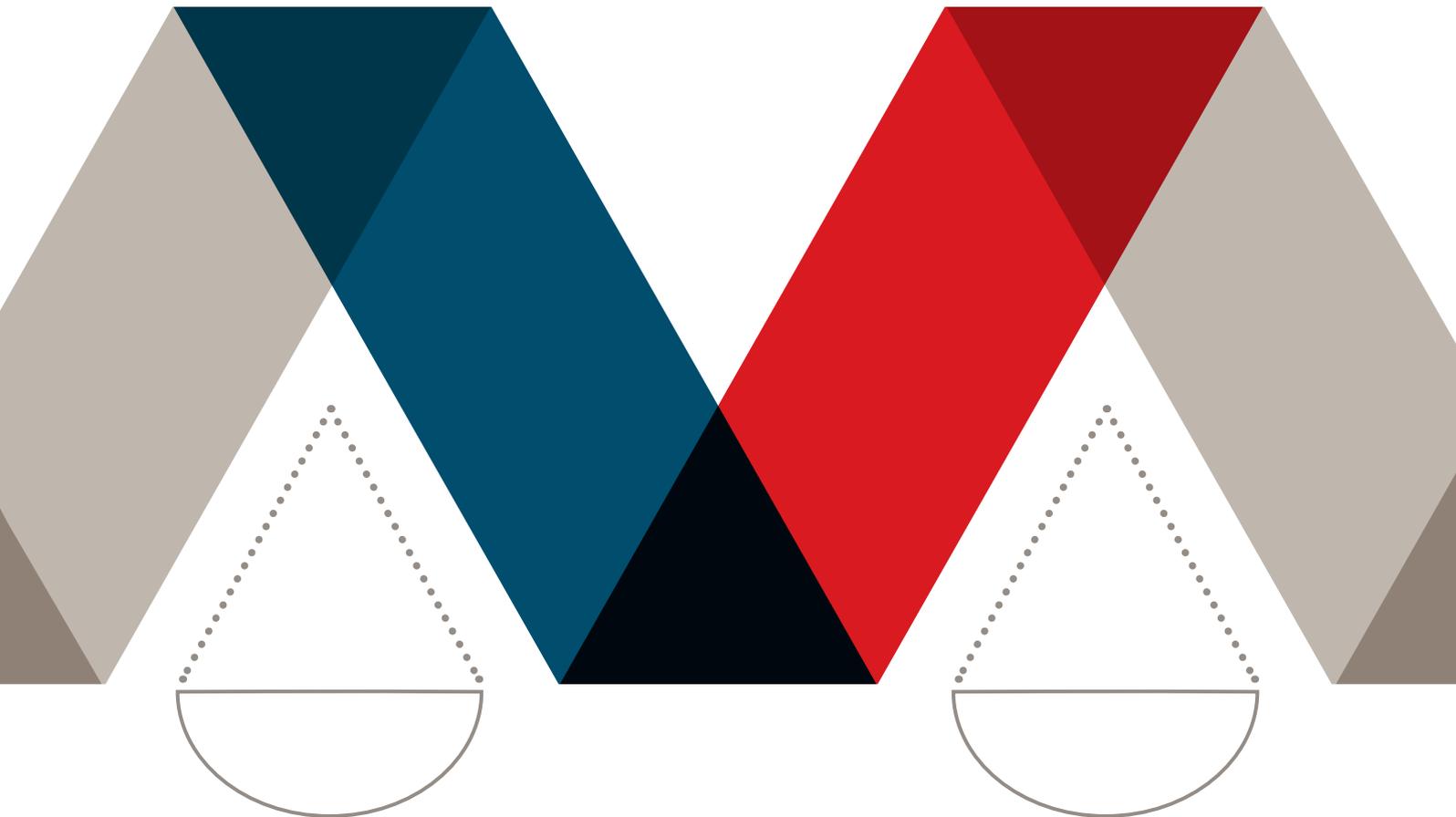


The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 2

**Who Are Victims of Crime and What Are Their
Criminal Justice Needs and Experiences?**

MAY 2015





Published by the Victorian Law Reform Commission

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The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 2

MAY 2015

Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?



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Preface

On 27 October 2014, the then Attorney-General for Victoria, the Hon. Robert Clark MP, asked the Victorian Law Reform Commission to review and report on the role of victims of crime in the criminal trial process. This important reference goes to the very heart of our criminal justice system, posing the challenging question: ‘What should the role of the victim be in the criminal trial process?’ Throughout this reference, the Commission’s consideration of this question will be informed by two interrelated sources of information—theory and practice.

Many academics and researchers approach the question of the role of victims in the criminal trial process by examining the underlying purposes of the criminal justice system and the relationship between the victim, the accused and the state. Why do we have a criminal justice system at all, what do we (as a society) want it to achieve, and for whom? The lessons of history, developments in human rights law, empirical research and a broad cross-section of academic thought (ranging across law, sociology, philosophy, political theory, and psychology) all make valuable contributions to the task of understanding and imagining a criminal justice system suited to purpose.

Of course, the criminal justice system is not just a theoretical construct. Every year in Victoria, hundreds of criminal trials and thousands of guilty plea hearings impact directly on the lives of victims, accused and witnesses. Listening to the experiences of these people—and of the people who work in the criminal justice system—is crucially important. It allows for a systematic identification of the issues that exist, and an informed consideration of practical initiatives for improvement which have been implemented or championed in Victoria and around the world.

Practice and theory are interrelated. They inform each other. The Commission encourages an approach to this reference which considers what we can learn from theory and what we can learn from practice, both individually and together (see Figure 1).

To facilitate and encourage this approach, the Commission is publishing a series of four information papers prior to consulting widely with the community. This is the second in that series. The four papers are:

- 1 The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory
- 2 The Role of Victims of Crime in the Criminal Trial Process: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?**
- 3 The Role of Victims of Crime in the Criminal Trial Process: the International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process
- 4 The Role of Victims of Crime in the Criminal Trial Process: Victims' Rights and Human Rights: the International and Domestic Landscape.

The first and second information papers aim to provide background information about the history of the modern criminal trial and its underlying principles and survey the evidence about who victims are and what they need from the criminal justice system. The third and fourth information papers then examine the International Criminal Court as a case study of victim participation, followed by a review of the sources of victims' rights internationally and in Australia. The papers in this series do not necessarily reflect the Commission's views and do not contain policy recommendations.

The Commission will publish a consultation paper on the reference in August 2015. That publication will mark the commencement of public consultation on the reference, and will invite submissions to the Commission. It is hoped that these information papers will assist in the public consultation process by providing relevant background information to the public in a helpful and convenient form. The Commission looks forward to public submissions following publication of the consultation paper.

Terms of reference

The Role of Victims of Crime in the Criminal Trial Process

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 27 October 2014.]

The Victorian Law Reform Commission is asked to review and report on the role of victims of crime in the criminal trial process.

In conducting the review, the Commission should consider:

- a) the historical development of the criminal trial process in England and other common law jurisdictions;
- b) a comparative analysis of the criminal trial process, particularly in civil law jurisdictions;
- c) recent innovations in relation to the role of victims in the criminal trial process in Victoria and in other jurisdictions;
- d) the role of victims in the decision to prosecute;
- e) the role of victims in the criminal trial itself;
- f) the role of victims in the sentencing process and other trial outcomes;
- g) the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process; and
- h) support for victims in relation to the criminal trial process.

The Commission is to report by 1 September 2016.

