

Fact Sheet 2: Options for Reform and Key Issues for Discussion

The Sentencing Advisory Council has developed two broad categories of options for reforming the system of restitution and compensation orders in Victoria:

1. options that make restitution and compensation orders sentencing orders; and
2. measures that keep restitution and compensation orders as ancillary orders, but improve their enforcement.

The Council also welcomes any suggestions for alternative options for reform.

Reforms to make restitution and compensation orders sentencing orders, or to significantly change the enforcement of restitution and compensation orders as ancillary orders, are likely to pose significant legal and procedural challenges in Victoria. The Council's options for reform have been developed with these challenges in mind. The Council is conscious that any reform will not be able to recover money or assets that offenders do not possess. A combination of reforms could be introduced.

1. Making 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.

Expanding the Purposes of Sentencing

The Council has also been asked whether the purposes of sentencing should be expanded to include the financial reparation of victims. Currently, sentencing orders can only be imposed in order to achieve one or more of the purposes listed in section 5 of the *Sentencing Act 1991* (Vic). It is possible to make restitution and compensation orders sentencing orders without changing the purposes of sentencing.

Sentencing purposes in Victoria:

- punishment
- deterrence (of both the offender and others)
- rehabilitation
- denunciation
- community protection.

Processes and Procedures

If restitution and compensation orders were to become sentencing orders, a number of questions would arise as to the appropriate processes and procedures for the orders, such as:

- How should information about an offender's financial means be brought before the court, and how should such information be considered?
- How would the court consider a victim's views on compensation?
- How would a victim's loss be established, and to what standard of proof?
- How would the amount of compensation be assessed?
- How would equality before the law, consistency of sentencing and parity between offenders be maintained?
- How would the independence of the prosecutor be maintained?
- What should the consequences be if an offender can't pay an order for restitution or compensation?

2. Keeping Restitution and Compensation Orders as Ancillary Orders but Improving Enforcement

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 these orders could be improved within the current system.

Improving Civil Enforcement for Victims within the Current System

Some possible reforms include:

- waiving fees relating to civil enforcement;
- automatically transferring restitution and compensation orders to the civil jurisdiction of the court for enforcement;
- having a designated court officer to assist victims with enforcement; and/or
- funding community legal centres to assist victims with enforcement.

Introducing State Enforcement

Once the court imposes an order for restitution or compensation, that order could be transferred to the 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 potential risks to victims, such as victim survivors of family violence, would need to be considered.

Alternatively, a victim could elect to assign their rights to enforce to the state. The state could undertake enforcement within the current powers available to enforce a judgment debt and the victim would not need to undertake enforcement themselves.

Increasing Access to Offender’s Assets

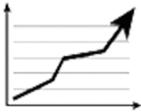
The *Confiscation Act 1997* (Vic) could be better utilised by increasing the use of current powers to investigate an offender’s assets and apply for a restraining order to preserve assets to meet a future order for restitution or compensation.

Alternatively, new powers could be created to allow for:

- the creation of a charge over restrained property, where a court makes a restraining order for the purposes of meeting an order for restitution or compensation; and/or
- increased powers of forfeiture, so that the circumstances in which an offender’s assets may be forfeited are broadened. This would allow the Director of Public Prosecutions, or a Police Prosecutor, to apply for a forfeiture order following an offender’s conviction, even where the property is not *tainted* property.

	Less intensive reforms	More intensive reforms
1. Improve civil enforcement for victims within current system	Remove fees relating to civil enforcement Have a designated court officer to assist victims seeking to enforce orders Provide free legal advice to victims seeking to enforce orders	Provide free legal representation to victims seeking to enforce orders through independent agency, such as a community legal centre
2. Introduce state enforcement	Victim can elect to assign right to state to enforce order	Automatic enforcement of orders on behalf of victims
3. Increase access to offenders’ assets	Improve use of current powers to restrain assets under the <i>Confiscation Act 1997</i> (Vic)	Amend the <i>Confiscation Act 1997</i> (Vic) to allow for the creation of a charge over an offender’s property Increase the powers to forfeit an offender’s property in certain circumstances

Comparison of Ancillary Orders and Sentencing Orders

	Ancillary Order	Sentencing Order
Standard of proof applying to granting an order? 	Balance of probabilities (civil standard) ↓	Beyond reasonable doubt (if adverse to accused) ↑
How and when is information presented to the court? 	Post-sentencing. The application is made by the victim or on the victim's behalf by a representative, such as the prosecutor. Key facts on which the application is based are established by the court during the criminal proceeding. Further information is put before the court through the application.	During the criminal or plea hearing, before sentencing. The court would need to establish relevant loss (financial loss or injury) to the criminal standard, and seek information on an offender's financial circumstances (e.g. New Zealand's <i>reparation report</i> process).
Relevance of offender's wealth? 	Unclear. The current position is that courts <i>may</i> take the offender's financial position into account. However, the Victorian Law Reform Commission has recommended removal of this provision, so that the process is more consistent with civil proceedings.	Yes. The sentencing principle of proportionality must apply.
Enforcement options? 	Civil options for enforcement.	Enforced by the state like a fine. Jurisdictions differ on consequences of failure to pay: some convert financial penalties into imprisonment sentences, others have community service options for non-payment.
Increased likelihood of successful enforcement? 	Low enforcement rates, difficult for victims to enforce.	Unclear. However, if the offender doesn't have money, enforcement remains difficult.