Submission to the Australian Law Reform Commission reference on Justice Responses to Sexual Violence

June 2024

Our background and expertise

We are a group of academics and practitioners from diverse backgrounds. Collectively we have expertise in law, sociology, and education, and have collectively authored many books, articles, and reports on areas of direct relevance to this reference. Our affiliations and expertise are detailed below.

Kate Seear is Professor at the Australian Research Centre in Sex, Health and Society at La Trobe University. An Australian Research Council Future Fellow, she is also a practising lawyer. In her previous role as Associate Professor in the Faculty of Law at Monash University, she was the inaugural Academic Director of the South-East Monash Legal Service (formerly Springvale Monash Legal Service, or SMLS). She has worked in community law and private practice, including as joint co-ordinator of the SMLS specialist legal clinic for victims of sexual assault and sexual abuse; periodic co-ordinator of the Family Law Assistance Program at the Monash Law Clinic Clayton (formerly Monash Oakleigh Legal Service); and a lawyer at the Women's Legal Service Victoria, where she was a Duty Lawyer in the Family Violence List at the Melbourne Magistrates' Court. Professor Seear is the corresponding author for this submission.

Genevieve Grant is Associate Professor and Director of the Australian Centre for Justice Innovation in the Faculty of Law at Monash University. A/Prof Grant's research focuses on empirical evaluation of civil justice, injury compensation and dispute resolution systems, with an emphasis on claimants' experiences of legal processes. She is a Chief Investigator in the National Health and Medical Research Council Centre of Research Excellence in Better Health Outcomes for Compensable Injury, which brings together researchers across disciplines to investigate how legal systems contribute to compensation claimants' health and social outcomes. A/Prof Grant leads teaching in civil litigation and dispute resolution at Monash Law and is a co-author of key tort and injury compensation texts (*Luntz & Hambly's Torts: Cases, Legislation and Commentary* and *Victorian Statutory Compensation Schemes*).

Sean Mulcahy is Research Officer at the Australian Research Centre in Sex, Health and Society at La Trobe University. With research and policy expertise in human rights law and experiences of stigma and discrimination against marginalised populations, he has authored major research reports for the Victorian Pride Lobby, Eros Association, InsurePride, and others. He completed a joint PhD in the School of Law at the University of Warwick and the Centre for Theatre and Performance at Monash University, where he also held appointment as a teaching associate in performance studies. He has worked on research projects addressing parliamentary scrutiny, native title, legal history, and LGBTIQA+ rights at the Victorian Ombudsman, the Australian Law Reform Commission, Melbourne Law School, First Nations Legal and Research Services, Victoria Law School, and the Victorian Local Governance Association.

Adrian Farrugia is an Australian Research Council DECRA Senior Research Fellow at the Australian Research Centre in Sex, Health and Society at La Trobe University. He is a sociologist of health with

expertise in the relationship between gender and health interventions such as drug education for young people. He has published widely on topics related to alcohol and other drugs, healthcare access for people with stigmatised conditions and, most recently, how issues related to sex, sexuality and harm are managed in efforts to address youth substance use.

Overall statement

Our submission is based on insights from our own research, as well as insights from legal practice (both paid and pro bono) for victims of family and sexual violence and claimants in civil litigation and injury compensation schemes.

In what follows, we confine ourselves to the following questions outlined in the ALRC Issues Paper:

> **Question 12** Do you have views about the [special] measures listed above? Have the measures reduced the trauma of giving evidence? Could they be improved? Have things changed? What is working well? What is not working well? Are there other measures which have been implemented and not listed above?
>
> **Question 13** Do you have other ideas for improving court processes for complainants when they are giving their evidence?
>
> **Question 15** Has the use of recorded evidence been implemented in your jurisdiction? If so, to what extent? How is this working in practice? What is working well? What is not working well? What could be improved? Do any of the matters discussed when the recommendations were made (some of which are outlined above) need further discussion in the context of reforms being implemented? Are there any other issues? What do you see as the advantages and disadvantages of using recordings of the complainant's evidence at trial?
>
> **Question 19** What is your view about the usefulness of jury directions in countering myths and misconceptions described by the research described above? Do you have a view on whether the jury directions in your jurisdiction are sufficient? Could they be more extensive? How are the jury directions under the *Jury Directions Act 2015* (Vic) working in practice? Can they be improved?
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> **Question 24** Should cross-examination that reflects myths and misconceptions about sexual violence, such as the belief that a 'rape victim' would be expected to complain at the first reasonable opportunity be restricted on the ground that it is irrelevant or on any other ground?
>
> **Question 33** Do you have views about the creation of specialist courts, sections, or lists? Do you support specialised training for judges who conduct sexual offence cases? What issues should that training address? Do you support some form of special accreditation for lawyers who appear in sexual offence cases? Would this reduce the number of lawyers available to appear in such cases and contribute to delays in hearing such cases?
>
> **Question 41** Have there been recent changes to the role of victims of sexual violence in the sentencing process in your jurisdiction? Are Victim Impact Statements given appropriate consideration by the sentencing judge? Are there further improvements to be made? Should victims have independent legal representation during sentencing submissions?

Question 48 Which of the measures listed above are likely to most improve civil justice responses to sexual violence?

Question 49 Apart from those listed above, are there other recent reforms and developments which the ALRC should consider? Are there further reforms that should be considered?

Question 53 What changes to compensation schemes would best promote just outcomes for victim-survivors of sexual violence?

Question 55 Have reforms been implemented in your State or Territory? If so, how are they working in practice? How could they be improved? Have things changed? What is working well? What is not working well?

Questions 12, 13 and 15 – Improving court processes for complainants

As noted in the issues paper, the availability of support persons and/or canine companions is one 'special measure' that might improve outcomes for complainants. While courts have discretion to allow special measures including who a support person might be, it is important that some categories of people are not unreasonably or unfairly excluded from being a support person on the basis of assertions that they will, for instance, interfere in proceedings. In our experience, one possibility is that a support person who is also a lawyer may be excluded on the basis of an assumption or assertion that they are in a special position to influence or interfere in proceedings or contaminate evidence.

No one should be excluded from being able to be a support person to a complainant simply by virtue of their experience or expertise (including that they are trained as a lawyer). While it makes sense to exclude some people from acting as support people (e.g. potential witnesses), it is equally important that a wide range of people have scope to support complainants at court, especially as court settings are foreign, complex and intimidating for many complainants and having a familiar and trusted person with them can matter a great deal. The integrity of proceedings can be protected through other means, such as ensuring any support person is subject to obligations – such as the usual obligation not to discuss evidence during breaks in cross-examination and the like – the exclusion of certain categories of person can be harmful to victims, as well as the support people themselves, especially where the potential support person has provided significant emotional support to a complainant in the lead up to a trial and is best placed to continue providing them with support.