The Commission's approach to this reference

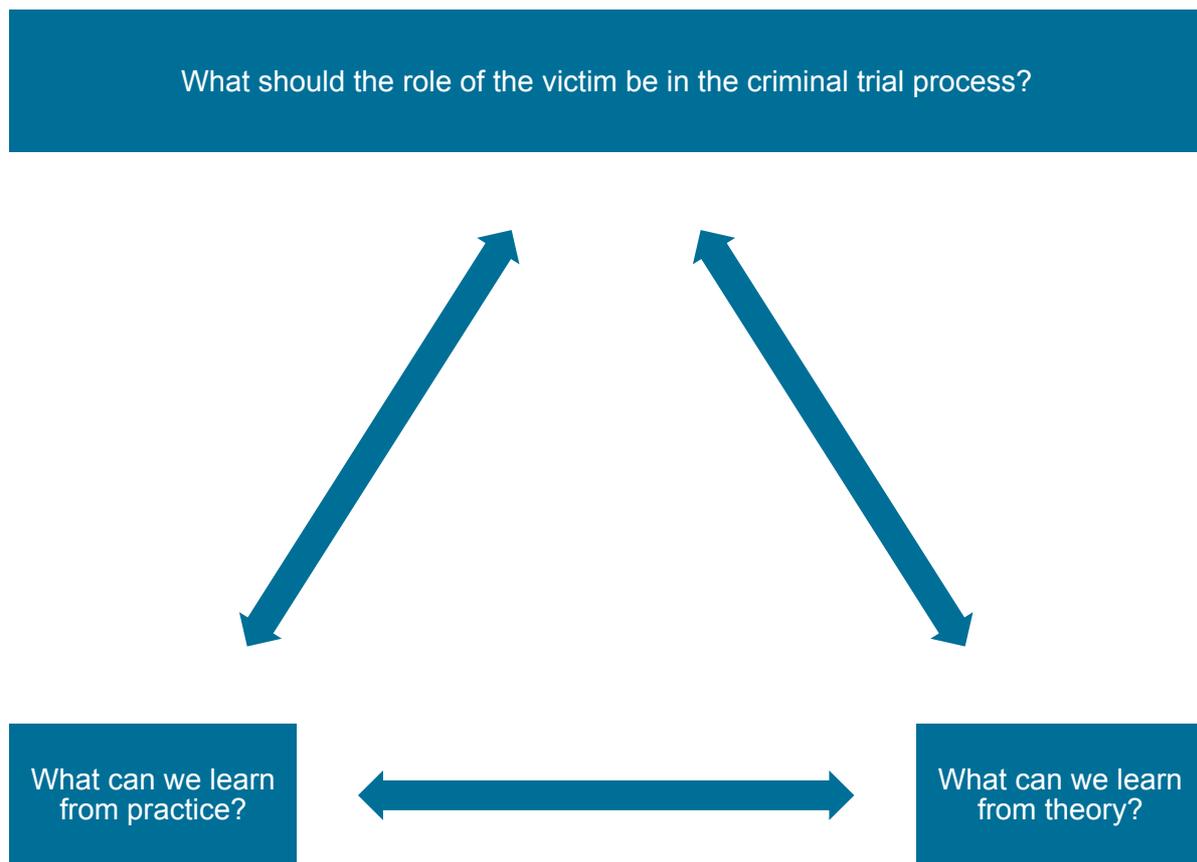


Figure 1: Practice and theory are interrelated

1 Understanding victims of crime—who are they?

Introduction

- 1 During the 2014 calendar year, 205,913 people and 73,078 businesses or organisations in Victoria reported to the police that they had been the victims of one or more crimes.¹ 80.4 per cent of these 278,992 reports of victimisation related to property offences and 19.5 per cent related to crimes against the person.² The most prevalent crimes against the person were assaults (not including sexual assaults), and more than half of all victims of crime were male (55.4 per cent).³
- 2 Who are these victims of crime? Empirical research tells us that there is not one simple answer to this question. However, while victims of crime come from many walks of life and experience the impact of the offending and their role in the criminal justice system in divergent ways, nonetheless some clear patterns emerge.
- 3 This information paper presents an outline of selected research, where possible identifying groups of crimes or victims that the research has focused on. The information contained in this paper does not necessarily reflect the views of the Commission. It is intended to inform and assist the consideration of the terms of reference.

¹ Victorian Crime Statistics Agency (VCSA), accessed 17 April 2014 at

<<http://www.crimestatistics.vic.gov.au/home/crime+statistics/year+ending+31+december+2014/victim+reports>>.

² Ibid. Property offences are defined by the Victorian Crime Statistics Agency as arson, burglary/break and enter, theft, deception, bribery, and property damage. Crimes against the person are defined by the VCSA as homicide, assault, sexual offences, abduction, robbery, blackmail, extortion, stalking, harassment, threatening behaviour, dangerous and negligent acts endangering people.

³ Ibid.

Terminology

- 4 The terms of reference refer to the role of victims in the criminal trial process.
- 5 There has been much debate about the use of the terms 'victim' and 'survivor'. The term victim has been criticised, particularly in feminist literature, as reducing a person to their experience of victimisation. It is also said to connote weakness rather than the resilience and strength of surviving. While the Commission acknowledges these criticisms, as the terms of reference refer to 'victims' and the word 'victim' is used in Victorian laws dealing with prosecution, punishment and reparation, the term 'victim' will be used in this information paper.
- 6 The Commission also acknowledges that there is some tension between the use of the term 'victim' and the presumption of innocence which an accused is entitled to during a criminal trial. Again, consistently with the terms of reference, 'victim' will be used throughout this information paper to describe those people who are often referred to as the 'complainant' (formerly prosecutrix) or 'alleged victim' during the criminal trial process.
- 7 In the Commission's consultation paper, to be published in August 2015, the matter of victim terminology will be discussed.

Definitions of victim in Victorian legislation

- 8 The *Victims' Charter Act 2006* (Vic) defines a victim as follows:
 - someone who suffers injury as a direct result of a criminal offence
 - the family member of a person who has died as a direct result of a criminal offence
 - a family member of a person injured as a result of a criminal offence who is under 18 years of age or incapable of managing his/her own affairs by reason of mental impairment
 - in the case of the criminal offence of 'grooming for sexual conduct with a child under the age of 16 years', the child and a family member.⁴
- 9 The *Sentencing Act 1991* (Vic) gives victims the right to make a victim impact statement during the sentencing hearing for an offender who is convicted by a jury or who pleads guilty. The definition of victim in the Sentencing Act is a person or body that has 'suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender'.⁵

⁴ *Victims' Charter Act 2006* (Vic) s 3.

⁵ *Sentencing Act 1991* (Vic) s 3.

-
- 10 For the purposes of sentencing, the courts have accepted that a person who was not the specific target of a crime can be a victim, including a person who witnesses a crime against another person, if injury, loss or damage is suffered as a direct result of the crime.⁶ Similarly, the victims of murder are taken to include the family of the deceased and can, in certain circumstances, extend further, including to the local community.⁷
- 11 The *Victims of Crime Assistance Act 1996* (Vic) establishes a scheme for the provision of financial assistance to ‘primary victims’, ‘secondary victims’ or ‘related victims’ of an act of violence.⁸ A primary victim is one who is injured or dies as a result of an act of violence committed against him/her.⁹ A secondary victim is a person injured as a result of witnessing an act of violence, or a parent or guardian of a primary victim under the age of 18 who is injured after becoming aware of the offence perpetrated against the primary victim.¹⁰ A related victim is defined as a close family member, dependant, or someone in an intimate personal relationship with a deceased primary victim.¹¹ The definition of ‘injury’ includes psychological injury. However, injury suffered as a result of loss or damage to property is specifically excluded.¹²
- 12 It can be seen that the central elements of the legal definition of victim in Victoria are that the crime was committed against a person and that a person has suffered in some way.¹³

Victim diversity and the impact of crime

- 13 Much of the research on the experiences and needs of victims is either concerned with victims of serious and specific violent offences (usually sexual assault and domestic

⁶ *Berichon v The Queen; Houssein v The Queen* [2013] VSCA 319 at [19] (Redlich JA and Robson AJA); *R v Silver* [2006] VSC 154.

⁷ *R v Miller* [1995] 2 VR 348 (Southwell, Ormiston and MacDonald JJ).

⁸ Section 3 of the *Victims of Crime Assistance Act 1996* (Vic) defines an ‘act of violence’ as ‘a criminal act or series of related criminal acts’, committed by one or more persons, which has occurred in Victoria and which has ‘directly resulted in injury or death of one or more persons’.

⁹ *Victims of Crime Assistance Act 1996* (Vic) s 7. The definition of primary victim also captures someone injured as a result of attempting to arrest someone who has committed a violent offence, attempting to prevent the commission of an offence or trying to rescue or aid a victim of a violent act.

¹⁰ *Victims of Crime Assistance Act 1996* (Vic) s 9. The definition expressly excludes those who commit the violent act or are criminally responsible.

¹¹ *Victims of Crime Assistance Act 1996* (Vic) s 11.

¹² *Victims of Crime Assistance Act 1996* (Vic) s 3.

¹³ Note that the *Criminal Procedure Act 2009* (Vic) does not define the word victim, but refers to the *Victims’ Charter Act 2009* or *Sentencing Act 1991*. The *Crimes Act 1958* (Vic) also does not define victim generally, but does specify who the victim is when defining specific offences.

violence), or with victims in general.¹⁴ There is little research comparing the experiences of victimisation across victims of different social categories, or across different types of crime.

- 14 The evidence is clear, however, that victims are not a homogenous group. The experiences and needs of victims will vary depending on personal factors such as age, gender, ethnicity, socio-economic status and health; the type of crime; the seriousness of the crime; the victim's relationship with the offender; and the victim's interactions with authorities. As the Australian Institute of Criminology (AIC) has noted:

the impact of crime victimisation varies with the individual. It can be short- or long-lasting; some may find the psychological impact hardest; for others it may be the physical injuries. Research continues to prove that each victim will react differently according to their life experience.¹⁵

- 15 The most common effects of crime on victims include shock, a loss of trust in society, guilt, physical injury, financial loss, psychological injury, behavioural change and responses related to a perceived risk of future victimisation.¹⁶ Research indicates that the 'effects of crime are pervasive and deleterious to the victims' emotional health'.¹⁷
- 16 Joanna Shapland and Matthew Hall analysed the state of research (both population surveys and longitudinal studies) into the effects of crime in 2007. They found that although the impact of crime varied depending on the characteristics of the victim and the crime, an emotional or psychological reaction to being victimised occurred in the majority of victims. Shapland and Hall tentatively suggested that longer term impacts were experienced by victims of severe sexual assaults, and to a lesser extent, physical assaults, and that more serious or violent offences were more likely to cause higher levels of emotional stress and long-lasting psychological, social and physical impacts, whilst financial and property loss were more typically short-term experiences.¹⁸

¹⁴ Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia*, (Research and Public Policy Series No.19, Australian Institute of Criminology, 2009) x; Annemarie ten Boom and Karlijn Kuijpers, 'Victims' Needs as Basic Human Needs' (2012) 18(2) *International Review of Victimology* 155, 156; Jim Parsons and Tiffany Bergin, 'The Impact of Criminal Justice Involvement on Victims' Mental Health' (2010) 23(2) *Journal of Traumatic Stress* 182, 186.

