

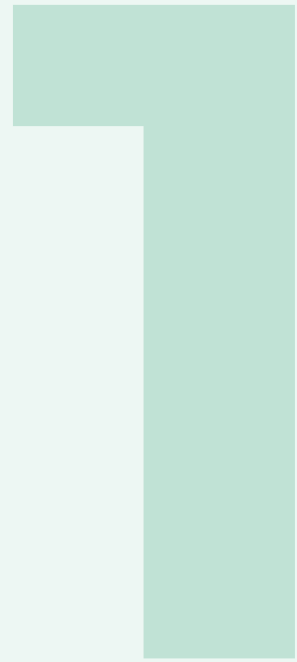
Part 1:

Background and introduction

Part 1 of this report introduces the Victims of Crime Commissioner's (VOCC's) systemic inquiry into victim participation. It includes an overview of the VOCC's inquiry approach and sets out the structure of the report.

Part 1 also provides background on victim participation, including its history and context, an overview of what participation is, how it is defined and described, and examines victims' existing participation in the justice system in Victoria.





Chapter 1: **Introduction**



The Victims of Crime Commissioner

The Victims of Crime Commissioner (VOCC) is an independent statutory officer with powers to advocate for the respect, recognition and inclusion of victims of crime in the justice system.

The VOCC is independent from ministers, government departments, justice agencies and the victims' services system.

Under the *Victims of Crime Commissioner Act 2015* (Vic) (VOCC Act), the VOCC is empowered to:

- investigate complaints made by victims about their treatment by justice agencies and victims' services¹
- report on the compliance of justice agencies and victims' services with the *Victims' Charter Act 2006* (Vic) (Victims' Charter)²
- conduct inquiries into systemic issues that affect victims of crime³
- represent the concerns of victims to government and provide advice to the Attorney-General, the Minister for Victim Support and government departments and agencies about improvements to the justice system to meet the needs of victims of crime.⁴

Unlike victims of crime commissioner roles in other Australian jurisdictions, the VOCC does not deliver services to victims. The VOCC is an independent regulator who monitors the compliance of justice agencies and victims' services with the Victims' Charter as well as providing an independent complaints and oversight function.

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

The Victims' Charter

The Victims' Charter sets cultural and behavioural obligations for justice and victims' services agencies when they interact with victims of crime. Victims are afforded special treatment by these agencies and are allowed to participate in certain parts of the justice process. One of the objects of the Victims' Charter is to acknowledge the victim's role as a participant, but not a party, to proceedings for criminal offences.⁵

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

Under the Victims' Charter, agencies are required to:

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

Some agencies, such as prosecuting and investigatory agencies, have additional obligations to consult victims and provide them with information under the Victims' Charter.

Under the Victims' Charter, investigatory agencies, prosecuting agencies and victims' services agencies are to respect the rights and entitlements of victims as participants in proceedings for criminal offences.⁶

¹ *Victims of Crime Commissioner Act 2015* (Vic) s 25A.

² *Ibid* s 28(1A).

³ *Ibid* ss 13(1)(b)-(c), 23(1).

⁴ *Ibid* s 13(1)(a), (d).

⁵ *Victims' Charter Act 2006* (Vic) s 4 (1)(ba).

⁶ *Ibid* s 7A.

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

The Commissioner oversees the operation of the Victims' Charter

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

Agency compliance with the Victims' Charter directly affects how victims of crime will experience both the justice and service system.

The VOCC has been given powers to publicly report agency compliance with the Victims' Charter and to consider complaints from victims about an agency that may have breached the Victims' Charter.⁸ The VOCC reports on this annually in the Victims of Crime Commissioner Annual Report.

The Commissioner's systemic inquiry powers

Under section 13(1)(b)-(c) of the VOCC Act, the VOCC can 'carry out inquiries on systemic victim of crime matters' and 'report to the Attorney-General on any systemic victim of crime matter'.

The VOCC's powers to carry out a systemic inquiry are broad and discretionary. For the purposes of her systemic inquiry powers, the VOCC defines a systemic victim of crime matter as a systems issue adversely impacting victims of crime.⁹

When the VOCC role was created in legislation, the importance of the systemic inquiry function was described as follows:

Although the commissioner will not become involved in individual cases and has no direct advocacy role in the courts, the systemic reforms that [they] will identify and promote will, in turn, promote the recognition and equality of victims before the law.

While the commissioner will listen to individual victims' experiences and problems, the greatest benefit of the commissioner's role will be the ability to inquire into and report on a broad range of systemic issues across the justice system that affect victims in a range of circumstances. Our intention is that the commissioner will focus on the big-picture issues that affect significant numbers of victims.¹⁰

Systemic inquiry planning process

In 2021, as part of the VOCC's annual systemic inquiry planning process, the VOCC assessed possible systemic inquiry topics. The following sources of data, information and insight are used during the VOCC's annual planning process:

- engagement activities with victims of crime and other stakeholders, including assessing trends and issues arising from meetings or focus groups with victims of crime and key stakeholder organisations
- policy development arising from researching and analysing victims' legislation, practice, programs and data
- matters arising from the VOCC's regulatory and complaints function
- issues arising from the VOCC's environmental scanning process, including academic research, government reports, parliamentary (or other) inquiries as well as public issues monitoring (including media monitoring).

⁷ Ibid s18 (2).

⁸ *Victims of Crime Commissioner Act 2015* (Vic) div 5.

⁹ 'Systems' in this context includes any policy, procedure, laws or services that intersect with victims' experience of the criminal justice or victims' services system.

¹⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 2015, 3278 (Martin Pakula, Attorney-General).

Together, these sources provide the basis for a systemic planning process that takes into account the breadth of issues that arise in Victoria relating to victims of crime.

Possible systemic inquiry topics are assessed against a range of criteria, including whether:

- the matter is systemic, or reasonably likely to be systemic
- victims' needs are at the centre of the inquiry topic¹¹ and it is an appropriate area of law or policy for the VOCC to review
- the systemic inquiry aligns with the objectives of the VOCC Act and Victims' Charter
- the VOCC has the ability to have an impact on this area of inquiry
- the inquiry does not duplicate other inquiries or reviews
- the inquiry would not interfere with the administration of justice.

Against these criteria, the topic of victim participation was assessed as an appropriate and necessary inquiry topic. Further background on the context of this topic, specifically as it relates to amendments to the Victims' Charter in 2018, are outlined below.

Overview of the systemic inquiry

Why victim participation?

Major changes to the Victims' Charter in relation to a victim's role as a participant occurred in 2018. These changes followed the report in 2016 by the Victorian Law Reform Commission (VLRC), *The Role of Victims of Crime in the Criminal Trial Process*, which recommended that the role of the victim as a participant in criminal proceedings be 'legislatively and operationally recognised'.¹²

The VLRC's 2016 report had found that victims felt disempowered or excluded from the criminal trial process and described their relationship with the prosecution as that of a 'passive receiver of information', an 'observer', and an 'outsider'.¹³

Following the VLRC's report, the Victims' Charter was amended in 2018 to recognise victims as participants in proceedings for criminal offences. Specifically, the amendments created:

- a new objective of the Victims' Charter recognising that a victim of crime has an inherent interest in the response by the criminal justice system to that crime and to acknowledge the victim's role as a participant, but not a party, in proceedings for criminal offences¹⁴
- a requirement for investigatory, prosecuting and victims' services agencies to respect the rights and entitlements of victims as participants in proceedings for criminal offences.¹⁵

When making recommendations to establish victims' role as participants, the VLRC had envisaged that this would drive cultural change in the justice system and would also make clear 'the parameters of the victim's legitimate expectations'.¹⁶ At the time, the VLRC stated: 'Without a properly articulated role, victims are not always respected as having a legitimate interest in criminal proceedings.'¹⁷

Five years on from the Victims' Charter amendments, little is known about how victims in Victoria are experiencing these new participatory entitlements and whether, as envisaged by the VLRC, these entitlements are resulting in tangible improvements to victims' status as a participant.

This inquiry examines whether recognising victims as participants under the Victims' Charter has driven the necessary cultural change envisaged by the VLRC and whether victims feel like participants in the justice system. Key to this is what it means for victims to experience participation, and how they define or describe participation.

By prioritising victims' voices, and whether they feel like participants, this report provides Victoria with a benchmark relating to victim participation in the justice system.

¹¹ This contrasts with areas of law reform that may intersect with victims' issues but would be more appropriately dealt with by other agencies or organisations.

¹² Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2016) 30.

¹³ *Ibid* 33.

¹⁴ *Victims' Charter Act 2006* (Vic) s 4(1)(ba).

¹⁵ *Ibid* 7A.

¹⁶ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2016) 23.

¹⁷ *Ibid* 29.

Scope of inquiry

Terms of reference

The terms of reference state the Commissioner will consider:

- victims' views on what 'participation' means to them at key stages of the justice process, including whether the current scope of participatory rights meet their justice needs
- victims' views on how the current (legislated) participatory rights translate to meaningful participation at key stages of the justice system, including any barriers experienced by victims
- the respective roles of various justice and victims' services agencies in upholding victims' participatory rights, and whether the necessary processes have been put in place to meet victims' legislative participatory rights
- justice sector and victims' services views on victims' participation in the justice process, including their views on any barriers to victim participation and associated impacts on the justice system and scope of their role or operations
- victims' and other stakeholders' views on whether further reforms are required to enable meaningful participation by victims of crime, whether involving legislative reform, cultural change, procedural or service system delivery
- approaches to victim participation in other jurisdictions and academic and other literature on best practice approaches to victim participation
- whether the right tools and systems are in place to measure victims' participation in the justice system, and their satisfaction with their participation in the justice system
- any other matters of relevance to consideration of victims' participatory rights in Victoria.

Participation extends to all victims and those harmed by crime

In its 2016 report, the VLRC noted that the role of victim as a participant extends to all victims regardless of whether they appear in court as witnesses for the prosecution.¹⁸ However, the changes made to the Victims' Charter in 2018 recognise victims as participants only in relation to 'proceedings for criminal offences'.¹⁹

Victims' interactions with the justice system do not follow a linear (or automatic) path to proceedings for criminal offences. As such, the Commissioner's inquiry has examined victim participation more broadly. This means participation is considered in the context of victims and individuals who:

- do not report to police (i.e. choose not to participate in the justice process at all)
- report to police but may withdraw a complaint²⁰
- may report to police and also be required to appear as a witness (e.g. are compelled to participate in the prosecution/court process)
- are harmed by crime, but have no formal role in reporting to police or being a witness (e.g. bereaved family members who may not be required to participate in the process, but may wish to be treated as a participant because they have experienced harm arising from a crime)
- may have participated in parallel or alternative justice opportunities (like restorative justice) or civil proceedings (e.g. Family Violence Intervention Orders) and have not been involved in criminal proceedings at all
- may be involved in crimes mental impairment matters.²¹

Consideration of concurrent and recent inquiries, reviews and projects

While the concept of participation is broad, it does not touch on all the issues victims may experience as they interact with the justice and victims' service systems. Some significant issues may be touched on in this report only to the extent that they intersect with concepts of participation.

¹⁸ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, 2016) 31.

¹⁹ *Victims' Charter Act 2006* (Vic) ss 4(1)(ba), 7A.

²⁰ It is noted that 'withdrawing a complaint' can be more common in relation to certain crimes, such as family violence and sexual assault, that require the co-operation of the victim/complainant. It is the state (through Victoria Police and/or the Director of Public Prosecutions) which determines whether to pursue charges/prosecution; however, the co-operation of the complainant/witness is crucial to the prosecution of certain crimes.

²¹ As provided for under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1996* (Vic).

The inquiry has also considered the inquiries, reviews and projects already completed or underway that address more specific issues for, or barriers encountered by, victims of crime to the extent that they are relevant to victim participation.

