Restitution and Compensation Orders
Issues and Options Paper
The Sentencing Advisory Council bridges the gap between the community, the courts and the government by informing, educating and advising on sentencing issues.

The Sentencing Advisory Council is an independent statutory body established in 2004 under amendments to the Sentencing Act 1991. The functions of the Council are to:

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

Council members come from a broad spectrum of professional and community backgrounds. Under the Sentencing Act 1991, Council members must be appointed under eight profile areas:

- two people with broad experience in community issues affecting the courts
- one senior academic
- one highly experienced defence lawyer
- one highly experienced prosecution lawyer
- one member of a victim of crime support or advocacy group
- one person involved in the management of a victim of crime support or advocacy group who is a victim of crime or a representative of victims of crime
- one member of the police force of the rank of senior sergeant or below who is actively engaged in criminal law enforcement duties
- the remainder must have experience in the operation of the criminal justice system.

For more information about the Council and sentencing generally, visit: www.sentencingcouncil.vic.gov.au
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Abbreviations

ACO  Asset Confiscation Operations
IMES  Infringement Management and Enforcement Services
OPP  Office of Public Prosecutions
VOCA Act  Victims of Crime Assistance Act 1996 (Vic)
VOCAT  Victims of Crime Assistance Tribunal
VLRC  Victorian Law Reform Commission

Glossary

**Accused**
A person who is charged with a criminal offence.

**Adjourned undertaking**
A sentence type that involves the adjournment of a criminal matter and the release of an offender, with or without conviction, for a specified period provided the offender gives an undertaking to comply with attached conditions.

**Average**
A measure of the central tendency of a distribution of numerical values, also known as the mean. The average (or mean) is calculated by adding all the values in the set, then dividing the total by the number of values used. For example, 2.8 is the average value in the following set of numbers: 1, 2, 2, 3, 4, 5. The average is the sum of the values in the set (in this case 17) divided by the number of values used to reach that total (in this case 6). The average is particularly sensitive to the influence of outliers (values that are very small or very large relative to the majority of values in a set). An alternative way to measure the middle value in a set of numbers is to calculate a median, which is resistant to the influence of outliers.

**Bankruptcy**
A declaration under the *Bankruptcy Act 1966* (Cth) that a person cannot pay their debts.

**Beneficiary**
In this paper, a person, corporation or other entity in whose favour an order for restitution or compensation has been made.

**Breach**
A failure to comply with a court order.

**Case**
In criminal law, one or more charges against a person sentenced at one hearing. In civil law, an individual or corporation taking a private legal action against another person or corporation.
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charge</td>
<td>In this paper, a single proven count of an offence.</td>
</tr>
<tr>
<td>Community correction order</td>
<td>A sentencing order, available since 16 January 2012, that may require the offender to comply with a range of conditions, including unpaid community work, treatment, supervision, curfews and restrictions on the offender’s movements and associates (Sentencing Act 1991 (Vic) pt 3A).</td>
</tr>
<tr>
<td>Compensation</td>
<td>In this paper, payment of money by an offender to a victim following an order made under Part 4, Division 2 of the Sentencing Act 1991 (Vic). Payment is made to compensate for pain, suffering or expenses incurred, or for property loss or damage caused directly because of an offence.</td>
</tr>
<tr>
<td>Creditor</td>
<td>In this paper, a victim who is seeking to enforce a judgment debt, and more generally a person or company to whom money is owing.</td>
</tr>
<tr>
<td>Default</td>
<td>In this paper, failure to pay a judgment debt or instalment order.</td>
</tr>
<tr>
<td>Financial reparation</td>
<td>In this paper, a payment by an offender to a victim to make amends for the commission of a crime.</td>
</tr>
<tr>
<td>Fine</td>
<td>A sentence that involves a court-ordered monetary penalty requiring an offender to pay a sum of money to the state.</td>
</tr>
<tr>
<td>Forfeiture</td>
<td>The removal by the state of property and/or goods from the owner following a court order or automatically following the commission of certain offences under the Confiscation Act 1997 (Vic).</td>
</tr>
<tr>
<td>Garnishee order</td>
<td>A legal order for deduction of a debtor’s wages to pay a judgment debt.</td>
</tr>
<tr>
<td>Higher courts</td>
<td>In this paper, the County Court of Victoria and the Supreme Court of Victoria.</td>
</tr>
<tr>
<td>Imprisonment</td>
<td>A custodial sentence that involves the confinement of an offender in prison.</td>
</tr>
<tr>
<td>Informant</td>
<td>The police officer or government official (for example, a local authority or transport authority) who commences a charge against an accused and may give evidence against them in court.</td>
</tr>
<tr>
<td>Instalment order</td>
<td>An order under the Judgment Debt Recovery Act 1984 (Vic) for payment of a judgment debt by instalments.</td>
</tr>
<tr>
<td>Judgment debt</td>
<td>The amount that must be paid by a judgment debtor as awarded under a court order.</td>
</tr>
<tr>
<td>Judgment debtor</td>
<td>A person who owes money under a judgment debt.</td>
</tr>
<tr>
<td>Judgment proof</td>
<td>A judgment debtor who, because of their limited financial resources, cannot pay a judgment debt. A judgment debtor in this position may be protected from having an instalment order made against them under the Judgment Debt Recovery Act 1984 (Vic).</td>
</tr>
</tbody>
</table>
**Leave**
Permission from a court to take an action that would not otherwise be allowed, for example, applying for leave to appeal.

**Median**
The middle value in a set or distribution of numbers. For example, 4 is the median value in the following set of numbers: 1, 2, 2, 3, 3, 4, 5, 5, 6, 6, 7. The median represents a statistical midpoint, where half of the values (1, 2, 2, 3, 3) are below the median, and half of the values (5, 5, 6, 6, 7) are above the median. If a set has an even number of values, the two middle values (sometimes defined as the lower median and the upper median) are averaged to find the median.

**Offender**
A person who has been found guilty of an offence.

**Official trustee in bankruptcy**
A person appointed to manage the finances of someone who has been declared bankrupt.

**Pecuniary penalty order**
A court order under the *Confiscation Act 1997 (Vic)* requiring an offender to pay an amount that is equivalent to the benefits obtained by committing certain offences.

**Reference period**
In this paper, the financial years between 2007–08 and 2016–17.

**Reparation**
A financial, practical or symbolic action directed towards making amends for a wrongdoing.

**Restitution**
In this paper, return of goods or payment of money by an offender to a victim to restore stolen property, following an order made under Part 4, Division 1 of the *Sentencing Act 1991 (Vic)*.

**Restraining order**
A court order preventing an offender from disposing of, or otherwise dealing with, property except as directed by the court.

**Suspended sentence**
A term of imprisonment that is suspended (that is, not activated) wholly or in part for a specified period (the operational period). If the offender reoffends during this period, they may be imprisoned for the total duration of the sentence. Suspended sentences have been abolished in the higher courts for all offences committed on or after 1 September 2013 and in the Magistrates’ Court for all offences committed on or after 1 September 2014.

**Victim**
In this paper, a person who has suffered harm, including a family member of a homicide victim, due to the action of an offender.

**Victim survivor**
In this paper, a victim of a family violence offence. The Council has adopted this term to ensure consistency with other publications of the Department of Justice and Regulation, Victoria.
Call for submissions

The Sentencing Advisory Council (the Council) is seeking submissions on the issues raised and questions posed in this issues and options paper.

The deadline for submissions is Friday 20 April 2018.

The Council intends to use submissions, and the results of consultations, to provide advice to the Attorney-General on restitution and compensation orders in Victoria. The Council welcomes submissions from stakeholders and the broader community in relation to any of the questions raised in this issues and options paper, as well as any other matter arising from the terms of reference.

When making a submission, please identify how you would like your submission to be treated, based on the following three categories:

- **Public submission** – the Council may refer to, or quote directly from, the submission and name the source of the submission in relevant publications. Public submissions may also be published on the Council’s website and provided to any person or organisation that requests a copy, at the completion of the reference.

- **Anonymous submission** – the Council may refer to, or quote directly from, the submission, but will not identify the source of the submission. Anonymous submissions, with all identifying information removed, may also be published on the Council’s website and provided to any person or organisation that requests a copy, at the completion of the reference.

- **Confidential submission** – the Council will not refer to, or quote from, the submission in any publication. Confidential submissions will only be used to inform the Council generally in its deliberations of the particular issue under investigation. Confidential submissions will not be published on the Council’s website and will not be provided to any person outside the Sentencing Advisory Council.

The Council reserves the right to not use or publish any submission that it considers may be defamatory or offensive.

To make a submission, please use one of the following methods:

- Email: contact@sentencingcouncil.vic.gov.au
- Post:  Sentencing Advisory Council  
  3/333 Queen Street  
  Melbourne VIC 3000
- Fax: 03 9908 8777
- Phone: 1300 363 196
Executive summary


The question of whether restitution and compensation orders should become sentencing orders in Victoria has been formally considered at least twice before: once by the Victorian Parliamentary Law Reform Committee in 1994 and more recently by the then Department of Justice in 2009. Neither review reached a firm conclusion on this issue.

Terms of reference

On 13 June 2017, the Council received terms of reference from the Attorney-General, requesting advice in relation to whether restitution and compensation orders made under the Sentencing Act 1991 (Vic) should become sentencing orders, rather than remain as orders in addition to sentence (often called ancillary orders).

In considering this request, the Council has been asked to advise whether:
- the purposes of sentencing should include the financial reparation of victims;
- there should be a presumption in favour of courts making such orders; and
- such orders should be enforced by the court in the manner of a fine.

If it concludes that restitution and compensation orders should become sentencing orders, the Council is asked to consider:
- the most appropriate processes and procedures for restitution and compensation orders in all courts;
- whether victims should have a right of appeal against the amount of an order awarded, or failure to make an order; and
- whether an offender’s financial circumstances should be taken into account when making an order.

This paper is intended to facilitate consultation on the key issues raised by the terms of reference and to propose potential measures for reform, and thereby assist in the development of the Council’s final advice to the Attorney-General, due in September 2018.

Need for a coherent approach to victims’ compensation in Victoria

In Victoria, victims of crime have a number of different options to seek compensation, depending on the circumstances. These options include making an application for an order for restitution or compensation under the Sentencing Act 1991 (Vic), taking action under civil law, applying to the Victims of Crime Assistance Tribunal (VOCAT) for government-funded assistance or a combination of these options.

For the criminal justice system to adequately and fairly compensate victims, a coherent approach to victim-oriented reforms is required.
The majority of offenders have very limited capacity to pay restitution or compensation to victims. Therefore, VOCAT has, and will continue to have, the primary role in compensating the majority of victims. The VLRC is conducting an inquiry into the operation of the VOCAT system and is due to report in July 2018.

The VLRC’s review of the *Victims of Crime Assistance Act 1996* (Vic) (the VOCA Act) has sought submissions on a number of matters, including the mechanisms for the state to seek recovery, from an offender, of a payment of an award under the VOCA Act, the introduction of a victim’s levy to supplement state-funded victims’ compensation and the potential for the victims’ financial assistance scheme to incorporate restorative justice opportunities.

The VLRC’s report, and recommendations in relation to VOCAT, may have implications for the use and enforcement of restitution and compensation orders. Ultimately, the government will need to consider the VLRC’s and the Council’s recommendations together, with a view to providing avenues for accessible, equitable compensation to all victims.

The Council intends to make recommendations that improve practical outcomes for victims and that are complementary to the broader system of victims’ compensation.

**Scope of the reference**

The Council’s reference is focused on restitution and compensation paid by offenders under the *Sentencing Act 1991* (Vic). Consideration of other aspects of the system of victims’ compensation, such as the operation of VOCAT or avenues for compensation through the common law, is outside the scope of the Council’s reference. Further, consideration of alternative models for funding VOCAT, such as the introduction of a victims’ levy payable by offenders, is also outside the scope of the Council’s reference.

To address the question of whether orders for financial reparation should become sentencing orders, this paper examines the underlying rationale for the current purposes of sentencing, as well as the purposes of restitution and compensation orders. This is in order to identify whether it is appropriate to extend the purposes of sentencing to include victims’ financial reparation and make restitution and compensation orders sentencing orders, or to make restitution and compensation orders sentencing orders without amending the purposes of sentencing. This paper also examines alternative approaches to enforcement of restitution and compensation orders that could be implemented even if those orders remain ancillary to sentence.

**What are restitution and compensation orders?**

Under the *Sentencing Act 1991* (Vic), there are three different orders for financial reparation that a court may order an offender to pay:

- **restitution order for property loss** – the court may order an offender to return stolen goods (or money from their sale) or make payment of a sum of money up to the value of stolen property;
- **compensation order for property loss** – the court may order any compensation that it sees fit for loss, destruction or damage to property as a result of the offence, provided that it does not exceed the value of the property in question; or
- **compensation order for injury** – the court may order compensation for pain and suffering and for expenses such as counselling, medical treatment or other costs.

Restitution and compensation orders (known as ancillary orders) are imposed by a court in addition to, but separate from, the sentence imposed upon an offender. They are provided for under Part 4, Divisions 1 and 2 of the *Sentencing Act 1991* (Vic).
While these orders require the offender to hand over property or make a payment, they are not intended as punishment. Rather they are intended to compensate the victim for property loss, injury or harm caused by the offence, or to return stolen property to the victim.

Restitution and compensation orders aim to provide a faster and cheaper alternative to complex civil proceedings. While the orders follow on from the criminal process, they are not strictly criminal in nature, and incorporate aspects of civil law.

The Director of Public Prosecutions in the County Court or Supreme Court, or a police prosecutor in the Magistrates’ Court, may apply for an order for restitution or compensation on behalf of a victim. However, due to resourcing limitations, the Director of Public Prosecutions will only assist a victim in making an application in limited circumstances. Often, a victim will need to seek private legal representation in order to make such an application, or otherwise navigate the system without legal assistance.

How are restitution and compensation orders currently enforced?

If not paid, an order for restitution or compensation becomes a judgment debt owing to the victim. The victim can enforce a judgment debt through further legal action in the civil jurisdiction in a number of ways, including by applying for:

- an oral examination of the offender;
- an instalment order;
- a warrant for seizure and sale of property;
- an order for the attachment of earnings or a debt; and/or
- a charging order over shares.

Flowchart illustrating the process for making and enforcing restitution and compensation orders
These processes can be cumbersome, expensive and often fruitless for many victims as the majority of offenders do not have the financial resources to pay an order for restitution or compensation. If an offender has only limited assets, the victim’s legal costs associated with enforcing the order may exceed any financial gains that may be received.

Some offenders, however, do have assets that can be used to pay an order for restitution or compensation. In these circumstances, the Director of Public Prosecutions can obtain a restraining order, which is an order that prevents an asset being sold, for the purpose of preserving the asset to pay an order for restitution or compensation. In some circumstances, the state will assist the victim to enforce the order for restitution or compensation against the offender.

In practice, investigation of offenders’ assets, and the use of these powers by investigating police officers, is inconsistent.

On the rare occasion that an offender is the victim of a civil wrong while in prison and is awarded civil damages, it may also be possible for a victim of that offender to recover payment from those damages.

Flowchart illustrating the powers for enforcement of restitution and compensation orders when a restraining order and/or forfeiture order has been made

How many orders are paid or successfully enforced?

The rates of enforcement of restitution and compensation orders are very low. Across all Victorian courts between 2007–08 and 2016–17, enforcement actions were rarely pursued, and only 0% to 2% of restitution and compensation orders had enforcement actions recorded against them.

It is difficult to ascertain exactly how many restitution and compensation orders are paid by offenders, as the orders are enforced as separate legal actions in the civil jurisdiction, and data collection practices vary. In addition, some offenders may pay victims directly, in which case this payment information is not held by the courts. However, even if it were possible to obtain further data, it is unlikely that this would demonstrate that many more restitution and compensation orders are paid by offenders.
Financial reparation and the purposes of sentencing

In Victoria, the purposes of sentencing do not include victims’ financial reparation. Section 5(1) of the Sentencing Act 1991 (Vic) provides that the only purposes for imposing sentences are just punishment, deterrence (both general and specific), rehabilitation, denunciation, community protection or a combination of two or more of these purposes. The purposes of the Act itself, however, are broader, and include the purpose of ensuring victims receive adequate compensation and restitution.

Although the financial reparation of victims is not a purpose of sentencing, a court must in determining sentence have regard to the impact of an offence on a victim, the personal circumstances of any victim and any loss, injury or damage resulting directly from the offence. A victim’s loss is a factor that must be considered in sentencing, rather than an aim or purpose of the sentence imposed. The Victim Impact Statement may inform the court of these matters.

A court may also take into account the offender’s conduct during, or in connection with, the criminal trial or hearing as an indication of their remorse, or lack of remorse. Therefore, an offender making reparation to a victim may be taken into consideration as a mitigating factor where it is a genuine indication of remorse, contrition or rehabilitation.

If financial reparation were to become one of the purposes of sentencing, the focus of sentencing may become reorientated towards the individual victim and their financial loss and injury, as well as the financial capacity of the offender. As the majority of offenders do not have the financial resources to pay compensation, the inclusion of financial reparation as a purpose of sentencing may be largely symbolic, and unlikely to yield practical benefits for most victims.

What happens in jurisdictions where restitution and compensation orders are sentencing orders?

No Australian jurisdictions, and relatively few international jurisdictions, have victims’ financial reparation as a purpose of sentencing. Victims’ financial reparation is a purpose of sentencing in New Zealand, Canada and England and Wales, and in these jurisdictions the orders are sentencing orders.

In South Australia, Queensland and the Australian Capital Territory, restitution and compensation orders are sentencing orders (and not merely orders ancillary to the sentence), but financial reparation is not a purpose of sentencing in any of those jurisdictions.

It appears that many of the barriers to enforcement present in Victoria also exist in those jurisdictions where restitution and compensation orders are sentencing orders. Enforcing restitution and compensation orders in the same way that fines are enforced may increase the rates of enforcement compared with those in Victoria, but it does not appear to substantially improve the overall enforcement rates, most likely because offenders in those jurisdictions similarly do not have the financial means to pay the orders.

In New South Wales, Tasmania and the Northern Territory, restitution and compensation orders are made in addition to sentence. Nevertheless, the Northern Territory and Tasmania enforce restitution and compensation orders in the same manner as fines.

Each of these jurisdictions has different approaches towards the consideration of an offender’s financial resources, a victim’s views on sentence, mechanisms for enforcement and the possibility of imprisonment as a consequence of default on payment of an order.
The limits of reform

Many offenders have no financial means to pay restitution and compensation orders. Research has shown that socio-economic disadvantage is often linked with offending, and that legal problems and debt are often cumulative. As a result, even the most efficient, victim-centred process for making and enforcing restitution and compensation orders cannot recover money or assets that offenders simply do not possess.

This fact must necessarily temper expectations about what reforms to making and enforcing restitution and compensation orders can realistically achieve, both for victims and for the broader community.

Measures for reform

Measures for reform are explored under two headings:

• options that make restitution and compensation orders sentencing orders; and
• measures that keep restitution and compensation orders as ancillary orders, but seek to improve the enforcement of these orders.

Measures for reform that would keep the orders as ancillary orders might involve improving civil mechanisms for enforcement of the orders within the current system, introducing state enforcement of the orders or increasing access to an offender’s assets through legislative amendment. These measures are not mutually exclusive, and a combination of reforms could be introduced.

Reforms to make restitution and compensation orders sentencing orders, or expand the purposes of sentencing to include victim’s financial reparation, are likely to pose significant legal and procedural challenges in Victoria. Further, there are likely to be substantial resourcing implications, particularly for the Magistrates’ Court of Victoria. The Council’s options for reform have been developed with these challenges in mind.

Options that make restitution and compensation orders sentencing orders

Restitution and compensation orders could be made sentencing orders, either as a condition of an existing order, such as a community correction order, or on their own as independent sentencing orders, as occurs in some jurisdictions.

Process and procedure

This paper poses a number of questions on the appropriate processes and procedures to be implemented if restitution and compensation orders were to become sentencing orders.

One question is how a victim’s views on sentence could be taken into account if the orders were to become part of sentence. Another is whether a victim should have an independent right to appeal an order for restitution or compensation, or the failure to make such an order. Any consideration of a victim’s views on sentence would be a substantial departure from established sentencing principles, and is distinct from a court’s consideration of the impact of a crime on a victim.

Incorporating restitution and compensation orders as sentencing orders may also increase the circumstances in which offenders make an application for leave to appeal their sentence.
If restitution and compensation orders were to become sentencing orders, consideration would need to be given to how evidentiary issues would be dealt with. Any findings of fact as to the amount or nature of a victim's loss would need to be proved beyond reasonable doubt. Questions would arise as to how additional evidence might be adduced, and whether this would create the potential need for cross-examination of victims about their loss. There would also need to be a mechanism for submissions to be made before a court about an offender's financial means, including any assets, their ability to meet any order for restitution or compensation and the impact of such an order on any of the offender's dependants.

A further issue is how a court would approach the question of fixing the appropriate amount for a compensation order. This may pose challenges to the existing parties to the criminal process, including the roles of the prosecutor, defence and judicial officer. For example, the prosecutor currently acts for the state in prosecuting a criminal offence and must act in the public interest, which may conflict with a requirement to advocate financial compensation for a victim.

In a number of jurisdictions, a court may order imprisonment if an order for restitution or compensation (forming part of an offender's sentence) is not paid.

**Challenges of making restitution and compensation orders sentencing orders**

Critically, the treatment of restitution and compensation orders as sentencing orders poses challenges for maintaining equality before the law, as well as for achieving consistency and parity in sentencing. For example, an issue arises if a sentence is imposed on one offender by virtue of that offender's capacity to pay an order for restitution or compensation, and a different sentence is imposed on another offender who has no capacity to pay but is similar in all other respects.

Further, if these orders were sentencing orders, this may raise specific issues for sentencing family violence offences, particularly where there is a relationship of financial interdependence between the offender and victim survivor (for example, where the offender and victim survivor jointly own assets).

**Measures that keep restitution and compensation orders as ancillary orders**

If it is not considered desirable to make restitution and compensation orders sentencing orders, there are a number of ways in which the enforcement of those orders could be improved within the current system.

**Improving civil enforcement for victims within the current system**

The accessibility and effectiveness of current civil enforcement mechanisms for victims within the current system could be improved.

Ways of improving the accessibility of current civil enforcement mechanisms for victims could include:

- providing free legal assistance for victims to enforce restitution and compensation orders in the civil system through a community legal centre or other agency;
- waiving fees relating to civil enforcement;
- empowering courts to automatically transfer restitution and compensation orders to the civil jurisdiction for commencement of enforcement; and/or
- having a designated court officer to assist victims with enforcement.
The cost of private legal representation means that many victims cannot afford to retain legal assistance to enforce their judgment debt. If there were a community legal centre or other agency that could provide ongoing legal representation to victims in enforcing these orders, this may improve the rates of civil enforcement.

If legal assistance were provided by a state-funded centre or agency, or if fees were waived, those costs would have to be met by the state. If courts automatically transferred orders to the civil jurisdiction, they would have to monitor the payment of orders and pursue those that remained unpaid.

**Introducing state enforcement of the orders**

Alternatively, state enforcement of restitution and compensation orders could be introduced, while maintaining the status of restitution and compensation orders as ancillary orders.

A key issue is whether the state enforcement of ancillary orders would constitute further punishment that is not taken into account in the sentencing process, as it would mean that offenders who cannot pay are subjected to further adverse consequences (such as seizure and sale of their property).

**Automatic enforcement**

Once the court imposes an order for restitution or compensation, that order could be transferred to Infringement Management and Enforcement Services (IMES), Department of Justice and Regulation, for automatic enforcement through existing civil mechanisms. This would remove the need for victims to initiate enforcement.

Any automatic enforcement would need to be approached with caution. It would need to consider the potential risk to victims, such as the risk of reprisals from offenders, of any order that was issued on the court’s own motion rather than on the application of the victim.

**Assigning the right to enforce the order to the state**

Alternatively, a victim could elect to assign their rights to enforce the order to the state. This option would provide an avenue for victims to enforce their orders without having to undertake the enforcement process themselves. Instead, the state would undertake the enforcement of the order as if it were the victim, bearing the burden and costs of enforcing the debt, within the current powers available to enforce a debt through civil enforcement mechanisms. This avenue, however, would require the state to fund the enforcement of private debts at the election of the victim. This would be a unique approach in Australia.

**Increasing access to an offender’s assets**

Another option is to better utilise the *Confiscation Act 1997* (Vic) to improve access to an offender’s assets, or alternatively amend the Act to broaden the circumstances in which an offender’s assets may be forfeited to meet an order for restitution or compensation.

**Improving the use of current powers under the Confiscation Act 1997 (Vic)**

The use of current powers under the *Confiscation Act 1997* (Vic) could be improved through implementing policies aimed at ensuring that individual informants are aware of the ability to investigate an offender’s assets and the power to apply for a restraining order to preserve assets to meet a future order for restitution or compensation.
Increasing powers of forfeiture

The circumstances in which an offender’s assets may be forfeited could be broadened, so that the Director of Public Prosecutions, or a police prosecutor, may apply to a court for a forfeiture order following an offender’s conviction, even where the property is not tainted (that is, where the property has not been used in connection with the offence). The Council recognises, however, that the forfeiture of assets where an offender has not been found guilty of a serious, profit-driven offence, and where the assets are not found to be tainted property, raises substantial constitutional and human rights issues.

Other potential amendments

Another option for reform is that, where a court makes a restraining order in respect of a person’s property and an order for restitution or compensation is made, a charge could be created on the restrained property in order to secure payment of the order for restitution or compensation to the victim. Similar provisions currently operate in Victoria in circumstances in which the court has made a pecuniary penalty order under the **Confiscation Act 1997** (Vic).

A victim could also potentially assign their rights to enforcement action to the state, allowing Asset Confiscation Operations (ACO), Department of Justice and Regulation, to pursue civil enforcement of the order for restitution or compensation (ACO is currently responsible for enforcement action under the **Confiscation Act 1997** (Vic)).

Alternative approaches to improving the enforcement of restitution and compensation orders

Making restitution and compensation orders sentencing orders may not address the underlying issue of the low enforcement rates of these orders in Victoria. Consequently, it may be that making the orders sentencing orders is undesirable. The Council will also consider alternative approaches to improving the enforcement of restitution and compensation orders and invites stakeholders to consider other alternative reforms.
Summary of questions

Options that make restitution and compensation orders sentencing orders

**Question 1: Restitution and compensation orders as sentencing orders**

Should restitution and compensation orders become sentencing orders? If so:

**Place in sentencing hierarchy**

a. Where in the sentencing hierarchy should the orders sit? Should they:
   i. be integrated as a condition of another order;
   ii. exist as stand-alone orders; or
   iii. both?

**Relationship with purposes of sentencing**

b. Should the purposes of sentencing under section 5(1) of the *Sentencing Act 1991* (Vic) be expanded to include the financial reparation of victims?

**Process and procedure**

c. How should information about an offender’s financial means be brought before the court, and how should it be considered?

d. Should a victim’s views on the appropriateness of a compensation order be considered in the sentencing process?

e. How should a victim’s financial loss be established?

f. How would the amount of compensation be assessed?

**Equity and parity**

g. How would the need to maintain equality before the law, consistency of sentencing and parity between offenders be addressed?

**Roles**

h. What would the consequences be for the roles of the prosecutor, defence and judicial officers? How would independence of the prosecutorial role be maintained?

**Consequences**

i. What should the consequences be if an offender cannot pay an order for restitution or compensation?
Measures that keep restitution and compensation orders as ancillary orders

Measures for reform of civil enforcement system

**Question 2: Improving civil enforcement mechanisms**

If restitution and compensation orders are to remain as ancillary orders, how should civil enforcement be improved?

a. Should free legal representation be provided to victims through a community legal centre or other agency?

b. Should fees be waived for victims of crime seeking to enforce restitution and compensation orders in the civil jurisdiction of the court in which the order was made?

c. Should courts automatically transfer restitution and compensation orders from the criminal jurisdiction to the civil jurisdiction for enforcement?

d. Is there another way to improve civil enforcement?

**Question 3: State enforcement of ancillary orders**

If restitution and compensation orders are to remain as ancillary orders, should the state enforce the orders? If so:

a. Should the state enforce the orders automatically on behalf of victims?

b. Should the state enforce the orders when a victim elects to assign their rights to the state to pursue enforcement?

c. Should the state enforce the orders in another way?

**Restraining orders, forfeiture orders and offenders’ assets**

**Question 4: Increasing use of existing powers under the *Confiscation Act 1997* (Vic)**

a. Should Victoria Police streamline their procedures for investigating alleged offenders’ assets and making applications for restraining orders under the *Confiscation Act 1997* (Vic)? If so, how?

b. Should Victoria Police investigate alleged offenders’ assets as part of the investigation of every offence, or only for certain offences?

c. Should the Office of Public Prosecutions further prioritise making applications for restraining orders over alleged offenders’ assets for the purposes of meeting future restitution and compensation orders?
Question 5: Reforms to the *Confiscation Act 1997* (Vic)

Should the *Confiscation Act 1997* (Vic) be amended? If so:

a. Should Asset Confiscation Operations, Department of Justice and Regulation, be allowed to undertake civil enforcement on behalf of victims, as occurs in enforcement of pecuniary penalty orders?

b. Should powers of forfeiture of an offender’s assets be increased where the asset has been restrained for the purpose of meeting an order for restitution or compensation? If so, which offences should be subject to increased powers of forfeiture?

c. Should the Act be amended to enable the creation of a charge over property?

d. Should the Act be amended to enable a victim to assign their rights to enforce the order to the state?

e. Should the Act be amended in another way?

f. If the powers under the *Confiscation Act 1997* (Vic) are expanded, should these powers be limited to certain types of offenders, offences or victims (for example, should they be for the benefit of certain categories of victims, such as persons rather than corporations)?

Other reforms

**Question 6: Other reforms**

Are there any other reforms to the framework for making and enforcing restitution and compensation orders that would better promote their successful enforcement?
1. Terms of reference: Introduction, background and scope

Overview

1.1 The purposes of this issues and options paper are to:

- provide background information on the current operation and enforcement of restitution and compensation orders, made under the *Sentencing Act 1991* (Vic):
- provide background information on the purposes of sentencing in Victoria, including the theoretical bases for these purposes, as well as the purposes of sentencing in other jurisdictions;
- examine the approaches taken in other jurisdictions to offender-paid restitution and compensation orders;
- discuss the issues associated with making and enforcing restitution and compensation orders as sentencing orders; and
- seek stakeholder and community responses on proposals for reforming the enforcement of restitution and compensation orders, including making these orders sentencing orders.

1.2 This issues and options paper is divided into six chapters. In addition to this introductory chapter:

- Chapter 2 provides an overview of the current regime for making and determining applications for restitution and compensation orders in Victoria, data on these orders in Victoria and discussion of the interaction of restitution and compensation orders with other aspects of the criminal justice system.
- Chapter 3 examines the current framework for enforcing restitution and compensation orders through the civil jurisdiction of the Magistrates’ Court and higher courts in Victoria, data on the rates of enforcement (where available), the interaction between the *Confiscation Act 1997* (Vic) and making and enforcing restitution and compensation orders, data on enforcement of restitution and compensation orders through the forfeiture of property under this regime, and case studies illustrating typical pathways through the system experienced by victims.
- Chapter 4 examines the existing purposes of sentencing in Victoria and their theoretical underpinnings, and the current consideration of victims’ interests and financial loss in the sentencing process.
- Chapter 5 discusses approaches in other jurisdictions to offender-paid restitution and compensation, and the relationship between these approaches and the purposes of sentencing, and presents available data on making and enforcing these orders in other jurisdictions.
- Chapter 6 presents several options for reform of the current system and examines the potential challenges of any such reform.

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Terms of reference

1.3 On 13 June 2017, the Council received a request for advice from the Attorney-General, the Hon Martin Pakula, MP, in relation to whether restitution and compensation orders, made to victims of crime under the Sentencing Act 1991 (Vic), should become sentencing orders, rather than remain as orders in addition to sentence (sometimes called ancillary orders).


1.5 In considering the question of whether restitution and compensation orders should become sentencing orders, the Council has also been asked to advise whether:
   • the purposes of sentencing should include the financial reparation of victims;
   • there should be a presumption in favour of courts making such orders; and
   • such orders should be enforced by the state in the manner of a fine.

1.6 In the event that it concludes that restitution and compensation orders should become sentencing orders, the Council is asked to consider:
   • the most appropriate processes and procedures for restitution and compensation orders in all courts;
   • whether victims should have a right of appeal against the amount of an order awarded, or failure to make an order; and
   • whether an offender’s financial circumstances should be taken into account when making an order.

1.7 In the preparation of its advice, the Council will consult with government and non-government stakeholders working in the criminal justice system and working with victims, as well as consulting with the broader Victorian community.

1.8 The Council is required to provide its advice to the Attorney-General by no later than 1 September 2018.

Background to the terms of reference

1.9 The VLRC report was tabled in parliament on 22 November 2016. The VLRC considered the role of the victim in the modern criminal trial process and identified five overarching rights and entitlements arising from the victim’s inherent interest in the criminal trial process. Those five rights and entitlements are:

1. to be treated with respect and dignity;
2. to be provided with information and support;
3. to be able to participate in processes and decision-making, without carrying the burden of prosecutorial decision-making;
4. to be protected from trauma, intimidation and unjustified interference with privacy during the criminal trial process; and
5. to be able to seek reparation.4

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4. Ibid xv.
1. Terms of reference: Introduction, background and scope

1.10 The VLRC report contains 51 recommendations. Recommendation 49 is that: The Attorney-General should ask the Sentencing Advisory Council to review whether orders made under Divisions 1 and 2 of Part 4 of the Sentencing Act 1991 (Vic) should become a sentencing option. The review should consider:

(a) whether the purposes of sentencing should include the financial reparation of victims;
(b) whether there should be a presumption of courts making such orders;
(c) whether such orders should be enforced by the state in the manner of a fine.

1.11 The VLRC highlighted a number of issues relating to the enforcement of restitution and compensation orders in the current system, including the fact that most victims must take offenders to court to enforce an order as a judgment debt. The VLRC commented that the fact that restitution and compensation orders are not sentencing orders affects how they can be enforced; if they were sentencing orders, they could be enforced in the same manner as fines.

1.12 The VLRC noted that the enforcement of restitution and compensation orders by the state may require the orders to be treated as sentencing orders, on the basis that this would reflect their punitive character. Any such change would come at a considerable cost to the community, and could have a significant effect on sentencing practices and outcomes. As a result, the enforcement of restitution and compensation orders needs to be considered within the broader question of whether these orders should be treated as sentencing orders and whether the purposes of sentencing should include compensating victims.

1.13 The VLRC also commented on the need for data on making and enforcing orders in the current system, in order to assess the potential costs and benefits of state enforcement.

Submissions to the Victorian Law Reform Commission

1.14 A range of submissions and evidence before the VLRC brought to light the issues with the current approach to the enforcement of restitution and compensation orders. The VLRC heard that victims who are awarded restitution and compensation then have to separately fund a solicitor to enforce the orders. The challenges to victims enforcing orders can be compounded by issues such as disability, language barriers and living in a remote location.

1.15 The VLRC reported differences of opinions among stakeholders on whether restitution and compensation orders should be enforced by the state. Some stakeholders supported state enforcement of the orders, proposing that the state could advance the compensation payment to the victim and require the offender to reimburse the state, or otherwise proposing that the orders become sentencing orders that are enforced in the same way as fines. Other stakeholders did not support restitution and compensation orders becoming sentencing orders, due to the risks that this would pose for equality before the law, as well as the procedural and evidentiary issues that would be raised by such a change.

6. Ibid.
8. Ibid, citing submissions of Victoria Police, Magistrate John Lesser and a parent of a victim.
9. Victoria Police supported the adoption of the New Zealand model of enforcement, in which restitution and compensation orders are treated as sentencing orders and are enforced as fines: Victoria Police, Submission to the Victorian Law Reform Commission Reference on The Role of Victims of Crime in the Criminal Trial Process (2015) 30.
1.16 A number of submissions to the VLRC raised the fact that most offenders have limited financial resources and cited this as a key reason why there would be little practical benefit in directing the state’s resources towards the enforcement of the orders.\(^{11}\)

1.17 The question of whether restitution and compensation orders should be made sentencing orders in Victoria has been formally considered at least twice before: once by the Victorian Parliamentary Law Reform Committee in 1994 and more recently by the then Department of Justice in 2009. Neither review reached a firm conclusion on this issue.

**The Parliamentary Law Reform Committee’s final report (1994)**

1.18 In 1994, the Victorian Parliamentary Law Reform Committee considered restitution and compensation for loss and damage to property\(^{12}\) and its relationship to the sentencing process, and the enforcement procedures for restitution and compensation orders.

1.19 The Committee released an interim report containing draft recommendations, one of which was that section 5(1) of the *Sentencing Act 1991* (Vic) be amended to provide that the purposes of a sentence include ‘the restoration of victim losses to the extent that imposition of a sentence for that purpose reinforces or supports other sentencing purposes.’\(^{13}\) In addition, the Committee proposed that restitution and compensation orders could constitute sentencing orders that may be made in addition to, or in substitution for, any sentence that could be imposed.\(^{14}\)

1.20 The Committee’s final report, however, concluded that it was premature to make reparation of victims a purpose of sentencing, or for compensation orders to be legislated as sentencing orders, due to strong stakeholder opposition to this course.\(^{15}\)

1.21 The Committee considered that the increased recognition of victims would lead to reparation becoming more integrated into the criminal justice system, and that in time, ‘the restoration of victim’s losses would become a significant object of the sentencing process.’\(^{16}\)

**The Department of Justice’s discussion paper (2009)**

1.22 In 2009, the Victorian Department of Justice (as it then was) commenced a review of both state-funded and offender-funded victims of crime compensation. A discussion paper was released asking a range of questions, including whether compensation orders should form ‘an integral part of the sentencing process’, and if such a change were to be introduced, how equality before the law could be maintained.\(^{17}\)

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

\(^{12}\) At this time, compensation for injury had not yet been introduced into the *Sentencing Act 1991* (Vic). Compensation for injury was later introduced on 1 January 2001: *Sentencing Act 1991* (Vic) s 85B as inserted by *Victims of Crime Assistance (Amendment) Act 2000* (Vic) s 21.


