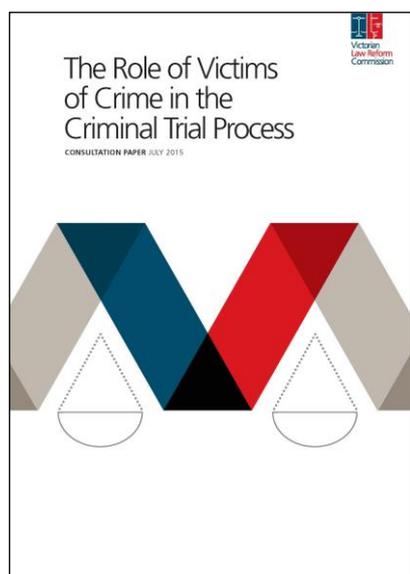


August 2015

## The Role of Victims of Crime in the Criminal Trial Process: Consultation Paper Summary

On 27 October 2014, the then Attorney-General of 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.

### Consultation paper



The Commission's consultation paper was published on 3 August 2015. The Commission will accept written submissions until 30 September 2015. Submissions can be made publicly or confidentially.

This document is a summary of the consultation paper. It highlights the central issues and options for reform canvassed in that paper.

This document does not provide a detailed explanation of the stages of the Victorian criminal trial process, or alternative processes and procedures, which can be found in the consultation paper.

The consultation paper can be downloaded at <http://www.lawreform.vic.gov.au/all-projects/victims-crime-criminal-trial-process>

### Consultations

The Commission will consult with victims, community services, judiciary, courts and the legal profession in both metropolitan and regional areas of Victoria.

The Commission will hold consultation days for victims of crime at our office in Melbourne, as well as visiting the following regions: Mildura, Geelong, Morwell, Shepparton, Wodonga, Warrnambool and Ballarat.

Consultations with the community will be based on the framework set out in the consultation paper.

## The terms of reference

[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.

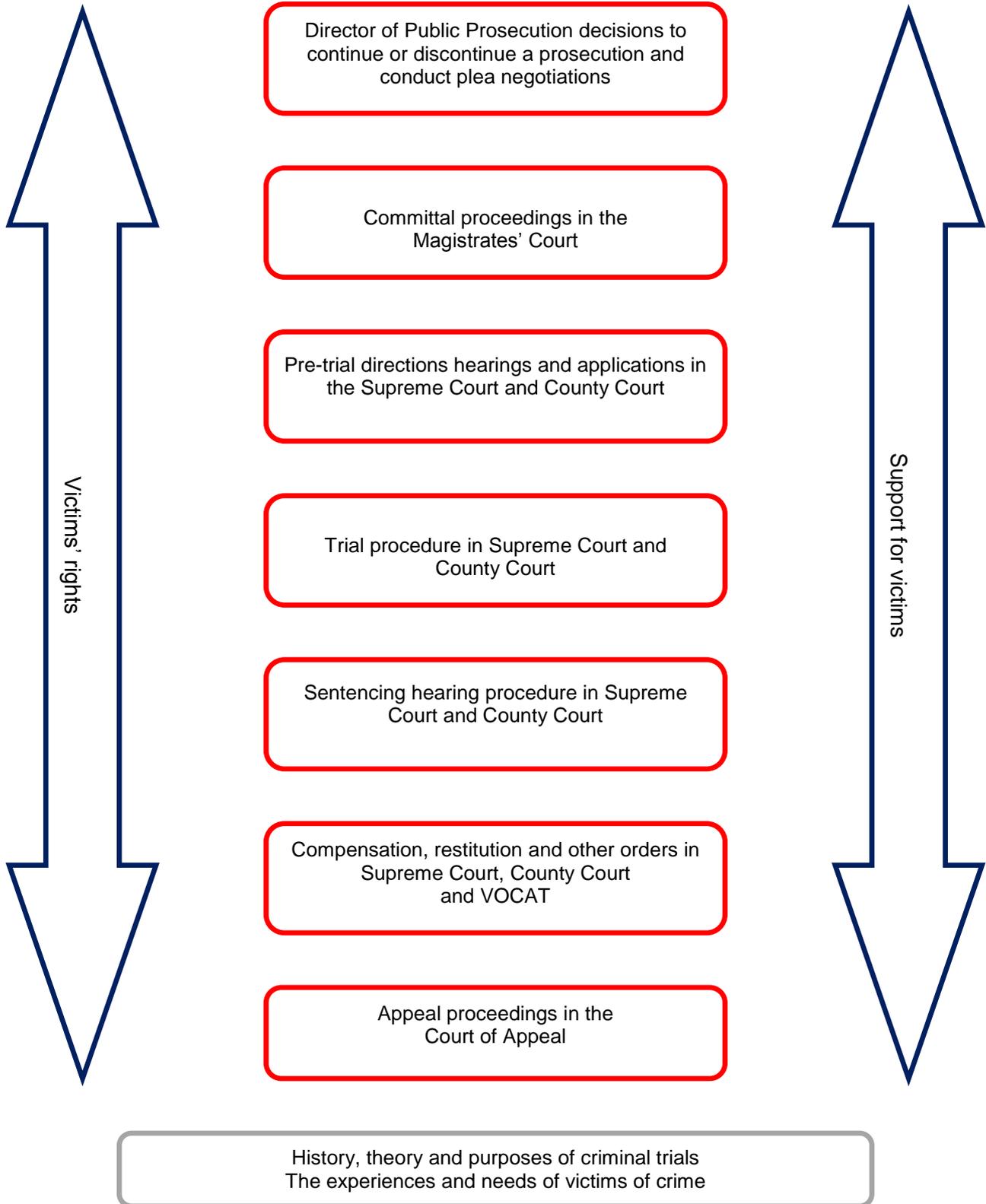
In conducting the review, the Commission should consider:

- (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 review

WHAT SHOULD BE THE ROLE OF VICTIMS OF CRIME IN THE CRIMINAL TRIAL PROCESS?



## **History, theory and purposes of criminal trials The experiences and needs of victims of crime (Chapters 2 and 3)**

Our understanding of the criminal trial process is shaped by the history, theory and purposes of the criminal justice system. These concepts are important to understand before embarking on any consideration of victim-centred reform.

### **History and legal systems**

The consultation paper traces the history of the criminal trial from its origins in England to modern day. Modern criminal trials in Australia are a contest between the prosecutor, acting as the state's representative, and the accused. Leading up to and during the trial, the prosecutor and the accused (usually through his or her lawyer) decide how their case will be conducted. Judges play a passive role and are not involved in the investigation of the case or the presentation of evidence to the court. The role of the victim is as a witness for the prosecution.

The criminal trial process in Australia can be contrasted with inquisitorial criminal trials, such as in Europe. In these jurisdictions, judges often conduct or oversee the investigation and prosecution, and the accused has less control over the conduct of proceedings. Victims may play a greater role in the criminal trial; they may be given lawyers, and may act as prosecutors.

### **Crime and public prosecutions**

Crime is understood as being something more than harm to one individual. It is also a public wrong, with adverse impacts for society as a whole.

The public aspect of crime is what justifies the prosecution of crime by the state on behalf of the community rather than the victim. The public prosecution of crime provides a forum for the public denunciation and condemnation of behaviour that has harmed the community, as well as individuals.

The modern criminal trial process is focused on controlling crime by detecting, convicting and sentencing those guilty of crime. In more recent decades, the interests and needs of victims have challenged the traditional approach to the criminal trial process.

### **Victims' needs and experiences**

Victims of crime are diverse. So too are their experiences of crime and their criminal justice and support needs. The experiences and justice needs of victims provides the foundation for the Commission's approach and discussion of reform options.

Research about the justice needs of victims continues to show that victims need respectful treatment, useful information and meaningful ways to participate during the criminal trial process.

