



LAW REFORM COMMITTEE

Restitution for Victims of Crime

INTERIM REPORT

NOVEMBER 1993

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TABLE OF CONTENTS

| | |
|--|------------------|
| Functions of the Committee | Page ix |
| Terms of Reference | xi |
| Chairman's Foreword | xiii |
| Overview | xv |
| Summary of Recommendations and Issues | xix |
| 1. Introduction | Paragraph |
| The Inquiry | 1.1 |
| Interests of Victims | 1.6 |
| Focus of Inquiry | 1.13 |
| Matters Not Covered | 1.14 |
| Major Themes | 1.19 |
| Public Attitudes to Restoration | 1.21 |
| Objectives | 1.24 |
| Conduct of Inquiry | 1.26 |
| Empirical Evidence | 1.33 |
| Structure of Report | 1.36 |
| Practical Limitations | 1.40 |
| 2. General Principles | |
| Definitions | 2.1 |
| Restitution Order | 2.8 |
| Compensation Order | 2.9 |
| Compensation for Personal Injuries | 2.10 |
| Reparation Provisions - Historical Overview | 2.13 |
| Restitution Orders | 2.13 |
| Compensation Orders | 2.26 |
| Operation of Part 4 of the <i>Sentencing Act</i> | 2.39 |
| The State, the Offender and the Victim | 2.44 |
| State and Offender | 2.46 |
| State and Victim | 2.52 |
| Offender and Victim | 2.54 |
| Reparation as an Aim in Sentencing | 2.58 |
| 3. Relationship to Sentencing Options | |
| Introduction | 3.1 |
| Reparation Orders and Sentencing Orders | 3.4 |

| | |
|--|-------|
| Reparation as a Mitigating Factor | 3.7 |
| Reparation as an Independent Criminal Sanction | 3.21 |
| Reparation as a Condition of Sentence | 3.41 |
| The Empirical Evidence | 3.51 |
| United Kingdom | 3.52 |
| New Zealand | 3.58 |
| Victoria | 3.62 |
| Making the Order | 3.68 |
| Reparation and Sentencing Options | 3.75 |
| Reparation and Custodial Sentences | 3.75 |
| Reparation and Suspended Sentences | 3.78 |
| Reparation and Non-Custodial Sentences | 3.82 |
| Reparation and Fines | 3.83 |
| Sentence or Condition of Order? | 3.84 |
| Reparation Orders in the Sentencing Hierarchy | 3.86 |
| | |
| 4. Obtaining and Making Reparation Orders | |
| Elements of Liability | 4.1 |
| Legislation | 4.1 |
| Restitution Orders | 4.15 |
| Compensation Orders | 4.33 |
| Young Offenders | 4.39 |
| Application | 4.50 |
| The Role of the Police | 4.56 |
| The Role of the Prosecution | 4.67 |
| A Presumption in Favour of Reparation | 4.78 |
| Joining Criminal and Civil Proceedings | 4.94 |
| Factors Relevant to the Exercise of the Discretion | 4.109 |
| The Financial Means of the Offender | 4.110 |
| Other Sentencing Orders | 4.129 |
| Evidentiary and Procedural Considerations | 4.137 |
| Appeals | 4.159 |
| Other Matters | 4.175 |
| Jurisdictional Limits | 4.175 |
| Standard of Proof | 4.183 |
| Proof of Ownership | 4.192 |
| Return of Property | 4.196 |
| Rationalisation of Part 4 | 4.201 |
| | |
| 5. Enforcement Procedures | |
| Introduction | 5.1 |
| Civil Model | 5.3 |
| Criminal Model | 5.15 |
| Direct Payment | 5.25 |
| Victims' Civil Rights | 5.29 |
| Enforcement Practice | 5.44 |

| | |
|---|-------|
| United Kingdom | 5.47 |
| New Zealand | 5.49 |
| Victoria | 5.51 |
| Convergence of Civil and Criminal Models | 5.70 |
| Reparation as a Sanction or Condition | 5.71 |
| Civil v. Criminal Enforcement of Reparation | 5.75 |
| Improving Existing Civil Enforcement Procedures | 5.80 |
| Interaction of Civil and Criminal Models | 5.88 |
| Other Options | 5.98 |
| 6. Mediation and Reparation | |
| Introduction | 6.1 |
| Mediation | 6.5 |
| Mediation in the Victim/Offender Context | 6.10 |
| Victim/Offender Reconciliation Programs | 6.13 |
| Models and Uses | 6.13 |
| Underlying Assumptions | 6.16 |
| Goals of Existing Overseas Programs | 6.21 |
| Goals of Australian Pilot Projects | 6.22 |
| Restoration as part of Victim/Offender Mediation | 6.25 |
| Advantages of Victim/Offender Mediation | 6.28 |
| Concerns about Victim/Offender Mediation | 6.29 |
| Australian Pilot Projects | 6.30 |
| The New Zealand Family Group Conference | 6.37 |
| Experience to Date | 6.39 |
| Evaluation of Overseas Programs | 6.39 |
| Evaluation of Recent Australian Pilot Projects | 6.61 |
| Pre-Conditions for Successful Mediation | 6.72 |
| Selection, Training, Qualifications and Certification | 6.78 |
| Safeguards for Victims, Offenders and Mediators | 6.84 |
| Consultation | 6.86 |
| The Role of Reparation in Victim/Offender Programs | 6.87 |
| Mediation and Sentencing | 6.94 |
| Part of Sentencing Disposition | 6.97 |
| Pre-Condition to Sentencing | 6.104 |
| Conclusions | 6.107 |
| 7. Related Issues | |
| Introduction | 7.1 |
| State Satisfaction of Reparation Orders | 7.3 |
| Victim Levy | 7.3 |
| Proceeds of Crime | 7.10 |
| Hypothecation of Fines | 7.11 |
| Support and Information Services | 7.21 |
| Central Referral Service | 7.23 |
| Victims' Advocacy Service | 7.28 |

| | |
|--|------------|
| Advice on Enforcement Procedures | 7.31 |
| Personal Injury Compensation Schemes | 7.34 |
| Crime Statistics Bureau and Judicial Studies Board | 7.38 |
| Crime Statistics Bureau | 7.39 |
| Judicial Studies Board | 7.46 |
| Financial and Administrative Impact | 7.51 |
| 8. Conclusion | 8.1 |
| Appendix I - Written Submissions | |
| Appendix II - Oral Submissions | |
| Appendix III - Relevant Provisions of the <i>Sentencing Act</i> | |
| Appendix IV - Diagrammatical representation of the operation of the provisions of Part 4 of the <i>Sentencing Act</i> | |
| Appendix V - Data on the making of reparation orders in Victorian Magistrates' Courts | |
| Appendix VI - Select Bibliography | |

FUNCTIONS OF THE COMMITTEE

Parliamentary Committees Act 1968

- 4E.** The functions of the Law Reform Committee are—
- (a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;
 - (b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

TERMS OF REFERENCE

Under the powers found in section 4F (1) (a) (ii) of the *Parliamentary Committees Act 1968*, the Governor in Council refers the following matter to the Law Reform Committee:

To enquire into and report to Parliament on whether the existing legislation procedures and administrative arrangements that currently provide for restitution to victims of crime are adequate with particular reference to—

- (a) the enforcement procedures for restitution orders;
- (b) the relationship of restitution orders to current sentencing options;
- (c) the role of mediation in restitution.

CHAIRMAN'S FOREWORD

This is the Interim Report to Parliament of the Law Reform Committee on its reference concerning Restitution for Victims of Crime.

The Committee makes a number of draft recommendations for changes to existing legislative and administrative arrangements that provide for restitution to victims of crime. A number of issues for further discussion are also highlighted at the beginning of the Report.

The draft recommendations relate to procedures for the enforcement of restitution orders, the relationship between restitution orders and current sentencing options and the role of mediation between victim and offender in bringing about restitution.

The Committee invites written submissions on the draft recommendations. Written submissions should be sent to the Secretary to the Committee by 18 February 1994. Once these have been considered, the Committee will hold further public hearings in the early part of 1994 before it proceeds to prepare its Final Report which it expects to table around March 1994. It will reject, adopt or modify the draft recommendations and may add recommendations on other issues raised in this Interim Report.

Like sentencing generally, and, indeed, the whole criminal law, restitution to victims of crime is inevitably an unsatisfactory area of human life. Many conflicting individual and community interests are involved and, in the end, the ability of offenders to make reparation to their victims is usually so limited that modest gains for victims and the community are all that is to be expected. Nonetheless, the losses of victims are substantial and even now the number of restitution and compensation orders made by courts are far from negligible. The Committee believes that useful advances can be made and that this Report addresses the needs of victims of property crime whilst, at the same time, achieving an appropriate balance between the interests of victims, offenders and the state.

As Chairman of the Committee, I express my gratitude to all those who have assisted in the conduct of the Inquiry, particularly the Committee's staff and its consultants. The Chairman is nominally responsible for drafting the Report but I should acknowledge that the former Secretary to

the Committee, Sturt Glacken, has played a central and essential role in research, co-ordination and direction of research and the writing of successive drafts of this Report.

The Committee looks forward to receiving responses to its draft recommendations and the issues raised for further discussion.

Hon. James Guest, MLC
Chairman

Compensation will answer the purpose of punishment but punishment will not answer the purpose of compensation. By compensation therefore the two great ends of justice are both answered at a time, by punishment only once.

Jeremy Bentham

1. This is the Interim Report of the Victorian Parliamentary Law Reform Committee on its Inquiry into Restitution for Victims of Crime.
2. The Report examines existing legislative and administrative arrangements that provide for restitution to victims of crime with particular reference to:
 - the enforcement procedures for restitution orders;
 - the relationship of restitution orders to current sentencing options;
 - the role of mediation in restitution.
3. The focus of the Report is on the principles and procedures governing the making of restitution and compensation orders pursuant to the provisions of Part 4 of the *Sentencing Act 1991*. 'Restitution' involves the act of restoring or giving back a thing to its proper owner. 'Compensation' involves the making of a monetary payment in recompense for loss or damage. 'Reparation' covers both restitution and compensation.
4. Part 4 of the *Sentencing Act* is concerned with the making of reparation orders by a sentencing court in the favour of victims for property loss or damage arising from the commission of a criminal offence. Reparation orders require offenders to restore property loss or damage suffered by victims.
5. Statutory provisions enabling sentencing courts to order restitution or compensation were first introduced to provide incentives to victims to assist in the prosecution of offenders and to relieve victims from the hardship that flowed from the forfeiture to the Crown of all property in the

possession of a convicted offender. Over time, however, reparation orders came to be viewed as providing a summary means for the recovery of property loss or damage. Flowing from that, reparation orders are not seen as forming part of the sentence and are considered as civil orders made in the sentencing process enforceable, not by the state, but by the victim in whose favour the order is made.

6. The Committee believes that the restoration of victim losses is a legitimate aim of sentencing and is consistent with the traditional aims of sentencing in a number of ways, including:

- First, in restoring the balance, reparation may accord with the just punishment for an offence.
- Secondly, reparation may serve as a deterrent either by ensuring that offenders do not profit from their offences or by making the act of reparation so unpleasant that the offender will be dissuaded from repetition.
- Thirdly, reparation may serve rehabilitative purposes in that the act of making reparation may be the first step in an offender's change of attitude and behaviour.
- Finally, reparation may serve the denunciatory aims of sentencing by making it clear that conduct which damages the property interests of others is unacceptable to the community.

7. The Committee therefore believes that the restoration of victim losses should be viewed as an aim of sentencing.

8. The reparation order can have a dual purpose of compensating victims and punishing offenders. The Committee believes that the reparation order should be more closely integrated into the sentencing process. The Committee also believes that reparation can be viewed as a sentencing sanction in its own right to the extent that imposition of a reparation order, whether alone or in combination with other sentencing orders, constitutes just punishment for the crime.

9. It is important that the restoration of victim losses be given due recognition by sentencing courts and that it not simply be viewed as an afterthought in the sentencing process. It is also important that police and prosecuting authorities be encouraged to provide adequate support and information to victims so they can pursue their rights to seek reparation.

10. The process for the obtaining and making of reparation orders can, in the Committee's view, be simplified. Sentencing courts should, wherever

possible, make reparation orders in all eligible cases. The Committee therefore believes that sentencing courts should be required to give and record reasons in cases where they do not order reparation and that sentencing courts have power to make an order on their own motion in the absence of an application.

11. Sentencing courts, however, should retain a discretion on whether to entertain an application for reparation where it may be more suitable for the claim to be dealt with in the civil courts. This is particularly the case where consideration of an application for a reparation order may lead to undue delays in the sentencing process.

12. The Committee is concerned that current procedures for the enforcement of reparation orders are inadequate. It believes that criminal enforcement procedures are more effective and economical. The Committee therefore concludes that reparation orders should be enforced in the same manner as that provided for in relation to fines.

13. Mediation between victim and offender has the potential to address the needs of both victims and offenders. The process of mediation between victim and offender also has the potential of promoting the restoration of victim losses. Restoration, as an outcome of mediation, may also take wider forms than material reparation of the type provided for in Part 4 of the *Sentencing Act*.

14. The Committee therefore supports the introduction of two types of victim/offender mediation pilot programs. The first model integrates mediation into the sentencing process so that mediation takes place after an offender is found guilty but before sentence is imposed so that the results of mediation can be considered by the sentencing court. The second model involves mediation taking place at a community level before an offender is charged and participation in mediation, in appropriate cases, can be viewed as an alternative to the formal criminal justice system. The Committee does not support any further extension of such programs until the long term effects of victim/offender mediation are better known.

15. In order to give proper recognition to the interests of victims in the criminal justice process, a number of other matters need attention, particularly the provision of support and information services to victims of crime.

16. More can be done, in the Committee's view, to accord proper recognition to the interests of victims in the criminal justice system. Whilst the Committee's proposals go some way towards meeting that objective, there is still more to be done.

SUMMARY OF RECOMMENDATIONS AND ISSUES

Set out below are the Committee's Draft Recommendations for changes to existing legislative and administrative arrangements relating to the making and enforcement of restitution and compensation orders by sentencing courts. Further, at the end of the Summary of Draft Recommendations, the Committee notes a number of additional matters on which it believes it has not received sufficient material to form a considered view as well as some on which its present view is that no action should be taken. The Committee invites submissions on these matters as well as the Draft Recommendations as part of its consultation on the Interim Report so that these other matters may also be addressed in its Final Report.

Draft Recommendation 1

That section 5(1) of the *Sentencing Act* be amended to provide that the purposes for which sentences may be imposed include the restoration of victim losses to the extent that imposition of a sentence for that purpose reinforces or supports other sentencing purposes. **(Para. 2.63)**

Draft Recommendation 2

That section 5(2)(c) of the *Sentencing Act* be amended to provide that in determining the sentence to be imposed, sentencing courts should have regard to the impact the offence had on persons affected by the offence. **(Para. 2.68)**

Draft Recommendation 3

That section 7 and Part 4 of the *Sentencing Act* be amended to provide that reparation orders constitute sentencing orders and may be made in addition to, or in substitution for, any sentence that can be imposed. **(Para. 3.85)**

Draft Recommendation 4

That section 5(7) of the *Sentencing Act* be amended to provide that courts must not impose a fine unless the purpose served cannot be met by the making of a reparation order. **(Para. 3.91)**

Draft Recommendation 5

In the event the Scrutiny of Acts and Regulations Committee receives a reference on *Redundant Legislation*, it is recommended that the Scrutiny of Acts and Regulations Committee examine, as part of that inquiry, the utility of reparation provisions dealing with the powers of criminal courts with a view to determining whether such provisions should be repealed or consolidated within the *Sentencing Act*. **(Para. 4.10)**

Draft Recommendation 6

That section 84 of the *Sentencing Act* be amended by:

- deleting references to 'stolen goods' and replacing such references with the expression 'stolen property' and making necessary consequential amendments;
- extending the power in section 84(1)(b) to situations where the proceeds of stolen property are in the possession or control of third parties;
- providing that courts may make any necessary ancillary order to give effect to an order for the restoration of stolen property. **(Para. 4.32)**

Draft Recommendation 7

That section 86 of the *Sentencing Act* be amended to make clear that compensation orders may include provision for consequential losses and should not be limited to the value of the property. **(Para. 4.37)**

Draft Recommendation 8

That the present model for the making and enforcing of reparation orders under the *Children and Young Persons Act 1989* not be altered until further consideration is given to the special circumstances of young offenders. **(Para. 4.46)**

Draft Recommendation 9

That:

- the Victoria Police be required to develop administrative procedures for advising victims of their rights to reparation orders, for ascertaining whether victims wish to apply for such orders and, if so, for collecting information needed in support of such applications;

- consideration be given to amending the standard Crime Report to include information on the rights of victims to seek reparation orders in cases involving property loss or damage;
- the Victoria Police be required to develop administrative procedures for informing victims whether a reparation application is to be made and whether an order has been made in their favour. **(Para.4.66)**

Draft Recommendation 10

That prosecuting authorities develop guidelines for the exercise of the discretion to apply for a reparation order and for informing victims of their rights to have an application made and of the outcome of any such application. **(Para. 4.73)**

Draft Recommendation 11

That Part 4 of the *Sentencing Act* be amended to provide that in cases where there is evidence of property loss or damage but the court does not make a reparation order, the court should record in writing its reasons for refusing to make the order. **(Para. 4.86)**

Draft Recommendation 12

That sections 84 and 86 of the *Sentencing Act* be amended to provide that reparation orders may be made on application or on the court's own motion. **(Para. 4.89)**

Draft Recommendation 13

That the *Sentencing Act* be amended to provide that in cases where victims wish to pursue their civil rights instead of having a reparation order made in a sentencing court, they may prevent a reparation application being made and that police and prosecuting authorities develop procedures to give effect to this recommendation. **(Para. 4.92)**

Draft Recommendation 14

That Part 4 of the *Sentencing Act* be amended to provide that where, on hearing a reparation claim, the sentencing court declines to determine the claim due to its complexity, or because of the absence of sufficient evidence, the sentencing court may:

- adjourn the hearing of the claim in order to call additional evidence and may give directions as to the conduct of the claim; or

- in cases where it is satisfied as to liability but there is insufficient evidence to assess the appropriate order, refer the claim to a civil court, with or without procedural directions. **(Para. 4.107)**

Draft Recommendation 15

That section 86 of the *Sentencing Act* be amended to provide that courts 'must' as far as practicable take account of the financial means of offenders in determining the amount of a compensation order and that guidelines be developed to assist courts in having regard to the amount of income offenders need to support themselves and their dependents when determining the amount of a compensation order and the method of payment. **(Para. 4.127)**

Draft Recommendation 16

That:

- (a) the *Sentencing Act* and the Rules of the Supreme, County and Magistrates' Courts be amended to prescribe procedures for the making of reparation applications;
- (b) the prescribed procedures include provision for:
 - the giving of written notice by prosecutors, informants or victims to accused persons of an intention to make a reparation application;
 - such written notice to specify the terms of the reparation order being sought and to be accompanied by supporting material setting out details of the loss or damage claimed;
 - accused persons to have an opportunity to give a written response (including, if necessary, the delivery of affidavit material) setting out the grounds on which the claim is disputed.
- (c) the steps described at (b) be completed prior to the first mention day of a charge;
- (d) sections 84(7) & (8) and 86(8) & (9) of the *Sentencing Act* be amended to:

- remove the current restriction that courts are only to order reparation where the relevant facts appear from the evidence that would be admissible on the hearing of the criminal charge; and
- make it clear that sentencing courts may call for additional evidence on the hearing of reparation claims in order to dispose of such claims.

(Para. 4.153)

Draft Recommendation 17

That section 84 of the *Sentencing Act* be amended to provide that a restitution order can only be made where the sentencing court is 'satisfied' that there has been property loss and that the claimant is entitled to recover the property in question.

(Para. 4.191)

Draft Recommendation 18

That consideration be given to consolidating sections 84 to 87 of the *Sentencing Act* so as to make consistent the powers of sentencing courts to order restitution or compensation.

(Para. 4.203)

Draft Recommendation 19

That reparation orders should be subject to the same enforcement procedures as that applicable to fines.