\(^{14}\) Ibid 51 (Draft Recommendation 3).


\(^{16}\) Ibid 95.

1.23 Given that this review was to consider the operation of both the state-funded Victims of Crime Assistance Tribunal (VOCAT) and offender-paid compensation, the discussion paper explored the possibility of the state seeking reimbursement of VOCAT claims from offenders.

1.24 No final report was ever published, and no information is publicly available on the outcomes of the consultation process.

Scope of the reference and the Council’s approach

Approach to the reference

1.25 The principal question for the Council is whether restitution and compensation orders should become sentencing orders, or remain ancillary orders.

1.26 The Council will also examine the underlying rationale for the current purposes of sentencing, and the purposes of restitution and compensation orders, in order to identify whether it is appropriate to extend the purposes of sentencing or to make restitution and compensation orders sentencing orders.

1.27 The answer to the question of whether restitution and compensation orders should become sentencing orders will, to some extent, determine how the orders should be enforced, and whether the orders ought to be enforced by the state in the same manner as fines.

1.28 If the orders are made sentencing orders, it follows that they ought to be enforced by the state in the same way as other sentences imposed by the courts on offenders. If the orders remain ancillary to the sentence imposed on an offender, it is questionable whether the state should undertake the enforcement of the order.

1.29 The Council’s intent in developing its recommendations is to improve practical outcomes for victims.\(^\text{18}\) The Council is also conscious of the importance of considering the questions raised by the terms of reference in light of the fundamental principle of the rule of law that the criminal justice system treat offenders alike.

1.30 The Council has endeavoured to measure the current enforcement rates for restitution and compensation orders in Victoria, and to make some observations on the likely barriers to successful enforcement of the orders. Although a complete picture of the enforcement rates of restitution and compensation orders in Victoria is not possible,\(^\text{19}\) this paper provides a picture of available data on enforcement of the orders (see Chapter 3).

1.31 The Council has also sought information on the operation of other Australian and overseas jurisdictions where restitution and compensation orders are treated as sentencing orders, in order to assess whether such an approach yields better results for victims.

\(^{18}\) During preliminary consultations, a number of stakeholders cautioned against developing recommendations that ‘look good on paper’, but are unlikely to improve practical outcomes: Meeting with Office of Public Prosecutions (7 September 2017); Meeting with Victims of Crime Commissioner (12 September 2017); Meeting with Victoria Legal Aid (20 September 2017).

\(^{19}\) Factors that prevent the Council from establishing a complete picture of the enforcement rates include some orders being paid following private agreements between the parties. During preliminary consultations, the Council heard that many victims who were legally represented would privately settle their claims: Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).
Compensation options for victims of crime

1.32 In Victoria, depending on the circumstances, a victim of a crime can:
- ask the court to make an order for restitution or compensation after the offender has been sentenced under the Sentencing Act 1991 (Vic);
- take legal action against the offender and seek a payment for damages under civil law;
- apply to VOCAT for government-funded assistance under the Victims of Crime Assistance Act 1996 (Vic) (the VOCA Act); or
- pursue a combination of these options.

Scope of the Council’s focus on offender-paid compensation under the Sentencing Act 1991 (Vic)

1.33 The Council has been asked to consider restitution and compensation orders made under the Sentencing Act 1991 (Vic). Consideration of other aspects of the system for victims’ compensation, such as the operation of VOCAT or options for compensation through the common law, is outside the scope of the Council’s review.

1.34 Similarly, exploration of alternative models for funding the state-funded assistance scheme, such as the introduction of a victims’ levy payable by offenders, and the operation of the Commonwealth Redress Scheme for survivors of institutional child sexual abuse, is outside the scope of the Council’s reference.

1.35 The VLRC is conducting an inquiry into the operation of the VOCAT system, and will report in July 2018. The VLRC is specifically consulting on the issue of the introduction of a victims’ levy.

Need for coherent approach to victims’ compensation in Victoria

1.36 The Council acknowledges the need for a coherent approach to victim-oriented reform within the criminal justice system, including the issue of the compensation of victims for the effects of crime. The recommendations of the VLRC’s reference on the VOCAT system may have implications for the use and enforcement of restitution and compensation orders. Ultimately, the government will need to consider the VLRC’s and the Council’s recommendations together, with a view to providing avenues for accessible, equitable compensation to all victims.


Scope of re-examination of process and procedure provisions in the Sentencing Act 1991 (Vic)

1.37 The VLRC report examined the victim’s role in obtaining restitution and compensation orders against offenders (for the benefit of individual victims), within its discussion of the avenues for financial reparation available to victims. The report made a number of recommendations aimed at improving the processes and procedures for restitution and compensation orders. Those recommendations included the following:

Recommendation 45:
Divisions 1 and 2 of Part 4 of the Sentencing Act 1991 (Vic) should be consolidated to provide a consistent set of procedures for restitution and compensation orders in the Supreme Court and County Court, and include the following elements:

(a) The court may make restitution and compensation orders on its own motion.
(b) The court must make inquiries as to whether an application for restitution or compensation orders will be made.
(c) A simple form prescribed in the Sentencing Regulations 2011 (Vic) to assist victims and their representatives in making an application for restitution or compensation orders.

Recommendation 46:
Sections 85H and 86(2) of the Sentencing Act 1991 (Vic) should be repealed to the extent that they apply to applications made by individuals in the Supreme Court and County Court under Division 2 of Part 4 of that Act.

Recommendation 47:
The Victims’ Charter Act 2006 (Vic) should be amended to require investigatory and prosecuting agencies to inform victims of their possible entitlements under Part 4 of the Sentencing Act 1991 (Vic) and refer them to available legal assistance.

Recommendation 48:
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).

1.38 If it does not recommend that restitution and compensation orders ought to become sentencing orders, the Council is not asked to provide advice on the processes and procedures for making those orders. The VLRC has already made recommendations towards improving the operation of the current provisions, and so the Council will only provide advice on consequential reforms that would be required if restitution and compensation orders were to become sentencing orders.

1.39 Short of recommending that the orders become sentencing orders, however, the Council may still make recommendations that aim to improve the enforcement of restitution and compensation orders as ancillary orders, and may consider amendments to processes and procedures relevant to any such changes.

23. Sections 85H and 86(2) provide that if a court decides to make a compensation order for injury or property loss, it may, in determining the amount and method of payment of the compensation, take into account the financial circumstances of the offender and the nature of the burden that its payment will impose. However, a court is not prevented from making a compensation order only because it has been unable to find out the financial circumstances of the offender: Sentencing Act 1991 (Vic) ss 85H, 86(3).
1.40 Similarly, the question of whether there should be a presumption in favour of making such orders will only be re-examined if the Council proposes that restitution and compensation orders ought to become sentencing orders.

Human rights considerations

1.41 As a public statutory authority, it is unlawful for the Council in making a decision, to fail to give proper consideration to a relevant human right. To that end, in developing its advice, the Council will have regard to the rights contained in the Charter of Human Rights and Responsibilities Act 2006 (Vic).

1.42 In this respect, the Council considers consultation particularly important, given that any change to the current system may have a disproportionate effect on certain groups, for example, victims, offenders and family members of offenders.

1.43 Further, this reference involves issues that enliven fundamental principles of law, including the rule of law, and the principle of equality before the law, reflected in the Charter of Human Rights and Responsibilities Act 2006 (Vic).

1.44 The Council will also have regard to the Victims’ Charter Act 2006 (Vic), which sets out principles on how the criminal justice system and victim service agencies should respond to victims, including the right of a victim to apply for compensation from a person found guilty of a criminal offence.

Preliminary consultations

1.45 Prior to the publication of this issues and options paper, the Council conducted preliminary consultations with a number of stakeholders, as detailed in the Appendix.

1.46 During preliminary consultations, the Council aimed to identify relevant issues, including:

- the barriers encountered by victims seeking to enforce restitution and compensation orders under the current system;
- the issues with expanding the purposes of sentencing to include the financial reparation of victims;
- legal and procedural issues that would likely arise if restitution and compensation orders were to become sentencing orders;
- the effect on the roles of the parties to the criminal process (judge, prosecutor, defence) if restitution and compensation orders were to become sentencing orders;
- the effect of any change to restitution and compensation orders on the principle of equality before the law; and
- whether any change to restitution and compensation orders, such as enforcing them in the same way that fines are enforced, would improve enforcement rates.

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24. The VLRC did not recommend that there should be a presumption in favour of making restitution and compensation orders: see Victorian Law Reform Commission (2016), above n 3, 233–235.
27. Victims’ Charter Act 2006 (Vic) ss 1, 16(1). The purpose of the Act is to recognise principles that govern the response to persons adversely affected by crime and to establish requirements for the monitoring and review of the principles set out in the Act: Victims’ Charter Act 2006 (Vic) s 1. Part 2 of the Act sets out principles governing responses to victims, including the right to information and to be treated with courtesy, respect and dignity: Victims’ Charter Act 2006 (Vic) ss 6–9.
1.47 During preliminary consultations, the Council also discussed the potential resource implications of making restitution and compensation orders sentencing orders. Incorporating restitution and compensation orders within the sentencing process is likely to have significant resource implications, and is likely to increase the demand on the resources of a number of organisations, such as the courts. If restitution and compensation orders were to become sentencing orders, it is likely that there would be a significant increase in the workload of the lower courts, as well as that of the legal representatives appearing in those courts. This is because the financial consequences of the crime on the victim, as well as the offender’s means, would likely be a matter for submissions from both parties to a criminal proceeding.

1.48 The challenges to making restitution and compensation orders sentencing orders are discussed at [6.39]–[6.104]. The measures for reform have been developed taking into account feedback received during the Council’s preliminary consultations.

**Relationship with the VLRC’s recommendations**

1.49 The government has not yet indicated whether it accepts all of the recommendations made in the VLRC report. There has been some indication, however, that some of the VLRC’s recommendations, such as the introduction of an intermediary scheme, will be implemented.28

1.50 The Council is conducting its review on the basis that, unless there are compelling reasons otherwise, its recommendations should be consistent with the VLRC’s, in the event that further recommendations made by the VLRC are implemented.

1.51 Some of the key VLRC recommendations that will change the role of victims in the criminal trial process in Victoria include:

- amending the *Victims’ Charter Act 2006* (Vic) to include recognition of the victim’s interest in the criminal justice system’s response to the crime, and amending the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to include certain minimum guarantees for victims of criminal offences, such as a right to be treated with respect at all times;
- introducing victim-related professional development training for the profession;
- system-wide monitoring and review of the implementation of the *Victims’ Charter Act 2006* (Vic);
- strengthening the relationship between victims and the prosecution, for example, through requiring prosecuting agencies to offer conferences before and after important court dates and requiring prosecuting agencies to consult with victims before making certain decisions (such as not proceeding with a charge);
- establishing a legal service for victims of violent indictable crimes within Victoria Legal Aid;
- increasing participation and the substantive rights of victims in court; and
- establishing a statutory scheme for restorative justice conferencing for indictable offences in Victoria.29

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1.52 The Council notes the recommendation that Victoria Legal Aid establish a legal service for victims of violent indictable crimes; such a service may have the capacity to assist certain victims with applications for restitution or compensation and enforcement procedures.\textsuperscript{30}

Relationship with VLRC’s VOCAT reference

1.53 The Council will need to consider the direction of the VLRC’s reference in relation to the operation and effectiveness of the VOCA Act and VOCAT. While the operation of VOCAT is beyond the scope of the Council’s reference, the VLRC report and recommendations may have implications for restitution and compensation orders under the \textit{Sentencing Act 1991} (Vic).

1.54 For example, the VLRC has been asked to consider the appropriateness of awarding assistance to primary (direct) victims for reasonable counselling or medical services, when there are other ways to promote recovery for victims. If the VLRC were to recommend a reduction or an increase in the scope of compensation available to victims through VOCAT, this may affect the number of victims seeking compensation orders under the \textit{Sentencing Act 1991} (Vic).

\textsuperscript{30} Victorian Law Reform Commission (2016), above n 3, 126 (Recommendation 23).
2. Restitution and compensation orders in Victoria

Overview

2.1 This chapter presents data on the imposition and payment of restitution and compensation orders in Victoria, and examines the current framework for imposing these orders. As noted at [1.32], restitution and compensation orders under the Sentencing Act 1991 (Vic) are one of a number of options a victim of crime in Victoria can pursue to seek financial compensation or assistance.

2.2 One of the purposes of the Sentencing Act 1991 (Vic) is ‘to ensure that victims of crime receive adequate compensation and restitution’. However, separate from the purposes of the Act are the only purposes for which sentences in Victoria can be imposed, which are:

- just punishment – to punish the offender in a way that is just in all the circumstances;
- deterrence – to discourage the offender (known as specific deterrence) or other people (known as general deterrence) from committing the same or similar offences;
- rehabilitation – to create conditions that help the offender to lead a law-abiding life;
- denunciation – to denounce, condemn or censure the offender’s behaviour (that is, to make it clear to the offender and the community that the behaviour is wrong); and
- community protection – to protect the community from the offender.

2.3 Restitution and compensation orders are not sentencing orders. They are available as ancillary orders, or orders made in addition to sentence, and do not form part of an offender’s punishment. The orders enable a sentencing court to order offenders to pay restitution or compensation for loss, injury or pain and suffering experienced by victims as a direct result of crimes.

2.4 There are three orders for financial reparation that can be sought by victims through the Sentencing Act 1991 (Vic):

- **restitution order for property loss** – where an offender has been found guilty of an offence connected with theft of goods, the court may order the return of the stolen goods (or money from their sale) or payment of a sum of money up to the value of the stolen property;

- **compensation order for property loss** – where an offender has been found guilty of an offence, the court may order (on its own motion or on the application of the prosecution or the person seeking compensation) any compensation that it sees fit for loss, destruction or damage to property as a result of the offence, provided the compensation does not exceed the value of the property in question; and

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31. The repayment data in this chapter reflects payments made to courts, generally prior to the victim taking enforcement action for payment of the debt. Data on payments following enforcement is presented in Chapter 3.
33. Sentencing Act 1991 (Vic) s 5(1). The purposes of sentencing in Victoria are discussed further in Chapter 4.
34. Orders are made ‘in addition’ to sentence: Sentencing Act 1991 (Vic) pt 4 divs 1–2.
35. Sentencing Act 1991 (Vic) ss 84, 85B, 86.
37. Sentencing Act 1991 (Vic) s 86.
compensation order for injury – where an offender has been found guilty of an offence, the court may order (on the application of a person who has suffered any injury as a direct result of the offence) compensation for pain and suffering and for expenses such as counselling, medical treatment or other costs.  

2.5 This chapter discusses the processes and case law relevant to the assessment of applications for restitution and compensation orders, and presents the available data on the numbers of orders made in the Magistrates’ Court and higher courts in the 10-year reference period between 2007–08 and 2016–17. Available data on the payment of these orders (generally prior to enforcement action being taken by the victim) is also presented.

The current framework for restitution and compensation orders in Victoria

Purpose of provisions

2.6 The central purpose of the restitution and compensation provisions in the Sentencing Act 1991 (Vic) is to ensure that victims receive adequate restitution and compensation for loss suffered.

2.7 The provisions are not intended to constitute punishment of the offender, although they may have the result of causing financial hardship. They aim to restore the damage or loss to a victim. Failure to pay an order for restitution or compensation does not affect an offender’s sentence.

2.8 The regime has been said to recognise the fact that the victim has been most affected by the offender’s action and that prosecution of the offender alone will not necessarily achieve recovery for a victim.

Legislative history

2.9 Victims have been able to seek orders for restitution and compensation for property loss through the Sentencing Act 1991 (Vic) since its introduction in 1991. In 1997, the regime was expanded to allow for applications for compensation for injury, including pain and suffering, following a finding of guilt against, or conviction of, an offender.

2.10 Restitution and compensation orders were intended to provide a faster and cheaper alternative to civil proceedings initiated by a victim against the offender. Civil proceedings can be complex, and the provisions in the Sentencing Act 1991 (Vic) were intended...
to provide a practical and flexible alternative. The orders also allow for greater compensation than that available under the state-funded victims of crime compensation scheme through the Victims of Crime Assistance Tribunal (VOCAT). However, the orders were not intended to encompass complex matters, which were still intended to be dealt with in civil courts.

2.11 Amendments to the Sentencing Act 1991 (Vic) introduced in 2000 sought to improve the process for victims to obtain compensation directly from the offender, widen the range of victims who could apply for compensation and provide for compensation for grief, distress and trauma.

2.12 Further amendments introduced in 2012 were aimed at:
- strengthening procedures to compensate victims for property loss or damage;
- requiring courts to inquire as to whether compensation for property damage would be sought;
- allowing the court to make a compensation order for property loss on its own motion where there was evidence of property loss or damage; and
- expanding the materials that a court could consider in determining the amount or particulars of the order.

2.13 The intention behind these amendments was to achieve more consistent and routine use of the power to order compensation for property loss.

2.14 The Sentencing Act 1991 (Vic) operates alongside the Victims’ Charter Act 2006 (Vic), which creates a framework for the recognition and promotion of the rights of victims. The Charter provides that a victim may apply to a court for an order that an offender pay compensation.

Process for making an application

2.15 An application for an order for restitution or compensation must be made within 12 months of the offender being found guilty or convicted of the offence. Where the relevant facts are sufficiently clear from the evidence, a court must not refuse to hear and determine an application, except in certain circumstances.

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46. RK v Mirk (2009) 21 VR 623, 628. In Director of Public Prosecutions v Esso Australia Pty Ltd (No 2), Cummins J noted, ‘it is undesirable that s 85B proceedings be burdened down by substantial complex or technical rules of procedure as may properly apply on the civil side’: Director of Public Prosecutions v Esso Australia Pty Ltd (No 2) (2001) 126 A Crim R 13, 18.


49. Prior to these amendments, ‘pain and suffering’ was not defined in the legislation: Victoria, Parliamentary Debates, Legislative Assembly, 26 May 2000, 1911 (Rob Hulls, Attorney-General).

50. The Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Act 2012 (Vic) made amendments to section 86, as well as adding sections 86(AA), 86(1A) and 86(1B). See Victoria, Parliamentary Debates, Legislative Assembly, 21 June 2012, 2942 (Robert Clark, Attorney-General); Victoria, Parliamentary Debates, Legislative Assembly, 18 August 2012, 3153–3154 (Michael Gidley, Mount Waverley).


52. Victoria, Parliamentary Debates, Legislative Assembly, 15 August 2012, 3150 (Christine Fiffe, Evelyn).

53. Sentencing Act 1991 (Vic) s 85C((1)(a)). The Council heard that applications for an extension of time are common, as a victim may not make an application within 12 months of the finding of guilt or conviction, for a number of reasons such as grief: Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

54. A court must not refuse to hear an application for a compensation order unless, in its opinion, the relevant facts do not sufficiently appear from materials before the court in the criminal proceeding: Sentencing Act 1991 (Vic) s 85F.
Applications by the prosecution

2.16 The Director of Public Prosecutions in the County Court and Supreme Court, or the informant or the police prosecutor in the Magistrates’ Court, is authorised to apply for an order for restitution or compensation on behalf of a victim. The Director of Public Prosecutions has published a policy outlining the circumstances in which the Office of Public Prosecutions (OPP) will apply for an order for restitution or compensation on behalf of a victim.

2.17 The Director of Public Prosecutions will only apply for an order for restitution or compensation on behalf of a victim if the following conditions are satisfied:

• there is sufficient evidence of pain and suffering, property loss, damage or medical expenses to justify the application;
• the amount of restitution or compensation can be readily determined;
• the application is not opposed by the offender;
• there is reason to believe, on the basis of information concerning the offender’s financial situation, that there is a reasonable prospect that the order can be wholly or substantially enforced. When assessing this factor, regard should be had to the value of the offender’s property that may be the subject of a restraining order; and
• in the case of a child or a person incapable of managing their affairs, a suitable person is available to act as a litigation guardian pursuant to section 85E of the Sentencing Act 1991 (Vic).

Case Study 1: Example of when the Office of Public Prosecutions may make an application for an order for restitution or compensation

A first-time offender is convicted of charges of theft and obtaining financial advantage by deception after stealing $50,000 from a sports club. The offender is sentenced to a community correction order, and is able to continue in her employment in administration. The offender does not oppose the making of a restitution order, although she does not have the ability to repay the money prior to her sentencing. The Office of Public Prosecutions subsequently makes an application for restitution for repayment of the stolen monies.

Case Study 2: Example of when the Office of Public Prosecutions will not make an application for an order for restitution or compensation

An offender is convicted of charges of theft and obtaining financial advantage by deception after using a stolen credit card to purchase goods to the value of $10,000. The offender opposes the making of an order for restitution or compensation. In accordance with their policies, the Office of Public Prosecutions does not make an application for compensation for property loss because the offender opposes the making of the order. The Office of Public Prosecutions instead refers the victim to the Victims of Crime Helpline.

56. Sentencing Act 1991 (Vic) s 85C.
2.18 If the Director of Public Prosecutions decides not to pursue an order for restitution or compensation on behalf of a victim, the victim must be given a referral to the Victorian Government’s Victims of Crime Helpline. In addition, the Director of Public Prosecutions’ policy requires solicitors from the OPP to ensure that victims are informed that they may be entitled to restitution and compensation.

2.19 During the Council’s preliminary consultations, the Director of Public Prosecutions noted that the circumstances in which the OPP will assist victims to make applications for restitution and compensation orders were restricted due to the different legal expertise required for making applications for these orders. In practice, this means that applications by the Director of Public Prosecutions on behalf of victims for restitution or compensation are rare.

2.20 In its 2016 report, the VLRC recommended that the Victims’ Charter Act 2006 (Vic) be amended to introduce an obligation requiring investigatory and prosecuting agencies to inform victims of their possible entitlements to restitution or compensation and to refer them to available legal assistance. The VLRC reported that some victims were not told initially, or at all, that they could seek restitution or compensation.

2.21 In a proceeding in the Magistrates’ Court, the police prosecutor or the informant may make an application for an order on behalf of the victim. During preliminary consultations, the Council heard that Victoria Police prosecutors regularly apply for orders for restitution or compensation for property loss, but rarely apply for compensation orders for injury.

2.22 Compensation orders for injury are rarely made in the Magistrates’ Court, as the actual costs of injuries may not be known at the time of resolution of a matter, and because victims often need more urgent financial assistance that is better accessed through other avenues.

2.23 Victoria Police prosecutors’ policy states that applications for compensation for injury should only be made when a number of conditions are met, including where there is a reasonable prospect that any order made against the offender can be substantially enforced. Unlike the Director of Public Prosecutions’ policy, however, Victoria Police prosecutors’ policy does not require the offender to consent to a compensation order prior to such an application.

58. Director of Public Prosecutions (2017), above n 57, 18.
60. Meeting with Office of Public Prosecutions (7 September 2017).
63. Ibid 239.
64. An informant is the police officer or government official (for example, a local authority or transport authority) who commences a charge against an accused and may give evidence against them in court.
65. Sentencing Act 1991 (Vic) ss 84(5), 85C. Provision is also made for the Director of Public Prosecutions to make such an application, but this does not occur in practice.
66. Meeting with Victoria Police Prosecutors (7 December 2017).
67. Meeting with Community Operations and Victim Support Services, Department of Justice and Regulation (30 November 2017); Meeting with Victoria Police Prosecutors (7 December 2017). The Council heard that police prosecutors generally have one month in which to prepare a brief of evidence. Often, the extent of a victim’s loss, or any psychological consequences, is unlikely to be ascertained until sometime after the crime has occurred and will not be known at this early stage: Meeting with Victoria Police Prosecutors (7 December 2017).
68. Email from Prosecutions Division, Legal Services Department, Victoria Police to Sentencing Advisory Council, 31 October 2017.
69. Meeting with Victoria Police Prosecutors (7 December 2017).
Case Study 3: Example of when a police prosecutor will make an application for a compensation order for property loss

An offender is convicted of a home invasion and sentenced to a community correction order in the Magistrates’ Court. During the home invasion, a number of the victim’s household items and possessions are damaged or destroyed. The cost of repairing a damaged wall, as well as replacing broken items including a television set, totals $10,000. The prosecution makes an application for compensation for property loss, supported by quotes and receipts documenting the cost of the repairs and damaged items.

Case Study 4: Example of when a police prosecutor will not make an application for a compensation order for injury

An offender is convicted of assault and sentenced to a community correction order in the Magistrates’ Court three months after the offence occurs. The offender is unemployed at the time of the offending, and has accumulated a large amount of debt in the months leading up to the commission of the offence. The victim sustains injuries requiring a short hospital stay and emergency dental work. At the time of the hearing in the Magistrates’ Court, the extent of the victim’s financial loss and injuries is still unclear, as the victim is still undergoing medical care.

In the circumstances, because it is unclear what the victim’s injuries and costs are, and due to the unlikelihood that the offender will be able to meet these costs, the police prosecutor does not make an application for a compensation order for injury. The victim later makes a claim to VOCAT for the injuries sustained.

2.24 The Council understands that Victoria Police does not have a settled policy on how prosecutors should advise victims of their entitlements to restitution or compensation under the Sentencing Act 1991 (Vic). Instead, individual informants are relied on to be aware of options for restitution or compensation and the power to seek a restraining order to preserve assets for any such order, and to take necessary steps to inform a victim of their rights.

Applications by the victim

2.25 If they do not receive assistance from the prosecution, victims may engage their own private legal representation to pursue an application for an order for restitution or compensation. If victims cannot obtain or afford legal representation, they may make an application independently. There are risks, however, associated with victims making applications for compensation in the absence of legal representation. The Council has been advised that, in some cases, the medical information disclosed by a victim in an application for compensation may form the basis of an appeal against conviction constituting fresh evidence that shows discrepancies in the way the complainant described the alleged offending. During the Council’s preliminary consultations, it was noted that it was rare for victims to proceed with applications for compensation for injury in the absence of legal assistance.

70. Meeting with Victoria Police (19 September 2017).
71. Meeting with Victoria Police (19 September 2017); Meeting with Victoria Police Prosecutors (7 December 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).
72. See for example, Coleman v The Queen [2011] VSCA 301 (12 October 2011); Greensill v The Queen (2012) 37 VR 257; Meeting with Waller Legal (28 November 2017).
73. Meeting with Waller Legal (28 November 2017).
2. Restitution and compensation orders in Victoria

2.26 The Council heard that, although applications for compensation under the Sentencing Act 1991 (Vic) were intended to be a practical and straightforward alternative to commencing civil proceedings against an offender, they still require considerable legal skill. The challenges of preparing an application make legal representation necessary, as does having a medico-legal expert prepare a report in support of an application, and attending court to be cross-examined if required. This can considerably increase the cost for victims seeking to make such applications. If there is a need for cross-examination of witnesses, such as medical experts, representation for both the applicant and the respondent is highly desirable.74

2.27 During preliminary consultations, the Council heard that Victoria Legal Aid is rarely approached by victims to provide assistance in these matters.75 Further, Victoria Legal Aid would likely be unable to assist many victims in these applications due to legal conflicts.76

2.28 Community legal centres generally do not have the resources to provide ongoing legal assistance to victims to apply for restitution and compensation orders under the Sentencing Act 1991 (Vic), although they may be able to provide legal advice and information to assist victims in making the applications themselves.77

Determining applications: a hybrid criminal–civil process

2.29 Generally speaking, the criminal law – that is, where an authority of the state prosecutes an individual or corporation – operates according to the evidentiary standard that a matter must be proven beyond reasonable doubt. The civil law – that is, where an individual or corporation takes a private legal action against another person or corporation78 – operates according to the standard that a matter must be proven on the balance of probabilities.

2.30 Restitution and compensation orders currently occupy a place between the civil and the criminal processes. Fundamentally, because the orders are not sentencing orders, applications proceed according to civil law criteria.79 However, applications for restitution and compensation orders are also not strictly civil in nature. In Director of Public Prosecutions v Esso Australia Pty Ltd (No 2), Justice Cummins lists 10 reasons why applications for compensation for injury80 are not strictly ‘civil’, including:

- the fact that, unlike in civil proceedings, in these proceedings the judge may take into account the financial circumstances of the offender, suggesting that the rehabilitation of the offender should not be ‘deflected or defeated’ by a compensation order; and
- the ‘intimate connection’ between the criminal trial including sentence and restitution and compensation orders.81

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74. Meeting with Walter Legal (28 November 2017). In some cases, the offender is represented by the Victorian Bar’s Duty Barrister Program: see for example, Coleman v The Queen [2011] VSCA 301 (12 October 2011).
75. Meeting with Victoria Legal Aid (20 September 2017).
76. For example, if it has acted for an offender in the past, Victoria Legal Aid would be unable to assist a victim in a direct claim against that offender: Meeting with Victoria Legal Aid (20 September 2017). Similar issues have arisen in the context of assisting victim survivors of family violence, with many of them being excluded from representation because Victoria Legal Aid has already acted for the offender. Victoria Legal Aid has introduced a pilot scheme in order to overcome these issues: Victoria Legal Aid, ‘Pilot Private Practitioner Duty Lawyer Scheme to Deal with Conflicts’ (legalaid.vic.gov.au, 2017) <https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/private-practitioner-duty-lawyers/pilot-private-practitioner-duty-lawyer-scheme-to-deal-with-conflicts> at 22 January 2018.
77. Community legal centres that offer free or low-cost legal help to members of the public can provide legal advice, information and, in some cases, ongoing assistance. Whether a community legal centre can provide ongoing assistance depends on a number of factors, including the capacity of the centre to assist; see further Federation of Community Legal Centres, ‘Getting Legal Help’ (fclc.org.au, 2018) <http://www.fclc.org.au_members/getting_legal_help.php> at 29 January 2018.
78. The state can be a party to a civil action if it makes a claim or a claim is made against it by another person or entity for a civil wrong. See further Judith Resnik, ‘Civil Processes’, in Mark Tushnet and Peter Cane (eds), The Oxford Handbook of Legal Studies (2005) 1–8.
80. This extends to restitution and compensation orders made under Sentencing Act 1991 (Vic) pt 4.
2.31 Once an application for restitution or compensation has been made in a court, it cannot resolve by way of a private agreement between the parties. This is because the courts have stated that restitution and compensation orders are not entirely civil matters, and that, as with criminal matters, there is a substantial public interest in open and accountable court processes for the resolution of these applications.\(^{82}\)

2.32 Prior to making an application for restitution and compensation, parties can negotiate privately before the offender is sentenced in order to reach an agreement on the payment of restitution or compensation. During preliminary consultations, the Council heard that this frequently occurs, and that consequently an offender will rely on payment of compensation as a factor in mitigation relevant to the issue of remorse on the plea.\(^{83}\)

2.33 The hybrid status of restitution and compensation orders, existing between the civil and the criminal law, requires the court to exercise functions that ‘are not the same, and can involve competing considerations’.\(^{84}\)

### Evidentiary considerations

2.34 A judge may be satisfied of the facts necessary to make an order for restitution or compensation from evidence:

- given at the hearing of the charge, including any findings of fact made in the proceeding;
- contained in documents provided to the court; and
- contained in admissions made on behalf of any person in connection with the application.\(^{85}\)

2.35 For compensation orders for injury, documents and admissions beyond the evidence given at the hearing of the charge, and other documents adduced during the criminal proceedings, may only be used as evidence with the consent of the parties.\(^{86}\) There is no equivalent provision for compensation orders for property loss.

2.36 The applicable standard of proof is the civil standard of proof, which requires the court to be satisfied on the balance of probabilities.\(^{87}\)

2.37 Evidence disclosed in an application for compensation may lead to an appeal against conviction. In at least two cases identified by the Council, a statement made to a psychologist or psychiatrist, tendered in evidence in support of an application for a compensation order for injury, has formed part of an appeal against conviction. This was on the basis that the medical evidence constituted fresh evidence bearing on the credibility of the complainant. In one case, this evidence against the victim’s credibility, in combination with other compelling factors, led the Court of Appeal to order that the accused be acquitted.\(^{88}\) In another case, the Court of Appeal found that there was a significant possibility that a jury would have acquitted the accused if the medical evidence had been before them, and ordered a retrial.\(^{89}\)

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82. Director of Public Prosecutions v Esso Australia Pty Ltd (No 2) (2001) 126 A Crim R 13, 17. This principle only applies once the application for restitution or compensation has been made. Prior to making such an application, parties are free to reach confidential agreements about compensation.

83. Meeting with the Chief Magistrate, Magistrates’ Court of Victoria, and Magistrates Charlie Rozencwajg and Susan Cameron (11 September 2017); Meeting with Waller Legal (28 November 2017); Meeting with Victoria Police Prosecutors (7 December 2017). See also discussion at [4.30].


85. Sentencing Act 1991 (Vic) ss 85F, 86(8), 84(7): a court must not refuse to hear an application unless the relevant facts do not sufficiently appear from this evidence.

86. Sentencing Act 1991 (Vic) ss 85G(1)(e).


Compensable injuries and losses

2.38 The range of injuries for which a compensation order may be obtained is wider than the range generally compensated under the civil law.

2.39 Compensation orders for injury may be awarded for pain and suffering experienced by the victim, and for losses incurred as a direct result of the offence, including:

- prior expenses incurred, or future expenses likely to be incurred, by the victim for ‘reasonable counselling services’;
- medical expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim; and
- other expenses actually and reasonably likely to be incurred by the victim, not including expenses arising from loss of, or damage to, the property.

2.40 There is no specific category for loss of earnings, or future earning capacity.

2.41 Injury is defined as ‘actual physical bodily harm, mental illness or disorder, pregnancy, grief, distress or trauma or other significant adverse effect, or any combination of these consequences’.

2.42 Loss and causation are to be assessed in a ‘common sense’ manner. Loss is not restricted to any particular type of loss. Damage must be ‘reasonably foreseeable’.

2.43 A victim may only seek compensation for injuries caused by the offences for which the offender has been found guilty. In cases that may involve offending over a long period of time (such as child sexual abuse), if the offender pleads guilty, or is found guilty, of only some of the offences originally charged, this will limit compensation to the consequences of the proven charges, and not all of the alleged conduct.

Assessing the amount of the order

2.44 In making a restitution order, a judge may order the return of the stolen goods, or goods that directly or indirectly represent the stolen goods, or may order a sum not exceeding the value of the stolen goods be paid to the original owner out of money taken from the offender at the time of their arrest.

2.45 Compensation orders for property loss can be for any amount that the court sees fit, but it must not exceed the value of the property lost, destroyed or damaged.
2.46 For compensation orders for injury, or for pain and suffering, a judge will determine the amount to be awarded by reference to the facts of the case.\(^{100}\)

2.47 There is no limit on the amount of compensation for injury that may be awarded.\(^{101}\) Consistent with the idea that compensation orders are not a form of penalty, however, the Sentencing Act 1991 (Vic) makes no provision for the award of punitive or exemplary damages.\(^{102}\) A compensation order should therefore only compensate a victim to the extent of their losses, and no further.\(^{103}\)

2.48 Courts have taken several different approaches to the assessment of appropriate compensation.\(^{104}\) There is limited discussion of the precise considerations and weight to be given to particular factors in the various orders made by the County Court and Supreme Court.\(^{105}\) This is likely to be due to the absence of a statutory ceiling on compensation and the difficulty of putting a monetary figure on the personal consequences of offending for victims. As was noted in one case, there is no ‘yardstick’ by which to measure grief or distress, and no easy conversion of emotional or psychological reaction to an amount of compensation,\(^{106}\) although courts may look generally to the principles of assessment of damages in the civil law.\(^{107}\)

2.49 For example, in a homicide case some of the factors to be taken into account in assessing damages for grief and trauma for the purposes of a compensation order for injury are:

- the circumstances in which the death occurred;
- the effect on the applicant on hearing of the event;
- the closeness of the relationship between the person seeking compensation and the person who has been killed;
- the age of the person seeking compensation; and
- the extent of grief and psychological suffering experienced as a result of the loss.\(^{108}\)

2.50 These matters mirror some of the same considerations when assessing damages in a civil proceeding, and the offenders’ rehabilitation or means is not considered as a relevant factor in assessment of the amount to be ordered.

2.51 If a victim has been awarded financial assistance through VOCAT, this amount will be deducted from any amount ordered.\(^{109}\)

2.52 From 2007–08 to 2016–17, the median amount awarded in the Magistrates’ Court for orders for restitution or compensation for property loss ranged from $400 to $550 each year, while the median amount for compensation orders for injury ranged from $502 to $2,355.

2.53 The amount for orders made in the higher courts varies significantly, with some compensation orders for injury ranging from tens of thousands of dollars to in excess of $500,000 for one order.\(^{110}\)

\(^{100}\) Director of Public Prosecutions v Energy Brix Australia Corporation (2006) 14 VR 345, 357.

\(^{101}\) A court may award such an amount as it sees fit: Sentencing Act 1991 (Vic) s 85B(1). See also Kaplan v Lee-Archer (2007) 15 VR 405, 407.


\(^{105}\) This issue was noted in Director of Public Prosecutions v Energy Brix Australia Corporation (2006) 14 VR 345, 355.