¹⁵ Cook et al, above n 14.

¹⁶ Joanna Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims' (2007) 14 *International Review of Victimology* 175, 178; Diane Green and Naelys Diaz, 'Predictors of Emotional Stress in Crime Victims: Implications for Treatment' (2007) 7(3) *Brief Treatment and Crisis Intervention* 194.

¹⁷ Green and Diaz, above n 16, 194.

¹⁸ Shapland and Hall, above n 16, 196. See also Green and Diaz, above n 16, 195, who note that higher levels of emotional stress have been found in victims of violent crime when compared to victims of non-violent crime.

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- 17 The Australian Bureau of Statistics (ABS) crime victimisation data suggests that victims of physical or threatened violence and/or attempted break-in are more likely to have poorer social wellbeing outcomes than people who have not experienced those crimes.¹⁹

Property crime victimisation

- 18 Although rates of property crime have been declining in Australia, they are still higher than those for crimes against the person.²⁰ The Victorian Crime Statistics Agency reported that during 2014, there were 54,002 individuals who reported being the victim of a crime against the person in Victoria, compared to 151,191 who reported being the victim of property crime.²¹ There is relatively little literature looking at the experiences and needs of this category of victim. The AIC noted the need for further research into 'more common forms of victimisation', such as burglary, as long ago as 1999.²²
- 19 What research there is indicates that although property crimes (particularly non-violent property crime) typically result in less severe and long-term effects than violent personal crimes, victims of property crime do suffer emotional and psychological harm.²³ Analysis of data from the Household, Income and Labour Dynamics in Australia Survey²⁴ by The Australia Institute found that being a victim of a property crime can affect a person's perception of safety for at least two years after the offence.²⁵
- 20 A United States study found that victims of burglary were three-and-a-half times more likely to report to police than victims of theft, which the authors suggest might be linked to the more invasive nature of burglary.²⁶ The study also found that property crime victims who received social support encouraging them to make a report to police

¹⁹ This study did not consider whether the poorer outcomes for victims were already present prior to their experience of victimisation. See Australian Bureau of Statistics (ABS), 'Analysis of Crime Victimisation and Social Wellbeing', 4524.0, *In Focus: Crime and Justice Statistics*, July 2012 (published 25 July 2012) accessed 12 March 2015 at <<http://www.abs.gov.au/ausstats/ABS@.nsf/Lookup/4524.0Chapter300July%202012#Relationship>>.

²⁰ Australian Bureau of Statistics, 'Facts & Figures Online Data Tool', accessed 24 March 2015 at <<http://www.aic.gov.au/dataTools/facts/vicPropertyRate.html>>.

²¹ Victorian Crime Statistics Agency, above n 1.

²² Cook et al, above n 14, x. One explanation for this, proffered by Paul Rock, is that because victim support services in Australia emerged from the need to support victims of serious, violent crime to come to terms with the trauma of their experience, the focus of research and support has remained centred on this group of victims and associated clinical therapeutic responses. He suggests that victims of other crimes, such as property crimes, have been overlooked. See Paul Rock, 'Aspects of the Social Construction of Victims in Australia' (2006) 1 *Victims and Offenders* 289.

²³ Shapland and Hall, above n 16, 186.

²⁴ The Household, Income and Labour Dynamics in Australia Survey is an annual survey conducted by the Melbourne Institute, Faculty of Business and Economics, University of Melbourne. For further information see <<https://www.melbourneinstitute.com/hilda/>>.

²⁵ David Baker, 'Feeling Safe Again: Recovering from Property Crime' (Policy Brief No.66, The Australia Institute, September 2014).

²⁶ Martin Greenberg and Scott Beach, 'Property Crime Victims' Decision to Notify the Police: Social, Cognitive, and Affective Determinants' (2004) 28(2) *Law and Human Behavior* 177, 185.

were 12 times more likely to do so than those who do not receive advice or were advised not to.²⁷

- 21 Fraud, including online fraud, has received growing attention in recent years. The AIC has suggested that victims of fraud 'share many of the same devastating outcomes as their counterparts who have suffered serious violent crime'.²⁸ Victims of fraud experience not only financial loss but also negative psychological, emotional and physical health impacts, feelings of betrayal and relationship breakdown, self-harm and suicide.²⁹ Victims of online fraud sometimes encounter demeaning responses and a lack of empathy when reporting fraud, compounding the negative psychological impacts of the fraud itself.³⁰
- 22 A 2012 review of 33 empirical studies on the needs of victims of crime found that while information and financial needs were common to all victims, victims of property crime more frequently had practical needs and sought financial restoration, such as replacing or being compensated for lost goods.³¹
- 23 While improved access to support services, counselling and financial assistance have been recommended for victims of property crimes,³² the 2004 ACT Burglary Victims Response Project found that burglary victims in the ACT did not consider victim support services to be generally necessary and did not commonly access such services.³³ Although this finding may seem to conflict with other research, this outcome may be related to practical and financial needs being met by house or contents insurance.³⁴

Gender and victimisation

- 24 Gender is an important factor impacting on the experience of victimisation. While men are more likely to be victims of crime overall, women are disproportionately victims of sexual offences and family violence offences, with the majority of offenders being

²⁷ Ibid, 182.

²⁸ Ian Marsh et al, *Criminal Justice: An Introduction to Philosophies, Theories and Practice* (Routledge, 2004) 127, cited in Cassandra Cross et al 'Challenges of Responding to Online Fraud Victimization in Australia' (*Trends and Issues in Crime and Criminal Justice* No. 474, Australian Institute of Criminology, May 2014), 3.

²⁹ Cross et al, above n 28, 3; see also Mark Button, Chris Lewis and Jacki Tapley, 'Not a Victimless Crime: The Impact of Fraud on Individual Victims and their Families' (2014) 27 *Security Journal* 36.

³⁰ Cross et al, above n 28, 4.

³¹ ten Boom and Kuijpers, above n 14, 163.

³² Cross et al, above n 28, 4; Baker, above n 25, 10.

³³ ACT Victims of Crime Coordinator, *Crime Victims and the Prevention of Residential Burglary: Report of the ACT Burglary Victims Response Project 2004* (ACT Department of Justice and Community Safety, Canberra, 2004), 20.

³⁴ Ibid, 39. The research found that insurance companies were the most frequently contacted agency by participants (67 per cent), whilst only five per cent contacted a counsellor or doctor.

male.³⁵ In 2013, 87 per cent of Victorian sexual assault victims were female, with 72 per cent of those women assaulted by someone known to them (including 26 per cent who were sexually assaulted by a family member).³⁶ The stigma associated with sexual assault can be particularly traumatising, leading to feelings of guilt, blame and unworthiness, as well as contributing to low reporting of sexual offences to police.³⁷

- 25 Family violence is characterised by a pattern of behaviour in which power and control is exercised through physical, verbal and financial means by an offender over the victim in the context of a domestic relationship.³⁸ Victims are often left disempowered, isolated and fearful of repeat victimisation.³⁹ Family violence victims have been found to be more likely to need practical assistance such as housing and employment, reflecting the dependence often created in such relationships.⁴⁰
- 26 Women’s and men’s experiences of victimisation are also distinguished by their relationship to the offender. While men are more likely overall to be victims of physical assault, the assault is more likely to be perpetrated by a male stranger.⁴¹ In contrast, 80 per cent of women assaulted in 2013–14 were assaulted by someone that they knew, with intimate partners and family members being the most common

³⁵ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children 2009–2021* (March 2009), 29. Note that aside from offences relating to breaching family violence intervention orders, there is no offence of domestic violence in Victoria. However family violence offences can be identified by ascertaining whether there is a family or domestic relationship between an offender and victim.

³⁶ Australian Bureau of Statistics, ‘Victoria’, 4510.0 – Recorded Crime – Victims, Australia, 2013 (released 26 June 2014), accessed on 11 March 2015 at <<http://www.abs.gov.au/ausstats>>. Note that 2014 data from the Victorian Crime Statistics Agency reveals a similar proportion of female/male victims of sexual offences, with 4836 (81%) of victims reporting to police being women and 1122 (19%) men, and that of the 54,002 offences against the person in 2014, only 11,518 were committed by offenders not known to the victim. See Victorian Crime Statistics Agency, Table 8, above n 1.

³⁷ Malini Laxminarayan, ‘Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type’ (2012) 25 *Social Justice Research* 390, 393; Liz Wall, ‘The Many Facets of Shame in Intimate Partner Sexual Violence’ (ACSSA Research Summary, Australian Centre for the Study of Sexual Assault, January 2012), 2; Victorian Law Reform Commission, *Sex Offences: Final Report* (2004), 81.

³⁸ Judith Herman, ‘Justice from the Victim’s Perspective’ (2005) 11(5) *Violence Against Women* 571, 572.

³⁹ Julie Stubbs, ‘Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence’ 33(3) *UNSW Law Journal* 970, 979. Note data from the Australian Bureau of Statistics Syndicates that it is more common for women to experience repeat victimisation in the context of assault. See Australian Bureau of Statistics, ‘Physical Assault’, 4530.0, *Crime Victimization, Australia 2012–13*, (published 12 February 2014) last accessed 29 April 2015 at <<http://www.abs.gov.au/ausstats>>

⁴⁰ ten Boom and Kuijpers, above n 14, 161.