(Para. 5.79)

Draft Recommendation 20

That provision be made that if reparation orders are to be enforced in the same manner as fines, the civil rights of a victim are to be preserved notwithstanding any conversion by an offender of the reparation order on default. **(Para. 5.95)**

Draft Recommendation 21

That:

- the court based pre-sentence mediation pilot program being implemented by the Correctional Services Division be the subject of a thorough evaluation as to its effectiveness and its impact on the sentencing process;

- after appropriate consultation, consideration be given to introducing a community based pre-court diversionary mediation program;
- the introduction of any further mediation programs be deferred pending assessment of the effectiveness of current programs;
- any future mediation programs be based on the considerations outlined by the Committee in terms of the aims of such programs, the training and selection of mediators, the confidentiality of the process, the enforcement of outcomes and the impact on the sentencing process. **(Para. 6.116)**

Draft Recommendation 22

That further consideration be given to the establishment of a mechanism for the provision of support and information services to victims of crime. **(Para. 7.16)**

Draft Recommendation 23

That a central referral service be established to provide initial counselling, information, advice and referral services to victims of crime. **(Para. 7.27)**

Draft Recommendation 24

That, subject to the outcome of the review of the *Criminal Injuries Compensation Act 1983* to be undertaken by the Government, consideration be given to conferring on sentencing courts a power to order compensation for personal injury in straightforward cases, subject to an upper monetary limit, in the same manner as that currently provided for in relation to property damage under Part 4 of the *Sentencing Act*. **(Para. 7.37)**

Draft Recommendation 25

That the Government act on the recommendations made by the Legal and Constitutional Committee for the establishment of an independent Bureau of Crime Statistics for Victoria. **(Para. 7.43)**

Draft Recommendation 26

That further research be conducted on the use and enforcement of reparation orders in Victoria and that such research encompass, in both qualitative and quantitative terms:

- the frequency with which reparation orders are made in eligible cases;

- _ the factors which cause courts not to make reparation orders;
- _ the ways in which reparation orders are combined with sentencing options;
- _ the operation of reparation as a mitigating factor in sentencing;
- _ the consideration of the financial means of offenders in making reparation orders;
- _ the number and monetary amounts of reparation orders;
- _ the extent to which reparation orders are satisfied and the time and costs involved in achieving compliance and the steps taken to enforce such orders;
- _ the differences in compliance rates (including an analysis of the extent of satisfaction, the time taken and the public and private costs of compliance) between the criminal enforcement of fines and the civil enforcement of reparation orders and judgment debts. **(Para. 7.45)**

Draft Recommendation 27

That the Judicial Studies Board be given the financial and administrative support needed for it to fulfil its statutory functions. **(Para. 7.50)**

ADDITIONAL MATTERS

In addition to the matters the subject of the above Draft Recommendations, the Committee invites submissions on the issues noted below.

Legislation

Is there a need for miscellaneous statutory provisions dealing with the powers of criminal courts to order reparation to be reviewed and consolidated?

(Paras 4.1 – 4.11)

Young Offenders

Should the legislative model for the making and enforcement of reparation orders be uniform in its application to all offenders? In the case of young

offenders, are there special considerations which require such offenders to be treated differently?

(Paras 4.39 – 4.49)

The Clear Case Requirement

Should sentencing courts retain their discretion on whether to deal with a reparation application in complex cases? If so, what considerations should guide the exercise of the discretion? If the reparation order is to be treated as a sentencing order, is it appropriate to retain the discretion?(Paras 4.136 – 4.157)

Appeals

If there is to be a presumption in favour of the making of a reparation order, how should a failure on the part of sentencing courts to order reparation in an eligible case be remedied? **(Paras 4.158 – 4.173)**

Jurisdictional Limits

Should the powers of sentencing courts to order reparation be subject to the monetary jurisdictional limits applicable to civil cases? **(Paras 4.174 – 4.181)**

Proof of Ownership

Should specific legislative provision be made for ownership to be proved readily by the use of statutory declarations, conclusive certificates or the like?

(Paras 4.191 – 4.194)

Return of Property

Should current statutory provisions dealing with the powers of courts and police and prosecuting authorities to deal with the property be rationalised?

(Paras 4.195 – 4.199)

Direct Payment

To what extent can the powers available under proceeds of crime legislation be used to satisfy reparation orders?

(Paras 5.25 – 5.28)

Enforcement

Is it possible to develop a hybrid model for the enforcement of reparation orders through the use of both civil and criminal means of enforcement? Is it possible to use other options for the satisfaction of reparation orders?(Paras 5.88 – 5.101)

Mediation - Young Persons and Disabled Persons

What safeguards are needed to ensure that any participation in mediation programs by young persons and disabled persons is done on a voluntary basis?

(Paras 6.72 – 6.77)

State Satisfaction of Reparation Orders

Is it possible to devise a scheme for the satisfaction of reparation orders from a central fund? How might such a scheme operate? **(Paras 7.3 – 7.20)**

Victims' Advocacy Service

Is there a need to establish a victims' advocacy service? How might such a service operate and how would it be financed? **(Paras 7.28 – 7.30)**

Advice on Enforcement Procedures

Is there a need for victims in whose favour reparation orders are made to be given special advice and assistance on the enforcement of such orders?

(Paras 7.31 – 7.33)

Financial and Administrative Impact

What might be the financial and administrative impact of the Committee's draft proposals, if implemented? **(Paras 7.51 – 7.55)**

THE INQUIRY

1.1 This is the Interim Report of the Victorian Parliamentary Law Reform Committee on its inquiry into Restitution for Victims of Crime and is tabled in the Parliament pursuant to section 4N(1)(a) of the *Parliamentary Committees Act 1968*.

1.2 The Governor in Council on 22 December 1992 referred to the Law Reform Committee the matter of restitution for victims of crime. Pursuant to section 4F(1)(a)(ii) of the *Parliamentary Committees Act* the Committee was asked to enquire into and report to Parliament on whether the existing legislation, procedures and administrative arrangements that provide for restitution to victims of crime are adequate with particular reference to -

- the enforcement procedures for restitution orders;
- the relationship of restitution orders to current sentencing options;
- the role of mediation in restitution.

1.3 In this Interim Report, the Committee makes a number of draft recommendations for changes to existing legislative and administrative arrangements relating to the restoration of victim losses for property loss or damage arising as a result of a criminal offence.

1.4 The Committee has decided to make draft rather than final recommendations in order to allow for further community consultation on the matters raised by the inquiry. As indicated in the Chairman's Introduction, the Committee invites written submissions on the draft recommendations and, once these have been considered, intends to hold public hearings to canvas issues arising from the draft recommendations and the responses to those draft recommendations. Once that process is completed, the Committee will deliberate further with a view to deciding which draft recommendations ought to be adopted or rejected, with or without modification, as final recommendations and will table its Final Report setting out the conclusions of those deliberations in the early part of 1994.

1.5 By section 4O(2) of the *Parliamentary Committees Act*, the responsible Minister, in this instance the Attorney General, the Honourable Jan Wade MP, is required, within six months of the tabling of the Committee's Report, to advise the Parliament as to the action (if any) the Government proposes to take in response to recommendations made by the Committee. The Committee wishes to make it clear that it is not until it tables its Final Report and adopts the draft recommendations as its final recommendations that the six month period in section 4O(2) commences to run. Nonetheless, in the intervening period the Committee would welcome any preliminary comments from the Attorney General and other relevant Ministers as part of its process of community consultation.

INTERESTS OF VICTIMS

1.6 It is now generally accepted that the interests and needs of victims should be accorded a more significant role in the criminal justice system. The increased concern with the rights of victims has been reflected by the introduction in Victoria of schemes for the compensation of victims of crime for personal injuries in 1972 and by the inquiries and resulting amendments to the statutory provisions which govern the making of restitution and compensation orders done with a view to making them more effective.

1.7 This Report is the latest of a series of reports in this State which have examined these matters. In June 1985 the Committee's predecessor, the Legal and Constitutional Committee of the Parliament, was requested to consider, among other matters:

The adequacy of existing legislative provisions and administrative procedures relating to the accountability of offenders to their victims and the payment of compensation to victims of crime.

The Legal and Constitutional Committee took as its basic premise that:

The notion of restitution is a constructive one which serves a number of purposes. First, it involves a recognition of victims of crime and has the potential to facilitate the restoration of their material position. It also requires offenders to take responsibility for their actions and thus may perform some rehabilitative function. Finally, restitution relieves the State of the burden of compensating property loss arising out of criminal acts.¹

1.8 The Committee's *Report upon Support Services for Victims of Crime*, tabled in November 1987, reviewed the operation of the *Criminal Injuries*

¹Legal and Constitutional Committee, *Report upon Support Services for Victims of Crime*, Parliamentary Paper No. 59 (1987) at 28.

Compensation Act 1983 and the *Penalties and Sentences Act 1985* and made a wide-ranging series of recommendations, many of which have been subsequently adopted.

1.9 In October 1985, a Sentencing Committee was established under the chairmanship of Sir John Starke QC to conduct a sweeping examination of Victorian sentencing law and practice. Although restitution and compensation were not matters specifically mentioned in its terms of reference, the Committee was required to examine the effect of various sentencing orders upon victims. Its Report, presented in April 1988, made a number of recommendations concerning the interests of victims.

1.10 At the federal level, the Australian Law Reform Commission has also considered restitution and compensation.² In its Discussion Paper on *Penalties* the Commission noted:³

One of the aims of sentencing outlined by the Commission is that the violation of the individual victim's personal and property rights ought to be redressed. Restitution is one method of seeking to achieve redress. Restitution personalises the offence by inviting the offender to see his or her conduct in terms of the damage and injury done to the victim. It is also based on the implicit assumption that the offender has the capacity to accept responsibility for the offence and that he or she will in many cases be willing to discharge that responsibility by making amends.

1.11 The rights of victims of crime have been recognised in a number of international charters and declarations. Paragraph 8 of the *Declaration of the Basic Principles of Justice Relating to the Rights of Victims of Crime*, adopted at the Seventh United Nations Congress in December 1985 on the Prevention of Crime, for example, provides that:

Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights.

1.12 The recommendations made in 1987 by the Legal and Constitutional Committee and by the Victorian Sentencing Committee in 1988 form an important background to this Report. The Report of the Victorian Sentencing Committee formed the basis of the *Sentencing Act 1991*, which commenced operation in April 1992. The Act modified and clarified the law relating to restitution and compensation in respect of loss or damage to property by providing that:

²Australian Law Reform Commission, Discussion Paper No.30, *Sentencing: Penalties* (1987) and Australian Law Reform Commission, Report No. 44, *Sentencing* (1988).

³Australian Law Reform Commission (1987) at 41.

- restitution and compensation orders can be made following a finding of guilt; they do not require a conviction as a precondition;
- restitution and compensation orders can be made in addition to any other sentencing order;
- restitution and compensation orders can be made in relation to offences taken into consideration;
- if a court is contemplating the imposition of a fine, it must take into account the fact that an offender may be required to make restitution or compensation when considering the financial circumstances of the offender;
- a court must give preference to restitution or compensation if an offender has insufficient means to pay both a fine and compensation;
- an application for a restitution and compensation order may be made by the Director of Public Prosecutions or the informant or police prosecutor on behalf of the person seeking such an order, although these parties are not obliged to make such an application.

The Act also states that one of its purposes is 'to ensure that victims of crime receive adequate compensation and restitution'.⁴

FOCUS OF INQUIRY

1.13 The primary focus of this Report is on the principles and procedures governing the making and enforcement of restitution and compensation orders pursuant to the provisions of Part 4 of the *Sentencing Act*. Despite the very recent amendments to the restitution and compensation provisions, the Committee considers that a number of matters require further attention in order to render reparation orders more effective in the interests of victims of crime. Among other things, the Committee has been concerned to determine whether:

- more orders should or could be made if courts were required to make a restitution or compensation order in any case where there was evidence of property loss or damage;

⁴*Sentencing Act 1991*, section 1(i).

- it should be mandatory for prosecutors or informants to make applications on behalf of victims if so requested;
- courts should be permitted to decline to make an order if the matter requires extensive investigation;
- the civil remedies of victims of crimes would be made more effective if, in a subsequent civil case, it were not necessary for the victim to re-establish all the facts which were proven at the trial of the offence;
- mediation may provide an appropriate means for bringing about restitution or compensation;
- there are more effective means by which restitution and compensation orders can be enforced.

MATTERS NOT COVERED

1.14 The provisions of Part 4 of the *Sentencing Act* deal with offences related to property not with personal injury. Material placed before the Committee⁵ has made it clear that there is widespread community concern regarding the operation of the provisions of the *Criminal Injuries Compensation Act 1983* and the provision of support services to persons affected by crime.

1.15 It has been necessary for the Committee to touch on these wider yet related concerns, particularly those dealing with the provision of information and support to victims. For example, the obtaining of a restitution or compensation order is premised on the assumption that victims are aware of their rights in that regard. This, in turn, raises the question as to whether persons affected by crime receive adequate advice from service providers as to their ability, for example, to obtain redress through the making of restitution or compensation orders.

1.16 The Committee believes that there is an urgent need to review the workings of the *Criminal Injuries Compensation Act* and has identified some of the issues that require consideration. The Committee has also considered the possible interaction or overlap between systems for compensating property losses and personal injuries arising from criminal conduct.

1.17 It is beyond the Committee's terms of reference to examine in any detail the operation of proceeds of crime legislation such as the *Crimes*

⁵For example, Written Submissions 1, 2 and 3; Hansard 25 March 1993.

(Confiscation of Profits) Act 1986 providing for the imposition of pecuniary penalties and the forfeiture of property used in connection with an offence. In some parts of the Report, however, reference is made to the relationship between orders made under that Act and sentencing principles.

1.18 For there to be a more comprehensive examination of the mechanisms in place for the restoration of victim losses, it is necessary, in the Committee's view, to consider the law relating to the seizure, confiscation and forfeiture of the proceeds of crime. It is also necessary to consider the substantive and procedural law dealing with the rights of parties to deal with property pending the determination of criminal charges or a civil dispute. Accordingly, in some respects, this Report should be viewed as the first step towards the development of an effective system for the restoration of victim losses.

MAJOR THEMES

1.19 In examining the role of restitution and compensation orders in the sentencing process, the Committee placed emphasis on the:

- potential of the restoration of victim losses as an aim of sentencing;
- possibility of restitution and compensation orders operating as sentencing sanctions in their own right;
- possible linking or combining of restitution and compensation orders with existing sentencing options;
- accommodation of the interests of victims in the sentencing process and the role of police and prosecuting authorities in representing or promoting victims' interests;
- need to improve procedures for the obtaining and making of restitution and compensation orders;
- distribution of functions between the criminal and civil courts in restoring victim losses;
- potential role of victim/offender mediation or reconciliation programs in the sentencing process and the place of restitution and compensation as possible outcomes of such programs;

- appropriate model for the enforcement of restitution and compensation orders and how enforcement procedures may be improved.

1.20 It is on these themes that the Committee conducted its inquiry and now presents its Report.

PUBLIC ATTITUDES TO RESTORATION

1.21 A number of surveys of both victims and the general public have concluded that people view the restoration of victim losses as an important function of the criminal justice system and as a means of achieving an appropriate balance between the interests of victims and offenders within that system.⁶

1.22 Both victims and members of the community at large view the restoration or reparation of victim losses as not only compatible with the aims of the criminal justice system and the sentencing process but as worthwhile objectives in pursuing both offender punishment and victim compensation. Restoration of victim losses is seen as a way of 'personalising' the effects of crime by having offenders make amends for their wrongdoing.

1.23 Community perceptions of the usefulness of restoration in sentencing have been an influence on the Committee's deliberations and its desire to strike an appropriate balance between the interests of victims, offenders and of state and society in the sentencing process.

OBJECTIVES

1.24 In conducting its inquiry the Committee formed the view that any system for the restoration of victim losses should seek to fulfil the following objectives:

- offenders should, wherever possible, make good the harm caused by their wrongdoing;

⁶See, for example, *Victims and Criminal Justice* (Adelaide, Attorney-General's Department, 1990) and *Victims of Crime: An Overview of Research and Policy* (Adelaide, Attorney General's Department, 1988).

- procedures for the restoration of victim losses within the criminal sentencing process should provide a quick and economical means for the redress of harm suffered as a result of criminal conduct;
- to the extent that victim losses are not restored in the sentencing process, alternative procedures for redress must be effective in terms of both time and costs.

1.25 The themes noted at 1.19 have been addressed by the Committee within the context of the above stated objectives.

CONDUCT OF INQUIRY

1.26 In order to further its work on the reference, the Committee:

- Established a Subcommittee to call for written and oral submissions and to report to the Full Committee. The Subcommittee was comprised of Hon. James Guest MLC, Chairman, Mr Neil Cole MP, Deputy Chair, Mr Peter Loney MP, Hon. Jean McLean MLC, Mr Peter Ryan MP and Mr Kim Wells MP.
- Commissioned Professor Arie Freiberg, Head of the Criminology Department, University of Melbourne, to prepare, in consultation with the Committee's Secretary, working drafts of Chapters 2, 3, 4, and 5 of the Report.⁷
- Enlisted, with the permission of the Attorney General, the assistance of officers of the Justice Department in its Caseflow Analysis Section and Criminal Justice Statistics Planning Unit, to conduct the quantitative research referred to in Chapters 3 and 5.
- Commissioned a qualitative study from the Department of Criminology, University of Melbourne, carried out by Ms Dina Galanopoulos, an Honours student with the Department, on the making of restitution and compensation orders, which is referred to in Chapter 5.
- Commissioned Professor Pat O'Malley, Mr Christopher Corns and Dr Tom Fisher of the National Centre for Socio-Legal Studies, La

⁷Some parts of this report have been drawn from the work of Professor Freiberg and Professor Richard Fox in Chapter 5 of *Sentencing: State and Federal Law in Victoria* (Melbourne, Oxford University Press, 1985) and has been reproduced with permission.

Trobe University, to prepare, in consultation with the Committee's Secretary, a working draft of Chapter 6 of the Report.

1.27 Initially, the terms of reference, as gazetted, required the Committee to table its Final Report by 30 June 1993. This reporting date was extended to the last day of the Spring Parliamentary Session to allow for appropriate community consultation. Given that the Committee has decided to make an Interim Report with draft recommendations, it has been necessary to seek a further extension on the final reporting date to early in the Autumn Parliamentary Session of 1994 and the Committee expects to table its Final Report around March 1994.

1.28 Work on the reference did not commence until the Committee appointed its secretariat staff in March 1993. In the period March to July 1993 the Subcommittee called for written submissions on the reference. A list of all those who made written submissions is set out at Appendix I.

1.29 During the same period and through to October 1993 the Subcommittee held public hearings to take evidence from interested parties. A list of the persons who appeared before the Subcommittee and the dates of their appearances is set out at Appendix II.

1.30 On 8 November 1993 the Subcommittee presented its Report to the Full Committee and on that day the Full Committee adopted the Report and resolved that it be tabled in the Parliament.

1.31 The Committee is of the view that before it decides to adopt the draft recommendations as its final recommendations, it is desirable that the contents of this Report be disseminated widely so as to stimulate debate and discussion on these matters. The Committee is anxious to receive input from a wider circle of persons and organisations than that which showed initial interest in the inquiry.

1.32 The Committee records its gratitude to all those who have assisted in the inquiry by the provision of advice, comments or information. In order to further a greater understanding of the place of victims in the criminal justice system and of the draft recommendations in this Report, the Committee invites and encourages interested people to continue that process of consultation.

EMPIRICAL EVIDENCE

1.33 Empirical evidence relating to the use of restitution and compensation orders in Victoria is virtually non-existent and the little data available in

records held by the courts and other agencies has not been made public before. Sentencing data for Higher Criminal Courts and the Magistrates' Courts published by the Department of Justice do not provide detail on the number of orders made or their size. Information about the effectiveness of the procedures for the enforcement of such orders is similarly unavailable.

1.34 In order better to inform itself, the Committee has, with the co-operation of the Department of Justice, undertaken a small study of existing enforcement arrangements. In addition, two recently published studies on compensation orders in the United Kingdom and one in New Zealand⁸ have shed some light upon the operation of similar legislation⁹ and reference is made to those findings in the Report.

1.35 Further, as noted in Chapter 5, the Committee has made a number of suggestions as to the future collection and publication of data on the making and enforcement of restitution and compensation orders so as to enable further evaluation and review of the operation of such orders and, if implemented, the various recommendations of the Committee.