\(^{108}\) See for example, Hunt v Akkus [2017] VSC 79 (7 March 2017); see also Brooks v Meade [2017] VSC 172 (6 April 2017).
2. Restitution and compensation orders in Victoria

2.54 In making an order for restitution or compensation against an adult offender, the court may take into account the financial circumstances of the offender and the nature of the burden that its payment would impose.\(^{111}\)

2.55 For restitution and compensation orders against children, however, the Children’s Court must take into account the financial circumstances of the offender and the nature of the burden that its payment would impose. Further, the Children’s Court may only make an order of up to $1,000 against an offender.\(^{112}\)

2.56 When considering the financial circumstances of the offender for the purposes of imposing a fine, the court must take into account any other order that it, or any other court, has made or proposes to make for forfeiture, automatic forfeiture, restitution or compensation.\(^{113}\) The court must give preference to imposing an order for restitution or compensation if it considers that the offender has insufficient means to pay both a fine and an order for restitution or compensation.\(^{114}\)

2.57 While restitution and compensation orders are not sentencing orders, they sit within the Sentencing Act 1991 (Vic), and a purpose of that Act is to provide for sentences that promote the rehabilitation of offenders.\(^{115}\) These orders, therefore, ought to be imposed with some regard to the broader purposes of the Act within which they sit.\(^{116}\) The court may consider whether the imposition of an order is likely to be a ‘crushing financial burden’ harming prospects of rehabilitation.\(^{117}\) However, the interests of a victim have been said to take priority, and a judge may make an order for restitution or compensation even though such an order may negatively affect an offender’s rehabilitation.\(^{118}\)

2.58 This places the courts in a difficult position. While restitution and compensation orders are not intended to punish, a large compensation order is likely to hinder an offender’s prospects of rehabilitation. For example, an offender who owns the property in which they live may stand to have that property seized and sold and be left without secure housing, and with the added barrier of a criminal conviction, this is likely to limit their work prospects.\(^{119}\)

2.59 If the offender’s means dictate the amount of compensation available to a victim, different victims will be treated differently, depending on the means of the offender.\(^{120}\) This is also an undesirable outcome. The Sentencing Act 1991 (Vic) offers little guidance as to how such a conflict is to be resolved,\(^{121}\) and the balance seems to be struck differently by different judicial officers.\(^{122}\)

\(^{111}\) Sentencing Act 1991 (Vic) s 85H.
\(^{112}\) Children, Youth and Families Act 2005 (Vic) s 417.
\(^{113}\) Sentencing Act 1991 (Vic) s 53.
\(^{114}\) Sentencing Act 1991 (Vic) s 53.
\(^{115}\) Sentencing Act 1991 (Vic) s 1(d)(i).
\(^{116}\) Interpretation of Legislation Act 1984 (Vic) s 35(a).
\(^{121}\) See Gregory v Gregory (2000) 112 A Crim R 19, 26: “How can one both fulfil the rights of the victim and not financially crush the offender? The subsection, conspicuous in its vagueness, provides no real solution to what in truth is a contradiction” (Cummins J).
Requirement that application be ‘straightforward’

2.60 A sentencing court may decline to hear an application for restitution or compensation if it is too complex.\(^{123}\) Providing for restitution and compensation orders in the *Sentencing Act 1991* (Vic) was intended to make available an accessible alternative to a victim bringing a civil claim against an offender.\(^{124}\) For the legislation to be effective, however, it cannot require a criminal court to undertake the same procedural steps as civil courts, nor to consider the often complex legal questions addressed in civil trials.

2.61 As a result, a common issue in compensation matters is whether the questions raised are too complex (or not ‘straightforward’ enough) to be dealt with under the *Sentencing Act 1991* (Vic).\(^{125}\)

2.62 The court must not refuse to hear and determine an application for an order for restitution or compensation unless the relevant facts do not sufficiently appear from the evidence given at the hearing, in any statement of material facts or in the available documents (together with admissions).\(^{126}\)

2.63 As the rights of the victim to bring a civil claim remain, the *Sentencing Act 1991* (Vic) only seeks to deal with clear and simple cases.\(^{127}\) This is a matter for the court’s discretion.\(^{128}\) Unless there is evidence that the discretion miscarried, it is not a point of appeal that a court is in error for hearing and determining an application that is too complex, or otherwise not ‘straightforward’.\(^{129}\)

2.64 For example, in a case involving two offenders responsible for a violent crime against a victim resulting in permanent physical and emotional injuries, Justice Bell noted that the victim should not be put through the additional trauma of making an application in the civil court, and found that the case was not so complex as to be unsuitable for determination.\(^{130}\)

Rights of appeal

2.65 Victims have no independent right of appeal in relation to restitution and compensation orders, including where a court has refused to make an order. Offenders and the Director of Public Prosecutions can appeal in relation to such orders. Where the Court of Appeal sets aside an offender’s finding of guilt and considers whether an order for restitution or compensation made in connection with that finding of guilt should not take effect, a victim may make submissions on the appeal.\(^{131}\)

126. *Sentencing Act 1991* (Vic) s 85F.
129. *Kaplan v Lee-Archer* (2007) 15 VR 405, 412. A party to a matter may also be able to appeal a judge’s refusal to hear an application for restitution or compensation on the grounds that it is too complex, although this has not been tested.
131. *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 2.47.
2. Restitution and compensation orders in Victoria

2.66 The Director of Public Prosecutions may appeal against a refusal to make an order for restitution or compensation, or the amount awarded. The Court of Appeal has noted that, in determining whether awards are unreasonably low, the issues before the court will be more akin to those arising in an appeal against an assessment of damages in a civil court, because such awards are not made as a form of penalty. The test for whether the court should intervene will be based on an assessment of whether the amount ordered could be considered so inadequate as to fall below that available in the exercise of sound discretionary judgment.

2.67 During the Council’s preliminary consultations, the OPP stated that it is unaware of any case in which the Director of Public Prosecutions has appealed either the amount awarded in a compensation order or the refusal of an application for an order for restitution or compensation.

2.68 The VLRC recommended that the Criminal Procedure Act 2009 (Vic) should be amended to enable victims to seek leave to appeal an order, or a refusal by a judge to make an order, independently of the Director of Public Prosecutions.

Relevance of restitution and compensation orders to other available compensation for victims

2.69 If a victim receives a restitution or compensation order, it may have consequences for their ability to access other options for financial assistance.

2.70 In principle, a victim’s right to bring civil proceedings is unaffected by an order for restitution or compensation. However, if a victim does receive compensation under the Sentencing Act 1991 (Vic) for particular injuries, this may affect the viability of bringing a civil case for compensation against the offender, or another party, in respect of those same injuries as there are restrictions to seeking compensation from multiple sources for the same injuries.

2.71 During the Council’s preliminary consultations, it was noted that it was an important strategic decision, requiring careful legal advice, as to whether to bring an action in the civil courts for compensation against an offender or an institutional defendant, or to pursue compensation under the Sentencing Act 1991 (Vic). For example, where a victim seeks compensation under the Act from an offender for sexual offences that occurred in an institutional setting, if the victim subsequently wishes to bring a civil claim for the same injuries against the institution in which the abuse occurred, the fact that the victim has already received compensation from the offender may limit the viability of bringing a claim against the institution.

132. Criminal Procedure Act 2009 (Vic) ss 3, 287; see for example, Director of Public Prosecutions v Energy Brix Australia Corporation (2006) 14 VR 345.


2.72 Even if it were possible to bring a subsequent civil claim, any amount already awarded to a victim would be taken into account in any assessment of damages. In such a civil case, an award of exemplary damages would not be open where an offender has already been subject to substantial criminal punishment for the same behaviour. Exemplary damages in a civil assessment of damages are intended to punish, and a court will likely be conscious of the need to avoid double punishment.

2.73 Similarly, VOCAT will take into account any order for restitution or compensation paid by an offender when making an award. Section 16 of the Victims of Crime Assistance Act 1996 (Vic) requires VOCAT to take into account any other financial assistance that the victim has received (and so any order for restitution or compensation). The Council heard in preliminary consultations that this may not necessarily occur, as there is a reliance on the parties to advise VOCAT that such an order has been made. In practice, a magistrate or judge may not be aware that any other order has in fact been made.

2.74 In addition, the matters that are available for a victim to seek compensation through VOCAT and that are available through the Sentencing Act 1991 (Vic) do not always overlap. For example, a victim may receive compensation of up to $20,000 through VOCAT for loss of earnings, but compensation for loss of earnings is not noted as a category of loss for which a compensation order may be sought (see [2.40]). Therefore, a victim could receive compensation through both avenues.

Data on restitution and compensation orders in Victoria

2.75 This section presents data on the number of cases in which an order for restitution or compensation was made in Victoria over the 10-year period from 2007–08 to 2016–17. As discussed at [2.3], these orders are imposed in addition to any sentence imposed in the case.

2.76 Data is presented on the number of compensation orders made each year, as well as on the number of beneficiaries. This section also outlines data on repayments made to meet an order for restitution or compensation, where the court has been notified of the payment.

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139. Sentencing Act 1991 (Vic) s 8SL provides that the right to bring civil proceedings is unaffected.
142. Victims of Crime Assistance Act 1996 (Vic) s 16(a); see Bentley v Furlan [1999] 3 VR 63. VOCAT will take into account any damages that the victim has recovered at common law and any compensation, assistance or payments of any other kind that the victim has received: Victims of Crime Assistance Act 1996 (Vic) s 16(a). It is unclear whether VOCAT takes into account the likelihood of the payment of restitution and compensation orders made under the Sentencing Act 1991 (Vic) if payment has not yet been made. Magistrates will consider information available to them at the hearing: Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017).
143. Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017).
144. Victims of Crime Assistance Act 1996 (Vic) s 8(c); Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017).
145. It is important to note that the data contained in this section does not capture payments that are made privately from an offender to a victim prior to an application for restitution or compensation; such payments can then be referred to in mitigation as part of an offender’s plea: see further [2.32].
146. The repayments presented in this section are those recorded by the courts most likely before enforcement action has been undertaken by the victim. Nevertheless, some of these payments may have been made after civil enforcement action. There was insufficient information to track whether individual payments were made before or after enforcement actions were taken for each case.
Restitution and compensation orders in the Magistrates’ Court

2.77 Figure 1 presents data on the number of cases in which an order for restitution or compensation for property loss, or a compensation order for injury, was made in the Magistrates’ Court between 2007–08 and 2016–17.147

2.78 In the Magistrates’ Court, there were 40,968 cases in which an order for restitution or compensation for property loss was imposed in addition to sentence over the 10-year reference period. In contrast, cases in which a compensation order for injury was imposed were very rare. Only 243 such cases were imposed over the 10-year period, and most of these orders were made in 2011–12 and 2012–13.148

2.79 This finding is consistent with statements made during the Council’s preliminary consultations that Victoria Police prosecutors routinely make applications for orders for restitution or compensation for property loss.149

2.80 Overall, these orders represent a relatively small percentage of the total number of criminal cases heard in the Magistrates’ Court. Of the 96,293 criminal cases sentenced in the Magistrates’ Court in 2016–17, only 3,998 of those cases included an order for restitution or compensation in addition to the sentence imposed in the case, representing 4.2% of the total cases heard.150

Figure 1: Number of cases that include an order for restitution or compensation for property loss or a compensation order for injury, Magistrates’ Court, 2007–08 to 2016–17

147. During preliminary consultation, the Council heard that the Magistrates’ Court records orders for restitution or compensation for property loss as the same order type: Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017).

148. The Council does not know why these orders were concentrated within these particular financial years.

149. Meeting with Victoria Police Prosecutors (7 December 2017).

150. These percentages were relatively consistent over the 10-year reference period, ranging from 3.7% in 2015–16 to 6.1% in 2008–09. The percentage of cases includes matters resolved by way of a diversion program, as persons who complete a diversion program may still be the subject of an order for restitution or compensation: Criminal Procedure Act 2009 (Vic) s 59(4)(c)(iv). In 2016–17, all of the restitution and compensation orders were for property loss. No compensation orders for injury were made in this financial year (as shown in Figure 1).

151. Cases are listed according to the earliest year in which the case included an order for restitution or compensation. The data excludes cases in which orders for compensation or restitution were imposed for Commonwealth offences only, and cases in which the earliest known order for restitution or compensation was imposed prior to 2007–08.
2.81 Orders for restitution or compensation for property loss are granted relatively rarely, even in cases in which the nature of the offending may make these orders appropriate (such as offences involving loss or destruction of property). In 2016–17, there were 75,915 sentenced (or diverted) criminal cases that included one or more offences commonly found in cases that received an order for restitution or compensation for property loss (such as criminal damage, burglary or deception). However, of these 75,915 criminal cases, only 3998 cases actually received an order for restitution or compensation for property loss (5.3%).

2.82 Similarly, during 2012–13 (the year with the highest number of cases that received compensation orders for injury during the reference period, as shown in Figure 1), there were 32,628 cases sentenced (or diverted) in the Magistrates’ Court with the same offence types that received a compensation order for injury, but a compensation order for injury was made in only 120 of those cases (0.4%).

2.83 Over the 10-year reference period, the number of intended beneficiaries exceeded the number of individual compensation orders made in each financial year, as in some cases an order may have been made in respect of multiple beneficiaries. The number of beneficiaries for orders for restitution or compensation for property loss ranged from 5,270 in 2015–16 to 8,208 in 2008–09. The number of beneficiaries for compensation orders for injury ranged from one in 2008–09 and 2014–15 to 195 in 2012–13.

2.84 Based on data from 2016–17, almost half (49.9%) of all beneficiaries for orders for restitution or compensation for property loss were individual persons, while 42.8% were corporations, small businesses or not-for-profit organisations. Of the 195 beneficiaries of compensation orders for injury in 2012–13 (the most recent year available with a sufficiently large number of beneficiaries), 52.8% were individual persons.

2.85 As noted at [2.52], over the 10-year reference period, the median amount awarded each year for an order for restitution or compensation for property loss was relatively constant, varying from $400 to $550. Over this same period, the average (mean) amount ranged from $1,984.85 to $2,680.27.

2.86 For compensation orders for injury, the median amount each year ranged from $502 to $2,355, while the average (mean) amount each year ranged from $864.15 to $7,255.25. The fact that few orders for compensation for injury are made means that there is likely to be greater variability between the median and the average dollar values for orders made each year.

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152. The most common offence types that received orders for restitution or compensation for property loss were theft, criminal damage (under both the Crimes Act 1958 (Vic) and the Summary Offences Act 1966 (Vic)), obtaining property by deception, burglary and obtaining financial advantage by deception. These are similar offences to those associated with compensation orders for injury. This may be due to orders for restitution or compensation for property loss being recorded by the Magistrates’ Court as orders for compensation for injury.

153. Beneficiaries are persons in whose favour an order for restitution or compensation has been made.

154. In some instances, one order for restitution or compensation may contain multiple beneficiaries, while in other instances, one beneficiary may be awarded multiple orders for restitution or compensation for the same case. Cases in which beneficiaries are listed as ‘unknown’ are assumed to include one unique beneficiary.

155. Beneficiaries are grouped into the earliest year in which the case received an order for restitution or compensation. The data excludes beneficiaries of orders for restitution or compensation imposed for cases involving Commonwealth offences only, and cases in which the earliest known order for restitution or compensation was imposed prior to 2007–08.

156. The remaining beneficiaries were police or other emergency services (1.9%), government departments or organisations (3.1%), local government entities (1.5%) or unknown or unspecified (0.8%).

157. The remaining beneficiaries were similar to those for orders for restitution or compensation for property loss: corporations, small businesses or not-for-profit organisations (40%), police or other emergency services (2.1%), government departments or organisations (1%), local government entities (3.1%) or unknown or unspecified (1%). It is unclear how compensation orders for injury could be made in favour of entities other than individuals. These findings may be due to orders for restitution and compensation for property loss being recorded by the Magistrates’ Court as orders for compensation for injury.
2. Restitution and compensation orders in Victoria

2.87 As shown in Figures 1 and 2, there were very few cases in which a compensation order for injury was made. Overall, compensation orders for injury were rarely made in the Magistrates’ Court over the 10-year reference period. This is consistent with comments made during the Council’s preliminary consultations.\(^{158}\)

2.88 The most common offence types that received a compensation order for injury were theft, destroying or damaging property and obtaining property by deception, similar offence types to those that received an order for restitution or compensation for property loss.\(^{159}\)

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**Figure 2:** Number of individual orders for restitution or compensation for property loss and compensation orders for injury, Magistrates’ Court, 2007–08 to 2016–17\(^{160}\)

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Order for restitution or compensation for property loss</th>
<th>Compensation order for injury</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007–08</td>
<td>6,999</td>
<td>–</td>
</tr>
<tr>
<td>2008–09</td>
<td>7,347</td>
<td>1</td>
</tr>
<tr>
<td>2009–10</td>
<td>6,933</td>
<td>19</td>
</tr>
<tr>
<td>2010–11</td>
<td>5,748</td>
<td>21</td>
</tr>
<tr>
<td>2011–12</td>
<td>5,104</td>
<td>126</td>
</tr>
<tr>
<td>2012–13</td>
<td>5,234</td>
<td>189</td>
</tr>
<tr>
<td>2013–14</td>
<td>5,369</td>
<td>1</td>
</tr>
<tr>
<td>2014–15</td>
<td>5,375</td>
<td>–</td>
</tr>
<tr>
<td>2015–16</td>
<td>5,198</td>
<td>–</td>
</tr>
<tr>
<td>2016–17</td>
<td>5,559</td>
<td>–</td>
</tr>
</tbody>
</table>

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**Payments to the Magistrates’ Court for restitution and compensation orders**

2.89 Figures 3 and 4 (page 28) show data on the payments made to the Magistrates’ Court of Victoria following the imposition of an order for restitution or compensation in that jurisdiction. When an order for restitution or compensation is imposed in the Magistrates’ Court, an offender, or their legal representative, may make an agreement directly with the victim for the return of goods or payment of the order. In these circumstances, the court would not be notified of the payment or meeting of the order. Therefore, the actual payment rates may be slightly higher than the rates observed in Figure 3 (although there is no evidence that this is the case).

2.90 Most of these payments have been made prior to a victim initiating enforcement action in the civil jurisdiction of the Magistrates’ Court for payment of the order for restitution or compensation.\(^{162}\)

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\(^{158}\) Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017); Meeting with Victoria Police Prosecutors (7 December 2017).

\(^{159}\) See above n 152.

\(^{160}\) The data may also include orders that were imposed prior to the reference period, but were brought back to court during the reference period to be varied, reheard or confirmed. Restitution and compensation orders imposed for Commonwealth offences only are excluded.

\(^{161}\) Email from Magistrates’ Court of Victoria to Sentencing Advisory Council, 9 June 2017; Meeting with Victoria Police Prosecutors (7 December 2017).

\(^{162}\) A small proportion of these payments may have been made after civil enforcement action was undertaken by the victim, but there was insufficient information to reveal whether individual payments were made before or after enforcement action was taken against the offender. For further discussion of enforcement of restitution and compensation orders in the Magistrates’ Court, see [3.37]–[3.47].
Figure 3: Payment rates of orders for restitution or compensation for property loss made to the Magistrates’ Court, 2007–08 to 2016–17

<table>
<thead>
<tr>
<th>Financial year (and number of orders)</th>
<th>Percentage of orders repaid</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007–08 (6,999)</td>
<td>5.0% 13.6% 81.4%</td>
</tr>
<tr>
<td>2008–09 (7,347)</td>
<td>5.8% 16.7% 77.5%</td>
</tr>
<tr>
<td>2009–10 (6,933)</td>
<td>5.5% 15.1% 79.4%</td>
</tr>
<tr>
<td>2010–11 (5,748)</td>
<td>6.0% 13.1% 80.9%</td>
</tr>
<tr>
<td>2011–12 (5,104)</td>
<td>5.7% 11.0% 83.3%</td>
</tr>
<tr>
<td>2012–13 (5,234)</td>
<td>5.8% 11.5% 82.6%</td>
</tr>
<tr>
<td>2013–14 (5,369)</td>
<td>5.0% 11.0% 83.2%</td>
</tr>
<tr>
<td>2014–15 (5,375)</td>
<td>5.2% 9.7% 85.2%</td>
</tr>
<tr>
<td>2015–16 (5,198)</td>
<td>4.4% 12.0% 83.8%</td>
</tr>
<tr>
<td>2016–17 (5,559)</td>
<td></td>
</tr>
</tbody>
</table>

163. Payments of restitution and compensation orders imposed for Commonwealth offences only are excluded. Each order is listed in the year in which the order for restitution or compensation for property loss was made.

Figure 4: Payment rates of compensation orders for injury made to the Magistrates’ Court, 2007–08 to 2016–17

<table>
<thead>
<tr>
<th>Financial year (and number of orders)</th>
<th>Percentage of orders repaid</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007–08 (0)</td>
<td></td>
</tr>
<tr>
<td>2008–09 (1)</td>
<td>100%</td>
</tr>
<tr>
<td>2009–10 (19)</td>
<td>84.2% 15.8% 100%</td>
</tr>
<tr>
<td>2010–11 (21)</td>
<td>81.0% 9.5% 12.7%</td>
</tr>
<tr>
<td>2011–12 (126)</td>
<td>84.1% 11.1% 4.7%</td>
</tr>
<tr>
<td>2012–13 (189)</td>
<td>84.7% 11.1% 4.7%</td>
</tr>
<tr>
<td>2013–14 (0)</td>
<td></td>
</tr>
<tr>
<td>2014–15 (1)</td>
<td>100%</td>
</tr>
<tr>
<td>2015–16 (0)</td>
<td></td>
</tr>
<tr>
<td>2016–17 (0)</td>
<td></td>
</tr>
</tbody>
</table>

164. Payments for compensation orders imposed for Commonwealth offences only are excluded. Each order is listed in the year in which the compensation order for injury was made in court.
2.91 Over the reference period, the restitution and compensation orders (both for property loss and for injury) that were most likely to be completely repaid tended to be for smaller monetary amounts on the original order. The orders that were not repaid or were only partially repaid tended to be for comparatively large amounts. For example, for orders for restitution or compensation for property loss made in 2016–17, those that were successfully repaid demanded an average of $981.27 on the individual order. In comparison, orders that had no recorded payments demanded an average of $2,017.66 on the original order, and orders that had some recorded payments demanded an average of $4,098.80 on the original order.

2.92 Of the compensation orders for injury shown in Figure 4, on average those most likely to receive complete repayment demanded smaller amounts ($1,000 or less) on the original order, compared with orders that were not repaid or only partially repaid. For example, of the orders that received completed payment in 2010–11, the average amount demanded on the order was $400.00. In contrast, of the orders that received partial or no payments in 2010–11, the average amounts demanded on the order were $1,074.25 for partial payment and $2,542.35 for no payments.

Restitution and compensation orders in the Children’s Court

2.93 As discussed at [2.55], the Children’s Court may make an order for restitution or compensation of up to $1,000 against a child, but it must take into account the child’s financial circumstances and the nature of the burden that payment would impose in determining the amount and method of payment.\(^{165}\)

2.94 The Council was advised that restitution and compensation orders are rarely made in the Children’s Court. The Children’s Court will more often impose a good behaviour bond, which requires the child to make a payment of a bond to the court. Provided the child complies with the conditions of the good behaviour bond, the bond will be returned once the order is completed.\(^{166}\)

2.95 Restitution and compensation orders represent a relatively small percentage of the orders issued by the Children’s Court, similar to the findings for the Magistrates’ Court. In 2016–17, only 3.7% of the total cases heard in the Children’s Court included an order for restitution or compensation in addition to the sentence imposed in the case.\(^{167}\) This percentage increases slightly, to 4.5%, if cases with restitution and compensation orders are compared only with the pool of cases that contained one or more proven offences commonly present in cases that received a restitution or compensation order\(^{168}\) in the Children’s Court (156 of 3,476 cases in 2016–17).

2.96 Figures 5 and 6 (page 30) show a steady decline in the number of cases in which an order for restitution or compensation for property loss was made in the Children’s Court over the reference period, and the number of individual orders for restitution or compensation for property loss. Compensation orders for injury were also extremely rare.

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\(^{165}\) Children, Youth and Families Act 2005 (Vic) s 417.

\(^{166}\) Good behaviour bonds may be made for a period of up to 12 months: Children, Youth and Families Act 2005 (Vic) s 367; Meeting with Victoria Police Prosecutors (7 December 2017).

\(^{167}\) Of the 4,191 criminal cases sentenced in the Children’s Court in 2016–17, only 156 of those cases received an order for restitution or compensation in addition to the sentence imposed. The total number of criminal cases in the Children’s Court also includes matters resolved by way of youth diversion. Persons who complete a diversion program may still be the subject of an order for restitution or compensation: Criminal Procedure Act 2009 (Vic) s 59(4)(c)(iv).

\(^{168}\) These cases include one or more charges of offences that were commonly present in cases that received an order for restitution or compensation for property loss in the Children’s Court, such as theft, criminal damage or burglary. These offences are similar to those that attracted orders for restitution or compensation for property loss in the Magistrates’ Court; see above n 152.
2.97 When restitution and compensation orders are made in the Children’s Court, they are more likely to be made against older children who have some income (for example, children who have left school to enter the workforce) and therefore capacity to pay such an order. The Council heard that the Children’s Court is generally reluctant to make restitution and compensation orders against children due to their limited capacity to pay any such order.169

Figure 5: Number of cases that include an order for restitution or compensation for property loss or a compensation order for injury, Children’s Court, 2007–08 to 2016–17

Figure 6: Number of individual orders for restitution or compensation for property loss and compensation orders for injury, Children’s Court, 2007–08 to 2016–17

169. Meeting with Victoria Police Prosecutors (7 December 2017).
170. Cases involving restitution and compensation orders imposed for Commonwealth offences only are excluded, as are cases in which the earliest known order for restitution or compensation was imposed prior to 2007–08.
171. The data may include orders imposed prior to the reference period but brought back to court during the reference period to be varied, reheard or confirmed. Restitution and compensation orders imposed for Commonwealth offences only are excluded.
2. Restitution and compensation orders in Victoria

2.98 In most financial years, the number of intended beneficiaries slightly exceeded the number of individual restitution and compensation orders, consistent with the fact that the orders were most likely made in respect of multiple beneficiaries.\(^{172}\) This trend is similar to that seen for restitution and compensation orders in the Magistrates’ Court. The number\(^{173}\) of beneficiaries for orders for restitution or compensation for property loss ranged from 164 in 2015–16 to 1,035 in 2009–10. The number of beneficiaries for compensation orders for injury ranged from one in 2010–11 and 2012–13 to seven in 2011–12.

2.99 Over the reference period, the median amount for an order for restitution or compensation for property loss was relatively constant, varying from $180 to $250 each year. The average (mean) amount each year ranged from $290.82 to $380.68.

2.100 For compensation orders for injury, the median and average (mean) amounts each year ranged from $200 to $1,000 (the maximum amount that can be imposed in the Children’s Court).

**Payments to the Children’s Court for restitution and compensation orders**

2.101 Figure 7 shows data on the payments made to the Children’s Court following the imposition of an order for restitution or compensation for property loss in that jurisdiction.

**Figure 7**: Payment rates of orders for restitution and compensation for property loss made to the Children’s Court, 2007–08 to 2016–17\(^{174}\)

172. The number of beneficiaries will not be the same as the number of individual orders. In some instances, one order for restitution or compensation may contain multiple beneficiaries, while in other instances, one beneficiary may be awarded multiple orders for restitution or compensation for the same case. Cases in which beneficiaries are listed as ‘unknown’ are assumed to include one unique beneficiary.

173. Beneficiaries are grouped into the earliest year in which the case received an order for restitution or compensation. The data excludes beneficiaries of restitution and compensation orders imposed for cases involving Commonwealth offences only, and cases in which the earliest known order for restitution or compensation was imposed prior to 2007–08.

174. Payment of restitution and compensation orders imposed for Commonwealth offences only are excluded. Each order is listed in the year in which the order for restitution or compensation for property loss was made.
2.102 The Council’s previous research has shown that there are generally low repayment rates for fines imposed in the Children’s Court.\textsuperscript{175} It is possible that some of these orders are being paid by offenders directly to victims (in which case, the court would not be notified of the payment of the order), although it is unlikely that this is happening in many instances.

2.103 As in the Magistrates’ Court, in the Children’s Court orders for restitution or compensation may be paid prior to a victim initiating enforcement action in the civil jurisdiction of the Magistrates’ Court (according to procedures for enforcement of judgment debts).\textsuperscript{176}

2.104 In total, there were only 12 compensation orders for injury made in the Children’s Court between 2007–08 and 2016–17. Ten orders had no recorded payments, one order had partial payments and one order had been fully paid.

**Restitution and compensation orders in the County Court**

2.105 Figure 8 presents data on the number of cases in which an order for restitution or compensation for property loss or a compensation order for injury was made in the County Court between 2007–08 and 2016–17. As the County Court’s data does not distinguish between compensation orders for property loss and those for injury, it is not possible to ascertain the proportion of cases in which a compensation order for injury or a compensation order for property loss was made.

*Figure 8: Number of cases that include a restitution order or a compensation order for property loss or injury, County Court, 2007–08 to 2016–17*\textsuperscript{177}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure8}
\caption{Number of cases that include a restitution order or a compensation order for property loss or injury, County Court, 2007–08 to 2016–17}
\end{figure}


\textsuperscript{176} Some of these payments may have been made after civil enforcement action was undertaken by the victim. There was insufficient data to determine whether individual payments were made before or after enforcement action had been taken. For discussion of enforcement of restitution and compensation orders made in the Children’s Court, see [3.48]–[3.49].

\textsuperscript{177} The County Court’s data collection does not distinguish between compensation orders for property loss and compensation orders for injury. Cases are listed in the year in which orders were finalised or sentenced, which is often (but not always) the year in which the order for restitution or compensation was made. The data excludes cases in which orders for restitution or compensation were imposed for Commonwealth offences only. The lower number of orders in 2016–17 may be due to some cases sentenced in that year requiring further hearings to determine applications for restitution and compensation orders.
2.106 Figure 9 shows the number of individual orders for restitution or compensation made in the County Court over the reference period.

2.107 Of the 1,635 criminal cases sentenced in the County Court in 2016–17, 131 included a compensation order for property loss or injury, and 11 cases included a restitution order. Overall, 8.4% of all cases sentenced that year included either a restitution order or a compensation order for property loss or injury in addition to the sentence imposed in the case. This is approximately double the proportion of orders made in both the Magistrates’ Court (4.2%) and the Children’s Court (3.7%).

2.108 A slightly smaller number of County Court cases (1,490 cases in 2016–17) had one or more sentenced offences identical to the offences in cases with an order for restitution or compensation,178 but only around 9.3% of these cases received an order for restitution or compensation.

2.109 Examining restitution orders and compensation orders separately, in 2016–17, there were 1,485 cases with one or more offences identical to the offences in cases in which a compensation order was made,179 and there were 982 cases with one or more offences identical to the offences in which a restitution order was made.180 Using this subset of cases, only 8.8% of cases (131 of 1,485 cases) with one or more of those offences actually received a compensation order, and only 1.1% (11 of 982 cases) with one or more of those offences actually received a restitution order.

Figure 9: Number of individual restitution orders and compensation orders for property loss or injury, County Court, 2007–08 to 2016–17

178. County Court data on restitution and compensation orders was not in a form linked to individual charges, unlike Magistrates’ Court data and Children’s Court data. The Council was only able to identify all the charges in a case that received an order for restitution or compensation, not the charges to which a specific order for restitution or compensation related.

179. These offences included theft, obtain property by deception, obtain financial advantage by deception, armed robbery, burglary and criminal damage. These offences are relatively similar to those that received compensation orders in the Magistrates’ Court and the Children’s Court.

180. Cases that received a restitution order commonly contained offences that included theft, armed robbery, obtain property by deception, obtain financial advantage by deception and robbery.

181. Restitution and compensation orders imposed for Commonwealth offences only are excluded. Orders are grouped according to the year in which their corresponding case was sentenced or finalised.
Over the 10-year reference period, the median amount for an individual compensation order for property loss or injury each year ranged from $1,050 in 2015–16 to $3,000 in 2016–17, while the average (mean) amount ranged from $26,198.47 in 2007–08 to $100,765.62 in 2013–14.

The median amount for an individual restitution order ranged from $224 in 2009–10 to $9,373.55 in 2007–08, while the average (mean) amount ranged from $9,072.95 in 2011–12 to $157,516.41 in 2010–11.

Payments to the County Court for restitution and compensation orders

As with payments for restitution and compensation orders in both the Magistrates’ Court and the Children’s Court, payments in the County Court may be made directly to the victim without notifying the court. Therefore, the data presented in this section may underestimate the number of orders either partly or substantially paid. However, stakeholder feedback suggests that private payments of the orders are rare.\footnote{Meeting with Victoria Police Prosecutors (7 December 2017).}

Overall, Figures 10 and 11 show very low rates of payment of orders recorded by the County Court.\footnote{Figures 10 and 11 only refer to restitution and compensation orders, as no payments were made for orders in the remaining category of ‘unknown/not further defined’.} In Figure 10, a slight increase is observed for the number of restitution orders that received full or partial payment in 2012–13. Examination of the restitution orders reveals that, in that year, one case included four restitution orders, which the offender paid. Given the small number of orders in each financial year in Figure 10, the percentages are affected by even minor changes to payments in a single case.

Figure 10: Percentage of individual restitution orders, by payment status, County Court, 2007–08 to 2016–17\footnote{Orders are listed in the financial year in which the case was finalised, that is, the year in which the case is considered to have been closed, the offending sentenced and any ancillary order decided on. Restitution orders imposed for Commonwealth offences only are excluded.}
2. Restitution and compensation orders in Victoria

2.114 Figure 11 shows a consistently low rate of payment of compensation orders across the 10-year reference period.

Figure 11: Percentage of individual compensation orders, by payment status, County Court, 2007–08 to 2016–17

Restitution and compensation orders in the Supreme Court

2.115 The Council identified 25 cases in which an order for restitution or compensation for property loss or a compensation order for injury was made in the Supreme Court between 2007–08 to 2016–17. ¹⁸⁶ The majority of cases (16 of 25 or 64%) were compensation orders for injury, which is likely due to the nature of the offences heard by the Supreme Court. There were nine cases (nine of 25 or 36%) that included a compensation order for property loss. There were only two restitution orders made during this period.

2.116 Fourteen of these orders were made following applications from family members whose relatives were killed by the offender.¹⁸⁷ These orders were made in respect of the grief, psychological injury and pain and suffering of the applicants.

¹⁸⁵ Orders are listed in the financial year in which the case was finalised, that is, the year in which the case is considered to have been closed; the offending sentenced and any ancillary order decided on. Compensation orders imposed for Commonwealth offences only are excluded.

¹⁸⁶ The following steps were taken to obtain this data: the Council used the JADE database to search Supreme Court cases from 2007–08 to 2016–17 (searching each year separately), using the search terms ‘85B,’ ‘compensation order’ and ‘restitution’. The results were cross-checked against data provided to the Council by the Supreme Court. A similar search using the AustLii database was conducted using the same search terms.

2.117 Two applications were made following convictions for intentionally causing serious injury and rape.\(^{188}\)

2.118 Offenders sentenced in the Supreme Court are likely to receive significant custodial sentences. If they do not have existing assets, it is unlikely that they will be able to pay orders for restitution or compensation following their release.\(^{189}\)

2.119 There were eight cases involving offences such as theft, obtaining financial advantage by deception and other related charges.\(^{190}\) For these cases, compensation orders for property were made in respect of seven cases. In one case, a restitution order was made.\(^{191}\)

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\(^{189}\) Meeting with Judicial Registrar Mark Pedley, Supreme Court of Victoria (11 September 2017).


3. Enforcement of restitution and compensation orders in Victoria

Overview

3.1 This chapter examines the current framework for the enforcement of restitution and compensation orders through the civil jurisdictions of the Magistrates' Court and the higher courts in Victoria, as well as presenting available data on the rates of enforcement.

3.2 This chapter also presents an overview of the interaction between the Confiscation Act 1997 (Vic) and making and enforcing restitution and compensation orders, and data on enforcement of orders under this regime.

Order for restitution or compensation becomes judgment debt

3.3 In many cases, offenders cannot pay an order for restitution or compensation that has been made against them. If an offender does have means but refuses to pay, it is up to the victim to seek enforcement. If the offender does not pay, the debt becomes a judgment debt that can be enforced through the civil jurisdiction of the court that made the original order.

3.4 If an offender has very limited financial means, it may not be possible to enforce an order against them. Offenders in this situation are sometimes referred to as judgment proof. An offender may be judgment proof if they do not have any assets, or if any assets that they do have are protected and cannot be obtained in satisfaction of a judgment debt. If an offender does not own their own home, a car valued at over $7,800, assets other than normal household items, and has no income other than Centrelink payments, they cannot be forced to pay an order for restitution or compensation.

3.5 If an offender does have some assets, there are a number of ways in which a victim can seek to enforce the judgment debt. These include applying for orders or warrants that compel the payment of the debt, or the seizure and sale of property to meet the debt. A victim can also petition for the offender’s bankruptcy, which may compel the offender to pay the debt.

3.6 If an offender is judgment proof, it may still be possible, though unlikely, for the debt to be enforced if the offender’s financial circumstances improve at a later time. A judgment debt can be enforced for at least 15 years, so a victim may seek payment if the offender’s financial circumstances improve within that time. However, a victim may not necessarily become aware that an offender’s financial circumstances have improved.