***Recommendation:* That courts ensure that special measures allow for a wide range of support persons, with rules about exclusion in only limited circumstances.**

One of the other special measures listed is the use of closed-circuit television to enable complainants to give their evidence outside the courtroom. Whilst this may reduce the trauma of giving evidence, some research suggests that because of the belief that legal practitioners and juries have in the value of live testimony, they are more likely to accept testimony that is delivered face-to-face rather than mediated through screens.[1] In her study of the use of closed-circuit television testimony in the prison context, Carolyn McKay identifies several losses experienced by prisoners giving testimony or otherwise appearing through video links: loss of ritual, loss of acknowledgment as a human, barriers to

[1] Leader, K. (2010) 'Closed-circuit television testimony: Liveness and truth-telling', *Law Text Culture* 14(1), 325-326.

communication and participation, loss of comprehension, loss of physical proximity, and loss of family support.[2] Writing in the context of defendants' testimony through screens, but equally applicable to complainants, Kate Leader argues:

> There is no doubt that this disappearance raises the possibility of dehumanization and may impair presumptions of innocence for a defendant [...] Live presence is a double-edged sword: it may protect a defendant's rights, but it also subjects her to a traumatic experience [...] We need to think about what is *lost*. What we know is lost is the defendant's live presence in the courtroom. [...] The ability to show up, therefore, to *be there* is a critical means—perhaps the only means—a defendant has of acting with agency, of being visible, of making things different. And when a defendant disappears, this possibility disappears with her.[3]

It is fair to say that the research on the impact of closed-circuit television testimony is variable (and partly because of the way that studies of this measure are designed). As the third author of this submission argues:

> Part of the problem to date is that legal practitioners and scholars have been asked to make sense of the moves to digital performance when there is considerable value in turning to [other experts such as] artists and performance-makers. It is critical, as new virtual technology is introduced into the court, that there is consideration of how it reshaped the audience's experience of legal performance.[4]

Therefore, this measure needs further discussion to assess its advantages and disadvantages in the context of how it has operated in practice since it has been implemented.

<u>Recommendation:</u> That further research be funded on the impacts of closed-circuit television testimony evidence since its implementation, led by inter-disciplinary research teams.

Questions 19 and 24 – Jury directions

The *Jury Directions Act 2015* (Vic) now provides jury directions that particularly impact LGBTQA+ people,[5] and these are reflected in the Criminal Charge Book developed by the Judicial College of Victoria. Jury directions like these can be useful in countering myths and misconceptions about LGBTQA+ people, but for them to properly work in practice requires proper LGBTIQA+ training of judicial officers and it is unclear what (if any) judicial education has been provided on these new jury directions.

There has also been criticism of jury directions leading to confusion and increased disputation.[6] Therefore, it is essential that any jury directions are clear and easily understood.

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[2] McKay, C. (2018). *The pixelated prisoner: Prison, video links, court 'appearance' and the justice matrix* London: Routledge, Ch 5.
[3] Leader, K. (2021) 'Law, presence to absence: The case of the disappearing defendant' in Rai, S. et al (eds), *Oxford handbook of politics and performance* Oxford: Oxford University Press, 84-85.
[4] Mulcahy, S. (Forthcoming) *Performing law* Routledge.
[5] *Jury Directions Act 2015* (Vic) ss 47H(b)(v)-(vi), 51(e)-(f), inserted by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic). Note that these directions do not apply on the basis of sex characteristics or intersex status.
[6] Flynn, A. & Henry, N. (2012). 'Disputing consent: The role of jury directions in Victoria', *Current Issues in Criminal Justice* 24(2), 174-5, 180.

There is also a broader question about whether affirmative consent models adequately capture the scenarios in which some gay, bisexual, and queer men have sex (for example, in dark rooms at sex on premises venues or in sessions under the influence of drugs), and there are no jury directions in the *Jury Directions Act* that account for these scenarios.

***Recommendation:* That education be provided to judicial officers on jury directions, the need for them to be expressed clearly and simply, and their impacts on diverse cohorts such as LGBTIQA+ people.**

Question 33 – Improving outcomes through education, specialisation and accreditation

As the lead author of this submission has argued, in forthcoming work on family violence intervention order proceedings co-authored with Becky Batagol, complainants may be exposed to both psychological and physical risks when they come into contact with lawyers in the context of family and/or sexual violence.[7] Judicial officers may also jeopardise the psychological and physical safety of complainants in a range of ways, including through the language and concepts they deploy, their management of trials, directions to juries and so on. Although the focus of Seear and Batagol's work is on lawyers' practices in the context of protection order negotiations, their work has relevance here, including because it draws on insights about legal ethics in sexual assault trials, and because it raises concerns that apply in the areas currently under consideration by the ALRC.

Of particular relevance are the observations from Seear and Batagol that:

- Legal practitioners (including judicial officers) can put both the psychological and physical safety of complainants at risk through their work.
- Psychological and physical safety is (and needs to be properly conceptualised as) an ethical matter.
- Psychological and physical safety is a problem that legal education needs to do more to address.

Drawing on and extending Seear and Batagol's work, we otherwise note that:

- While sexual offending is an especially complex and sensitive area of legal practice, it currently does not require any further education or specialisation beyond the relevant areas of law required for practice (criminal law, evidence law, civil law and/or legal ethics). The Priestley 11 subjects do not require law students to train on issues of central significance in sex offending, such as gender, sexuality, race and class, nor to study myths and stereotypes about sexual offending, including victim behaviour. This means that practitioners and, later, judicial officers may end up working in a complex and sensitive legal arena where stereotypes are commonplace but where there is no express requirement at any point in time for these professionals to become better educated about these issues or to work to consider how they might be perpetuating harms through their own practice. This includes, as the lead author of this submission has elsewhere argued, harms that might arise when people come into contact with the law and undergo a profound shift in their sense of self, self-worth, or belonging.[8] These affects – on identity or subjectivity – are often not seen as properly legal or ethical problems and are not the subject of compulsory legal education.
- Although Rule 21.8 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* ('the Solicitors' Rules') is designed to offer special and additional protections to complainants 'in

[7] Seear, K. & Batagol, B. 'The safety of victim-survivors is an ethical matter: Negotiating family violence protection orders', in Byrne, G. & Horan, J. (eds.) *Sexual assault trials: Challenges and innovations* (LexisNexis, forthcoming).
[8] Seear, K. (2020). *Law, drugs and the making of addiction: Just habits*, Routledge, London.

proceedings in which an allegation of domestic or family violence, sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence', the provision may not necessarily protect complainants from potentially injurious advocacy, in part because the provision focuses on the intent of lines of questioning, and because important questions remain about how it is enforced.