⁴¹ Australian Bureau of Statistics, ‘Physical Assault’, 4530.0 – Crime Victimization, Australia, 2013–14 (released 17 February 2015), accessed on 11 March 2015 at <<http://www.abs.gov.au/ausstats>>

perpetrators.⁴² Similar statistics exist in relation to face-to-face threatened assault⁴³ and homicide.⁴⁴

- 27 Gender also appears to impact on responses to victimisation and help-seeking. Research indicates that women are more likely to seek help, while men tend towards a more problem-focused response, which may result in higher levels of emotional stress and longer recovery time.⁴⁵ The AIC has noted that there is limited information about the impact of crime on men and their support needs and that victim support services tended to only have a small caseload of men compared to women.⁴⁶ Men have also been found to be less accepting of the notion of being a victim⁴⁷ and to experience feelings of shame at being a victim.⁴⁸

Aboriginal and Torres Strait Islander people

- 28 The over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system is well documented.⁴⁹ What is perhaps less recognised is that Aboriginal and Torres Strait Islander people, especially women, are also overrepresented as victims of crime and are less likely to disclose victimisation compared to non-Indigenous victims of crime.⁵⁰
- 29 The particular justice needs of Aboriginal and Torres Strait Islander people must be seen in the context of mistrust in, and detachment from, the criminal justice system as a result of the impact of colonisation, a history of oppressive laws, policies and policing, and the

⁴² Ibid.

⁴³ Australian Bureau of Statistics, 'Threatened Assault', 4530.0 – Crime Victimisation, Australia, 2013–14 (released 17 February 2015), accessed on 11 March 2015 at <<http://www.abs.gov.au/ausstats/>>

⁴⁴ Willow Bryant and Tracy Cussen, 'Homicide in Australia: 2010–11 to 2011–12: National Homicide Monitoring Program Report' (AIC Reports: Monitoring Reports 23, Australian Institute of Criminology 2015) 16.

⁴⁵ Green and Diaz, above 16, 201.

⁴⁶ Samantha Bricknell et al, 'Male Victims of Non-Sexual and Non-Domestic Violence: Service Needs and Experiences in Court' (AIC Reports: Research and Public Policy Series 126, Australian Institute of Criminology) ix.

⁴⁷ John McDonald et al, *Mapping Access and Referral Pathways for Marginalised Victims of Violent Crime in Rural and Regional Victoria* (School of Behavioural and Social Science and Humanities, University of Ballarat, 2010) 9.

⁴⁸ Bricknell et al, above n 46, x.

⁴⁹ See for example *Royal Commission into Aboriginal Deaths in Custody National Report: Overview and Recommendations* (Commissioner Elliott Johnson, Australian Government Publishing Service, Canberra, 1991).

⁵⁰ Matthew Willis, 'Non-disclosure of Violence in Australian Indigenous Communities' (*Trends and Issues in Crime and Criminal Justice* No.405, Australian Institute of Criminology, 2011) 1; Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander Peoples', 1370.0 Measures of Australia's Progress, 2010 (released 15 September 2010), last accessed 29 April 2015 at <<http://www.abs.gov.au/ausstats/>>.

ongoing systemic discrimination experienced by Aboriginal and Torres Strait Islander people in many facets of their lives.⁵¹

- 30 For Aboriginal and Torres Strait Islander women and children, who make up the majority of Indigenous family violence victims, their relationship with the criminal justice system can be uniquely distressing, as expressed by Melissa Lucashenko:

Black women have been torn between the self-evident oppression they share with indigenous men – oppression that fits uneasily if at all into the frameworks of White feminism – and the unacceptability of those men’s violent sexist behaviours toward their families.⁵²

- 31 Heather Nancarrow’s research demonstrated a clear difference in attitudes to the criminal justice system between Indigenous women, who ‘strongly rejected the criminal justice system as an appropriate and effective response to domestic and family violence’ and non-Indigenous women, who believed that, while it is largely ineffective, it remains the best response.⁵³

Victims from culturally and linguistically diverse backgrounds

- 32 Coming from a refugee or migrant background can also be determinative of an individual’s experience of victimisation. For example, people from particular ethnic backgrounds might be at greater risk of experiencing racially motivated or hate-motivated crime.⁵⁴ The AIC has identified the fear of crime as being disproportionately experienced by culturally and linguistically diverse (CALD) communities and linked to hate crime.⁵⁵
- 33 Ethnicity has been found to be related to reporting of crime, with those groups who perceive the criminal justice system as likely to treat them unfairly less likely to report a

⁵¹ Willis, above n 50, 1; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997); Royal Commission, above n 49.

⁵² Melissa Lucashenko, ‘Violence against Indigenous Women: Public and Private Dimensions’, in Sandy Cook and Judith Bessant (eds) *Women’s Encounters with Violence: Australian Experiences* (2007) 147–58, 156, cited in Heather Nancarrow, ‘In Search of Justice for Domestic and Family Violence: Indigenous and non-Indigenous Australian Women’s Perspectives’ (2006) 10(1) *Theoretical Criminology* 87, 89.

⁵³ Nancarrow, above n 52, 100.

⁵⁴ Lorana Bartels, ‘Crime Prevention Programs for CALD Communities in Australia’ (*Research in Practice, Report No. 18*, Australian Institute of Criminology, June 2011) 3.

⁵⁵ *Ibid.*

crime to police.⁵⁶ AIC research suggests that the quality of interaction between members of CALD communities and the criminal justice system can be influenced by:

- a lack of awareness of the operation of the criminal justice system
- difficulties accessing culturally appropriate or language-specific support services
- mistrust of state authorities based on negative experiences in country of origin
- fears relating to deportation
- concern about stigma or shame associated with interacting with actors in the criminal justice system (particularly in relation to sexual violence or domestic violence).⁵⁷

Disability, mental health and marginalisation

34 Research indicates that people with disabilities are more vulnerable to becoming victims of crime, including hate-motivated crime.⁵⁸ The Australian Human Rights Commission (AHRC) has noted that 'women and girls with disability experience violence at significantly higher rates, more frequently, for longer, in more ways and by more perpetrators'.⁵⁹

35 The AHRC's 2014 report *Equality Before the Law* highlighted a range of difficulties experienced by people with disabilities when accessing the justice system, including:

- a lack of protection against the risk of ongoing violence
- a lack of adequate supports, modifications and adjustments to overcome barriers to access to the system
- a perception that people with disabilities are unreliable, non-credible or incapable witnesses
- the tendency of police, lawyers and courts to use confusing questioning styles
- incorrect assessments about the legal capacity of people with disabilities

⁵⁶ McDonald et al, above n 47, 14 (citing Maria Bonar and Debra Roberts, *A Review of the Literature Relating to Family and Domestic Violence in Culturally and Linguistically Diverse Communities in Australia* (Family and Domestic Violence Unit, Department for Community Development, Western Australia, 2006)).

⁵⁷ Bartels, above n 54, 3; Annabelle Allimant and Beata Ostapiej-Piatkowski, 'Supporting Women from CALD Backgrounds Who Are Victims/Survivors of Sexual Violence: Challenges and Opportunities for Practitioners' (ACSSA Wrap No.9, Australian Centre for the Study of Sexual Assault, 2011); McDonald et al, above n 47.

⁵⁸ C Wilson et al, 'Intellectual Disability and Criminal Victimization' (AIC Trends and Issues in Crime and Criminal Justice No.60, Australian Institute of Criminology, 1996); Mark Sherry, *Hate Crimes Against People with Disabilities* (2000) accessed 31 March 2015 at <<http://wwda.org.au/issues/viol/viol1995/hate/>>.

⁵⁹ Australian Human Rights Commission, *Equality Before the Law: Towards Disability Justice Strategies* (2014), 12. See also Susie Balderston, 'Victimized Again? Intersectionality and Injustice in Disabled Women's Lives after Hate Crime and Rape' (2013) 18(A) *Gendered Perspectives on Conflict and Violence: Part A, Advances in Gender Research* 17.

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- a compounding of disadvantage already experienced.⁶⁰

- 36 People with a mental illness are also more likely to be victims of crime than the general population.⁶¹ This vulnerability is compounded by the greater prevalence of mental illness among marginalised groups, such as those experiencing homelessness and Aboriginal and Torres Strait Islander people.⁶² Research from the United States indicates that people who are homeless are far more likely to be victims of crime than they are to be perpetrators.⁶³
- 37 Overall, research indicates that the experiences of victims of crime are shaped by their life experiences, social attributes and demographics. For victims who experience multiple forms of discrimination or marginalisation, barriers to meaningful interactions with the justice system can be compounded. It is beyond the scope of this information paper to cover all the experiences and issues for the many different victims of crime. Rather, this information paper highlights that a multitude of factors and vulnerabilities contribute to the many and varied experiences of crime and victimisation.

⁶⁰ Australian Human Rights Commission, above n 59, 16.

⁶¹ A McFarlane et al, *The Prevalence of Victimization and Violent Behaviour in the Seriously Mentally Ill* (Project funded by the Criminology Research Council, University of Adelaide 2004) 3.

⁶² Lauren Costello et al, 'Mental Health and Homelessness: Final Report for the Mental Health Commission of NSW' (Research Synthesis Service, Australian Housing & Urban Research Institute, June 2013); Robert Parker, 'Australia's Aboriginal Population and Mental Health' (2010) 198(1) *The Journal of Nervous and Mental Disease* 3.

⁶³ McDonald et al, above n 47, 14, (citing Garland and Miller, 'Repeat Victims: The Criminalization and Victimization of the Homeless'. Paper presented at the Annual Meeting of the American Society for Criminology, (St. Louis, Missouri, 12 November 2008)).