192. Meeting with Victoria Legal Aid (20 September 2017); see [3.7].
194. Pursuant to Supreme Court Act 1986 (Vic) s 42, the provisions of the Bankruptcy Act 1966 (Cth) apply to protect an offender who is a judgment debtor. Provisions contained in the Judgment Debt Recovery Act 1984 (Vic) also limit the ability to extract money from those with limited means.
195. Bankruptcy Act 1966 (Cth) s 116(2)(b); Bankruptcy Regulations 1996 (Cth) regs 6.03–6.03B.
196. An instalment order cannot be made without the consent of the judgment debtor if the debtor’s only income is a pension or other government benefit: Judgment Debt Recovery Act 1984 (Vic) s 12. An offender could consent to payments being deducted from such a benefit.
197. The enforcement of a judgment debt was previously said to be limited to just 15 years, due to the operation of Limitation of Actions Act 1958 (Vic) s 5(4). However, the Full Federal Court has held that these provisions do not limit the enforcement of a judgment debt to 15 years: Denney v Reasonable Endeavours Pty Ltd (2003) 130 FCR 494. This position has also been accepted in subsequent case law: Bomak v Bokarot (2005) 194 FLR 223. Enforcement of a judgment debt after the 15-year period has lapsed, however, is likely to involve further legal expenses.
Case Study 5: Example of a judgment proof offender

A compensation order for injury is made against an offender who has been convicted and sentenced for assaulting a victim. The offender owns a car worth $5,000, lives in a rental property and receives Centrelink payments. He has no assets other than some basic household items. After payment of his rent and utilities, and meeting basic expenses such as paying for groceries, the offender does not have any funds remaining from his Centrelink benefit that could be used to repay the victim. Sale of the offender’s car would mean that he cannot attempt to apply for employment, as there is very limited public transportation in his area of residence.

The victim is unable to pursue the offender through the civil system because the offender does not have any ability to pay the victim without placing himself in significant financial hardship, and the limited assets he does have are protected under the law. He is therefore judgment proof.

3.7 It is likely that many offenders cannot pay restitution and compensation orders. A large percentage of offenders have limited financial resources.\textsuperscript{198} Although it is unclear what proportion of people facing criminal charges receive assistance from Victoria Legal Aid, it is clear that it is a significant proportion,\textsuperscript{199} and that these people are of low income and own minimal assets.\textsuperscript{200}

3.8 The Council heard during preliminary consultations that the majority of offenders are of limited means.\textsuperscript{201}

3.9 Similarly, offenders owing civil debts are also likely to be of limited means.\textsuperscript{202} Research has shown that socio-economic disadvantage is often linked with offending, and that legal problems and debt are often cumulative.\textsuperscript{203} Magistrates’ Court data from 2011–12 indicates that, of the 10 locations with the highest concentrations of judgment debtors,\textsuperscript{204} around half fell in highly disadvantaged local government areas, and only 27.7% of judgment debtors were employed full-time.\textsuperscript{205}

\textsuperscript{198} For example, in 2016–17, Victoria Legal Aid assisted 90,649 unique clients, of which 53% were receiving government benefits and 28% had no income: Victoria Legal Aid, Annual Report 2016–2017 (2017) 3, 25.

\textsuperscript{199} In the Magistrates’ Court of Victoria in 2014–15, there were 101,106 matters finalised, and in the same year, Victoria Legal Aid made 12,604 grants of legal aid to assist with summary criminal matters: see Law and Justice Foundation of New South Wales, Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid’s Summary Crime Program (2017) 222; Victoria Legal Aid, Annual Report 2014–2015 (2015) 44. This figure does not include legal information services provided by Victoria Legal Aid duty lawyers in the Magistrates’ Court. In 2014–15, Victoria Legal Aid provided duty lawyer services in 59,869 matters: ibid 43.

\textsuperscript{200} Victoria Legal Aid applies a means test to assess whether, and to what extent, to fund legal assistance for someone charged with a criminal offence. The means test assesses the income and value of assets of a person applying for legal assistance, as well as the income and value of assets of any person who is financially associated with the person seeking legal assistance (such as a family member). Generally speaking, persons receiving a full grant of legal aid have a net disposable income of less than $361 per week, and assets of under $1,095: Victoria Legal Aid, ‘Means Test’ (handbook.vla.vic.gov.au, 2017) <https://handbook.vla.vic.gov.au/handbook/12-means-test> at 11 January 2018.

\textsuperscript{201} Meeting with Victoria Legal Aid (20 September 2017); Meeting with Walter Legal (28 November 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

\textsuperscript{202} Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (13 September 2017).

\textsuperscript{203} Pascoe Pleasence and Hugh M. McDonald, ‘Crime in Context: Criminal Victimisation, Offending, Multiple Disadvantage and the Experience of Civil Legal Problems’ (2013) 33 Updating Justice 1, 1. The Department of Justice and Regulation in its Access to Justice Review recognised that there was a lack of meaningful data about the justice system and the people that use it: Department of Justice and Regulation, Access to Justice Review: Volume I Report and Recommendations (2016) 54, 66.

\textsuperscript{204} This includes judgment debtors whose debts do not relate to criminal offences.

3. Enforcement of restitution and compensation orders in Victoria

3.10 These findings provide important context, and must necessarily temper expectations about what reforms to the enforcement of restitution and compensation orders can realistically achieve, both for victims and for the broader community. Even the most efficient, victim-centred process for making and enforcing restitution and compensation orders cannot recover from an offender money or assets that they simply do not possess.

Civil enforcement of orders

3.11 A judgment debt can be enforced through the civil jurisdiction of the court that made the order through a variety of means, including applying for:
   - an instalment order;\textsuperscript{206}
   - a warrant for seizure and sale of goods;\textsuperscript{207}
   - a warrant for seizure and sale of real estate;\textsuperscript{208}
   - an order for attachment of earnings;\textsuperscript{209}
   - a charging order if an offender owns shares;\textsuperscript{210} and
   - an attachment of debt procedure (a \textit{garnishee order}).\textsuperscript{211}

3.12 For orders made in the Children’s Court, the victim may file the order in the Magistrates’ Court within five years following the making of the order for restitution or compensation.\textsuperscript{212} There are limits on the enforcement actions that can be taken against children.\textsuperscript{213}

3.13 It can cost a victim up to tens of thousands of dollars in court costs and solicitors’ fees to enforce a civil judgment debt, depending on the type of enforcement mechanism pursued, and the complexity of the matter.\textsuperscript{214} Some firms undertake this work on a ‘no-win, no-fee’ basis if there is some prospect of recovery.\textsuperscript{215}

3.14 During preliminary consultations, the Council heard that these civil enforcement processes can be cumbersome, expensive and often fruitless for victims.\textsuperscript{216}

3.15 In addition, a victim may encounter difficulties in locating an offender. If an offender cannot be located, it is difficult to commence civil proceedings against them. For example, if a victim does not know an offender’s current address, they cannot send a letter of demand or initiate proceedings.\textsuperscript{217}

\textsuperscript{206} Judgment Debt Recovery Act 1984 (Vic) s 6.
\textsuperscript{207} Magistrates’ Court Act 1989 (Vic) s 111(1)(a); Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 69; County Court Civil Procedure Rules 2008 (Vic) O 69.
\textsuperscript{208} Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 69.06; County Court Civil Procedure Rules 2008 (Vic) O 69.06. The Magistrates’ Court Act 1989 (Vic) only authorises a warrant of seizure and sale in the case of personal property: Magistrates’ Court Act 1989 (Vic) s 111.
\textsuperscript{209} Magistrates’ Court Act 1989 (Vic) s 111(1)(b); Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 72; County Court Civil Procedure Rules 2008 (Vic) O 72.
\textsuperscript{210} Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 73; County Court Civil Procedure Rules 2008 (Vic) O 73. There is no equivalent provision in the Magistrates’ Court General Civil Procedure Rules 2010 (Vic).
\textsuperscript{211} Magistrates’ Court Act 1989 (Vic) s 111(1)(c); Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 71; County Court Civil Procedure Rules 2008 (Vic) O 71.
\textsuperscript{212} Children, Youth and Families Act 2005 (Vic) s 418(2). The victim is not to be charged for filing the order with the relevant court: Children, Youth and Families Act 2005 (Vic) s 418(3).
\textsuperscript{213} See Children, Youth and Families Act 2005 (Vic) s 418(4).
\textsuperscript{214} Meeting with Waller Legal (28 November 2017). The costs of enforcing a civil judgment debt are set out in the respective court rules: Magistrates’ Court (Fees) Regulations 2012 (Vic) sch 1; County Court (Fees) Regulations 2012 (Vic) sch 1; Supreme Court (Fees) Regulations 2012 (Vic) sch 1.
\textsuperscript{215} Some firms may undertake this work if the offender owns property (which is ascertained through title searches), or if there is a restraining order over other assets owned by the offender: Meeting with Waller Legal (28 November 2017).
\textsuperscript{216} Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (13 September 2017); Meeting with Waller Legal (28 November 2017).
\textsuperscript{217} Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).
Summons for oral examination

3.16 An offender may be summoned to court to answer questions under oath regarding their financial status (known as an oral examination) and to produce any documents in their possession relating to such questions. A court cannot make an instalment order without first orally examining the debtor, or otherwise being satisfied that the order should be made.

3.17 This hearing assists in determining an offender’s financial situation. It is not an enforcement process per se, but may assist a victim in deciding which avenue of enforcement they should take.

3.18 If a judgment debtor is not asked by the court to produce documents to prove their financial position, the court may rely on the statements of the debtor as to their financial position. The court may then make an order that the offender pay the debt by instalments.

3.19 If the offender does not attend the hearing, a warrant for their arrest may be issued.

Figure 13: Current system of enforcement of restitution and compensation orders

220. A court may require a judgment debtor to produce documents: Judgment Debt Recovery Act 1984 (Vic) s 16.
221. Providing false statements under oath is a criminal offence (perjury): Crimes Act 1958 (Vic) s 314. However, it may be difficult for the misinformation of a judgment debtor to be proven.
222. Judgment Debt Recovery Act 1984 (Vic) pt II.
3. Enforcement of restitution and compensation orders in Victoria

**Instalment orders**

3.20 A court may order that a judgment debt be paid by instalments, or such an agreement may be entered into by the offender and victim.224 An instalment order cannot be made without the consent of the offender if the offender’s income is derived solely from a pension, or other regular social security payment.225 If an offender complies with an instalment order, enforcement or execution of the judgment debt by other means is stayed (that is, put on hold).226

3.21 If an offender defaults on the payment of an instalment order, the victim can apply to the court for a summons to require the offender to attend court.227 If the court is satisfied that the offender is able to pay the instalments as required under the order, but is persistently and wilfully refusing to make payments, the court can sentence the offender to up to 40 days’ imprisonment.228

**Civil warrants**

3.22 A victim can obtain a civil warrant that will be enforced by the Sheriff.229 This is an order to the Sheriff to seize and sell either goods or real estate belonging to the offender. For warrants issued in the Magistrates’ Court, the warrant to seize property cannot be executed against real estate but it can be issued against goods,230 although there are protections for a debtor’s personal and household property, property used to earn income and property used primarily as a means of transport.231

3.23 A victim can only obtain a warrant for the seizure and sale of real estate in the County Court and Supreme Court, but not in the Magistrates’ Court.232

3.24 The Sheriff is responsible for the enforcement of all warrants issued by a Victorian court.233 This includes warrants arising out of civil judgment debts, fines and infringements. The Sheriff’s powers only extend as far as the powers set out in the Sheriff Act 2009 (Vic), and the Sheriff is also limited by the protections in the Bankruptcy Act 1966 (Cth).234

3.25 Civil warrants are executed by the Sheriff on a first-in-time basis. That is, priority is determined according to the date on which the warrant was originally delivered to the Sheriff.235 These priority rules mean that where a judgment debtor has multiple warrants against them, a victim’s debt will be a lesser priority for enforcement if the other warrants against the offender are delivered to the Sheriff earlier in time.

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227. Judgment Debt Recovery Act 1984 (Vic) s 17. The application for summons must be accompanied by an affidavit explaining the facts and circumstances of the default: Magistrates’ Court General Civil Procedure Rules 2010 (Vic) r 61.06.
228. Judgment Debt Recovery Act 1984 (Vic) s 19. See also Imprisonment of Fraudulent Debtors Act 1958 (Vic) s 22, which provides for the imprisonment of a judgment debtor including in circumstances in which they are about to leave Victoria without paying the debt or instalments or are about to move elsewhere within Victoria with intent to avoid paying the debt.
230. Magistrates’ Court Act 1989 (Vic) s 111. A mechanism exists for transferring the enforcement process from the Magistrates’ Court to the Supreme Court where other enforcement processes have failed: see Magistrates’ Court Act 1989 (Vic) s 112; a certificate may be granted to transfer proceedings from the Magistrates’ Court to the Supreme Court where a warrant to seize property has been unsatisfied.
231. Supreme Court Act 1986 (Vic) s 42; Bankruptcy Act 1966 (Cth) s 116. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (13 September 2017); see also [3.4].
232. Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 69.04; County Court Civil Procedure Rules 2008 (Vic) O 69.04. The Magistrates’ Court Act 1989 (Vic) only authorises a warrant of seizure and sale in the case of personal property: Magistrates’ Court Act 1989 (Vic) s 111.
233. Sheriff Act 2009 (Vic); Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (13 September 2017).
235. Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 68.05(6); County Court Civil Procedure Rules 2008 (Vic) O 68.05(6); Magistrates’ Court General Civil Procedure Rules 2010 (Vic) O 68.05(6).
3.26 During preliminary consultations, the Council was advised that the fees payable by a victim to the Sheriff for the execution of a warrant are expensive and prohibitive. Additional fees are applicable for each additional address specified for execution, or for renewal or redirection of a warrant. The execution of a warrant may also be delayed by outdated address information.

Order for attachment of earnings and attachment of debt

3.27 An order for the attachment of earnings requires a debtor’s employer to deduct instalments from the offender’s wages and forward those instalments to the victim. An order for the attachment of debt may be made where an offender is owed money by a third party (sometimes called a garnishee). The victim may apply to the court for an order to compel the third party to pay that money directly to them.

Charging order

3.28 In the County Court and Supreme Court, a victim may obtain a charging order over an offender’s shares. This order enables the victim to sell an offender’s shares and to recover a judgment debt sum from the proceeds. A charging order is not available in the Magistrates’ Court.

Bankruptcy proceedings

3.29 If an offender owes a debt (or aggregate of debts) over $5,000 and the debt is not based on a judgment or an order issued more than six years earlier, it is possible that the offender could be declared bankrupt. A person can be made bankrupt through either seeking to have themselves declared bankrupt or having a creditor or creditors apply to have the court declare the person bankrupt.

3.30 When a person is declared bankrupt, it means that:

- creditors are prevented from further pursuing payment from them;
- certain restrictions are placed on them; and
- their property (with some exceptions) is made available for distribution among creditors.

3.31 A creditor (in this instance, a victim owed a judgment debt by the offender) may take legal action seeking to have the offender declared bankrupt to compel payment of the order,

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236. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (13 September 2017). The fees applicable for execution or attempted execution of a warrant or other process by the Sheriff are set out in Sheriff Regulations 2009 (Vic).

237. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (13 September 2017).

238. Magistrates’ Court Act 1989 (Vic) s 111(1)(b); Magistrates’ Court General Civil Procedure Rules 2010 (Vic) O 72; Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 72.

239. Magistrates’ Court Act 1989 (Vic) s 111(1)(c); Magistrates’ Court General Civil Procedure Rules 2010 (Vic) O 71; County Court Civil Procedure Rules 2008 (Vic) O 71; Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 71.

240. County Court Civil Procedure Rules 2008 (Vic) O 73; Supreme Court (General Civil Procedure) Rules 2015 (Vic) O 73.


242. A number of steps must be taken by a creditor in order for an offender to be declared bankrupt, including applying for and serving a bankruptcy notice. Once the notice is served on the debtor (the offender), they have 21 days to respond by paying the debt, requesting that it be set aside or applying for an extension of time in which to comply with the notice: Bankruptcy Act 1966 (Cth) s 40; Australian Financial Security Authority, ‘Creditor Bankruptcy Notices’ (afsa.gov.au, 2018) <https://www.afsa.gov.au/online-services/creditors-bankruptcy-notices> at 25 January 2018. Failure to comply with a bankruptcy notice is an act of bankruptcy, which empowers the creditor to proceed with bankruptcy proceedings, and to file a creditor’s petition with the Federal Court: Bankruptcy Act 1966 (Cth) s 40(1)(g). If the court agrees with the creditor’s petition, they may grant a sequestration order, which renders the debtor bankrupt: Bankruptcy Act 1966 (Cth) s 43. Once a debtor is declared bankrupt, a trustee is appointed to manage the bankruptcy, and investigate if there are any assets available to pay creditors. A trustee in bankruptcy has wide-ranging powers: Bankruptcy Act 1966 (Cth) ss 127, 129AA(3).

subject to the bankruptcy protections. A victim may also wish to take advantage of provisions allowing the trustee in bankruptcy to recover, for the benefit of creditors, property recently transferred by an offender to third parties.

3.32 Depending on the offender’s financial circumstances, they may seek to have themselves declared bankrupt in order to address their debts.

3.33 In some instances, where an offender has available assets, the possibility of bankruptcy might compel them to pay an order for restitution or compensation, due to the undesirable consequences of bankruptcy, such as restrictions on overseas travel, effects on the debtor’s ability to apply for future credit or effects on employment. If declared bankrupt, the offender will lose property that is defined as divisible under the Bankruptcy Act 1966 (Cth), including houses, land and motor vehicles over a certain value, and therefore the offender might pay if there is a risk of this occurring.

3.34 There are, however, a range of fees involved that may render the option of pursuing the offender’s bankruptcy inaccessible to many victims. During preliminary consultations, the Council was advised that most victims are unlikely to see any financial benefit from pursuing the bankruptcy of an offender, as there are rarely assets to seize. Ultimately, if an offender does not have any valuable assets and has a low income, even the threat of bankruptcy will be of little consequence, because there would be nothing for a trustee in bankruptcy to take.

3.35 Alternatively, an offender without assets may wish to be declared bankrupt themselves, so that debts that they owe are extinguished. Some debts will be extinguished when an offender is discharged from bankruptcy, meaning that the debt will no longer be recoverable.

3.36 Whether a debt for an order for restitution or compensation will be extinguished upon bankruptcy is uncertain. To be extinguished by bankruptcy, an order for restitution or compensation must have been incurred prior to the date of bankruptcy and must be the subject of a debt agreement. Even if they were the subject of a debt agreement, certain types of restitution and compensation orders may not be extinguished following bankruptcy. If the debt were extinguished, an offender would be released from having to pay the victim.


245. Bankruptcy Act 1966 (Cth) ss 127, 129AA(3); see also Fitzroy Legal Service (2017), above n 243, 357.

246. For further information on the advantages for debtors of declaring bankruptcy, see Fitzroy Legal Service (2017), above n 243, 356–357.


250. Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).

251. Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).

252. A person will be discharged from bankruptcy after three years and one day: Bankruptcy Act 1966 (Cth) s 149.

253. The Bankruptcy Act 1966 (Cth) does not specify whether restitution and compensation orders are provable (provable debts are those that a creditor can claim for in bankruptcy): Bankruptcy Act 1966 (Cth) s 82. However, in R v Lenske it was held that a debt payable under a restitution order was provable and therefore may be extinguished upon bankruptcy. In that case, the debt was not extinguished, but a permanent stay was ordered on enforcement of the orders: R v Lenske (1986) 9 FCR 532, 532. Not all provable debts are extinguished by bankruptcy: Bankruptcy Act 1966 (Cth) s 153; see further Fitzroy Legal Service (2017), above n 243, 367.


255. Restitution and compensation orders made in relation to proceedings under the Confiscation Act 1997 (Vic) may not be extinguished by bankruptcy, nor may those made in relation to offences involving fraud: Bankruptcy Act 1966 (Cth) ss 82(3A), 153(2)(b).
Enforcement data

3.37 This section presents data on enforcement orders made in Victorian courts. The data has been matched, where possible, with data from Infringement Management and Enforcement Services (IMES), Department of Justice and Regulation, which also oversees the execution of civil enforcement mechanisms by the Sheriff.

3.38 Across all jurisdictions, only a very small proportion of cases involving an order for restitution or compensation led to any enforcement action being recorded by either the court or IMES.

Magistrates’ Court

3.39 Table 1 presents data provided by the Magistrates’ Court on enforcement of orders for restitution and compensation for property loss from 2007–08 to 2016–17 (see also Figure 2 for the number of orders made). Table 1 shows that enforcement action was taken in respect of only 0.2% of these orders.

3.40 Enforcement action, however, does not guarantee successful enforcement of the order. For example, the issuing of a warrant to seize property will be an enforcement action but the warrant may not have been successfully executed.\(^\text{256}\)

3.41 There were no compensation orders for injury made over the 10-year reference period for which enforcement action was recorded.

Table 1: Number of orders for restitution or compensation for property loss by enforcement action, Magistrates’ Court, 2007–08 to 2016–17\(^\text{257}\)

<table>
<thead>
<tr>
<th>Enforcement action</th>
<th>Payment status for the order</th>
<th>Total</th>
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<td>No payments</td>
<td>Some payments</td>
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<td>Application for attachment of debt</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Application for attachment of earnings</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Warrant to seize property</td>
<td>49</td>
<td>9</td>
</tr>
<tr>
<td>Application for instalment order</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Summons for oral examination</td>
<td>45</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total orders with any of the above actions taken</strong></td>
<td><strong>97</strong></td>
<td><strong>19</strong></td>
</tr>
<tr>
<td>No enforcement action taken</td>
<td>48,075</td>
<td>3,172</td>
</tr>
</tbody>
</table>

\(^\text{256}\). For discussion of civil warrants, see [3.22]–[3.26]. For further discussion of the powers to enforce a warrant to seize property, see Fitzroy Legal Service (2017), above n 243, 348.

\(^\text{257}\). These numbers exclude all orders that were made in respect of Commonwealth offences only. The total number of restitution and compensation orders with any form of enforcement may not match the sum of individual types of enforcement actions, because some restitution and compensation orders may have multiple types of enforcement actions taken against them.
3.42 As shown in Table 2, a relatively low number (55 cases of 123 or 44.7%) of enforcement actions ordered by the Magistrates’ Court were subsequently registered with IMES. All of these enforcement actions were made in respect of orders for restitution or compensation for property loss.258

3.43 Overall, a very small proportion of cases involving restitution and compensation orders ultimately led to any enforcement action being registered either with the Magistrates’ Court or with IMES.

Table 2: Last known enforcement actions for cases with an order for restitution or compensation for property loss, by whether enforcement action was registered by IMES, Magistrates’ Court, 2007–08 to 2016–17

<table>
<thead>
<tr>
<th>Last known enforcement action in court</th>
<th>No known enforcement action in the case</th>
<th>Court order for enforcement by Magistrates’ Court only</th>
<th>Enforcement action registered by IMES</th>
<th>Court order for enforcement action registered by IMES</th>
</tr>
</thead>
<tbody>
<tr>
<td>No known enforcement action in the case</td>
<td>40,782 (orders for restitution or compensation for property loss)</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>243 (compensation orders for injury)</td>
<td>–</td>
<td>–</td>
<td>63*</td>
<td>–</td>
</tr>
<tr>
<td>IMES warrant issued without court order for enforcement listed</td>
<td>–</td>
<td>–</td>
<td>63*</td>
<td>–</td>
</tr>
<tr>
<td>Application for attachment of debt</td>
<td>–</td>
<td>1</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Application for attachment of earnings order</td>
<td>–</td>
<td>5</td>
<td>–</td>
<td>1</td>
</tr>
<tr>
<td>Summons for oral examination</td>
<td>–</td>
<td>44</td>
<td>–</td>
<td>3</td>
</tr>
<tr>
<td>Application for instalment order</td>
<td>–</td>
<td>9</td>
<td>–</td>
<td>5</td>
</tr>
<tr>
<td>Warrant to seize property</td>
<td>–</td>
<td>9</td>
<td>–</td>
<td>46</td>
</tr>
<tr>
<td><strong>Total number of cases</strong></td>
<td><strong>41,024</strong></td>
<td><strong>68 (orders for restitution or compensation for property loss only)</strong></td>
<td><strong>63 (orders for restitution or compensation for property loss only)</strong></td>
<td><strong>55 (orders for restitution or compensation for property loss only)</strong></td>
</tr>
</tbody>
</table>

a. This group of cases does not list the Magistrates’ Court as authorising the enforcement. This may be due to inconsistencies between the datasets kept by the Magistrates’ Court and IMES.

258. These figures are based on matching data from the Magistrates’ Court with enforcement data from IMES. The results may underrepresent the actual orders enforced due to difficulties in linking the two separate datasets. IMES data on enforcement of restitution and compensation orders can only be linked to Magistrates’ Court cases against which these orders were made, not to the individual order for restitution or compensation. This is why numbers in Tables 2 and 3 differ slightly from those in Table 1.

259. The data excludes cases in which restitution and compensation orders were imposed for Commonwealth offences only, and cases in which the earliest known order for restitution or compensation was imposed in the case prior to 2007–08.
3.44 Table 3 shows the results of warrants made in order to enforce an order for restitution or compensation for property loss imposed in the Magistrates’ Court. Of these warrants, only a handful were associated with payments recorded by the court.

Table 3: Results for warrants on cases with orders for restitution or compensation for property loss reported by IMES, by known payment status, Magistrates’ Court, 2007–08 to 2016–17

<table>
<thead>
<tr>
<th>Payment status in Magistrates’ Court for order for restitution or compensation for property loss</th>
<th>Warrant result (IMES)</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>No payments in court</td>
<td>Awaiting instructions</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Expired</td>
<td>76</td>
</tr>
<tr>
<td></td>
<td><strong>Paid</strong></td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Returned to court</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Unprinted</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td>90</td>
</tr>
<tr>
<td>Some payments in court</td>
<td>Awaiting instructions</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Expired</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td><strong>Paid</strong></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Returned to court</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Unprinted</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td>18</td>
</tr>
<tr>
<td>Completed payments in court</td>
<td>Awaiting instructions</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Expired</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td><strong>Paid</strong></td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Returned to court</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Unprinted</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td>10</td>
</tr>
</tbody>
</table>

260. IMES can classify a warrant as paid even if the amount paid back is less than the original amount demanded. For example, if a person pays back $495 of a $500 warrant, IMES may consider the rest of the warrant not worth pursuing. Conversely, a warrant may be associated with repayment of the original order for restitution or compensation, but may not be marked as paid if there are other penalties owing on the warrant and/or IMES is not aware that the person made payments directly to the court or beneficiaries.
3.45 One reason why recorded payments in the Magistrates’ Court are extremely low may be due to payment records held by the Magistrates’ Court and IMES acting independently of each other. In other words, a payment made to IMES for an outstanding warrant will not automatically be registered with the Magistrates’ Court, and conversely, payments made to the Magistrates’ Court will not automatically be registered with IMES. Table 4 provides an example of this, showing that during the reference period, IMES recorded that payment had been completed for the amount on the warrants for 11 cases with orders for restitution or compensation for property loss. However, all of these 11 cases were still recorded by the Magistrates’ Court as not having any payment made.

### Table 4: Comparison of Magistrates’ Court and IMES payment records for cases with orders for restitution or compensation for property loss, by last known payment status, 2007–08 to 2016–17

<table>
<thead>
<tr>
<th>Payment status in Magistrates’ Court</th>
<th>Payment status in IMES</th>
<th>Total cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No payments made on warrant</td>
<td>Some payments made on warrant</td>
</tr>
<tr>
<td>No payments made to court</td>
<td>77</td>
<td>2</td>
</tr>
<tr>
<td>Some payments made to court</td>
<td>16</td>
<td>1</td>
</tr>
<tr>
<td>Payments complete to court</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Total linked in IMES</td>
<td>100</td>
<td>5</td>
</tr>
<tr>
<td>No IMES record found</td>
<td>40,850</td>
<td>0</td>
</tr>
</tbody>
</table>

a. This may include cases in which the original amount demanded on the order for restitution or compensation was paid, but the person may still owe additional money for other fees or orders. Due to this, some of these cases may not be placed in the ‘paid’ category in Table 3.

3.46 Conversely, the Magistrates’ Court recorded that seven cases had payment completed on their order for restitution or compensation for property loss, but IMES had registered these cases as not having any payments made against their issued warrant.

3.47 Nevertheless, the number of orders being registered as paid by either the Magistrates’ Court or IMES represents an extremely small proportion of the overall orders made.

### Children’s Court

3.48 Of the restitution and compensation orders made in the Children’s Court over the 10-year reference period (see Figure 6, page 30), no recorded actions were taken to enforce these orders.

3.49 To enforce an order made in the Children’s Court, a copy of the order must be certified by the Children’s Court Principal Registrar, prior to being filed for enforcement in the Magistrates’ Court. The enforcement of any order for restitution or compensation made in the Children’s Court is likely to be extremely rare.

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261. The data excludes cases in which restitution and compensation orders were imposed for Commonwealth offences only, and cases in which the earliest known order for restitution or compensation was imposed in the case prior to 2007–08.


263. Meeting with Victoria Police Prosecutors (7 December 2017).
**County Court**

3.50 Of the cases sentenced in the County Court from 2007–08 to 2016–17 that included an order for restitution or compensation (see Figure 8, page 32), only a very limited number of cases included orders for which enforcement action was taken.\(^{264}\)

3.51 As shown in Table 5, only 46 cases (out of 2,296 cases with a compensation order for property loss or injury) had an enforcement action issued by the County Court. Seven cases had an enforcement action issued by the County Court for unknown payment orders (either a restitution order or a compensation order). In one case, a warrant for seizure and sale was issued and the debt paid, although it is unclear whether this is due to the successful enforcement of the warrant or another reason.

3.52 For the 106 cases that received a restitution order for property loss over the 10-year reference period, no enforcement action was taken.

3.53 This section only discusses data on enforcement of orders made in the County Court, as there was no data available on enforcement of orders made in the Supreme Court.

Table 5: Number of cases that include an order for restitution or compensation, by enforcement action, County Court, 2007–08 to 2016–17\(^{265}\)

<table>
<thead>
<tr>
<th>Enforcement action</th>
<th>Compensation for property loss or injury</th>
<th>Restitution</th>
<th>Unknown or unspecified payment order</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application for attachment of earnings order</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Application for instalment order</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Order for oral examination by registrar filed</td>
<td>11</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Summons for attachment of debt order (garnishee order)</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Warrant for apprehension issued</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Warrant returned unexecuted</td>
<td>6</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Warrant for seizure and sale issued</td>
<td>31</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total orders with any of the above actions taken</strong></td>
<td><strong>46</strong></td>
<td><strong>0</strong></td>
<td><strong>7</strong></td>
</tr>
<tr>
<td><strong>No enforcement action issued</strong></td>
<td><strong>2,250</strong></td>
<td><strong>106</strong></td>
<td><strong>12</strong></td>
</tr>
</tbody>
</table>

264. Data on enforcement of restitution and compensation orders made in the County Court can only be linked to the cases against which these orders were made, not the individual order for restitution or compensation.

265. These numbers exclude all restitution and compensation orders that were made in respect of Commonwealth offences only. The total number of cases including an order for restitution or compensation with any form of enforcement may not match the sum of individual types of enforcement actions, because some cases may have multiple types of enforcement actions taken against them.
3.54 Of the 46 cases that included a compensation order for property loss or injury that had an enforcement action recorded in the County Court, only 27 were found to have had any warrant activity undertaken by IMES. This could indicate that IMES was not required to take action for the particular type of enforcement action undertaken, such as an application for an instalment order, or that IMES was not able to trace the remaining 19 cases.\textsuperscript{266}

3.55 There were no enforcement matters brought to IMES in respect of restitution orders, and four enforcement matters were brought to IMES for unknown payment orders.

Table 6: Last known enforcement actions for cases with an order for restitution or compensation, by whether warrant was registered by IMES, County Court, 2007–08 to 2016–17\textsuperscript{267}

<table>
<thead>
<tr>
<th>Last known County Court enforcement order</th>
<th>No known enforcement action in the case</th>
<th>Court order for enforcement by County Court only</th>
<th>Court order for enforcement and enforcement action registered by IMES</th>
</tr>
</thead>
<tbody>
<tr>
<td>No known enforcement action in the case</td>
<td>2,335</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Application of attachment of earnings orders</td>
<td>–</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Application for instalment order</td>
<td>–</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Order for oral examination filed</td>
<td>–</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>Summons for garnishee order</td>
<td>–</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Warrant for apprehension issued</td>
<td>–</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Warrant for seizure and sale issued</td>
<td>–</td>
<td>5</td>
<td>27</td>
</tr>
<tr>
<td>Warrant returned unexecuted</td>
<td>–</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Total number of cases</td>
<td>2,335</td>
<td>22</td>
<td>31</td>
</tr>
</tbody>
</table>

\textsuperscript{266} All of the warrants listed with IMES were for cases that did not have any payments recorded by the County Court.

\textsuperscript{267} These numbers exclude all restitution and compensation orders that were made in respect of Commonwealth offences only.
3.56 Table 7 shows that the majority of warrants registered with IMES were marked as expired (according to their last known status).

<table>
<thead>
<tr>
<th>Type of order from County Court</th>
<th>Warrant result</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation for property loss or injury</td>
<td>Warrant expired</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Expired or inexecutable</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Returned to court</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>27</strong></td>
</tr>
<tr>
<td>Unspecified orders</td>
<td>Warrant expired</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>In progress</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td><strong>Paid</strong></td>
<td><strong>1</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>4</strong></td>
</tr>
</tbody>
</table>

a. The Council was advised that this warrant was paid as a result of the Sheriff auctioning the person’s interest in a property. The property was also subject to a restraining order made under the Confiscation Act 1997 (Vic).

3.57 In the County Court, there were only two cases (see Table 8) in which records indicated that payment had been completed on the warrant, at least for the original compensation order. An additional five cases had partial payments registered against the warrant, indicating some degree of success, even if the payments were incomplete.

<table>
<thead>
<tr>
<th>Type of order from County Court</th>
<th>Warrant result</th>
<th>No payments made on warrant</th>
<th>Some payments made on warrant</th>
<th>Payments complete on warrant</th>
<th>Total cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation order for property loss or compensation order for injury</td>
<td>Warrant expired</td>
<td>19</td>
<td>3</td>
<td>1*</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Expired or inexecutable</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Returned to court</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>21</strong></td>
<td><strong>5</strong></td>
<td><strong>1</strong></td>
<td><strong>27</strong></td>
</tr>
<tr>
<td>Unspecified orders</td>
<td>Warrant expired</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>In progress</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td><strong>Paid</strong></td>
<td><strong>0</strong></td>
<td><strong>0</strong></td>
<td><strong>1</strong></td>
<td><strong>1</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>3</strong></td>
<td><strong>0</strong></td>
<td><strong>1</strong></td>
<td><strong>4</strong></td>
</tr>
</tbody>
</table>

a. IMES data indicated that this person had paid the total compensation order ordered by the courts, but had not paid off additional costs owed to IMES. This may explain why the warrant result was not marked as paid.
Asset restraint and forfeiture under the Confiscation Act 1997 (Vic)

3.58 The Confiscation Act 1997 (Vic) provides for the confiscation of the proceeds and instruments of crime, and property suspected to be tainted in relation to serious criminal activity. The overarching objectives of this regime are to deprive persons of the proceeds of crime, disrupt criminal enterprises and deter criminal activity.268 The Act provides for the restraint, confiscation and forfeiture of property in specific circumstances.

3.59 The purposes of the Confiscation Act 1997 (Vic) include to ‘preserve assets for the purpose of restitution and compensation to victims of crime’.269 While most forfeiture and confiscation under the Act happens in the absence of an order for restitution or compensation, to the extent that the two intersect, enforcement under the Act may assist a victim in receiving payment of an order.

3.60 The Office of Public Prosecutions (OPP) conducts legal proceedings under the Confiscation Act 1997 (Vic) for the restraint and confiscation of assets. Asset Confiscation Operations (ACO), Department of Justice and Regulation, is then responsible for the enforcement and management of seized, restrained and forfeited property. ACO is also responsible for the enforcement of pecuniary penalty orders.270

The relationship between asset confiscation and victims’ compensation

3.61 Section 15(1) of the Confiscation Act 1997 (Vic) allows for a restraining order to be made to preserve property for the purposes of satisfying:

• a forfeiture order;271
• automatic forfeiture;272
• a pecuniary penalty order;273 and/or
• an order for restitution or compensation.274

3.62 The interaction between asset confiscation and restitution and compensation orders therefore arises when property is restrained for the purpose of obtaining a restitution or confiscation order under the provisions of the Confiscation Act 1997 (Vic).

3.63 A restraining order preserves an asset and prevents dealings or disposal of property by an offender.275 A restraining order can be obtained if a person is charged (or will be charged within 48 hours) with an indictable offence or certain other offences,276 or where the property is suspected of being tainted, that is, connected to a serious profit-driven offence.277 An application for a restraining order must state the purpose for which it is sought and may specify more than one purpose.278

269. Confiscation Act 1997 (Vic) s 1(h).
270. A pecuniary penalty order is an order that an offender pay to the state a sum equivalent to the benefit that the offender has derived from committing the offence: Confiscation Act 1997 (Vic) pt 8.
275. Confiscation Act 1997 (Vic) s 14(1).
276. Confiscation Act 1997 (Vic) ss 16(1), 36K.
277. A person does not have to have been charged for a restraining order to be made, as the property may fall within the civil forfeiture regime: Confiscation Act 1997 (Vic) pt 4.
278. Confiscation Act 1997 (Vic) s 15(2).
3.64 Where a restraining order has been made for the purpose of meeting an order for restitution or compensation alone, ACO does not assist a victim with the enforcement of the order against the offender. The victim will still need to pursue civil enforcement (see [3.11]–[3.36]) to obtain payment of the judgment debt through seizure and sale of the restrained asset.

