

## Fact Sheet 1: Overview

### Terms of Reference for the Sentencing Advisory Council's Review and Advice

On 13 June 2017, the Attorney-General asked the Sentencing Advisory Council for advice on restitution and compensation orders. The terms of reference ask whether restitution and compensation orders, made to victims under the *Sentencing Act 1991* (Vic), should become sentencing orders. The Council's review will also consider whether:

- the purposes of sentencing should include the financial reparation of victims;
- there should be a presumption in favour of courts making restitution and compensation orders; and
- restitution and compensation orders should be enforced by the state in the same way as fines.

The Council will conduct research and consult with legal bodies and the community, and provide its final advice to the Attorney-General in September 2018. The Council is currently seeking written submissions on the questions posed in *Restitution and Compensation Orders: Issues and Options Paper*. The deadline for submissions is **Friday 20 April 2018**.

### What the Current Project Will Examine

The Council's reference is focused on restitution and compensation paid by offenders under the *Sentencing Act 1991* (Vic). Other aspects of the system of victims' compensation, such as the operation of the Victims of Crime Assistance Tribunal (VOCAT) or avenues for compensation through the common law, are outside the scope of the Council's reference. 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.

### What Are Restitution and Compensation Orders?

Restitution and compensation orders are *ancillary orders*, in other words, orders a court may impose in addition to, but separate from, the sentence imposed upon an offender. These orders 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. Instead, they are meant to return property or compensate for harm caused to the victim of an offence.

Compensation orders for injury may be ordered to help victims cover expenses that are a direct result of the offence (such as medical treatment or counselling), or as compensation for the pain and suffering victims experience because of the offence.

There is no limit to the amount of compensation that can be made for either expenses or pain and suffering.

Failure to pay an order for restitution or compensation does not affect the rest of the offender's sentence, or expose the offender to further criminal penalties.

A victim can make an application for a restitution or compensation order by themselves. Alternatively, 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 on behalf of a victim.

**Restitution order** – the offender must return stolen property (or the money from its sale), or make a payment of a sum of money up to the value of the stolen property (section 84). Property refers to any kind of goods or belongings.

**Compensation order for property loss** – payment by the offender to the victim for the loss, destruction or damage to the victim's property as a result of the offence, up to (but no greater than) the value of that property (section 86).

**Compensation order for injury** – the victim may apply for an order requiring the offender to pay compensation for the pain and suffering caused directly because of the offence and for expenses such as counselling, medical or other expenses (section 85B).

## How Can Victims Get Financial Compensation?

In Victoria, a victim of a crime can:

- ask the court to make an order for restitution or compensation after sentencing the offender 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); or
- pursue a combination of these options.

If the victim pursues a claim for damages in a civil court, the offender's financial circumstances will not affect how much compensation the court may order. However, taking legal action under civil law will usually require the victim to pay for a lawyer. Civil litigation is often a costly and lengthy process. The *Sentencing Act 1991* (Vic) provisions were intended to be a faster and cheaper alternative.

The Council's current review, and its final advice, will only consider orders for restitution and compensation under the *Sentencing Act 1991* (Vic), and will not cover civil litigation or applications to VOCAT.

## How Are Restitution and Compensation Orders Enforced?

Often, offenders have no means to pay orders for restitution or compensation. If an offender does have the means, but refuses to pay, it is up to the victim to seek enforcement.

Unlike court-ordered fines (which are enforced by the state), restitution and compensation orders can only be enforced by the victims themselves. The Council will examine whether there are ways of improving the enforcement of orders under the current system.

### Order Becomes a Judgment Debt

If the offender does not pay an order for restitution or compensation, the debt that is owed becomes a *judgment debt*. The judgment debt can then be enforced through the civil jurisdiction of the court that made the original order.

If this is unsuccessful, the victim may also take legal action seeking to have the offender declared bankrupt. Bankruptcy proceedings will only assist a victim in very limited circumstances.

#### **Victim's options to enforce judgment debt:**

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

### What If the Offender Can't Pay?

If an offender has no substantial assets, it may not be possible to enforce a judgment debt against them. If an offender does not own their own home, a car valued over \$7,800 or 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 (these offenders are sometimes described as being *judgment proof*).

In these circumstances, the victim can still obtain a judgment debt against the offender for the money owed, but this debt cannot be enforced unless the offender's financial circumstances improve. Judgment debts can be enforced for at least 15 years, so the victim may seek payment if the offender's financial circumstances improve (and the victim becomes aware of this) within that time.

Current system for making and enforcing restitution and compensation orders