Where possible, the Commissioner has aimed to elevate important work already completed or underway while enabling significant projects to continue without duplication. This is particularly important in the following key areas:

- **Victim Services Review:** In 2020, the Centre for Innovative Justice comprehensively examined the strengths and limitations of Victoria's victim support system. In December 2021, the Victorian Government released its *Victim Support Update* which stated that the 'review suggests an ambitious "once in a generation" reform agenda that will take time to fully consider and implement.'²² At the time of publication of this report, the Government has not publicly committed to implementing the proposed new service model outlined in the Victim Services Review report.
- **Review to improve victims' experience of summary criminal proceedings:** In November 2021, the Department of Justice and Community Safety's report, *Review to Improve Victims' Experience of Summary Criminal Proceedings* found that 'victims often feel disconnected from summary proceedings because they lack information about the process, or they feel that their experience is overlooked in the process.'²³ The report makes 12 recommendations that aim to improve victims' experience of summary proceedings. At the time of publication of this report, the Government has not responded to the review.
- **Ten-year strategy to address sexual violence and harm:** In November 2021, the Victorian Government committed to delivering a 10-year strategy to address sexual violence and harm by 2022.²⁴ The Government has not publicly committed to implementing all recommendations of the VLRC's 2021 report *Improving the Justice System Response to Sexual Offences*, but many recommendations of that report relate to victim participation. At the time of publication of this report, the 10-year strategy to address sexual violence and harm was not yet published.
- **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.²⁵ In acknowledgement of this dedicated work, particularly a comprehensive approach to consulting with the Aboriginal community, the VOCC engaged with the Aboriginal Justice Caucus and the Women, Families and Victims Collaborative Working Group to discuss the progress made on this project, rather than running parallel (and potentially duplicative) consultation processes. At the time of publication of this report, the Aboriginal Victims of Crime Strategy was not yet published.
- **Yoorrook Justice Commission:** The Yoorrook Justice Commission is exploring the injustices experienced by First Peoples in the criminal justice system. This work will include producing a report which will make recommendations for consideration in the process of negotiating Treaty with the State of Victoria.²⁶
- **Development of a new Financial Assistance Scheme:** A new Financial Assistance Scheme (FAS) will replace the Victims of Crime Assistance Tribunal in 2024.²⁷ The Department of Justice and Community Safety is developing the new scheme. The delivery of a new FAS has the potential to benefit many victims of crime and the VOCC will regulate the scheme once established.
- **Disability Royal Commission:** The Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has been running since 2019. The Royal Commission is examining all forms of violence, abuse, neglect and exploitation in all settings where they occur.²⁸ The Royal Commission has published reports across public hearings, research and policy themes. The Interim Report was published 30 October 2020 and at time of publication of this report, seven Progress Reports have been published.²⁹

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

23 Victorian Government, *Review to improve victims' experience of summary criminal proceedings* <<https://engage.vic.gov.au/review-improve-victims-experience-summary-criminal-proceedings>>.

24 Premier of Victoria, 'Stronger Laws for Victim-Survivors of Sexual Violence' (Media Release, 12 November 2021) <<https://www.premier.vic.gov.au/stronger-laws-victim-survivors-sexual-violence>>.

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

26 Yoorrook Justice Commission, *Yoorrook Justice Commission Newsletter* (Issue 2, August 2022) <https://app4.vision6.com.au/em/message/email/view.php?id=1644349&a=105697&k=EOIU_UohxGMnF9UBIwPxxW9RwTWVVOAGvBf4Xmc_Q>. In August 2023, Yoorrook published Report into Victoria's Child Protection and Criminal Justice Systems which included a number of recommendations relating to the criminal justice system: Yoorrook Justice Commission, *Report into Victoria's Child Protection and Criminal Justice Systems* (Report, August 2023).

27 Victorian Government, *Victims of Crime Financial Assistance Scheme* (Web Page, 5 July 2023) <<https://www.vic.gov.au/victims-crime-financial-assistance-scheme>>.

28 Australian Government, *Establishment of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Media Release, April 2019) <<https://pmtranscripts.pmc.gov.au/release/transcript-42256>>.

29 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Publications* (Web Page) <<https://disability.royalcommission.gov.au/publications>>.

Scope of systemic inquiry determined by resources

The VOCC Office undertook this inquiry within existing resources. Accordingly, the inquiry's scope was limited to the research, engagement and information/data collection able to be completed by a small policy team. Accordingly, the VOCC:

- focused on the key issues raised by victims of crime
- engaged with victims during a specific period, in line with resourcing and capacity
- engaged with stakeholders during a specific period, in line with resourcing and capacity.

This inquiry also drew on existing research and data about victims' experiences to ensure the inquiry did not:

- duplicate large-scale inquiries that had already been undertaken in relation to victims' experiences of the justice system³⁰
- require victims who had already told their story and shared their experience in another forum to have to do so again unless this was their wish.

Inquiry focuses on responses to crime

No Victorian should ever become a victim of crime and need to interact with the justice or victims' service system. Sadly, many do and the VOCC plays an important part in ensuring the justice and victims' services system is responsive to the needs of those who do become victims of crime.

The VOCC does not have a focus on primary prevention, although the Commissioner acknowledges that primary prevention should always be a key focus of government.

³⁰ The *Victims of Crime Commissioner Act 2015* (Vic) requires the Commissioner to avoid unnecessary duplication of inquiries: s 24.

Inquiry approach and methodology

Approach guided by objects of the VOCC Act and Victims' Charter

In performing her systemic inquiry functions, the Commissioner must have regard to the objectives of the VOCC Act and Victims' Charter, which are:³¹

To promote:	<ul style="list-style-type: none"> • the recognition of victims of crime in the justice system • the concerns of victims of crime in the decision making of government • the inclusion and participation of victims of crime in the justice system
To recognise:	<ul style="list-style-type: none"> • the impact of crime on victims of crime, their families, witnesses and the broader community • that all persons adversely affected by crime should be treated with respect by justice and victims' services and be offered information to enable them to access appropriate services to help with the recovery process • that a victim of crime has an inherent interest in the response by the criminal justice system to that crime • the victim's role as a participant, but not a party, in proceedings for criminal offences
To reduce:	<ul style="list-style-type: none"> • the likelihood of secondary victimisation by the criminal justice system

Phases of the systemic inquiry

This project had six main phases:

1. Engaging with individual victims of crime via a publicly available online survey and meeting with individual victims of crime
2. Preliminary consultations with stakeholders
3. Analysis of preliminary findings from victims' insights
4. Further engagement with stakeholders, including consultation meetings, engagement with lived experience groups and consultants and a survey of victims' professionals
5. Data analysis and research
6. Identifying policy solutions and developing recommendations.

Prioritising engagement with victims of crime

The inquiry prioritised the lived experiences and voices of victims of crime.

The first phase of the inquiry included a comprehensive victim engagement phase informed by contemporary understandings of trauma-informed practice principles. An overview of this approach is provided in **Table 1** below.

³¹ *Victims of Crime Commissioner Act 2015 (Vic)* s 14.

Table 1: VOCC principles of trauma-informed practice and their application

<p>1. Safety – relates to how practices and settings support physical and emotional safety, including the feeling of safety.</p>	<p>We heard from victims in places and ways that they felt safe. We had clear processes and trauma-informed support to promote safety.</p> <p>We included a trigger warning at the start and end of the survey, and information about how victims can access further support should the survey content raise issues for them.</p> <p>We ensured our engagement materials communicated the VOCC's independence from government to promote safety among people who have had challenging experiences with government departments.</p>
<p>2. Trustworthiness and transparency – involves maintaining clear and appropriate boundaries, honouring confidentiality, and being clear and consistent.</p>	<p>We exercised our duties in good faith and did not promise outcomes that are beyond our power to achieve. We provided people with a clear explanation about the purpose, the process and how victims' input would be used.</p> <p>We ensured victims provided their informed consent, that their data was de-identified, and we only use their stories in ways that they have consented to.</p> <p>We were clear with people who participated about how the VOCC Office will uphold data security and privacy requirements to ensure victim information is kept private.</p>
<p>3. Peer support – relates to support provided by people with lived experience.</p>	<p>We provided opportunities for peer support by enabling victims to use support people during their engagement with us.</p>
<p>4. Collaboration and mutuality – means allowing people to play an active role in their engagement, and having providers acknowledge the expertise that they bring to the process.</p>	<p>We communicated to victims that we are here to learn from their experiences and expertise, and that we believe that they are active participants in the justice system who should be treated with courtesy, respect and dignity.</p> <p>We enacted processes to ensure that we reported back to victims about how their collective contribution has informed the VOCC's work in advocating for victim-centre policy, practice and law reform.</p>
<p>5. Empowerment, voice and choice – involves people having control over their recovery and independence and their preferences regarding support services. Empowerment involves building consumer skills and allowing clients to be involved in the planning, operating, and evaluating of services.</p>	<p>We facilitated engagement in a way that built on victims' strengths and ensured their voices are heard and taken seriously.</p> <p>We provided victims with a series of choices about when, where, and how they engage with us (i.e. different methods of engagement, the ability to not respond to questions).</p> <p>We provided victims with resources and informed them of the VOCC's role and their rights and options around consent and participation.</p>

Table 1: VOCC principles of trauma-informed practice and their application

<p>6. Culture, historical and gender issues – involves a recognition of stereotypes and bias, historical trauma, and a commitment to practice that works to redress inequities and is responsive to victims’ diverse needs.</p>	<p>We worked to remove barriers to participation by ensuring our engagement work is accessible in various formats.</p> <p>We ensured our engagement work asks victims about systemic barriers that they have experienced.</p> <p>We also worked with and alongside trusted specialist services to communicate that the VOCC was seeking victims’ input into her inquiry in a way that is ethical, trauma-informed and promotes cultural safety.</p>
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Before starting to engage with victims, the VOCC Office consulted with 13 expert stakeholders to gain a deeper understanding of trauma-informed engagement methodologies and tools that have been tested and implemented with victims of crime, with a focus on victims who experience systemic barriers. This process allowed VOCC to seek insights into:

- current trends and patterns in the demographic profile of victims of crime
- the types of victimisation they experience
- the systemic barriers and challenges they encounter with the justice system.

Through sector consultation, the VOCC Office gained an understanding of how these organisations are tailoring ways to engage with victims of crime who experience systemic discrimination and may be marginalised. The organisations consulted had specialist expertise working with victims of crime who are:

- Aboriginal and Torres Strait Islander people
- people with disability, including those who experience poor mental health
- multicultural, migrant and refugee communities
- children and young people
- women, including those who experience family violence and sexual offences.

The VOCC Office also consulted with universities who specialise in research practices with a diverse range of people who are victims of crime, as well as with several justice agencies.

How the VOCC heard from victims of crime

The VOCC released a survey seeking input from individuals about their experiences of the justice system, with a specific focus on victims’ participatory rights.³² Victims were also invited to contact the VOCC’s office if they wished to talk about their experience in another way.

The VOCC received a total of 156 responses to the survey. **Appendix 1** outlines:

- the survey methodology, including survey design, distribution, accessibility, response rates
- limitations of the data, including response rates
- key statistics on the demographics of respondents.

The VOCC also invited individuals to meet with staff from the VOCC Office, either in individual interviews or focus groups, to discuss their experiences of the justice system.³³ Victims were also invited to contact the VOCC’s office if they wished to talk about their experience in another way.

The VOCC Office spoke with 17 individuals who identified themselves as victims of crime.

Due to COVID-19, and to make contact easier for victims from different locations, interviews were conducted via telephone or online where this was safe.

³² The survey was available from 22 October 2021 to 1 March 2022 at: Victims of Crime Commissioner, *Victims of crime online survey (2021)* <<https://www.victimsofcrimecommissioner.vic.gov.au/survey>>.

³³ Victims were advised that they could register for an interview with VOCC staff, and were able to book a telephone interview or an online interview. See Victims of Crime Commissioner, *How victims of crime can be involved in the system inquiry (Web Page, 2021)* <<https://www.victimsofcrimecommissioner.vic.gov.au/victim-engagement-inquiry>>.

Adopting a trauma-informed approach, victims were consulted on the best way to represent their voices and were offered multiple options and opportunities to amend or add to their contributions. Victims were also consulted about their preferences for confidentiality and/or anonymity, including how they wish to be identified (or anonymised) in the report. The VOCC aimed to respect the many and varied ways in which victims wished to contribute to the inquiry, and references to victims interviewed in this report reflect victims' preferences to the extent possible under legislation.³⁴

The VOCC also met with a number of lived-experience experts and consultants via existing advisory or committee mechanisms. Where this occurred, the Commissioner was guided by the trauma-informed practice and safety mechanisms already in place and managed by the secretariat for these groups.