STRUCTURE OF REPORT

1.36 The Report is divided into the following chapters:

- Chapter 1 provides an overview of the terms of reference, the manner in which the inquiry was conducted and the major issues addressed in the Report.
- Chapter 2 defines the terms 'restitution', 'compensation', 'reparation' and 'victim' and discusses the possible role of reparation in sentencing.
- Chapter 3 discusses the relationship between reparation orders and sentencing options.

⁸Galaway B. and Spier P., *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* (Wellington, Department of Justice, 1992).

⁹Newburn T., *The Use and Enforcement of Compensation Orders in Magistrates' Courts*, (London, HMSO, 1988) and Moxon D., Corkery J.M. and Hedderman C., *Developments in the Use of Compensation Orders in Magistrates' Courts Since October 1988* (London, HMSO, 1992).

- Chapter 4 is concerned with the substantive and procedural law governing the obtaining and making of reparation orders.
- Chapter 5 addresses the ways in which reparation orders can be enforced.
- Chapter 6 looks at the potential role of mediation in the criminal justice system and the possible goal of reparation as an outcome of mediation.
- Chapter 7 considers other matters relevant to the promotion and recognition of the interests of victims.
- Chapter 8 sets out the Committee's conclusion.

1.37 The Report also has the following Appendices:

- Appendix I lists persons and organisations that made written submissions on the reference.
- Appendix II lists those persons who appeared before the Subcommittee to make oral submissions and the dates of their appearances.
- Appendix III reproduces the provisions of the *Sentencing Act* that are relevant to the inquiry.
- Appendix IV is a diagrammatical representation of the operation of the provisions of Part 4 of the *Sentencing Act*.
- Appendix V contains tables relating to data on the making of restitution and compensation orders in Victorian Magistrates' Courts.
- Appendix VI is a select bibliography of articles, texts and materials mentioned in the body of the Report.

1.38 The terms of reference and the Committee's draft recommendations are set out at the beginning of the Report.

1.39 In the Report, the Committee sets out, in each relevant section, the background to each issue, the questions that it addressed in the inquiry and its conclusions and draft recommendations with respect to each issue.

PRACTICAL LIMITATIONS

1.40 In the period 1992/93, a total of 284,430 major property crimes were reported to the Victoria Police. These were broken down into 86,007 reports for burglary, 127,561 for theft, 28,907 for motor vehicle theft and 41,955 for fraudulent offences.¹⁰

1.41 However, when compared with the period 1991/92, there was an overall decrease in the number of reported property offences. Burglaries fell by 2%, theft by 3.5%, fraud and deception by 12% and motor vehicle theft by 8%. Although the number of property damage offences increased by 2.5%, arson fell by 7%. The overall rate of property crime has been stable since 1987/88 after an increase in the rate throughout the 1970s. 1992/93 was the second consecutive year in which the total amount of property crime decreased.¹¹

1.42 In the period commencing 1 January 1993 and ending 30 June 1993, approximately 4,750 restitution and compensation orders were made by Victorian Magistrates' Courts where most such orders are made. This meant that, in the Magistrates' Courts, 3.6% of convictions for offences involving property loss or damage resulted in a reparation order being made.

1.43 These figures suggest that:

- First, given the difference between the number of reported offences and resulting convictions, many victims of property crime will not have the opportunity to seek compensation through the sentencing courts.
- Secondly, restitution or compensation orders will only be made in a relatively small percentage of cases that result in a conviction for an offence involving property loss or damage.

1.44 Therefore, the Committee has been concerned to ensure that, wherever practicable, offenders compensate victims for losses arising from criminal conduct. In particular, the Committee is concerned that the compensation of victim losses be seen as an important matter for sentencing courts and as more than a mere afterthought.

1.45 What needs to be borne in mind, however, is that there are severe practical limitations on any system designed to compensate victims within the sentencing process. The principal limitation is that most offenders will

¹⁰Victoria Police, Official Crime Statistics, 1992/93.

¹¹Criminal Justice Statistics Planning Unit, Department of Justice, Bulletin No. 3.

lack the financial means necessary to make compensation. Limitations also arise because, both in concept and practice, the state and the victim have different interests and very different relationships with the offender. These differences are discussed in the following Chapter.

1.46 Bearing in mind these limitations, the Committee has explored the ways in which the present system for compensating victims of crime within the sentencing process may be improved.

DEFINITIONS

2.1 The terms 'restitution', 'compensation' and 'reparation' are nowhere defined in Victorian legislation. The terms are often used interchangeably in various jurisdictions and the varying usages can result in some confusion. In a non-technical context, 'restitution' generally refers to the act of restoring or giving back a thing to its proper owner, or more generally, of making reparation to a person for any loss or injury inflicted.¹² 'Reparation', in turn, may be defined as restoration, making amends or making compensation, whilst the word 'compensation' connotes some counter-balancing action through the provision of something equivalent to the loss.¹³

2.2 In legal terms, compensation may mean monetary payment to make good a loss, whether that payment is made by the offender, the state or a third party. In the United States, 'compensation' generally refers to payments by the state to victims while 'restitution' refers to compensation made by the offender to the victim.¹⁴ Commonwealth law refers compendiously to 'reparation, restitution or compensation'¹⁵ and, although not defined in the legislation, a distinction is drawn between 'restitution' and 'reparation' in that the latter is only enforceable through civil processes.

2.3 The Legal and Constitutional Committee Report defined compensation as 'the payment of money to a victim for loss, damage or injury sustained as a consequence of crime'.¹⁶ It defined restitution as 'the restoration of lost or damaged property to the victim, or a contribution

¹² Shorter Oxford English Dictionary.

¹³ Shorter Oxford English Dictionary.

¹⁴See Schafer S., *Victimology: The Victim and His Criminal* (Virginia, Reston Publishing Co., 1977) at 112.

¹⁵ *Crimes Act 1914* (Cth), section 20(1).

¹⁶Legal and Constitutional Committee, *Report upon Support Services for Victims of Crime*, Parliamentary Paper No.59 (1987) at 6.

towards such restoration, by the offender'.¹⁷ These definitions accord with contemporary legal usage in Victoria and it is in this sense that they are used in the Report. 'Reparation' is used as a generic term to cover both restitution and compensation.

2.4 The term 'victim' is also not the subject of a generally accepted definition. Section 3 of the *Criminal Injuries Compensation Act 1983* defines a 'victim', for the purposes of providing compensation as 'a person injured or killed ... by the criminal act of another person, and includes a person injured or killed' when trying to arrest someone, prevent the commission of a criminal act, or aid or rescue a victim of a criminal act.

2.5 A broader definition is found in the *Declaration of the Basic Principles of Justice Relating to the Rights of Victims of Crime*, Part A of which defines victims as:¹⁸

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operating within member states, including those laws prescribing criminal abuse of power.

2.6 Since its terms of reference are limited to reparation for property loss or damage, the Committee's working definition of 'victims' comprises those persons whose property interests are affected by crime where there is a causal connection between the criminal act and the harm suffered.¹⁹

2.7 The *Sentencing Act* contains no statutory definitions of either the terms 'restitution' or 'compensation' but empowers courts to make two types of reparation orders, the restitution order and the compensation order.

Restitution Order

¹⁷ *Ibid.*

¹⁸This was approved by the General Assembly of the United Nations in December 1985. See generally, Sumner C.J., 'Victim Participation in the Criminal Justice System' (1987) 20 *Australian and New Zealand Journal of Criminology* 195 at 199.

¹⁹See the interpretation of 'victim' in the *Criminal Injuries Compensation Act 1983* given by the Full Court in *Savage v. Crimes Compensation Tribunal* [1990] V.R. 96 at 100 following the High Court in *Fagan v. Crimes Compensation Tribunal* (1982) 150 C.L.R. 666.

2.8 The restitution order is primarily concerned with the power of the court to order the restoration *in specie* of stolen goods. However, in certain cases, the court can order the delivery or transfer of any goods that may represent the proceeds of the stolen goods or may order that a sum of money be paid out of money taken from the offender's possession on his or her arrest (*Sentencing Act*, section 84). The aim of the latter order is to make use of funds which may be readily available for compensation where restitution *in specie*, or recovery of proceeds, is not feasible. All three forms of orders are treated as restitution orders under the *Sentencing Act*.

Compensation Order

2.9 The compensation order enables a court to order the offender to make monetary compensation for the loss, destruction or damage of property up to the value of the property lost, destroyed or damaged (*Sentencing Act*, section 86). In this respect, it is solely a substitutive form of reparation.

Compensation for Personal Injuries

2.10 In Victoria, compensation for personal injuries can be obtained from the Criminal Injuries Compensation Tribunal under the *Criminal Injuries Compensation Act*, and compensation can in some cases also be obtained under the *Police Assistance Compensation Act 1968*. Other sources of reparation for personal injury may also be available. These include private arrangements for insurance cover against death, disability or medical expenses, public welfare payments such as Commonwealth social security benefits²⁰ and sums payable under work care²¹ or motor accidents legislation.²²

2.11 In a number of other jurisdictions, sentencing courts have the power to order monetary compensation from an offender for losses arising from physical injury.²³

²⁰ *Social Security Act 1991* (Cth).

²¹ See, for example, the *Accident Compensation Act 1985*.

²² *Transport Accident Act 1986*.

²³ See, for example, *Powers of Criminal Courts Act 1973* (UK), section 35; *Victims Compensation Act 1987* (NSW), section 53; *Penalties and Sentences Act 1992* (Qld), section 35; *Criminal Code* (WA), section 719; *Criminal Code Act* (NT), section 393; *Criminal Code 1924* (Tas), section 425A(1).

2.12 The Committee therefore asked whether Victorian law should empower criminal courts to make orders for compensation for personal injury. If it does, should this power complement, or be a substitute for, the powers exercised by the Criminal Injuries Compensation Tribunal? The Committee returns to this issue in Chapter 7.

REPARATION PROVISIONS – HISTORICAL OVERVIEW

Restitution Orders

2.13 Until the early part of the sixteenth century, in the United Kingdom conviction of a person for larceny resulted in that person's property being forfeited to the Crown. Included in the forfeited property were the stolen goods the subject of the charge and conviction, with the result that the true owner lost any title to the stolen goods.²⁴

2.14 In 1529 legislation was introduced²⁵ to provide that where an owner of stolen goods prosecuted an offender and obtained conviction, title in the goods would revert to the owner. In 1861 the power to restore property was extended beyond cases involving theft²⁶ and was also extended to include situations where property owners provided assistance to the Crown but did not conduct the prosecution. The power was also extended beyond stolen goods to other forms of property.

2.15 Under these provisions, the courts, on conviction, had power to award a writ of restitution or to order restitution in a summary manner. The writ of restitution was needed to reverse the rule that on conviction for a felony the felon's property (including any stolen goods) was forfeited to the Crown. However, with amendments to the *Sale of Goods Act*, providing that on conviction property in stolen goods reverted to the owner notwithstanding any intermediate dealings, the writ of restitution became unnecessary.

2.16 The early provisions also provided for exceptions with respect to persons who acquired valuable securities or negotiable instruments in good faith, for valuable consideration and without notice of their tainted status.

²⁴See *Encyclopedia of the Laws of England*, Volume XI (London, Sweet and Maxwell, 1898) at 738-740, which this section of the Report draws on. See also Hodgson Committee, *Profits of Crime and Their Recovery* (London, Heinemann, 1984) Chapter 2.

²⁵21 Hen. VIII. c.11

²⁶ *Larceny Act 1861* c.96 section 100.

2.17 The provisions applied in Victoria and found their way into section 471 of the Victorian *Crimes Act* of 1915.

2.18 The provisions, notwithstanding drafting changes to the *Crimes Acts* of 1928 and 1958, remained largely in the same form until 1973 with the enactment of the *Crimes (Theft) Act 1973*, which was based on the United Kingdom *Crimes (Theft) Act* of 1968.

2.19 The *Crimes (Theft) Act 1968* (UK) came about as a result of recommendations made by the Criminal Law Revision Committee in its *Eighth Report: Theft and Related Offences*.²⁷ In its report, the Committee said that the existing law on restitution was 'complicated and obscure ... because the enactments ... represent the last stages of a confused history going back to mediaeval times and [are] intimately bound up with forfeiture on conviction of felony'.²⁸

2.20 Reviewing the then state of the law, the Criminal Law Revision Committee noted that:²⁹

- the provisions failed to reflect changes brought about by the abolition of the rule as to forfeiture on conviction of a felon;
- there were doubts whether the provisions had the legal effect that ownership of stolen goods was restored to the original owner on conviction or whether the provisions were restricted to enabling courts to order the physical return of stolen goods;
- if the provisions had that broader operation, this was superfluous as title to property depended entirely on civil law;
- the practice of ordering restitution had become obsolete because in straight forward cases property was simply handed back to the owner without an order.

2.21 The Criminal Law Revision Committee therefore recommended that the restitution provisions not deal with the reverting of property at law but that criminal courts have power to order in a summary manner the physical return of property where persons are entitled to its recovery. The matter of

²⁷Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences* (1966, Cmnd.2977). For an analysis of the changes brought about by the *Theft Act 1968* (UK) see Macleod J.K., 'Restitution under the Theft Act 1968' [1968] *Criminal Law Review* 577.

²⁸Criminal Law Revision Committee at 76.

²⁹*Ibid* at 77-78.

legal entitlement to the property would be determined by the civil law. The Committee also recommended that:

- courts have power to order the transfer of goods in the possession of an offender which represent the proceeds of the stolen goods, on application by a person entitled to the stolen goods;
- courts have power to order offenders to pay a sum of money equivalent to the value of the stolen goods (where they could not be recovered) from money found on the offender at the time of apprehension, on application by a person entitled to the stolen goods;
- provision be made for offenders to compensate innocent purchasers or lenders for losses arising from a restoration order out of money found on the offender at the time of apprehension, on application by the relevant third party;
- no specific provision be made as to the enforcement of orders as disobedience could be dealt with by the law of contempt. In this regard, it noted that:

As it would probably be impractical (as well as undesirable) that an order should be made in any but straightforward cases, it seems wrong to complicate the law by including procedural provisions which will not be required in practice.³⁰

2.22 As noted above, the recommendations of the Criminal Law Revision Committee were given effect in Victoria through the *Crimes (Theft) Act 1973* which inserted a new section 94 into the *Crimes Act 1958* dealing with restitution.³¹ In addition to the Committee's recommended draft legislation, both the 1968 United Kingdom Act and the 1973 Victorian Act inserted provisions providing that restitution orders should only be made where the facts appear sufficiently from the evidence given at the hearing of the criminal charge, thus restricting, consistent with the Committee's views, the ability of criminal courts to hear additional evidence to resolve disputed claims.

2.23 With the passage of the *Penalties and Sentences Act 1985*, the provisions of section 94 of the *Crimes Act 1958* were repealed and, in effect, transferred to section 90 of the first mentioned Act. The 1985 provisions followed the

³⁰*Ibid* at 79.

³¹The provisions of section 94 were based on the restitution provisions suggested by the Criminal Law Revision Committee in clause 24 of its Draft Theft Bill: *Ibid* at 111.

1973 model but added that 'conviction' includes both findings of guilt and pleas of guilt.

2.24 Although the *Penalties and Sentences Act 1985* was the subject of detailed review by the Victorian Sentencing Committee, it did not recommend any substantial changes to the restitution provisions in section 90 but did recommend their simplification and rationalisation and that restitution take priority over fines.

2.25 Again, the *Sentencing Act 1991* followed the 1985 provisions which, in turn, were based on the 1973 model but added that applications could be made not only by persons entitled to an order but also by the prosecutor or informant on their behalf and made clear that restitution orders were enforceable as civil judgments.

Compensation Orders

2.26 Statutory provisions enabling criminal courts to make compensation orders for property loss or damage have a shorter but equally complex history.

2.27 The power of the criminal courts to order compensation was first introduced by section 4 of the *Forfeiture Act 1870* (UK) with monetary limits being placed on the amounts that could be awarded. Similar provisions applied in Victoria by virtue of the *Forfeitures for Treason and Felony Abolition Act 1878*.³² Those provisions were later replaced by section 572 of the *Crimes Act 1915* which provided that a sentencing court could, 'if it thinks fit' upon application of 'any person aggrieved', immediately after conviction award compensation for any loss of or damage to property suffered 'through or by means' of the offence provided the sum awarded did not exceed the 'value of the property lost stolen injured or destroyed'.

2.28 An award was deemed to be a judgment debt due to the person entitled to receive the money from the offender enforceable in the same manner as an order for costs. Orders for costs could be enforced by civil enforcement procedures, direct payment from money found on the offender on apprehension or, in cases of imprisonment, through payment by the curator entrusted with the convicted person's property.

³²For a discussion on the history of compensation provisions see Fox R. and Freiberg A., *Sentencing: State and Federal Law in Victoria* (Melbourne, Oxford University Press, 1985) at para. 5.301 and Hodgson Committee, Chapter 2.

2.29 The provisions of section 572 of the *Crimes Acts* of 1915 and 1928 found their way into section 546 of the *Crimes Act 1958* without substantial change until 1970 through the *Crimes (Amendment) Act 1970* which:

- extended the availability of the power to cases involving non conviction on conditional recognisance or cases involving probation orders;
- introduced a power to order that compensation be paid by instalment and that default of one instalment rendered the remaining balance due and payable;
- made clear that compensation orders operate as judgment debts and may be enforced in the same manner as civil orders;
- preserved in express terms the civil rights of persons to recover damages to the extent that such rights are not satisfied by payment or recovery under a compensation order.

2.30 The *Crimes (Theft) Act 1973* also introduced a specific provision into the *Crimes Act 1958* (section 96) for the compensation of loss or damage suffered as a result of a theft of a motor vehicle. Section 96, unlike section 546, provided that for the purposes of recovery and default, orders to compensate for motor vehicle damage were regarded as fines or penalties imposed in the exercise of criminal jurisdiction.

2.31 Sections 96 and 546 of the *Crimes Act 1958* were repealed and replaced by sections 91 and 92, respectively, of the *Penalties and Sentences Act 1985*. No substantial changes were made to the provisions other than deletion of the fine or penalty enforcement procedure for motor vehicle compensation orders.

2.32 The current compensation provisions of section 86 of the *Sentencing Act 1991* consolidated sections 91 and 92 of the 1985 Act into one section and brought the procedural aspects of the compensation provisions into line with the restitution provisions by providing that:

- compensation orders could only be made where the facts are sufficiently clear from the evidence adduced at the hearing of the criminal charge;
- applications could be brought by persons claiming to have suffered loss or damage as a result of the offence or on their behalf by prosecutors or informants.

The 1991 Act also made it clear that an offender's financial means are relevant not only to the method of payment but also for determining the amount of the order.

2.33 The 1991 Act also added that convictions included findings and pleas of guilt (replacing the recognisance and probation provisions) and that findings of fact made by the court hearing the criminal charge were admissible and prima facie evidence of those facts in any subsequent compensation application.

2.34 The preceding discussion on the origins of the restitution and compensation provisions in Part 4 of the *Sentencing Act* illustrates that the initial rationale for conferring restorative functions on the criminal courts differed as between restitution and compensation powers. In the case of restitution, the power was seen as necessary to provide relief to owners from the harsh effects of the rule as to forfeiture on conviction for a felony; especially where the owner prosecuted or assisted in the prosecution of the offender. With respect to compensation provisions, their initial rationale was to provide a summary procedure to facilitate the civil recovery of property loss or damage arising from the commission of an offence. However, as the Hodgson Committee pointed out, both restitution and compensation provisions 'were rewards for those who had assisted in bringing offenders to justice'.³³

2.35 With the abolition of the rule on forfeiture of a convicted felon's property and the severance of the link between prosecution by the victim and recovery of property,³⁴ courts came to view the reparation power (including both restitution and compensation) as providing a summary procedure for the recovery of property loss or damage³⁵ and, flowing from that, reparation orders were not to be seen as forming part of the sentence.

2.36 The criminal courts therefore became reluctant to determine reparation claims where there were disputes as to liability or quantum. The provisions themselves came to reflect that approach by making it clear that criminal courts could only order reparation where such an order was supported by the facts adduced at the criminal trial; thus restricting their ability to hear additional evidence to resolve any disputes.

³³Hodgson Committee at 19.

³⁴*Ibid* at 13.

³⁵See the discussion in *R. v. Braham* [1977] V.R. 104 at 108 c.f. *In Re Samuel Clements, Ex parte Ralph Brothers* (1895) 21 V.L.R. 237 at 239 per Hood J. who indicated that the 'real object was ... to avoid the scandal of a second [civil] jury reversing the verdict of the first [criminal] jury'.