2 Criminal justice needs and victims' experiences of the criminal justice system

Introduction

- 1 A criminal offence in an adversarial criminal justice system such as Victoria is understood to be an offence against the state and a harm against the community. A public prosecutor is designated the role of prosecuting breaches of the criminal law on behalf of the state, not the victim. While the state and the victim's interests may often align, where they diverge the public interest carries greater weight in prosecutorial decision-making than does the private interest of the victim.
- 2 The role of the victim in our adversarial criminal system has been described as that of 'evidentiary cannon fodder, of witness or claimant, not of citizen with participatory rights and obligations'.⁶⁴
- 3 At its worst, the criminal trial process is experienced by victims as secondary victimisation,⁶⁵ causing negative psychological consequences that can be distinguished from, and compound, the trauma of the original event.⁶⁶
- 4 Haley Clark interviewed a small sample of sexual assault victims in Victoria. These victims variously described the system as being far removed from their ideals of justice and instead as 're-victimising', 'threatening', 'a game about winning and losing' and

⁶⁴ John Braithwaite, 'Juvenile Offending: New Theory and Practice', in L. Atkinson and S. Gerull (eds), *National Conference on Juvenile Justice* (Australian Institute of Criminology, 1993) 36.

⁶⁵ Secondary victimisation refers to a negative societal or community reaction to the original victimisation experience, for example, blaming the victim for his/her conduct in relation to a criminal offence.

⁶⁶ Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4) *Social Justice Research* 313, 321; Judith Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159, 159; See also Cook et al, above n 14, 47.

'certainly not about justice'.⁶⁷ Judith Herman, an expert in traumatic stress, has observed that 'if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.'⁶⁸

- 5 Some victims of crime do experience some, or even most, of the criminal justice system as a positive experience, and feel that their needs have been met. However, research conducted around the world over the last three decades consistently reports victim dissatisfaction with some or all of the processes, actors and institutions making up the criminal justice system.⁶⁹
- 6 Research suggests that matters involving an offender well known to the victim (such as domestic violence) can be more stressful because of ongoing fear of the offender or the offender's supporters, family pressure to repair a relationship or to continue living in the same community, complicated feelings of loyalty towards the offender, and financial pressure to provide for self or children.⁷⁰ For these victims, questions about how to hold the offender accountable and what type of punishment and reparation are appropriate can be especially complicated.
- 7 The next section of this paper summarises the key themes arising from research over the last three decades on the needs and experiences of victims of crime throughout the criminal trial process. It is important to note that during this time, particularly in Victoria, there have been significant and extensive reforms to the criminal justice system aimed at addressing the very problems the research identifies. These reforms include the introduction of the *Victims' Charter Act 2006* (Vic), changes to procedures for taking evidence from vulnerable witnesses, provision for victims to provide a victim impact statement in sentencing, and the establishment of witness assistance and support services. The purpose of this paper is not to comment on the effectiveness or otherwise of those reforms, but to outline what the evidence from research with victims of crime has said about the experiences and needs of victims during the criminal trial process.

⁶⁷ Haley Clark, "What is the Justice System Willing to Offer?" Understanding Sexual Assault Victims/Survivors' Criminal Justice Needs' (*Family Matters*, No. 85, Australian Institute of Family Studies, 2010) 31.

⁶⁸ Herman, above n 66, 159. Note that the majority of the research exploring victim distress and secondary victimisation from the criminal trial process has focused on victims of sexual offences. There is a relative lack of data on whether secondary victimisation occurs in the cases of other victims of crime, especially non-violent offences.

⁶⁹ Joanna Shapland et al, *Victims in the Criminal Justice System* (Gower Publishing, 1985); Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler, 1996); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002); Victorian Law Reform Commission, above n 37.

⁷⁰ Nancarrow, above n 52; Herman, above n 38, 571; Stubbs, above n 39, 979; Edna Erez, Julie Globokar and Peter Ibarra, 'Outsiders Inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169, 174.

Justice

- 8 It is often said that victims want justice. But justice is a contested and contextual concept, shaped at a community level by culture, history, geography and resources, and at the individual level by the experiences, social situation and personalities of the people involved.⁷¹ Justice can mean different things to different people.
- 9 Victimology literature tends to distinguish procedural justice (or procedural fairness) from distributive justice (or substantive justice). In the context of the criminal trial process, distributive justice relates to satisfaction with the ultimate outcome, such as a plea settlement, jury verdict or sentencing determination. Procedural justice on the other hand is concerned with the quality of a victim's experience of the processes that result in the ultimate outcome.⁷²

Procedural justice

- 10 Research indicates that a victim of crime is more likely to consider an outcome fair and the system legitimate if the processes leading to that outcome are perceived to be fair.⁷³ A recent Australian study found that victims' satisfaction with police, courts and prosecutors is primarily determined by the quality of procedural experiences with those institutions and that the outcome of the case did not significantly influence the level of satisfaction.⁷⁴ An explanation for this is that victims are able to access procedural information and participate in the process before knowing the substantive outcome of their case. Thus, a victim's assessment of the fairness of the outcome is likely to be influenced by their perceptions of how fair the procedures were that led to that outcome.⁷⁵

⁷¹ Michael King et al, *Non-adversarial Justice* (Federation Press, 2009), 46.

⁷² Some academics (see Malini Laxminarayan et al, 'Procedural and Interactional Justice: A Comparative Study of Victims in the Netherlands and New South Wales' (2012) 9(3) *European Journal of Criminology* 260) differentiate between procedural justice and the concept of 'interactional justice', which incorporates two aspects: informational justice and interpersonal justice. Informational justice refers to the provision of information about why certain procedures were followed, decisions made and where assistance can be obtained, while interpersonal justice refers to the way in which people are treated in the provision of information, execution of procedures or determination of outcomes. For the purposes of this paper, these concepts are incorporated into the concept of 'procedural justice'.

⁷³ Tom Tyler, 'Social Justice: Outcome and Procedure' (2000) 35(2) *International Journal of Psychology* 117; Laxminarayan et al, above n 72, 261.

⁷⁴ Stuart Ross et al, *Fairness and Equity for Victims of Crime: What Do They Want and Why Don't They Get It? Final Report* (ARC Discovery Project DP0665417, December 2009) 144.

⁷⁵ Jo-Anne Wemmers, 'Victims' experiences in the criminal justice system and their recovery from crime' (2013) 19(3) *International Review of Victimology* 221, 223 (citing K Van den Bos and E Lind, 'Uncertainty Management by Means of Fairness Judgements' (2002) 34 *Advances in Experimental Social Psychology* 1; and K Van den Bos, E Lind and H Wilke, 'The Psychology of Procedural and

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- 11 A study conducted by Joanna Shapland et al in 1985 identified victims as seeking procedural justice in the form of information, participation and fair treatment from the criminal justice system.⁷⁶ In the 30 years since, these aspects of procedural justice have consistently emerged as central to victims' justice needs from sociological, psychological and victimological literature.⁷⁷
- 12 A 2013 systematic review of 22 studies that assessed victim satisfaction concluded that the five key procedural justice concerns for victims are:
- respect
 - accuracy
 - voice
 - information
 - general fairness.⁷⁸

While the review warned against generalisation about victims because of the lack of comparative research across crime types and some contradictory findings, studies from the United States and other jurisdictions suggest that the central ideas of procedural justice can be seen across highly diverse social environments.⁷⁹

- 13 Bearing this warning in mind, three broad categories of victims' procedural justice needs emerge from the literature:
- participation and voice (including less formal forums for participation)
 - information
 - trust, neutrality and respectful treatment.

Participation and voice

- 14 For all of the criticism levelled at it, the criminal justice system continues to be seen by victims as the primary site for addressing victims' justice needs.⁸⁰ However, empirical research indicates that many victims seek more meaningful participation in the system and that meaningful participation may be more important to some victims than

Distributive Justice Viewed from the Perspective Of Fairness Heuristic Theory' in R Cropanzano (ed), *Justice in the Workplace: From Theory to Practice*, Vol. 2 (Lawrence Erlbaum, 2001), 49–66).

⁷⁶ Shapland et al, above n 69.

⁷⁷ See for example Tyler, above n 73 (2000); Strang above n 69, 302.

⁷⁸ Malini Laxminarayan, et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8 *Victims and Offenders* 119, 141.

⁷⁹ Ben Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System' (2011) 11(4) *Criminology & Criminal Justice* 345, 350.