Engagement with other experts and stakeholders

As noted above, the VOCC has a statutory obligation to promote the concerns of victims of crime. For this reason, victims' voices are at the centre of the VOCC's inquiry.

The VOCC also consulted with other experts and justice and victims' services system stakeholders. **Appendix 2** outlines who the Commissioner consulted with.

Research, data and information gathering

The VOCC undertook a range of complementary research and data and information gathering to supplement the views of victims participating in the VOCC's inquiry. This included:

- conducting a comprehensive literature review of relevant reviews, inquiries and research
- surveying victim support professionals, targeting frontline support workers in Victims Assistance Programs (VAPs), Centres Against Sexual Assault (CASAs) and specialist family violence services. **Appendix 1** outlines the methodology for this survey.
- in addition to consulting stakeholders, seeking written responses to requests for information from key agencies and organisations.

Appendix 1 outlines the limitations of the VOCC's Victims' Survey in detail. In summary, this includes a relatively small number of responses (156 responses) which cannot be considered a representative sample of all victims of crime in Victoria.

The VOCC wanted to give victims the greatest, and most flexible, opportunity to have their voices heard and has also aimed to account for the complexity of crime victimisation whereby victims often do not have a singular experience of victimisation. Therefore, there was no instruction or requirement for respondents to focus on a single victimisation experience or an experience between specific date ranges. For this reason, some experiences may pre-date certain justice agency or victims' services program or policy reforms. They may also pre-date certain legislative changes aimed at improving victims' experiences.

The survey was designed to be as simple as possible for victims to complete. For this reason, the VOCC did not require respondents to identify the relevant jurisdiction or prosecutorial agency of a criminal matter. This is because some victims of crime do not know what jurisdiction their matter was prosecuted in and do not understand the various justice agencies involved. Accordingly, the survey does not distinguish between crimes heard in the summary or indictable jurisdictions and therefore between agencies prosecuting the matters, although some victims (in free text answers) did provide more specific information about which prosecuting agency had managed their case.

³⁴ *Victims of Crime Commissioner Act 2015 (Vic)* s 30(2).

A note on survey and interview referencing in this report

In this report, survey responses are not referenced as survey respondents cannot be identified due to their anonymity.

Victims, lived-experience experts and advocates who participated in individual interviews or meetings have been anonymised, unless an individual has specifically asked to be identified and identifying them will not prejudice legal proceedings.

Some quotes from victims of crime have been used multiple times throughout the report where the quote is relevant across areas. For example, a victim may have talked about their feelings of participation during the prosecution process. This may be referred to in sections of the report describing victims' feelings of participation overall, as well as in sections of the report specifically relating to participation during the prosecution process.

The VOCC has not changed victims' direct words even where there may be spelling or grammatical errors so as to respect and preserve victims' direct voices.

About this report

This report has three parts:

- **Part 1** provides the background and context to this inquiry, including the history and context of victims' entitlements.
- **Part 2** sets out the VOCC's key findings on the central question of this inquiry – do victims feel like participants? Part 2 provides in-depth discussion of whether victims feel like participants and what participation feels like to them. Part 2 also discusses structural and systemic barriers to participation, along with participation across key phases of the justice system.
- **Part 3** sets out the VOCC's vision for a more authentic participatory role for victims of crime, including recommendations for reform.

Policy and law reform over the past fifty years has created increased opportunities for victims of crime to engage with, and be supported by, the justice and broader victims' services system.¹ After a long history of neglect, victims are now recognised as legitimate 'stakeholders' in the justice system.²

The criminal justice system and its traditional focus on the fairness of the trial to the accused is changing and is increasingly recognising victims' interests when considering what is required for a trial to be described as fair.

This chapter provides background and context in relation to victims of crime and the evolution of victim entitlements in Victoria.

¹ Malini Laxminarayan, 'Interactional Justice, Coping and the Legal System: Needs of Vulnerable Victims' (2013) 19(2) *International Review of Victimology* 145. Malini states: 'While 30 years ago it was correct to assert that the victim was the forgotten party of the criminal justice process, today this would be at odds with the actual situation of victims.': at 148.

² Deirdre Healy, Exploring Victims' Interactions with the *Criminal Justice System: A Literature Review* (Department of Justice, Ireland, October 2019) 8; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 29.

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Chapter 2:
**Background
and context**



Who are victims of crime?

The word 'victim' has different meanings across Victorian legislation dealing with victim entitlements, state-funded financial assistance, sentencing and the regulation and oversight of victims' services and the justice system.

Table 2: Overview of victim definitions in Victoria

Act	Definition
Victims' Charter Act³	<ul style="list-style-type: none"> • someone who suffers injury as a direct result of a criminal offence • the family member of a person who has died as a direct result of a criminal offence • a family member of a person injured as a result of a criminal offence who is under 18 years of age or incapable of managing his/her own affairs by reason of mental impairment • in the case of the criminal offence of 'grooming for sexual conduct with a child under the age of 16 years', the child and a family member
Victims of Crime Commissioner Act⁴	<ul style="list-style-type: none"> • a victim as defined by the Victims of Crime Assistance Act or/Victims of Crime (Financial Assistance Scheme) Act • a victim as defined by the Victims' Charter Act
Victims of Crime Assistance Act/Victims of Crime (Financial Assistance Scheme) Act⁵	<ul style="list-style-type: none"> • primary victim⁶ • secondary victim⁷ • related victim⁸
Sentencing Act⁹	<ul style="list-style-type: none"> • a person or body that has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence whether or not that injury, loss or damage was reasonably foreseeable by the offender

For the purposes of this inquiry, the VOCC adopts a broad definition of victim to include those who have been harmed by crime, whether they are the 'primary', 'secondary' or 'related' victim.

We also consider victims to include people who are harmed by crime but:

- do not report that crime to police or who choose not to be involved in the justice process
- have no formal role in reporting to police or being a witness
- have participated in parallel or alternative justice opportunities (like restorative justice) or civil proceedings
- may be involved in crimes mental impairment matters.¹⁰

³ *Victims' Charter Act 2006* (Vic) s 3.

⁴ *Victims of Crime Commissioner Act 2015* (Vic) s 3.

⁵ *Victims of Crime Assistance Act 1996* (Vic) s 3; *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) s 3.

⁶ A primary victim of an act of violence is a person who is injured or dies as a direct result of an act of violence committed against the person: *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 3, 9.

⁷ A secondary victim of an act of violence is a person who is present at the scene of an act of violence and who is injured as a direct result of witnessing that act: *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 3, 13.

⁸ A related victim of an act of violence is a person who, at the time of the occurrence of the act of violence was a close family member or was a dependent of or had an intimate personal relationship with a primary victim of that act who died as a result of that act: *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic) ss 3, 15.

⁹ *Sentencing Act 1991* (Vic) s 3(1).

¹⁰ Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

The impacts of crime and secondary victimisation

The impacts of crime

Many victims of crime experience unimaginable trauma. Becoming a victim of crime can have far-reaching consequences, destabilising victims' physical and psychological health, employment, study, finances, relationships and overall wellbeing.¹¹

Victims of crime experience various short- and long-term effects following a crime. Effects may include shock, loss of trust, guilt at becoming a victim of crime, a sense of uncertainty, disempowerment, increased feelings of vulnerability, and symptoms of fear, anxiety, depression, confusion, sadness, anger and stress.¹²

Because crime victimisation can have such profound impacts on victims, they are deeply invested in how the justice system responds to crime. This investment in the justice system response is enshrined in the *Victims' Charter Act 2006* (Vic) (Victims' Charter) which recognises 'that a victim of crime has an *inherent interest* in the response by the criminal justice system to that crime' (emphasis added).

Justice system and victims' needs

The justice system in Victoria includes activities and organisations involved in policing and prosecuting crimes, such as Victoria Police, the Director of Public Prosecutions, courts and lawyers. Victims may interact with some or all of these types of organisations. When victims do interact with agencies that are part of the justice system, they have a range of needs. These needs can vary over time and may differ between victims of the same types of crime.¹³

Research has found that victims' needs include:¹⁴

- voice
- validation/acknowledgement/recognition
- information
- support (emotional, practical, psychological, financial)
- control/autonomy
- compensation/reparation
- offender accountability
- offender punishment.¹⁵

Secondary victimisation

When victims' needs are not met, victims can experience secondary victimisation. This means victims are further traumatised by responses from agencies or organisations following their victimisation.¹⁶

A recognition of victims' needs – and of the harms caused by secondary victimisation – has led to a range of statutory entitlements to improve victims' experience of the justice process. Outlined below is the background to these victim entitlements in Victoria. These entitlements give context to consideration of a victim as a 'participant' or victim 'participation', which is discussed in detail in **Chapter 3**.

¹¹ Tamar Dinisman and Ania Moroz, *Understanding Victims of Crime: The Impact of the Crime and Support Needs* (Victim Support, United Kingdom, 2017) 3.

¹² *Ibid* 4.

¹³ *Ibid* 3. Dinisman and Moroz state that: 'While many victims have several of the same needs, not every victim has all needs; the characteristics of both the incident and the individual can influence the number and nature of the required needs.'

¹⁴ Nicole Bluett-Boyd and Bianca Fileborn, 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) 28. See also Robyn L Holder and Amanda L Robinson, 'Claiming Justice: Victims of Crime and their Perspectives of Justice' (2021) 27(2) *International Review of Victimology* 129, 131; Jonathan Doak, Ralph Henham and Barry Mitchell, 'Victims and the Sentencing Process: Developing Participatory Rights?' (2009) 29(4) *Legal Studies* 651, 652.

¹⁵ As noted by Holder and Robinson, accountability and punishment are not the same: Robyn L Holder and Amanda L Robinson, 'Claiming Justice: Victims of Crime and their Perspectives of Justice' (2021) 27(2) *International Review of Victimology* 129, 134.

¹⁶ Malini Laxminarayan, 'Interactional Justice, Coping and the Legal System: Needs of Vulnerable Victims' (2013) 19(2) *International Review of Victimology* 145.

Evolution of victim entitlements in Victoria

Several reports over the past decade, including key Victorian reports, have comprehensively outlined the evolution of the victims' role in the criminal justice system.¹⁷ It is now well understood that for much of the twentieth century victims were largely marginalised in the justice process, relegated to the status of a mere witness for the prosecution.¹⁸

Significant reforms have attempted to remedy the disaffection felt by victims of crime towards the justice system. Victims' rights movements, influenced by the civil and women's rights movements before them, emerged in the 1960s and 1970s. By the 1970s, Victoria had introduced the *Criminal Injuries Compensation Act 1972* (Vic) which, like other financial assistance and compensation schemes emerging around the world, marked a new phase in the recognition and provision of support for victims of crime in Victoria.¹⁹

Policy and law reform over the past fifty years has increased opportunities for victims of crime to engage with and be supported by the justice and broader victims' services system.²⁰ After a long history of neglect, victims are now recognised as legitimate 'stakeholders' in the justice system.²¹

United Nations Declaration

The United Nations *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power* (UN Declaration) in 1985 marked another significant point in the development of victims' rights. The UN Declaration described basic principles for the treatment of victims, including that victims be:²²

- treated with compassion and respect for their dignity
- informed of their role and the timing and progress of a case
- entitled to redress and restitution by the offender, with financial compensation from the state where restitution is not possible
- provided proper assistance throughout the legal process
- protected in relation to their privacy and their safety
- provided the necessary material, medical, psychological and social assistance to recover from crime.

Significantly, the UN Declaration stated that the needs of victims should be facilitated by:

[a]llowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.²³

While the UN Declaration marked a significant worldwide recognition of victims and their status, translating the Declaration's principles into practice proved challenging.