- Lawyers might violate other existing ethical rules through their advocacy – such as the rule requiring them not to be a 'mere mouthpiece' for their client, per Rule 17.1. This raises questions about the adequacy of existing legal ethics rules, enforcement practices and education.
- Although one way for legal ethics violations to be enforced is for complainants to themselves make complaints about a lawyer's conduct, they may not be aware of their right to do so, fear the repercussions or implications of so doing (especially in the context of intimate partner violence), or not have the capacity (including financially) to make complaints.
- Although the reasons for these issues arising are complex and cannot be solved by better education alone, education nevertheless has an important role to play.
- There are risks in developing education from the perspective of just one expert or discipline, including because different experts and those from diverse disciplinary perspectives have different views about important issues. For instance, in an area in which we have done a great deal of work, alcohol and other drugs, experts hold divergent views on issues such as the nature and meaning of 'addiction' (including the very use of this term), the effects of alcohol and other drug use,[9] the links between alcohol and other drug consumption and offending, including sexual offending, and the nature and meaning of other 'addictions' sometimes said to be relevant to sexual offending, such as sex addiction.[10] Recent research on drug education pedagogy, led by the third author of this submission, also demonstrates the risks of relying on one discipline or viewpoint. The development of youth-focussed initiatives such as school-based drug education generally rely on public health perspectives without including insights from other disciplines such as the sociology of education and lessons from other areas of expertise such as sexuality education.[11] As a result, drug education pedagogy often addresses the relationship between alcohol and other drug use, sexual harassment and violence and consent in ways that blame victim-survivors for the harms they experience.[12] Importantly, such limitations would be less likely if more diverse perspectives such as those from sexuality education informed drug education.
- On the other hand, there are also risks with not carefully prescribing content to and for study, as, for instance, in the tertiary curriculum, where a much larger number of providers and educators would be present (than for continuing professional development) and where a degree of autonomy and flexibility in teaching method and style is needed. The nature and quality of course content could end up differing considerably, including for the reasons identified in the previous point, and because educators may themselves hold stereotypical assumptions about relevant issues including gender, sexuality, race and class. There may be unintended consequences in simply inviting tertiary law

[9] See, for example: Fraser, S., Moore, D. & Keane, H. (2014). *Habits: Remaking addiction*. Basingstoke: Palgrave Macmillan; Fraser, S. & Seear, K. (2011). *Making disease, making citizens: The politics of hepatitis C*. Aldershot: Ashgate; Karasaki, M., Fraser, S., Moore, D. & Dietze, P. (2013). 'The place of volition in addiction: Differing approaches and their implications for policy and service provision', *Drug and Alcohol Review,* 32(2); Keane, H. (2002). *What's wrong with addiction?* Melbourne: Melbourne University Press.

[10] Seear, K. (2023). 'Making addicts: Critical reflections on agency and responsibility from lawyers and decision makers', *Psychiatry, Psychology and Law*, 30(1); Seear, K. & Fraser, S. (2016). 'Addiction veridiction: Gendering agency in legal mobilisations of addiction discourse', *Griffith Law Review,* 25:1.

[11] Farrugia, A. (2024). 'Drug education as a site of sexuality education', in Allen, L. & Rasmussen, M. (eds.), *The Palgrave encyclopedia of sexuality education*. Cham: Palgrave MacMillan (Available early online doi.org/10.1007/978-3-030-95352-2_128-1).

[12] Farrugia, A. (2023). "Something serious': Biopedagogies of young people, sex and drugs in Australian drug education', *Pedagogy, Culture and Society* (Available early online doi.org/10.1080/14681366.2023.2295285).

teachers to incorporate teaching in these issues in their classes, especially given reports of sexual harassment in the tertiary education sector.[13]

- The question of education and training has been considered by several jurisdictions, including, most recently, Western Australia, through the Law Reform Commission of Western Australia's recent report on sexual offences.[14] Drawing on insights from New South Wales and Victoria, among others, the Commission recommended that the government develop and deliver a program of specialised training for lawyers, police, judges and magistrates covering a wide range of issues including: the nature and prevalence of sexual violence in the community; the effects of trauma on victim-survivors; identifying and countering misconceptions about sexual violence; and how to respond to diverse experiences and contexts of sexual violence. In our view, training on such issues is important but it is also key that it incorporate specific/explicit attention to how gender, sexuality, race, class and other related matters (e.g. disability, age, sex worker status, victim-survivor criminal record/history) can shape perceptions, experiences and practices, such as practices of reporting to police, people's willingness to engage with police. It is also essential that such training be historically situated, with a focus on how the law of sexual offending has evolved over time.

With these insights in mind, we recommend:

***Recommendation*: That lawyers dealing with sex offences in relevant jurisdictions (criminal law, civil law) be required to undertake specialised continuing professional development on issues of relevance to their practice, such as myths and stereotypes about gender, sexuality, class, race and sexual offending, and that they be required to report on their completion of that training as part of their annual continuing professional development reporting obligations. This might take the form of their annual legal ethics continuing professional development points needing to be in specialist areas as a condition of practice in the criminal law, effected by an adjustment to the relevant regulations for the profession.**

***Recommendation*: That judicial officers be similarly expected to undertake specialised continuing professional development on issues of relevance to their practice, such as myths and stereotypes about gender, sexuality, class, race and sexual offending, as a condition of deployment to relevant areas of practice.**

***Recommendation*: That the nature and content of relevant continuing professional development and judicial education be developed by a panel of experts from different disciplines, including people with lived experience and from diverse cohorts, and that these programs be evaluated and updated regularly. They should be fully resourced in each state and territory.**

***Recommendation*: That consideration be given to embedding obligations for all law students to learn about issues such as the gendered, sexed, classed, and racialised origins and dimensions of the criminal law on sexual offending as part of the Priestley 11 curriculum through a phased approach, after education is delivered at the profession and judicial levels and properly evaluated.**

Question 41 – Victim Impact Statements

[13] Henning, M. et al. (2017). 'Workplace harassment among staff in higher education: A systematic review', *Asia Pacific Education Review* 18.
[14] Law Reform Commission of Western Australia. (2023). *Project 113: Sexual Offences – Final Report*. Western Australia: Law Reform Commission of Western Australia.

Despite the beneficial impact of Victim Impact Statements ('VIS'), there has been 'distress and anger by some victims in relation to their experiences in the sentencing court.'[15] In one such case, *R v Borthwick*,[16] Leon Borthwick was charged with murder and convicted of the manslaughter of Mark Zimmer:

> At Borthwick's plea hearing in September 2010, the family victims submitted VISs to the court wanting to read them aloud. The defence objected to the content of the statements because sections addressed matters other than the impact of the offence [...] The objection was upheld and the court engaged in a very lengthy and public process of editing the statements. Amended versions were then handed back to the family victims who appeared appalled at the outcome. Further conflict occurred in December when the family victims were not permitted to sit in the body of the courtroom with the family of the defendant and were relegated to the public gallery upstairs. Members of the deceased's family subsequently gave media interviews about their distress and anger at their experiences in the courtroom.[17]

This is despite other judgments having held that making rulings with respect to individual parts of a contentious VIS is not 'necessary, or even desirable.'[18] Reforms have been introduced to address some of the troubles encountered in *Borthwick*.[19] However, studies show that many victims still express frustration that 'their voice was being constrained by legislation and filtering processes during the "consultation" period before the hearing.'[20]

***Recommendation:* That consideration be giving to simplifying the process for determining admissibility of Victim Impact Statements and exploring alternative avenues for victims to share the impacts of criminal offending outside the court process.**

Questions 48 and 49 – Compensation and civil litigation responses to sexual violence

We welcome the Commission's attention to the full range of compensation and civil litigation responses to sexual violence. The Issues Paper rightly notes the absence of data about the performance of the criminal justice system in response to sexual violence. The data deficit is more extreme in relation to the response of compensation schemes and the civil justice system. Intermittently, a rare insight into individual cases is provided by claims that are finalised by judgment. Almost nothing is known about the number and characteristics of claims that are resolved privately through negotiation, nor the number of eligible claimants who do not claim at all. Because we know so little about this area, reform proposals are made in conditions of significant uncertainty. Accordingly, care must be taken to ensure unintended adverse consequences are minimised.