⁸⁰ Jo-Anne Wemmers, 'Where do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395, 405–406; Clark, above n 67, 30.

controlling the outcome of the case.⁸¹ This desire has long been attributed to feelings of frustration and alienation which are said to be caused by the system's 'failure to provide victims with a legitimate and active role when dealing with offences committed against them'.⁸²

- 15 Judith Herman's 2005 study of sexual assault and domestic violence victims in the United States found that for those study participants who sought redress in the criminal justice system, the 'single greatest shock was the discovery of just how little they mattered'.⁸³ This experience can exacerbate feelings of helplessness and loss of control caused by the traumatic experience of the crime in the first place.⁸⁴
- 16 The decision of prosecutors to accept a plea of guilty to lesser charges, or not to proceed with a prosecution, is a particular source of concern reported by victims. Research by the AIC in 1999 found that many victims expressed frustration about the prosecutor's role as lawyer for the state, rather than acting on behalf of the victim, and their corresponding inability to give the prosecutor directions.⁸⁵
- 17 A key finding arising from a 2009 survey of 107 Australian victims of crime was that:
... satisfaction with prosecution services is influenced by outcomes where an offender is convicted on lesser or only some charges, but this is attributable to dissatisfaction with the charge negotiation process and not the outcome per se.⁸⁶
- 18 Research has suggested that victims seek transparency and accountability in relation to prosecutorial decisions, which would serve to promote the legitimacy of the process.⁸⁷
- 19 Different victims will seek different degrees of participation at different stages of a criminal trial process. Individuals will also differ in their ability to actually participate and to make decisions in a complex environment. For example, for 22 Victorian women who had been victims of sexual assault, strong representation of their interests through the criminal justice process was more important than having personal decision-making power.⁸⁸

⁸¹ Shapland et al, above n 76; Jo-Anne Wemmers and Katie Cyr, 'Victims' Perspective on Restorative Justice: How Much Involvement are Victims Looking For?' (2004) 11 *International Review of Victimology* 259.

⁸² Jacqueline Joudo Larsen, 'Restorative Justice in the Australian Criminal Justice System' (AIC Reports, Research and Public Policy Series 127, 2014), 26, (citing Strang, above n 69); Cook et al, above n 14, 54.

⁸³ Herman, above n 38, 581.

⁸⁴ Cook et al, above n 14, 54; Wemmers, above n 75, 223 (citing K Van den Bos and E Lind, 'Uncertainty Management by Means of Fairness Judgements' (2002) 34 *Advances in Experimental Social Psychology* 1).

⁸⁵ Cook et al, above n 14, 54.

⁸⁶ Ross et al, above n 74, 144. This study also found that victims' experiences of the criminal justice system are 'sector specific experiences ... A good or bad experience with one agency or sector has little carry-over to experiences with other agencies' (144).

⁸⁷ Clark, above n 67, 35; Justice Strategy Unit, South Australian Government, *Victims of Crime Review: Report One* (June 1999), 98.

⁸⁸ Clark, above n 67.

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- 20 This is consistent with international research which has indicated that victims do not necessarily seek ultimate decision-making power because of the burden of responsibility that comes with that level of control.⁸⁹ Research by Jo-Anne Wemmers and Katie Cyr with victims who participated in youth victim–offender mediations in Canada found that victims want to be consulted, heard and given the opportunity to have input into decision-making processes. However, they also felt that decision-making power should remain with authorities.⁹⁰
- 21 ‘Voice’ is an aspect of participation which is frequently used to refer to the opportunity and capacity of a victim to tell their story and to feel that they have been heard. Once a matter proceeds to prosecution, the legal status of the victim becomes that of an ‘alleged victim’ or ‘complainant’, and his/her role becomes that of a witness for the state. If an accused is acquitted, or the prosecution discontinued after a committal, the giving of evidence may be the only opportunity for a victim to give their account of what happened.
- 22 Retelling a traumatic event is often a traumatising experience in itself.⁹¹ This trauma may be compounded by the public nature of the criminal trial and by aggressive cross-examination, intended to create doubt about a witness’s honesty or accuracy of recollection.⁹² Even non-aggressive questioning may be distressing for victims who are unable to tell their story in their own way, instead permitted only to answer lawyers’ questions.⁹³ Some Victorian victims interviewed by Clark described the process of giving evidence as humiliating, degrading and manipulative.⁹⁴ They wanted:
- a more inclusive approach to evidence, being able to provide the full context and offending circumstances, being given the opportunity to voice their story, highlighting the impacts of the assaults, and exposing their understanding about the truth...⁹⁵
- 23 Clark’s research is supported by other empirical studies which have similarly found that many victims seek to have a greater voice, including a more effective means to tell their story and the impact of the offending.⁹⁶ Restorative justice mechanisms, such as victim–offender mediations or family group conferences, have been found to provide some

⁸⁹ Shapland et al, above n 69, 178; Wemmers and Cyr, above n 81, 270; Wemmers, above n 80, 412.

⁹⁰ Wemmers and Cyr, above n 81, 268.

⁹¹ Cook et al, above n 14, 57.

⁹² Ibid.

⁹³ Clark, above n 67.

⁹⁴ Ibid, 34; See also Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003).

⁹⁵ Clark, above n 67.

⁹⁶ Wemmers and Cyr, above n 81; Tinneke Van Camp and Jo-Anne Wemmers, ‘Victims’ Satisfaction with Restorative Justice: More Than Simply Procedural Justice’ (2013) 19(2) *International Review of Victimology* 117; Herman, above n 66.

- victims, in appropriate cases, with a less formal and more supportive forum in which to voice their views and tell their story in a more meaningful way.⁹⁷
- 24 Giving victims greater voice has been linked in the literature to psychological research suggesting a connection between a victim being empowered to tell their story, being included and having choice, and their healing.⁹⁸ However, concerns have been raised about the validity of some of the research methods and conclusions in a number of the studies said to support a causal link between victim experience of the criminal justice system and recovery.⁹⁹
- 25 In many jurisdictions (including Victoria), once an offender has pleaded guilty or been convicted, a victim is permitted to detail the impact of the crime on their life to the court during the sentencing hearing through a victim impact statement.¹⁰⁰ One of the widely understood purposes of victim impact statements is to provide a therapeutic and communicative role for victims.¹⁰¹ Some studies suggest that victims consider this opportunity for voice and participation in sentencing to be ‘too little too late’ and instead seek recognition earlier in the trial process.¹⁰²
- 26 Increased victim participation has been linked to victims’ increased satisfaction with an offender’s sentence. This is said to be a consequence of giving victims some control over process and a form of official acknowledgement.¹⁰³ However, there is also some

⁹⁷ Van Camp and Wemmers, above n 96; Strang et al, ‘Victims Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis’ (2006) 62(2) *Journal of Social Issues* 281. Note that there is considerable debate about the suitability of restorative justice mechanisms in the context of domestic violence and sexual assault. See for example Stubbs above n 39; and Shirley Julich, ‘Views of Justice Among Survivors of Historical Child Sexual Abuse: Implications for Restorative Justice in New Zealand’ (2006) 10(1) *Theoretical Criminology* 125. In contrast, the Centre for Innovative Justice’s report, *Innovative Justice Response to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community* (2014) recommends restorative justice mechanisms and models at different stages of the criminal justice process in the context of sexual offences.

⁹⁸ Herman, above n 66, 162–163, (citing D G Kilpatrick et al, ‘The Rights of Crime Victims – Does Legal Protection Make a Difference?’ National Institute of Justice Research in Brief, Washington, DC, December 1998). See also Van Camp and Wemmers, above n 96, whose survey of crime victims invited to attend a victim-offender mediation suggests there is correlation between procedural fairness and victims’ wellbeing.

⁹⁹ Parsons and Bergin, above n 14, 183; Wemmers (2013), above n 75.

¹⁰⁰ In Victoria, the impact of offending on any victim, the personal circumstances of the victim and any injury, loss or damage caused by the offending are among the factors that the court must consider when determining sentence. See *Sentencing Act 1991* (Vic), s 5(2).

¹⁰¹ Victim Support Agency (VSA), *A Victim’s Voice: Victim Impact Statements in Victoria* (Department of Justice, State of Victoria, 2009) 9.

¹⁰² Wemmers, above n 80, 399.

¹⁰³ Edna Erez and Ewa Bienkowska, ‘Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland’ (1993) 21 *Journal of Criminal Justice* 47; Jonathan Doak et al, ‘Victims and the Sentencing Process: Developing Participatory Rights?’ (2009) 29(4) *Legal Studies* 651, 653.

evidence that limiting participation to giving a victim impact statement does not change victim satisfaction.¹⁰⁴

- 27 Interviews with justice professionals have highlighted that creating unrealistic expectations in victims about the impact of their participation can be harmful or lead to disillusionment.¹⁰⁵ In 2011, Christine Englebrecht considered research from the United States on the use of victim impact statements in homicide matters.¹⁰⁶ Englebrecht found that there can be a gap between victim expectation (because they were given a role) and experience (the role did not influence the outcome). Englebrecht argued that it is important to consider the quality or meaningfulness of victim participation mechanisms, and to clarify the nature and purpose of the inclusion of victims in the criminal justice system so as to avoid falsely raising victims' expectations.¹⁰⁷

Information and support

- 28 Once a matter proceeds to court, victims are confronted with complex laws defining the criminal offence, regulating the use of evidence and setting the court procedures. Often the rules are difficult to understand. A lack of understanding can leave a victim feeling isolated. So too can a lack of support.
- 29 The provision of timely, accessible and accurate information to victims about criminal procedures and the status of their case is consistently identified as one means to remedy some victim dissatisfaction and increase levels of confidence in the criminal trial process.¹⁰⁸
- 30 The timing of the provision of information plays a significant role. As the Victim Support Agency of Victoria (VSA) has noted, victims are unlikely to absorb new information when they are in a highly distressed state.¹⁰⁹
- 31 Accurate information assists in managing a victim's expectations by setting out the reality of the criminal trial process and the victim's role within it. Research from South Australia highlights the risk of unfulfilled expectations, with increased victim dissatisfaction with a sentence being associated with unfulfilled expectations about

¹⁰⁴ Edna Erez, Leigh Roeger and Michael O'Connell, *Victim Impact Statements in South Australia* (Australian Institute of Criminology, Canberra, 1996), 213. This study found that half of survey participants who stated that they provided VIS material said it did not make a difference, whilst a small number said that it upset or disturbed them.

