist in working with victims and witnesses in your courtroom.<sup>32</sup>

However, it is not clear what, if any, training or ongoing education is mandated for judicial officers hearing criminal cases.

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

Trauma-informed training may lead not only to enhanced sensitivity towards victims and their needs, but to practical outcomes that improve participation. For example, the Centre for Innovative Justice's report on how the prosecution communicates with victims about resolution decisions found that time pressures imposed by courts may compromise the consultation process.<sup>33</sup> During its consultations, the VOCC was told there is pressure on prosecutors and defence to progress matters and that to redress participation for victims around plea negotiations 'would require a level of engagement that is entirely at odds with the pressure coming from the courts'.<sup>34</sup>

Respecting a victim's role as a participant requires consideration of how certain practices impact not just on the prosecution and defence but on the victim as a participant in their own right.

While some progress has been made, particularly in the availability of training resources via the JCV, a more structured education and professional development framework in relation to victims' rights and entitlements underpinned by trauma-informed principles is required. Requiring judicial officers to complete victim-centred education and training before hearing criminal cases and appeals would demonstrate the importance of victims' interests and participation in the justice system.

The JCV should develop a training and education framework on victims' rights and entitlements underpinned by trauma-informed principles.

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.<sup>35</sup>

Heads of jurisdiction should direct all judicial officers to participate in specified training, professional development or continuing education concerning victims before hearing criminal cases and appeals. As the legal system continues to change for victims, heads of jurisdiction should require all judicial officers to undertake refresher training on a regular basis.

To entrench best practices and drive cultural change, the JCV and courts should publish data on victim-related training and education in their annual reports.

<sup>32</sup> Judicial College of Victoria, *Victims of Crime in the Courtroom: A Guide for Judicial Officers* (Guide, 2019) <<https://www.judicialcollege.vic.edu.au/resources/victims-crime-courtroom-guide-judicial-officers>>.

<sup>33</sup> Centre for Innovative Justice, *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.

<sup>34</sup> Consultation Meeting 18 – Victoria Police – Session 2.

<sup>35</sup> Dr Helen Szoke, *Review of Sexual Harassment in Victorian Courts and VCAT – Report and Recommendations – Appendix 3. Judicial Independence, Accountability and the Role of the Heads of Jurisdictions* (Court Services Victoria, March 2021) 12.



**RECOMMENDATION 53**

**The Judicial College of Victoria should develop a training and education framework on victims' rights and entitlements underpinned by trauma-informed principles.**

**Heads of jurisdiction should:**

- **direct all judicial officers to participate in specified training, professional development or continuing education concerning victims before hearing criminal cases and appeals**
- **require all judicial officers to undertake refresher training on a regular basis**
- **publish data on completion of training and education in their annual reports.**

A training and education framework on victims' rights and entitlements, underpinned by trauma-informed principles, should feature:

- diverse victims' voices and their lived experience of the criminal justice system
- the views and experiences of victim support workers and advocates, specifically in relation to barriers frequently experienced by victims
- trauma-informed ways to acknowledge victims and facilitate their participation in the courtroom
- in-depth guidance in relation to legislative provisions designed to protect victims, specifically protections relating to giving evidence and the 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 to incorporate Victim Impact Statement processes into the sentencing task
- competencies in relation to specific areas of victimisation, including sexual assault, family violence and stalking.

## Education and training for lawyers

Research indicates that victims' satisfaction with the justice process depends significantly on how the process is conducted – that is, procedural fairness. The extent to which victims feel they are treated with dignity and respect will inform their assessment of the quality of their interactions with authorities.<sup>36</sup>

Lawyers play an important role in enabling victims to participate in the justice process. However, some victims told the VOCC they were dismayed by the way lawyers treated them. For example, one victim interviewed by the VOCC recalled being told by the prosecutor while at the court: 'No crying, no sighing and no rolling your eyes. And no huffing and puffing and if you can't do that, sit over there in the corner or stay outside.'<sup>37</sup>

Another victim surveyed by the VOCC described the OPP's communication style as 'arrogance and no compassion understanding or openness to explain the system in a humanly way ... you are just a pawn to get the outcome'.