Legal reform alone is not always enough to change entrenched cultures and practices in our criminal justice system – a system in which the prosecution and the defence have traditionally been the only parties. The Commission is therefore seeking views on what measures are required to ensure that any victim-centred reform is accompanied by the necessary cultural change within the criminal justice system.

## **What should be the role of victims of crime in the criminal trial process? (Chapter 4)**

The fundamental, overarching question for this review is ‘What should be the role of victims in the criminal trial process?’

The Commission has proposed three responses to this question, each of which leads to different reform proposals.

- The role of the victim is ‘protected witness’. This role leads to reforms that aim to protect victims from being subjected to further harm in their role as witness for the prosecution.
- The role of the victim is ‘participating witness’. This role leads to reforms that aim to empower victims by providing avenues for greater participation in prosecutorial and judicial decision-making and for victims to be heard during the trial process.
- The role of the victim is ‘prosecuting witness’. This role leads to reforms that aim to give victims some or all of the functions, rights and obligations associated with the role of the prosecutor.

Victims may have different roles at different stages of the criminal trial process.

### **The stages of an adversarial criminal trial**

The terms of reference require the Commission to examine certain stages of the criminal trial process.

A brief description of each of these stages is provided below, together with examples of reform options raised in the consultation paper.

This is followed by a brief outline of victims’ rights and support for victims, which are relevant throughout each victim’s criminal trial process journey.

## ***The role of victims in the decision to prosecute (Chapter 5)***

Victims may experience distress or dissatisfaction when they are not involved in, or do not understand, a prosecutor's decision to discontinue a prosecution, continue a prosecution against a victim's wishes, or accept a plea of guilty to lesser charges.

Victoria's Director of Public Prosecutions and all prosecutors working for the Office of Public Prosecutions (OPP) act on behalf the state. Their responsibility is to act in the public interest. They do not act on behalf of victims.

Although prosecutors do not act on behalf of victims, they must make sure that the prosecutorial system considers the concerns of victims. Prosecutors have obligations to seek the views of victims and notify victims of decisions to discontinue a prosecution. They also have obligations to consult and inform victims about decisions to accept a plea of guilty to lesser charges.

However, there are no direct consequences for a criminal trial if a prosecutor fails to comply with such obligations.

### **Reform options and questions include:**

- whether there should be stronger obligations on prosecutors to consult with victims and if so, whether there should be consequences for a failure to consult
- whether victims should be given the opportunity to access legal advice or representation before consultation with prosecutors
- how much weight should be given to the views of victims consulted
- whether there should be a process for judges to follow to make sure that victims are consulted
- whether victims should have a right to have decisions of the DPP to continue or discontinue a prosecution or to accept a plea of guilty to lesser charges independently reviewed
- whether restorative justice processes, such as victim-offender mediation or family conferencing, should be available to victims as an alternative or in addition to the formal criminal trial process.

## ***The role of victims in committal proceedings (Chapter 6)***

The Commission's review is limited to the trial process for indictable crimes heard in Victoria's Supreme and County Courts. However, before an indictable offence can be heard in the Supreme or County Court, it must progress through committal proceedings in the Magistrates' Court.

Committal proceedings may include a committal hearing, where witnesses may be cross-examined. Victims may therefore undergo cross-examination at least twice during the criminal trial process: at the committal hearing and again at the trial. This can compound the stress and trauma experienced by victims.

In sexual assault matters, child victims or victims with a cognitive impairment cannot be cross-examined at the committal hearing.

Some indictable offences are not required to go through committal proceedings. For these offences, the prosecutor or the accused can request that the charges be determined summarily in the Magistrates' Court. If charges are heard in the Magistrates' Court, the magistrate determines whether the accused is guilty or not. A lower sentencing range is available.

The only role for victims during committal proceedings is as a witness.