¹⁰⁵ Erez, Globokar and Ibarra, above n 70.

¹⁰⁶ Christine Englebrecht, 'The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System' (2011) 36(2) *Criminal Justice Review* 129.

¹⁰⁷ *Ibid*, 146.

¹⁰⁸ See for example, Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure, Interim Report* (Report No. 42; July 1991); Shapland et al, above n 69; Justice Strategy Unit, South Australian Government, above n 87; Bradford, above n 79; ten Boom and Kuijpers, above n 14,163; and Laxminarayan et al, above n 78, 141.

¹⁰⁹ Victim Support Agency, above n 101, 10.

the effect of a victim impact statement on sentencing outcomes.¹¹⁰ The VSA's 2009 research found that victim satisfaction with the process was influenced by their understanding of the role the victim impact statement would play in sentencing, which is linked to the information and support they received in preparing it.¹¹¹

- 32 Research also suggests that providing victims with information about the available sources of support is important. Ben Bradford analysed the outcomes of the British Crime Survey in 2011 and suggested that victims who have contact with victim support services are likely to have more confidence in the effectiveness and fairness of the criminal justice system because they are provided with a space to have a voice and a sense of having that voice taken seriously.¹¹²

Trust, neutrality and respectful treatment

- 33 Procedural justice research indicates that individuals are likely to be more satisfied with an outcome if the actors in the criminal justice system (police, prosecutors, defence lawyers, magistrates and judges) treat them with respect and dignity. It is also important that the motives of these actors are trusted and that victims feel that there is no bias in the handling of their case.¹¹³ Fair dealings are linked with promoting trust, addressing feelings of uncertainty and encouraging positive perceptions of the system.¹¹⁴
- 34 Many victims, when surveyed, focus on how they were treated during the criminal trial process, not just on the outcome of the case.¹¹⁵ The VSA's 2009 research found that the way in which a judge dealt with, and responded to, a victim impact statement during the sentencing hearing was very important to the victim's satisfaction with the process.¹¹⁶ Social psychology research suggests that this is linked to the human need to feel like a valued member of a social group: the way victims are treated by criminal justice authorities can inform their perception of their place, role and status within the broader system.¹¹⁷

¹¹⁰ Erez, Roeger and O'Connell, above n 104, 213.

¹¹¹ Victim Support Agency, above n 101, 42.

¹¹² Bradford, above n 79, 345.

¹¹³ Tyler, above n 73, Jo-Anne Wemmers, et al 'What is Procedural Justice: Criteria used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures' (1995) 8(4) *Social Justice Research* 329; Jo-Anne Wemmers, *Victims and the Criminal Justice System* (Kugler, 1996).

¹¹⁴ Bradford, above n 79, 345; Wemmers, above n 75, 223; Jason Sunshine, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) 37(3) *Law and Society Review* 513 (focuses on perceived legitimacy of police only).

¹¹⁵ Wemmers, above n 113, 348; Wemmers, above n 80, 402 (citing Jo-Anne Wemmers, *Victims and the Criminal Justice System* (Kugler, 1996)).

¹¹⁶ Victim Support Agency, above n 101.

¹¹⁷ Tyler, above n 73, 122; Bradford, above n 79, 350 (citing Jonathan Jackson and Ben Bradford, 'Crime, Policing and Social Order: On the Expressive Nature of Public Confidence in Policing' (2009) 60(3) *British Journal of Sociology* 493; and Jason Sunshine and

- 35 Insensitive, infrequent or dismissive interactions, or the lack of interaction, with police, lawyers and judges can undermine victims' perception of fairness and may leave them feeling that their status is low in the system, that they have not been believed or that their victimisation is of minimal concern.¹¹⁸ Further, as Edna Erez et al have observed, 'merely opening the floodgates to victim inclusion through legislation does little to preclude unresponsive or insensitive encounters that can lead to victim disillusionment or harm'.¹¹⁹
- 36 In the context of sexual assault, research suggests that misunderstandings built on negative stereotypes about women and sexual assault still influence society's response to sexual assault victimisation.¹²⁰ Comparative research by Malini Laxminarayan suggests that victims of sexual assault are likely to place emphasis on respectful and dignified treatment by authorities as a way of counteracting negative stereotypes.¹²¹
- 37 The nature and experience of cross-examination in a committal or trial has received much attention. For example, research into the perceptions of treatment of victims in the Magistrates' Court of Victoria found that over 70 per cent of respondents strongly disagreed or disagreed that they were treated with courtesy, dignity and respect by the accused's lawyers.¹²² Research suggests that, in addition to the experience of cross-examination causing distress and humiliation, it can also leave victims feeling that the information upon which a decision will be based has been rendered inaccurate, undermining trust in the decision maker.¹²³
- 38 There is a body of literature that focuses on whether restorative justice practices and values can better deliver procedural justice needs, particularly respect, trust, meaningful participation and voice. Research by Tinneke Van Camp and Jo-Anne Wemmers in Canada and Belgium, and Heather Strang et al in the United Kingdom and Australia, provides examples of restorative justice values and processes generally being found to meet these needs.¹²⁴ Another positive of restorative justice identified by Van Camp and

Tom Tyler, 'Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as a Prototypical Representative of a Group's Moral Values' (2003) 66(2) *Social Psychology Quarterly* 153).

¹¹⁸ Wemmers, above n 80, 402 (citing Jo-Anne Wemmers, *Victims and the Criminal Justice System* (Kugler, 1996));

Herman, above n 38, 585; VSA, *Information and Support Needs of Victims and Witnesses in the Magistrates' Court of Victoria* (Department of Justice, State of Victoria, 2013), 17–18.

¹¹⁹ Erez, Globokar and Ibarra, above n 70, 185.

¹²⁰ Malini Laxminarayan, 'Interactional Justice, Coping and the Legal System: Needs of Vulnerable Victims' (2013) 19(2) *International Review of Victimology* 145; Victorian Law Reform Commission, above n 94, 345–6.

¹²¹ Laxminarayan, above n 37, 391.

¹²² VSA, above n 118, 17.

¹²³ Laxminarayan, above n 78, 122 (citing G M Matoesian, *Reproducing Rape: Domination Through Talk in the Courtroom* (Polity Press, 1993)).

¹²⁴ Van Camp and Wemmers, above n 96; Strang et al, above n 97.

Wemmers was that it is consent-based, dialogue-focused, and offered a flexible space and the provision of care.¹²⁵ Emotional reparation, validation and recognition have also been positively associated with restorative justice values and processes, as referred to below.¹²⁶ It should be noted that restorative justice is not considered appropriate for all victims, or for all crimes, and that restorative justice practices are not desired by all victims.¹²⁷

Distributive justice

- 39 For some victims, the outcome of the trial process will be the major determinant of their satisfaction with and confidence in the criminal justice system.¹²⁸ Just as procedural justice may impact upon a victim's attitude towards the outcome, the outcome of the case may influence an individual's assessment of the fairness of the process.¹²⁹
- 40 The research suggests that, broadly speaking, victims seek distributive justice in the form of:
- punishment and retribution
 - deterrence, protection and community safety
 - material and emotional reparation and restoration (including validation and denunciation).

Punishment and retribution

- 41 Retributive punishment refers to punishment as an end in itself, typically referred to as seeking the imposition of a sentence which is proportionate to the gravity of the crime committed. Retributive punishment is undoubtedly sought by some victims, however there is research that indicates that many victims do not seek punishment or revenge.¹³⁰ Laxminarayan's 2013 review of empirical research noted that the level of retribution

¹²⁵ Van Camp and Wemmers, above n 96.

¹²⁶ Wemmers, above n 80; Van Camp and Wemmers, above n 96; Strang et al, above n 97.

¹²⁷ See for example Stubbs above n 39; Julich, above n 97; Nancarrow, above n 52. Note that it is beyond the scope of this information paper to discuss when restorative justice processes are and are not appropriate and the safeguards that are necessary in different circumstances. For detailed analysis of restorative justice mechanisms and future directions in Victoria, see Parliament of Victoria Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice: Final Report of the Victorian Parliament Law Reform Committee* (Parliamentary Paper No. 184, Session 2006–2009, May 2009).

¹²⁸ See for example, Strang, above n 69, 13, who notes that 'Overall satisfaction with the criminal justice system seems to be strongly correlated with the victim's satisfaction with the sentence the offender received, but the main variable influencing satisfaction with the sentence is perception of fairness in sentencing, that is, the *process*' (emphasis in the original).

¹²⁹ Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990), 122.