Some victims also felt that prosecutors did not always have an appreciation of victims' trauma and lack of knowledge of the justice system. For example, one victim interviewed by the VOCC spoke about the insensitive way in which they were offered a restorative justice process by the prosecutor just moments after being advised that charges were to be downgraded.<sup>38</sup>

Training for lawyers has continued to be a key theme in inquiries and reviews relating to improving the justice system for victims.

<sup>36</sup> Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and Their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221, 223.

<sup>37</sup> Interview 5 – Victim of crime.

<sup>38</sup> Interview 12 – Victim of crime.

The Centre for Innovative Justice's 2019 review into how the prosecution communicates with victims about plea resolutions recommended that the Office of Public Prosecutions (OPP) identify opportunities to support lawyers (and the Victims and Witness Assistance Service staff) to develop their capabilities to deliver a best-practice approach to communicating with victims and consulting with them about resolution decisions.<sup>39</sup>

In its 2016 report *The Role of Victims of Crime in the Criminal Trial Process*, the VLRC recommended that:<sup>40</sup>

- the Legal Services Board take a lead role in encouraging barristers practising in criminal law to receive victim-related professional development training within their first three years of practice (recommendation 4)
- Victoria Legal Aid and the Office of Public Prosecutions lead the development and delivery of a training program to foster cultural change in how victims are perceived and treated during the criminal trial process (recommendation 6).

Recent reports from the VLRC on *Improving the Response of the Justice System to Sexual Offences* (2021) and *Stalking* (2022) also recommended further training and education for lawyers.<sup>41</sup>

Despite awareness of the need for improvement, inquiries and reviews continue to recommend improved training and education for lawyers in relation to victims of crime. To progress beyond recommendations limited to specific reviews, an ongoing training and education framework is needed that embeds professional development in relation to victims' rights and entitlement.

Practising lawyers – both barristers and solicitors – are required to undertake compulsory professional development each year.<sup>42</sup> Although there are different ways of earning their (compulsory) '10 points', for many lawyers this means 10 hours of classes involving a traditional lecture-style format. Seven points are likely to be in an area of their existing subject matter expertise (which may include laws relevant to victims). Lawyers must spend a minimum of one hour on the remaining three streams, namely ethics, professional development and practice management. As a result, lawyers often only spend one hour developing professional skills of the kind that would help them to build trauma-informed and victim-centred skills and practices for their interactions with victims.<sup>43</sup>

Education and training for lawyers is not only about understanding relevant laws, such as those on victims' rights. Victim-centred legal practices require skill development in communicating with victims and interacting with victims in a trauma-informed manner. It is clear from victims that lawyers require further training in developing these skills.

An ongoing training and education framework is needed for all lawyers (prosecution and defence) in relation to victims' rights and entitlements and victim-centred legal practice. The Victorian Legal Services Board and Commissioner together with the Office of Public Prosecutions and Victoria Legal Aid should examine ways of improving training and education for all lawyers (prosecution and defence) in relation to victims' rights and entitlements and victim-centred legal practice.

39 Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions, Victoria, April 2019) 15.

40 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 402.

41 See, e.g., Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 410, recommendation 69; Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022), recommendation 5 a-c.

42 *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (NSW) r 8; *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (WA) r 6.

43 Chris Humphreys, *Getting the Point? Review of Continuing Professional Development for Victorian Lawyers* (Report, November 2020) 4-5 <[https://lsbc.vic.gov.au/sites/default/files/2020-11/CPD\\_Report\\_Final\\_0.pdf](https://lsbc.vic.gov.au/sites/default/files/2020-11/CPD_Report_Final_0.pdf)>.



## RECOMMENDATION 54

**The Victorian Legal Services Board and Commissioner, Office of Public Prosecutions and Victoria Legal Aid should examine ways of improving training and education for all lawyers (prosecution and defence) in relation to victims' rights and entitlements and victim-centred legal practice with a view to developing a training and education framework for all lawyers.**

A training and education framework on victims' rights and entitlements and victim-centred legal practice should include:

- trauma-informed legal practice including skills in communicating with victims and interacting with victims in a trauma-informed manner
- diverse victims' voices and their lived experience of the criminal justice system
- the views and experiences of victim support workers and advocates, specifically in relation to barriers frequently experienced by victims
- in-depth guidance in relation to legislative provisions designed to protect victims, specifically protections relating to giving evidence
- how to question a victim in a respectful manner and avoid questioning that is improper or inappropriate
- competencies in relation to specific areas of victimisation, including sexual assault, family violence and stalking.