3.65 ACO may, however, be able to assist the victim with enforcement of the order for restitution or compensation against the offender where a restraining order has been made for the purpose of meeting an order for restitution or compensation, as well as for one of the other purposes outlined in the Act.

3.66 As shown in Figure 14, ACO can enforce an order for restitution or compensation for a victim in circumstances in which:
• the offender’s assets are restrained;
• compensation is awarded to the victim in respect of the same offending pursuant to the provisions of the Sentencing Act 1991 (Vic); and
• the restrained property is forfeited, either because it is tainted or because it is property in which the offender has an interest if the offence is a defined, serious profit-motivated offence.

Figure 14: Current system of powers under the Confiscation Act 1997 (Vic) and enforcement of restitution and compensation orders

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

280. Confiscation Act 1997 (Vic) s 15(1).

281. Confiscation Act 1997 (Vic) sch 2; Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).
3.67 In these circumstances, the state will be responsible for the enforcement of any forfeiture, automatic forfeiture or pecuniary penalty order. The provisions of the Confiscation Act 1997 (Vic) provide that where a restraining order has been made for the purpose of paying an order for restitution or compensation, as well as for another purpose, the payment of any order for restitution or compensation is to be given priority, and the state must first pay the order out of any property forfeited. In such circumstances, the state will pursue the forfeiture order, and the victim will not need to pursue civil enforcement.

**Processes and policies for investigating an offender’s assets**

3.68 During preliminary consultations, the Council was advised that the extent to which an offender’s assets are investigated by Victoria Police for the purposes of meeting future restitution and compensation orders will depend largely on the individual informant handling the case. Informants’ workloads, and the need to prioritise investigation of the alleged offences, mean that additional investigation of an offender’s financial position to meet a possible order for restitution or compensation may be difficult to complete in the given timeframes.

3.69 Prior to July 2014, investigation of an offender’s assets was undertaken by Victoria Police Criminal Proceeds Squad. In 2013, the Victorian Auditor-General published a report on the operation of the Asset Confiscation Scheme, which involves cooperation between Victoria Police, the OPP and ACO. The report considered that it was ineffective for the Criminal Proceeds Squad’s resources to be used to undertake work on behalf of victims. It was recommended that the focus of the squad should be on pursuing profit-motivated, serious and organised crime, rather than pursuing compensation for victims.

3.70 Following this recommendation, responsibility for investigating an offender’s assets in order to potentially meet an order for restitution or compensation was decentralised, and it was to be undertaken by the informant in any given matter, except in relation to serious, profit-motivated offending.

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

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

284. Meeting with Victoria Police (19 September 2017); Meeting with Waller Legal (28 November 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017); Meeting with Victoria Police Prosecutors (7 December 2017). See also Victorian Auditor-General’s Office, Follow Up of Asset Confiscation Scheme (2016) x.

285. Meeting with Victoria Police Prosecutors (7 December 2017).


288. Ibid 51.

289. Meeting with Victoria Police (19 September 2017). In the 12 months to February 2016, victims’ compensation work had dropped to around 10% of the Criminal Proceeds Squad’s work: Victorian Auditor-General’s Office (2016), above n 284, 9.
3.71 Victoria Police policies, and training provided to police members on investigating an offender’s assets, have been described as ad hoc. During the Council’s preliminary consultations, it was noted that there may be forthcoming updates to internal Victoria Police procedures in order to standardise guidance provided to informants regarding victims’ compensation and the investigation of offenders’ assets.

3.72 The OPP stated that they scan all files that are referred to them for prosecution to determine whether there is the potential for an application for restitution or compensation. If the potential for such an application to be made by the OPP is identified, the OPP undertakes searches to ascertain whether an alleged offender has any assets in the form of property. However, the Council does not have any data on how consistently these policies are followed, and in any event, the Director’s policy on making such applications is likely to limit the instances in which such applications are pursued.

Civil avenues for asset investigation and preservation

3.73 If a victim seeks legal assistance from a private solicitor in respect of victims’ compensation, the legal practitioner may undertake property and land title searches to ascertain whether the owner owns any property.

3.74 A private solicitor cannot apply for a restraining order under the Confiscation Act 1997 (Vic). Under civil law, a victim’s private solicitor may make an application to obtain an interlocutory injunction to prevent a party to a proceeding from removing or otherwise dealing with assets located in Victoria. However, there is a high standard to be met to obtain such an order, as an applicant must show that there is an ‘imminent risk’ that an asset will be moved or disposed of. In addition, such a process is expensive.

Asset confiscation avenues

3.75 A person’s assets can be forfeited by the state in the following circumstances:

- **Automatic forfeiture (no court order needed)** – If an offender is convicted of certain serious, profit-driven offences (Schedule 2 offences), property can be automatically forfeited following conviction, subject to applications for exclusion. For these offences, forfeiture occurs automatically, and there is no need for an additional court order, nor is there any discretion for the court to not order forfeiture of the relevant property. There is no requirement that the property be tainted property.

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290. Meeting with Victoria Police (19 September 2017); Meeting with Waller Legal (28 November 2017).
292. Meeting with Office of Public Prosecutions (7 September 2017). This is undertaken in accordance with the Director of Public Prosecution’s policies: see [2.16]–[2.19].
293. Meeting with Office of Public Prosecutions (7 September 2017).
294. See [2.16]–[2.19] for further discussion of the Director of Public Prosecution’s policies.
295. Supreme Court Act 1986 (Vic) s 37(3). These orders are sometimes referred to as freezing orders or Mareva orders: John Arthur, ‘Interlocutory Injunctions, Freezing Orders and Other Applications’ (Paper presented at Continuing Professional Development Seminar, Svenson Barristers, Melbourne, 18 February 2014).
296. For example, an applicant may need to show that the offender’s house is up for auction: Meeting with Waller Legal (28 November 2017).
297. In addition to the costs of making the application in the Supreme Court, an applicant must undertake to pay damages to the respondent for any loss flowing from the interlocutory injunction: Meeting with Waller Legal (28 November 2017). It was noted that there is confusion for some police members as to both Victoria Police’s and the prosecution’s role in applying for restraining orders, as well as the ability for private solicitors to obtain freezing orders: Meeting with Waller Legal (28 November 2017).
298. Confiscation Act 1997 (Vic) sch 2. These offences include serious drug and dishonesty offences.
300. Confiscation Act 1997 (Vic) s 35.
3. Enforcement of restitution and compensation orders in Victoria

Case Study 6: Example of when property may be subjected to automatic forfeiture

An accused is convicted of trafficking a large commercial quantity of a drug of dependence (a Schedule 2 offence). The Director of Public Prosecutions applies to restrain certain assets, including the offender’s home and a bank account, for the purpose of satisfying an automatic forfeiture order that will be made if the offender is convicted. The accused is convicted, and the property and monies in the bank account are automatically forfeited within 60 days of the conviction.

- **Discretionary forfeiture (on court order)** – If an offender is convicted of an indictable offence or certain profit-motivated summary offences (noted in Schedule 1 of the *Confiscation Act 1997* (Vic)), a court has discretion to order forfeiture of tainted property.\(^{301}\)

Case Study 7: Example of when property may be subjected to discretionary forfeiture

An accused pleads guilty to a range of historical sexual offences against children (Schedule 1 offences). The Director of Public Prosecutions applies for forfeiture of a vintage car in which a number of the offences took place. The court finds the property to be tainted property and grants the order, forfeiting the car.

- **Civil forfeiture (on court order)** – Property may be forfeited on application of the Director of Public Prosecutions where property has been restrained in relation to a Schedule 2 offence, but where there has been no finding of guilt or conviction. If the court is satisfied on the balance of probabilities that the person has committed a Schedule 2 offence, and the property is found to be tainted, the property may be forfeited, subject to exclusion orders and hardship considerations.\(^{302}\)

Case Study 8: Example of when a property may be subjected to civil forfeiture

Mr A owns a property that he rents to Mr B, who uses the house to cultivate a large commercial quantity of cannabis (a Schedule 2 offence). Mr B is charged and convicted of the offence. A restraining order for the purpose of civil forfeiture is obtained by the Director of Public Prosecutions. The property is tainted because it was used in the commission of the offence. Mr A states that, while he knew that Mr B was growing cannabis, he thought it was only a few plants for personal use, and therefore, he did not have knowledge of the commission of the relevant offence. The court rejects this based on evidence adduced in Mr B’s criminal trial, and states that Mr A probably knew of the commission of the offence. The property is forfeited.

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3.76 The Confiscation Act 1997 (Vic) also provides for pecuniary penalty orders to be made. A pecuniary penalty order is an order that an offender pay to the state a sum equivalent to the benefit that the offender derived from the commission of the offence, where a person is convicted of an offence requiring automatic forfeiture.\footnote{Confiscation Act 1997 (Vic) pt 8.}

3.77 As noted at [3.66], ACO can enforce an order for restitution or compensation for a victim in limited circumstances.

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**Case Study 9: Example of when property may be forfeited to meet an order for restitution or compensation**

An accused defrauds a victim of $500,000, and uses that money to buy real and personal property. The Director of Public Prosecutions applies to restrain those assets for the purposes of meeting a future restitution order, and to satisfy a forfeiture order that may be made. The offender is found guilty, and the victim applies for and receives a restitution order for the $500,000. The court hears the application for forfeiture, finds the property to be tainted and orders the forfeiture of the property. Asset Confiscation Operations liquidates the assets and pays the victim the $500,000 (less conversion costs).

3.78 Where there is no power to forfeit an asset, however, even where property has been restrained for the purpose of meeting an order for restitution or compensation, ACO cannot assist the victim to enforce the judgment debt.

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**Case Study 10: Example of when property may not be forfeited to meet an order for restitution or compensation**

An offender, a young father, punches a victim, a young man, at a licensed venue, causing him to fall and hit his head. The victim passes away two weeks later. The offender pleads guilty to manslaughter, and is sentenced to a period of 10 years’ imprisonment. The offender and his partner jointly own a family home. Since the offender’s arrest, the home has been inhabited by the offender’s partner and his child.

The Director of Public Prosecutions applies to restrain the offender’s interest in this property for the purpose of meeting a future compensation order that may be brought by the deceased victim’s family. The victim's family members are awarded compensation orders for pain and suffering totalling $80,000. The restraining order remains in place over the offender’s property, but the victim’s family do not have the financial resources to pursue civil enforcement against the offender. Asset Confiscation Operations does not have any power to liquidate the asset. The judgment debt period of 15 years lapses.
Exclusion applications

3.79 The *Confiscation Act 1997 (Vic)* contains provisions that allow a person with an interest in restrained property to make an application for an exclusion order to protect property either from the restraining order or from forfeiture. These provisions are intended to protect third parties. The third party will bear the onus of proof to the civil standard, that is, on the balance of probabilities, in such applications. An applicant will need to demonstrate to the court that their interest is an excludable interest.

3.80 Not all rights to property will be considered an excludable interest.

3.81 In some circumstances, an offender may also make an application for exclusion. A court may exclude property from a restraining order if it is satisfied that the property is neither tainted nor needed to satisfy any purpose for which the restraining order was made. If the accused person or offender is unable to establish that the property is neither tainted nor so needed, it must remain restrained.

Data on enforcement under the *Confiscation Act 1997 (Vic)*

3.82 As discussed at [3.61], the OPP can apply for a restraining order under the *Confiscation Act 1997 (Vic)* for a range of purposes. Only a small proportion of restraining orders are obtained for the purpose of satisfying an order for compensation.

3.83 Figure 15 (page 58) indicates that, between 2010–11 and 2016–17, the number of restraining orders ranged from 91 to 133 orders each year. Restraining orders to satisfy a compensation order (for injury or property loss) comprised between 18.7% (in 2010–11) and 50.4% (in 2015–16) of the total restraining orders made in a given year.

3.84 Some restraining orders can be made for multiple purposes, for example, to satisfy an order for restitution or compensation, and to meet any forfeiture order that may be made (see further [3.64]–[3.66]). From 2010–11 to 2016–17, 95.3% of restraining orders made to satisfy a compensation order for injury were made for this purpose alone (182 of 191 orders). In comparison, only 15.9% of restraining orders made to satisfy a compensation order for property loss were for this purpose alone (11 of 69 orders), with the remaining restraining orders made to satisfy both the compensation order and another purpose.

3.85 From 2010–11 to 2016–17, the OPP made applications for nine restraining orders where the purpose was to satisfy a compensation order for injury, accompanied by another purpose, and 58 restraining orders to satisfy a compensation order for property loss, accompanied by another purpose. Where a restraining order is made for the purpose of meeting a compensation order, accompanied by another purpose, the beneficiaries of these compensation orders may gain the benefit of the state enforcing these orders for payment. However, no data was available on whether these orders were more likely to be successfully paid than compensation-only restraining orders.

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305. A legal or equitable estate or interest in property, or a right, power or privilege over property, will be excludable: *Confiscation Act 1997 (Vic)* s 3(1). Where a debtor/creditor relationship exists, the interest will not be excludable: *Caruana v Director of Public Prosecutions* (2011) 215 A Crim R 456. For example, where a sum of $60,000 was transferred to an offender in order to conceal that amount from a third party, the interest in that $60,000 was not excludable from the operation of the restraining order, because the relationship between the parties was one of debtor/creditor.


308. The data provided from the OPP did not include any restraining orders made for the purpose of meeting a restitution order, and only referred to restraining orders made for the purpose of meeting a compensation order for injury or property loss.

309. This would depend on whether a forfeiture order is ultimately made by the court: see [3.66].
Some restraining orders made to satisfy compensation orders have since been set aside, which may occur for a number of reasons (see Figure 17). The OPP estimates that 26.9% of restraining orders made between 2010–11 and 2016–17 for the purpose of satisfying a compensation order have since been set aside (70 of 260 orders). The remaining 190 restraining orders are still in operation. The number of restraining orders that are set aside varies from year to year.
3. Enforcement of restitution and compensation orders in Victoria

3.87 Figure 17 indicates the reasons why some restraining orders have been set aside. The majority of restraining orders (32 of 70 orders or 45.7%) were set aside because compensation was paid. Other reasons for setting aside a restraining order included the accused being found not guilty or acquitted, or because victims did not pursue compensation.

**Figure 17:** Reasons for setting aside restraining orders made for the purpose of satisfying a compensation order, 2010–11 to 2016–17

<table>
<thead>
<tr>
<th>Reason order was set aside</th>
<th>No conviction/acquitted</th>
<th>Victim(s) did not proceed with compensation application</th>
<th>Property excluded/released</th>
<th>Compensation paid</th>
<th>Compensation paid and victim(s) did not proceed with compensation application</th>
<th>Undetermined/unknown reason</th>
<th>Discontinued</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of orders set aside</td>
<td>11</td>
<td>10</td>
<td>4</td>
<td>32</td>
<td>1</td>
<td>8</td>
<td>3</td>
<td>1</td>
</tr>
</tbody>
</table>

3.88 ACO reports that they have administered 138 cases between 2007–08 and 2016–17 for the purposes of managing compensation payments to victims. Figure 18 indicates the number of these cases, based on the earliest year that assets in a case were approved for payment to beneficiaries.

**Figure 18:** Number of cases administered by Asset Confiscation Operations for the purposes of meeting restitution and compensation orders, 2007–08 to 2016–17

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310. One case was classified as having ‘compensation paid and victims did not proceed with application’. This case had multiple victims; one received compensation and the others decided not to proceed with the compensation application. The category of ‘other’ involves a case in which a restraining order was set aside, to be replaced with a different restraining order.
3.89 It is important to note that it may take several years for assets that have been restrained for the purposes of meeting a compensation order to be accessed to meet this purpose. This may be due to factors such as the value of assets available.

3.90 Of the 138 cases managed by ACO from 2007–08 to 2016–17, 64 cases (or 46.4%) were recorded as having complete payment of the compensation order. The remaining 74 cases, on average, had payment of 39.5% of the compensation amounts ordered.

3.91 There was no data available on cases managed by ACO for which no payment had been made. 311

3.92 As shown in Figure 19, in the majority of cases in which assets were confiscated to meet a compensation order, the type of assets seized mainly comprised real property (that is, real estate), followed by bank accounts (24.6%) and vehicles (15.2%).

3.93 The most common case types involved either theft or deception offences. In 2009, more than half of the victims who sought compensation through restrained or forfeited property were corporations or similar entities that had been victims of crime. 312

3.94 Some offences against the person, including sexual offences and murder, also appeared.

3.95 For the deception and theft offences, the assets confiscated included real property, bank accounts and vehicles (see Figure 20, page 62). The number of cases involving other offence types is too low to reliably examine the type of assets seized.

3.96 In 2015–16, $2.02 million in compensation payments were made to victims of crime by ACO in accordance with the Confiscation Act 1997 (Vic). 313

Figure 19: Percentage of cases administered by Asset Confiscation Operations, by type of assets confiscated to meet compensation order, 2007–08 to 2016–17 314

<table>
<thead>
<tr>
<th>Type of asset (and number of cases)</th>
<th>Percentage of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real property (87)</td>
<td>63.0%</td>
</tr>
<tr>
<td>Bank account(s) (34)</td>
<td>24.6%</td>
</tr>
<tr>
<td>Vehicle(s) (21)</td>
<td>15.2%</td>
</tr>
<tr>
<td>Cash (16)</td>
<td>11.6%</td>
</tr>
<tr>
<td>Household items/personal effects (8)</td>
<td>5.8%</td>
</tr>
<tr>
<td>Shares (6)</td>
<td>4.3%</td>
</tr>
<tr>
<td>Pecuniary penalty order (3)</td>
<td>2.2%</td>
</tr>
<tr>
<td>Boat (2)</td>
<td>1.4%</td>
</tr>
<tr>
<td>Furniture (2)</td>
<td>1.4%</td>
</tr>
<tr>
<td>Jewellery (1)</td>
<td>0.7%</td>
</tr>
<tr>
<td>Business (1)</td>
<td>0.7%</td>
</tr>
<tr>
<td>Fishing licence (1)</td>
<td>0.7%</td>
</tr>
<tr>
<td>Gold bullion (1)</td>
<td>0.7%</td>
</tr>
<tr>
<td>Jet ski (1)</td>
<td>0.7%</td>
</tr>
<tr>
<td>Musical equipment (1)</td>
<td>0.7%</td>
</tr>
<tr>
<td>Superannuation (1)</td>
<td>0.7%</td>
</tr>
</tbody>
</table>

311. This is because cases in which assets have not yet been disposed are likely to still be going through court proceedings.


314. Orders for pecuniary penalty orders did not describe what the seized asset was. Percentages will not add to 100% because some cases will have multiple types of assets confiscated.
Table 9: Number and percentage of cases in which assets were confiscated to pay compensation orders, by offence type, 2007–08 to 2016–17

<table>
<thead>
<tr>
<th>Offence type</th>
<th>Number of cases</th>
<th>Percentage of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theft</td>
<td>32</td>
<td>23.2</td>
</tr>
<tr>
<td>Obtain property by deception</td>
<td>31</td>
<td>22.5</td>
</tr>
<tr>
<td>Obtain financial advantage by deception</td>
<td>12</td>
<td>8.7</td>
</tr>
<tr>
<td>Indecent act with a child</td>
<td>10</td>
<td>7.2</td>
</tr>
<tr>
<td>Indecent assault</td>
<td>9</td>
<td>6.5</td>
</tr>
<tr>
<td>Murder</td>
<td>9</td>
<td>6.5</td>
</tr>
<tr>
<td>Incest</td>
<td>5</td>
<td>3.6</td>
</tr>
<tr>
<td>Intentionally cause serious injury</td>
<td>5</td>
<td>3.6</td>
</tr>
<tr>
<td>Rape</td>
<td>3</td>
<td>2.2</td>
</tr>
<tr>
<td>Other offences (each of which appear in two cases or less)</td>
<td>24</td>
<td>17.4</td>
</tr>
<tr>
<td><strong>All offences</strong></td>
<td><strong>138</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Prisoner Compensation Quarantine Fund

3.97 Where a prisoner is awarded damages while in prison, it may be possible for a victim to recover payment of an order for restitution or compensation from the Prisoner Compensation Quarantine Fund.

3.98 The Corrections Act 1986 (Vic) provides for the creation of a ‘prisoner compensation quarantine fund’ for the purpose of paying into that fund damages awarded to prisoners for civil wrongs.

3.99 Any amount over $10,000 will be held in the fund for 12 months, and can be paid to a victim to satisfy an order for damages or a judgment debt following the making of an order for restitution or compensation. A victim may request to be notified of any award of damages to a prisoner.

3.100 The Prisoner Compensation Quarantine Fund scheme commenced on 23 September 2008. Since then, 15 prisoners have had money quarantined in the fund. Data provided to the Council indicates that, as at 30 June 2017, five victims who had been awarded an order for restitution or compensation had been paid out of the fund.

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315. Percentages may not add to 100% because some cases may have multiple offence types.
316. This may occur when a prisoner is successful in bringing an action for civil damages following an assault in prison.
317. Corrections Act 1986 (Vic) pt 9C. Amounts awarded to a prisoner for medical and legal costs are excluded and will not be paid into the fund: Corrections Act 1986 (Vic) s 104V.
318. Corrections Act 1986 (Vic) s 104X. A notice must be published in the Government Gazette and newspapers when a prisoner receives an award of damages: Corrections Act 1986 (Vic) s 104Y. Despite these provisions, the Council heard of instances where a victim only became aware that a prisoner had received a payout through media reports: Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).
320. Email from Victims Register PCQF Co-ordinator, Victims Support Agency, Department of Justice and Regulation, to Sentencing Advisory Council, 28 September 2017; Email from Victims Register PCQF Co-ordinator, Victims Support Agency, Department of Justice and Regulation, to Sentencing Advisory Council, 22 November 2017. It has been noted that the practical effect of the Prisoner Compensation Quarantine Fund scheme is that offenders who owe debts that may be paid through the fund may not have any incentive to pursue their civil damages against the state if they are the victim of an assault or civil wrong while in custody.
Figure 20: Percentage of cases by type of assets confiscated, and by offence type in the case, 2006–07 to 2016–17

Orders for pecuniary penalty orders did not describe what the seized asset was. Percentages may not add to 100% because some cases may have had multiple types of assets confiscated.
4. The purposes of sentencing in Victoria

Overview

4.1 This chapter examines the existing purposes of sentencing in Victoria, their theoretical underpinnings and the current consideration of victims’ interests and financial loss in the sentencing process.

4.2 The Council has been asked to advise as to whether restitution and compensation orders should become sentencing orders, and whether the purposes of sentencing should include financial reparation. It is possible to make restitution and compensation orders sentencing orders without making victims’ financial reparation a purpose of sentencing. Nevertheless, the questions are interlinked, and it is necessary to consider the basis of the current purposes of sentencing, and whether it is desirable to amend those purposes to include victims’ financial reparation.

4.3 One of the purposes of the *Sentencing Act 1991* (Vic) is ‘to ensure that victims of crime receive adequate compensation and restitution’.\(^{322}\) However, separate from the purposes of the Act are the only purposes for which sentences in Victoria can be imposed, which are:

- just punishment – to punish the offender in a way that is just in all the circumstances;
- deterrence – to discourage the offender (known as specific deterrence) or other people (known as general deterrence) from committing the same or similar offences;
- rehabilitation – to create conditions that help the offender to lead a law-abiding life;
- denunciation – to denounce, condemn or censure the offender’s behaviour (that is, to make it clear to the offender and the community that the behaviour is wrong); and
- community protection – to protect the community from the offender.\(^{323}\)

4.4 No single purpose is the main or dominant purpose of sentencing. For each case, the court looks at the features of the offending and the offender, and decides on the purpose, or combination of purposes, that should apply.\(^{324}\)

4.5 These five purposes are the only purposes of sentencing for an adult in Victoria. A sentence, therefore, cannot be imposed for the purpose of financially compensating a victim. This is consistent with the fact that none of the available sentencing orders in Victoria is specifically directed at financially compensating a victim.

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323. *Sentencing Act 1991* (Vic) s 5(1). For a detailed discussion of the meaning and origin of each of these purposes of sentencing, see Freiberg (2014), above n 312, 234–266.
Theoretical underpinnings of the current purposes of sentencing

4.6 It is necessary to distinguish the purposes and aims of the criminal justice system as a whole from the aims of sentencing, which relate solely to one stage of the process.\(^{325}\)

4.7 Sentencing is the process of the state responding to an offender’s crimes, following the criminal process and a finding of guilt against the offender. One of the purposes of a criminal sentence is to punish the offender for their crimes. While there is general agreement that those who commit criminal acts ought to be punished, there are divergent views on the justification and aims of punishment.\(^{326}\)

4.8 While sentencing and punishment are not the same thing, many of the accepted purposes of sentencing are derived from theories of punishment. There are two main theories of punishment that have dominated debate: the retributive theory of punishment and the utilitarian theory of punishment. The retributive theory of punishment essentially states that people who voluntarily commit offences deserve to be punished for their wrongdoing.\(^{327}\) In contrast, the utilitarian theory of punishment aims to decrease the level of crime and to achieve the greatest overall good.\(^{328}\)

4.9 Deterrence, rehabilitation and community protection are derived from the utilitarian theory of punishment.\(^{329}\) Denunciation has also been linked to utilitarianism, although it also draws on the retributive theory of punishment.\(^{330}\)

4.10 The purpose of restoration or reparation has emerged in recent years in some jurisdictions as an additional purpose of sentencing.\(^{331}\)

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\(^{330}\) Ibid.

\(^{331}\) Such jurisdictions include New Zealand, Canada and England and Wales: see Table 10 (page 72).
4. The purposes of sentencing in Victoria

Application of the purposes of sentencing

4.11 The Sentencing Act 1991 (Vic) provides limited guidance on how the purposes of sentencing are to be ranked, and sentencing judges are generally free to apply the purposes with a broad discretion.

4.12 In Veen v The Queen (No 2), the High Court recognised that the purposes of sentencing are ‘guideposts to the appropriate sentence but sometimes they point in different directions’. While the five purposes of sentencing can be seen to be overlapping in some ways, all of these purposes cannot logically co-exist – at least not on an equal footing.

4.13 A challenge in assessing a judge’s consideration of any given purpose is the avoidance of two-stage sentencing, and the requirement that sentencing judges apply an instinctive synthesis of all relevant purposes and factors in exercising their sentencing discretion. There has been much commentary on the difficulties with the instinctive synthesis approach, and the wide discretion that can lead to disparate sentencing results.

4.14 Many commentators consider that a system that provides a ‘pick and mix’ list of sentencing purposes, with little guidance as to which purpose should have a controlling role, ‘will produce only chaos, unfairness and inconsistency’.

4.15 Critic H. L. A. Hart has argued that there is a cohesion in the purposes of sentencing in that the different purposes serve different aspects of the justice system, and the utilitarian purpose of deterrence provides a ‘general justifying aim’.

332. Some guidance is provided for particular categories of offences or offenders. For example, for serious offenders, community protection becomes the primary aim of sentencing: Sentencing Act 1991 (Vic) s 6D(a).
335. Freiberg (2014), above n 312, 235; see also R v Dixon (1975) 22 ACTR 13, 17–18.
336. Markanian v The Queen (2005) 228 CLR 357, 403 (Kirby J).
339. Warner et al. (2017), above n 326, 70. Andrew Ashworth argues that offering judges a choice of purposes is inconsistent with principled sentencing: Ashworth (2010), above n 325, 77.
Consideration of victims’ interests in the sentencing process

4.16 Although not a purpose of sentencing, victims’ loss or injury may be considered in the sentencing process in Victoria in a number of ways.

4.17 Historically, the recognition and consideration of victims’ rights in criminal punishment have been overlooked, and only began to emerge in England in the eighteenth century. In the last 30 years, the emergence of the victims’ rights movement has led to greater consideration of the role of victims in the sentencing process. How recognition of such rights ought to interact with the other purposes of sentencing is somewhat unclear.

Victims’ losses as a factor to be considered in sentencing

Relationship between factors and purposes in the sentencing process

4.18 Distinct from the purposes of sentencing are the factors outlined in section 5(2) of the Sentencing Act 1991 (Vic) to which a court must turn its attention when sentencing an offender. These factors include, but are not limited to:

- the maximum penalty for the offence;
- current sentencing practices;
- the nature and gravity of the offence;
- the offender’s previous character;
- the impact of the offence on any victim;
- the personal circumstances of any victim of the offence; and
- any loss, injury or damage resulting directly from the offence.

4.19 These factors may bear upon the relevance of certain purposes of sentencing. For example, an offence with grave consequences may highlight the importance of achieving community protection through the sentencing process.

4.20 A purpose of sentencing demands that the court sentence towards a particular outcome, such as community protection or rehabilitation, according to the needs of the case. Thus, the Sentencing Act 1991 (Vic) considers the effect on victims as a factor to be considered in sentencing, rather than an aim or purpose of the sentence imposed.

4.21 In one way, the factors can be considered as inputs that contribute to the instinctive synthesis process, which leads to a sentence that is driven towards the purposes of sentencing outlined in section 5(1) of the Act. For example, the plea of guilty cannot be an aim of the sentencing process, although the fact of a guilty plea invites consideration of the sentencing purposes of deterrence and rehabilitation.

345. See generally discussion on sentencing methodology in Freiberg (2014), above n 312, 228.
Consideration of victims’ loss in the sentencing process

4.22 The Sentencing Act 1991 (Vic) states that, in sentencing an offender, a court must have regard to the impact of the offence on any victim, the personal circumstances of any victim, and any loss, injury or damage resulting directly from the offence. In addition to prosecution submissions, information on these matters may be provided to the court through the Victim Impact Statement (discussed below).

4.23 Elevating financial compensation to the status of a purpose of sentencing has the potential to radically reorient the sentencing exercise towards the individual victim of the crime, and their loss or injury, as well as the financial capacity of the offender. In addition, as most offenders will likely not have the means to provide any meaningful compensation, the inclusion of financial reparation as a purpose of sentencing may be largely symbolic.

4.24 An expansion of the purposes of sentencing to include financial reparation for the victim could be inconsistent with the five current purposes of sentencing. This is because a purpose to financially compensate a particular victim brings into focus and elevates the consequences of the crime for a single victim, as opposed to considering the prosecution of the crime from the perspective of the state.

4.25 It could be argued that steering the sentencing exercise towards the purpose of the financial compensation of an individual is contrary to the underlying utilitarian justifications for many of the purposes of sentencing, although it could also be considered consistent with the retributive theory of punishment.

Victim Impact Statements

4.26 In Victoria, victims may contribute to the sentencing hearing through the provision of a Victim Impact Statement to the court. A Victim Impact Statement is a sworn statement to the court that outlines ‘the impact of the offence on the victim and … any injury, loss or damage suffered by the victim as a direct result of the offence’. A Victim Impact Statement can be made in relation to any offence.

4.27 A Victim Impact Statement can include photographs, videos, audio recordings, drawings, poems and other material relating to the impact of the offence on the victim. It can assist the court in determining sentence, as well as forming materials in support of an application for restitution or compensation. A Victim Impact Statement might, for example, include a description of the financial loss or medical costs incurred by the victim as a result of the offending.

347. Sentencing Act 1991 (Vic) s 8L. The victim’s injuries or loss may also be put before the court through other aspects of the criminal process, such as through the prosecution opening.
349. Sentencing Act 1991 (Vic) s 8L(1).
350. Sentencing Act 1991 (Vic) s 8K.
351. Sentencing Act 1991 (Vic) s 8L(2).
4.28 A Victim Impact Statement cannot contain opinions or arguments on what kind of sentence should be imposed, or the length of any sentence. A court may rule some or all of a Victim Impact Statement inadmissible, meaning that it cannot be presented at the sentencing hearing, or taken into account by the judicial officer in making their decision.

4.29 The Victorian Court of Appeal has noted, however, that expressions of forgiveness or support for the offender in the Victim Impact Statement may have weight in moderating the sentence. Nevertheless, the victim’s attitude towards the offender should not govern the judge’s approach to sentencing.

Reparation as an indication of remorse

4.30 In Victoria, a court may take into account the conduct of the offender in, or in connection with, the criminal trial or hearing as an indication of remorse, or lack of remorse, on the part of the offender. Therefore, an offender’s making of reparation to the victim may be taken into consideration as a mitigating factor where it is a genuine indication of remorse, contrition or rehabilitation. Reparation may be financial or take another form, such as an action. The degree of sacrifice by an offender in making reparation will also be considered relevant.

4.31 Where reparation reduces the extent of any injury, loss or damage caused to a victim by the offending, this may justify a reduction in the sentence that would have otherwise been imposed.

4.32 In the absence of the above factors, however, the settlement of a claim for compensation will not be taken into account in sentencing an offender, as the civil compensation claim serves different purposes from a sentencing order, and there is no relationship between the civil proceedings and the criminal trial.

4.33 The courts have been reluctant to significantly reward offenders who make reparation, in order to avoid the appearance that offenders are able to buy their way out of harsher sentences.

4.34 The absence of any reparation, or any attempt to make reparation, may be considered an aggravating factor for some offences, most notably theft-related offences.
The purposes of sentencing in Victoria

Restorative justice in Victoria

4.35 The its 2016 report, the Victorian Law Reform Commission (VLRC) examined the operation of victim–offender restorative justice conferencing in Victoria, noting its relevance for the payment of restitution and compensation orders.365

4.36 The term restorative justice applies to procedures that operate as an alternative to, or in addition to, the criminal trial process, and that focus on victim healing, holding the offender to account, community restoration, repairing harm and loss, and repairing damaged relationships.366 Restorative justice is a process, not an outcome, and it increases the involvement of victims, families and communities in the criminal justice system.367 In Victoria, the term has been applied to a range of different justice interventions and programs.368 Restorative justice conferencing allows the people most affected by a crime and the person responsible to talk about what happened, how people were affected and what can be done in response to the harm.369

4.37 The South Eastern Centre Against Sexual Assault operates a restorative justice program for victims of sexual offences.370 However, there is no legislated restorative justice process available in Victoria for indictable crimes committed by adults.371

4.38 Sentencing may be deferred to allow an offender to take part in a restorative justice process. Section 83A of the Sentencing Act 1991 (Vic) allows the Magistrates’ Court and County Court to defer sentencing for up to 12 months. This requires the agreement of the offender. Sentencing can be deferred for a number of purposes, including to ‘allow the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim’, or for any other purpose the court considers appropriate.372 When the matter returns to court for sentencing, the court is required to consider the offender’s behaviour during the deferral period.373

4.39 Although restorative justice conferencing will not be appropriate in all cases, it can be beneficial for victims, offenders and the community.374 The VLRC recommended the phased introduction of restorative justice conferencing for indictable offences in Victoria, to be available both as a pre-sentence option following a plea of guilt and as an option in connection with applications for restitution or compensation after a plea of guilt.375 The report suggests that, initially, the scheme should not apply to sexual violence and family violence offences.376

371. The Children’s Court can refer young offenders to group conferencing, but victim consent or participation is not a precondition: Children, Youth and Families Act 2005 (Vic) s 415.
372. Sentencing Act 1991 (Vic) ss 83A(1A)(d)–83A(1A)(e).
373. Sentencing Act 1991 (Vic) s 83A(3).
375. The VLRC also recommended introducing restorative justice conferencing where the Director of Public Prosecutions makes a decision to discontinue a prosecution: ibid 194.
4.40 An example of how restorative justice can assist in the financial reparation of victims is found in the New Zealand context, where restorative justice conferences play a large role in the financial reparation of victims. Conferences between an offender, victim and their support persons can be used to reach compensation agreements. Any agreement for financial reparation can then be included as part of the offender’s sentence if the judge decides that it is appropriate to do so in the circumstances. These conferences are designed to give victims a voice in the process, and the outcome of a conference may be taken into account by a judge at the time of sentencing.

4.41 The VLRC report noted research suggesting that payment of an order for restitution or compensation is more likely to be made where the offender has participated in a restorative justice process than when they have not.

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378. In New Zealand, courts have the power to order a reparation report, which may include information regarding the outcomes of a restorative justice process: Sentencing Act 2002 (NZ) ss 26, 33–34.

5. Approaches to restitution and compensation orders in other jurisdictions

Overview

5.1 This chapter discusses approaches to restitution and compensation orders in other Australian, and comparable overseas, jurisdictions. The approaches taken in these jurisdictions are presented under two broad headings:

- approaches in jurisdictions where orders for the financial reparation of victims are sentencing orders; and
- approaches in jurisdictions where orders for the financial reparation of victims are not sentencing orders.

5.2 In order to make recommendations for any change to the Victorian system for restitution and compensation orders, the Council sought to examine the operation and effectiveness of restitution and compensation orders in other jurisdictions. This will assist in identifying the practical consequences of any similar amendments in Victoria.

5.3 The Council has also sought data on the effectiveness of the enforcement of orders in other jurisdictions. This chapter presents the available data from these jurisdictions.

5.4 Essential features of the different jurisdictions are examined, including:

- whether victims' reparation is a purpose of sentencing;
- the relevance of offender means;
- enforcement mechanisms; and
- whether an offender can be imprisoned as a consequence of failing to meet an order for restitution or compensation.

Approaches in jurisdictions where orders for victims' financial reparation are sentencing orders

5.5 This section provides an overview of jurisdictions where financial reparation is a sentencing order, forming part of an offender's sentence. Table 10 (page 72) presents a snapshot of these jurisdictions.

Australian jurisdictions

5.6 As shown in Table 10, of the three Australian jurisdictions where restitution and compensation orders are sentencing orders, none provides that a victim's financial reparation is an explicit purpose of sentencing. In some jurisdictions, however, the rights of victims are incorporated into the sentencing process to a greater extent. In South Australia and Queensland, for example, the consideration of any injury, loss or damage suffered by a victim...
as a result of the offending is a matter that a court must consider during the sentencing process. In South Australia, the court must have regard to the degree to which the defendant has shown contrition for the offence, including any reparation made.