2.37 The changes made to the provisions have, in some ways, been inconsistent. While the ambit of reparation orders has been extended in terms of the range of powers available, their use, in practical terms, has been restricted by limiting the evidence criminal courts can consider on the hearing of a reparation claim.

2.38 Although the philosophical grounding of the reparation remedy is civil in nature, a hybrid model has developed by the incorporation of criminal sentencing principles, such as the relevance of an offender's financial means, into the discretion to grant the relief sought. In examining the current reparation provisions, the Committee has therefore had to consider whether reparation should be viewed essentially as a civil remedy or as a sentencing order or, alternatively, as an amalgam of both, with the dual purpose of offender punishment and victim restoration.

OPERATION OF PART 4 OF THE SENTENCING ACT

2.39 It is convenient to set out a brief overview on how the provisions of Part 4 of the *Sentencing Act* operate in providing restitution or compensation to victims of crime. The provisions are discussed in more detail in Chapter 4.³⁶

2.40 Reparation orders can be made by all Victorian courts exercising State criminal jurisdiction upon either a finding of guilt or upon conviction,³⁷ in addition to any sentencing order³⁸ and with respect to offences which have only been taken into consideration,³⁹ where goods have been stolen or a person has suffered loss or destruction of, or damage to, property as a result of the offence.⁴⁰

2.41 An application for a reparation order may be made as soon as practicable after the finding of guilt or the recording of a conviction⁴¹ by the person suffering loss, or on that person's behalf by the Director of Public Prosecutions (in the Supreme and County Courts) or the police prosecutor

³⁶See generally, Freiberg A. and Glacken S., 'Restitution for Victims of Crime' (1993) 67 *Law Institute Journal* 794.

³⁷Sections 84(1) and 86(1).

³⁸The title to Part 4 reading 'Orders in Addition to Sentence'; also see *Victorian Sentencing Manual*, Compiled by Judges of the County Court of Victoria (Melbourne, Law Printer, 1991) parts 43.2 and 43.3 and *R. v. Landolt*, (1992) 63 A. Crim. R. 200, dealing with equivalent provisions in the *Penalties and Sentences Act 1985*.

³⁹Section 100 of the *Sentencing Act*, involving admission of other pending charges. See footnote 10, Chapter 4.

⁴⁰Sections 84(1) and 86(1).

⁴¹Sections 84(5)(a) and 86(5)(a).

or informant (in Magistrates' Courts), although prosecutors and informants retain a discretion as to whether to make such an application.⁴²

2.42 The material that a sentencing court may consider on such an application is confined to the evidence given at the hearing of the criminal charge, the 'available documents' and any admissions made by or on behalf of the accused person.⁴³ The expression 'available documents' means any written statements or admissions that would be admissible as evidence on the hearing of the charge, the depositions taken at the committal proceeding or any written statements or admissions used as evidence in the committal proceeding.⁴⁴

2.43 Once an order is made, it is deemed to operate as a civil judgment enforceable by civil means at the option of the person in whose favour the order is made.⁴⁵

THE STATE, THE OFFENDER AND THE VICTIM

2.44 The early criminal law was concerned as much with personal reparation as it was punishment. The law of torts and the criminal law were relatively undifferentiated and an offender's liability could be expunged by the offender making appropriate compensation or restitution.⁴⁶ However, as the civil and criminal law gradually separated and as the state supplanted the private citizen as the 'victim' and prosecutor of crime, compensation gave way to punishment. Sanctions such as capital punishment and the confiscation of an offender's goods by the state militated against offenders being able to make restitution or compensation. Although most major crimes against persons or property are also torts, historically the ability of victims to obtain compensation through the civil process has proved largely unsatisfactory.

2.45 In order clearly to understand the appropriate role for reparation in the criminal justice system, it is essential that three important relationships be distinguished,⁴⁷ namely, those between:

⁴²Sections 84(5)(b) & (6) and 86(5)(b) & (6).

⁴³*Victorian Sentencing Manual*, para. 43.216.

⁴⁴Sections 84(8) and 86(9).

⁴⁵Sections 85 and 87. For more detailed discussion on enforcement procedures see Chapter 5.

⁴⁶Kaye J.M. 'The Making of English Criminal Law: The Beginning - A General Survey of Criminal Law and Criminal Justice Down to 1500' [1977] *Criminal Law Review* 4.

⁴⁷See Ashworth A., 'Punishment and Compensation: Victims and the State' (1986) 6 *Oxford Journal of Legal Studies* 86 at 89; Duff P.,

- the state and the offender;
- the state and the victim; and
- the victim and the offender.

State and Offender

2.46 Modern criminal law is primarily concerned with the relationship between the state and the offender. Offences are regarded primarily as offences against the state with the public interest being considered paramount. Sentencing legislation is therefore offender oriented. The basic purpose of the criminal law is 'to declare public disapproval of an offender's conduct by means of public trial and conviction and to punish the offender by imposing a penal sanction'.⁴⁸ However, in more recent times it has been argued that the criminal law should take into account the other relationships and, in particular the relationships between, on the one part, victims and, on the other part, offenders and the state.⁴⁹

2.47 Section 5(1) of the *Sentencing Act* sets out the purposes for which sentences may be imposed. These are:

- to punish the offender to an extent and in a manner which is just in all of the circumstances ('just deserts');
- to deter the offender or other persons from committing offences of the same or a similar character;
- to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated;
- to manifest the denunciation by the court of the type of conduct in which the offender engaged;
- to protect the community from the offender; or
- a combination of two or more of those purposes.

'The Victim Movement and Legal Reform' in Maguire M. and Pointing J., *Victims of Crime: A New Deal?* (Milton Keynes, Open University Press, 1988) at 147.

⁴⁸ Ashworth at 89.

⁴⁹ See, for example, Written Submissions 6, 9 and 12; Hansard 25 March 1993 at 26-30, 17 June 1993 at 10 and 22 June 1993 at 20-21.

2.48 No reference is made to reparation to victims of crime as a purpose of sentencing although, as mentioned above, reparation is one of the stated aims of the Act.

2.49 In contrast, although it does not articulate the purposes of sentences in the same way as section 5 of the *Sentencing Act*, section 16A of the *Crimes Act 1914* (Cth) specifically requires a court to take into account such matters as:

- the personal circumstances of any victim of the offence;⁵⁰
- any injury, loss or damage resulting from the offence;⁵¹
- the degree to which the person has shown contrition for the offence through the making of reparation, or in other ways.⁵²

2.50 Reparation as an aim of sentencing, and as a sanction itself, may be consistent with the traditional aims of sentencing in a number of ways:

- First, reparation may accord with the just deserts theory in that the making of reparation may, in both a moral and practical sense, restore the balance. The Canadian Sentencing Commission⁵³ argued that if justice is to be done, the violation of the individual victim's personal and property rights ought to be redressed. It stated that:

Restitution personalizes the offence by inviting the offender to see his or her conduct in terms of the damage and injury done to the victim... (It) contemplates that the offender has the capacity to accept responsibility for the offence and that he or she will in many cases be willing to discharge that responsibility by making amends.

However, there are limits to this approach. Just punishment requires that a sentence be imposed on the basis both of the harm caused and the culpability of the offender. Punishment may still be imposed even in the absence of harm to a victim and conversely, there may be little culpability even where a victim has suffered catastrophic harm. As Ashworth notes, 'the imposition of penalty does not necessarily depend upon the effects on victims - it

⁵⁰ Section 16A(2)(d).

⁵¹ Section 16A(2)(e).

⁵² Section 16A(2)(e).

⁵³ Canadian Sentencing Commission, *Sentencing Reform in Canada* (1987) at 390. See also Hansard 25 March 1993 at 9-10 and 16.

depends upon the rights and values protected by the criminal law⁵⁴;

- Secondly, reparation may serve as a deterrent either by ensuring that offenders do not profit from their offences or by making the act of reparation so unpleasant that the offender will be dissuaded from repetition.⁵⁵ The question, however, of whether mere compensation can amount to deterrence will depend upon the amount of harm caused and whether in fact reparation has been made.⁵⁶ In Victoria, the confiscatory aspects of reparation are dealt with by the *Crimes (Confiscation of Profits) Act 1986*.
- Thirdly, reparation may serve rehabilitative purposes. By accepting his or her moral responsibility, the act of making reparation may be the first step in an offender's change of attitude and behaviour.⁵⁷
- Finally, reparation may serve the denunciatory aims of sentencing by making a public statement that behaviour which damages the property interests of others is unacceptable and that the rights of victims will be vindicated by the state.

2.51 An argument can therefore be made that reparation may be treated as a proper purpose of sentencing. It falls within the classic definition of punishment; the infliction of unpleasant consequences on an offender for an offence against legal rules.⁵⁸ However, the elevation of reparation to a criminal sanction in its own right does not necessarily mean that the victim is more likely to be compensated. Nor does it necessarily satisfy the state's interest in sentencing. Satisfaction of the victim's interest is not tantamount to satisfaction of the state's interest. As already noted, an offender's moral culpability may be unrelated to the harm caused. The extent of the harm may depend on factors outside the control of the offender. In some cases, there may be no identifiable victim, yet the state still has an interest in imposing sanctions.

State and Victim

⁵⁴Ashworth at 93.

⁵⁵Hansard 1 October 1993 at 30-31.

⁵⁶Thorvaldson S.A., 'Toward the Definition of the Reparative Aim' in Hudson J. and Galaway B. (eds) *Victims, Offenders and Alternative Sanctions* (Lexington, Lexington Books, 1980) at 19.

⁵⁷*Ibid* at 20. Hansard 13 September 1993 at 12 and 1 October 1993 at 3.

⁵⁸ Ashworth at 94.

2.52 The state can recognise the interests of victims in a number of ways, including criminal compensation schemes, civil processes, sentencing orders and the like. The recognition of the victim's right to be compensated does not, however, determine how that compensation will be effected. Looking to offenders often proves futile, either because the offender may never be apprehended or convicted, or if brought before the courts, may lack the means to make compensation. In addition, conflicts may arise between the needs of the offender and his or her dependants and those of the victim.

2.53 In Victoria, the state has recognised its duty to provide compensation in cases of personal injury where the offender is incapable of paying through the establishment of the Criminal Injuries Compensation Tribunal. It also provides for compensatory mechanisms in respect of motor vehicle and industrial injuries which may often come about as a result of breaches of regulatory quasi criminal laws. In some jurisdictions a system of national compensation for harm provides a comprehensive system for protecting victims, without the necessity for singling out the victims of crime as a separate group.⁵⁹ That option was ruled out in Australia some decades ago.⁶⁰ In the absence of insurance, there is no comprehensive scheme in respect of loss or damage to property.

Offender and Victim

2.54 The obligation of the offender to make reparation to the victim is the 'very essence of corrective justice'.⁶¹ That obligation can be met through the operation of the civil courts or the criminal courts or may even be done informally through private compromise or semi-formally, through systems of mediation.

2.55 The primary purpose of the civil law is to ensure that obligations between individuals are honoured and that compensation is made to persons whose interests have been harmed by the fault of others.⁶² Although the civil law may have the secondary purposes of retribution and deterrence, it is basically restorative in nature.

⁵⁹See, for example, the *Accident Compensation Act 1972* (NZ).

⁶⁰See *National Committee of Inquiry into Compensation and Rehabilitation in Australia 1974* (*The Woodhouse Committee*), Commonwealth Parliamentary Paper Nos. 100, 135 & 192, 1974 and National Compensation Bill 1974.

⁶¹ Ashworth at 107.

⁶²*Ibid* at 87.

2.56 Acceptance of the goal of reparation in the criminal courts may serve a number of functions:⁶³

- it not only denounces the crime, it vindicates the victim;
- it may be more practical than requiring the victim to take separate action through the civil process;
- it signals the responsiveness of the criminal justice system to the victim's rights and needs by recognising the victim's psychological need that notice be taken of the specific wrong done.⁶⁴

2.57 The state can also have an interest in promoting victim/offender reconciliation through compensation/mediation schemes in that such schemes, if they operate to divert offenders from the criminal justice system, can save resources.⁶⁵ More victim involvement in the criminal justice system may also result in increased co-operation with law enforcement agencies and possibly lead to more effective law enforcement. The evidence in this regard is, however, equivocal at best.⁶⁶

REPARATION AS AN AIM IN SENTENCING

2.58 The problem of reconciling the three possibly conflicting interests of the state, the offender and the victim is a perennial one. Whether the sentencing system alone can satisfy these competing interests is doubtful. While it can be argued that reparation should be included in the general aims of sentencing for the reasons outlined above, it is clear that reparative sanctions alone cannot be expected to meet all of the aims of sentencing⁶⁷ nor can they be expected to satisfy all of the needs and interests of victims.

2.59 However, the Committee believes, on balance, that reparation, if made a specific aim in sentencing, may go some way towards the creation of a more satisfactory balance between the interests of the state, the offender and the victim. It is also of the view, however, that the sentencing process must take into account factors in addition to reparation and that to address

⁶³*Ibid* at 108.

⁶⁴Canadian Sentencing Commission at 392.

⁶⁵Miers D.R., *Compensation for Criminal Injuries* (London, Butterworths, 1990) at 317.

⁶⁶Shapland J., 'Victim Assistance and the Criminal Justice System: The Victim's Perspective' in Fattah E.A. (ed.), *From Crime Policy to Victim Policy* (New York, St. Martin's Press, 1986) at 139.

⁶⁷Thorvaldson at 22.

the interests of victims properly requires more than simply the elevation of reparation as an aim in sentencing.

2.60 Further, if reparation is to become a stated legislative aim of sentencing, it is important that it be matched with the aims noted at paragraph 2.47 in accordance with the arguments discussed at paragraphs 2.50 and 2.51. Statutory recognition of the relevance of reparation to sentencing can serve not only the interests of victims but also the wider interests of state and society in securing compliance with the criminal law.

2.61 The Committee therefore considered whether the *Sentencing Act* should be amended by adding to the stated purposes for which sentences may be imposed the purpose of restoring losses suffered by persons as a result of the conduct engaged in by the offender.

2.62 The Committee notes that reparation or restoration may be viewed as either a primary or a secondary aim of sentencing. It also notes that section 1(i) of the *Sentencing Act 1991* already states that one of the purposes of the Act is to ensure that victims of crime receive adequate compensation and restitution. The Committee is of the view that section 5(1) of the *Sentencing Act* should be amended to the effect that, subject to the other stated purposes of sentencing being met, a sentence may also be imposed to enhance the likelihood that the legislative purpose expressed in section 1(i) is achieved.

Draft Recommendation 1

2.63 The Committee therefore recommends that section 5(1) of the *Sentencing Act* be amended to provide that the purposes for which sentences may be imposed include the restoration of victim losses to the extent that imposition of a sentence for that purpose reinforces or supports other sentencing purposes.

2.64 The Committee believes that it is appropriate that reparation be treated as a secondary aim of sentencing and adopts the following comments of the Australian Law Reform Commission:

Restitution, where this is possible, should also be encouraged. In the final analysis, however, punishments are not imposed on offenders for the purpose of rehabilitation, or for restitution. They are imposed to punish the offender for having broken the law. But, where rehabilitation can be advanced, or restitution ensured, within the context of a just punishment for the crime, this should be encouraged.⁶⁸

⁶⁸Australian Law Reform Commission, Report No. 44, *Sentencing* (1988) at 18.

2.65 The Committee has also considered whether statutory recognition should be given to the need for sentencing courts to have regard to the impact of crime on victims, in terms similar to that found in section 16A of the Commonwealth *Crimes Act 1914*. It is noted that section 5(2) of the *Sentencing Act* requires sentencing courts to have regard to, amongst other things; '(c) the nature and gravity of the offence' which often will include consideration of the effects of crime on victims.

2.66 The Committee therefore has had to consider whether section 5(2) of the *Sentencing Act* should be amended by adding to the factors that sentencing courts must have regard to the impact the offence has had on persons affected by the offence.⁶⁹

2.67 The Committee notes that such an amendment would codify the existing law and practice relating to relevant factors taken into account by courts in the exercise of sentencing discretions.⁷⁰ It also notes that such an amendment would be consistent with one of the stated aims of the *Sentencing Act*, namely, the securing of adequate reparation for victims.

Draft Recommendation 2

2.68 The Committee therefore recommends that section 5(2)(c) of the *Sentencing Act* be amended to provide that in determining the sentence to be imposed, sentencing courts should have regard to the impact the offence had on persons affected by the offence.

2.69 The relationship between reparation orders and sentencing orders is discussed further in Chapter 3. In particular, the Committee explores the possibility of amending the *Sentencing Act* to provide that reparation orders can be made in addition to, or as conditions of, or in substitution for any sentence that can be imposed under Part 3 of the Act.

⁶⁹Hansard 25 March 1993 at 27-28 and 22 June 1993 at 20-21 and 34.

⁷⁰Hansard 28 May 1993 at 15, *Victorian Sentencing Manual*, part 16.5.

3. RELATIONSHIP TO SENTENCING OPTIONS

INTRODUCTION

3.1 The powers of the criminal courts to order restitution and compensation are entirely statutory. The courts have no common law power to make such orders. Modern reparation provisions are based upon the premise that they are designed simply to facilitate the civil recovery of compensation for the loss or damage suffered. This justification was articulated in *Ironfield*:⁷¹

If a man takes someone else's property or goods he is liable in law to make restitution or pay compensation even if no compensation order is made by the court before which he is convicted. A victim who wishes to assert his rights need not be put to the additional trouble and expense of independent proceedings.

3.2 Consistent with this view, the courts have been adamant that awards of compensation are additional to the sentencing process and are not a substitute for the punishment due to the accused for the crime. That view has been based on an interpretation of statutory provisions indicating that reparation orders do not form part of the sentence. In the absence of a statutory direction to the contrary, the Victorian Court of Criminal Appeal will not allow appeals against the severity of a sentence based upon the alleged oppressive effect of the combined operation of a custodial or other sentence and an order for compensation. In *Braham*⁷² it ruled that if a sentence was to be regarded as excessive, it could only be by force of the degree of punishment represented in the custodial or other punitive component taken alone without reference to the impact of the compensation ordered.

3.3 However, because the civil and criminal orders are linked in a practical, if not theoretical, manner by their conjunction in the criminal courts, a mutual interaction has evolved. Sentencing concepts such as the need to take the means of an offender into account have been introduced into compensation orders. Conversely, the fact that restitution or

⁷¹(1971) 55 Cr. App. R. 91 at 92.

⁷²[1977] V.R. 104 at 108-109.

compensation has or will be made will indirectly affect the sentencing order, both at common law and under statute.

REPARATION ORDERS AND SENTENCING ORDERS

3.4 The *Sentencing Act* distinguishes between various kinds of orders. At the core of the Act lies the 'sentencing orders', set out in section 7. These encompass sentences of imprisonment, intensive correction orders, youth training centre orders, community-based orders, fines and dismissals, discharges or adjournments. Restitution and compensation orders are classified as orders 'in addition to sentence' in recognition of their quasi-criminal or hybrid nature. These orders are, in essence, civil orders which are made in criminal courts.⁷³ Other such ancillary orders include driver licence cancellation or suspension (section 89) and hospital orders (under Part 5).

3.5 A restitution or compensation order can be made in addition to any sentencing order. Although conditions may be attached to some sentencing orders, it is not the practice in Victoria to attach conditions of restitution or compensation. Section 38(1)(g) of the *Sentencing Act* specifically prohibits attaching a condition requiring the making of restitution or the payment of compensation, costs or damages to a community-based order although reparation orders could, in theory, attach to other conditional orders such as conditional adjournments.

3.6 The distinction between reparation as an ancillary order and reparation as a sentence or a condition of a sentence is important, primarily because of the differing consequences which may flow from a breach. A reparation order which is an ancillary order can be attended on breach by civil or criminal consequences, depending upon the relevant statutory scheme. In Victoria, compensation orders are enforced by civil means. However, if the order is made as a condition attached to another sentencing order, the procedure for default will follow the variation or cancellation proceedings for that order.⁷⁴

REPARATION AS A MITIGATING FACTOR

3.7 Although the statutory powers sentencers possess to order restitution and compensation are regarded as an adjunct to the sentencing

⁷³*Braham* [1977] V.R. 104.