In Victoria, it has been suggested that the non-specific wording of the UN Declaration hampered its effective implementation in this state. Victoria's Department of Justice (as it was then known) stated in 2005 that implementing the procedural justice aspects of the UN Declaration had proven 'problematic' because there was a lack of consensus about the extent to which victims should have procedural rights in the criminal justice process.²⁴

The need for a Victims' Charter in Victoria

In 2005, the then-Victorian Department of Justice released a consultation paper for a proposed victims' charter 'that would clearly state the rights of victims of crime'.²⁵

In attempting to chart a way forward for recognising victims' interests in Victoria, while not impacting on the operation of the justice system and the rights of the accused, the consultation paper articulated some of the tensions between victims and the state, including that:

- decisions to prosecute are based on the strength of evidence (whether there is a reasonable prospect of a conviction) and 'public interest', and such considerations do not always align with victims' interests

¹⁷ See, generally, Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016).

¹⁸ Kerstin Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Palgrave MacMillan, 2019) 1.

¹⁹ Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Supplementary Consultation Paper, 2017) 15.

²⁰ Malini Laxminarayan, 'Interactional Justice, Coping and the Legal System: Needs of Vulnerable Victims' (2013) 19(2) *International Review of Victimology* 145, 148.

²¹ Deirdre Healy, *Exploring Victims' Interactions with the Criminal Justice System: A Literature Review* (Department of Justice, Ireland, October 2019) 8; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 29.

²² *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN GA Res 40/34 (29 November 1985).

²³ *Ibid* [Article 6(b)].

²⁴ Department of Justice (Victoria), *Victims' Charter: Community Consultation Paper* (2005) 12.

²⁵ *Ibid* 4.

- even where a victim may not wish a matter to proceed, a prosecutor may have reason to continue a prosecution in the public interest, regardless of the victim's wishes
- where a victim wishes a matter to proceed, a prosecutor may determine a prosecution should not proceed because of a determination that there is not a reasonable prospect of a conviction, regardless of the victim's wishes
- prosecutors may pursue plea negotiations (i.e. accepting a guilty plea to a less serious offence) regardless of a victim's views.²⁶

The consultation paper also stated that victims':

[I]lack of legal status in the criminal justice system has been identified as one of the major obstacles facing victims; they have become a disenfranchised group who *have ceased to be active participants in the justice process*.²⁷ (emphasis added)

As demonstrated by the above consultation paper extract, victims' lack of 'active' participation in the justice process was a major impetus for introducing a Victims' Charter in 2006.

Introduction of the Victims' Charter

The *Victims' Charter Act 2006 (Vic)* (Victims' Charter) aimed to prioritise victim recovery, minimise secondary victimisation, and incorporate the principles outlined in the UN Declaration.²⁸

The purpose of the Victims' Charter was to set out minimum standards that would apply to criminal justice and government agency responses when dealing with victims of crime.²⁹ It was considered the Victims' Charter would provide a 'benchmark' in developing service standards and victims' policies across the justice system:

Enshrining these principles in legislation provides a clear recognition by the government of victims of crime and their important role in the criminal justice process. It will form the basis for future policy development in this area.³⁰

The Victorian Government's intention was to develop a framework encompassing all existing legislative rights and entitlements for victims, but not to broaden existing rights and entitlements.³¹

The Victims' Charters' objectives were to:

- provide statutory recognition for victims of crime and the harm caused by offending
- establish principles to govern responses by the criminal justice system to victims
- minimise secondary victimisation and improve victims' experiences of the criminal justice system.³²

The Victims' Charter set out non-enforceable entitlements for victims of crime, including entitlement to:

- respectful treatment
- information
- protection from an accused in court
- make a victim impact statement
- privacy
- access compensation
- certain information about the offender.

The Victims' Charter did not create a legal right to recourse for victims experiencing breaches of their entitlements. In fact, section 22 of the Victims' Charter specifically states that no legal rights are affected by the Victims' Charter:

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

At the time the Victims' Charter was introduced it also did not create any independent complaints pathways or mechanisms for oversight or monitoring whether victims' entitlements were being upheld by justice and victims' services agencies.³³

²⁶ Ibid 8.

²⁷ Ibid 8.

²⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 14 June 2006, 2046 (Rob Hulls, Attorney-General).

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Changes were made in 2019 to the VOCC's role to provide the VOCC with powers to receive complaints from victims who felt their Victims' Charter rights had been breached and to monitor prescribed agencies' compliance with the Victims' Charter.

While the Victims' Charter has undoubtedly assisted with elevating victims' interests and entitlements in the justice system since its introduction,³⁴ the Second Reading Speech for the Victims' Charter made clear Parliament's intention for it to continue to 'facilitate the *ongoing* cultural change within the criminal justice system'³⁵ (emphasis added), suggesting further work would be required to elevate victims' status and role.

Introduction of the Victims of Crime Commissioner

The first Victorian Victims of Crime Commissioner (VOCC) was appointed in October 2014. The Commissioner's role was formalised through the *Victims of Crime Commissioner Act 2015 (Vic)* (the VOCC Act) which established the Victims of Crime Commissioner as a Governor-in-Council appointment with clearly stated functions and powers.

The legislative intent was to create an independent commissioner whose role would focus on recognising victims within the justice system, representing victims' interests to the government, and promoting victims' inclusion and participation within the justice system.³⁶

Inquiry into the role of victims in the criminal trial process

In 2016 the Victorian Law Reform Commission (VLRC) released *The Role of Victims of Crime in the Criminal Trial Process* (the VLRC's 2016 report). The VLRC noted that while victims' experiences of the criminal justice system had improved over the years, there was disparity between legislative entitlements and the actual experiences of victims.³⁷

The VLRC heard from many victims who had felt marginalised, had been provided with inconsistent information and services, and generally treated poorly throughout the criminal justice process.

Victims told the VLRC that they felt disempowered or excluded from the criminal trial process and described their relationship with the prosecution as that of a 'passive receiver of information', 'observer' and an 'outsider'.³⁸ The VLRC reported that victims wanted 'greater input into decisions by the prosecution and the court that affect them'.³⁹

To remedy victims' disaffection, the VLRC envisaged a triangulation of interests in the criminal trial: those of the state, the victim and the accused.⁴⁰

The VLRC's 2016 report contained 51 recommendations, including that victims be recognised as participants in the criminal justice process:

The victim is neither a bystander nor a party, *but is a participant whose role is essential to the effective functioning of the criminal justice system*...The recognition of victims as participants reflects the reality of victims' inherent interest in the criminal trial process and the various capacities in which they may be involved in that process. It gives proper regard to the hardship experienced by victims as a result of crime, their special interest in the criminal trial process, and their contribution to the detection and prosecution of crime in society.⁴¹ (emphasis added)

The VLRC asserted that providing statutory recognition of the victim's interest in the criminal justice system's response to the crime, and recognising their status as 'participants', would support the necessary shift in how victims are perceived and treated by criminal justice agencies and the courts.⁴² The VLRC also asserted that recognising victims as participants was 'consistent with modern jurisprudence on the triangulation of interests in the criminal trial: those of the state, the victim and the accused'.⁴³

Further, the VLRC stated that such legislative recognition:

would bring together conceptually the disparate legislative and procedural measures that have been introduced over the past 30 years and provide a common basis for understanding the victim's role as a participant in the criminal trial process.⁴⁴

This concept of the victim as participant, and victim participation, is discussed in more detail in **Chapter 3** of this report.

Key recommendations from the VLRC's 2016 report are summarised below.

³⁴ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 12.

³⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 14 June 2006, 2047 (Rob Hulls, Attorney-General).

³⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 September 2015, 3278-3279 (Martin Pakula, Attorney-General).

³⁷ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 14.

³⁸ *Ibid* 33.

³⁹ *Ibid* 33.

⁴⁰ *Ibid* 27.

⁴¹ *Ibid* 30.

⁴² *Ibid* 34.

⁴³ *Ibid* 30.

⁴⁴ *Ibid* 34.



Key recommendations of the 2016 VLRC report *The Role of Victims of Crime in the Criminal Trial Process* relating to victim participation

- **The objects of the Victims' Charter should be amended:** to include recognition that a victim of crime has an inherent interest in the response by the criminal justice system to that crime, which gives rise to the rights and entitlements that are conveyed in the Act and shape the victim's role as a participant in the criminal trial process. Section 6(2) of the Victims' Charter should be amended to require investigatory, prosecuting and victims' services agencies to treat victims with courtesy and to respect their dignity and their rights and entitlements as participants in the criminal trial process.
- **Recognising victims as participants in the *Charter of Human Rights and Responsibilities Act 2006*:** Part 2 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) should be amended to include a right for a victim of a criminal offence that contains the following minimum guarantees: (a) to be acknowledged as a participant (but not a party) with an interest in the proceedings (b) to be treated with respect at all times (c) to be protected from unnecessary trauma, intimidation and distress when giving evidence.
- **Establishment of a legal service for victims of indictable crimes:** Victoria Legal Aid should be funded to establish a service for victims of violent indictable crimes, modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW. It should provide legal advice and assistance, in accordance with the *Legal Aid Act 1978* (Vic), in relation to: (a) substantive legal entitlements connected with the criminal trial process (b) asserting a human right, or protecting vulnerable individuals, in exceptional circumstances.
- **More robust consultation requirements on prosecuting agencies:** The Victims' Charter should be amended to require prosecuting agencies to consult with victims before the prosecution makes a decision to: (a) not proceed with some or all charges (b) accept a plea of guilty to a lesser charge (c) apply for, agree to or oppose an application for summary jurisdiction (d) agree to or oppose an application to cross-examine the victim at committal (e) pursue an appeal against a sentence or acquittal.
- **Giving victims of sexual assault greater involvement in decisions about confidential communications:** Division 2A of Part 2 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) should be amended by: (a) requiring the prosecution to notify the victim of their right to appear and the availability of legal assistance in relation to an application to subpoena, access and use their confidential communications (b) requiring the court to be satisfied that the victim is aware of the application and has had an opportunity to obtain legal advice (c) prohibiting the court from waiving the notice requirements except where the victim cannot be located after reasonable attempts or the victim has provided informed consent to the waiver (d) providing victims with standing to appear (e) permitting victims to provide a confidential sworn or affirmed statement to the court specifying the harm the victim is likely to suffer if the application is granted.
- **Establishment of an intermediaries scheme:** The Department of Justice and Regulation, in consultation with the Office of the Public Advocate, should establish a scheme for the appointment of professional intermediaries, modelled on the Witness Intermediary Scheme in England and Wales. The intermediaries would assist in obtaining evidence from child victims and victims who have a disability, as defined by the *Equal Opportunity Act 2010* (Vic), that is likely to diminish the quality of their evidence.
- **Establishment of a statutory restorative justice scheme:** The Victorian Government should establish a statutory scheme for restorative justice conferencing for indictable offences in Victoria that is supplementary to the criminal trial process.
- **Enhanced compensation and restitution processes:** The *Criminal Procedure Act 2009* (Vic) should be amended to enable victims to seek leave to appeal, independently of the Director of Public Prosecutions: (a) a refusal by the Supreme Court or County Court to make an order pursuant to Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic) (b) orders made by the Supreme Court or County Court pursuant to Divisions 1 and 2 of Part 4 of the *Sentencing Act 1991* (Vic).

Victims recognised as participants in Victoria

Following the VLRC's 2016 report, the Victorian Government introduced amendments to the Victims' Charter to recognise 'the victim's role as a participant, but not a party, in proceedings for criminal offences' in the Victims' Charter objects.⁴⁵ These amendments introduced by the Victorian Government in 2018 also require investigatory agencies, prosecuting agencies and victims' services agencies to 'respect the rights and entitlements of victims as participants in proceedings for criminal offences'.⁴⁶

Contrary to the VLRC's recommendation, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was not 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.

The following recommendations relevant to victim participation have also not been implemented to date:

- establishment of a broad-based victims' legal service for victims of violent indictable crimes⁴⁷
- a statutory scheme for restorative justice conferencing for indictable offences in Victoria⁴⁸
- strengthening of entitlements in relation to restitution and compensation orders.⁴⁹

New functions and powers for the Victims of Crime Commissioner

Following the VLRC's 2016 report, the Victorian Government introduced new powers for the VOCC to report on justice agencies' and victims' services' compliance with the Victims' Charter. These powers included:

- receiving complaints from victims of crime in relation to an agency's compliance with the Victims' Charter principles
- monitoring and reporting on investigatory, prosecuting and victims' services agencies' compliance with the Victims' Charter.