¹³⁰ See for example Edna Erez and Pamela Tontodonato, 'The Effect of Victim Participation in Sentencing on Sentence Outcome' (1990) 28 *Criminology* 451, 467.

sought by victims varied depending on a number of factors, such as severity of offence, perceptions of immorality and the relationship between the victim and the offender.¹³¹

- 42 For many victims, retribution seems to be a lesser priority than community acknowledgment and denunciation of the crime, public safety, emotional restoration and compensation.¹³² Herman's interviews with sexual assault and domestic violence victims in the United States suggest that some victims feel conflicted by vengeful feelings, considering them to be 'alien to their self-image' and 'an imposition from the perpetrator's psychotic inner world'.¹³³ Herman suggests that the low number of victims in her small study who stated a wish for revenge, or for the perpetrator to suffer, related to a desire to maintain a moral distinction between themselves and the offender.¹³⁴

Deterrence, protection and community safety

- 43 Some victims want an offender to face a prison sentence as a way of making them understand the gravity of the wrong committed, deterring future crime and protecting others from harm. Other victims may seek these outcomes through offender rehabilitation in addition, or as an alternative, to prison.¹³⁵
- 44 Immediate safety has been identified in research studies as a particular need of victims of violent offences, including family violence.¹³⁶ The wish to protect others from a dangerous person was a reason identified by the small group of sexual assault survivors in Clark's study to explain their motivation for engaging with the criminal justice system in the first place.¹³⁷ Herman found that personal safety and protection of others, as opposed to revenge or vindictiveness, were more significant motivations for wanting an offender to serve a custodial sentence than punishment.¹³⁸

Material and emotional reparation and restoration

- 45 Reparation is a broad term which is generally understood to include any attempt to make good a wrong.
- 46 In criminal justice systems, reparation includes compensation and restitution,¹³⁹ both of which can be ordered by a Victorian court under the *Sentencing Act 1991* (Vic). While

¹³¹ Laxminarayan, above n 78, 124.

¹³² Shapland et al, 'Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes' (Centre for Criminological Research, University of Sheffield, 2006), 72; Strang et al, above n 96, 302; Herman, above n 38, 585; Clarke, above n 67.

¹³³ Herman, above n 38, 591.

¹³⁴ Ibid.

¹³⁵ Shapland et al, above n 132; Clark, above n 67, 30.

¹³⁶ ten Boom and Kuijpers, above n 14, 161.

¹³⁷ Clark, above n 67, 30.

¹³⁸ Herman, above n 38, 595.

¹³⁹ Australian Law Reform Commission, *Sentencing of Federal Offenders*, (2006), 267.

both compensation and restitution are important, a review of empirical research indicates that compensation is ranked as of higher importance to victims of property crimes than victims of personal violence. For victims of personal violence, having someone to talk to, protection and a court decision were more important.¹⁴⁰ It has also been suggested that victims prefer compensation from an offender rather than state-funded compensation, even though it is likely to be limited, because it links offender recognition with the harm caused.¹⁴¹

- 47 Reparation may also be understood as including emotional reparation, such as an apology¹⁴² by an offender, having an offender understand the harm caused to the victim and the demonstration of remorse by an offender. Strang has suggested that victims place value on what offenders can do by way of restoration, as compared to what they can pay.¹⁴³ Similarly, an evaluation of three restorative justice schemes in the United Kingdom found that victims emphasised apologies and offender rehabilitation, rather than financial reparation.¹⁴⁴ Such outcomes may be particularly important for victims and communities that seek restoration of relationships, such as the Aboriginal and Torres Strait Islander women interviewed in Nancarrow's research.¹⁴⁵
- 48 Emotional reparation may incorporate outcomes that see an offender, family and/or community members validate a victim's experience and condemn or denounce the offender's actions.¹⁴⁶ Herman posited that community validation or denunciation is

¹⁴⁰ ten Boom and Kuijpers, above n 14, 162 (citing M C Baumann and W Schadler, 'Victims of Reported Crime – Their Expectations, Needs and Perspectives. An Inquiry of Crime Victims Concerning Victim Protection, Victim Support and Mediation', in G Kaiser et al (eds) *Victims and Criminal Justice* (Freiburg: Max-Planck Institut), 3–27). See also David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' (2014) 20(1) *International Review of Victimology* 145, 148.

¹⁴¹ Miers, above n 140, 148.

¹⁴² Herman's study suggested that an apology is less important to victims when compared to validation because of the inability to know whether an offender is genuinely remorseful or empathetic, or acting with self-interested ulterior motives, such as an attempt to manipulate the victim or interested third parties (see Herman, above n 38, 587). In contrast, Strang's restorative justice research points to an apology being more important to victims than vengeance or money (see Strang et al, above n 97). Strang has also found that apologies from an offender to a victim are more likely to occur in restorative justice settings and be perceived as sincere when compared to the court (Strang, above n 69, 118).

¹⁴³ Strang, above n 69, 8–24.

¹⁴⁴ Shapland et al, above n 132, 72.

¹⁴⁵ Nancarrow, above n 52, 98.

¹⁴⁶ Herman, above n 38, 585; Clark, above n 67, 30–32; Julich, above n 97, 129; On the importance of validation and procedural justice in the context of victim compensation, see Bruce Feldthusen et al, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law* 66. A study in the United States looked at victim experience in the context of applying to a court for a civil protection order and found 'validation was most strongly correlated with global satisfaction with the court process.' See Lauren Bennett Cattaneo et al, 'The Court Impact Scale—A Tool for Evaluating IPV Victims' Experience in Court' (2013) 28(5) *Journal of Interpersonal Violence* 1088, 1088.

important because 'it affirmed the solidarity of the community with the victim and transferred the burden of disgrace from victim to offender'.¹⁴⁷

- 49 Research suggests that sometimes a guilty plea, verdict or an award of compensation may be a necessary outcome for validation and/or denunciation to occur, particularly in the contexts of sexual assault or domestic violence.¹⁴⁸
- 50 Focus on the circumstances of the offence, rather than the impact of the crime on a victim's life and the impact of the criminal process on their recovery, can be a source of frustration and upset for victims. Strang has criticised the criminal justice system's lack of attention to 'non-material dimensions of victimisation' such as anger, fear and mistrust.¹⁴⁹ Strang has suggested that 'victims consistently report that emotional restoration is what they desire most from their "justice" experience and what they so rarely find in the formal justice system.'¹⁵⁰ Based on her research, Strang has argued that restorative justice practices, such as victim-offender conferences, provide potential for meeting victims' emotional reparation needs, as well as the procedural justice needs discussed above.¹⁵¹ She concluded that restorative practices benefit victims from a range of backgrounds, at different points in the criminal process and across the range of criminal offenders. However, she also acknowledged that restorative justice practices may not provide emotional reparation for some victims, and may even risk further emotional harm (for example, where a victim confronts an unremorseful offender).¹⁵² Restorative practices may also fail to meet the demands of victims seeking more traditional retributive justice outcomes.¹⁵³

Conclusion

- 51 Who are victims of crime and what do they seek from the criminal justice system? The research considered above highlights that, while victims of crime come from all parts of our community, it is the most vulnerable who are the most likely to be subjected to victimisation or to face barriers in having their needs met in the criminal justice system. The data reveals that property crimes are most prevalent, women are more likely to be the victims of sexual assault and domestic violence, and men are more likely to be the victims of assaults perpetrated by strangers.

¹⁴⁷ Herman above n 38, 585.

¹⁴⁸ Julich, above n 97, 129; Herman, above n 38, 585; Feldthusen et al, above n 146, 97–98.

¹⁴⁹ Strang, above n 69, 23.

¹⁵⁰ Strang et al, above n 97, 302 (citing Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002))

¹⁵¹ Strang, above n 69; Strang et al, above n 97. Similar findings can be found in Shapland et al, above n 132.

¹⁵² Strang et al, above n 97, 303.

¹⁵³ See for example the response of the non-Indigenous women interviewed by Nancarrow, above n 52, 99; Julich, above n 97, 133.

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- 52 As Keir Starmer, the former Director of Public Prosecutions for England and Wales, recently noted, the criminal justice system has, for too long, proceeded on the basis of ‘deep rooted assumptions’ about who victims are and how they behave.¹⁵⁴ Yet, as the above analysis makes clear, the experiences of victims are far from uniform, or consistent with stereotypes. Neither are their expectations uniform for their role in the criminal justice system or their demands of it.
- 53 Much of the research into the experiences and needs of victims in the criminal justice system focuses on victims of sexual offences and serious assaults (including homicide). Perhaps this reflects the relative rates of trials versus pleas of guilty in our higher courts. For example, there were 358 trials in the County Court of Victoria in 2013–14. 40 per cent of those trials were for sexual offences. While overall 71 per cent of cases in the County Court resolved as a plea of guilty without a trial, only 44 per cent of sexual offence matters resolved as a plea of guilty.¹⁵⁵
- 54 The most recent public statistics for the Supreme Court are for 2012–13, during which there were 38 finalised trials and 56 plea hearings.¹⁵⁶ The types of matters heard in the Supreme Court involved murder, attempted murder, incitement to murder, manslaughter, culpable driving, assisting an offender, sexual offences, major drug trafficking and importations, deception and theft.¹⁵⁷
- 55 The research suggests that victims of crime seek procedural and distributive justice from the criminal justice system. That is, they have needs focused on the processes and needs focused on the outcomes—which are interrelated and interdependent. It also suggests that not all the needs of all victims can be met through the adversarial criminal trial processes.
- 56 What should the role of the victim be in the criminal trial process? The empirical research discussed in this paper provides important data to inform future consideration of this fundamental question.
- 57 The Commission will publish a consultation paper in August 2015 inviting public submissions, and will then commence a period of public consultation on the reference. The Commission looks forward to public submissions following publication of the consultation paper.

¹⁵⁴ Keir Starmer, ‘Human Rights, Victims and the Prosecution of Crime in the 21st Century’ (2014) 11 *Criminal Law Review* 777, 782.

¹⁵⁵ County Court of Victoria, *2013–2014 Annual Report* (2015), 10–11.

¹⁵⁶ Supreme Court of Victoria, *2012–2013 Annual Report* (2014), 36.

¹⁵⁷ *Ibid*, 35.

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The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 2

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