⁷⁴Harland A.T., 'Restitution Statutes and Cases: Some Substantive and Procedural Constraints' in Hudson J. and Galaway B. (eds.) *Victims, Offenders and Alternative Sanctions* (Lexington, Lexington Books, 1980) at 152.

process and are not used to impose punishment for the crime, nonetheless, a reduction in sentence may be justified if reparation is made or a genuine attempt to make reparation is made or information is given which leads to the restoration of property.⁷⁵ The bases of mitigation are various. On the one hand, courts are reluctant to 'reward' offenders who make restitution in case it is regarded as a means of permitting any person, but particularly the wealthy, to buy their way out of deserved sentences. On the other

hand, the making of restitution may be an indication of remorse or contrition or rehabilitation. Pragmatically, courts tend to take the view that:⁷⁶

While a crime is a crime against the community, one must remember that a crime is often a crime which injures a particular individual. The ends of justice are better served if some restitution is made to the victim where restitution is possible. The courts ought to encourage restitution and obviously one way for them to do that is to offer some inducement in the form of a lesser penalty.

3.8 In Part 19.3 of the *Victorian Sentencing Manual*⁷⁷, the relevance of the making of reparation in considering the conduct of the offender since the commission of the offence is explained in the following terms:

- apart from providing evidence of remorse, it is a relevant personal factor;
- the weight to be given may be affected by instances where reparation funds come from third parties and not the offender or from the proceeds of the stolen goods;
- the making of reparation may provide evidence of reformation or rehabilitation.

The *Victorian Sentencing Manual* also notes that:

- sentencers should not adjourn the sentencing process to allow an offender 'the opportunity to fulfil a vague promise to make'

⁷⁵Under the *Criminal Justice Act 1985* (NZ), section 12, a court may take into consideration at sentencing any offer of compensation and may have regard to whether or not the offer has been accepted by the victim as expiating or mitigating the wrong. See also Hansard 28 May 1993 at 4, 17 June 1993 at 9 and 13 September 1993 at 12.

⁷⁶*Mickelberg* (1984) 13 A. Crim. R. 365, 370 per Brinsden J.

⁷⁷*Victorian Sentencing Manual*, Compiled by Judges of the County Court of Victoria (Melbourne, Law Printer, 1991) part 19.3.

reparation but should adjourn to allow for the completion of a reparation transaction;

- the onus is on the offender to put forward a realistic reparation proposal;
- some disparity between co-offenders may be allowed on the basis of reparation being evidence of remorse on the part of one co-offender but disparity should not be allowed because one co-offender has greater access to funds.

3.9 The concerns of the courts that offenders not be able to 'buy their way out of sentences' by achieving reductions in the head sentence through reparation is reflected in the following passage in the judgment of Stanley J. in *O'Keefe*⁷⁸:

The court ... is not a debt collecting institution. It would be of the worst example if any sentencer induced or tended to induce a belief that offenders could escape punishment if, when convicted, they made or offered to make restitution. Offenders cannot bargain with the court, and, in effect buy themselves out of sentences.

3.10 The study conducted by the Criminal Justice Statistics Planning Unit, Department of Justice, discussed further below, also threw some light on how the making of a reparation order may have a mitigating affect on the overall sentence. The study considered what impact reparation may have on the ordinary sentence that would be imposed by the courts in the offence categories of theft, property damage, social security and other Commonwealth offences. The results are set out in Tables 4.1 - 4.4 of Appendix V.

3.11 For theft, the study found that whilst 11.8% of cases would ordinarily result in a suspended custodial sentence, when a reparation order was also made only 7.4% of theft cases resulted in a suspended custodial sentence. In contrast, however, whilst 17.1% of theft cases would normally result in a bond, where a reparation order was also made only 6.1% resulted in a bond. In the case of community corrections orders, whilst 32.2% of theft cases ordinarily resulted in this disposition, when combined with a reparation order, the corresponding figure was 39.6%.

3.12 In property damage cases, the corresponding figures were:

- suspended sentences
 - ordinary disposition - 6.8%
 - with reparation - 4%

⁷⁸ [1959] Qd R. 395 cited in *Victorian Sentencing Manual* at para. 19.305.

- bonds
 - ordinary disposition - 18.2%
 - with reparation - 10.7%
- community corrections orders
 - ordinary disposition - 27.7%
 - with reparation - 37.6%.

3.13 For social security offences, the corresponding figures were:

- custodial sentence
 - ordinary disposition - 19.6%
 - with reparation - 15.5%
- bonds
 - ordinary disposition - 44.7%
 - with reparation - 27.8%
- community corrections orders
 - ordinary disposition - 12.9%
 - with reparation - 33.6%.

3.14 These figures tend to indicate that where a reparation order is made, there is an increased likelihood of that order being combined with a community corrections order. Conversely, where a reparation order is made, there is less prospect of a bond also being made.

3.15 It has been suggested to the Committee that if reparation is to follow conviction automatically or operate as a sentence, it would be inappropriate to view the making of, or the attempt to make reparation as a mitigating factor,⁷⁹ either because it simply restores the status quo⁸⁰ or if it is a sentence, default may be visited with the consequences of additional punishment.⁸¹

3.16 On balance the Committee is of the view that where there has been reparation or a genuine attempt at reparation on the part of offenders, that should operate as a mitigating factor and, all other things being equal, result in an appropriate reduction in the sentence. The correct basis for mitigation, in the Committee's view, is that reparation can provide evidence of remorse or rehabilitation on the part of offenders. The exact weight that

⁷⁹Hansard 22 June 1993 at 7.

⁸⁰Hansard 17 June 1993 at 2 and 27-28.

⁸¹Hansard 28 May 1993 at 1 and 22 June 1993 at 14 and 17.

should be accorded to reparation should remain a matter for the sentencing court having regard to all the circumstances of the individual case.

3.17 It has also been suggested to the Committee that it might be appropriate to amend the *Sentencing Act* to make specific provision that the making of reparation is a mitigating factor, on the proviso that sentencing courts have regard to an offender's financial means so as to minimise the risk of disparity in sentencing due to the relative economic status of offenders.⁸²

3.18 The Victorian Sentencing Committee had recommended that the *Sentencing Act* contain an inclusive list of mitigating and aggravating factors.⁸³ However, that recommendation was not implemented and the *Sentencing Act* does not, with the possible exception of section 6 dealing with factors relevant to assessing the character of an offender, codify mitigating and aggravating factors. In the absence of a more comprehensive approach to the codification of mitigating and aggravating factors, the Committee does not support the proposal to make specific provision for reparation to be considered as a mitigating factor as it is more appropriate that the matter be dealt with as part of the general law of sentencing which takes into account the relative financial means of offenders.

3.19 Having accepted that reparation can be considered a proper purpose of sentencing, the Committee now turns to examine the relationship between reparation orders and current sentencing options.

3.20 In particular, the Committee now considers whether a reparation order should be used as a sentence in itself or as a condition of another sentence and, if so, what should be the consequence of breaching a reparation order in those circumstances.

REPARATION AS AN INDEPENDENT CRIMINAL SANCTION

3.21 The sentencing model applying in Victoria is, of course, not the only model which can be conceived. Reparation orders can be constituted as sentencing orders in their own right.

3.22 In South Australia, for example, a compensation order may be made 'instead of, or in addition to, dealing with the defendant in any other way'.⁸⁴

⁸²Written Submission 22 and Hansard 1 October 1993 at 3 and 12-14.

⁸³*Victorian Sentencing Committee Report 1988* at 268-271.

⁸⁴*Criminal Law (Sentencing) Act 1988* (SA), section 53(2)(a).

In the United Kingdom, it has been possible for the courts to make a compensation order as the sole sentencing order for some years.⁸⁵ In New Zealand, reparation is also an independent sanction⁸⁶.

3.23 At a theoretical level, proponents of such a scheme argue that when a compensation order is an independent sanction of the criminal courts, it brings home more tellingly to the offender that he or she has caused harm to the victim.⁸⁷ This symbolic aspect is, of course, difficult to measure, and it would appear that the argument in favour of the 'criminalisation' of reparation orders is often more concerned with matters relating to the modes of enforcing such orders than as to their symbolic effect.

3.24 In practical terms, in the United Kingdom, there is probably little difference between compensation orders and fines, other than the final destination of the payment. Both are made in the criminal courts, both constitute sentencing options in their own right, both are enforceable by the state in the same manner, both have regard to the means of the offender and both usually involve very small amounts.⁸⁸

3.25 The Victorian Sentencing Committee examined, but rejected the idea that reparation should stand as a sentence in its own right on three primary grounds.

3.26 First, it claimed that such a sanction would have a differential impact depending upon the economic status of the offender. It argued that the use of reparation as an aim of sentencing would discriminate between the wealthy and less wealthy, because the wealthy would be likely to make good any damage done to the victim and would therefore be able to escape more severe sanctions because of their social and economic status. This was regarded as likely to lead to unjustified disparity.⁸⁹ It also argued that the effectiveness of a sanction should not be determined by the economic means of the offender. In relation to these arguments, the Committee notes that although the effectiveness of a sanction should not unduly rest on the economic means of the offender, provisions dealing with the assessment of fines and other pecuniary penalties make it clear that the offender's means is a relevant consideration to sentencing. If sentencing courts focus on the ability of offenders to make reparation when determining the appropriate

⁸⁵*Criminal Justice Act 1982 (UK)*, section 67.

⁸⁶*Criminal Justice Act 1985 (NZ)*, section 22.

⁸⁷Miers D.R., *Compensation for Criminal Injuries* (London, Butterworths, 1990) at 45. See also Hansard 25 March 1993 at 9.

⁸⁸Ashworth, A., 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 *Oxford Journal of Legal Studies* 86 at 117.

⁸⁹*Victorian Sentencing Committee 1988* at 109. See also Hansard 28 May 1993 at 1-19.

sentence, any inequity in the treatment of offenders should be minimised. The real issue as to effectiveness concerns the ability or willingness of offenders to satisfy reparation orders.

3.27 Secondly, the Victorian Sentencing Committee considered that the need to determine disputes as to the quantum of damages would lead to extensive delay.⁹⁰ This Committee accepts that while on the one hand a greater encouragement of the use of reparation provisions will no doubt increase the workload of sentencing courts and lead to some additional expense and delays in the sentencing process, on the other hand, a greater use of reparation in criminal courts may lessen the workload of civil courts. Essentially, it is a question of distributing the overall workload between criminal and civil courts and arguably the provision of cost effective reparation remedies in the criminal courts will tend to an overall decrease in the public and individual costs involved in civil proceedings.⁹¹

3.28 Thirdly, the Victorian Sentencing Committee considered that if reparation were to be a goal in itself, it might fail to take into account the role of the state in the enforcement of the criminal law which is said to have wider interests that may not always match those of any particular victim.⁹² This argument relates to the difference between restoration and punishment. Where a restitution or compensation order merely has the effect of restoring the status quo, for example, by forcing the return of property or the disgorging of the benefits of crime, a sentencer may feel that something more is required by way of infliction of some other 'disbenefit' or punishment. Although the victim may be satisfied by the restorative component of justice, the state's interest may require something further. Evidence from the United Kingdom supports the view that sentencers believe that compensation on its own is rarely considered a sufficient sanction for retributive, deterrent or denunciatory purposes. Newburn found from his interviews that magistrates regarded compensation as a relatively minor matter. Compensation was one of the final considerations in court and was seen as an ancillary matter. They were unwilling to regard compensation as a sole penalty, preferring to combine it with other sentences. According to Newburn: 'The rationale for this is that compensation, they feel, is not a sufficient punishment, returning one only to the status quo.' This sentiment arose because of the ambiguous role of the compensation order and is considered to be independent of any legal or institutional problems in making compensation orders.⁹³

⁹⁰See also Written Submission 19.

⁹¹Hansard 1 October 1993 at 36-52.

⁹²*Victorian Sentencing Committee Report 1988* at 109.

⁹³Newburn T., *The Use and Enforcement of Compensation Orders in Magistrates' Courts*, (London, HMSO, 1988) at 48.

3.29 The argument that reparation only restores the status quo and does not represent punishment for an offender overlooks the reality that in many, if not most cases, in the absence of a reparation order, offenders are unlikely to restore victim losses unless victims initiate and pursue civil proceedings. In light of the expense and trouble involved in separate civil litigation and the limited prospects of recovery, many victims will choose not to exercise that option. The argument also overlooks the practical effect that reparation orders can have on offenders. The theory that reparation as a sanction does no more than restore the status quo may not match reality.⁹⁴

3.30 A parallel dilemma is found in relation to confiscation orders made under the *Crimes (Confiscation of Profits) Act 1986*. Confiscation orders are, in theory, civil penalties, and have little to do with sentencing. However, like compensation orders, they are founded upon criminal acts, are heard in the criminal courts and there is an inevitable association with sentencing.⁹⁵ Section 5(2A) of the *Sentencing Act* recognises this, but differentiates between 'compensatory' confiscation and 'punitive' confiscation in the following manner:

- (2A) In sentencing an offender a court -
 - (a) may have regard to a forfeiture order made under the *Crimes (Confiscation of Profits) Act 1986* in respect of property -
 - (i) that was used in or in connection with, the commission of the offence;
 - (ii) that was intended to be used in or in connection with, the commission of the offence;
 - (iii) that was derived or realised, directly or indirectly, from property referred to in sub-paragraph (i) or (ii);
 - (b) must not have regard to a forfeiture order made under that Act in respect of property that was derived or realised, directly or indirectly, by any person as a result of the commission of the offence;
 - (c) may have regard to a pecuniary penalty order made under that Act to the extent to which it relates to benefits in excess of profits derived from the commission of the offence;
 - (d) must not have regard to a pecuniary penalty order made under that Act to the extent to which it relates to profits (as opposed to benefits) derived from the commission of the offence).
- (2B) Nothing in sub-section (2A) prevents a court from having regard to a confiscation order made under the *Crimes (Confiscation of Profits) Act 1986* as an indication of remorse or co-operation with the authorities on the part of the offender.

⁹⁴See Hodgson Committee, *Profits of Crime and Their Recovery* (London, Heinemann, 1984) at 138-139.

⁹⁵See Freiberg A. and Fox R.G., 'Forfeiture, Confiscation and Sentencing' in Fisse B., Oss G. and Fraser D. (eds) *The Money Trail: Confiscation of the Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Sydney, Law Book Company, 1992) at 106 f.f.

3.31 In essence, section 5(2A) distinguishes between the effects of forfeiture or pecuniary penalty orders that relate to the direct proceeds of a crime and those orders that relate to benefits in excess of the direct proceeds. Only the effect on offenders of orders relating to property interests in excess of the direct proceeds is considered relevant to sentencing. By analogy, the effect on an offender of a reparation order which seeks to restore the status quo is, similarly, not a relevant consideration apart from its traditional treatment as providing evidence of remorse or rehabilitation, as discussed earlier.

3.32 The element of the state interest in sentencing becomes crucial in this respect. As the Victorian Sentencing Committee argued, if reparation were to be a goal in itself, it might fail to take into account the role of the state in the enforcement of the criminal law. In its view, the 'state's interest in pursuing criminal justice goes beyond simply ensuring that victims have their losses minimised' and included such matters as retribution, deterrence and rehabilitation. It concluded that 'if people can buy their way out of the natural consequences that flow within the system from their wrongdoing, the ability of that system to prevent crime in the community would be reduced.'⁹⁶

3.33 Similar views were expressed by Miers:⁹⁷

At first sight, compensation orders appear to fit well with such sentencing notions as balancing the harm caused by the offender and of correcting injustice as between him and his victim. ... A compensation order may cancel out the unfair treatment of the victim by the offender; but that is all. It cannot cancel out, since it does not address, the public aspect of the offender's conduct. Nor, since it is calculated primarily by reference to the actual harm sustained by the victim, is it sufficiently sensitive to permit individualised sentencing beyond adjustment according to the offender's means. ... The individualisation of compensation orders is problematic not only where the offender does not have sufficient means, but also where he does.

3.34 The nub of Mier's argument is that compensation orders are limited sanctions because they cannot properly take into account degrees of fault. Because the compensation order focuses upon the extent of loss to the victim, which may vary due to factors completely outside the control of the defendant, it cannot take into account the offender's culpability, be it intentional, reckless or negligent. A sentencing order, which focuses primarily on the offender, makes allowances for this, but the compensation order cannot.⁹⁸ This argument reinforces the importance of distinguishing between the various relationships between state, offender and victim discussed in Chapter 2 and the need to be aware that the one sanction cannot serve all these purposes simultaneously.

⁹⁶*Victorian Sentencing Committee Report 1988* at 109.

⁹⁷Miers at 294-5.

⁹⁸*Ibid* at 291.

3.35 It is clear that if the reparation sanction is to be effective, these ambiguities must be resolved. In New Zealand, where such a sanction is available, there has been no consensus on the aims of the reparation sanction. Galaway and Spier observe:⁹⁹

There is considerable confusion as to whether reparation should be perceived primarily as a penalty for offenders or primarily as a service for victims. As a penalty, reparation might well be designed to accomplish the traditional objectives of sentencing, or it might be used to accomplish the emerging concepts of restorative justice. As a victim service, reparation might be designed to compensate victims or increase opportunities for victim participation in the criminal justice system. Although it may be possible to accomplish both victim and offender aims in a given case, it is essential to establish which of these aims should be the primary focus as a guide in cases where the two goals may not be equally accomplishable...

Solving this ambiguity goes well beyond the issue of reparation and raises fundamental questions regarding the appropriate role, if any, of victims in the administration of criminal law... But the ambiguity must be resolved if reparation is to be consistently and effectively administered.

3.36 The Committee accepts that the state's interest in ensuring compliance with the criminal law through sentencing is no doubt wider than those of any particular victim. However, part of the state's interest includes the interests of individual victims and the Committee is not persuaded that there is a necessary conflict between the two nor that victims' interests cannot be accommodated within the wider public interest in sentencing. The Committee believes that in many instances the two aims of the reparation sanction - penalising offenders and compensating victims - can complement each other and that there is not an inherent conflict or incompatibility between the two. Further, if there is a conflict between the two aims, the Committee believes that the primary focus of reparation should be the restoring of victim losses as it views restoration as a subsidiary aim of sentencing.

3.37 One of the Committee's concerns with the creation of a reparation sanction (apart from enforcement implications which are discussed below) is the problem of possible disparity in sentencing because some offenders may be in a better financial position to make reparation. However, the Committee notes that:

- there is at the moment a risk of disparity in the existing state of the law through the operation of reparation as a mitigating factor;

⁹⁹Galaway B. and Spier P., *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* (Wellington, Department of Justice, 1992) at 171.

- in deciding whether to make a reparation order and in assessing the mitigating effects of reparation the courts should have regard to the financial means of offenders and thus minimise the risk of disparity;
- the courts have made it clear that offenders should not be able to buy themselves out of a deserved sentence and reparation will be only one of several relevant factors in determining the appropriate sentence.

3.38 Another issue raised during the Committee's inquiry¹⁰⁰ is the need to distinguish between punishment for a criminal wrong and the consequences flowing from a civil wrong. It was suggested, in varying forms, that it would be wrong to visit on an offender the consequences of civil liability as part of sentencing as considerations relevant to punishment are much broader.¹⁰¹ It was also said that reparation should focus on the victim and punishment on the offender and that reparation should not be used to punish offenders and, conversely, punishment should not be used as a means of compensating victims.¹⁰²

3.39 These arguments reflect the distinction between culpability and restoration as principles relevant to sentencing with the former concentrating on the conduct of the offender and the latter on the needs of the victim. The arguments also reinforce the possible conflict between the dual aims of a reparation sanction as to offender punishment and victim service. However, for the reasons discussed above and in Chapter 2, the Committee believes that in most cases there will not be a conflict between these two aims, particularly if the restoration of victim losses is viewed as a subsidiary aim of sentencing.

3.40 The Committee, on balance, believes that there is potential for reparation to be a sentencing sanction in its own right. Furthermore, the aims of offender punishment and victim service are not necessarily incompatible but rather, may be complementary to each other.

REPARATION AS A CONDITION OF SENTENCE

3.41 An alternative to the scheme of constituting a reparation order as a sanction in its own right is one which allows the reparation order to be made a condition of a sentence, rather than being an order ancillary to the

¹⁰⁰Written Submissions 15 and 16.

¹⁰¹Hansard 28 May 1993 at 1.

¹⁰²Hansard 22 June 1993 at 2-4.

sentence. A reparation order could be attached to all or some sentencing orders.