### **Reform options and questions include:**

- whether there should be obligations on prosecutors to consult with victims during committal proceedings in relation to decisions about the cross-examination of witnesses, including victims, and an application for charges to be determined summarily by a magistrate
- whether magistrates should be required to take into account the views of a victim when deciding whether the victim may be cross-examined at a committal hearing, or whether charges will be determined summarily
- whether the prohibition on cross-examination of child victims and victims with a cognitive impairment in sexual offence matters should be extended to other victims or all victims
- whether the evidence of victims at committal hearings should be recorded to be used in the subsequent trial.

## ***The role of victims in pre-trial proceedings (Chapter 7)***

If an accused pleads guilty during committal proceedings, the case will proceed to a sentencing hearing (see below for a discussion of the role of victims in sentencing).

If an accused pleads not guilty and is committed for trial in the Supreme or County Court, at least two directions hearings will take place. Directions hearings involve a judge making orders to ensure that the trial proceeds fairly and efficiently and the prosecution and defence identifying pre-trial applications they intend to make.

Before the trial starts in front of the jury, the trial judge will make rulings on pre-trial applications about matters such as:

- whether multiple charges or charges against multiple accused persons will be heard in separate trials
- whether particular types of evidence can be used during the trial
- whether lawyers can access or use a victim's medical or counselling records in sexual offence cases ('confidential communications')
- whether the defence can use evidence about a victim's sexual history
- whether to prohibit the publication of identifying information.

In Victoria, victims of sexual offences can ask the judge for leave to appear in court and make submissions if an application is made for access to or use of confidential communications. Victims do not have a role, other than as a witness, in any other pre-trial application.

### **Reform options and questions include:**

- whether victims should always be allowed to appear in court and make submissions (rather than needing permission from the judge) in response to confidential communications applications
- whether victims should be permitted to appear in court and make submissions when pre-trial applications affect their interests
- whether prosecutors and judges should be obliged to ensure that victims are informed, consulted and able to access legal advice about pre-trial applications that affect their interests
- whether the state should provide legal representation for victims
- whether restorative justice processes, such as mediation or conferencing, should be available to victims who seek an alternative resolution of their case or want to try a restorative process in addition to the traditional criminal trial.

## ***The role of victims in the trial (Chapter 8)***

The criminal trial is often the focal point of a victim's journey through the criminal justice system. Giving evidence and being cross-examined during the trial can be a traumatic, stressful and dissatisfying experience for victims.

During the trial, judges are not obliged to treat victims differently to other witnesses. However, there are laws that require judges, or give judges discretion, to ensure protective procedures are in place for victims of sexual offences and for other vulnerable victims.

Protective procedures include having the victim sit in another room and give evidence to the court through closed-circuit television, placing a screen between the victim and the accused in court, and allowing the victim to have a support person next to them when giving evidence.

Child victims and victims with a cognitive impairment in sexual offence matters give their evidence at special hearings. At a special hearing, an audio-visual recording of a victim's statement to a police officer is played as their evidence-in-chief. The victim is then cross-examined from a remote witness facility through closed-circuit television.

In some jurisdictions, intermediaries are used to assist with the process of questioning vulnerable witnesses.

Judges also have powers and duties to control the way that the prosecutor and the accused's lawyer ask questions of a victim.

The role of the victim in the trial is limited to being a witness for the prosecution.

### **Reform options and questions include:**

- whether protective procedures designed to protect some vulnerable victims when giving evidence should be extended to a broader range of victims
- whether measures are needed to ensure judges enforce laws designed to protect victims
- whether all victims should be allowed to rely on an audio-visual recording of their interview with police as their evidence-in-chief
- whether certain victims should be allowed to use an intermediary during the trial
- whether victims should be permitted to participate in the trial through a lawyer who could make submissions or ask questions of witnesses in relation to matters that affect the interests of the victim
- whether victims could be given a role as a secondary prosecutor during the trial
- if victims were able to participate in the trial, who should provide legal representation.

## ***The role of victims in sentencing (Chapter 9)***

Victims can play a role in sentencing hearings by preparing and presenting a victim impact statement.