Funding and legal assistance services

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[15] Booth, T. (2011). 'Crimes, victims and sentencing: Reflections on *Borthwick*', *Alternative Law Journal* 36(4): 236.
[16] [2010] VSC 813.
[17] Booth, T. (2011). 'Crimes, victims and sentencing: Reflections on *Borthwick*', *Alternative Law Journal* 36(4): 236.
[18] *R v Dowlan* [1998] 1 VR 123, 140.
[19] See *Sentencing Act 1991* (Vic) ss 8L(3), 8N, 8Q(3) which provide, cumulatively, that the victim must file their statement with the court and defence a reasonable time before sentencing so that the court can make a ruling on admissibility and advise the victim of this prior to their statement being read in court.
[20] Booth, T. (2012). *Accommodating justice: An exploratory study of the structures that shape victim participation and the presentation of victim impact statements in the sentencing of homicide offenders in the NSW Supreme Court* PhD thesis: University of New South Wales, 397. See also Booth, T. (2016). *Accommodating justice: Victim impact statements in the sentencing process* Annandale: Federation Press.

The Issues Paper notes that 'government funding for some applicants in civil proceedings' has been a recommendation of previous reviews, with a view to making the civil litigation process more accessible and effective for victim-survivors of sexual violence. The Victorian Law Reform Commission's report on *Improving the Justice System Response to Sexual Offences* (2021) limited this recommendation to cases that raise important legal or systemic issues, or involve claimants with strong cases who face 'many barriers to justice'.[21] For the reasons set out below, we argue that investment in specialist legal assistance to enable victim-survivors to navigate and assess the range of compensation options available is a more urgent priority.

Evidence to previous inquiries suggests that some victim-survivors have difficulty obtaining private legal assistance in relation to civil proceedings in this domain. In Australia, conditional ('no win, no fee') costs agreements dominate the market for plaintiff-side personal injury legal services. Significantly, the practical operation of the market necessitates that a plaintiff lawyer makes an assessment about the prospects of securing a successful outcome for a client as part of the process of deciding to provide services for that claimant (that is, the lawyer is effectively choosing the client, rather than the reverse).[22] Where a potential claimant has a strong case and has good prospects of enforcing a settlement or judgment, the market dictates that they should be able to engage a private lawyer.

The chief barriers to civil claims involving injury arising out of sexual violence are well documented and interrelated.[23] They include identifying eligibility for a claim, the challenging experience of pursuing the claim, the costs risk where a claim is unsuccessful and ultimately extracting any ordered compensation from the perpetrator. Though we are necessarily speculating, these challenges likely drive the scarcity of civil claims arising out of sexual violence (outside of the institutional child abuse setting). They also play a role in assessments made by lawyers about acting for claimants in this space. The constellation of challenges will not be rectified in individual cases nor the system more broadly by providing funding for applicants to pursue some civil proceedings.

Victim-survivors seeking compensation in relation to sexual violence require information and advice about the range of options available to them, which may intersect. Depending on the circumstances of the offending and any conviction secured, these options may include workers' compensation (where the violence occurred at work), statutory victims of crime compensation, a civil claim for damages in negligence or battery, and sentencing-related compensation orders. Each of these types of claims has its own time limits and claims process. A little-understood aspect of navigating the choices to be made in this context is that the claims and schemes may require compensation or support from other sources to be repaid or pursued, or may in fact preclude the claimant from seeking social security benefits for a specified period.[24] In the absence of timely and specialised legal support, a victim-survivor may find themselves facing such consequences as being out of time to make the relevant application, surprised by the repayment obligations some schemes give rise to, or being precluded from receiving social security following a damages settlement.

In its *Restitution and Compensation Orders Report* (2018), the Sentencing Advisory Council recommended that consideration be given to the establishment of a specialist legal service to assist victim-survivors

[21] Victorian Law Reform Commission. (2018). *Improving the justice system response to sexual offences report*, 234-5.
[22] Grant, G. (2021). *Consumers' experiences of legal services: Rapid review* (report for the Victorian legal Services Board + Commissioner), 15-17.
[23] Forster, C. (2005). 'Good law or bad lore? The efficacy of criminal injuries compensation schemes for victims of sexual abuse: A new model of sexual assault provisions', *University of Western Australia Law Review*, 32, 264, 271-2.
[24] Taliadoros, J. & Grant, G. (2021). *Victorian statutory compensation schemes* LexisNexis, Ch 14.

with compensation matters.[25] The report emphasised the complexity of the legal needs that victim-survivors have in relation to compensation options, and the importance of legal advisors understanding family violence. We note that a telephone-based Victims Legal Service is currently being delivered in Victoria in a partnership between Victoria Legal Aid, community legal centres, and Aboriginal legal services.[26] As at June 2024, the service is providing services to victim-survivors of sexual violence in relation to protecting confidential communications in a court proceeding; financial assistance through the Victims of Crime Assistance Tribunal; and making applications for compensation and restitution orders (pursuant to the *Sentencing Act 2008* (Vic)). This is a very welcome development and evaluation of that service will provide crucial insight. We also note that the South Eastern Monash Legal Service has had a longstanding service for victims of sexual assault, sexual abuse and family violence, providing related and relevant services. Ensuring such services have the capacity to provide advice (and supported referral, where necessary) about the fuller range of compensation options and their interactions is critical to better meeting victim-survivors' needs in this area.

Enforcement of compensation orders and damages awards and agreements

The ability to enforce court-ordered compensation and damages awards and agreements is critical to ensuring justice is achieved for those who pursue and achieve these outcomes. Again, though the evidence base is very limited, it is clear enforcement is a challenge in this area. We endorse the recommendations made both by the Sentencing Advisory Council and the Victorian Law Reform Commission ('VLRC') in relation to the enforcement of compensation orders and outcomes in civil proceedings, namely that state governments enforce orders and agreements on the request of the victim-survivor involved.[27]

<u>Recommendation</u>: That state governments enforce court orders and agreements for compensation in claims arising out of sexual violence involving individual (non-institutional) defendants, on the request of the relevant victim-survivor.