3.42 As it currently stands, the *Sentencing Act*, by section 38(1)(g), specifically prohibits the making of a reparation order as a program condition of a community based order. Further, the drafting of sections 19 to 21, dealing with intensive correction orders, suggests that satisfaction of a reparation order could not be made a condition of such orders.

3.43 Although there are only limited possibilities in Victoria, reparation orders can be made a condition of a sentence, rather than being ancillary thereto. The possible combinations or linking of reparation orders to sentencing options under the *Sentencing Act* are:

- imposition of a reparation order in addition, or ancillary, to any sentencing disposition;
- the making of reparation orders as conditions of suspended custodial sentences, releases on adjournment and discharges or dismissals.

3.44 Under Commonwealth legislation, conditions regarding compensation and restitution may be included in recognisances when federal offenders are discharged without a conviction being recorded against them under section 19B of the *Crimes Act 1914* (Cth), or conditionally released after conviction under section 20. Section 20(1) permits the court to sentence a person to imprisonment, but to order release upon the offender giving security by recognisance to comply with conditions, including 'reparation, restitution or compensation'. Section 20(2A) provides that a person is not to be imprisoned for breach of such a condition. Where a court makes an order under section 20, rather than under section 21B (which creates an ancillary power to make a reparation order like that found in Part 4 of the *Sentencing Act*¹⁰³), it has the effect of drawing the offender within the ambit of the overall penalty and exposes the offender to the possibility of imprisonment in the event of failure to make reparation.¹⁰⁴

¹⁰³Section 21B provides that on conviction or discharge under section 19B, the court may, in addition to any penalty, order the offender to 'make reparation ... by way of money payment or otherwise' to the:

- (a) Commonwealth, in respect of 'any loss suffered or any expense incurred by reason of the offence';
- (b) any person, in respect of any loss suffered by the person 'as a direct result of the offence'.

¹⁰⁴*Johannessen v. Lee* (1993) 93 A.T.C. 4001.

3.45 Section 20A(5) provides that on the hearing of proceedings for breach of a condition of a discharge under section 19B(1) or of a release under section 20(1), the court may, in the case of:

- discharge - revoke the order, convict the person and deal with the person in any manner in which he or she could have been dealt with for the offence if the order had not been made or take no action;
- release - continue the order and impose a pecuniary penalty or exercise the same default powers as in the case of a breach of a condition of a discharge.

Section 20AA also allows for the conditions of a discharge or release order to be removed or varied on application and section 20AA(3)(d)&(e) provides specifically for a reduction in quantum or for variation in instalment arrangements for the making of reparation.

3.46 South Australian law also permits a court to make it a condition of a bond that the offender restore misappropriated property or pay compensation to any person for injury, loss or damage¹⁰⁵. Under Queensland law, both community service orders and intensive correction orders may contain conditions that an offender make restitution or compensation. The order is discharged when restitution or compensation is made.¹⁰⁶

3.47 The difference between treating reparation as an independent sentence or as a condition of sentence is significant in terms of the consequences of a breach of the order. Where a reparation order is an integral part of the sentence, failure to pay will trigger default of the whole sentence so that, for example, if a suspended sentence were imposed with a condition of compensation, failure to pay may require the sentence of imprisonment to be executed. This process, in effect, makes imprisonment the ultimate default penalty for failure to pay. The consequences would differ, depending upon the type of sanction.

3.48 It has been argued that such a scheme would be preferable in that it ties reparation more closely to the sentencing system and, from the victims' point of view, the combination order may be regarded as a stronger vindication of their rights. It is also said that it would avoid situations where offenders receive a reduction in sentence because of a reparation

¹⁰⁵*Criminal Law (Sentencing) Act 1988 (SA)*, section 42(1)(g).

¹⁰⁶*Penalties and Sentences Act 1992 (Qld)*, sections 104 and 116.

order but the order remains unsatisfied.¹⁰⁷ On the other hand, it may disadvantage poorer offenders, who, if they are unable to pay, are subject to the harsher consequences of the default penalty.

3.49 In the United Kingdom, the court has power to defer the passing of sentence for up to six months:

For the purpose of enabling the court to have regard, in determining his sentence, to his conduct after conviction including, where appropriate, the making by him of reparation for his offence.¹⁰⁸

3.50 This provision seems little used, and it would appear that with the ordinary delay between the offence and trial, there is ample opportunity for the offender to make, or offer to make, compensation, prior to sentence.¹⁰⁹ This issue is explored further in Chapter 6, in the context of the outcomes of offender/victim reconciliation programs, including any proposals for reparation, being conveyed to the sentencing court as part of a pre-sentence report or assessment.

THE EMPIRICAL EVIDENCE

3.51 In considering which option to adopt, the Committee has had regard to how, in practice, courts make reparation orders in terms of their frequency, the amounts involved and the type of offences leading to their making. In this regard, it has considered studies conducted in the United Kingdom, New Zealand and Victoria.

United Kingdom

3.52 Over the last fifteen years, three major studies on the use of compensation orders have been undertaken in the United Kingdom under the auspices of the Home Office. The first was carried out in 1978¹¹⁰ and the later studies in 1988¹¹¹ and 1992.¹¹² Because of the major changes in the law

¹⁰⁷See, for example, Hansard 28 May 1993 at 28-29 and 17 June 1993 at 1.

¹⁰⁸*Powers of Criminal Courts Act 1973*, section 1(1).

¹⁰⁹Miers at 248.

¹¹⁰Softley P., *Compensation Orders in Magistrates Courts* (London, HMSO, 1978).

¹¹¹Newburn T., *The Use and Enforcement of Compensation Orders in Magistrates' Courts*, (London, HMSO, 1988).

¹¹²Moxon D., Corkery J.M. and Hedderman C., *Developments in the use of Compensation Orders in Magistrates Courts Since October 1988* (London, HMSO, 1992).

which have occurred over that period, only the most recent studies are of present interest.

3.53 Newburn's 1988 study examined the criminal statistics for the United Kingdom for 1985 and surveyed 471 courts, of which 271 replied to his questionnaire. He carried out a focussed study of four courts and interviewed court staff. His survey yielded 1,313 responses, which represented a response rate of 35.4%. Moxon's 1992 study was intended to assess the impact of changes made in 1988 by the *Criminal Justice Act 1988* (UK). The major change of relevance for the purpose of this inquiry was the introduction of the requirement that a court give its reasons for not awarding compensation in cases involving personal injury, or property loss or damage. It collected information on 3,500 cases dealt with in nine Magistrates' Courts during the twelve months before and the twelve months after the changes made by that Act.

3.54 When interpreting the results of these studies, it should be borne in mind that in the United Kingdom compensation orders are available in respect of personal injuries as well as property loss or damage resulting from an offence. For comparative purposes, reference is therefore made only to those results dealing with compensation for property damage. Another major difference between the jurisdictions is that magistrates in the United Kingdom are lay persons who sit relatively infrequently, whereas the magistracy in Victoria is comprised of full-time, legally qualified professionals and in recent years their criminal jurisdiction has expanded so that almost 95% of all criminal cases are dealt with in the Magistrates' Court. In comparison to the approximately 34,000 magistrates in the United Kingdom, there are about 90 in Victoria.

3.55 Newburn's analysis showed that in the United Kingdom, in 1985, compensation orders were made in 77% of criminal damage cases. The average amount of orders in such cases was £67. In the Crown Court, compensation orders were made in 8% of all cases and 50% of the orders were for amounts under £50, 69% were under £100 and 96% were under £500. The average amount ordered overall was £119. It was evident that compensation orders were generally very small, perhaps because the offender's means were insufficient or because the injury, loss or damage was not very large.¹¹³ In 1988, 13% of all offenders sentenced had compensation orders made against them, the majority of which were in relation to criminal damage, fare evasion and social security offences.¹¹⁴

3.56 Moxon's 1992 study found, not surprisingly, that there was a relationship between the amount of the loss and likelihood of the loss being

¹¹³Newburn at 14.

¹¹⁴Miers at 322.

compensated by the order. Thus 90% of losses up to £50 were compensated in full whereas less than 50% of orders over £500 attracted full compensation. This was related both to the means of the offender and the increased likelihood that the quantum of the loss would be disputed where the amount claimed was relatively large.¹¹⁵

3.57 In the United Kingdom, the elevation of the compensation order to the status of an independent sanction has made little difference to either the extent of its use or its enforcement. Its legal status may make very little difference as to whether victims, in fact, will be compensated. According to Miers, the use of compensation orders as the sole sentence did not increase since the power to make that order was introduced. In 1988, 4.2% of all compensation orders were sole orders, which amounted to 0.5% of all offenders sentenced.¹¹⁶ Newburn's study found that only 5% of those in his sample used compensation as a sole penalty and that there was only slight evidence that where it was used alone, the amount ordered was in fact higher than when it was used in combination with a fine.¹¹⁷ Moxon's 1992 study found that in the Magistrates' Court, only 6% of orders were imposed without additional penalty while only 1% of orders in the Crown Court were compensation orders alone.¹¹⁸

New Zealand

3.58 In 1985 the New Zealand Department of Justice published a study of restitution in that country.¹¹⁹ The study involved a survey of all courts, including the Children's Court, in New Zealand between the 10th and the 21st of January 1983. It examined records relating to 709 offenders who were involved in 1346 charges of property offences such as burglary, theft, receiving stolen property, fraud and destruction of property. One-fifth of the sample came from the Children's Court. Of the entire sample, 79% were under 25 year olds and 63% were unemployed. In 31% of cases, the victims had no loss either because no loss occurred or because the property was recovered. Of those cases where a loss was specified, 54% were under \$100 and 70% were under \$500. Only 5.35% of orders were for amounts over \$2000.¹²⁰

¹¹⁵Moxon at 18.

¹¹⁶Miers at 322.

¹¹⁷Newburn at 10.

¹¹⁸Moxon at vii.

¹¹⁹Galaway B. and Walker W., *Restitution Imposed on Property Offenders in New Zealand Courts* (Wellington, Department of Justice, 1985) at 1.

¹²⁰*Ibid.*

3.59 In 71% of cases where there was a loss, the police requested restitution. The mean amount requested was \$486 and the median amount was \$95. In 52% of cases where there was loss, an order was made. Of orders made, 71% were for amounts of less than \$200. The mean amount was \$333 and the median amount was \$66.

3.60 In 1992 another major study was published by the New Zealand Department of Justice evaluating the operation of the *Criminal Justice Act 1985* (NZ) which introduced the sentence of reparation.¹²¹ The major statistical data was derived from court files and the central data base in relation to property offences and monetary penalties dealt with or imposed by the District Court in the first three months of 1988 and 1989.¹²² This study found that in 1991, of 53,732 convictions for property offences, 19% resulted in a sentence of reparation. Of 9,593 convictions for violent offences, 2% resulted in such a sentence. In 41% of the property cases, no victim losses were identified and where they were identified, the mean loss was \$679 and the median loss was \$130.¹²³ Only 8% of cases involved losses of more than \$500.¹²⁴ Of the sample of cases in the District Court, only 30% of offenders were employed in the workforce, 52% were unemployed and 13% were collecting a form of Social Security benefit.¹²⁵ Consistent with other studies, it was found that a major determinant of whether an order was made was whether the police requested reparation. Reparation was imposed in 70% of cases where police requested it, compared with 36% of cases in which they did not.¹²⁶ Police requested reparation in 71% of cases where a victim loss was identified.

3.61 In New Zealand, reparation is rarely used as a sole sanction. In 1988, of 198,355 charges which resulted in sentences, only 5% resulted in a sentence of reparation and 20% of those involved the use of reparation as a sole sanction.¹²⁷

Victoria

3.62 The Criminal Justice Statistics Planning Unit of the Department of Justice examined 4,673 cases in the Victorian Magistrates' Courts in which

¹²¹Galaway and Spier.

¹²²For a full account of the methodology and the other data sets obtained, see Galaway and Spier, Chapter 2.

¹²³Softley P., *Compensation Orders in Magistrates Courts* (London, HMSO, 1978).

¹²⁴Galaway and Spier at 56.

¹²⁵*Ibid* at 51.

¹²⁶*Ibid* at 58.

¹²⁷That is, it was used in this way in 1.08% of all cases: Galaway and Spier, at 32.

restitution or compensation orders were made in the period from 1 January 1993 to 30 June 1993. That study focussed on two major issues. First, the number of eligible cases that resulted in a reparation order being made. Secondly, the relationship between reparation orders and existing sentencing options in particular categories of offences.¹²⁸ The results of the study are set out in the tables in Appendix V.

3.63 In terms of the frequency in which reparation orders were made in eligible cases, the major findings of the study were that reparation orders were made in:

- 33.8% of social security cases;
- 25.9% of property damage cases;
- 5% of theft cases dealt with summarily.

3.64 Of the total sample, the study found that reparation orders were combined with the following sentencing options:

- custodial sentences - 17%;
- suspended custodial sentences - 7%;
- bonds - 9%;
- community corrections - 44%;
- licence cancellation - 3.2%;
- fines - 24%.

3.65 Having regard to particular offence categories, it found that reparation orders were combined with fines in 26% of social security offences, 39.5% of property damage cases, 13.8% of theft cases and 71% of driving and traffic cases.¹²⁹ It also found that reparation orders were combined with community corrections orders in 37% of social security cases, 37.6% of property damage cases, 50% of theft cases and 10% of driving and traffic cases.

¹²⁸ Although social security offences and other Commonwealth offences are included in the study, for comparative purposes less weight should be given to these categories because of the different procedures for the making and enforcement of reparation orders under the *Crimes Act 1914* (Cth) and *Social Security Act 1991* (Cth).

¹²⁹ The category of driving and traffic offences formed only a small part of the overall sample.

3.66 The overall conclusions of the study were that where a reparation order is made there is an increased tendency for a community corrections order to be made, a decreased tendency for a bond to be made and a decreased tendency for a custodial sentence to be imposed.

3.67 In considering the relationship between reparation orders and sentences, it is also important to bear in mind how orders may be made and the type of victim claims involved.

Making the Order

3.68 A compensation order must be related to a particular sum of money owing to a particular person or entity. Where there are multiple offences, there must be a separate compensation order in respect of each offence. A single order covering losses as a whole is regarded as invalid, particularly if there is more than one victim.¹³⁰ Similarly, a failure to specify who is to be compensated will result in the order being quashed.¹³¹

3.69 Where crimes have been committed jointly, it is possible for compensation to be ordered against all of the accused persons in the form of a joint and several order and it will not suffice for any one accused to assert that his or her contribution to the crime represented only a small proportion of the value of the loss or damage sustained.¹³² However, the enforcement of such orders creates difficulties and they should not be made if substantial justice can be achieved by orders made severally.¹³³ If the means of the offenders vary, then some may have to make compensation while others will not. It is not a ground for appeal on disparity of sentence that one offender was ordered to pay compensation and others not.¹³⁴

3.70 If there are multiple victims, compensation will usually be apportioned on a pro rata basis, but a court may select between victims on the basis that some may be better placed to pursue other remedies, for example, where one victim is a bank, and the other an individual.¹³⁵

¹³⁰*Inwood* (1974) 60 Cr. App. R. 70 at 74.

¹³¹*Oddy* (1974) 59 Cr. App. R. 66 at 69.

¹³²*Braham* [1977] V.R. 104 at 112-113.

¹³³*Grundy* [1974] 1 W.L.R. 139.

¹³⁴*Miers* at 265.

¹³⁵*Ibid* at 262; Lanham D., 'Criminal Fraud and Compensation Orders' (1986) 10 *Criminal Law Journal* 297 and 'Restitution Orders' (1986) 10 *Criminal Law Journal* 394.

3.71 Newburn's 1988 study of compensation orders in the United Kingdom found that 14.5% of cases involved more than one defendant and 16% involved more than one victim. Of the victims, 50% were an organisation or company such as local councils, local authorities, shops and other institutions. The typical victim therefore was not necessarily an individual or family.¹³⁶ In 20% of cases there was previous acquaintance between offender and victim.¹³⁷ In only 4% of cases was the victim present in court.

3.72 Similarly, Moxon's 1992 study found that 56% of property offences were committed against business or organisations such as the Department of Social Security whilst 37% were against individuals.¹³⁸ In New Zealand, Galaway and Spier found that businesses were victims for 49% of offences, adult citizens 33%, households 7% and government agencies or employees 7%.¹³⁹

3.73 An examination of 265 reparation orders made by Victorian Magistrates' Courts in November 1991 showed that 98 orders were made in favour of individuals, 63 in favour of government departments or agencies, 55 in favour of small businesses, 16 in favour of large retailers and 22 in favour of banking institutions.¹⁴⁰

3.74 Of that sample, the largest order was for \$157,127.70 and the smallest for \$7.00, with the median amount being \$650.60. However, 157 orders were for amounts less than \$1,000 and the most common order was for around \$200. Seventy orders were for \$200 or less and 50 orders were for amounts between \$200 and \$500.

REPARATION AND SENTENCING OPTIONS

Reparation and Custodial Sentences

3.75 In the United Kingdom reparation orders are rarely made in combination with custodial orders. Newburn found that only 1% of compensation orders in the Magistrates' Court were made in combination with an immediate custodial sentence¹⁴¹ while Moxon also found that in

¹³⁶Newburn at 18.

¹³⁷*Ibid* at 19.

¹³⁸Moxon at 18.

¹³⁹Galaway and Spier at 54.

¹⁴⁰Eleven orders had insufficient details to allow for appropriate classification.

¹⁴¹Newburn at 13.

most cases the making of a custodial order precluded the making of a compensation order.¹⁴²

3.76 Offenders who are sent to prison are unlikely to have the means to pay compensation orders and are, in Victoria, unable to earn sufficient money in prison to make any appreciable contribution to the victim.¹⁴³ Miers summarises the position as follows:¹⁴⁴

While the fact that the offender has received an immediate, and possibly substantial custodial sentence is no ground for not ordering compensation if he clearly has the means to pay, an order should not be made if its effect would be to subject him, on his release from custody, to a financial burden which he would not be able to meet from his available resources and which might encourage him to commit further offences to obtain the means to meet the requirements of the order. The longer the postponement of the initial payment of compensation, the more certain the court needs to be about the chances of the offender being able to comply.

3.77 The Committee believes that in the majority of cases where immediate and substantial custodial sentences are imposed, it would not be appropriate to make a reparation order where there is little prospect of it being satisfied. One of the overriding considerations, in the Committee's view, as to the making of a reparation order is whether the offender has the capacity to satisfy the order contemplated. There will be few cases where an offender has the capacity to satisfy a substantial reparation order whilst being subject to a custodial sentence.

Reparation and Suspended Sentences

3.78 In the United Kingdom, approximately 3% to 4% of compensation orders are made in combination with a suspended sentence of imprisonment.¹⁴⁵ This combination raises a number of significant problems. While a compensation order is more likely to be made in such cases and on more onerous terms, enforcement becomes problematic if the offender breaches the sentence and is sent to prison.¹⁴⁶ A court has no power to vary the compensation order, and will probably not consider the existence of the compensation order to be a proper ground for not executing the suspended sentence.

¹⁴²Moxon at 9.

¹⁴³Prisoners in Victoria are paid between \$2.50 and \$6.50 per working day, depending upon the type of work undertaken. Unemployed prisoners do not receive any pay.

¹⁴⁴Miers at 282.

¹⁴⁵Newburn at 13; Moxon at 9.

¹⁴⁶Miers at 286.

3.79 In the United Kingdom, section 37(d) of the *Powers of Criminal Courts Act 1973* was amended in 1988 to allow the court, on the application of an offender, to discharge or reduce the compensation order if it appears:

That the person against whom the order was made has suffered a substantial reduction in his means which was unexpected at the time when the compensation order was made, and that his means seem unlikely to increase for a considerable period.

3.80 In submissions both oral and written,¹⁴⁷ the Committee was urged to consider combining reparation orders with sentencing options so that non fulfilment of the former would lead to a reconsideration of the latter by way of resentencing on the taking of breach proceedings. In particular, it was suggested that satisfaction of a reparation order should be made a condition of a suspended custodial sentence so that failure to satisfy a reparation order can lead to breach proceedings and resentencing on the suspended custodial sentence, which may result in the imposition of the custodial sentence.¹⁴⁸

3.81 Although the Committee believes there is some potential for linking the satisfaction of reparation orders with sentences, it does not believe that the linkage is appropriate in the case of suspended custodial sentences. As noted by the Victorian Sentencing Committee,¹⁴⁹ Victoria has done away with the concept of 'debtors prisons' with the reform of the *Imprisonment of Fraudulent Debtors Act 1958*. The effect of that legislation is that in the absence of wilful and persistent disobedience of a court order (which may constitute a contempt of court) the inability of a person to satisfy a civil judgment debt should not result in imprisonment.