Since 2019, the VOCC has been responsible for:

- reporting on how agencies meet their legal obligations under the Victims' Charter
- investigating complaints from victims of crime who believe their rights and entitlements under the Victims' Charter have not been met by an investigatory body, prosecuting agency and/or victims' service
- advocating for the respect, recognition and inclusion of victims of crime in the Victorian justice system
- conducting systemic inquiries
- representing the concerns of victims of crime to government and other decision-making bodies.

The Commissioner is also required to start a review of the Victims' Charter no later than 2024.

Victims' entitlements in Victoria – an overview

Victims in Victoria now have entitlements, both enshrined in the Victims' Charter and in other legislation to:

- respectful treatment by justice and victims' services agencies
- special treatment, by virtue of unique characteristics or their role as witness
- receive information about an investigation and prosecution, along with appropriate referrals to support
- state-funded financial assistance
- privacy and protection in court
- a range of procedural and evidentiary protections, including for certain crimes or certain victim cohorts based on specific characteristics

⁴⁵ *Victims' Charter Act 2006* (Vic) s 4(1)(ba).

⁴⁶ *Ibid* s 7A.

⁴⁷ The Victorian Government has created a 'Victims Legal Service' which is limited to helping victims to access state-funded financial assistance, compensation and restitution. See Victorian Government, *Reforms we will deliver to support victims of crime* (Web Page, 15 June 2022) <<https://www.vic.gov.au/victim-support-update/reforms-we-will-deliver-support-victims-crime#delivering-a-new-victims-legal-service>>. This is not consistent with the VLRC's vision of a broader, more comprehensive victims' legal service.

⁴⁸ The Victorian Government has introduced a 'Victim-Centred Restorative Justice Program' for some victims of crime but it is not a statutory scheme and applies to a limited cohort or victims who have been through the criminal trial process: see 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/vcrj/restorative-justice-for-victims-of-crime-on-the-victims-register>.

⁴⁹ Noting that the Victims Legal Service will address some barriers for victims' access to restitution and compensation.

- take part in certain justice system processes, including:
 - being consulted during certain prosecutorial decision-making processes
 - being heard in relation to applications for leave to produce confidential communications in sexual offence matters
 - making a Victim Impact Statement
 - applying for compensation or restitution
 - being heard in relation to certain treatment,⁵⁰ post-sentence⁵¹ or parole decisions
 - applying for leave to appear as an interested party in a coronial proceeding
 - applying to the court to review a suppression order.

While victims now have a range of entitlements, many of these entitlements can be categorised as ‘passive’, such as the right to receive information.⁵²

Doak has noted that while reforms to improve victim services have often received a ‘warm reception’, providing victims with procedural rights has always proved much more contentious.⁵³

In this context, Freiberg and Flynn articulate a tension between proponents of more active or participatory rights for victims and those questioning whether such participation can be accommodated in an adversarial system:

Despite the strong and cogent arguments in favour of greater victim participation, *there remain problems that have limited the adoption of many of the recommendations made by the proponents of more victim participation in the criminal justice system.* The principal arguments against such participation are founded on the traditional view of the adversarial system, which regards the criminal contest as between two parties – the state and the accused – and therefore assumes that the addition of a third party (the victim) would unfairly disadvantage the accused by diminishing their rights, rendering the proceedings more confrontational and hindering the speedy resolution of cases.⁵⁴ (emphasis added)

This more contentious notion of victim ‘participation’ is considered further in **Chapter 3**.

Victims’ experiences of the justice system

Previous reviews and inquiries

Over the past two decades, there have been many significant reports and inquiries examining victims’ experiences of the justice and victims’ service system.⁵⁵ The breadth of these reviews demonstrates the complexity of the criminal justice system. Some reviews and inquiries also serve to demonstrate victims’ sometimes contentious, and often precarious, place in the justice system.

One of the striking features when taking a global view of these reviews and inquiries is the similarity in key findings and recommendations, including:

- The need for cultural change and ongoing training and education in the justice system in relation to victims’ rights and trauma-informed practices, particularly for police, legal professionals and the judiciary.
- Deficiencies in the provision of support to victims, including a lack of specialised, consistent and targeted support, providing victims with a single (consistent) advocate or ‘one-stop shop’.
- That victims continue to have a range of unmet legal needs, highlighted across general reviews and inquiries, as well as cohort or crime-specific reviews.
- That victims need better provision and coordination of information between different parts of the service and justice system.
- ‘Implementation gaps’ – victims often have rights ‘on paper’, but they are often not implemented or able to be realised, whether because of a lack of resources or because the culture within organisations and across the justice system has not changed.

⁵⁰ Where a person is found not guilty or unfit to stand trial due to mental impairment under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

⁵¹ 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) <<https://www.postsentenceauthorityvic.gov.au/post-sentence-scheme>>.

⁵² Maarten Kunst, Lieke Popelier and Ellen Varekamp, ‘Victim Satisfaction with the Criminal Justice System and Emotional Recovery: A Systematic and Critical Review of the Literature’ (2015) 16(3) *Trauma, Violence, & Abuse* 336, 337.

⁵³ Jonathan Doak, Ralph Henham and Barry Mitchell, ‘Victims and the Sentencing Process: Developing Participatory Rights?’ (2009) 29(4) *Legal Studies* 651, 651.

⁵⁴ Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 10 <<http://link.springer.com/10.1007/978-3-030-61383-9>>.

⁵⁵ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016); Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Report No 38, July 2018); Centre for Innovative Justice, *Strengthening Victoria’s Victim Support System: Victim Services Review* (Report, November 2020); Victorian Law Reform Commission, *Stalking* (Report No 45, June 2022); 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/LCLSLIC_59-10_Vic_criminal_justice_system.pdf>; 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).

- Agencies, including those with statutory obligations towards victims and those providing essential services to victims, face significant funding and resourcing challenges, making them unable to meet the needs and entitlements of victims.
- Victims are not a homogenous group – each victim is different, creating complexity in meeting victims' needs and entitlements. A 'one-size-fits-all' approach to victims (whether it concerns services or information) is inadequate.
- There are many barriers to recognising the interests and entitlements of victims, particularly for different victim cohorts (e.g. for children and young people, Aboriginal and Torres Strait Islander people, people with disabilities, people from culturally and linguistically diverse communities, people from LGBTIQ+ communities, victims of family violence or sexual assault, people living in rural and regional communities).

While most reviews find that resourcing for victims' services agencies and investigatory and prosecuting agencies is a significant problem, cultural problems in recognising victims' interests and entitlements remain.

Barriers to improving victims' participation

In 2016, the VLRC said that progress in changing the criminal justice system for victims 'has been at times slow and limited'.⁵⁶ There remains a tension between proponents of more participatory rights for victims and those questioning whether such participation can be accommodated, particularly in relation to the criminal trial process, which adopts an adversarial approach.

While reforms to improve victim support (and to a lesser extent, 'passive' information rights) have been more widely supported, enabling an active participatory role for victims both in the trial process and in other justice processes, such as bail or parole, has proven far more controversial.⁵⁷

Identified below are some of the barriers to enhancing victim participation in Victoria.

Changes in the law are often incremental

Changes to improve victims' participation in the criminal justice system largely reflect a process of incremental change. Incremental change in policy and law reform is not unique to victims' rights, but in this context may reflect:

- a progressive understanding and development of knowledge about what victims need, based on evaluations and research done over time
- the nature of government reform processes which take time, require dedicated resources and may be influenced by competing demands and other reform agendas
- the challenges of securing sufficient government funding to translate policy objectives into tangible outcomes for victims (i.e. many victim entitlements depend on government-funded agencies having the resources to facilitate or uphold victims' entitlements)
- the competing goals and demands of different parts of the justice system which are sometimes presented as in binary opposition to victims' interests.

Incremental change can also reflect that some reform opportunities have met with resistance. It can also mean key stakeholders in the justice system continue to interpret progress differently. For example, the VLRC's 2016 report into victims found that the Law Institute, Victorian Bar and the Criminal Bar Association believed that improper questioning of witnesses is rare and judicial officers 'are adequately enforcing existing protections'.⁵⁸ However, victims, victim support workers and some legal professionals and judicial officers said that 'judicial intervention is not always adequate and improper questioning still occurs'.⁵⁹

Similarly, in 2022, the Criminal Bar Association opposed the introduction of a bill legislating for 'affirmative consent', and was quoted in the media as stating that a suite of reforms had already been introduced over the past decade to strengthen the state's sexual assault laws.⁶⁰ This was despite a VLRC review of justice system responses to sexual assault laws in 2021 which found the law in relation to consent needed reform.

⁵⁶ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) xvi.

⁵⁷ Jonathan Doak, Ralph Henham and Barry Mitchell, 'Victims and the Sentencing Process: Developing Participatory Rights?' (2009) 29(4) *Legal Studies* 651, 651.

⁵⁸ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 96.

⁵⁹ *Ibid.*

⁶⁰ Sumeeya Ilanbey, 'Lawyers Criticise State's Proposed Sexual Consent Laws', *The Age* (online, 11 August 2022) <<https://www.theage.com.au/politics/victoria/lawyers-criticise-state-s-proposed-sexual-consent-laws-20220810-p5b8mp.html>>.

Opposition to criminal justice reform more generally is well known. The criminal justice system is 'steeped in tradition' and is 'reactionary rather than proactive'.⁶¹ In part this reflects the focus of the legal profession on precedents. It also reflects the analytical focus of lawyers who are trained in deconstructing cases and arguments. A particular challenge with victim participation is that any change to victim participation is likely to be new and most people in the justice system have not had exposure to victims' experiences, perspectives, and rights as part of their training in the law.

Right to a fair trial

Opposition to increasing victim participation can arise because of a concern that reforms may inappropriately affect or limit the right of the accused to a fair trial.

It could be argued that one of the barriers to improving victim participation lies in the way victim participation is often discussed. As Manikis says, the

literature on victim participation in criminal justice has often framed the interests of victims in opposition to those of the accused. Indeed, the rhetoric of 'balancing rights' or 'balancing interests' of the accused with those of victims reinforces a zero-sum game perception of criminal processes where victims advance punitive aims.⁶²

Framing victim participation as a 'zero-sum game' suggests that there are only a limited number of rights potentially available in a trial and that any right that a victim secures comes at the expense of the right to a fair trial that the accused currently possesses.

Fair trial considerations have often focused on the accused's right to a fair trial.⁶³ In the latter parts of the 20th century, criticisms of criminal laws and criminal trials from feminist critiques and victims' rights movements have expanded what is necessary for a trial to be fair.⁶⁴ Further, fair trial principles reflect changing social and political standards.⁶⁵ The common law and fair trial principles have some flexibility to evolve with changes in society, such as changes in technology and societal expectations.⁶⁶

Lord Steyn referred to a 'triangulation of interests', reflecting the public interest in a fair trial for the accused, victim, and the community.⁶⁷ This formulation may continue to expand. The scope of changes supported or warranted by this expanded notion of a fair trial is yet to be fully realised.⁶⁸

This evolving and broader focus of fair trial interests has been criticised. Academics Anthony Duff et al have argued that the criminal trial is 'under attack' from victim-oriented changes.⁶⁹ They contend that these changes 'threaten to erode traditional conceptions of the criminal trial'⁷⁰ and may compromise the function and purpose of the trial. In the view of Duff et al, it is not necessary to recognise victims as participants because a criminal trial is a public enquiry that always considers the interests of victims.⁷¹ However, as Kirchengast says, this 'interpretation of the role of the victim' recognises victims 'as significant only to the extent interpreted by the prosecutor in the public interest'.⁷²

Describing criminal trials, as Duff et al do, with such a narrow and traditional or binary focus 'tends to reinforce the status quo'.⁷³ It focuses on the rights of the accused and does not sufficiently take account of the need to consider victims' interests through a triangulation of interests.⁷⁴ As Kirchengast observes, '[j]ust as defendants may be convicted and sentenced improperly, victims can be silenced and removed from a system with which they are otherwise intimately connected'.⁷⁵ It is therefore important to recognise that the criminal trial can change and be a more 'inclusive forum through which various perspectives and interests come to be valued'.⁷⁶ Triangulating fair trial interests provides a principled means for changing criminal proceedings in a more inclusive way.