## Education and training for law students

In 2016, the VLRC observed that 'there is scope for the study of victim-orientated laws to be incorporated into evidence and criminal law subjects'.<sup>44</sup> A law degree includes eleven compulsory subjects (called the 'Priestley 11') and some optional subjects. Compulsory subjects such as Criminal Law and Evidence may include some discussion of victims, but the focus is primarily on understanding the law. Some optional subjects may examine victims' legal issues in more detail.

Increasing law students' familiarity with victims' rights and how the law works in relation to victims further recognises the importance of victims. It reflects that victims are integral to, and participants in, the criminal justice system. Victims are not irrelevant or simply something to be added as an afterthought to criminal practice.

Including the study of victims' rights and interests in law courses would better reflect that a fair trial no longer only involves a binary perspective (of the prosecution and the accused) but reflects a triangulation of interests which include those of the victim.

Accordingly, the VLRC further recommended that:<sup>45</sup>

The Victorian Legal Admissions Board, ... should advocate for the education and training requirements for admission to the legal profession to include the study of law and procedures relevant to victims, and the causes and effects of victimisation (recommendation 3).

The Victorian Legal Admissions Board advised the VOCC that the Board drew this recommendation to the attention of the Law Admissions Consultative Committee (LACC). However, the LACC deferred adoption of any recommendations because the Australian Council of Law Deans was conducting a 'comprehensive review of legal education and regulation in Australia'.<sup>46</sup>

The VOCC is of the view that education and training requirements for admission to the legal profession should include the study of law and procedures relevant to victims, and the causes and effects of victimisation. The VOCC supports the Victorian Legal Admissions Board's continued efforts in advocating for the education and training requirements for admission to the legal profession to include the study of law and procedures relevant to victims, and the causes and effects of victimisation.

<sup>44</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 50.

<sup>45</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 50.

<sup>46</sup> Correspondence from Victorian Legal Admissions Board to Fiona McCormack, Victims of Crime Commissioner, 7 March 2023.

# Measuring the cost of crime

## Funding and resourcing

One of the most consistent challenges identified in reviews and by stakeholders is the need for additional resourcing to uphold victims' rights and entitlements and provide victims with the services and responses they need.

For example, the VLRC's 2021 report *Improving the Response of the Justice System to Sexual Offences*, raised concerns about the resourcing of the OPP's Victims and Witness Assistance Service.<sup>47</sup> The VLRC recommended that the Victorian Government should, as a priority, address the lack of resources for agencies responding to sexual violence, including specialist sexual assault services, police, and the prosecution.<sup>48</sup>

In 2021, the Department of Justice and Community Safety found that if the prosecution (often Victoria Police) were required to consult with victims in summary proceedings, as the OPP is required to do under the Victims' Charter, there would be significant resourcing implications and introducing such a change without a 'substantial increase in resourcing, [would] risk system failure'.<sup>49</sup>

In 2021, the Legislative Council Legal and Social Issues Committee of the Parliament of Victoria heard in its inquiry into the criminal justice system that resourcing was a problem. For example, Kathleen Maltzahn, Chief Executive Officer of Sexual Assault Services Victoria, said that 'services offered by the organisation all operate on waitlists, with staff frequently needing to decide who they will not be able to service'.<sup>50</sup> The Committee also heard evidence of problems with a lack of victims' services and resources to support people in rural and regional Victoria.<sup>51</sup>

In 2020, the Centre for Innovative Justice (CIJ) identified significant limitations in the capacity of Victims Services, Support and Reform in the Department of Justice and Community Safety to meet the diverse needs of victims of crime who were in contact with a victims' service agency.<sup>52</sup> The CIJ's Victim Services Review found that the current victims' services system is not adequately structured or resourced to provide the level of support required by bereaved families.<sup>53</sup>

A number of reviews have also made recommendations for new services to be provided to victims. For example, the CIJ's Victim Services Review articulates a vision for a fully integrated victim support model which includes:

- 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.<sup>54</sup>

Multiple reviews have identified the need for funding to support victim's diverse needs, including:

- legal representation for victims in relation to applications to access their confidential communications in sexual offence cases<sup>55</sup>
- providing legal advice to bereaved families engaged in the coronial process<sup>56</sup>
- complex legal needs triggered by crime, for example, child protection issues, restraining orders, employment issues because a victim may be away from work for a significant period(s), and migration issues.<sup>57</sup>

This inquiry has identified many matters that require additional funding.