Procedural reforms and 'special measures' in civil litigation

As the Commission identifies, a range of reforms affecting civil litigation have been made in the wake of the Royal Commission into Institutional Child Sexual Abuse and related inquiries. Many of these reforms – such as the abolition of time limits, the introduction of means to identify a proper defendant and set aside settlement deeds – have profoundly changed the landscape of litigation for institutional child abuse and improved access to claims for victim-survivors. The consequences of these changes are still playing out and their impact on outcomes is yet to be determined. We note, for example, that in 2020 the Supreme Court of Victoria established an Institutional Liability List to manage claims against organisations involving the physical or sexual abuse of a minor. From 2021-22 to 2022-23 there was a 48 per cent increase in case initiations in the list, with 517 cases commenced in 2022-23 and a growing pending caseload.[28] In public forums, the Supreme Court and County Court have reported on the significant number of self-represented plaintiffs bringing these proceedings.[29]

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[25] Sentencing Advisory Council. (2018). *Restitution and compensation orders*. Melbourne: Sentencing Advisory Council, 99.
[26] Victoria Legal Aid, *Victims Legal Service* (https://www.legalaid.vic.gov.au/victims-legal-service).
[27] Victorian Law Reform Commission. (2018). *Improving the justice system response to sexual offences report*, 236-7; Sentencing Advisory Council. (2018). *Restitution and compensation orders report,* Ch 4.
[28] Supreme Court of Victoria. (2023). *Annual report 2022-23*, 27.
[29] County Court of Victoria & Supreme Court of Victoria. 'Institutional liability: Insights from the front lines'. Seminar, 24 August 2023.

There has been considerable case management innovation and procedural reform in recent years in respect of criminal and family law, evidence law and criminal procedure. We note the Commission's reference to special measures procedural changes in criminal proceedings, and also the operation of limits on the rights of self-represented litigants to cross-examine parties in family law matters.[30] There has, however, been comparatively little consideration in Australia of reform required to better protect victim-survivors in civil litigation settings involving claims against individuals relating to sexual violence. This may be at least partly because of the rarity of this kind of case.

We urge the Commission to consider the specific nature of litigation involving an individual victim-survivor pursuing an individual perpetrator in a civil proceeding (that is, in the absence of an institutional or organisational defendant). We are concerned that in the focus on the potential benefits of civil litigation in this and previous inquiries there has been insufficient attention to the unpredictability and risks associated with these proceedings for victim-survivors, and the extent to which civil courts and their procedures are ill-equipped to provide necessary protections. We are conscious that the choice to pursue any kind of compensation claim is ultimately (and should always be) the choice of the victim-survivor. There is, however, a dearth of empirical evidence on the experience of pursuing such claims to inform reform proposals. By way of example, in 2021, the VLRC quoted three victim-survivors in support of its argument in favour of increasing access to civil claims: two people who had hoped to pursue claims but were unable to do so (one because they could not find a lawyer who would act for them), and a third who pursued a claim against an organisation (a workplace), rather than an individual. Notably absent from this and other inquiries have been the voices of victim-survivors who have pursued civil proceedings against individual defendants about their experiences in those claims.

For clarity, we take the opportunity here to set out some of the risks of civil proceedings between individuals relating to sexual violence. In such cases, the contemporary medical and other evidence of the impacts of sexual violence on the victim-survivor is highly relevant to questions of causation and the assessment of damages. While this material (such as records of counselling or other therapeutic interventions) may be protected to some extent in criminal proceedings, it is likely to be the main substance and focus of civil proceedings. The victim-survivor will be required to disclose this material (in addition to a range of other material about the circumstances surrounding the sexual violence) as part of their discovery obligations. Should the perpetrator be unrepresented, they will be provided with and have access to that material, subject to any case management directions the court might make.

Secondly, the victim-survivor will face the prospect of repeated exposure to the perpetrator in the course of the civil proceeding. This may be mediated by the involvement of lawyers on one or both sides, but there may be events relating to directions hearings, interlocutory applications, and appropriate dispute resolution (such as case conferences or mediations) where those encounters may be unavoidable and require careful management. Finally, in the context of a trial in a civil proceeding, the victim-survivor will face the prospect of cross-examination about the sexual violence they have experienced and its continuing impacts on them. In the event the perpetrator is unrepresented, this cross-examination may be conducted by them directly.

A recent civil proceeding pursued to the Court of Appeal in Victoria provides a valuable illustration of the drawn-out nature of civil litigation in relation to sexual violence, the way defendant conduct can

[30] Booth, T., Kaye, M., & Wangmann, J. (2019). 'Family violence, cross-examination and self-represented parties in the courtroom: The differences, gaps and deficiencies', *University of New South Wales Law Journal*, 42, 1106.

impact on victim-survivors, the case management challenge these proceedings present, and the need for procedural reform.

***Osborne v Butler* [2024] VSCA 6 (15 February 2024)**

In 2008, 15-year-old Jodi Butler (a pseudonym) was sexually assaulted and reported the assault to police. The offender was charged in 2013. In 2017, the offender was convicted of two counts of sexual penetration of a child under 16 after a trial in the County Court of Victoria. The offender appealed against his conviction and sentence and the Director of Public Prosecutions ('DPP') appealed against the sentence. In June 2018, the Victorian Court of Appeal refused the offender leave to appeal and upheld the DPP's appeal, resentencing the offender to a longer custodial sentence.

In 2019, Butler commenced civil proceedings in the County Court of Victoria alleging assault and battery and seeking damages for post-traumatic stress, depression and anxiety, as well as aggravated and/or exemplary damages. Throughout the proceeding at first instance Butler had legal representation and the offender was unrepresented. In the course of pre-trial directions in the civil proceeding:

> *[Butler] was ordered to serve an affidavit setting out the evidence-in-chief she intended to give, 'confined to the consequences of the conviction' recorded against the [offender]. At an earlier directions hearing, the judge had told the [offender] that the civil trial was not a 'second bite' at the convictions entered against him. The judge refused to permit the [offender] to call witnesses to give evidence about a range of matters, many of which were plainly not relevant but one of which was the knowledge of the witnesses about Butler having made false allegations against him.*[31]

The trial took place on 24 and 25 August 2022. The Court of Appeal judgment reports extracts of the trial judge's efforts to balance the interests of Butler and the unrepresented offender in the course of the trial, including the following comments the judge addressed to the offender:

> *'So, this case is about the assessment of damages following the admission of the fact of your conviction. So, the matters you raise about the plaintiff's entitlement to damages from any harm that you may have caused as opposed to harm that she's caused to herself or caused by unrelated matters, I'll give you leave to ask appropriate questions in a respectful and confined manner about that. But I am not going to allow questions about the events leading up to the matters upon which you were convicted. I am, in particular, not going to allow any more time to be spent telling me about crooked cops and crooked barristers and things that are irrelevant to this case. If that has occurred, you had appeal rights, you exercised those, and the appeal didn't go well for you. This is not a re-hearing, it's not a rehash of those events. And I've told you this on several occasions and previous directions hearings, so I apologise if I sound a little frustrated, but I am, because I don't feel that you understood, or have understood what I've been trying to explain to you. Rightly or wrongly, you were convicted. […]*
>
> *This is not the appeal, it's not the criminal trial, okay? So, it will be a lot easier for everyone if we just approach this case on the basis that, rightly or wrongly, you have been convicted, and that stands as a fact. And so, now we move on from that to work out what, if any, entitlement to damages [Butler] has, by reason of the convictions. Now, that's where I want to move to.* [32]

The Court of Appeal judgment notes that during the civil trial, the judge:

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[31] *Osborne v Butler* [2024] VSCA 6 (15 February 2024) [8].
[32] *Osborne v Butler* [2024] VSCA 6 (15 February 2024) [47].