61 Jacqueline Horan and Shelley Maine, 'Criminal Jury Trials in 2030: A Law Odyssey' (2014) 41 *Journal of Law and Society* 551, 553.

62 Marie Manikis, 'A New Model of the Criminal Justice Process: Victims' Rights as Advancing Penal Parsimony and Moderation' (2019) 30 *Criminal Law Forum* 201, 208.

63 This can be seen in the specific minimum guarantees for a fair trial set out in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2), 14(3).

64 Jill Hunter, Terese Henning, Jeremy Gans and Kate Warner (eds), *Criminal Process and Human Rights* (Federation Press, 2011) 381. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 27.

65 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 93.

66 *Dietrich v The Queen* (1992) 177 CLR 292, 328 (Deane J); Chief Justice James Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 43.

67 *R v A (No 2)* [2002] 1 AC 45, 65 [38].

68 See, eg, Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37 *Melbourne University Law Review* 539, 559.

69 Anthony Duff et al, *The Trial on Trial: Volume 3. Towards a Normative Theory of the Criminal Law* (Hart Publishing, 2007) 1.

70 *Ibid* 1-2.

71 *Ibid* 214.

72 Tyrone Kirchengast, 'Recent Reforms to Victim's Rights and the Emerging "Normative Theory of the Criminal Trial"' (2010) 56 (Issues 1-2) *Criminal Law Quarterly* 82, 88.

73 Mary Jane Mossman, 'Running Hard to Stand Still: The Paradox of Family Law Reform' (1994) 17(1) *Dalhousie Law Journal* 5, 10.

74 Tyrone Kirchengast, 'Recent Reforms to Victim's Rights and the Emerging "Normative Theory of the Criminal Trial"' (2010) 56 (Issues 1-2) *Criminal Law Quarterly* 82, 111.

75 *Ibid*.

76 *Ibid* 86.

Adopting the approach to triangulating fair trial interests, the VLRC said that:

The legitimate rights of victims, properly understood, do not undermine the legitimate rights of the accused or of the community, properly understood. The true interrelationship of the three – victim, accused and community – is mutual and complementary, not exclusory.⁷⁷

The VLRC said that the interests of the victim should be considered 'alongside those of the accused and the community'.⁷⁸ As then Chair of the VLRC, the Hon P D Cummins AM said, the 'courts have remained confined by the binary interests of the prosecution and defence, whereas jurisprudence has evolved to a broader understanding of the criminal trial'.⁷⁹ This legitimate public expectation includes recognising the importance of victim participation in ensuring a (triangulated) fair trial. The VLRC said that the accused's right to a fair trial can be protected while treating victims fairly, with 'appropriate respect for their dignity and humanity'.⁸⁰

Concerns about unfairly disadvantaging the accused

In addition to a perception that victims' reforms may unfairly disadvantage the accused, opposition to victims' reforms may also reflect a view that victims are motivated by private interests or by being overly 'punitive'.⁸¹ For example, victim impact statements have been criticised as increasing the chances of biasing legal decision makers towards decisions that are disadvantageous for defendants.⁸²

There are occasions where victims have sought law reform that is more punitive in nature, for example, calling for longer prison sentences. However, research from the Centre for Innovative Justice indicates that being punitive is often not a prime motivating factor for victims. For example, procedural justice is more important to many victims than the outcome in determining their satisfaction with the criminal justice system. Procedural justice can include prosecutors taking an interest in the victim, listening to and considering victim's wishes, and according victims respect and recognition.⁸³ Other research has reached the same conclusion, namely that improving victim participation can promote 'non-punitive, moderate and parsimonious interests'⁸⁴ and that improving victim participation need not come at the expense of the accused's interests.⁸⁵

Resourcing and funding

Another barrier to improving victim participation relates to the practicalities of elevating another actor in the criminal justice system to a status that would increase demands on scarce funding and resourcing.

The costs associated with implementing changes, including the pressure such initiatives would put on other justice agencies and the courts who would be required to change processes, policies, IT and physical infrastructure (and be appropriately funded to do so), are likely to have influenced the level of support by policy makers for increased participation for victims of crime.⁸⁶

⁷⁷ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) xiv.

⁷⁸ *Ibid* 10.

⁷⁹ *Ibid* vi.

⁸⁰ *Ibid* 196.

⁸¹ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 133, 151; Marie Manikis, 'A New Model of the Criminal Justice Process: Victims' Rights as Advancing Penal Parsimony and Moderation' (2019) 30 *Criminal Law Forum* 201, 208.

⁸² Maarten Kunst, Giulia de Groot, Jelmar Meester, Janne van Doorn, 'The Impact of Victim Impact Statements on Legal Decisions in Criminal Proceedings: A Systematic Review of the Literature across Jurisdictions and Decision Types' (2021) 56 *Aggression and Violent Behavior*, 1. <<https://linkinghub.elsevier.com/retrieve/pii/S1359178920302160>>.

⁸³ 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) 20.

⁸⁴ Marie Manikis, 'A New Model of the Criminal Justice Process: Victims' Rights as Advancing Penal Parsimony and Moderation' (2019) 30 *Criminal Law Forum* 201, 208. See also Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconciling the Role of Third Parties* (Bloomsbury, 2008) 152–53.

⁸⁵ Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 110–12 <https://link.springer.com/10.1007/978-3-030-61383-9_2>.

⁸⁶ Cost and resourcing implications were noted in a recent Victorian Government report as a policy rationale for not implementing strengthened rights for victims: Victorian Government, *Review to Improve Victims' Experience of Summary Criminal Proceedings* (Web Page, November 2021) <<https://engage.vic.gov.au/review-improve-victims-experience-summary-criminal-proceedings>>.

As outlined in **Chapter 2**, following the Victorian Law Reform Commission's report, *The Role of Victims of Crime in the Criminal Trial Process* (the VLRC's 2016 report), the *Victims' Charter Act 2006* (Vic) (Victims' Charter) was amended in 2018 to recognise 'the victim's role as a participant, but not a party, in proceedings for criminal offences' in the Victims' Charter objects.¹

The Victims' Charter further states that investigatory agencies, prosecuting agencies and victims' services agencies are to 'respect the rights and entitlements of victims as participants in proceedings for criminal offences'.²

In order to provide context to this report, this chapter considers:

- why victims have come to be described as participants in Victorian legislation
- what is meant by 'participation' or being a 'participant', including why these terms may not have been defined in legislation such as the Victims' Charter
- the extent of victims' current participatory entitlements
- barriers to victim participation in Victoria.

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

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

3

Chapter 3:
**Victim participation –
an overview**



Why describe victims as participants?

Lack of participation linked to secondary victimisation

Lack of participation in the justice system – or not being treated like a participant – has been shown to be a primary source of dissatisfaction for victims and has been linked to secondary victimisation.³

Victims told the VLRC that they felt disempowered or excluded from the trial process, feeling like a “passive receiver of information”, an “observer”, and an “outsider”.⁴

Increased participation for victims is linked to procedural justice research which demonstrates that offering victims a role in proceedings enhances justice system legitimacy and the acceptance of justice outcomes.⁵ Academic Jonathon Doak states that ‘victim participation increases satisfaction with justice through giving victims a sense of empowerment and official, albeit symbolic acknowledgement.’⁶

Conversely, failure to offer victims a chance to participate in criminal proceedings can ‘result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm’.⁷ Academics Freiberg and Flynn assert that:

increased victim participation in the criminal justice process has been said to vindicate and reinforce the rights of individuals to participate in all those government processes that most affect their lives, and to assist in restoring the dignity of the individual and in recognising the victims’ moral and emotional needs.⁸

Finding the right description for victims’ role

A major barrier for recognising victims has been their lack of legal status within the justice system.⁹ While victims have an interest in how the criminal justice system is administered, in ‘terms of substance, processes and outcomes’,¹⁰ their lack of legal status within the justice system has been a major barrier to their participation.¹¹

The criminal justice system has long recognised parties (the prosecution and the accused) and witnesses but a victim may or may not be a witness in a criminal proceeding. Because of victims’ lack of official status in criminal proceedings, victims have often not been informed or involved in ‘their’ case, despite having an inherent and legitimate interest in the way criminal justice is administered.¹²

Finding the right description for the role of victims in the criminal justice system is challenging. Some of the challenge arises from the adversarial nature of the justice system – that it is a contest between the state and the accused. However, another challenge arises because a victim’s ‘role’ in the justice system can vary considerably from one case to the next. For example, victims can be significantly harmed by a crime but have no ‘formal’ role in the justice system. A bereaved family member of a homicide victim may initially be unaware that a crime has occurred, have no role in reporting the crime to police and may not be required as a witness in the criminal trial. Their lives, however, are immeasurably impacted by the outcome of a criminal trial.

In other cases, such as sexual assault, the state often requires a victim to report the crime to police. In these cases, the victim will be integral to the prosecution as a complainant and witness. Therefore, the way in which the State and various justice ‘actors’ relate to, intersect with and ultimately inform and include victims and their varied roles, must not only ‘flex’ and adapt to the role of victims in the specific contexts of a case, but also individual victims’ preferences for their level of involvement in the justice process.

Furthermore, those working in the justice system tend to view the role of victims relevant to their specific function and role. For example:

- police are required to view victims in the context of their investigatory role, including assessing a victim’s credibility¹³

3 Antony Pemberton and Sandra Reynaers, ‘The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements’ in Edna Erez, Jo-Anne Wemmers and Michael Kilchling (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Publishing, 2011) 229; see also Kerstin Braun, *Victim Participation Rights: Variation Across Criminal Justice Systems* (Palgrave MacMillan, 2019) 3.

4 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 33.

5 Antony Pemberton and Sandra Reynaers, ‘The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements’ in Edna Erez, Jo-Anne Wemmers and Michael Kilchling (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Publishing, 2011) 229; Jonathan Doak, Ralph Henham and Barry Mitchell, ‘Victims and the Sentencing Process: Developing Participatory Rights?’ (2009) 29(4) *Legal Studies* 651, 653.

6 Jonathan Doak, Ralph Henham and Barry Mitchell, ‘Victims and the Sentencing Process: Developing Participatory Rights?’ (2009) 29(4) *Legal Studies* 651, 653.

7 Erin Ann O’Hara, ‘Victim Participation in the Criminal Process’ (2005) 13(1) *Journal of Law and Policy* 229, 244.

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

9 Department of Justice (Victoria), *Victims’ Charter: Community Consultation Paper* (2005) 8.

10 Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconciling the Role of Third Parties* (Hart Publishing, 2008) 243.

11 Department of Justice (Victoria), *Victims’ Charter: Community Consultation Paper* (2005) 8.

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

13 Eryn Nicole O’Neal, ‘“Victim Is Not Credible”: The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants’ (2019) 36(1) *Justice Quarterly* 127, 127.

- prosecution represent the state and are required to acquit their duties independent of the government, police, the victim or any other person,¹⁴ therefore ‘the public prosecutor’s contemporary role, which now includes helping to facilitate victims’ inclusion in the criminal justice system, can sit uneasily with their overarching duties’¹⁵
- judicial officers control how hearings and trials are conducted and are ‘impartial decision-makers in the pursuit of justice’¹⁶ – victims of crime are just one of many ‘stakeholders’ a judicial officer is required to accommodate and incorporate in the pursuit of justice.

Move towards victims as participants

In 2016, the VLRC concluded that the victims’ role had already evolved and changed and that victims were now more accommodated in the trial process.¹⁷ However, the VLRC stated that ‘the language and conceptual basis of the victim’s role had not evolved in line with the changes to the role itself’ and that this had ‘contributed to the fragmented development of victim-oriented laws and policies, and a related lack of compliance’.¹⁸

The VLRC concluded that the word ‘victim’ was insufficient to describe the victim’s inherent interest in the justice system, nor ‘their integral part in the response’.¹⁹ Nor was the term ‘witness’ sufficient or appropriate.²⁰ Stakeholders told the VLRC that victims should be described by a term that communicates victims as ‘actors’ within the justice system.²¹

The VLRC recommended that victims be described as ‘participants’ in the criminal justice system. The VLRC concluded that victims should be recognised as ‘participant[s] whose role is essential to the effective functioning of the criminal justice system’,²² stating such recognition of victims as participants reflects the reality of victims’ inherent interest in the criminal trial process.²³

The term ‘participant’ provides a way of describing the importance of victims and signifies the need to respect victims’ rights, entitlements and interests.