5.7 While financial reparation is not a purpose of sentencing in Queensland and the Australian Capital Territory, restitution and compensation orders form part of an offender’s sentence.

Table 10: Comparison of jurisdictions where orders for victims’ financial reparation are sentencing orders

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Reparation is a purpose of sentencing</th>
<th>Terminology used</th>
<th>Enforcement</th>
<th>Recovery by state or victim</th>
<th>Possibility of imprisonment on default</th>
<th>Financial hardship on offender is a relevant consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Australia</td>
<td>No</td>
<td>Restitution and compensation</td>
<td>Fine</td>
<td>State</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Queensland</td>
<td>No</td>
<td>Restitution and compensation</td>
<td>Fine</td>
<td>State</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>No</td>
<td>Reparation</td>
<td>Fine</td>
<td>State</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>South Africa</td>
<td>No</td>
<td>Restitution and compensation</td>
<td>Civil judgment</td>
<td>State assistance&lt;sup&gt;a&lt;/sup&gt;</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Yes</td>
<td>Reparation</td>
<td>Fine</td>
<td>State</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Canada</td>
<td>Yes</td>
<td>Restitution</td>
<td>Civil judgment debt or as breach of a conditional order</td>
<td>Victim&lt;sup&gt;b&lt;/sup&gt;</td>
<td>Yes&lt;sup&gt;c&lt;/sup&gt;</td>
<td>Yes</td>
</tr>
<tr>
<td>England and Wales</td>
<td>Yes</td>
<td>Restitution and compensation</td>
<td>Fine&lt;sup&gt;d&lt;/sup&gt;</td>
<td>State</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

b. Saskatchewan is an exception; see further [5.51].
c. This depends on whether the order is made as part of a conditional sentence: see [5.58].
d. Enforcement occurs in a similar way to a fine, although a distinction is made between a fine and a compensation order: Courts Act 2003 (UK) sch 5 pt 1.

380. Criminal Law (Sentencing) Act 1988 (SA) ss 10(1)(d)–(e), (g); Penalties and Sentences Act 1992 (Qld) ss 9(2)(e), 9(2)(e).
381. Criminal Law (Sentencing) Act 1988 (SA) s 10. In a provision unique to South Australia, a victim may include in their Victim Impact Statement a recommendation as to sentence: Criminal Law (Sentencing) Act 1988 (SA) s 7C(2).
382. Crimes (Sentencing) Act 2005 (ACT); Criminal Law (Sentencing) Act 1988 (SA); Penalties and Sentences Act 1992 (Qld).
South Australia

5.8 In South Australia, an order for compensation may be made instead of, or in addition to, dealing with the offender in any other way. Although restitution orders in South Australia are sentencing orders, they cannot be made instead of another sentencing disposition. In 2016–17, 2116 compensation orders were made in the Magistrates Court of South Australia, with only two restitution orders made in the period between July 2012 and June 2017.

5.9 The South Australian Director of Public Prosecutions advised that, in his experience, courts rarely impose orders for restitution or compensation. This is because if the offender has the means to pay restitution or compensation, they generally do so prior to sentence, in order to put forward the payment as a matter in mitigation. Where an offender has not done this, it is usually because they do not have the financial resources to make such a payment, which is then taken into account by the court when considering an order for restitution or compensation.

5.10 The South Australian Director of Public Prosecutions also noted that courts may be reluctant to make an order of compensation in circumstances in which they do not have adequate information about an offender’s financial status or the victim’s losses, nor information on whether such loss is covered by insurance.

Queensland

5.11 In Queensland, both restitution and compensation orders form part of an offender’s sentence. An order for restitution or compensation may be made ‘in addition to any other sentence to which the offender is liable’ as a non-custodial sentencing option. The court may make an order for restitution or compensation regardless of whether it records a conviction.

5.12 During preliminary consultations, the Council was advised that in the Magistrates Court of Queensland, these orders are generally treated as orders made in addition to sentence, rather than as a primary sentence imposed on an offender. In the Queensland higher courts, however, an order for restitution or compensation is factored into the overall sentence imposed on an offender rather than being treated as an ancillary order. The Queensland Court of Appeal has stated that restitution and compensation orders should not be made where the offender does not have the capacity to pay. The Council was advised during preliminary consultations that where there is limited information available

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383. Criminal Law (Sentencing) Act 1988 (SA) s 53(2)(b). At the time of publication, these provisions were set to be repealed by the Sentencing Act 2017 (SA).
385. Letter from Judge Mary-Louise Hribal, Chief Magistrate, Magistrates Court Adelaide, to Sentencing Advisory Council, 25 August 2017. In 2012–13 and 2016–17, the majority of compensation orders were made for amounts less than $250 (55% of orders).
388. Penalties and Sentences Act 1992 (Qld) s 35(2); R v Matauaina [2011] QCA 344 (29 November 2011) [35]. The court in R v Matauaina commented that a compensation order was part of sentence, but not a form of punishment.
389. Penalties and Sentences Act 1992 (Qld) s 34.
390. Teleconference with Legal Aid Queensland (9 November 2017). In 2016–17, the Queensland Magistrates Court ordered restitution in 12,345 matters and compensation in 2,972 matters. Compensation orders were most frequently made in relation to offences of acts intended to cause injury, fraud, deception and related offences; property damage and environmental pollution; and theft and related offences. Letter from His Honour Judge Orazio Rinaudo AM, Chief Magistrate, Magistrates Court of Queensland, to Sentencing Advisory Council, 21 August 2017.
391. Teleconference with Director of Public Prosecutions, Queensland (4 December 2017).
392. R v McQuire [2004] 1 Qd R 685, 694. The Court of Appeal has also stated that in the absence of evidence that an offender has the ability to pay an order for restitution or compensation, ordering a compensation order in addition to a sentence of imprisonment may prevent an offender from being able to reintegrate into society upon release, and may constitute a crushing sentence: R v Flint [2015] QCA 275 (18 December 2015) [24].
on an offender’s financial means, or where it is unlikely that the offender has the capacity to pay, prosecutors are unlikely to make such applications.\textsuperscript{393} In the higher courts, compensation orders for pain and suffering are rarely made.\textsuperscript{394}

5.13 A unique feature of the operation of the orders in Queensland is that the standard of proof in relation to findings of fact at sentencing differs from other Australian jurisdictions. In Queensland, a sentencing judge must be satisfied of findings of fact on the balance of probabilities, but the standard of proof varies according to the consequences of the finding on the person being sentenced.\textsuperscript{395} The standard of proof when sentencing is never as high as the criminal standard for a finding of guilt by beyond reasonable doubt.\textsuperscript{396} As a result, a sentencing judge may be satisfied of matters relating to a victim’s loss, or an offender’s financial means, on the balance of probabilities.\textsuperscript{397} If the consequences for an offender of a particular finding are severe, the sentencing judge will need to be satisfied of those facts to a greater degree.\textsuperscript{398}

**Australian Capital Territory**

5.14 In the Australian Capital Territory, a reparation order can be made as part of a combined sentence, including in combination with a term of imprisonment.\textsuperscript{399} A good behaviour order or an intensive correction order may include a condition regarding compliance with a reparation order.\textsuperscript{400} A reparation order can also be made without conviction.\textsuperscript{401}

**International jurisdictions**

5.15 New Zealand, South Africa, Canada and England and Wales all have victims’ financial reparation orders that form part of an offender’s sentence.\textsuperscript{402} In New Zealand, Canada and England and Wales, victims’ financial reparation is also a purpose of sentencing.\textsuperscript{403} In South Africa, despite restitution and compensation orders being sentencing orders, victims’ financial reparation is not a purpose of sentencing.\textsuperscript{404} In those jurisdictions where victims’ financial reparation is a purpose of sentencing, or even part of the criminal process, it is a relatively recent addition.\textsuperscript{405}

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\textsuperscript{393} Teleconference with Director of Public Prosecutions, Queensland (4 December 2017).

\textsuperscript{394} Teleconference with Director of Public Prosecutions, Queensland (4 December 2017).

\textsuperscript{395} In essence, the more serious the consequences for the offender of the finding, the higher the standard of proof. This has been described as a ‘sliding scale’: Teleconference with Director of Public Prosecutions, Queensland (4 December 2017); Evidence Act 1977 (Qld) s 132C(3); \textit{R v Lacey; Ex parte Attorney-General (Qld)} (2009) 197 A Crim R 399. This includes findings of fact in relation to allegations contained in a Victim Impact Statement: \textit{R v Evans} [2011] 2 QD R 571.

\textsuperscript{396} Teleconference with Director of Public Prosecutions, Queensland (4 December 2017). In Victoria, a sentencing court must not take into account matters adverse to the accused unless the matters have been proven beyond reasonable doubt: \textit{Anderson v The Queen} (1993) 177 CLR 520, 536. See further Freiberg (2014), above n 312. 134. The lower standard of proof required in Queensland has been described as ‘more akin to that in a civil trial than that in a criminal trial’: \textit{R v Miller} [2004] 1 Qd R 548, 533.

\textsuperscript{397} In Victoria, this would not be the case: see [6.39].

\textsuperscript{398} This is known as the Briginshaw test: see Briginshaw v Briginshaw (1938) 60 CLR 336.

\textsuperscript{399} \textit{Crimes (Sentencing) Act 2005 (ACT)} s 29.

\textsuperscript{400} \textit{Crimes (Sentencing) Act 2005 (ACT)} ss 11(5)(c), 13(3)(e).

\textsuperscript{401} \textit{Crimes (Sentencing) Act 2005 (ACT)} s 18. However, see \textit{R v CA (No 2)} (2016) 316 FLR 49, 52: these orders are ‘not a core part of the sentencing process’ (Murrell CJ).

\textsuperscript{402} \textit{Sentencing Act 2002 (NZ)} s 32; \textit{Criminal Procedure Act 51 of 1977 (South Africa)} ch 29; \textit{Criminal Code, RSC 1985, c C-46, s 737.1; Powers of Criminal Courts (Sentencing) Act 2000 (UK)} s 130.

\textsuperscript{403} In New Zealand, for example, providing for the interests of the victim of the offence, including providing financial reparation for harm done, is a purpose of sentencing. In sentencing an offender, a court must take into account information concerning the effect of the offending on a victim. These purposes can be achieved through the imposition of an order for financial reparation, a specific sentencing order in New Zealand: \textit{Sentencing Act 2002 (NZ)} s 7(1)(c)–(d), 8(f). 12. In Canada, one of the purposes of sentencing is ‘to provide reparations for harm done to victims or to the community’: \textit{Criminal Code, RSC 1985, c C-46, s 718(e)}. In England and Wales, one of the purposes is to make ‘reparation by offenders to persons affected by their offences’: \textit{Criminal Justice Act 2003 (UK)} s 142(1)(e).

\textsuperscript{404} \textit{Criminal Procedure Act 51 of 1977 (South Africa)} ss 297, 300. The purposes of sentencing in South Africa are known as the ‘triad of Zinn’ and require a sentencing judge to consider the gravity of the offence, the offender’s circumstances and the public interest: S v Zinn [1969] 2 SA 537.

5. Approaches to restitution and compensation orders in other jurisdictions

**New Zealand**

5.16 In New Zealand, a court must impose a reparation order for an offence that has caused a person to suffer loss of property, emotional harm or consequential harm, unless the court considers that such an order would result in undue hardship for the offender or their dependants.\(^{406}\) Such an order may be imposed alone, or in addition to any other sentence.\(^{407}\) If a court considers that a sentence of reparation may be appropriate, it can order a probation officer to prepare a reparation report, which is a pre-sentence report on matters such as the value of any loss, as well as on the financial capacity of the offender.\(^{408}\) The court can also order the offender to provide information on their financial circumstances.\(^{409}\)

5.17 A reparation sentence is designed to be compensatory in nature, rather than punitive.\(^{410}\) In 2015–16, approximately 5.4% of all sentences in New Zealand (3,491 of 64,616) had a reparation or restitution component.\(^{411}\)

**South Africa**

5.18 In South Africa, a court may make the payment of compensation a condition of the suspension or postponement of sentence, or as a stand-alone order.\(^{412}\) However, such an order has been identified as suitable for only trivial crimes, rather than as a means of avoiding a term of imprisonment for a more serious crime.\(^{413}\)

**Canada**

5.19 In Canada, reparation is a purpose of sentencing,\(^{414}\) and restitution orders\(^{415}\) are sentencing orders that are considered part of the offender’s punishment.\(^{416}\) These orders have been said to give effect to many of the principles of sentencing, including denunciation, specific and general deterrence, and rehabilitation.\(^{417}\)

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406. Sentencing Act 2002 (NZ) ss 12, 32. The Sentencing Act 2002 (NZ) sets out the hierarchy of the different sentencing options, including orders for reparation: Sentencing Act 2002 (NZ) s 10A.


408. Sentencing Act 2002 (NZ) ss 33–34. In preparing such a report, the probation officer must attempt to achieve agreement between the offender and the victim on the amount that should be paid in reparation: Sentencing Act 2002 (NZ) s 34(1).

409. Sentencing Act 2002 (NZ) s 42. A court may order that an offender be detained for a period of up to two hours for the purposes of making such a declaration: Sentencing Act 2002 (NZ) s 42A.


411. Stats NZ Tatarunga Aotearoa, ‘Dataset: Adults Convicted in Court by Sentence Type – Most Serious Offence Fiscal Year’ (nzdotstats.stats.govt.nz, 2017) <http://nzdotstat.stats.govt.nz/wbas/index.aspx?DataSetCode=TABLECODE7373> at 6 December 2017. In 2016–17 in the District Court, 432 offenders were discharged without conviction with the payment of restitution or compensation as a condition (Sentencing Act 2002 (NZ) ss 106(3)(a)–(b)); 254 offenders were convicted and discharged with the payment of restitution or compensation as a condition of ‘come up for sentence if called on’ (Sentencing Act 2002 (NZ) ss 110(3)(a)–(b)); 790 had the payment of restitution or compensation as a condition of ‘come up for sentence if called on’ (Sentencing Act 2002 (NZ) ss 110(3)(a)–(b)). A total sum of $1,248,403 was owed collectively by offenders for restitution and compensation orders made in 2016–17 in the District Court: Letter from Group Manager, Courts and Tribunals, Regional Service Delivery, Ministry of Justice, New Zealand, to Sentencing Advisory Council, 10 October 2017.


414. Criminal Code, RSC 1985, c C-46, s 718(e). See also section 718(f), which provides that an objective of sentencing is to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or the community.

415. In Canada, the term restitution is used to refer to what are termed compensation orders in Victoria. Compensation in Canada instead refers to an amount paid to the victim by a third party, such as the state: Jo-Anne Wemmers et al., Restitution in the Context of Criminal Justice (2017) 3.

416. Criminal Code, RSC 1985, c C-46, s 738(1)(a); R v Fontana [2017] ONSC 2964 [43].

5.20 In Canada, a restitution order can be made on its own, together with a sanction, as a condition of probation or in addition to a conditional sentence. Where punishment is exacted by a restitution order; there should be a corresponding reduction in other forms of punishment. Restitution orders in Canada have objectives centred on the offender taking responsibility for their crime and in preventing the offender from profiting from crime. Rehabilitation and reintegration of offenders into society are key considerations in whether a court will make a restitution order, and the central focus is not on compensating a victim. A victim’s right to restitution is recognised in the Canadian Victims Bill of Rights.

5.21 Data suggests that restitution orders are seldom used in Canada. In 2014–15 (prior to the commencement of the Canadian Victims Bill of Rights), Canadian courts ordered restitution in only 2.3% of cases.

**England and Wales**

5.22 In England and Wales, a sentencing court must have regard, as a purpose of sentencing, to the making of reparation by offenders to persons affected by the offences. In England and Wales, a compensation order may be imposed instead of, or in addition to, dealing in another way with an offender, and a court must consider making such an order.

5.23 The majority of compensation orders in England and Wales are made alongside non-custodial sentences, but a compensation order can be made in addition to another sentence imposed on an offender, or as a sentence in its own right. Restitution orders are also available, but these are ancillary orders.

5.24 Despite the fact that a compensation order is part of an offender’s sentence in England and Wales, it is not intended to punish, but is intended to be retributive, reparative and rehabilitative. It has been said that the imposition of a compensation order should therefore

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418. Criminal Code, RSC 1985, c C-46, ss 738(1), 732.1(3.1)(a), 742.3(2)(f).
419. R v Siemens (1999) 26 CR (5th) 302 [10]; a restitution order should not be used as a ‘mechanical afterthought’ to sentence.
421. Wemmers et al. (2017), above n 415, 4; R v Yates (2002) 169 CCC 3d 506 [7].
422. Victims Bill of Rights, SC 2015, c 13, s 2; the Bill provides to every victim the right to have the court consider making a restitution order against the offender, and every victim in whose favour a restitution order is made has the right, if they are not paid, to have the order entered as a civil court judgment that is enforceable against the offender. Victims Bill of Rights, SC 2015, c 13, ss 16–17.
423. Wemmers et al. (2017), above n 415, 6. More recent data has not been published.
425. If the offender is convicted of an offence that carries a fixed or minimum sentence, the compensation order can only be made in addition to any other sentence imposed: Powers of Criminal Courts (Sentencing) Act 2000 (UK) s 130. It is noted that, at the time of publication, a draft Sentencing Code was under consideration in England and Wales, containing streamlined provisions relating to compensation, and no provisions relating to restitution. The new Code categorises compensation orders as sentencing orders and restitution orders as ancillary: Law Commission, The Sentencing Code: Volume 2 – Draft Legislation (2017).
426. David Miers, ‘Offender and State Compensation for Victims of Crime: Two Decades of Development and Change’ (2014) 20(1) International Review of Criminology 145, 151. The approach to compensation orders differs depending on the sentencing guideline that is applicable. For example, under the Environmental Offences: Definitive Guideline, the offence range (range of sentences) is a financial penalty of 100 pounds to 3 million pounds, and the sentencing court should first consider making an order for compensation over any other financial penalty, and then consider confiscation or a fine if the offender has financial means: Sentencing Council for England and Wales, Environmental Offences: Definitive Guideline (2014) 3. In contrast, the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline provides that, in the majority of cases, the court should conclude that compensation should be dealt with in the civil courts and should state that no such order is to be made for that reason: see Sentencing Council for England and Wales, Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline (2015) 12.
427. Restitution orders are classified under the further powers of the court, rather than under the provisions for financial penalties and orders: Powers of Criminal Courts (Sentencing) Act 2000 (UK) s 148(1); Gary Betts, ‘Restitution Orders’ (westlaw.co.uk, 2017) at 6 December 2017.
5. Approaches to restitution and compensation orders in other jurisdictions

5.25 A unique feature of the system of compensation orders in England and Wales is that the Sentencing Council for England and Wales sets out in monetary terms suggested starting points for physical and mental injuries commonly encountered in magistrates’ courts.

5.26 Despite the fact that these jurisdictions treat restitution and compensation orders as part of an offender’s sentence, most apply the principle that these orders should only be made in straightforward cases, leaving victims to pursue civil remedies to seek compensation from offenders when there are complex questions (such as questions regarding the causation of the relevant loss) that were not determined in the criminal proceedings.

Consideration of a victim’s views on sentence

5.27 In the jurisdictions where orders for victims’ financial reparation are sentencing orders, courts may generally have regard to a victim’s desire for reparation. In some jurisdictions, an order for financial reparation may be made regardless of whether a victim wishes to receive it. As a general rule, however, courts do not take into account a victim’s views as to other components of an offender’s sentence, such as whether, or for what duration, an offender should be imprisoned.

5.28 In England and Wales, it has been said that a victim’s views on the appropriate sentence should not affect the thinking of a judge, and that it is not appropriate to take them into account as the role of the court is not to ‘exact revenge’. However, if the victim does not want compensation, this should ‘be made known to the court and respected’.

5.29 Canadian case law suggests that a victim’s views on sentence are relevant and must be considered, but ‘can never be determinative’. A victim’s views may conflict with the public interest, and where that is the case, the public interest must prevail. A victim’s views should not lead to an increase or decrease in sentence or determine the type of sentence imposed, but the victim’s views may be taken into account.

5.30 In South Australia, a Victim Impact Statement may contain a victim’s recommendations on the sentence to be determined by the court. In Queensland, a victim cannot provide views on the appropriate sentence, although a victim may be permitted to file an outline of argument if an offender appeals against the imposition of an order for restitution or compensation.

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432. An example is New Zealand: see [6.31].
433. R v Harrod (Martin) (2014) 1 Cr App R (S) 76, 477; R v Pritchard (1973) 57 Cr App R 492, 494.
436. R v St Martin 2015 ONSC 3840 [35].
437. R v St Martin 2015 ONSC 3840 [35].
5.31 In New Zealand, a victim’s views may be placed before the court in a reparation report, although there have been cases in which reparation orders have been imposed in circumstances in which victims do not desire financial compensation.

5.32 If a victim’s views were to determine an appropriate sentence and whether an offender was to make financial reparation, this could undermine public confidence in the criminal justice system. In a 2016 case, the Supreme Court of Appeal of South Africa rejected an argument by defence counsel that an allegation of rape had been falsely made in order to extort money from the offender, where a victim had expressed her wish that the offender receive a community-based sentence and pay financial compensation rather than receive a lengthy term of imprisonment. On appeal, the court resentsenced the offender to a term of imprisonment, because public confidence in the criminal justice system would be undermined if a sentence of financial compensation and a community-based sentence were imposed for rape, even though those were the victim’s wishes.

### Relevance of offender means

5.33 As shown in Table 10, in jurisdictions where orders for victims’ financial reparation are sentencing orders, the courts may take into account an offender’s financial means when considering the imposition of an order for restitution or compensation.

5.34 In New Zealand, despite the strong statutory presumption in favour of an order being made, the court will not impose a sentence of reparation if satisfied that doing so will result in undue hardship for an offender. During preliminary consultations, however, the Council was advised that, in practice, orders are often made in the absence of clear evidence of an offender’s ability to meet a reparation order. In some cases, an offender may assert an ability to meet a reparation order, but then default on payments.

5.35 In Canada, a court may still impose an order for restitution if an offender is without means, but will not do so if it will negatively affect the offender’s reintegration into society or the offender’s rehabilitation. In some circumstances, where an offender has means, the making of financial reparation is said to contribute to an offender’s reintegration into society. Nevertheless, financial capacity is still a relevant and important consideration. A lack of means was identified as a primary obstacle for victims obtaining restitution in Canada.

5.36 In England and Wales, in addition to assessing whether an offender has the means to pay, a court considers whether the offender can pay within a reasonable time. A court cannot increase a period of imprisonment if an offender does not have the means to pay an order for restitution or compensation, and an offender is not permitted to buy a shorter sentence because they have means.

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441. Sentencing Act 2002 (NZ) s 34.
442. See for example, R v Bursuk [2016] 2 NZDC 24416 (2 December 2016); Teleconference with Legal Services Commissioner/Group Manager, National Service Delivery, Ministry of Justice, New Zealand (11 December 2017).
446. Teleconference with Legal Services Commissioner/Group Manager, National Service Delivery, Ministry of Justice, New Zealand (11 December 2017).
447. R v Fitzgerald [1990] 1 SCR 1005; Wemmers et al. (2017), above n 415, S.
449. R v Bagga (1989) 11 Cr App R (s) 497, 499. The provisions relating to restitution orders do not require the court to take into account an offender’s means, in contrast to the compensation order provisions: Ormerod and Perry (2018), above n 429, E16.11.
450. Miers (2014), above n 426, 151; R v Copley (1979) 1 Cr App R (S) 55, 57.
5. Approaches to restitution and compensation orders in other jurisdictions

5.37 In South Africa, courts only make an order for restitution or compensation where an offender has sufficient property or assets to make payment, or to make payment to a large extent.\(^{451}\)

5.38 In South Australia, alongside considering whether an offender has means to comply with any such order, a sentencing court must also consider whether compliance with any compensation order will unduly prejudice the welfare of any of the offender’s dependants.\(^{452}\) In many cases, courts do not make an order for restitution or compensation because it is accepted that the offender has no means to pay.\(^{453}\)

5.39 Similarly, in the Australian Capital Territory, consideration has been given to the impact of an order on an offender where it has been said that ‘the only predictable method of [the offender] raising the funds is by committing further burglaries’.\(^{454}\)

5.40 Many jurisdictions require a court to give preference to making an order for restitution or compensation over a fine, if the court considers that the offender does not have the means to pay both.\(^{455}\)

Enforcement

5.41 In the jurisdictions where orders for victims’ financial reparation are part of an offender’s sentence, those orders are generally enforced in the same manner as a fine, most commonly by the state rather than by a victim.\(^{456}\)

5.42 In jurisdictions where restitution and compensation orders are enforced in the same manner as a fine, enforcement mechanisms generally involve:

- instalment or payment arrangements;
- placement of a charge over land;
- deductions or garnisheeing of wages or similar;
- vehicle immobilisation (wheel clamping);
- seizure and sale of assets or property; and/or
- suspension of the offender’s driver licence.

5.43 In South Australia, in addition to these enforcement options,\(^{457}\) an offender may be required to produce documents or material relevant to their means, and it is an offence to refuse or to fail to comply with such a request.\(^{458}\) Fees for issuing, serving and executing enforcement action in relation to a restitution order are payable by the offender.\(^{459}\)

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455. Criminal Law (Sentencing) Act 1988 (SA) s 14; Criminal Code, RSC 1985, c C-46, s 740.
456. In South Australia, Queensland, the Australian Capital Territory, England and Wales and New Zealand, the orders are enforced in the same way as fines: Fines Enforcement and Debt Recovery Act 2017 (SA); State Penalties Enforcement Act 1999 (Qld); Crimes (Sentence Administration) Act 2005 (ACT); Crimes Act 1961 (NZ); Summary Proceedings Act 1957 (NZ); Courts Act 2003 (UK) sch 5.
457. Such enforcement options include payment arrangements and the seizure and sale of assets, among others: Criminal Law (Sentencing) Act 1988 (SA) pt 9 div 3 sub-div 4.
458. Criminal Law (Sentencing) Act 1988 (SA) s 70B. The maximum penalty is $10,000.
459. Criminal Law (Sentencing) Act 1988 (SA) s 59(6). In the case of a restitution order, a victim may request an authorised officer to take enforcement action, and this may include seizing property, or causing the property to be valued and an order made requiring an offender to pay that sum: Criminal Law (Sentencing) Act 1988 (SA) s 59.
5.44 Similarly, in Queensland, restitution and compensation orders are enforced in the same manner as fines by the Queensland Government’s State Penalties Enforcement Registry. Where an offender has a number of outstanding orders, fines or infringements, any money collected by the agency is prioritised to the payment of restitution and compensation orders.

5.45 In the Australian Capital Territory, fine enforcement action can include a voluntary work order or imprisonment (in addition to other enforcement options). However, a reparation order can only be discharged by voluntary community work or imprisonment with the consent of the person in whose favour the order has been made.

5.46 In New Zealand, the Ministry of Justice pursues offenders for payment of reparation orders to victims. Around one-fifth of reparation orders are paid by offenders. During preliminary consultations, the Council heard that pursuing enforcement of such orders poses a number of challenges, particularly where orders have been imposed in circumstances in which an offender cannot pay the reparation order within a reasonable period, or where there are difficulties in locating offenders or victims.

5.47 In New Zealand, the majority of offenders receiving reparation orders do not have assets that can be seized to meet the orders. The Law Commission of New Zealand has previously recommended that enforcement mechanisms be improved and suggested that new provisions should be introduced to enable property to be restrained and confiscated in order to meet reparation orders.

5.48 Enforcement of a compensation order in England and Wales is administered by the court in a similar way to a fine. The amount is paid to the court and then transferred to the victim. The state pursues the debt if an offender fails to pay, and the court must make an attachment of earnings order if it appears that the offender is employed.


461. State Penalties Enforcement Act 1999 (Qld) s 112.

462. Other enforcement mechanisms include driver licence suspension, suspension of vehicle registration, an order allowing deduction from the defaulter’s earnings or bank account, or seizure and sale of property: Crimes (Sentence Administration) Act 2005 (ACT) pt 6A.3.


464. In New Zealand, enforcement options include issuing a warrant for seizure of property, making an attachment order or issuing a deduction notice for a bank account: see Summary Proceedings Act 1957 (NZ) ss 83, 87, 87A, 92, 93, 95, 104A.


466. Teleconference with Legal Services Commissioner/Group Manager, National Service Delivery, Ministry of Justice, New Zealand (11 December 2017).

467. The Council heard that where an offender pays off an order over a very long period of time in small instalments, this can be retraumatising to victims: Teleconference with Legal Services Commissioner/Group Manager, National Service Delivery, Ministry of Justice, New Zealand (11 December 2017).

468. New Zealand Law Commission, Compensating Crime Victims (2010) 28–47. This recommendation was rejected by the government on the basis that there was no need for such a regime, that it would be outside the scope and intent of the Criminal Proceeds (Recovery) Act 2009 (NZ), which was concerned with disrupting and preventing significant profit-driven criminal activity, and that it would be too difficult and costly to implement: New Zealand Government, Government Response to Law Commission Report on Compensating Crime Victims (2011) 5.


5. Approaches to restitution and compensation orders in other jurisdictions

5.49 South Africa and Canada are exceptions to the general rule that where restitution and compensation orders are sentencing orders, they are enforced in the same way as fines. Although in South Africa an order for restitution or compensation forms part of an offender’s sentence, it is enforced as a civil judgment in the Magistrates’ Court, even if the order has been made in a superior court.\(^{471}\) A court clerk will assist a victim with enforcement.\(^{472}\)

5.50 In Canada, the enforcement process differs depending on the province in which the restitution order is made and whether it is made as a stand-alone order or as part of a conditional sentence or probation. If the order is a stand-alone order, or remains unpaid following expiry of a conditional sentence or probation, a victim can enforce the order as a civil judgment debt.\(^{473}\) Enforcement mechanisms include garnishing wages, a writ of seizure and sale filed with the Sheriff, or an examination in aid of execution.\(^{474}\) If the order is part of a conditional sentence or probation, the offender may be charged with a breach if they fail to pay the order, and may be brought back before the court.\(^{475}\)

5.51 In the Canadian province of Saskatchewan, however, the government has implemented a new program to ease the burden on victims, by transferring enforcement to the state (for individuals and not-for-profit organisations only), allowing victims to register their orders with the Ministry of Justice at no cost.\(^{476}\) Under the Saskatchewan Restitution Civil Enforcement Program, 74% of orders were paid in 2014–15.\(^{477}\)

**Imprisonment on default**

5.52 A key concern for any change to the Victorian system for enforcement of restitution and compensation orders would be avoiding the imprisonment of those who are unable to pay the order.\(^{478}\)

5.53 In those jurisdictions where orders for victims’ financial reparation are sentencing orders, an offender may face imprisonment as a result of failing to pay. In most jurisdictions, the capacity to pay is a prerequisite to the imposition of a term of imprisonment, such that a court is not punishing an offender’s inability, but rather their refusal, to comply with the order for reparation.

5.54 In South Australia, the court may make a community service order if enforcement processes fail, and the court is satisfied that the debtor does not have (or is not likely to have within a reasonable time) the means to satisfy a sum without the debtor or dependants suffering hardship.\(^{479}\) If the debtor fails to comply with the community service order, the court may then make an order for imprisonment.\(^{480}\)

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471. Criminal Procedure Act 51 of 1977 (South Africa) s 300(3).
473. Criminal Code, RSC 1985, c C-46, s 741(1).
474. The legislative framework for the enforcement of restitution orders as judgment debts in Canada depends on the province or territory; see generally Michael D. Schafler and Melissa Saunders, Litigation and Enforcement in Canada: Overview (2015).
475. Criminal Code, RSC 1985, c C-46, s 742.6.
478. In line with reform to the enforcement of fines and infringements in Victoria, the Council notes the importance of avoiding imprisoning persons in lieu of payment of debts. See further Sentencing Advisory Council (2014), above n 175, 189 (Recommendation 32); Meeting with the Chief Magistrate, Magistrates’ Court of Victoria, and Magistrates Charlie Razencwajg and Susan Cameron (11 September 2017); Meeting with Victims of Crime Commissioner (12 September 2017).
479. Criminal Law (Sentencing) Act 1988 (SA) s 70U.
5.55 In Queensland, an offender may be imprisoned if they fail to comply with an order, for a period not exceeding one year if convicted on indictment, or six months if convicted of a summary offence. A court may give such directions as it sees fit for the enforcement of the term of imprisonment and may include a direction that the offender appears before the court to show cause as to why the imprisonment should not be enforced because of the failure to comply with the order. Imprisonment is also an option for enforcement through the State Penalties Enforcement Register. During preliminary consultations, the Council heard that in Queensland courts generally avoid imposing orders where the offender does not have the means to pay.

5.56 In the Australian Capital Territory, failure to pay a reparation order may lead to imprisonment where compliance with the order is a condition of a good behaviour order or intensive correction order.

5.57 In New Zealand, if a reparation order remains unpaid, the matter may be referred to a judge who can impose imprisonment, home detention, community detention or community work, or issue a charging order to allow the state to collect the proceeds of a voluntary sale of the offender’s real estate. An example of the use of these provisions is Slavich v the Queen, where an offender failed to pay a reparation sentence of $60,000 in circumstances in which the offender’s family had the capacity to pay, and received a further sentence of imprisonment of four and a half months as a result of the failure to meet the order.

5.58 In Canada, if the order is part of a conditional sentence or probation, the offender may be imprisoned as a result of breach proceedings if they fail to pay the order. If the order is a stand-alone order, imprisonment is not a consequence of default.

5.59 In England and Wales, imprisonment is possible as a consequence of default. The length of imprisonment depends on the amount of compensation that has not been paid.

5.60 In South Africa, where payment of compensation is a condition of the suspension or postponement of sentence, the court cannot order a further period of imprisonment for an offender’s failure to pay. A court can imprison an offender who fails to pay a financial reparation judgment debt, for contempt of court.

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482. Penalties and Sentences Act 1992 (Qld) s 39.

483. Imprisonment warrants and a formula for the calculation of a period of imprisonment on default are set out in State Penalties Enforcement Act 1999 (Qld) s 52A.

484. Teleconference with Legal Aid Queensland (9 November 2017); Teleconference with Director of Public Prosecutions, Queensland (4 December 2017).


488. Criminal Code, RSC 1985, c C-46, s 742.6; R v Wu [2003] 3 SCR 530.


492. This power is subject to constitutional limitations, however: Anne Hughes, Human Dignity and Fundamental Rights in South Africa and Ireland (2014) 233–234.
Approaches in jurisdictions where orders for victims’ financial reparation are not sentencing orders

5.61 This section provides an overview of jurisdictions where orders for victims’ financial reparation are not sentencing orders and do not form part of an offender’s sentence. Table 11 provides an overview of these jurisdictions.

Table 11: Overview of jurisdictions where orders for victims’ financial reparation are not sentencing orders

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Reparation is a purpose of sentencing</th>
<th>Terminology used</th>
<th>Enforcement</th>
<th>Recovery by state or victim</th>
<th>Possibility of imprisonment on default</th>
<th>Financial hardship on offender is a relevant consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victoria</td>
<td>No</td>
<td>Restitution and compensation</td>
<td>Civil judgment debt</td>
<td>Victim</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>New South Wales</td>
<td>No</td>
<td>Restitution and compensation</td>
<td>Civil judgment debt or fine</td>
<td>State or victim</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Tasmania</td>
<td>No</td>
<td>Restitution and compensation</td>
<td>Civil judgment debt or fine</td>
<td>State or victim</td>
<td>Yes</td>
<td>Yes*</td>
</tr>
<tr>
<td>Western Australia</td>
<td>No</td>
<td>Restitution and compensation*</td>
<td>Civil judgment debt</td>
<td>Victim</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>No</td>
<td>Restitution and compensation</td>
<td>Fine</td>
<td>State</td>
<td>Yes</td>
<td>Not clear*</td>
</tr>
</tbody>
</table>

a. See further [5.70].
b. These are known collectively as reparation orders: Sentencing Act 1995 (WA) pt 16.
c. See further [5.68].

5.62 In Tasmania, Western Australia, New South Wales and the Northern Territory, orders for victims’ financial reparation are not sentencing orders. Some of these jurisdictions, however, do recognise victims in their purposes of sentencing in some way. For example, in New South Wales, one of the purposes of sentencing is to recognise the harm done to the victim and the community. Similarly, a purpose of the Sentencing Act 1997 (Tas) is to recognise the interests of victims of offences.