Victim impact statements are a way for victims to make the judge and the offender aware of the ways in which the crime has impacted on them. The impact of the crime is taken into account when the judge imposes the sentence. There are rules about what can be included in a statement and what is relevant to imposing a sentence.

Community impact statements are permitted in some jurisdictions. These are statements that detail the impact of crime on a particular community.

In some jurisdictions the outcomes of restorative justice processes, such as victim-offender mediation, are taken into account by judges when sentencing an offender. In appropriate cases and with the necessary safeguards, restorative justice processes can provide an avenue for victims to speak more freely about the impact of the crime on their life, ask the offender questions about their offending, and consider ways that an offender can restore the harm that they caused.

The Commission's review is limited to the role of victims at the sentencing hearing, and does not consider types of sentences or sentencing levels.

### **Reform options and questions include:**

- whether victims should be allowed to express in their victim impact statement an opinion about what sentence an offender should receive
- whether additional measures are needed to restrict the publication of victim impact statements or restrict disclosure to offenders
- whether victims should be allowed to make submissions at sentencing hearings
- should victims be represented by a lawyer during sentencing hearings, who could also assist with the preparation of their victim impact statement
- whether community impact statements should be introduced in Victoria
- whether restorative justice processes should be available as part of, or alternative to, the sentencing process.

## ***Compensation, restitution and other orders (Chapter 10)***

Victims can apply for compensation or restitution orders as part of the criminal trial process, but only if an offender is convicted. Victims can apply for these orders with or without a lawyer. Sometimes the DPP applies on behalf of a victim.

Compensation and restitution orders are made by a judge in addition to sentencing. This means that compensation and restitution orders do not form part of an offender's punishment.

A victim cannot appeal a judge's decision about compensation or restitution orders. Instead, they have the option of starting separate proceedings in the court's civil (non-criminal) jurisdiction.

If an offender does not pay, victims must commence proceedings in the court's civil jurisdiction to enforce the orders.

Victims of crime may also be eligible for financial assistance through the Victims of Crime Assistance Tribunal (VOCAT). This is a state-funded scheme designed to provide financial assistance to victims. The state can try to recover money from the offender.

### **Reform options and questions include:**

- whether judges should be required to consider making a compensation or restitution order in addition to sentencing an offender
- how should the offender's financial circumstances be taken into account by judges when making compensation or restitution orders
- whether the state, rather than victims, should be responsible for enforcing compensation and restitution orders against offenders
- whether victims should be allowed to appeal compensation and restitution orders
- whether victims should be permitted to make their compensation claim during the trial, instead of after sentencing
- whether eligibility for financial assistance through VOCAT should be expanded
- whether restorative justice processes, such as mediation or conferences, should be available to victims who apply to the court for compensation or restitution orders or victims who apply to VOCAT.

## ***The role of victims in appeal proceedings (Chapter 11)***

The DPP and the offender can both appeal a ruling made before or during a criminal trial ('an interlocutory appeal') with the permission of the Court of Appeal.

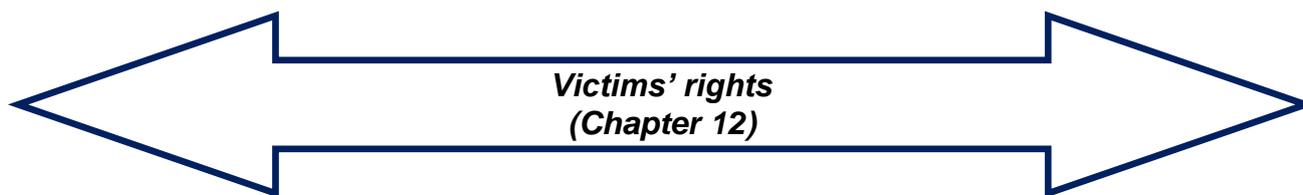
Both the DPP and the offender can appeal against sentencing orders, although the offender can only do so with the Court of Appeal's permission. If an appeal results in the Court of Appeal resentencing an offender, the current practice is that victims do not provide a new victim impact statement to the Court of Appeal.