What is meant by participation or participant?

Legislation does not define ‘participation’ or ‘participant’

Describing a victim as a participant in the criminal justice system is designed to provide a unifying idea of the role of a victim. However, while reconceptualising the role of victims as a ‘participant’, the VLRC did not define what it means to be a participant. The Victims’ Charter amendments in 2018 that describe victims’ role as participant similarly do not define what it means to be a ‘participant’.

In a criminal proceeding, the term ‘party’ is not defined in legislation. Similarly, ‘participant’ remains free of a prescriptive definition. Not defining the exact limits of what it means to be a participant provides room for the continuing evolution of the role of a victim as a participant over time.

Providing room for the role of a victim to grow is essential. Research continues to identify different ways in which victims’ experience of the criminal justice system could be improved. As the way victims’ participation changes, fears about victim participation detrimentally affecting the adversarial process may dissipate. This kind of incremental reform allows an approach of cautious, but continuing, improvement to victim participation.

How this report uses ‘participation’

A key part of this inquiry is asking victims of crime what they think participation is. When surveying victims about their experiences, the VOCC gave a non-exhaustive list of things that participation *might* include, like being given information and regular updates, being asked their views before key decisions were made and having these views taken into account, as much as possible. The VOCC did not want to limit how

¹⁴ 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) 17.

¹⁵ 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) 18.

¹⁶ Supreme Court of Victoria, *Our Judiciary* (Web Page) <<https://www.supremecourt.vic.gov.au/about-the-court/our-judiciary>>.

¹⁷ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 29.

¹⁸ *Ibid.*

¹⁹ *Ibid.* 30.

²⁰ *Ibid.*

²¹ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 30.

²² *Ibid.*

²³ *Ibid.*

victims might articulate participation.

For this reason, we asked victims:

- whether they *felt like* participants in the justice system
- what lack of participation *looks and feels like* to them
- what meaningful participations *looks like* to them.

At the end of **Chapter 4**, we provide an overview of how victims describe meaningful participation. However, like the VLRC, the VOCC does not seek to define participation. Having regard to how victims describe meaningful participation, the VOCC considers it more significant to ask not how participation should be defined, but how participation can be facilitated. In other words, what are the enablers of participation?

Accordingly, when we talk about ‘participation’ or ‘participant’ in this report, we are talking about the common uses and concepts associated with these words, rather than any legal or other prescribed definition. That is, we mean that:

- a ‘participant’ is a person who takes part in something
- ‘participation’ is the action of taking part in something.

When referring to participation – or taking part in something – we acknowledge that this can occur on a spectrum. This report aims to explore this spectrum of participation in more detail in relation to specific aspects of a victim’s justice experience, particularly across **Chapters 6 to 11** where victims describe their participation during certain parts of the justice process.

Key elements of participation identified in research

Scholars and researchers have developed different ways of understanding what it means for victims to participate. While their approaches may differ, there are common elements across the research.

The VLRC said that ‘participation is a broad concept and takes many forms’.²⁴ The VLRC referred to:

- ‘involvement’ and ‘input’
- giving victims a voice
- considering victims’ preferences.²⁵

The VLRC did not envisage ‘participation’ as extending to victims having decision-making power.²⁶ Instead, participation was envisaged as victims having ‘opportunities to meaningfully communicate and contribute to decision-making processes, without carrying the burden of responsibility that comes with prosecutorial decision making’.²⁷

Ian Edwards describes participation as:²⁸

- providing *information* to victims (e.g. about the hearing process and when court events will take place)
- *consulting* with victims (e.g. about their views on whether to accept a plea of guilty to a lesser charge), and
- enabling victims to *express* their views (e.g. about the impact the crimes have had on them).

Edwards said that the term participant is linked to the idea of ‘citizenship’ which involves a person being able to make decisions about their life and ‘to have a say in those social and political structures forming the basis of community and state organization’.²⁹

Douglas Beloof says that as a participant, a victim has rights to participate intermittently in criminal processes, in contrast to a party who participates in the entire criminal process.³⁰ Further, a victim’s rights to participate exist independently of the prosecution and the accused and independently of whether the victim is a witness.

Kathleen Daly has defined victim participation differently, focusing on participation as victims being

²⁴ Ibid 132.

²⁵ Ibid.

²⁶ Ibid 133.

²⁷ Ibid.

²⁸ Ian Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44 *British Journal of Criminology* 967, 975–76.

²⁹ Ibid 975.

³⁰ Douglas E Beloof, ‘The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review’ (2005) 2005 (2) *Brigham Young University Law Review* 255, 270–72.

informed, asking questions and receiving information. Daly then considers other aspects of what victims seek from the justice system, such as being a *voice* (to tell their story and the impact the crime has had on them); *validation* (affirming that the victim is believed); *vindication* (this involves both affirming that the act was legally/morally wrong and that the perpetrator's act(s) were wrong); and *accountability* (that the offender be required to give an account/take responsibility for their actions).³¹

Marie Manikis says that *accountability* is emerging as a new form of, and reason for, victim participation. This form of participation involves victims undertaking a 'monitoring and oversight role to ensure that errors are discovered and accounted for'.³² This kind of victim participation applies where a decision has already been made by the prosecution or a court and a victim is able to seek some form of review of that decision.

Victims' current participatory entitlements

Articulating the victim as a 'participant' in the criminal justice system provides a unifying idea of the role of a victim rather than a term from which rights and entitlements necessarily flow. That is, rights and entitlements do not necessarily flow because victims have 'participant' status under the Victims' Charter. In this regard, the inclusion in the Victims' Charter of victims as participants is an aspirational legislative change – one that seeks to address the perceived need for longer-term cultural change and a shift in the way in which victims are perceived by actors in the justice system.

There are, however, participatory mechanisms for victims in Victoria underpinned by legislative entitlements.

Victims' participatory interests and entitlements sit across many different pieces of Victorian legislation.

Across these provisions, victims' participatory interests and entitlements can be broadly categorised as falling into four categories, with varying levels of passivity or 'active' entitlement:

Aspirational/ guiding principles	→	Legislative provisions that espouse victim participation but do not provide specific participatory mechanisms (either in definition or procedure)
Participation 'enhancers'	→	Legislative entitlements that may enhance participation but do not involve substantive participatory rights. Such entitlements may include protections for victims (e.g. privacy, safety and special arrangements for giving evidence)
Participatory 'interest'	→	Legislative provisions that consider victims' interests (and sometimes their views) but without giving the victim any substantive participatory rights or providing any formal mechanism to include the victim in the process/decision making
Substantive participatory entitlements	→	The victim can intervene, express views, be heard or have a formal role.

An analysis of participatory provisions across Victorian legislation demonstrates that the vast majority of provisions can be categorised as participation 'enhancers' or participatory 'interests'. Provisions of this nature may enhance participation, or consider victims' interests in the process, but not involve substantive participatory rights.

As such, victims' participatory opportunities in Victoria are dominated by provisions which do not provide for substantive participatory rights or provisions, or where there is no formal mechanism to include the victim in the process at all.

Examples of these interests and entitlements in Victorian legislation are provided in **Table 3** below.

³¹ Kathleen Daly, 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton, Felix Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Taylor & Francis, 2014) 378, 387.

³² Marie Manikis, 'Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process' (2017) 1 *Public Law* 63, 67.

Table 3: Victims’ participatory interests and entitlements under existing legislation

Type	Examples
Aspirational/ guiding principles	<ul style="list-style-type: none"> • Under the Victims’ Charter, a victim is to be acknowledged ‘as a participant, but not a party, in proceedings for criminal offences’.³³ • Under the Victims’ Charter, victims of crime ‘are to be treated with courtesy, respect and dignity’.³⁴
Participation ‘enhancers’	<ul style="list-style-type: none"> • Under the Victims’ Charter, agencies are to have regard to the Victims’ Charter, agencies are to be responsive to the needs of victims, to provide information and referral, privacy protections, to have complaint avenues.³⁵ • Under the Victims’ Charter, victims should be given information about:³⁶ <ul style="list-style-type: none"> – outcome of bail applications – progress of an investigation – offences charged/not charged/modified/discontinued/pleas – a trial/hearing/appeal – the court process and how to attend court – their role as a witness. • Under the Victims’ Charter, victims in the indictable stream must be given reasons in relation to decisions to:³⁷ <ul style="list-style-type: none"> • modify charge • discontinue charge • accept a plea of guilty to a lesser charge. • The DPP is to give a victim information when making a decision to:³⁸ <ul style="list-style-type: none"> – agree to or oppose an application to cross-examine the victim at a committal hearing and – apply for, agree to or oppose an application for summary jurisdiction or – oppose an application for a sentence indication. • Under the Victims’ Charter, victims should be protected in court from the accused and their family/supporters.³⁹ • Certain victims have access to alternative or special arrangements for giving evidence including: <ul style="list-style-type: none"> – emotional support person⁴⁰ – limits on cross-examination⁴¹ – special hearings for giving evidence⁴² – use of audiovisual links to give remote evidence⁴³ – use of screens in court.⁴⁴ • There are limits on lines of questioning in sexual assault matters.⁴⁵ • Protection from cross-examination by the accused personally, in family violence and sexual assault matters.⁴⁶ • In mental impairment matters, victims are to be given notice of hearings and details of supervision orders.⁴⁷ • Some victims are eligible to be placed on the Victims Register and receive updates about the offender.⁴⁸

33 *Victims’ Charter Act 2006* (Vic) s 4. Under section 7A, investigatory agencies, prosecuting agencies and victims’ services agencies are to respect the rights and entitlements of victims as participants in proceedings for criminal offences.

34 *Ibid* s 6.

35 *Ibid* ss 6, 18, 7, 7A, 7B, 14, 19.

36 *Ibid* ss 8, 9, 9A, 9C, 10, 11.

37 *Ibid* s 9C.

38 *Ibid* s 9B(2).

39 *Victims’ Charter Act 2006* (Vic) s 12.

40 A complainant in a committal hearing of a sexual offence charge who is giving evidence or hearing a recording of evidence played may have a court-approved person present to provide emotional support: *Criminal Procedure Act 2009* (Vic) ss 133, 360.

41 Limits on cross-examination of children or cognitively impaired victims of sexual offences: *Criminal Procedure Act 2009* (Vic) ss 123, 198A, 350, 376.

42 At a directions hearing for a sexual offence with a child or cognitively impaired complainant, the court may require a special hearing to be held before or during the trial: *Criminal Procedure Act 2009* (Vic) ss 181, 363, 370; *Family Violence Protection Act 2008* (Vic) s 69(3).

43 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 42M, 42P.

44 *Criminal Procedure Act 2009* (Vic) ss 360, 364.

45 *Ibid* ss 341, 342, 343, 346, 349, 351.

46 *Ibid* s 123 (Part 4.5).

47 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 38C, 38D, 38E.

48 *Corrections Act 1986* (Vic) ss 30A, 30B, 30I.

Type	Examples
Participatory 'interest'	<ul style="list-style-type: none"> • A bail decision maker must take into account the known or likely view of a victim.⁴⁹ • The DPP must ensure the prosecutorial system gives appropriate consideration to the concerns of the victims of crime.⁵⁰ • Effect on the victims of a child offender must be considered when determining if a joint committal should proceed.⁵¹ • The court may decide not to give a sentence indication if there is too little information on the impact of the offence on the victim.⁵² • When there is a child or young person accused: <ul style="list-style-type: none"> – The court and prosecutor must consider the impact on the victim when determining whether to adjourn a proceeding to allow an accused child to participate in a diversion program or group conference. The impact on the victim is also to be considered when determining the type of diversion program.⁵³ – The victim's interest is to be considered when deciding whether a serious indictable youth offence is tried summarily. When considering sentencing options, the court must have regard to the impact on a victim.⁵⁴ • Special arrangements for giving evidence are available in sexual assault trials but require the court to consult with complainants about their preferences and wishes.⁵⁵ • The complainant in a family violence case may give evidence in chief by a recorded statement. The prosecution must take into account the wishes of the complainant.⁵⁶ • Victims must be considered if a prisoner applies to change their name or their sex if this is considered offensive.⁵⁷ • A victim of a serious offender is entitled to privacy. The court must have regard to the victim if it allows publication.⁵⁸ • On application, the Magistrates' Court may order a conviction of a person to become spent. The magistrate must consider the impact on any victim of the offence to which the application relates.⁵⁹

49 *Bail Act 1997* (Vic) ss 3AAA(1)(3), 5AAA (3)(a).