5.63 Western Australia, the Northern Territory and Tasmania have legislation broadly similar to that in Victoria. In Tasmania, restitution and compensation orders are mandatory in relation to certain crimes, although not necessarily ordered in practice. The rules of evidence do not apply to the making of compensation orders. In Western Australia, a court may make an order that a fine imposed on an offender be paid to the victim

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494. Crimes (Sentencing Procedure) Act 1999 (NSW) s 3A(g).
495. Sentencing Act 1997 (Tas) s 3(h).
(in the case of an assault conviction), that the offender pay the victim an amount of money as compensation, or order that property be returned to a victim.\(^\text{499}\) In the Northern Territory, restitution and compensation orders may be made.\(^\text{500}\) Restitution and compensation orders in these jurisdictions are ancillary to sentence.

\[\text{5.64} \quad \text{In New South Wales, the situation is slightly different. A victim may be awarded financial support or a recognition payment, which is paid from the state-funded Victim’s Fund.}^{\text{501}} \text{ The Commissioner of Victims’ Rights may then take restitution action against the offender to recover that amount. This is a civil process, separate from the criminal proceedings.}^{\text{502}} \text{ An offender may seek administrative review of an order to repay this amount.}^{\text{503}} \text{ The court may also make an order for compensation for injury (for a sum not exceeding $50,000) or loss.}^{\text{504}} \text{ This is a direction by the court that the offender pay compensation for loss or injury directly to the victim and is an order ancillary to the sentencing process.}^{\text{505}}\]

\[\text{5.65} \quad \text{The majority of jurisdictions limit the imposition of orders to clear and simple cases.}^{\text{506}}\]

**Relevance of offender means**

\[\text{5.66} \quad \text{In those jurisdictions where victims’ financial reparation are not sentencing orders, the financial means of an offender is not always considered when a court decides whether to make an order for restitution or compensation. In many jurisdictions, priority is given to making an order for restitution or compensation over a fine, where an offender has insufficient means to pay both.}^{\text{507}}\]

\[\text{5.67} \quad \text{In Western Australia, an offender’s lack of financial means does not preclude an order from being made. It has been said that ‘it cannot be wrong in principle to make a compensation order’ against an offender who is without means, where it is open to a victim to pursue civil proceedings.}^{\text{508}} \text{ It has also been stated that the court would be able to order compensation even if it believed that a defendant had no means to pay.}^{\text{509}} \text{ This would prevent victims from having to take further legal action if the offender later came into money.}^{\text{510}}\]

\[\text{5.68} \quad \text{In the Northern Territory, the issue is unclear because the legislation makes no reference to consideration of an offender’s financial means.}^{\text{511}} \text{ A court will not be in error for taking into account an offender’s means, but there is uncertainty as to whether a court is required to have regard to an offender’s means, and this has not yet been judicially determined.}^{\text{512}}\]

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\(^{499}\) Sentencing Act 1995 (WA) ss 56, 117, 120.

\(^{500}\) Sentencing Act 1995 (NT) pt 5 div 1.


\(^{503}\) Victims Rights and Support Act 2013 (NSW) s 66; see for example, Miles v Commissioner of Victims Rights [2017] NSWCATAS 188 (16 June 2017); Prompromis v Commissioner of Victims Rights [2017] NSWCATAD 195 (20 June 2017).

\(^{504}\) Victims Rights and Support Act 2013 (NSW) pt 6 divs 2–3.

\(^{505}\) See for example, Tasmania: Director of Public Prosecutions v Avery (2009) 18 Tas R 401 and Western Australia: Scott v Del Piano (1990) 7 SR (WA) 32.

\(^{506}\) Sentencing Act 1997 (Tas) s 43; Sentencing Act 1995 (WA) s 53(3).

\(^{507}\) Cooper v Sinnathamby [2007] WASCA 32 (12 February 2007) [24].

\(^{508}\) Sentencing Legislation Amendment and Repeal Act 1999 (WA); Western Australia, ‘Sentencing Legislation Amendment and Repeal Bill’ Parliamentary Debates, Legislative Assembly, 29 October 1998, 2899 (Colin Barnett, Premier).


5. Approaches to restitution and compensation orders in other jurisdictions

5.69 In New South Wales, financial hardship is relevant, but an order may be made even where an offender has only limited capacity to make financial reparation. 512

5.70 The Sentencing Act 1997 (Tas) does not make any specific reference to an offender’s means, but it has been held that an offender’s financial means are relevant to making a compensation order. 513

Enforcement

5.71 In jurisdictions where restitution and compensation orders are ancillary to sentence, the orders are more commonly enforced as civil judgments, but in some jurisdictions they are enforced in the same manner as fines.

5.72 In Tasmania, restitution and compensation orders are sometimes enforced as a civil judgment debt, but can also be enforced as a fine, and different approaches are taken between the Supreme Court of Tasmania and the Magistrates Court of Tasmania. 514 In practice, the Magistrates Court was found to be using the fine enforcement procedures, while the Supreme Court was not. 515 In Supreme Court matters, the Director of Public Prosecutions sends a letter to an offender telling them to pay the order directly to the victim, and that any enforcement action will be brought by a victim. 516 In Tasmania, it appears as though few orders are actually paid. 517

5.73 In the Northern Territory, restitution and compensation orders are enforced in the same manner that fines are enforced. 518

5.74 In New South Wales, the recovery of restitution amounts sits with the Office of State Revenue. The orders are taken to be court-imposed fines. 519 At the completion of a 12-month trial, where enforcement moved to the Office of State Revenue, 70% of restitution orders were either paid or under active management through an instalment arrangement or a work and development order. 520 In New South Wales, the main difficulties in pursuing payment of restitution orders from offenders were that the majority of offenders were from low socio-economic backgrounds and generally did not have accumulated assets, many were unemployed for significant periods of time and if incarcerated would have difficulty accessing employment even after release, and in many cases the offender was difficult to locate. 521

5.75 An order for compensation in New South Wales may be entered as a civil judgment debt and enforced by a victim using civil enforcement mechanisms. The Office of State Revenue does not pursue an offender for payment of a compensation order on the victim’s behalf. 522

512. See for example, Miles v Commissioner of Victims Rights [2017] NSWCATAD 188 (16 June 2017): an offender was found to be suffering from financial hardship but was nevertheless ordered to pay a reduced sum of restitution. See also R v Meakin (No 4) [2017] NSWSC 999: an order for compensation was made against an offender who had no assets, did not own a home or motor vehicle and had no more than a few hundred dollars in his bank account.


514. Sentencing Act 1997 (Tas) s 45; Warner and Gawlik (2003), above n 497, 64.

515. Warner and Gawlik (2003), above n 497, 64.

516. Ibid.

517. Ibid.

518. Fines and Penalties (Recovery) Act 2001 (NT) s 6(1)(da); see also R v Williams (2010) 246 FLR 279.

519. Fines Amendment Act 2017 (NSW) s 112C.


The Victims Rights and Support Act 2013 (NSW) allows for streamlined enforcement through the court registrar, as the victim is provided with a certificate of the court order for compensation to file as a judgment debt with the registrar.\textsuperscript{523} Civil enforcement fees are waived where a victim is seeking to enforce an order for compensation.\textsuperscript{524}

5.76 In Western Australia, a compensation order is enforced as a civil judgment of the court.\textsuperscript{525} A restitution order may be enforced by requesting the Sheriff to seize the property and deliver it to the victim.\textsuperscript{526}

5.77 In the Northern Territory, restitution and compensation orders fall within the definition of fines for the purposes of enforcement.\textsuperscript{527} If compensation is to be paid by instalments, and the offender defaults on payment, the total amount becomes immediately payable.\textsuperscript{528} If not paid, a warrant for arrest may be issued. Enforcement mechanisms include suspension of driver licences or registration, wheel clamping, suspension of business, placing a charge over land, examination on summons (oral examination), a community work order; seizure and sale of assets or garnisheeing of wages.\textsuperscript{529}

Imprisonment on default

5.78 In those jurisdictions where orders for victims’ financial reparation are not sentencing orders, imprisonment is generally not available if an offender does not pay. In New South Wales, for example, an offender cannot be imprisoned for failing to pay a restitution debt but can be imprisoned for contempt of court if they deliberately fail to pay a compensation order and have the means to pay.\textsuperscript{530}

5.79 In Tasmania, as restitution and compensation orders can be enforced in the same manner as fines, imprisonment or community service can be ordered in default of payment.\textsuperscript{531} However, this appears to be rarely used by the courts.

5.80 In Western Australia, a court may order imprisonment for a failure to pay compensation, but only if the court is of the opinion that the offender has, or ought to have, the means to pay. The Civil Judgments Enforcement Act 2004 (WA) provides that a failure to pay in such circumstances is punishable as a charge of contempt of court.\textsuperscript{532}

5.81 In the Northern Territory an offender may be imprisoned for a term not exceeding 12 months for breaching an order for restitution or compensation.\textsuperscript{533} This term of imprisonment does not need to be set at the time that the order is made, but can be made at a later stage.\textsuperscript{534} The debt is not extinguished where an offender is imprisoned as a result of a failure to pay.\textsuperscript{535}

\textsuperscript{523} Upadhyaya v The Queen [2017] NSWCCA 162 (7 July 2017) [12].
\textsuperscript{525} Sentencing Act 1995 (WA) s 119(2).
\textsuperscript{526} Sentencing Act 1995 (WA) s 120A.
\textsuperscript{527} Fines and Penalties (Recovery) Act 2001 (NT) s 6(1)(da).
\textsuperscript{528} This is unless the Fines Recovery Unit orders otherwise: Fines and Penalties (Recovery) Act 2001 (NT) s 95(4).
\textsuperscript{529} Fines and Penalties (Recovery) Act 2001 (NT) s 5.
\textsuperscript{530} Supreme Court Rules 1970 (NSW) pt 55; District Court Act 1973 (NSW) s 199(1); Witham v Holloway (1995) 183 CLR 525, 530.
\textsuperscript{531} Warner and Gawlik (2003), above n 497, 66.
\textsuperscript{532} Civil Judgments Enforcement Act 2004 (WA) pt 4 div 8. Any period of imprisonment imposed must not be longer than 40 days: Civil Judgments Enforcement Act 2004 (WA) s 90(3).
\textsuperscript{533} Sentencing Act 1995 (NT) s 93.
6. Measures for reform

Overview

6.1 This chapter presents some measures for reform to the system of restitution and compensation orders in Victoria. The options are presented under two headings:

- options that make restitution and compensation orders sentencing orders; and
- measures that keep restitution and compensation orders as ancillary orders (and not sentencing orders) but seek to improve the enforcement of these orders.

6.2 Discussions during the Council’s preliminary consultations have highlighted a number of ways to improve the enforcement of orders within the current system, including avenues for improving the use of existing powers under the *Confiscation Act 1997* (Vic), or amending this Act to strengthen enforcement of restitution and compensation orders.

6.3 These measures are not mutually exclusive, and a combination of measures reforming restitution and compensation orders could be introduced.

6.4 This chapter also considers the challenges to making restitution and compensation orders sentencing orders.

Context for reform

6.5 In examining the different measures for the reform of the system of restitution and compensation orders in Victoria, the Council has proceeded on the basis of the Victorian Government’s acceptance of a number of the recommendations made by the Victorian Law Reform Commission (VLRC) in its 2016 report (VLRC report).\(^{536}\)

6.6 The Victorian Government has not yet announced its response to a number of recommendations made by the VLRC, including the recommendation for the introduction of a statutory scheme for restorative justice conferencing for indictable offences in Victoria,\(^{537}\) and the recommendation that Victoria Legal Aid should be funded to establish a legal service for victims of violent crimes.\(^{538}\)

6.7 The Council notes that the VLRC’s review of the *Victims of Crime Assistance Act 1996* (Vic) (the VOCA Act) will consider the operation and effectiveness of state-funded assistance to victims in Victoria. The VLRC is due to provide its advice to government on 27 July 2018.

6.8 The VLRC’s review of the VOCA Act has sought submissions on a number of matters, including the mechanisms for the state to seek from an offender recovery of a payment of an award under the VOCA Act, the introduction of a victim’s levy to supplement state-funded victims’ compensation, and the potential for the victims’ financial assistance scheme to incorporate restorative justice opportunities.\(^{539}\)

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536. This includes the introduction of intermediaries (skilled communication specialists) who will assist victims to give evidence to police and in court: Attorney-General, Victoria, and Premier of Victoria (2017), above n 28; Victorian Law Reform Commission (2016), above n 3, 174 (Recommendation 30).

537. Victorian Law Reform Commission (2016), above n 3, 194 (Recommendation 32). The VLRC recommended that such a scheme be available after a guilty plea and in connection with an application for an order for restitution or compensation by the victim.

538. Ibid 126 (Recommendation 23). The Council heard in preliminary consultations that Victoria Legal Aid are investigating the possibility of providing such a service: Meeting with Victoria Legal Aid (20 September 2017).

6.9 Changes to the scheme for state-funded assistance in Victoria, including increased recovery from offenders of payments under the VOCA Act, and changes to the categories or amounts of assistance available under the VOCA Act, may have implications for the use and enforcement of restitution and compensation orders.

Making restitution and compensation orders sentencing orders

6.10 The Council has been asked to consider whether the Sentencing Act 1991 (Vic) should be amended to make restitution and compensation orders sentencing orders. In examining this question, the Council has been asked whether the purposes of sentencing should be amended to include the financial reparation of victims, whether there should be a presumption in favour of courts making such orders and whether they should be enforced in the manner of a fine.

6.11 As discussed at [4.2] and as demonstrated by jurisdictions such as South Australia and Queensland, it is possible to make restitution and compensation orders sentencing orders without amending the purposes of sentencing.

6.12 This section explores options that would amend the Sentencing Act 1991 (Vic) to make restitution and compensation orders sentencing orders, leading to enforcement in line with the enforcement of fines by Fines Victoria, or an alternative enforcement path, such as the state undertaking civil enforcement mechanisms against the offender. The practical and legal issues raised by these options are also considered.

6.13 If it concludes that restitution and compensation orders should become sentencing orders, the Council is also asked to provide advice on:

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

6.14 If it does not conclude that restitution and compensation orders should become sentencing orders, the Council will consider other measures for improving the enforcement of restitution and compensation orders within the current framework.

Options that make restitution and compensation orders sentencing orders

6.15 One option is to amend the Sentencing Act 1991 (Vic) to make restitution and compensation orders sentencing orders, as stand-alone sentencing orders, as a condition of an existing order, such as a community correction order, or both.

540. See Fines Reform Act 2014 (Vic).

541. The Council will also endorse the VLRC’s recommendations in respect of restitution and compensation orders, unless there is a compelling reason not to: Victorian Law Reform Commission (2016), above n 3, xxvii–xxviii (Recommendations 45–48).
6. Measures for reform

6.16 As discussed in Chapter 5, other Australian and overseas jurisdictions have taken varied approaches to the question of offender-paid victims’ financial reparation. In some jurisdictions, these orders are a condition of a community-based sentence,542 while in others, they are stand-alone sentencing orders that sit alongside fines as a sentencing disposition available to a court. In some jurisdictions, a compensation order may be imposed in more than one way.543

Adjourned undertakings

6.17 Under the current system in Victoria, a court may already require an offender to pay restitution or compensation as a condition of an adjourned undertaking, unconditional discharge or unconditional dismissal.544

6.18 If a person is found guilty of an offence, a court may adjourn the proceeding for up to five years on the basis that the offender gives certain undertakings. This is known as an adjourned undertaking. The court has discretion as to whether to record a conviction.545

6.19 For any adjourned undertaking, the court must include the conditions that the offender:

• attend court if called on to do so;
• be of good behaviour; and
• if relevant observe any special conditions imposed by the court, such as participation in certain services designed to reduce the likelihood of further offending.546

6.20 It is an offence to contravene a condition of an adjourned undertaking.547 Therefore, if the undertaking has a condition of payment of restitution or compensation to the victim, failure to make such a payment would constitute a failure to comply with the conditions specified in the order.548

6.21 Given their place in the sentencing hierarchy, adjourned undertakings, dismissals and discharges are used for low-level offending. In order to make restitution and compensation orders appropriate for higher-level offending, they would need to be introduced as a condition of a different sentencing order, or as a stand-alone sentencing order.

Place in sentencing hierarchy

6.22 An option would be to provide that a court may attach the payment of restitution or compensation as a condition of a community correction order, or make an order for restitution or compensation as a stand-alone sentencing order.549

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542. Jurisdictions include Canada and the Australian Capital Territory: see [5.14], [5.50].
543. Jurisdictions include Canada, South Africa and the Australian Capital Territory: see [5.14], [5.18], [5.50].
545. Sentencing Act 1991 (Vic) ss 72, 75. A court may impose an unconditional dismissal where it is satisfied that a person is guilty of an offence, but it does not wish to impose any penalty nor to record a conviction: Sentencing Act 1991 (Vic) s 76. If the court does wish to record a conviction, it may unconditionally discharge the offender without further penalty: Sentencing Act 1991 (Vic) s 73.
546. Sentencing Act 1991 (Vic) ss 72, 75. See also Sentencing Act 1991 (Vic) s 80 (definition of justice plan condition). During preliminary consultations, the Council heard that the Magistrates’ Court often orders payment of compensation as a condition of an adjourned undertaking: Meeting with Victoria Police Prosecutors (7 December 2017).
547. An offender who does not comply with the conditions of their adjourned undertaking without a reasonable excuse can receive a fine of up to 120 penalty units: Sentencing Act 1991 (Vic) s 83AC.
548. If an offender’s ability to pay restitution or compensation changes, they may apply for a variation of the adjourned undertaking: Sentencing Act 1991 (Vic) s 78.
549. These options could be available in addition to the current option to impose a condition of payment of compensation on an adjourned undertaking.
6.23 Restitution and compensation orders could be introduced as a condition of a community correction order, so that an offender’s compliance with the condition (by way of meeting payments) could be monitored by Corrections Victoria. Under this model, information about an offender’s financial means could be provided to the court as part of the contents of the pre-sentence report prepared by Corrections Victoria when assessing an offender for a community correction order.\(^550\)

6.24 If an offender fails to comply with a condition of a community correction order, there are a range of responses, from administrative sanctions to the commencement of formal proceedings for the charge of contravention of a community correction order, which carries a maximum penalty of three months’ imprisonment and can also allow the court to resentence the offender for the original offences.\(^551\) In order to avoid a situation in which those without means are punished for failing to comply with a restitution or compensation condition, legislation might provide that an offender can only be imprisoned for a contravention where that offender has the means to meet the condition but is unwilling to do so.

6.25 Alternatively, the orders could be introduced into the sentencing hierarchy as stand-alone sentencing orders, similar to fines. In some Australian jurisdictions, legislation provides that a court should not impose a fine if it is possible for it to impose a compensation order (and the offender cannot pay both).\(^552\)

### Enforcement and consequences of default

6.26 A key question is what consequences would follow an offender’s default on the payment of an order for restitution or compensation, if the orders were to become sentencing orders. Under the new Fines Victoria scheme, the Director of Fines Victoria will have extensive powers to take enforcement action under the Fines Reform Act 2014 (Vic), including the option to issue an enforcement warrant against a fine defaulter allowing for the seizure and sale of the defaulter’s personal property,\(^553\) apply driver and vehicle sanctions,\(^554\) or place a charge over real property.\(^555\)

6.27 Offenders who are serving a term of imprisonment in respect of other offences may consent to imprisonment in respect of unpaid fines.\(^556\) In addition, offenders can apply to convert court fines into community work, to be paid off at a rate of approximately $25 per hour.\(^557\)

6.28 The fact that an offender serves further imprisonment time, or undertakes community service, will not have any direct benefit to the victim owed the order for restitution or compensation. This is true even if, as in some jurisdictions, an order for further imprisonment or community service can only be made where the victim consents.\(^558\) Further, additional imprisonment or community work may have unintended criminogenic consequences and directly affect an offender’s prospects of rehabilitation.

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\(^{550}\) Sentencing Act 1991 (Vic) s 8B.

\(^{551}\) Sentencing Act 1991 (Vic) s 83AD. For a detailed discussion of responses to offenders on community correction orders, see Sentencing Advisory Council, Contravention of Community Correction Orders (2017).

\(^{552}\) See for example, South Australia: Criminal Law (Sentencing) Act 1988 (SA) s 14.

\(^{553}\) Fines Reform Act 2014 (Vic) s 109.

\(^{554}\) Fines Reform Act 2014 (Vic) s 89.

\(^{555}\) Fines Reform Act 2014 (Vic) s 96.

\(^{556}\) Sentencing Act 1991 (Vic) s 16A.

\(^{557}\) There are rules applying to who can convert their fine to community work: see County Court of Victoria, Fines and Costs (2012) 2.

\(^{558}\) This is the case in the Australian Capital Territory: Crimes (Sentence Administration) Act 2005 (ACT) s 116ZK((1)(c)).
Consideration of victims’ views on sentence

6.29 As discussed at [4.40], in New Zealand, the possibility of imposing a sentence of compensation can be explored in a pre-sentence conference with the victim, in order to ascertain whether the victim considers compensation an appropriate sentencing outcome, and to gather evidence on a victim's financial loss.

6.30 As noted by the VLRC, victims can hold differing views on receiving compensation directly from the offender. Some victims may wish to seek payment directly from the offender, rather than the state.559 Others do not want to receive money from an offender at all, or not over a long period of time if payment is being made by way of instalments, particularly if an offender defaults on payment of an instalment and the enforcement process has to recommence.560

6.31 In one case in New Zealand, a victim who expressed a preference against a reparation order was awarded such an order against her wishes. The award was for $10,000, to be paid at a rate of $10 per week, which caused distress to the victim.561 Such outcomes are undesirable.

6.32 A further issue is how to account for a victim who may change their views as to whether they would like to receive financial compensation from an offender. Where the payment of the order is by way of instalments, a victim may decide that they no longer want to be continually reminded of the offending with each receipt of payment over an extended period of time.

6.33 If orders for victims’ financial reparation were to become sentencing orders, it would be necessary to consider what status to accord the views of the victim on the appropriate sentence. Currently, a victim’s desire for a lengthy custodial sentence to be imposed, or even a victim’s desire that an offender’s rehabilitation be prioritised in the sentencing process, is not accepted as a legitimate consideration for the purpose of sentencing.562

6.34 If victims’ financial reparation were to become a purpose of sentencing, however, the views of the victim – at least in respect of that component of the sentence – would necessarily have to be considered in order to avoid undesirable consequences. Some victims may not want to receive financial aid from a perpetrator of a crime against them, while others may prefer that, rather than a sentence of imprisonment, the offender be returned to working life in order to meet a compensation claim. This may be difficult to navigate, as it would be a departure from established sentencing principles for a victim’s views to influence the sentencing discretion in this manner.

6.35 One way this issue might be addressed would be to confine consideration of a victim's view on sentence to the component of the sentence that relates only to the financial reparation of the victim. In that way, it would not be for the victim to provide, or the court to consider, their views on other sentencing orders.

560. Ibid 229; Miers (2014), above n 426, 152. Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (13 September 2017).
Rights of appeal

6.36 If orders for victims’ financial reparation were to become sentencing orders, a question arises as to whether the victim would have an independent right to appeal against an order for restitution or compensation, or the failure to make such an order. Given that a victim’s views on sentence are not accepted as legitimate considerations for the purposes of sentencing (see [4.29]), it would not be consistent to allow victims to appeal the failure to make an order for restitution or compensation. As noted at [1.37], the VLRC has recommended that the current provisions be amended to enable victims to have a right to appeal against an order or the failure to make an order, where the order is an ancillary order.  

6.37 Making restitution and compensation orders sentencing orders may increase the number of applications for leave to appeal against sentence, on the basis of, for example, an offender’s changed financial circumstances.

6.38 In addition, if an offender is not ordered to pay compensation and then makes a payment of compensation after their sentence, that offender may argue that this is a matter of fresh evidence, requiring the court to reconsider the sentence imposed on them.

Challenges to making restitution and compensation orders sentencing orders

Evidentiary considerations

6.39 In Victoria, a sentencing court may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. However, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities.

6.40 If restitution and compensation orders were to become sentencing orders, any findings of fact as to the amount of a victim’s loss would presumably be a matter adverse to the accused, and therefore would need to be proved beyond reasonable doubt. This would require additional evidence being presented before the court, and potentially further cross-examination of victims on their claimed losses.

Establishing an offender’s financial position

6.41 If restitution and compensation orders were to become sentencing orders, the court would also need to take into account an offender’s financial position in order to impose a proportionate sentence.

6.42 As discussed at [5.16], in New Zealand, a court may order an offender to make a declaration as to their financial capacity. In other jurisdictions, this information is placed before the court by the offender’s legal representative.

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564. Meeting with Judicial Registrar Mark Pedley, Supreme Court of Victoria (11 September 2017). In R v McLeod (2007) 16 VR 682 and Kapkidis v The Queen [2013] VSCA 35 (1 March 2013), the forfeiture of the offender’s assets post-sentence was taken to be fresh evidence forming the basis of a successful appeal against sentence. In Coleman v The Queen [2014] VSCA 228 (17 September 2014), the court rejected an argument that payment of compensation orders and the confiscation of assets after sentence constituted fresh evidence.
567. Sentencing Act 2002 (NZ) ss 41(2), 42. A court may order that an offender be detained for a period of up to two hours for the purposes of making such a declaration: Sentencing Act 2002 (NZ) s 42A.
6.43 There would need to be some mechanism for submissions to be made before a court on an offender’s financial means, including their assets and ability to meet any order for restitution or compensation that may be imposed. In addition, it may be necessary for a court to be provided with submissions on behalf of the offender’s family members who may be adversely affected by any reparation order made.\(^{568}\)

6.44 This is likely to require additional court time, and most likely further adjournments.\(^{569}\)

6.45 A question would also arise as to who bears the onus of proof in such circumstances, such as whether an offender would be required to provide evidence of their inability to meet such an order, or whether the prosecution would be required to provide evidence of the offender’s capacity to pay.

**Establishing victim’s loss**

6.46 A further issue is how a victim’s loss would be established, and tested, in criminal proceedings.

6.47 As discussed at [6.40], if restitution and compensation orders were to become sentencing orders, any findings of fact as to the amount of a victim’s loss would likely be a matter adverse to the accused, and so would need to be proved beyond reasonable doubt. This would certainly require additional argument, and may require cross-examination of victims on their claimed losses.

6.48 In the Magistrates’ Court, victims are not usually present for the plea hearing or the sentencing of the offender (which are usually at the same hearing). If restitution and compensation orders were to become sentencing orders, victims may be required to attend court in order to provide evidence on their financial loss.\(^{570}\)

6.49 Under the current system, an accused is entitled to seek access to a victim’s records, and to introduce those records into evidence in a criminal trial, provided that they are relevant to the facts in issue.\(^{571}\) An accused can access a range of records, including medical records and records relating to a victim’s psychological or psychiatric history,\(^{572}\) by filing a subpoena\(^{573}\) with the court.

6.50 There is a presumption that confidential communications (such as counselling records) of victims of sexual offending are excluded from criminal trials, including sentencing.\(^{574}\) These restrictions on an accused’s access to confidential communications of victims of sexual offending were introduced in order to promote the public interest in victims of sexual assault seeking counselling, and to protect victims from the harm that may be caused if their private information is made public.\(^{575}\)

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568. This was raised during the Council’s preliminary consultations: Meeting with Office of Public Prosecutions (7 September 2017); Meeting with Victoria Legal Aid (20 September 2017); Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017).

569. Meeting with Victoria Legal Aid (20 September 2017).

570. Meeting with Victoria Police Prosecutors (7 December 2017).


573. Subpoenas can be used to compel individuals or organisations to produce documents: Supreme Court (Criminal Procedure) Rules 2008 (Vic) r 1.12; Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 42.02; Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 42.02; County Court Criminal Procedure Rules 2009 (Vic) r 1.09; County Court Civil Procedure Rules 2008 (Vic) r 42.02. See also Magistrates’ Court Act 1989 (Vic) s 43.

574. Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 32C.

6.51 Nevertheless, in some circumstances, an accused can gain access to a victim’s confidential communications if granted leave by the court. 576

6.52 This presumption may conflict with the necessity for disclosure of medical materials if a court is to be required to determine whether a victim has, for example, sustained an injury as a consequence of the offence, and seeks to make an order for compensation.

6.53 If victims’ financial losses, as well as the consequences of their injuries (including consequential mental illnesses or grief), were needed to be established to the criminal standard of proof, it may require accused persons to have greater access to materials relevant to victims’ psychological or psychiatric injuries, including otherwise confidential medical records. This would enable, for example, offenders to challenge a victim’s assertion that the offending caused the injury for which compensation is sought, by examining whether a victim’s psychiatric condition pre-existed the commission of the crime. This may produce undesirable consequences for victims.

6.54 The timing of when materials concerning a victim’s financial loss and injuries would be put before a court also raises issues. There may be some confidential communications that do not have substantial probative value to a fact in issue during the course of a criminal trial, 577 but may nevertheless be relevant to the question of establishing a victim’s injuries to the criminal standard. 578 If these materials were routinely disclosed to the accused, this could mean that early disclosures of criminal offending could be used to discredit or challenge a victim’s allegations. 579

6.55 This would have practical consequences for prosecutors appearing in all courts, as it would be necessary for evidentiary materials to be prepared and provided to the defence prior to a hearing. This would be particularly onerous for police prosecutors preparing large numbers of matters in the Magistrates’ Court. 580

6.56 The Director of Public Prosecutions has also raised concerns about the calculation or assessment of a victim’s financial loss, and the specific skillset that such work would require of prosecutors. 581

Assessing the appropriate amount for compensation

6.57 A further issue is how a court would approach the question of fixing the appropriate amount for a compensation order.

6.58 In some jurisdictions, compensation is fixed according to the principles applicable to the assessment of damages in civil matters. In others, there is more clear guidance in the form of suggested starting points for different types of injury. 582

578. See for example, the excluded evidence in Baker (A Pseudonym) v The Queen [2015] VSCA 323 (2 December 2015).
579. Meeting with Waller Legal (28 November 2017).
580. Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017); Meeting with Victoria Police Prosecutors (7 December 2017).
582. This is the case in England and Wales: see [5.23].
An issue raised during the Council’s preliminary consultations was how the appropriate relationship between the charge and the amount of compensation would be determined. For example, if a matter were to resolve from a charge of rape to a plea to a charge of indecent assault, a question would arise as to whether the amount of compensation that a victim would be entitled to would also reduce, in line with the lesser charge.

If the amount of the compensation order were adjusted to reflect the charge, victims of crime may have a greater concern regarding the resolution of matters to pleas. If more matters were contested, this would have resourcing implications.

In addition, if, as a result of plea negotiations, particular charges were dropped, this may lead to disputes about which offences caused particular injuries, and a contest about whether the offences sentenced caused the injuries sustained by the victim.

In some jurisdictions, an order is made even if an offender has no capacity, or limited capacity, to pay. In Victoria, this would be inconsistent with other principles of sentencing, such as proportionality.

The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* provides that every person is equal before the law and is entitled to the equal protection of the law without discrimination.

If restitution and compensation orders were to become sentencing orders, it may pose challenges for the consistent sentencing of offenders for like offences, as well as for the principle of equal treatment of offenders before the law.

**Consistency**

Consistency is a fundamental aspect of Victoria’s criminal justice system. It is the first purpose of the *Sentencing Act 1991 (Vic)*, and it has been described by the High Court as crucial to the notion of equal justice:

> Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.

If restitution and compensation orders were to become sentencing orders, it may be difficult to measure or achieve consistency in sentencing in the way that consistency can be achieved for offenders receiving sentences of imprisonment, for example.

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583. Meeting with Office of Public Prosecutions (7 September 2017).
584. Submissions to the VLRC raised the concern that the number of trials and contested hearings would increase, and the number of guilty pleas would decrease, if the orders were to become sentencing orders: Victorian Law Reform Commission (2016), above n 3, 234, referring to Submission 25 (Law Institute of Victoria) and Submission 29 (Victorian Bar and Criminal Bar Association).
585. This is the case in Western Australia: see [5.67].
6.67 For sentences of imprisonment, current sentencing practices are ascertained by reference to sentencing statistics, as well as through comparison with cases involving similar offending (and offenders). To measure consistency among the compensation orders imposed, there would need to be some consideration of compensation orders made for similar offences. However, given that any compensation order would be made in respect of a victim’s injuries in a particular case, it would be extremely difficult to measure consistency of sentences for compensation in respect of different offences and different consequences for victims.

6.68 In addition, a sentence involving deprivation of liberty for a period of time is presumed to weigh equally on offenders, and where it does not, adjustment can be made to account for aspects of an offender’s circumstances that may make a custodial sentence particularly burdensome. However, where there are offenders with widely differing financial circumstances, it would be difficult to achieve consistency of sentences for like offences, given the need for the sentence involving an order for reparation to be proportionate to an offender’s financial means.

6.69 The need for consistency of sentences for similar offences would require the development of case law on the appropriate amounts of compensation for particular offences, in order for there to be consistency of sentencing practices. This would be difficult to determine, given the differing consequences for victims, financial and otherwise, of similar criminal offending.

Parity

6.70 Where two offenders with different financial means are involved in the commission of a single crime, it would be difficult to achieve parity between sentences in the form of compensation orders for these two offenders, as each sentence must be proportionate to the financial means of the offender.

6.71 Further, consistency in awards of financial compensation for various offences would be difficult to achieve, given the need for proportionality of the compensation order in light of an offender’s financial means. Therefore, victims who encounter perpetrators with different financial means could receive vastly different compensation orders for similar offending.

Preferential treatment of offenders with greater financial means

6.72 If restitution and compensation orders were to become sentencing orders, it may pose challenges for the equal treatment of offenders with differing financial means, on the basis that it could lead to offenders being sentenced differently, depending on their wealth. A wealthy offender could potentially be sentenced to a short term of imprisonment, on the basis that their sentence included a large compensation order to their victim, while a less wealthy offender, sentenced for the same offences, could potentially receive a longer imprisonment term because their sentence could not include a compensation order.

590. Director of Public Prosecutions v CPD (2009) 22 VR 533, 552, but note Director of Public Prosecutions v Dalgleish (A Pseudonym) [2017] HCA 41 (11 October 2017); see further Freiberg (2014), above n 312, 451.


592. This can be contrasted with the moderation of the length of a custodial sentence due to an offender’s circumstances, which does not directly affect the victim.
6.73 There have been a number of judicial comments to the effect that offenders should not be able to ‘buy their way out of prison’. It would conflict with the principle of equality before the law if an offender with increased financial resources were able to evade further imprisonment time simply due to their ability to pay an order for restitution or compensation.

6.74 For some types of offenders and offences, it might be possible to establish an equitable basis for trading off financial penalties against sentences if it were possible for the court to ascertain the financial penalty that would be harsher than a custodial sentence for any given offender. However, this information is likely to be unobtainable, and for those without money, such a trade-off is impossible.

6.75 It could be argued that the justice system already treats offenders differently according to their financial means, and that those with greater financial resources are more likely to get favourable outcomes at a number of stages of the criminal justice process. If restitution and compensation orders were to become sentencing orders, there would need to be greater consideration given to how offenders with greater financial means could be treated equally in sentencing courts to those with fewer financial resources.

6.76 In some jurisdictions, an order to compensate for the victim’s loss can be made even if an offender has limited means, but financial capacity is taken into account in determining how the amount is to be paid or what the consequences of any failure to pay might be.

6.77 During the Council’s preliminary consultations, a number of stakeholders noted that the issue of equality before the law would require careful consideration. It was also noted that such issues already arise in relation to the imposition of fines.

Roles of parties to criminal process

Role of prosecutor

6.78 A number of stakeholders raised concerns that making restitution and compensation orders sentencing orders would pose challenges to the existing roles of parties to the criminal process.

6.79 The prosecutor currently acts for the state in prosecuting a criminal offence, and is obliged to act independently and impartially. The prosecution must act in the public interest, which may not always align with a victim’s interests.


594. This argument was made in respect of pecuniary penalties in Douglas (2007), above n 593, 357.

595. This has been seen in a range of studies, such as Richard Cloverdale, Postcode Justice: Rural and Regional Disadvantage in the Administration of Law in Victoria (2011); Charles E. Betsey, ‘Income and Wealth Transfer Effects of Discrimination in Sentencing’ (2005) 32(3–4) The Review of Black Political Economy 111.

596. Meeting with Victoria Legal Aid (20 September 2017); Teleconference with Legal Services Commissioner/Group Manager, National Service Delivery, Ministry of Justice, New Zealand (11 December 2017).

597. This is the case in New South Wales: see [5.69].

598. Email from Manager Law Reform & Policy, County Court of Victoria, to Sentencing Advisory Council, 12 September 2017; Meeting with Office of Public Prosecutions (7 September 2017); Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

599. Meeting with the Chief Magistrate, Magistrates’ Court of Victoria, and Magistrates Charlie Rozencauwig and Susan Cameron (11 September 2017); Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017).

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


6.80 If restitution and compensation orders were to become sentencing orders, the prosecutor’s role may have to change to become (in part) an advocate for the victim in the sentencing process. For example, in order to establish the need for compensation, the prosecutor might have to prove to the court that the victim incurred an injury or loss, and propose to the court what the appropriate compensation would be. It may also require prosecutors to consider medical evidence regarding a victim’s injuries, and to respond to challenges to this evidence that may be raised by the defence.

6.81 Prosecutors may also need to negotiate with defence lawyers on behalf of victims, to attempt to reach agreements concerning injuries or losses sustained, or to reach agreements on compensation amounts for the purposes of resolving matters to pleas.

6.82 During the Council’s preliminary consultations, the Director of Public Prosecutions raised concerns about the expansion of a prosecutor’s role within such a system, and the further expertise that prosecutors would need to possess to adequately advocate in relation to a victim’s financial loss.603

6.83 Another stakeholder, in noting the complexity of the system for victims’ compensation, stated that if the system were to change, victims would need to consult practitioners with an understanding of the interaction between the different avenues for compensation, who could give considered legal advice on the potential consequences of payment of compensation under the Sentencing Act 1991 (Vic) and civil avenues for compensation, against either the offender or third parties.604

6.84 Such a change would also extend the matters that the Office of Public Prosecutions (OPP) needs to canvas with victims.605

6.85 If another organisation, such as Victoria Legal Aid, were to be tasked with assisting victims in making applications for restitution and compensation orders (or appealing those orders), this would raise further issues. As noted at [2.27], Victoria Legal Aid is often unable to assist victims due to legal conflicts. Victoria Legal Aid would be unable to assist a victim in a claim against an offender for whom it has acted in the past. Given the large number of clients that Victoria Legal Aid assists, this is an issue that could prove significant.606

Role of defence

6.86 If restitution and compensation orders were to become sentencing orders, the defence practitioner may be required to consider and test the victim’s evidence of their financial loss, if that course is consistent with the instructions of their client.