- *'indicated multiple times that he would not permit the criminal trial to be 'run again''*;[33]
- *'accepted that the applicant 'committed the assaults' on the respondent, which were 'serious sexual offending against a vulnerable young person in circumstances where a breach of trust was involved'';*[34]
- prevented the offender from cross-examining the respondent as to her credit and *'as to the 'factual matters upon which he was convicted''*;[35] and
- *'admitted into evidence the remarks of the sentencing judge in respect of the applicant's convictions, together with the reasons given by this Court for refusing leave to appeal against conviction and upholding an appeal against sentence by the Director of Public Prosecutions. These documents seem to have been relied upon principally as showing the seriousness of the sexual offending and the fact that this Court upheld the convictions.* [36]

Judgment in the civil proceeding was handed down on 31 August 2022. The judge awarded pain and suffering damages of $250,000 and $25,000 in aggravated damages. The offender appealed to the Court of Appeal, and in a judgment in February 2024, the Court of Appeal accepted the offender's arguments that the trial judge had misconstrued provisions of the *Evidence Act 2008* (Vic) dealing with evidence of judgments and convictions (ss 91 and 92) and failed to ensure a fair trial on the basis that the judge treated the issues in dispute as being limited to causation of Butler's injuries and the quantum of damages. The Court of Appeal emphasised that the *Evidence Act* exception that allows evidence of a conviction to be used in a civil proceeding is limited to just the evidence of the conviction itself, and 'does not extend to the sentence, sentencing remarks or evidence given in the criminal proceeding'.[37] The matter was remitted to the County Court for rehearing. More than 15 years have now passed since the sexual violence offences occurred.

The value of special measures in civil litigation for victim-survivors of family violence and specified criminal offences has been the subject of a recent inquiry by the Civil Justice Council in the United Kingdom[38] and resultant law reform.[39] That reform requires rules of court to make provision for special measures in civil proceedings to protect witnesses and prevent cross-examination by an unrepresented defendant who has been convicted of a specified offence against the plaintiff. Further analysis of this approach and the extent to which existing civil case management approaches in Australia might be adapted to accommodate these measures is required.

<u>Recommendation</u>: That consideration be given to the development of special measures in civil proceedings in Australia involving claims by victim-survivors of sexual violence against individual defendants.

Question 53 – Improving outcomes for victim-survivors through compensation schemes

As Professor Ian Freckelton has explained:

> The payment of financial compensation for the non-pecuniary effects of crime, such as the pain

[33] Ibid [15].
[34] Ibid [12].
[35] Ibid.
[36] Ibid [16].
[37] Ibid [34].
[38] Civil Justice Council (United Kingdom). (2020). *Vulnerable witnesses and parties within civil proceedings: Current position and recommendations for change.*
[39] *Domestic Abuse Act 2021* (UK) ss 64 and 66.

> and suffering engendered by criminal acts of violence, is a phenomenon of comparatively recent experience. It accompanied the dawning of awareness of the impact of criminal offences of violence upon victims during the 1960s and into the 1970s.[40]

These schemes – in operation in each state and territory – are often described as 'therapeutic', 'beneficial' or 'remedial', intended to remedy wrongs, benefit victims, and assist them to recover from the impacts of the crimes perpetrated against them. It is common for the schemes to expressly reference 'sympathy' as an objective. It is also common for the relevant legislation governing these schemes to establish eligibility criteria for compensation, including various grounds upon which an application might be refused. In our view, and as the lead author of this submission has argued elsewhere, these two features of crimes compensation schemes are inter-related.[41] Our submission here focuses on this interrelationship and the harms it can generate for victims.

In a submission to the Victorian Law Reform Commission's reference on victims of crime in 2017, the lead author and colleagues wrote the following, in a discussion about the Victorian *Victims of Crime Assistance Act 1996* and its inclusion of a reference to 'sympathy' for victims as one of the key objectives of the Act:

> While this statement is doubtless well-intentioned, it does not take into account the higher historically and politically specific conditions under which sympathy is experienced and considered legitimate. As such it creates a set of problems for applicant victims. By tying awards of compensation to the articulation and experience of 'sympathy' in this way, the Act introduces a set of political and moral considerations about who evokes and 'deserves' sympathy. As we explain in the sections that follow, there is clear evidence of [Victims of Crime Assistance Tribunal or] VOCAT members reading key provisions of the Act through a moral lens, and grappling with questions about sympathy and morality in some of the cases we have examined. For example, VOCAT members, like other members of the community, sometimes struggle to view people with a past history of alcohol and other drug use (or 'addiction') as subjects deserving of sympathy. This struggle is a common feature of contemporary Western liberal societies. The same can be said for applicant victims with a criminal record (a matter taken up by the VLRC itself in its supplementary consultation paper).
>
> Relevantly, there is a large and diverse literature about the relationship between justice and emotions, including sympathy. As Professor Sara Ahmed has argued, emotions can be productive when connected to justice, but there are also:
>
> > […] risks of justice defined in terms of sympathy or compassion: justice then becomes a sign of what I can give to others, and works to elevate some subjects over others […] But we must also challenge the view that justice is about […] being the right kind of subject. Justice is not about 'good character'. Not only does this model work to conceal the power relations at stake in defining what is good-in-itself, but it also works to individuate, personalise and privatise the social relation of (in)justice.[42]

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[40] Freckelton, I. (2004). Compensation for victims of crime. In Kaptein, H. & Malsch, M. (eds.), *Crime, victims and justice: Essays on principles and practice.* Aldershot: Ashgate, 31.
[41] Seear, K. and Fraser, S. (2014). 'The addict as victim: Producing the 'problem' of addiction in Australian victims of crime compensation', *International Journal of Drug Policy,* 25(5).
[42] Ahmed, S. (2015). *The cultural politics of emotion.* (2nd Ed.) Routledge: New York, 195.