50 *Public Prosecutions Act 1994* (Vic) ss 24, 36(3), 38(2), 41(2), 43(3).

51 *Children, Youth and Families Act 2005* (Vic) s 516A.

52 *Criminal Procedure Act 2009* (Vic) s 208. Under the *Criminal Procedure Act 2009* the court may decide not to give a sentence indication if it has enough information on the offence's impact on the victim but there is no requirement or mechanism to consult with a victim: s 208.

53 *Children, Youth and Families Act 2005* (Vic) ss 356D(4)(c), 356F, 356G, 415.

54 *Ibid* ss 356(6)(c), 356A(2)(a).

55 *Criminal Procedure Act 2009* (Vic) pt 8.2 div 6, ss 376, 379, 381, 384, 385, 387.

56 *Ibid* div 7B.

57 *Corrections Act 1986* (Vic) ss 47(2)(d), 79B, 79C, s 47P(2)(d), 79HC, 79HD; *Children, Youth and Families Act 2005* (Vic) ss 488P, 488Q; *Serious Offenders Act 2018* (Vic) ss 260, 265D.

58 *Serious Offenders Act 2018* (Vic) ss 277, 280, 288, 289.

59 *Spent Conviction Act 2021* (Vic) ss 16, 19.

Type	Examples
<p>Substantive participatory entitlements</p>	<ul style="list-style-type: none"> • A victim has a right to make a complaint to the Victims of Crime Commissioner (VOCC) in relation to an agency's compliance with the Victims' Charter.⁶⁰ • The DPP must seek a victim's views before making a decision to:⁶¹ <ul style="list-style-type: none"> – modify a charge – discontinue a charge – accept a plea of guilty to a lesser charge – oppose an application for a sentence indication – appeal a sentence or an acquittal. • Where the accused seeks production of records of a victim's confidential communications with a doctor or counsellor, a victim (known as a 'protected confider') has a right to appear in the proceeding and make a submission and obtain legal advice.⁶² • If a court finds a person guilty of an offence, a victim of the offence may make a statement to the court (Victim Impact Statement, VIS) for the purpose of assisting the court in determining the sentence.⁶³ • In assisting the court in determining any conditions it may impose on an order made in respect of a person under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (CMIA), or in determining whether or not to grant a person extended leave – a family member of the person or a victim of the offence may make a report to the court.⁶⁴ • If a court finds or convicts a person guilty of an offence, a victim may apply to the court for a compensation order.⁶⁵ • Victims are entitled to apply for state-funded financial assistance.⁶⁶ • A victim is entitled to make a submission around the conditions of a supervision order, interim supervision order, detention order, interim detention order and review of orders and conditions.⁶⁷ • A victim in relation to a criminal act by a prisoner may apply (in writing) to the Secretary for information about the prisoner compensation quarantine fund.⁶⁸ A person included on the Victims Register may make a submission to the Board for consideration by the Board in determining whether to make a parole order.⁶⁹ • A victim can apply to a coroner for leave to appear as an interested party in a proceeding if they have a sufficient interest and it is deemed appropriate.⁷⁰ • A victim of an alleged sexual offence or a sexual offence can publish any particulars even where it is likely to identify themselves⁷¹ and a person with a sufficient interest may apply to a court for a victim privacy order in respect of a deceased affected person who was the victim of a sexual offence or an alleged sexual offence.⁷² • A victim of a sexual offence over the age of 16 years has a statutory entitlement to request the offence not be disclosed.⁷³ A victim of a sexual or family violence offence may apply to the court to review a suppression order relating to that offence and to that offence on appeal.⁷⁴

60 *Victims of Crime Commissioner Act 2015* (Vic) ss 25A, 25B, 25C, 25F, 25H, 25J, 25K; *Victims' Charter Act 2006* (Vic) s 19B.

61 *Victims' Charter Act 2006* (Vic) s 9B(1).

62 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 32C(5), 32D(2)(c); see also *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32BA inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic), which commenced on 7 September 2022.

63 *Sentencing Act 1991* (Vic) s 8K(1).

64 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 40, 42.

65 *Sentencing Act 1991* (Vic) ss 85B, s 85G, 85I, 85J (pt 4 divs 1 and 2).

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

67 *Serious Offenders Act 2018* (Vic) ss 27(2), 28, 30(2), 134, 135, 153, 154; *Corrections Act 1986* (Vic) s 30A.

68 *Corrections Act 1986* (Vic) ss 104X, 104Y, 104Z, 104ZA, 104ZE.

69 *Ibid* ss 74A, 74B, 104ZY.

70 *Coroners Act 2008* (Vic) ss 56, 66, 76A, 83, 115.

71 *Judicial Proceedings Reports Act 1958* (Vic) s 4(1BA).

72 *Ibid* s 4D.

73 *Crimes Act 1958* (Vic) s 327(5).

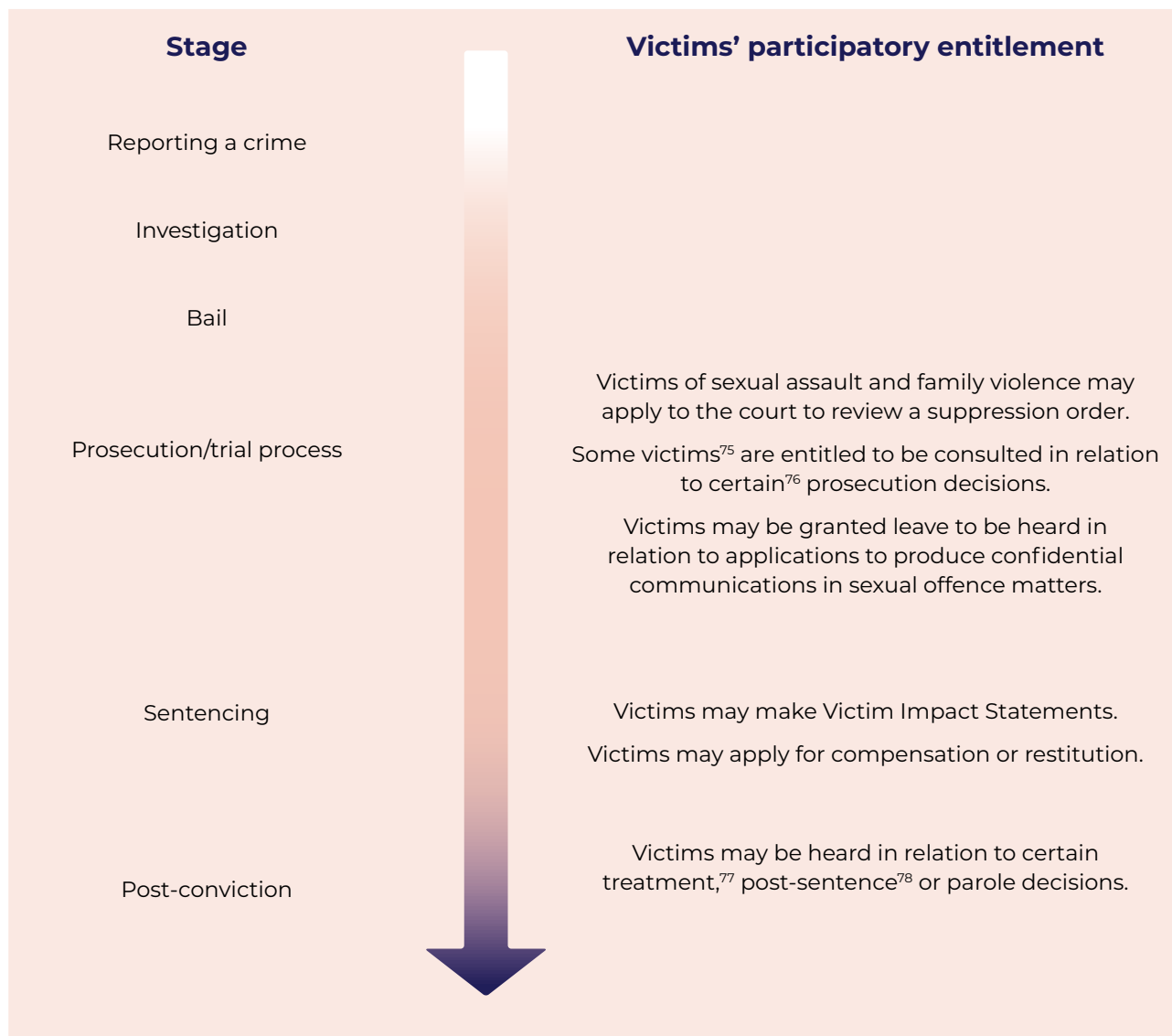
74 *Open Courts Act 2013* (Vic) s 15.

Mapping participation across the justice process

As noted above, there are few substantive participatory entitlements in Victoria granted to victims. Substantive participatory entitlements are those which specifically empower victims to participate or have a formal role at key stages of the justice process.

Figure 1 below outlines these substantive participatory entitlements mapped against the 'traditional' or formal justice process aligned with a criminal process.

Figure 1: Substantive participatory entitlements across the justice system



⁷⁵ In indictable crimes prosecuted by the Director of Public Prosecutions (DPP), the DPP is to seek the views of the victim before making certain prosecution decisions: *Victims' Charter Act 2006* (Vic) s 9B.

⁷⁶ Victims' views are to be sought by the DPP in relation to decisions to substantially modify the charges, discontinue the prosecution, accept a plea of guilty to a lesser charge, oppose an application for a sentence indication or appeal a sentence or appeal an acquittal: *Victims' Charter Act 2006* (Vic) s 9B.

⁷⁷ Where a person is found not guilty or unfit to stand trial due to mental impairment: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

⁷⁸ 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 January 2022) <<https://www.postsentenceauthority.vic.gov.au/post-sentence-scheme>>.

Participatory entitlements outside the criminal trial process also include:

- seeking leave to appear as an interested party in coronial proceedings⁷⁹
- having the right to make a Victim Report in *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* processes⁸⁰
- the right to seek state-funded financial assistance and to have legal representation to do so.⁸¹

Few of the participatory entitlements set out in **Figure 1** provide a mechanism for enforcement, or for a breach to be remedied in such a way that a victim's participation can be secured before that procedural step is finalised. For example, if the Director of Public Prosecutions (DPP) fails to consult with a victim about a plea decision, a victim can only complain to the VOCC when the prosecution of that offence is finalised, therefore limiting practical remedies for an aggrieved victim.

Furthermore, some provisions:

- provide for exceptions, or only apply to certain victims⁸²
- are not included in the Victims' Charter, limiting victims' ability to complain about alleged breaches to the VOCC
- are difficult to realise or uphold in practice due to the way in which the justice system (or certain aspects of it) operates, such as speed of court proceedings⁸³ and lack of coordination across agencies/services
- are almost impossible for a victim to be aware of without access to independent legal advice or representation.

⁷⁹ *Coroners Act 2008* (Vic) s 56.

⁸⁰ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 42.

⁸¹ *Victims of Crime Assistance Act 1996* (Vic) s 48.

⁸² For example, victims' views are to be sought by the DPP in relation to a decision to substantially modify the charges, discontinue the prosecution, accept a plea of guilty to a lesser charge, oppose an application for a sentence indication, appeal a sentence or appeal an acquittal, but such requirements only apply in indictable crimes, not crimes prosecuted by Victoria Police in the summary jurisdiction: *Victims' Charter Act 2006* (Vic) s 9B.

⁸³ A key example of this is the difficulty faced by victims in the Magistrates' Court who often do not have an opportunity to make a VIS because of the processes and speed of matters heard in the summary jurisdiction. This is discussed in detail in Chapters 9 and 18 of this report.