6.87 This may require defence practitioners to consider the evidence (including medical evidence) relied on by the prosecution to substantiate a victim’s claim, and to challenge aspects of that evidence, or the assertion that the criminal offence caused the victim’s injuries.

6.88 Under the current system, such a contest can occur if the amount of any order is disputed. However, if these orders were to become sentencing orders, this would likely become more commonplace and result in a significant increase in the workloads of criminal defence practitioners, particularly for those managing high caseloads in the Magistrates’ Court.607

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603. Meeting with Office of Public Prosecutions (7 September 2017). This issue was also raised by the County Court of Victoria: Email from Manager Law Reform & Policy, County Court of Victoria, to Sentencing Advisory Council, 12 September 2017.

604. Meeting with Waller Legal (28 November 2017).

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

606. Meeting with Victoria Legal Aid (20 September 2017).

607. Meeting with Victoria Legal Aid (20 September 2017).
Role of judicial officers

6.89 Magistrates and judges sitting in the criminal jurisdiction are not commonly responsible for assessing victims' injuries, or determining the appropriate amount of compensation. These matters are more often considered in civil courts, where judicial officers regularly evaluate medical reports, and assess the likely ongoing consequences of physical and mental injuries, and make calculations concerning matters such as the claimant’s lost earnings, or the costs of ongoing care.

6.90 Requiring judicial officers in criminal courts to routinely assess injuries and losses sustained by victims, and to consider and determine the appropriate financial compensation, represents a significant extension of their current role.

Family violence matters

6.91 During the Council’s preliminary consultations, a number of stakeholders noted the risks posed by making restitution and compensation orders sentencing orders, when considering family violence offending.608

6.92 In its previous research, the Council has cautioned against the use of fines as a sentencing disposition in the context of sentencing for contravention of family violence intervention orders and safety notices. The Council has noted that fines are generally unable to fulfil the purposes of community protection and rehabilitation, and may compound the harm experienced by the victim. Where the offender and victim are in a relationship of financial interdependence, a fine is likely to punish the victim as well as the offender by withdrawing resources from the family as a whole.609

6.93 These same issues arise when considering whether restitution and compensation orders should become sentencing orders. The imposition of an order for restitution or compensation in circumstances in which a family violence offender is in a continuing relationship with a victim survivor (or otherwise in a relationship of continuing economic ties) would require a family violence offender to make a payment to a victim survivor out of what may be a shared pool of resources. This is unlikely to be of any practical benefit to a victim survivor. Further, victim survivors of family violence may be pressured by an offender to request or accept a compensation order in lieu of another sentencing disposition, in order for an offender to avoid another sentencing outcome.610 Given the large proportion of criminal matters involving family violence offending, these issues require careful consideration.611

Resource implications

6.94 A number of stakeholders raised concerns about the potential resource implications of making restitution and compensation orders sentencing orders.612

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608. Meeting with Victoria Legal Aid (20 September 2017); Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017).


610. Meeting with Victoria Police Prosecutors (7 December 2017).

611. Victoria Police have stated that about 40% to 60% of front-line police activities relate to family violence: State of Victoria, Royal Commission into Family Violence, Volume III: Report and Recommendations (2016), 56 citing Transcript of Assistant Commissioner Cornelius, 3 August 2015, 1667 [13]–[15].

612. Meeting with Office of Public Prosecutions (7 September 2017); Meeting with the Chief Magistrate, Magistrates’ Court of Victoria, and Magistrates Charlie Rozenwajg and Susan Cameron (11 September 2017); Meeting with Judicial Registrar Mark Pedley, Supreme Court of Victoria (11 September 2017); Meeting with Victoria Police (19 September 2017); Meeting with Victoria Legal Aid (20 September 2017); Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalf and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017).
6.95 The OPP noted that if it were required to make submissions on victims’ losses, as well as respond to challenges about victims’ injuries and financial losses, prosecutors would need to have particular training to equip them for making these arguments.\(^{613}\) It is likely that criminal defence practitioners would also require additional training to equip them to respond to arguments about a victim’s financial loss and injuries, and similarly, that judicial officers would need further training if they were required to assess and quantify injuries for the imposition of compensation orders as sentencing orders.

6.96 Any changes to restitution and compensation orders are likely to have significant resourcing implications for the Magistrates’ Court, which hears many matters per day.\(^{614}\) As noted at [2.80], the number of cases in which an order for restitution or compensation is made in addition to sentence in the Magistrates’ Court currently represents a small proportion of the total number of criminal cases heard in that court each year. This would likely increase if restitution and compensation orders became sentencing orders.

6.97 If the majority of criminal matters before the Magistrates’ Court required a further two minutes’ court time (a conservative estimate), even this could have significant implications for the Magistrates’ Court’s lists. It would also place further burdens on informants and police prosecutors, who would need to prepare the applications and evidence, including obtaining medical assessments and quotes to quantify property loss, and liaise with victims about attending court for cross-examination,\(^{615}\) as well as on Victoria Legal Aid lawyers and on those appearing for accused persons in the Magistrates’ Court.\(^{616}\)

6.98 Further, the number of intended beneficiaries of restitution and compensation exceeds the number of orders made. If the orders were made more frequently, there would be an increase in the number of beneficiaries. This would require further resources to enforce the orders on behalf of each intended beneficiary.

6.99 Any changes may also have implications for the number of appeals, if these orders were to become part of an offender’s sentence.

**Effect on resolution of matters and increased adjournments**

6.100 Victoria Police prosecutors, the OPP and Victoria Legal Aid noted that making restitution and compensation orders sentencing orders would be likely to cause delays in matters resolving to pleas, or may prevent matters from resolving into plea agreements, as it would constitute another issue on which the parties would need to reach an agreement.\(^{617}\)

6.101 In addition, the availability of compensation as a sentencing order may affect the timely resolution of matters, as a prosecutor may be reluctant to negotiate on particular charges if it would mean that a victim would be less likely to receive adequate compensation for the injuries sustained.

6.102 Making restitution and compensation orders sentencing orders may also lead to an increase in the number of times a matter is adjourned, as the court and the parties may require additional time to obtain information such as medical reports and documentation concerning an offender’s financial position.

\(^{613}\) Meeting with Office of Public Prosecutions (7 September 2017).

\(^{614}\) Meeting with Victoria Police Prosecutors (7 December 2017).

\(^{615}\) Meeting with Victoria Police Prosecutors (20 September 2017).

\(^{616}\) Meeting with Victoria Legal Aid (7 September 2017); Meeting with Victoria Legal Aid (20 September 2017); Meeting with Victoria Police Prosecutors (7 December 2017).
6. Measures for reform

6.103 The Council heard that, in Queensland, matters may be adjourned due to the need for prosecutors to prepare materials for the purpose of making an application for restitution or compensation, although police prosecutors appearing in the Magistrates’ Court will usually have information relevant to a restitution or compensation application prepared as a matter of course.\textsuperscript{618}

6.104 Again, this could have significant resourcing implications for courts, most notably the Magistrates’ Court.\textsuperscript{619}

### Question 1: Restitution and compensation orders as sentencing orders

Should restitution and compensation orders become sentencing orders? If so:

**Place in sentencing hierarchy**

a. Where in the sentencing hierarchy should the orders sit? Should they:
   i. be integrated as a condition of another order;
   ii. exist as stand-alone orders; or
   iii. both?

**Relationship with purposes of sentencing**

b. Should the purposes of sentencing under section 5(1) of the Sentencing Act 1991 (Vic) be expanded to include the financial reparation of victims?

**Process and procedure**

c. How should information about an offender’s financial means be brought before the court, and how should it be considered?

d. Should a victim’s views on the appropriateness of a compensation order be considered in the sentencing process?

e. How should a victim’s financial loss be established?

**Equity and parity**

g. How would the need to maintain equality before the law, consistency of sentencing and parity between offenders be addressed?

**Roles**

h. What would the consequences be for the roles of the prosecutor, defence and judicial officers? How would independence of the prosecutorial role be maintained?

**Consequences**

i. What should the consequences be if an offender cannot pay an order for restitution or compensation?

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\textsuperscript{618} Teleconference with Legal Aid Queensland (9 November 2017).

\textsuperscript{619} Meeting with Office of Public Prosecutions (7 September 2017); Meeting with Victoria Legal Aid (20 September 2017); Meeting with Victoria Police Prosecutors (7 December 2017).
Measures that keep restitution and compensation orders as ancillary orders

6.105 If it is not considered desirable to make restitution and compensation orders sentencing orders, there are a number of ways in which the enforcement of those orders within the current framework could be improved.

6.106 These measures involve the least amount of change to the current system, and seek to either:

- improve the accessibility and effectiveness of current civil enforcement mechanisms for victims; or
- introduce state enforcement of restitution and compensation orders, while maintaining their status as ancillary orders.

Ancillary orders with improved civil enforcement undertaken by victim

6.107 While retaining restitution and compensation orders as ancillary orders, changes that may assist victims to enforce judgment debts for restitution and compensation orders might include:

- providing free legal assistance for victims to enforce these debts in the civil system, through a community legal centre or other agency;
- waiving the fees for initiating and pursuing civil enforcement through the courts;\(^{620}\)
- empowering courts to automatically transfer restitution and compensation orders to the civil jurisdiction, for enforcement, without the need for the victim to commence this process; and/or
- having designated court officers provide assistance to victims seeking to enforce restitution and compensation orders in the civil system of each court.\(^{621}\)

6.108 The cost of private legal representation means that many victims cannot afford to retain legal assistance to enforce their judgment debt. Free legal advice services provided by some community legal centres may provide information and advice to victims, but these centres may not have the resources to provide ongoing legal representation.\(^{622}\) If there were a community legal centre or other body that could provide ongoing legal representation to victims in enforcing these orders, this may improve the rates of civil enforcement.\(^{623}\)

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\(^{620}\) For fees that may apply to a victim seeking to enforce a debt, see *Magistrates’ Court (Fees) Regulations 2012* (Vic); *County Court (Fees) Regulations 2012* (Vic); *Supreme Court (Fees) Regulations 2012* (Vic); *Sheriff Regulations 2009* (Vic). Following recent reforms, warrant issue fees for compensation orders may be waived: *Fines Reform Act 2014* (Vic) s 9. See further [3.13]. This may represent a large amount of revenue for the state. As such, the financial implications of such a change would need to be considered.

\(^{621}\) This could potentially be undertaken by the co-ordinator for self-represented litigants in the County Court or Supreme Court; see discussion of these roles in Department of Justice and Regulation, *Access to Justice Review: Background Paper – Self-Represented Litigants* (n.d) 5. There is no equivalent officer in the Magistrates’ Court of Victoria.

\(^{622}\) Community legal centres that offer free or low-cost legal help to members of the public can provide legal advice, information and in some cases ongoing assistance. Whether a community legal centre can provide ongoing assistance depends on a number of factors, including whether the centre has the resources to assist: see further Federation of Community Legal Centres (2018), above n 77.

\(^{623}\) In addition, community legal centres are less likely to face the legal conflict issues encountered by Victoria Legal Aid: see [2.27]; Meeting with Victoria Legal Aid (20 September 2017).
6. Measures for reform

6.109 In addition to any costs of legal representation, it can cost victims thousands of dollars in court fees to enforce the orders in the civil jurisdiction.\(^{624}\) If the fees are removed for the civil enforcement of the orders, these costs will have to be borne by the state.

6.110 Waiving fees would still require the victim to enforce the order for restitution or compensation, but it would involve courts providing further assistance to victims attempting to navigate the civil jurisdiction.

6.111 Another way of assisting victims with enforcing the orders is to have courts automatically refer orders made in the criminal jurisdiction to the civil jurisdiction for enforcement if the orders remain unpaid.

6.112 One issue with any automatic referral process, however, would be whether the court would have to monitor the payment of orders and pursue those that remain unpaid.

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**Case Study 11: Hypothetical – assisted civil enforcement**

A victim receives a compensation order for physical injuries caused by an offender convicted of intentionally causing serious injury. The victim, a pensioner, is awarded a sum of $25,000 in the County Court.

The victim attends a community legal centre for legal advice, and decides to pursue the offender in the civil jurisdiction. The victim cannot afford to retain a private solicitor to assist in this process. Through a specific program, the community legal centre is funded to provide legal advice and assistance to victims to enforce judgment debts.

The community legal centre considers the victim’s options and provides legal advice on the best avenues to pursue in order to enforce the judgment debt in the civil jurisdiction of the County Court. The victim approaches the County Court Registry to initiate proceedings. The County Court Registry advises the victim that they are able to waive some fees due to the victim’s financial position and the nature of the judgment debt.

The County Court waives the fee for the victim to pursue a summons for oral examination of the offender, in order to ascertain the offender’s financial position. The victim is provided with assistance in completing the forms by the community legal centre, which also assists the victim on the day of the examination.

The court hears that the offender has personal savings in a bank account of $5,000, and little prospects of employment following release from prison. The court orders that payments be made by way of an instalment order.

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\(^{624}\) With the assistance of civil solicitors, these costs can be much greater: Meeting with Waller Legal (28 November 2017). The costs of various enforcement mechanisms vary: see County Court of Victoria, ‘Fees’ (countycourt.vic.gov.au, 2018) <https://www.countycourt.vic.gov.au/fees> at 5 January 2018; Magistrates’ Court of Victoria, Fees and Costs Ready Reckoner (2018).
Question 2: Improving civil enforcement mechanisms

If restitution and compensation orders are to remain as ancillary orders, how should civil enforcement be improved?

a. Should free legal representation be provided to victims through a community legal centre or other agency?

b. Should fees be waived for victims of crime seeking to enforce restitution and compensation orders in the civil jurisdiction of the court in which the order was made?

c. Should courts automatically transfer restitution and compensation orders from the criminal jurisdiction to the civil jurisdiction for enforcement?

d. Is there another way to improve civil enforcement?

Ancillary orders with enforcement undertaken by the state

6.113 It may be desirable for restitution and compensation orders to be enforced, either automatically or at the request of the victim, by Infringement Management and Enforcement Services (IMES), Department of Justice and Regulation, potentially through Fines Victoria.

Automatic enforcement

6.114 After a court makes an order for restitution or compensation, the order could be transferred to IMES for automatic enforcement through the existing civil enforcement mechanisms. This option would remove the need for victims to initiate the enforcement of these orders.

Assigning the right to enforce the order to the state

6.115 Alternatively, a victim could elect to assign their rights to enforce the order to the state. Upon making an order for restitution or compensation, a court could inquire whether a victim elects to assign the enforcement of the order to the state, which could then enforce the order through civil enforcement mechanisms.

6.116 This option would provide an avenue for victims to have the orders enforced without having to undertake the enforcement process themselves. Instead, the state would undertake the civil enforcement of the order as if it were the victim, bearing the burden and costs of enforcing the debt, within the current powers available to enforce a debt through civil enforcement mechanisms.

6.117 Given that the order is not a sentencing order, the state could not enforce the order in the same way that it enforces a fine under the Sentencing Act 1991 (Vic). Further, the state would not have the ability to, for example, require that an offender serve further time in custody or undertake community service through the process of civil enforcement.

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

626. See [3.11]–[3.36] for a summary of civil enforcement powers.

627. Court fines will be enforced by Fines Victoria: Fines Reform Act 2014 (Vic) s 5; Infringement Management and Enforcement Services, Fines Victoria: A New Fines Recovery Model (2017) 1. The consequences of default under the Fines Victoria scheme include further time in custody or community service. There would be no basis for ordering an offender to serve further time in custody without restitution and compensation orders being considered sentencing orders. An amendment bringing restitution and compensation orders within the definition of a court fine could bring the orders within enforcement by Fines Victoria: Meeting with Infringement Management and Enforcement Services, Department of Justice and Regulation (13 September 2017).

6. Measures for reform

6.118 A critical issue is that this option would require the state to fund the enforcement of private debts, unless, for example, the state had the ability to recover the costs of enforcement from an offender or to deduct these costs from any monies or assets obtained for a victim through the enforcement process.

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**Case Study 12: Hypothetical – assigning rights of enforcement to the state**

An offender is found guilty of the offence of recklessly causing serious injury. A victim applies for a compensation order for injury, and is awarded a sum of $30,000. The court inquires whether the victim would like the Department of Justice and Regulation to pursue the enforcement of the order on the victim’s behalf. The victim agrees to this.

The Department of Justice and Regulation’s Asset Confiscation Operations applies for an application for oral examination of the offender, who is serving a four-year imprisonment term. The offender is compelled to provide documents to the court on their financial position. The court hears that the offender has personal savings in a bank account of $15,000, but little prospects of employment following release from prison. The court orders that payments be made by way of an instalment order over a number of years.

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**Risk to victims associated with automatic enforcement**

6.119 One researcher has noted concerns regarding the automatic enforcement of debt recovery mechanisms against offenders on behalf of victims. This is particularly the case for victim survivors of family violence, where a victim survivor may still be in regular contact with an offender, and may hold concerns that enforcement action would trigger an escalation in violence or another act of retaliation from the offender.

6.120 As a result, any amendments that introduce the automatic enforcement of an order for restitution or compensation against an offender, particularly where the order has been issued on the court’s own motion rather than on the application of the victim, would need to consider the potential for enforcement to increase risk to victims.

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**Further punishment**

6.121 A further issue arises as to whether state enforcement of ancillary orders constitutes further punishment that is not taken into account in the sentencing process. State enforcement would likely mean that offenders who could not pay the orders would be subjected to automatically pursued civil enforcement mechanisms. Many offenders would have multiple and potentially compounding debts, and the impact of such enforcement on these offenders may be particularly punitive (see [3.9]). However, those who do not have any assets that can be seized, or are unemployed or on a low income, cannot have the order enforced against them.

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629. The state already undertakes this with respect to the enforcement of unregistered driving in toll zones (for both CityLink and EastLink). This has been identified as placing a significant burden on the Magistrates’ Court: see further Sentencing Advisory Council (2014), above n 175, 303.

630. This currently occurs with respect to the payment of restitution and compensation orders out of forfeited funds: Confiscation Act 1997 (Vic) s 31.


632. See for example, ibid 10.

633. Compensation orders for property loss can currently be made on the court’s own motion: Sentencing Act 1991 (Vic) s 86(1A)(b). The VLRC recommended that this power be extended to restitution and compensation orders for injury: Victorian Law Reform Commission (2016), above n 3, 125 (Recommendation 45).

634. Debtors in these circumstances can be deemed judgment proof. For further discussion of this term, see [3.4].
Question 3: State enforcement of ancillary orders

If restitution and compensation orders are to remain as ancillary orders, should the state enforce the orders? If so:

a. Should the state enforce the orders automatically on behalf of victims?

b. Should the state enforce the orders when a victim elects to assign their rights to the state to pursue enforcement?

c. Should the state enforce the orders in another way?

Increased access to an offender’s assets

6.122 As discussed at [3.59], one of the purposes of the Confiscation Act 1997 (Vic) is to ‘preserve assets for the purpose of restitution and compensation to victims of crime’. To this end, a person’s assets can be restrained for a range of purposes, including to satisfy any order for restitution or compensation that may be made once the offender has been found guilty and sentenced.\(^{636}\)

6.123 A number of stakeholders have commented on the potential to further use the existing powers under the Confiscation Act 1997 (Vic) to improve access to an offender’s assets, in order to maximise the potential for any future order for restitution or compensation to be paid.\(^{637}\)

6.124 The power to apply for a restraining order to preserve an alleged offender’s assets to meet a future order for restitution or compensation is underutilised.\(^{638}\)

6.125 Currently, a person’s assets can only be forfeited by the state in very limited circumstances, and usually only where the person has been found guilty of a serious offence and the assets are found to be tainted property, that is, used, or intended to have been used, in connection with the offence. This means that, although a victim may have a restraining order over an offender’s property, unless the property was used in connection with the crime, there is no power for the state to forfeit the asset.\(^{639}\) If a victim does not have the resources to pursue civil enforcement, the asset can remain untouched and the judgment debt may lapse.\(^{640}\)

6.126 Improving the use of existing powers under the Confiscation Act 1997 (Vic) may go some way to increasing the potential for a victim to successfully enforce an order for restitution or compensation. However, without assistance for victims in enforcing judgment debts within the current legislative powers, victims may be unable to enforce an order for restitution or compensation even where the court has restrained an asset that could meet the order.

635. Confiscation Act 1997 (Vic) s 1(h).

636. Confiscation Act 1997 (Vic) s 15(1).

637. Meeting with Victims of Crime Commissioner (12 September 2017); Meeting with Victoria Police (19 September 2017); Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017); Meeting with Deputy Chief Magistrate Broughton, Magistrates’ Court of Victoria, and Magistrates Johanna Metcalfe and Andrew Capell, Joint Supervising Magistrates of the Victims of Crime Assistance Tribunal (4 October 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

638. Meeting with Office of Public Prosecutions (7 September 2017); Meeting with Victims of Crime Commissioner (12 September 2017); Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017). See [3.68]–[3.72] for discussion of the investigation of offenders’ assets.

639. See [3.58] for further discussion of confiscation of assets.

640. See Chapter 3 for further discussion of enforcement of judgment debts. Meeting with Victoria Police (19 September 2017); Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).
6.127 There is also the potential to expand the powers under the Confiscation Act 1997 (Vic) to strengthen the enforcement of restitution and compensation orders.

6.128 The forfeiture of property is a substantial intrusion into an individual’s or a corporation’s property rights, and is a considerable sanction, whether it is classified as civil or criminal. Any expansion of such powers needs to be considered in light of the importance of maintaining natural justice considerations, as well as the right under the Charter of Human Rights and Responsibilities Act 2006 (Vic) that a person ‘must not be deprived of his or her property other than in accordance with law’.

Investigation of assets and applications for restraining orders

6.129 As discussed at [3.60], under the Confiscation Act 1997 (Vic), the Director of Public Prosecutions or Victoria Police can apply to have an alleged offender’s assets restrained for the purpose of satisfying any order for restitution or compensation that may be made once the offender has been found guilty and sentenced. The Director of Public Prosecution’s policy requires that consideration must be given to the potential for a restraining order, but it is unclear to what extent this occurs.

6.130 There is no data available on the proportion of criminal offences involving a victim in which the prosecution seeks a restraining order. However, during the Council’s preliminary consultations, a number of stakeholders noted that these applications are rare, and that whether such an application is made depends on whether the informant or prosecutor in the case prioritises making such an application.

6.131 As discussed at [3.68], within the current framework, Victoria Police informants are responsible for investigating an offender’s assets, and asking victims whether they would like to seek an order for restitution or compensation after the completion of the criminal process.

Improved use of existing powers

6.132 There are a range of measures for improving the use of the current powers available under the Confiscation Act 1997 (Vic) in order to better identify and restrain an offender’s assets for the purposes of meeting a future order for restitution or compensation.

6.133 Victoria Police could introduce procedures that state that the informant should investigate an offender’s assets following a victim reporting a crime, including undertaking property and land title searches to ascertain whether the offender owns any property. Guidance could also be provided to informants on when and how to inquire with a victim as to whether they wish to make an application for restitution or compensation following the criminal process.

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641. See discussion in Maxwell (2011), above n 268.
643. Director of Public Prosecutions (2017), above n 57, 42.
644. Meeting with Victims of Crime Commissioner (12 September 2017); Meeting with Victoria Police (19 September 2017); Meeting with Victoria Legal Aid (20 September 2017).
645. Meeting with Victoria Police (19 September 2017).
646. These inconsistencies may reflect the competing priorities of informants, who are focusing on the investigation of the criminal offence, and variation in knowledge across the police force as to how to investigate an offender’s assets: Meeting with Victoria Police (19 September 2017); Meeting with Victoria Police Prosecutors (7 December 2017); Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).
During the Council's preliminary consultations it was noted that undertaking such investigations before a decision was made to charge an individual for a criminal offence would be an ineffective use of resources. Any procedures increasing police investigation of accused persons' assets would need to be balanced against the need to prioritise the investigation of the alleged criminal offence. There would also need to be some regard to the amount of loss a victim is likely to have sustained.

Following a decision to charge an offender for the alleged offence, Victoria Police could then also make an application for a restraining order in relation to any relevant assets, in order to meet any future order for restitution or compensation that may be made following the completion of the criminal process. This would prevent the offender from dissipating any assets that they may have prior to an order for restitution or compensation being made.

This may have considerable resourcing implications for Victoria Police informants, who would have to undertake investigations of the assets of alleged offenders, in addition to their existing duties, and their primary role in gathering evidence to prove alleged offences.

The OPP could also prioritise the identification of matters in which there are assets that could be restrained for the purpose of meeting any future order for restitution or compensation.

One stakeholder raised concerns about the potential for false allegations to be driven by the prospect of receiving a compensation order. If there were to be increased use of applications for restraining orders prior to the criminal process, the potential for this to lead to increased false allegations may need to be considered.

**Question 4: Increasing use of existing powers under the Confiscation Act 1997 (Vic)**

**a.** Should Victoria Police streamline their procedures for investigating alleged offenders' assets and making applications for restraining orders under the Confiscation Act 1997 (Vic)? If so, how?

**b.** Should Victoria Police investigate alleged offenders' assets as part of the investigation of every offence, or only for certain offences?

**c.** Should the Office of Public Prosecutions further prioritise making applications for restraining orders over alleged offenders' assets for the purposes of meeting future restitution and compensation orders?

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647. Meeting with Victoria Police (19 September 2017); Meeting with Victoria Police Prosecutors (7 December 2017).

648. Victoria Police Prosecutors noted that most applications for an order for restitution or compensation for property loss in the Magistrates' Court are for amounts under $1,000, and that it would be an ineffective use of resources to undertake investigation of offender's assets for relatively small financial losses: Meeting with Victoria Police Prosecutors (7 December 2017).


650. The Director of Public Prosecutions’ policy requires that a solicitor consider the potential for a restraining order to be made: Director of Public Prosecutions (2017), above n 57, 42.

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

652. The potential for the accused to state that their accusers are financially motivated may also be used to challenge allegations in criminal trials, and could affect conviction rates for some offences.
Increased powers to forfeit an offender’s assets

6.139 As discussed at [3.75], there are certain circumstances in which the state has the power to forfeit an offender’s assets. These circumstances generally involve forfeiture of restrained assets following a finding of guilt for a serious profit-driven offence (for example, a serious drug trafficking offence), or following a conviction for certain offences, where the property is tainted, that is, found to have been used, or intended to have been used, in connection with the offence.

6.140 One option is to widen the circumstances in which the Director of Public Prosecutions or a police prosecutor may apply to a court for a forfeiture order following an offender’s conviction for an offence, where a restraining order has been obtained for the purposes of meeting a future order for restitution or compensation, even if the property is not tainted. This could involve identifying a class or category of offences, so that if an offender is found guilty of such an offence, and a victim receives an order for restitution or compensation in respect of such offending, an application may be made for the discretionary forfeiture of restrained assets.

6.141 Where a restraining order has been obtained for the purposes of meeting a future order for restitution or compensation, and an offender is convicted of an indictable offence, the Director of Public Prosecutions could be empowered to make an application to the Supreme Court, or the court in which the offender was convicted, for a forfeiture order for property, which could be triggered upon the victim being awarded an order for restitution or compensation.

Forfeiting untainted assets

6.142 The overarching objectives of the Confiscation Act 1997 (Vic) are to deprive persons of the proceeds of certain offences and tainted property, and to deter, disrupt and undermine certain profit-motivated criminal activities. The only situation in which the state is currently empowered to forfeit an offender’s assets, in the absence of a connection between the assets and the crime, is where the offender has been convicted of a serious, profit-driven offence, and therefore there is an underlying assumption that their property has been derived from their participation in serious and profit-motivated criminal offending.

6.143 The forfeiture of assets where an offender has not been found guilty of a serious profit-driven offence, and where the assets are not found to be tainted property, raises considerable constitutional and human rights issues. There is no other jurisdiction in Australia in which such powers exist. There are also the interests of third parties, such as the offender’s family.

653. Confiscation Act 1997 (Vic) s 35(1).
654. Confiscation Act 1997 (Vic) s 32. For indictable offences and certain (profit-motivated) summary offences, see Confiscation Act 1997 (Vic) sch 1.
655. Confiscation Act 1997 (Vic) s 32(1). See further [3.75].
656. Tainted property is either property used in or in connection with the commission of a relevant offence or property wholly or substantially derived from the commission of an offence.
659. See for example Gray (2012), above n 658.
660. The Sentencing Bill 2016 (SA) initially contained new provisions allowing for the restraint and seizure of all or any of an offender’s assets, whether it was earned legitimately, in order to meet restitution and compensation orders made in cases of ‘offences of dishonesty’. These provisions were not enacted in the Sentencing Act 2017 (SA): Attorney-General’s Department, Government of South Australia, Transforming Criminal Justice: New Sentencing Principles and Options: Factsheet (2016); Office of Parliamentary Counsel (SA), Sentencing Bill 2016: Draft for Comment (2016) 82 (‘Division 3 – Special Provisions Relating to Offences of Dishonesty’).
who may not have known of the offending and may be adversely affected by the forfeiture of an asset, such as a family home.\textsuperscript{661} However, the forfeiture of an offender’s interest in a joint asset may be justifiable for those offenders who have committed serious offences, causing considerable financial and emotional consequences for victims.

**Case Study 13: Hypothetical – forfeiting untainted assets**

An employed 40 year old male offender is found guilty and sentenced for the offence of intentionally causing serious injury. The offence involved punching another patron at a licensed venue, causing permanent damage to the victim’s sight in one eye.

The offender has no prior convictions, and is repaying a mortgage on a family home, jointly owned by him and his partner. For the offending, he receives a sentence of 12 months’ imprisonment. He has savings of under $5,000, a family car valued at $7,000 and limited other assets. There is $200,000 of equity in the property. The victim applies for and receives a compensation order for injury of $50,000.

The victim would like the offender’s interest in the property to be extracted to meet the compensation order. The offender’s wife makes an exclusion application to protect her share of the joint asset. The offender’s interest in the property is valued at $80,000. The bank refuses the application to refinance against the property due to the offender’s diminished employment prospects. Under the extended powers under the *Confiscation Act 1997* (Vic), the property is seized and sold to extract the payment of $50,000.

**Which offences should lead to increased powers of forfeiture?**

6.144 It may be desirable for the state to have increased powers to apply for the forfeiture of an offender’s assets for the purposes of meeting an order for restitution or compensation for particular kinds of offences.

6.145 During preliminary consultations, the Council heard that a significant proportion of offences leading to applications for compensation orders for injury are sexual offences.\textsuperscript{662}

6.146 Given the significance of increasing the state’s powers to forfeit an offender’s assets, particularly when the property is not tainted property – and has not been used, or was not intended to be used, in connection with the offence – it would be appropriate that any such change be limited to indictable offences,\textsuperscript{663} and potentially be targeted at securing assets for restitution and compensation claims from victims who have been gravely affected by the offences perpetrated against them.

6.147 For this reason, it may be desirable that the powers to forfeit assets for the purposes of meeting an order for restitution or compensation be limited to circumstances in which an offender has been convicted of an offence involving serious physical or psychological injury to a person.\textsuperscript{664}

\textsuperscript{661} Even where an offender’s family member makes an application for an exclusion order over their interest in a shared asset, such as a family home, this may still lead to a situation in which a home is sold to extract an offender’s interest in the property to meet an order for restitution or compensation: Meeting with Office of Public Prosecutions (7 September 2017); Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).

\textsuperscript{662} Meeting with Waller Legal (28 November 2017).

\textsuperscript{663} This is consistent with the scheduled offences in the *Confiscation Act 1997* (Vic).

\textsuperscript{664} These offences may be captured by current classifications of serious violent offences or serious sexual offences: *Sentencing Act 1991* (Vic) sch 1.
6. Measures for reform

Which victims should have further assistance from the state?

6.148 Alternatively, the increased powers of forfeiture could be triggered by an order for restitution or compensation in respect of particular offending, which could then empower the Director of Public Prosecutions to make an application to forfeit assets to the extent required to meet the order for restitution or compensation.

6.149 It may be preferable for the state to only provide assistance for the enforcement of restitution and compensation orders in circumstances in which the victim is a real person, rather than a corporation or similar entity. This is due to the need to preserve the state’s resources for victims who cannot enforce orders themselves, due to financial or other barriers. A large proportion of restitution and compensation orders are made in favour of corporations or similar entities (see [2.84]).

Creation of a charge over property

6.150 Where a court makes a restraining order in respect of a person’s property, and a pecuniary penalty order (see [3.61]) against that person, a charge is created on all the property to which the restraining order applies to secure payment of the pecuniary penalty order to the state.

6.151 A similar provision could be introduced in order to secure payment of an order for restitution or compensation to a victim. Therefore, if a court makes a restraining order for the purposes of meeting a future order for restitution or compensation, and then subsequently makes such an order, a charge could be created on the restrained property in order to secure payment of the order to the victim.

6.152 During preliminary consultations, the Council heard that this would be one practical way to improve the ability to realise assets in order to meet restitution and compensation orders. Such a change would effectively enable the property sale process to be triggered in circumstances in which an order for restitution or compensation is made, therefore securing payment to the victim.

Assigning a victim’s enforcement rights to the state

6.153 Under the Confiscation Act 1997 (Vic), a pecuniary penalty order becomes a civil debt due by the person to the state (described as the Crown), and it is enforced by the state through civil enforcement mechanisms.

6.154 As discussed at [3.60], Asset Confiscation Operations (ACO), Department of Justice and Regulation, has particular expertise in the enforcement of orders for forfeiture of property made under the Confiscation Act 1997 (Vic).

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665. Such barriers include grief: Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

666. During the Council’s preliminary consultations, it was noted that the Director of Public Prosecutions does not assist large corporations with applications for the restraint of property in order to meet restitution and compensation orders: Meeting with Witness Support Services, Office of Public Prosecutions (7 December 2017).

667. Confiscation Act 1997 (Vic) s 72(1). In addition, on application by the state, a court has the power to make a declaration that certain property may be available to satisfy the pecuniary penalty order if the property has subsequently been passed to another person: Confiscation Act 1997 (Vic) s 70(1). An example is if the offender has gifted the property to another person.

668. Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017).

669. Confiscation Act 1997 (Vic) s 74; Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (21 September 2017). This is similar to the enforcement of pecuniary penalty orders under the Proceeds of Crime Act 2002 (Cth).
6.155 If a victim were to assign their rights to the state, ACO could pursue the civil enforcement of restitution and compensation orders in line with its procedures for pursuing payment of pecuniary penalty orders owed to the state.

**Question 5: Reforms to the Confiscation Act 1997 (Vic)**

Should the Confiscation Act 1997 (Vic) be amended? If so:

a. Should Asset Confiscation Operations, Department of Justice and Regulation, be allowed to undertake civil enforcement on behalf of victims, as occurs in enforcement of pecuniary penalty orders?

b. Should powers of forfeiture of an offender’s assets be increased where the asset has been restrained for the purpose of meeting an order for restitution or compensation? If so, which offences should be subject to increased powers of forfeiture?

c. Should the Act be amended to enable the creation of a charge over property?

d. Should the Act be amended to enable a victim to assign their rights to enforce the order to the state?

e. Should the Act be amended in another way?

f. If the powers under the Confiscation Act 1997 (Vic) are expanded, should these powers be limited to certain types of offenders, offences or victims (for example, should they be for the benefit of certain categories of victims, such as persons rather than corporations)?

**Other reforms to promote enforcement of restitution and compensation orders for victims**

6.156 The Council notes that the VLRC’s review of the VOCA Act, which is due to be provided to government on 27 July 2018, may propose changes that dramatically change the system for state-funded victims’ compensation in Victoria. Such reforms may include changes to the categories or amounts of assistance available under the VOCA Act, the introduction of a victim’s levy to supplement the state-funded victims’ compensation fund or increased recovery of VOCA Act payments from offenders. The recommendations of the VLRC’s review of the VOCA Act may have implications for the use and enforcement of restitution and compensation orders, and therefore the outcomes of the Council’s reference will need to be considered in light of any recommendations made by the VLRC.

6.157 The Council invites stakeholders to consider other alternative reforms to the framework for making and enforcing restitution and compensation orders that may promote effective enforcement of the orders.

**Question 6: Other reforms**

Are there any other reforms to the framework for making and enforcing restitution and compensation orders that would better promote their successful enforcement?

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## Appendix: Preliminary consultations

### Meetings and teleconferences

<table>
<thead>
<tr>
<th>Date</th>
<th>Meeting/teleconference</th>
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<tr>
<td>14 August 2017</td>
<td>Meeting with Victorian Law Reform Commission</td>
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<tr>
<td>18 August 2017</td>
<td>Meeting with Registry, County Court of Victoria</td>
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<tr>
<td>7 September 2017</td>
<td>Meeting with Office of Public Prosecutions</td>
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<tr>
<td>11 September 2017</td>
<td>Meeting with the Chief Magistrate, Magistrates’ Court of Victoria, and Magistrates Charlie Rozencwajg and Susan Cameron</td>
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<td>11 September 2017</td>
<td>Meeting with Judicial Registrar Mark Pedley, Supreme Court of Victoria</td>
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<td>12 September 2017</td>
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<td>19 September 2017</td>
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<td>21 September 2017</td>
<td>Meeting with Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation</td>
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<td>4 October 2017</td>
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<tr>
<td>9 November 2017</td>
<td>Teleconference with Legal Aid Queensland</td>
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<td>11 December 2017</td>
<td>Teleconference with Legal Services Commissioner/Group Manager, National Service Delivery, Ministry of Justice, New Zealand</td>
</tr>
<tr>
<td>11 December 2017</td>
<td>Meeting with Victorian Law Reform Commission</td>
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