> Despite this, there are reasons why we should value an explicit reference to emotions in legislation. As feminist scholars have long argued, law too often relies on and instantiates the importance of 'reason' and 'rationality', such as in 'the reasonable person test',[43] in ways that seek to separate the 'proper' exercise of law from feeling. As Sara Ahmed argues, this tradition 'constructs emotions as not only irrelevant to judgement and justice, but also as unreasonable, and as an obstacle to good judgement'.[44] In other words, although it would not do to dispense with articulations of emotion altogether, it is vital that we interrogate what they 'do' in legal processes, and that we bear in mind that emotions are politically shaped. Helpfully, Ahmed argues that legal articulations of emotion reference an 'involvement in social norms'.[45] For example, in previous years, men were convicted of sodomy or other 'indecency' offences in many countries around the world, including Australia. These offences were often underpinned by articulations of emotion including disgust. Affected individuals and their consensual adult relationships were not considered to be deserving of sympathy, although in recent years, parliaments have begun to pass laws to quash historic convictions on the basis that they were unjust.[46] In our analysis and discussion of VOCAT cases that follow, similar important connections between social norms and emotions can be clearly detected, as the flow-through effect of s1(2)(b) is clearly felt in cases involving alcohol, drugs, gendered violence and 'addiction'.[47] This occurs wherever VOCAT members are dealing with questions about drug use, past criminal offending, and other behaviours (such as unprotected sex, 'risky' practices and sex work) that are often the subject of moral judgement.
>
> In allowing VOCAT members to consider whether victims are 'worthy' of state sympathies, the scheme allows for both the *politicisation of suffering* and the *making of moral judgments* about 'appropriate'/'worthy' victims; this is a significant problem with the scheme and one that we argue needs to be addressed.[48]

In that submission, Seear and colleagues went on to explain how a schematic focus on sympathy was operationalised, especially through provisions of the various state and territory Acts that establish eligibility criteria for crimes compensation. Of particular concern were those provisions that either permit or require crimes compensation decision makers to consider issues such as the character, behaviour, or attitude of applicants for compensation. Focussing in that submission on section 54 of the *Victims of Crime Assistance Act 1996*,[49] the authors argued that a provision which allowed (or required) consideration of the victim's character, behaviour or attitude was especially concerning, including because it enabled: victim-blaming (especially although not only in cases involving family violence and sexual violence); could be stigmatising (e.g. by stigmatising certain alcohol or other drug consumptive practices); reinforced or produced problematic understandings of agency, responsibility and criminality (including through promoting the idea that offenders had limited or reduced agency, responsibility or culpability for offending).

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[43] See for example: Cahn. N. (1992). 'The looseness of legal Language: The reasonable woman standard in theory and practice', *Cornell Law Review*, 77(6), 1398.
[44] Ahmed, S. (2015). *The cultural politics of emotion*. (2nd Ed.) Routledge: New York, 195.
[45] Ahmed, S. (2015). *The cultural politics of emotion*. (2nd Ed.) Routledge: New York, 195.
[46] For a discussion see, for example: Gerber, P. (2014). 'Expunging convictions for gay sex: An old wrong is finally righted', *The Conversation*. https://theconversation.com/expunging-convictions-for-gay-sex-an-old-wrong-is-finally-righted-33013 (accessed 16 October 2017). We note, however, that the expungement scheme did not incorporate compensation.
[47] Noting, however, that this provision is not replicated in *Victims of Crime (Financial Assistance Scheme) Act 2022* (Vic).
[48] Seear, K., Fraser, S., Moore, D., valentine, k. & Keane, H. (2017). Submission to the Victorian Law Reform Commission Review of the Victims of Crime Assistance Act.
[49] See also *Victims of Crime (Financial Assistance Scheme Act 2022* (Vic) 33(a).

In recent work, the lead author of this submission, together with Jamie Walvisch and Liza Miller, has examined the equivalent Western Australian provision.[50] That provision differs from the Victorian one in the sense that its focus is not broadly on character, behaviour or attitude at any point in time, but rather 'any behaviour, condition, attitude, or disposition of the victim that contributed, directly or indirectly, to the victim's injury or death'.[51] The authors argue that the section is problematic in ways that mimic the Victorian Act, but that it additionally allows for explicit consideration of behaviours thought to 'provoke' an act of violence, and note that to this extent the provision appears to repeat flawed logics that have been heavily critiqued in the context of the criminal law and in some instances, outlawed. They argue not for a repeal of the relevant section but for its amendment (in order to avoid any uncertainty or potential unintended consequences), and in a contribution to the world's first feminist legislation project,[52] show how the provision could be rewritten to avoid harmful effects.[53] Other states and territories have similarly concerning provisions, some of which are listed in the Appendix. We support the call for reform here and recommend that relevant and similar provisions in all states and territories be identified and amended.

Recommendation: That provisions in all state and territory crimes compensation legislation that allow for the character, conduct, disposition, behaviour and/or attitude of victims to be taken into account when determining their eligibility for compensation be amended, modelled on amendments by Seear, Walvisch and Miller (forthcoming).

Recommendation: That consideration be given to amending relevant state and territory crimes compensation legislation to remove reference to awards of compensation being a 'symbolic expression' of 'sympathy' (or similar) as an objective of those Acts.

Question 55 – Victims of Crime Commissioners

The Victorian Victims of Crime Commissioner was established in 2015. Whilst the Commissioner plays an important role in advocating for the 'recognition, inclusion, participation and respect of victims of crime',[54] there have been concerns raised about the Commissioner's approach towards marginalized victims of crime, particularly sex workers. In the context of law reforms decriminalising sex work in Victoria, the Commissioner appeared to support a licensing model for sex work premises and a specialist sex industry within the police force,[55] which is not supported by sex worker peer organisations.[56] There was also no substantive discussion of sex workers' experiences as victims of crime in the Commissioner's systemic inquiry into victim participation in the justice system.[57] This could be improved

[50] Seear, K., Walvisch, J. & Miller, E. (Forthcoming). 'Reconsidering the role of the victim in criminal injuries compensation', in Batagol, B., et al.,*The feminist legislation project: Re-writing laws for gender-based justice.* Routledge: London.
[51] *Criminal Injuries Compensation Act 2003* (WA) s 41(a).
[52] Batagol, B., Seear, K., Askola, H. & Walvisch, J. (Forthcoming). *The feminist legislation project: Re-writing laws for gender-based justice.* Routledge: London.
[53] Seear, K., Walvisch, J. & Miller, E. (Forthcoming). 'Reconsidering the role of the victim in criminal injuries compensation', in Batagol, B., et al., *The feminist legislation project: Re-writing laws for gender-based justice.* Routledge: London.
[54] *Victims of Crime Commissioner Act 2015* (Vic) s 13(1)(a).
[55] Victims of Crime Commissioner. (2021) Submission on Victorian Government Discussion Paper: Decriminalising Sex Work.
[56] Vixen Collective. (2016). Submission on Victorian Law Reform Commission Discussion Paper: The Role of Victims in the Criminal Trial Process.
[57] Victims of Crime Commissioner. (2023). *Silenced and sidelined: Systemic inquiry into victim participation in the justice system.*

by amending relevant legislation establishing the Victims of Crime Consultative Committee to ensure that appointment of members of the Committee has regard to diversity.[58]

Recommendation: ***That legislation establishing victims of crime consultative committees, or the like, be amended to ensure that appointment of members has regard to diversity.***

Conclusion

We thank the Commission for the opportunity to make this submission and for their time and consideration and can be contacted via the corresponding author if any further details are required on our submission.