Reparation and Non-Custodial Sentences

3.82 Compensation orders are frequently made in combination with non-custodial sentences such as probation or community work. The major concern of the sentencer in these cases will be the means of the offender and the evidence is clear that compensation orders will more likely be made if the offender is employed.¹⁵⁰ In the United Kingdom, Newburn found that

¹⁴⁷Written Submissions 5 and 14; Hansard 28 May 1993 at 28-29 and 17 June 1993 at 1.

¹⁴⁸Under section 31(5) of the *Sentencing Act*, on hearing proceedings for breach of a suspended sentence the court may restore whole or part of the suspended custodial sentence, extend the operation of the suspended sentence or make no order on the suspended sentence and, in addition, impose a fine.

¹⁴⁹*Victorian Sentencing Committee Report 1988* at 357.

¹⁵⁰Miers at 285.

17% of orders were combined with a conditional discharge; 16% with probation orders and 10% with community service orders.¹⁵¹ Moxon found that about 19% of orders were combined with conditional discharges, 12% with probation and 7% with community service.¹⁵²

Reparation and Fines

3.83 The relationship between these two monetary orders is discussed in more detail in Chapter 4. The quantum of these orders will differ. Generally, a fine is commensurate with the gravity of the offence. However, section 50(5) of the *Sentencing Act* states that:

- A court in fixing the amount of a fine may have regard to (among other things) -
- (a) any loss or destruction of, or damage to, property suffered by a person as a result of the offence; and
 - (b) the value of any benefit derived by the offender as a result of the offence.

The quantum of a compensation order will be commensurate, not with the gravity of the offence, but with the victim's loss,¹⁵³ subject to appropriate consideration of the offender's financial means. The Act makes it clear that in the case of conflict, the compensation order should take precedence.¹⁵⁴

SENTENCE OR CONDITION OF ORDER?

3.84 Having considered the alternative schemes outlined above and the empirical evidence of how such orders are used, and bearing in mind the Committee's belief that reparation orders should be more closely integrated into the sentencing process, the Committee is of the view that reparation orders should constitute independent sanctions. In reaching this conclusion, the Committee had particular regard to the following factors:

- although reparation orders were historically and conceptually regarded as civil orders, albeit made in the criminal courts, in practice almost all reparation is effected through the criminal courts; consequently the nature of that jurisdiction should receive more recognition;

¹⁵¹Newburn at 13.

¹⁵²Moxon at 9.

¹⁵³Miers at 287.

¹⁵⁴*Sentencing Act*, section 50(4); see also the discussion in Chapter 4.

- reparation already affects sentence as a mitigating factor where it provides evidence of remorse or rehabilitation on the part of offenders;
- it is important for victims of crime to see that the criminal law has had regard to their interests in the sentencing process;
- changing the status of the order would not necessarily affect the weight to be accorded to it in the sentencing process; a court would not be required significantly to alter its sentencing practices;
- the evidence from those jurisdictions in which such a step has been taken is that it has not resulted in major disturbances in the sentencing process;
- there is no evidence that disparity of sentences has increased on account of the change in the status of the order from an ancillary order to a sentencing order;
- if reparation orders were conditions of other sentences, the breach rate of those sentences would increase, creating a heavier workload for the courts and a real possibility that more offenders would be serving community-based orders, or be imprisoned in default;
- while it is possible to make reparation orders a condition of some, but not all sentencing orders, it is preferable that the regime for breach of a reparation order be uniform.

Draft Recommendation 3

3.85 Accordingly, the Committee recommends that section 7 and Part 4 of the *Sentencing Act* be amended to provide that reparation orders constitute sentencing orders and may be made in addition to, or in substitution for, any sentence that can be imposed.

REPARATION ORDERS IN THE SENTENCING HIERARCHY

3.86 If reparation orders were to be made independent sanctions, where would they fit into the sentencing hierarchy? Sections 5(3)-(7) of the *Sentencing Act* set out the hierarchy of sentencing options by providing that courts should not impose a particular sentence if the same purpose can be achieved through the imposition of a less severe sentence. Section 7 lists the various sentencing options available to the courts, including, lastly, the making of any order authorised by the Act, which includes reparation orders under Part 4.

3.87As the Committee believes restoration or reparation should be a subsidiary and not a primary aim in sentencing, the use of a reparation sanction will be either to support or reinforce other punishment aims like deterrence and rehabilitation or to promote victim compensation. In practical terms, the reparation sanction will have a similar status to fines but its proper place in the sentencing hierarchy may depend on the use to which it is put.

3.88In considering the appropriate sentencing hierarchy, the Victorian Sentencing Committee recommended that compensation orders be equated with fines in terms of fines or compensation orders that are 'substantial', 'moderate' or 'small' to the offender.¹⁵⁵ Although there are good reasons for equating fines with reparation orders, especially in terms of variation and breach proceedings, the function of the fine is limited to offender punishment whereas the reparation sanction includes that function and the object of victim compensation. Further, the *Sentencing Act* already gives priority to reparation orders over fines.

3.89There are therefore reasons for placing reparation orders below fines with the effect that courts should not impose a fine unless it is thought that the purposes for which the sentence (fine) is imposed cannot be achieved by a reparation order. This would involve amending section 5(7) of the *Sentencing Act*. If the court believes that something more than a reparation order is required by way of punishment, it could impose a fine or other sentencing order to achieve that purpose.

3.90Further, it must be borne in mind that in many cases there will be no conflict between the imposition of a fine and the making of a reparation order. This is because many offences are offences against the state only and do not involve any individual victim. Also, in many cases there may be no identifiable victim and the question of a reparation order will not arise.

Draft Recommendation 4

3.91The Committee therefore recommends that section 5(7) of the *Sentencing Act* be amended to provide that courts must not impose a fine unless the purpose served cannot be met by the making of a reparation order.

3.92 The Committee now turns to consider the substantive and procedural law governing the obtaining and making of reparation orders before considering mechanisms for their enforcement.

¹⁵⁵*Victorian Sentencing Committee Report 1988* at 364.

ELEMENTS OF LIABILITY

Legislation

4.1 The power to make restitution and compensation orders is found in Part 4 of the *Sentencing Act*. Both restitution and compensation orders can be founded upon either a finding of guilt or upon a conviction. They can be made in addition to any sentencing order but cannot be made alone. The powers are available to all criminal courts in Victoria exercising state jurisdiction.

4.2 The Legal and Constitutional Committee noted¹⁵⁶ that there were in existence a 'myriad of specific provisions which apply to specific offences' in relation to restitution and compensation. It recommended that:

Victorian statutory provisions providing for restitution should be ... rationalised by the enactment of a single restitutive provision in the *Penalties and Sentences Act 1985*, which would cover all offences against Victorian law that result in loss of or damage to property.¹⁵⁷

4.3 Although a number of restitution and compensation provisions are still scattered around the statute books,¹⁵⁸ the problem identified by the Legal and Constitutional Committee has now been remedied in the main by the creation of the general powers in Part 4 of the *Sentencing Act*.

¹⁵⁶Legal and Constitutional Committee, *Report upon Support Services for Victims of Crime*, Parliamentary Paper No. 59 (1987) at 30.

¹⁵⁷Legal and Constitutional Committee at 33; see also Recommendation 18.

¹⁵⁸*Summary Offences Act*, section 52(2); *Weights and Measures Act*, section 83(3).

4.4 Nonetheless, there still remain a number of statutory provisions dealing with reparation in differing contexts. These can be divided into three groups; those that deal with the powers of criminal courts,¹⁵⁹ those that support civil processes and those that are of a hybrid nature.

4.5 Reparation provisions dealing with the powers of criminal courts include sections 90 (title to stolen property) and 570 (appeals) of the *Crimes Act 1958*, section 54 (power to order restitution) of the *Magistrates' Courts Act 1989* and sections 5, 28, 29, 33 and 34 (power to order restitution) of the *Summary Offences Act 1966*.¹⁶⁰

4.6 Reparation provisions designed to support civil processes include section 5 and Schedule 1 (restitution for performance) of the *Sale of Goods (Vienna Convention Act) Act 1987*, section 31 (restitution by landlord) of the *Landlord and Tenant Act 1958* and section 15 of the *Perpetuities and Accumulations Act 1986*.¹⁶¹

4.7 Reparation provisions of a hybrid nature, involving quasi criminal regulatory regimes, include section 42 of the *Stock Diseases Act 1968*, sections 16 and 17 of the *Bees Act 1971* and section 24 of the *Secondhand Dealers and Pawnbrokers Act 1989*.¹⁶²

4.8 Notwithstanding the predominant place of Part 4 of the *Sentencing Act* in providing reparation powers in sentencing, it is clear that there are still a number of statutory provisions which overlap Part 4. There are also, as noted, a number of provisions which serve different purposes unrelated to sentencing. The Committee believes that to the extent there remain miscellaneous statutory provisions relating to the powers of sentencing courts to order reparation, these provisions should be repealed, unless they

¹⁵⁹Provisions of this type are discussed in more detail further below.

¹⁶⁰Section 28 of the *Summary Offences Act 1966* has been amended recently by the *Summary Offences (Stolen Cattle) Act 1993*. Other similar provisions include sections 137, 152 and 191 of the *Children and Young Persons Act 1989*, sections 5 and 12 of the *Crimes (Confiscation of Profits) Act 1986*, section 121 of the *Transport Accident Act 1986* and section 65A of the *Environment Protection Act 1970*.

¹⁶¹Other civil provisions include Part 3 of the *Fair Trading Act 1985* and section 35 of the *Travel Agents Act 1986*.

¹⁶²There are also a number of provisions which deal with compensation for property damage suffered by employees. These include the *Education Act 1958* (volunteer school worker), the *Police Compensation Act 1968*, (any person suffering property damage while assisting the police), the *Country Fire Authority Act 1958* (volunteer fire officers) and the *Emergency Management Act 1986*, (emergency workers).

serve particular purposes that cannot be catered for by Part 4 of the *Sentencing Act*.

4.9 It is beyond the scope of the present inquiry to examine every single statutory provision dealing with reparation. The Committee understands that the Scrutiny of Acts and Regulations Committee is expected to receive a reference on *Redundant Legislation*. It would be appropriate that as part of that inquiry an examination of redundant reparation provisions be conducted.

Draft Recommendation 5

4.10 Accordingly, in the event that the Scrutiny of Acts and Regulations Committee receives a reference on *Redundant Legislation*, it is recommended that the Scrutiny of Acts and Regulations Committee examine, as part of that inquiry, the utility of reparation provisions dealing with the powers of criminal courts with a view to determining whether such provisions should be repealed or consolidated within the *Sentencing Act*.

4.11 Further, as part of the consultative process on the draft recommendations in this Report, the Committee welcomes submissions on these matters.

4.12 The Legal and Constitutional Committee also noted¹⁶³ that the reparation provisions only applied where an offender had been convicted or there had been a finding of guilt in relation to the commission of an offence. This was an inevitable consequence of an offender based system, which could be compared with the system of compensation for personal injuries, where the Criminal Injuries Compensation Tribunal's jurisdiction is founded on proof of the commission of an offence. It does not matter that the offender has been neither apprehended nor convicted.

4.13 The Legal and Constitutional Committee was also concerned that the informal processes of restitution and compensation should be fair and consistent and, in particular, that prosecutorial discretion was properly exercised so that offenders would not be subject to undue pressure to agree to make compensation or restitution to avoid court hearings. It recommended¹⁶⁴ that:

Further research be undertaken by the Attorney-General's Department into informal agreements between victims and offenders to ensure that the rights of both parties are adequately protected.

¹⁶³Legal and Constitutional Committee at 31.

¹⁶⁴*Ibid*, Recommendation 16.

4.14 That recommendation assumes particular importance given that reparation orders can be made on the entering of a plea of guilty and where agreement has been reached on the making of a reparation order and in situations where offenders may not have legal advice and representation. To date no action has been taken in relation to this recommendation and the Committee addresses the question of informal agreements in Chapter 6.

Restitution Orders

4.15 Restitution orders can be made only in respect of stolen goods, which include items obtained by blackmail or deception. By section 84(1) the offender must have been convicted of 'any offence with reference to the theft (whether or not the stealing is the gist of the offence)'. This not only includes offences of handling stolen goods and robbery, but also burglary, aggravated burglary and related offences involving accessorial liability or conspiracy where there is proof that a theft has actually occurred.

4.16 A restitution order may be made against anyone in possession or control of the goods in question, not just the offender found guilty of an offence. This includes both those who have received the goods knowing them to be stolen (for example police, prosecuting authorities, or other offenders), and those who are unaware of their origin, such as bona fide purchasers for value.

4.17 Restitution orders are available to restore goods stolen in the course of offences which, under section 100 of the *Sentencing Act*, have only been taken into consideration.¹⁶⁵

4.18 The Legal and Constitutional Committee was of the view that the power of the court to order restitution was too limited and that it was necessary to make clear that a court is 'empowered to make the widest variety of orders including (but not limited to) those requiring the payment of money or the rendering of services (or any combination thereof)' as well as the orders presently available. Its recommendation was that:¹⁶⁶

The court shall have the power to make any order for restitution from any source and on any terms and conditions which it considers fair and just in all the circumstances of the case.

¹⁶⁵Under the section 100 procedure, an offender charged with an offence or offences may admit having committed those offences, in which case the court may take them into account in sentencing. This means that the sentence for the current offence can include additional punishment on account of these offences, but the sentence may not exceed the maximum penalty prescribed for the principal offence. These offences are not regarded as convictions except for the purposes stated in the legislation.

¹⁶⁶Legal and Constitutional Committee at 40.

4.19 This recommendation has not been adopted. The Committee has therefore considered whether the courts should be given wider powers to make reparation orders in any form, from any source and on any terms and conditions considered just and reasonable in the circumstances.

4.20 In making the above recommendation, the Legal and Constitutional Committee stated that the courts should have wide powers 'to order the form of restitution which would be most beneficial to a victim and to fully consider the financial circumstances of an offender'. Presumably, it was meant that sentencing courts should have sufficient flexibility to tailor orders to best meet the circumstances of individual cases.

4.21 The Committee is of the view that the provision proposed by the Legal and Constitutional Committee is too wide and open ended and has particular concerns with the suggestion that reparation be ordered 'from any source' as it believes that for reparation to serve its stated aims, it is essential that offenders themselves be liable to make reparation.¹⁶⁷ Flexibility in providing satisfaction for a victim may well be negotiable where the offender cannot restore stolen property and lacks money without the courts having to devise ingenious remedies.

4.22 With some exceptions the Committee is satisfied that section 84 is sufficiently wide in enabling sentencing courts to make appropriate types of restitution orders; being the return of stolen goods, the delivery of goods representing the proceeds of stolen goods and the payment of a compensatory sum from money found on the offender at the time of apprehension.

4.23 The only definitions relevant to the expression 'stolen goods' in the *Sentencing Act* can be found in section 84(9) which says that 'stealing' is to be construed in accordance with sections 90(1) and (4) of the *Crimes Act 1958* and that 'goods' includes motor vehicles. Sections 90(1) and (4) of the *Crimes Act* deal with goods stolen outside Victoria and goods obtained by blackmail or deception respectively.

4.24 The law of theft and related offences makes a distinction between 'property' and 'goods' in that under the *Crimes Act* the following offences relate to 'property'; theft (sections 72–74), robbery (sections 75–77) and obtaining property by deception (section 81); whereas the offence of handling and receiving relates to stolen goods (section 88). Section 71(1) defines 'goods' to include 'money and every other description of property except land and includes things severed from the land by stealing'. The

¹⁶⁷See Hansard 25 March 1993 at 16, 28 May 1993 at 30, 17 June 1993 at 22–23, 22 June 1993 at 3–4 and 27 and 1 October 1993 at 45.

same provision defines 'property' to include 'money and all other property real or personal including things in action and other intangible property'.¹⁶⁸ Section 90(2) also provides that references to stolen goods includes goods representing the proceeds of the stolen goods that are in the hands of the thief or receiver and section 90(3) says that goods cease to be stolen once they are restored to the original owner.¹⁶⁹

4.25 As noted above, a restitution order can only be made where 'goods have been stolen' and a person has been found guilty of an offence 'connected with the theft (whether or not stealing is the gist of the offence)'. Prior to implementation of the statutory model proposed by the United Kingdom Criminal Law Revision Committee, restitution provisions covered all forms of property and all wrongful or criminal dealings in property.¹⁷⁰

4.26 The Committee is concerned that confining the power to order restitution to 'stolen goods' may restrict the situations in which such a power may be exercised where the thing stolen may not constitute 'goods' and prefers adoption of the wider statutory definition of 'property' for the avoidance of any doubt.

4.27 The Committee is also concerned about situations where third parties may be in control of the stolen goods or the proceeds of such goods. In this regard, section 84(1)(a) allows for orders to be made against third parties in possession of the stolen goods and section 84(1)(b) enables orders to be made against offenders in possession of the proceeds of the stolen goods. However, sentencing courts do not have power to make orders against third parties in possession of the proceeds of stolen goods.¹⁷¹

4.28 In considering this matter, the United Kingdom Criminal Law Revision Committee formed the view that the power now found in section 84(1)(b) should be limited to:

... cases where the proceeds are in the hands of the offender. In these cases there should be no difficulty in deciding whether the goods in question are proceeds of the original goods or not. To extend the provision to proceeds in the hands of

¹⁶⁸Section 73(6) restricts the situations in which there can be an unlawful appropriation of interests in land.

¹⁶⁹The distinction between 'property' and 'goods' was considered by the Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences* (1966, Cmnd. 2977) at 21-29 in the context of theft and at 65-67 regarding handling and receiving. The Committee was mainly concerned with the limited situations in which interests in land could be said to be stolen. The Committee did not discuss the distinction in the context of restitution.

¹⁷⁰See the discussion in Chapter 2.

¹⁷¹See the discussion at paras 4.196-4.200.

another might lead to disputes as to the source of the goods in respect of which the order was sought.¹⁷²

4.29 However, for the reasons discussed in this Chapter,¹⁷³ the Committee believes that criminal courts should play a more active role in resolving disputed reparation claims. It is not convinced that the reason put forward by the Criminal Law Revision Committee is sufficient to preclude an extension of the power in section 84(1)(b) to third parties.

4.30 The Committee notes that by the terms of section 84(2) of the *Sentencing Act*, courts could only make orders of the type envisaged where the applicant would be entitled to recover the property from the offender or the third party. The Committee also notes that innocent third parties who have acquired the stolen property or property representing the proceeds of stolen property in good faith and for valuable consideration would maintain their rights at law, including their rights to make consequential claims against offenders or other parties for failing to give good title to such property.

4.31 Although the Committee does not accept the recommendation of the Legal and Constitutional Committee that courts be given an unfettered power to make restitution orders on any terms,¹⁷⁴ it does see some merit in giving the courts more flexible powers. This can best be done, in the Committee's view, by creating a general power for the restoration of stolen property or its proceeds and providing that the more specific powers that currently exist be inclusive in nature.

Draft Recommendation 6

4.32 The Committee therefore recommends that section 84 be amended by:

- **deleting references to 'stolen goods' and replacing such references with the expression 'stolen property' and making necessary consequential amendments;**
- **extending the power in section 84(1)(b) to situations where the proceeds of stolen property are in the possession or control of third parties;**
- **providing that courts may make any necessary ancillary order to give effect to an order for the restoration of stolen property.**

Compensation Orders

¹⁷²Criminal Law Revision Committee at 78.

¹⁷³See especially, paras 4.78-4.108 and 4.137-4.158.

¹⁷⁴See, for example, Hansard 1 October 1993 at 16-17.