47 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) 247.

48 Ibid.

49 Department of Justice and Community Safety (Victoria), *Improving Victims' Experience of Summary Criminal Proceedings* (Final Report, November 2021) 25.

50 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 2022) 309 <[https://parliament.vic.gov.au/images/stories/committees/SCLSI/inquiry\\_into\\_Victorias\\_Justice\\_System\\_/Report/LCLSIC\\_59-10\\_Vic\\_criminal\\_justice\\_system.pdf](https://parliament.vic.gov.au/images/stories/committees/SCLSI/inquiry_into_Victorias_Justice_System_/Report/LCLSIC_59-10_Vic_criminal_justice_system.pdf)>.

51 Ibid 310.

52 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 41-6.

53 Ibid 139.

54 Ibid 56.

55 Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report No 42, September 2021) recommendation 87a.

56 Coronial Council of Victoria, *Coronial Council of Victoria – Reference 4 – November 2017: Coronial Council Appeals Review* (November 2017) 49-54.

57 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 18.

## Socioeconomic analysis

Many recommendations from reports and inquiries require new or additional funding. While there are strong justifications for the provision of funding for victims given the harm they have experienced, a detailed socioeconomic analysis would provide a much clearer insight into the true cost of crime to victims, employers, the community, and health systems. It would also provide a stronger platform for determining what investments government should make to support changes concerning the rights of victims of crime and help them to recover from the effects of crime.

Recommendations for additional funding for services of the kind discussed above usually focus on the need to fund a specific service. The justifications for funding are often based on addressing problems experienced by victims with existing systems and services. Funding is justified based on important policy considerations like providing better support for victims, removing barriers that prevent victims from accessing services, addressing specific legal needs that victims may have, increasing victim participation and reducing secondary victimisation.

In most cases, it is then a matter for the Victorian Government to determine what funding it will provide. However, funding is determined based on an assessment of the individual program or recommendation rather than upon a deeper understanding of the socioeconomic impact of providing support and services to victims.

Further, while reviews have been detailed from a policy perspective and recommending improvements/expansion of services, they rarely examine the details of resourcing issues. For example, when recommending the replacement of the victims of crime assistance scheme, the VLRC recommended that the body administering the new administrative scheme 'should be provided with the staffing and funding necessary to properly perform their functions'.<sup>58</sup> The VLRC's recommendation reflects that assessing funding needs generally falls outside the expertise and terms of reference of the reviewing bodies.

In conducting its 2020 review of victims' services, the CIJ indicated that it was not within the scope of its review to undertake detailed costing of the impacts of crime on victims. Nonetheless, the CIJ found:

an unequivocal case for investment in victim support – not only from the crucial perspective of victims' rights and recovery, but from the perspective of fiscal responsibility. This is because evidence suggests that the delivery of appropriate and effective support to victims of crime can support the functioning of the criminal justice system; mitigate the socioeconomic impacts of victimisation; and disrupt cycles of disadvantage and harm. Importantly, in the context of rising prison numbers, this harm includes a significant risk of potential future offending.<sup>59</sup>

Taking a holistic approach to the needs of victims of crime challenges conceptions of victims as people who experience crime as a one-off event and who can be quickly restored to the life that they enjoyed before the criminal act. Further, while not conducting a socioeconomic analysis, the CIJ identified that in relation to victims of crime generally, the individual, families, the community, and government bear the costs of crime in different ways including:

- reduced economic participation and productivity, including due to withdrawal from employment or withdrawal from education (with subsequent impacts on lifetime earning capacity)
- costs associated with physical and mental ill-health, including use of acute health services and longer-term service use
- costs arising from the impacts on victims' children, including disengagement from school, mental ill-health and trauma, and in some instances, child protection involvement
- costs associated with informal caring
- costs associated with future victimisation and offending.<sup>60</sup>

To the extent that there have been reviews and additional investment for victims, they have generally been in relation to victims of family violence and/or sexual offences rather than victims of crime more generally.