Yours sincerely,

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[58] *Victims of Crime Commissioner Act 2015* (Vic) pt 3 div 3.

Appendix

VICTIMS OF CRIME ASSISTANCE ACT 1996 - SECT 54 (VIC)

Matters to which Tribunal must have regard

In determining whether or not to make an award of assistance or the amount of assistance to award, the Tribunal must have regard to the following:

(a) the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence;

(b) in the case of an application by a related victim—

(i) the character or behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) of the deceased primary victim of the act of violence;

(ii) any obligations owed to the applicant and any other related victim applicants by the deceased primary victim of the act of violence;

(iii) the financial resources (including earning capacity) and financial needs of the applicant and any other related victim applicants;

(iv) if the related victim is a close family member of, or had an intimate personal relationship with, the deceased primary victim of the act of violence, the nature of the relationship between them;

(c) whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation;

(d) any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death;

(e) whether the person by whom the act of violence was committed or alleged to have been committed will benefit directly or indirectly from the award;

(f) any other circumstances that it considers relevant.

CRIMINAL INJURIES COMPENSATION ACT 2003 - SECT 41 (WA)

41 . Behaviour etc. of victim to be considered

In deciding whether or not to make a compensation award, or the amount of a compensation award, in favour of a victim, or a close relative of a deceased victim, an assessor —

(a) must have regard to any behaviour, condition, attitude, or disposition of the victim that contributed, directly or indirectly, to the victim's injury or death; and

(b) may, if he or she thinks it is just to do so —

(i) refuse to make a compensation award because of that contribution; or

(ii) reduce the amount that the assessor would otherwise have awarded.

VICTIMS RIGHTS AND SUPPORT ACT 2013 - SECT 44 (NSW)

Reasons for not approving the giving of victims support or for reducing amount of financial support or recognition payment

44 REASONS FOR NOT APPROVING THE GIVING OF VICTIMS SUPPORT OR FOR REDUCING AMOUNT OF FINANCIAL SUPPORT OR RECOGNITION PAYMENT

(1) In determining whether or not to approve the giving of victims support, and in determining the amount of financial support to be given or recognition payment to be made, the Commissioner must have regard to the following--

(a) any behaviour (including past criminal activity), attitude or disposition of the primary victim concerned that directly or indirectly contributed to the injury or death sustained by the victim,
(d) whether the victim participated in the commission of the act of violence or act of modern slavery, encouraged another person to commit the act of violence or act of modern slavery or otherwise gave assistance to any person by whom the act of violence or act of modern slavery was committed,
(e) whether the victim has failed to provide reasonable assistance to any person or body duly engaged in the investigation of the act of violence or act of modern slavery or in the arrest or prosecution of any person by whom the act of violence or act of modern slavery was committed or alleged to have been committed,
(f) whether the victim failed to take reasonable steps to mitigate the extent of the injury sustained by the victim, such as seeking appropriate medical advice or treatment, as soon as practicable after the act of violence or act of modern slavery was committed,
(g) such other matters as the Commissioner considers relevant.

(3) In determining the matter referred to in subsection (1) (f) in the case of an act of violence or act of modern slavery involving sexual assault or domestic violence, the Commissioner must have regard to the nature of the relationship between the victim and the person or persons by whom the act of violence or act of modern slavery is alleged to have been committed.

(3A) In determining a matter referred to in subsection (1) or (2) in the case of an act of modern slavery, the Commissioner must have regard to the nature of the relationship between the victim and the person or persons by whom the act of modern slavery is alleged to have been committed.

(4) In determining the amount of financial support to be given or the recognition payment to be made to a person, the Commissioner must have regard to--

(a) any amount that has been paid to the person or that the person is entitled to be paid--
(i) by way of damages awarded in civil proceedings, or
(ii) under any other Act or law (including workers compensation), or
(iii) under any insurance or other agreement or arrangement, and
(b) any other amount that has been received by the person or that (in the opinion of the Commissioner) is likely to be received by the person, in respect of the act of violence or act of modern slavery to which the application for financial support or a recognition payment relates.

(5) If the Commissioner is satisfied that the applicant may be entitled to workers compensation (or payment in the nature of workers compensation) in respect of the act of violence or act of modern

slavery to which the application relates, the Commissioner is to postpone the determination of the application until any entitlements to workers compensation have been determined.

(6) If the Commissioner is satisfied that the applicant may be entitled to death and disability payments under Part 9B of the *Police Act 1990* in respect of the act of violence or act of modern slavery to which the application relates, the Commissioner is to postpone the determination of the application until any entitlements to those payments have been determined.

(6A) If the Commissioner is satisfied that an applicant for victims support, who is a family victim referred to in section 25 (2A), may be entitled to any damages under the *Compensation to Relatives Act 1897* , or any payment under the *Motor Accident Injuries Act 2017* , in respect of the act of violence or act of modern slavery to which the application relates, the Commissioner is to postpone the determination of the application until any entitlement to those damages or to that payment (as the case may be) has been determined.

(7) The Commissioner may postpone the determination of a person's application pending the determination of another application for financial support or a recognition payment if the person has been convicted of an offence that is a **"relevant offence"** under section 58 in relation to that other application.

VICTIMS OF CRIME ASSISTANCE ACT 2009 - SECT 80 (QLD)

No grant to particular persons if primary victim's activities caused act of violence

80 NO GRANT TO PARTICULAR PERSONS IF PRIMARY VICTIM'S ACTIVITIES CAUSED ACT OF VIOLENCE

(1) The government assessor can not grant assistance to a primary victim of an act of violence if the government assessor is satisfied, on the balance of probabilities, the only reason, or the main reason, the act of violence was committed against the primary victim was—

(a) because the victim was involved in a criminal activity when the act of violence happened; or
(b) because of the victim's previous involvement in a criminal activity, whether or not the victim is currently involved in the criminal activity.

(2) The government assessor can not grant assistance in relation to an act of violence to a person who is not the primary victim of the act if the government assessor is satisfied, on the balance of probabilities—

(a) the only reason, or the main reason, the act of violence was committed against the primary victim of the act was a reason mentioned in *subsection (1) (a)* or *(b)* ; and
(b) the person was, or ought reasonably to have been, aware of the primary victim's involvement in the criminal activity.

(3) *Subsection (2)* does not apply if the person was aware of the primary victim's involvement in the criminal activity only because the person witnessed the act of violence.

(4) In deciding whether a primary victim of an act of violence was involved in a criminal activity, the government assessor may have regard to the following—

(a) any information, or the contents of any document, about the act of violence obtained under *section 65* or *66* ; and
(b) the circumstances of the offences to which the convictions mentioned in the victim's criminal history relate, including—
(i) when the offences happened; and
(ii) the seriousness of the offences; and
(iii) the primary victim's age when the offences happened; and
(iv) the regularity of the offences; and
(c) any other matters the assessor considers relevant for assessing the primary victim's involvement in a criminal activity.