The DPP can seek permission to appeal an acquittal in special circumstances.

The offender can seek the Court of Appeal's permission to appeal a conviction. If an offender successfully appeals a conviction, the Court of Appeal can consider cancelling a compensation or restitution order connected to that conviction. In these circumstances, the victim may be permitted to make submissions to the Court. Other than this situation, victims have no role in appeal proceedings.

### **Reform options and questions include:**

- whether victims should be allowed to commence interlocutory appeals against rulings that affect their interests with permission from the Court of Appeal
- whether the DPP should be required to consult with victims about appeals
- whether victims should be given standing to participate in certain appeals
- whether victims should be allowed to provide an updated victim impact statement in circumstances where the Court of Appeal decides to resentence an offender.



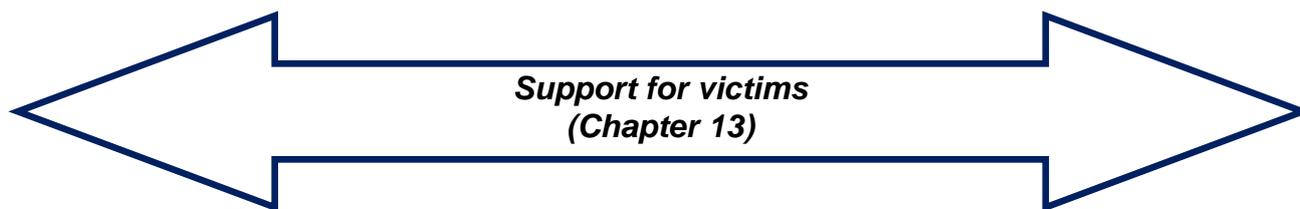
The *Victims' Charter Act 2006* (Vic) sets out principles governing how investigatory, prosecuting and victims' services agencies should respond to victims of crime. The principles apply throughout a victim's journey through the criminal justice system.

The principles include respectful and dignified treatment of victims, the provision of specified information to victims, protection of victims and rights to make a victims impact statement or apply for compensation orders or financial assistance from VOCAT.

While the principles are sometimes referred to as rights or obligations, they are not legally enforceable. This means that court action cannot be taken by a victim who feels that the principles have been not been applied. However, a victim can complain directly to the organisation the victim feels has failed to uphold the principles.

**Reform options and questions include:**

- whether there are rights or obligations not currently in the Victims' Charter that should be included
- whether there should be a pathway for victims to legally enforce some or all Victims' Charter rights
- whether there should be a process for investigating and resolving complaints made by victims and, if so, whether the Victorian Victims of Crime Commissioner should play a role in this process
- what remedies should be available for breaches of the Victims' Charter.



The provision of effective support services before, during and after the criminal trial process can improve victim satisfaction with the criminal justice system.

In Victoria, the Victims Support Agency coordinates the delivery of services to victims of crime, including the Victims of Crime Helpline and the Victims Assistance Program.

The Child Witness Service, OPP Witness Assistance Service and Court Network also provide support services that are primarily focused on support at court. In addition, there are numerous community legal centres and non-government victim support and advocacy groups that provide different types of assistance to victims of crime.

Timely, accessible and accurate information to victims about their case specifically and the criminal process generally can improve victims' experience during the criminal trial process.

Victims may need legal advice, assistance or representation. However victim support services are not generally funded to provide such services. If victims were to play a greater role in the criminal trial process, as contemplated by some of the options for reform outlined in the consultation paper, legal advice, assistance and representation would need to be accessible by victims on an equitable basis.

**Reform options and questions include:**

- whether the delivery of victims support services in Victoria could be improved
- whether there should be a court-based legal advisory service available to victims who are at court and in need of prompt advice
- whether a victims' advocate service should be established, to provide legal advice, casework assistance and, where appropriate, representation, throughout a victim's journey through the criminal justice system
- whether the Victorian Victims of Crime Commissioner should have any other functions relating to support for victims of crime.