<sup>58</sup> Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 38, July 2018) recommendation 8.

<sup>59</sup> Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review* (Final Report, November 2020) 41.

<sup>60</sup> *Ibid* 49. The costs associated with future victimisation and offending refers to research that reveals that victims of crime may 'be vulnerable to further crime victimisation ... [and] may also engage in offending behaviour': at 49. For example, a failure to address mental health issues, drug and alcohol use, and homelessness in victims of crime is linked with offending.

In other areas, conducting this kind of socioeconomic research has led to a deeper understanding of the true cost of crime and the value of investing in supporting victims. This understanding has led to significant increases in government funding for services. For example:

- The Victorian Government commissioned KPMG to measure the cost of family violence to government, the community, and individuals. In 2015–16, an estimated 160,000 people experienced family violence in Victoria. KPMG estimated the total cost of family violence was \$5.3 billion in 2015–16, comprised of:
  - \$1.8 billion for the government provision of services
  - \$2.6 billion for costs borne by individuals and their families, and
  - \$918 million for costs borne by the Victorian community and broader economy.<sup>61</sup>
- Anglicare commissioned Deloitte to conduct a socioeconomic cost-benefit analysis of the potential cost savings of extending the age of support for children and young people in out-of-home care. Deloitte's study identified significant potential benefits to individuals and the community that could flow from extending out-of-home care from the age of 18 to 21.<sup>62</sup>

Similarly, a recent cost-benefit analysis of the economic benefit flowing from legal aid services funded by the Australian Government demonstrated that

for every dollar spent by the federal Australian government on legal assistance, Legal Aid Commissions deliver \$2.25 in quantitative benefits. The report found these benefits relate to avoided costs to the justice and other systems, to individuals, and to wider government and societal outcomes that may arise, for example, from early intervention.<sup>63</sup>

A socioeconomic analysis of the cost of crime (to victims, victims' families, employers, the community, and to government) and the potential benefits that would flow from greater investment in responding to victims' needs (to assist them to recover from crime and participate more effectively in the criminal justice system) would be invaluable.

This kind of analysis is critical in considering recommendations for increasing investment to reduce the long-term impacts of crime on victims and to enable victims to exercise their rights to participate in the criminal justice system. The analysis would also make clear to the Victorian Government what benefits flow from their economic investment, and the consequences of not providing support for victims. This analysis could also assess the benefits of funding the entrenchment of education and training for the judiciary and lawyers in conducting trauma-informed legal proceedings and victim-centred legal practice.

Socioeconomic analysis should build a consistent method for estimating the costs of crime and would provide an important part of the evidence base for the Victorian Government's investment in reforms over the short, medium, and long term.



#### RECOMMENDATION 55

**The Victorian Government should fund an independent socioeconomic analysis of the costs of crime to victims and the broader community.**

The socioeconomic analysis should be modelled on the report *The Cost of Family Violence in Victoria* (2017). The report should include consideration of:

- reduced economic participation and productivity as a result of crime victimisation
- costs associated with physical and mental ill-health, including use of acute health services
- costs associated with informal caring as a result of victimisation
- costs associated with future victimisation and offending, having regard to the known links between victimisation and offending.

61 KPMG, *The Cost of Family Violence in Victoria* (Summary Report, May 2017) 2 <<https://www.vic.gov.au/sites/default/files/2019-05/Cost-of-family-violence-in-Victoria.pdf>>.

62 Deloitte Access Economics, *Raising Our Children: Guiding Young Victorians in Care into Adulthood* (Report, April 2016) ii-iii <<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-guiding-young-victorians-in-care-into-adulthood-anglicare-220816.pdf>>.

63 Louise Glanville and Martha Arkalis, 'What is the Cost of not Funding Legal Assistance' (Speech, International Legal Aid Group, Harvard, 21–23 June 2023) 1 <<https://www.legalaidvic.gov.au/benefits-funding-legal-assistance>>. Louise Glanville is the Chairperson of National Legal Aid and the Chief Executive Officer of Victoria Legal Aid.