4.33 Compensation orders may be made in respect of any 'loss or destruction of, or damage to, property' as a result of the commission of an offence. There is overlap between sections 84 and 86 but the relevant offence categories for the compensation power in section 86 are wider. They are not confined to offences connected with theft. The concept of 'loss' is not confined to any particular kind of loss and is given its ordinary meaning unless specifically defined by statute for certain offences. Legislation may also clarify the basis upon which the value of property is to be calculated for the purpose of section 86 of the *Sentencing Act*.¹⁷⁵

4.34 The word 'loss' allows recompense to be obtained for the replacement value of the items, but there is some doubt as to whether, in the absence of statutory authority, a court has the power to order the payment of interest as part of the compensation order, either for the loss of the use of those items or on the order itself.¹⁷⁶ Part compensation may be ordered, but nothing beyond the value of the property lost, destroyed or damaged. Compensation is not permitted for consequential loss, such as loss of use of a vehicle or the time taken to repair damage to property or appear as a witness,¹⁷⁷ as section 86(1) says that courts may order an offender to pay compensation in a sum 'not exceeding the value of the property lost, destroyed or damaged'.

4.35 The loss or damage must be attributable to the crimes for which the accused has been found guilty. Orders cannot be made in respect of offences for which the accused has not been charged, or in relation to which he or she has been acquitted, or which are causally irrelevant or too remote, as the damage must arise 'as a result of the offence' (section 86(1)). An order may be made in relation to an offence taken into account, although how practical this power may be is questionable if the victim is unaware of the hearing or trial and is therefore unlikely to make application.¹⁷⁸ Where

¹⁷⁵See, for example, *Environment Protection Act 1970*, section 65A; *Fisheries Act*, section 31(2); *Transport Act 1983*, section 223F.

¹⁷⁶See, however, *D.P.P. v. Jones*, Victorian Court of Criminal Appeal, unreported, 29 October 1992, where a reparation order under the *Crimes Act 1914* (Cth) was criticised for not making adequate provision for compound interest on the debt.

¹⁷⁷Galaway and Spier suggest that consideration be given to permitting courts to order compensation for consequential loss; Galaway B. and Spier P., *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* (Wellington, Department of Justice, 1992) at 173.

¹⁷⁸Miers D.R., *Compensation for Personal Injuries* (London, Butterworths, 1990). Further, the mention system in the Magistrates' Courts for guilty pleas results in

multiple offences are taken into consideration, the position may be further complicated by the fact that the order made is subject to the offender's means.

4.36 The Committee believes that the expression 'loss of or damage to' should be given its usual meaning¹⁷⁹ to include not only direct losses but consequential losses by way of, for example, interest, finance and legal costs, that flow from the offence. This proposal is consistent with the role of reparation as an aim in sentencing and its potential for pursuing aims of offender punishment and victim compensation. Furthermore, the extension of loss or damage to include consequential loss or damage is consistent with Australia's obligations under the United Nations *Declaration of the Basic Principles of Justice Relating to the Rights of Victims of Crime* (discussed in Chapter 1), which requires provision to be made for the return of property, payment for harm or loss suffered and 'reimbursement of expenses incurred as a result of victimisation'.

Draft Recommendation 7

4.37 Accordingly, the Committee recommends that section 86 of the *Sentencing Act* be amended to make clear that compensation orders may include provision for consequential losses and should not be limited to the value of the property.

4.38 The Committee draws attention to its draft recommendation dealing with the need to consider the offender's financial means to ensure that excessive or unrealistic reparation orders, which may include provision for consequential losses, are not made.

Young Offenders

4.39 Orders for restitution and compensation can be made in addition to any of the sentences imposed by the Children's Court. By section 191 of the *Children and Young Persons Act 1989*, the provisions of Part 4 of the *Sentencing Act* apply to such proceedings. In making compensation orders,

many victims being unaware that a case is being dealt with and are thus deprived of the opportunity to apply for reparation. The Committee has therefore suggested that pre-hearing notice procedures be developed to overcome this problem, a matter discussed further below.

¹⁷⁹As to which, see *P. & S. Ranicar v. Frigmobile Pty Ltd.* [1983] Tas. R. 113 and *G.H. Renton and Co. Limited v. Palmyra Trading Corporation of Panama* [1957] A.C. 149 that 'loss of or damage to' is not limited to actual loss of or the physical damage to the property and includes consequential losses.

the court must take the financial circumstances of the child into account and the nature of the burden payment will impose when deciding the amount and method of payment.¹⁸⁰ These additional orders may be made whether or not the child is formally convicted.¹⁸¹

4.40 Sections 159, 164 and 172 of the *Children and Young Persons Act 1989* allow for the imposition of special conditions for probation, youth supervision or youth attendance orders, which may include conditions as to the making of restitution or compensation. Compliance with the special condition is monitored by the Health and Community Services officer responsible for supervision of the order. In the event of default, the supervising officer can take breach proceedings for the child to return to court for resentencing.¹⁸²

4.41 In 1992, the Children's Court recorded the following number of convictions for property related offences:

- robbery - 63;
- burglary - 684;
- theft - 2018;
- property damage - 385;
- fraud - 34;
- public transport - 2400.¹⁸³

Of the total number of convictions recorded by the Children's Court in 1992, 39% related to property offences and a further 15% for fare evasion.¹⁸⁴ Unfortunately, however, the Committee has been unable to ascertain how many reparation orders were made as a result of those convictions as information of this type is not readily available. It is clear, nonetheless, that the position of young offenders in reparation schemes assumes importance.

¹⁸⁰*Children and Young Persons Act 1989*, section 192; as the reference in section 86(2) of the *Sentencing Act* to 'may' is altered to read, in cases involving young persons, 'must'.

¹⁸¹*Children and Young Persons Act 1989*, section 137(4).

¹⁸²Written Submission 21.

¹⁸³This category would include property damage and fare evasion. The figures are based on information provided to the Committee by the Department of Health and Community Services.

¹⁸⁴See Children's Court Statistics 1992, Annual Report, Department of Justice, Caseflow Analysis Section, Table 4.

4.42 It has been suggested to the Committee that it is inappropriate to make restitution or compensation a condition of a youth sentencing order because of the consequences flowing from default, the civil nature of reparation and because it is inconsistent with the position under the *Sentencing Act* pertaining to adult offenders.¹⁸⁵

4.43 The Committee, in Chapter 3, has concluded that reparation should be integrated into the sentencing process by amending the *Sentencing Act* so that reparation orders constitute sentencing orders. It also concluded that this option was preferable to having reparation operate as a condition of a sentencing order.

4.44 Whilst it is desirable that the model for the making and enforcement of reparation orders under the *Sentencing Act* be uniform in its application to all offenders, the Committee acknowledges that special considerations may exist in the case of young offenders. Differences between adult and young offenders have already been given recognition by the legislature in terms of the courts' consideration of the financial circumstances of the offender and the supervision and enforcement of reparation orders.

4.45 However, insufficient material has been placed before the Committee so far as to the need to differentiate between adult and young offenders for it to form a considered view on the matter.¹⁸⁶ If the Committee's proposals for amending the *Sentencing Act* were implemented, uncertainty may arise as to the application of its provisions to young offenders and whether it remains open to make reparation a condition of a youth sentencing order. At this stage it would be desirable to leave the present model for the making and enforcing of reparation orders in the Children's Court intact, pending further consideration of the special circumstances of young offenders.

Draft Recommendation 8

4.46 The Committee therefore recommends that the present model for the making and enforcing of reparation orders under the *Children and Young Persons Act 1989* not be altered until further consideration is given to the special circumstances of young offenders.

4.47 As part of the Committee's consultation on the draft recommendations made in this Report, it welcomes submissions on the issues noted above.

¹⁸⁵Written Submission 21.

¹⁸⁶Written Submission 2 deals with the operation of personal injury compensation schemes in the Children's Court. Written Submission 21 has been discussed above and is elaborated upon in Hansard 1 October 1993, at 20-35. The Committee, however, believes that it requires further submissions on the position of young offenders.

4.48 Under section 223E(2) of the *Transport Act 1983*, a court which finds a child guilty of a relevant graffiti offence may, if it orders a non-accountable undertaking, an accountable undertaking, adjournment or probation, also order that the child take part in a graffiti clean-up program for a specified number of hours (not exceeding 40) and over a specified time (not exceeding 3 months). The Court must be satisfied first that a place exists for the child in the relevant graffiti clean up program.¹⁸⁷ This provision applies whether or not the child consents to the condition.¹⁸⁸

4.49 These provisions raise the possibility of reparation orders taking a wider form than that contemplated by Part 4 of the *Sentencing Act*. The graffiti clean up program is one way of having offenders restore losses incurred by victims. In that instance the 'victim' is the Public Transport Corporation but the traditional nexus between the particular offence and specific loss or damage is absent. The possibility of there being wider forms of reparation is discussed in Chapter 6 in the context of the possible outcomes of mediation programs.

APPLICATION

4.50 An application for restitution or compensation must be made as soon as practicable after the offender is found guilty or convicted. It may be made by the person seeking reparation or on that person's behalf by the Director of Public Prosecutions (if the sentencing court is the Supreme Court or County Court) or the informant or police prosecutor (if the sentencing court is the Magistrates' Court).¹⁸⁹ However, neither the Director of Public Prosecutions, the informant, nor the police prosecutor is compelled to make an application on behalf of the victim.

4.51 Under sections 84 and 86 of the *Sentencing Act*, courts have no power unilaterally to award restitution or compensation.¹⁹⁰ Thus, if an accused pleads guilty, or is found guilty, and neither the prosecution nor the victim asserts a claim, the court may not make an order. The question of whether courts should be able to make reparation orders in the absence of an application is discussed below.

¹⁸⁷*Transport Act 1983*, section 223E(3).

¹⁸⁸*Transport Act 1983*, section 223E(4).

¹⁸⁹*Sentencing Act*, sections 84(5) and 86(5).

¹⁹⁰However, there is some argument that the difference in wording between sections 84(1) and 86(1) and the reference only in the latter to orders made 'on the application of a person' means that courts can make section 84 restitution orders on their own motion but sections 84(5)(a) and 86(5)(a) tend against such an argument.

4.52 For some time there has been a concern that restitution and compensation orders are not used sufficiently by the courts. Research in the United Kingdom has shown that the most significant variable as to the making of compensation orders is whether a specific request has been made or whether the prosecution raised the possibility of compensation during sentencing.¹⁹¹ Newburn found that in criminal damage cases the success rate on application was 93% and for theft, 84%.

4.53 In 1970, the United Kingdom Advisory Council on the Penal System considered it undesirable that a victim should have to make application, but recognised the difficulties in making compensation orders in the absence of the victim or an application being made.¹⁹² However, after a number of changes, there is now a statutory obligation upon a sentencing court in the United Kingdom to give and record its reasons as to why it has not made an order when it has the power to do so, and provision is also made that such orders can be made in the absence of an application.¹⁹³ This complements the power to order compensation as a sanction in its own right. These provisions are intended to benefit victims by requiring the courts to consider the matter of compensation in every eligible case and to make it easier for victims to discover why an order has not been made.¹⁹⁴ The victim, under this system, then has the power as an 'aggrieved person' under section 111 of the *Magistrates' Court Act 1980* (UK) to pursue the matter in a higher court.¹⁹⁵

4.54 In South Australia, a compensation order may be made on application by the prosecution or on the court's own initiative.¹⁹⁶

4.55 The Committee has therefore considered how the following concepts might be applied to encourage greater utilisation of restitution and compensation orders:

¹⁹¹Shapland J., 'Victim Assistance and the Criminal Justice System: The Victim's Perspective' in Fattah E.A. (ed) *From Crime Policy to Victim Policy* (New York, St. Martin's Press, 1986) at 137; Newburn T., *The Use and Enforcement of Compensation Orders in Magistrates Courts* (London, HMSO, 1988) at 25; Miers D.R., *Compensation for Criminal Injuries* (London, Butterworths, 1990) at 258.

¹⁹²Miers at 257.

¹⁹³*Criminal Justice Act 1988* (UK), section 104(1).

¹⁹⁴Moxon D., Corkery, J.M. and Hedderman, C., *Developments in the use of Compensation Orders in Magistrates Courts Since October 1988* (London, HMSO, 1992) at 1.

¹⁹⁵Section 111 refers both to parties to proceedings and aggrieved persons.

¹⁹⁶*Criminal Law (Sentencing) Act 1988* (SA), section 53(2)(a); see also *Criminal Code* (WA), section 719 - compensation order may be made the court on its own motion or upon the application of the prosecution or the person aggrieved.

- a more active role for the police;
- a more active role for the prosecution;
- the creation of a presumption in favour of the making of such an order;
- the joining of criminal and civil proceedings.

The Role of the Police

4.56 If victims are to apply for restitution or compensation, how are they to know of their rights to do so? In Victoria, the Crime Report compiled by the police requires a description of the property stolen, its value and details of the offence. It provides information for the victim about the Criminal Injuries Compensation Tribunal, which deals with personal injuries, and about the Victims of Crime Assistance League, but it does not advise them of their right to apply for a restitution or compensation order.¹⁹⁷

4.57 In the United Kingdom, a number of attempts have been made to ensure that victims take advantage of their right to obtain such orders. Police first developed administrative procedures for determining victims' wishes to receive compensation and if so, for verifying their claims.¹⁹⁸ Apparently this fell into disuse as police and prosecutors did not see assistance to victims as part of their role.¹⁹⁹ In 1990, the Home Office prepared a *Victim's Charter* which states:²⁰⁰

The police should ensure that they know what loss or injury the victim has suffered – to pass on to the CPS [Crown Prosecution Service] and the court if someone is charged, in order to ensure that no victim loses their right to compensation by oversight.

4.58 A checklist for police exhorts them to check arrangements for recording the victim's loss and their views about compensation and to report to Crown Prosecutors with a view to obtaining a compensation order. Victims are also asked to keep records which will facilitate a claim.²⁰¹

¹⁹⁷Hansard 25 May 1993 at 22.

¹⁹⁸Miers at 260.

¹⁹⁹*Ibid* at 261.

²⁰⁰Moxon at 2.

²⁰¹*Ibid*.

4.59 In New Zealand, Galaway and Spier in a recent review of the *Criminal Justice Act 1985* recommended that:

Procedures should be developed to ensure that the police are systematically determining and reporting all victim losses and recommending reparation. Documentation of loss and recommendations for reparation has a positive impact on the likelihood that a reparation sentence will be imposed.²⁰²

4.60 The Committee therefore had to consider what should be the role of the police in assisting victims to prepare and present reparation applications. Are police procedures for informing victims of their rights to compensation and restitution and for assisting them to substantiate their claims adequate? If not, what can be done to improve those procedures?

4.61 Whether in practice existing police procedures for informing victims of their rights to obtain reparation orders are adequate may very much depend upon individual circumstances and the ability of individual officers to provide adequate oral advice to particular victims.

4.62 In evidence to the Committee²⁰³ it was made clear that in many cases victims will find it difficult to digest the information given to them because of the stress and trauma associated with the criminal incident. Often victims will forward documentation like the Crime Report to their insurer and thus part with information that they may need at a later time. Further, victims are provided with the seventh carbon copy of the Crime Report which is often illegible.

4.63 There are a number of ways in which victims can be better informed of their rights in general and their rights to reparation orders, including the establishment of a victims advisory referral service²⁰⁴, use of '008' or '0055' telephone information services, the production of Victims' Charter brochures and by changes to the standard Crime Report²⁰⁵.

4.64 Invariably, the first contact that victims of crime have with persons that may be able to provide advice and assistance is with members of the Victoria Police. It is therefore important that police officers be in a position to provide accurate and reliable information to persons affected by crime. Current procedures for doing so are not, in the opinion of the Committee, adequate.

4.65 In the study on the making of reparation orders by Victorian Magistrates' Court, discussed in Chapter 5, it was found that in many

²⁰²Galaway and Spier at 172.

²⁰³Hansard 25 March 1993 at 15-22 and 24-34.

²⁰⁴Written Submission 12.

²⁰⁵Hansard 25 March 1993 at 15-17 and 28 May 1993 at 22-24.

instances reparation orders were obtained on behalf of victims without victims being informed that an application was to be made or that an order had been made in their favour. The Committee believes this to be most unsatisfactory, particularly in light of the fact that under the current provisions of the *Sentencing Act* it is up to victims to enforce the terms of a reparation order. Clearly, victims are being deprived of their rights to seek redress through the enforcement of a reparation order if they are not informed of the fact that an order has been made in their favour.

Draft Recommendation 9

4.66 Accordingly, the Committee recommends that:

- **the Victoria Police be required to develop administrative procedures for advising victims of their rights to reparation orders, for ascertaining whether victims wish to apply for such orders and, if so, for collecting information needed in support of such applications;**
- **consideration be given to amending the standard Crime Report to include information on the rights of victims to seek reparation orders in cases involving property loss or damage;**
- **the Victoria Police be required to develop administrative procedures for informing victims whether a reparation application is to be made and whether an order has been made in their favour.**

The Committee believes that other steps can be taken to better inform victims of their rights and these are discussed in Chapter 7.

The Role of the Prosecution

4.67 Prior to the introduction of the *Sentencing Act*, a reparation order could only be made on the application of the victim.²⁰⁶ The Legal and Constitutional Committee noted the difficulties in placing the onus on victims to make application for restitution.²⁰⁷ In order to simplify and make more accessible the process it recommended that:²⁰⁸

²⁰⁶Sections 90(1) and 92(1), *Penalties and Sentences Act 1985*; although arguably traditional restitution orders *in specie* could be made on the court's own motion under section 90(1)(a); see the discussion in Chapter 2.

²⁰⁷Legal and Constitutional Committee at 34.

²⁰⁸*Ibid.*

Prosecutors ascertain the exact extent of the victim's claim prior to any hearings, prepare any documentation to support that claim, and make application to the court for restitution on behalf of the victim.

4.68A question arises as to whether a more active role is required of prosecutors in this process. A recent article discussing the evolution of the relevant provisions of the Act outlines some of the background to, and issues arising from, the recent attempt to give the prosecution a larger role in the process of application:²⁰⁹

In the discussions preceding the *Sentencing Act 1991* (Vic.), a proposal was advanced in relation to restitution and compensation orders which would have required a more proactive role from prosecutors to the effect that an application for a restitution or compensation order could be made on behalf of the victim by the Director of Public Prosecutions. The Director of Public Prosecutions opposed this expansion of role on the basis that the crown prosecutors should not become involved in such applications. Counsel for the crown, it was argued, were appointed to appear on behalf of the Crown, not civilian witnesses, were bound by the Rules of Counsel not to appear without a solicitor and were not to be concerned with adducing evidence for civil cases. An argument was also made on the basis of the increased work load entailed in the tacking on of civil litigation to the criminal trial process. It was argued that any blurring of the line between prosecution in the public interest and applications on behalf of victims would offend against the fundamental principle of independence.

These comments are problematic and require a fundamental re-examination of the respective roles of the various parties involved in criminal litigation and the structure of the courts. While it is true that prosecutors appear on behalf the Crown, they do, in a general sense, represent the 'public interest' which, in the particular case, includes the interests of those who have suffered a loss at the hands of the offender. Since the Crown effectively usurped the role of the private victim some centuries ago to become the surrogate victim, the victim's rights have tended to be regarded as a secondary consideration. In most cases it is unrealistic to expect victims to undertake costly civil actions. The duty to take into account, and even advance the interests of the victim, should be seen as concomitant to the right of the state to prosecute, having regard to its greater resources, skill and knowledge.

The issue of workload is significant, but the real issue relates to where that burden should fall. Surely the administrative workload upon the Director of Public Prosecutions should be regarded as part of a government's commitment to advancing the rights of victims. As to the workload of the courts, the issue is one of the distribution of load - between the civil and the criminal courts. It is more likely that the 'tacking on' of civil litigation to a criminal trial will only marginally increase time and cost, in comparison with the expense of a completely new and independent action. Ultimately, the state pays for both civil and criminal courts.

The role of a Crown Prosecutor is crucial in the criminal justice system, but it is not immutable. While there may be, in some cases, a conflict between the interests of the victim and the duty of the prosecution, this will not be so in the majority of cases. Society's changing views of the importance of the victim in the

²⁰⁹Freiberg A., 'Sentencing and Judicial Administration' (1993) 2 *Journal of Judicial Administration* 171 at 182-3.

criminal justice system requires a re-assessment of the nature of the 'public interest' which the Director of Public Prosecutions represents.

4.69 No information has yet been obtained to indicate whether, or to what extent, the powers given to the prosecution have been exercised since April 1992 and whether the conferring of these powers has led to the courts making more reparation orders in eligible cases.

4.70 The question that therefore arose for the Committee's consideration was whether the prosecution should be required to make application for restitution or compensation in every eligible case. Alternatively, if the prosecution is to retain its present discretion on making an application, how should that discretion be exercised?

4.71 It would seem that the discretion conferred on prosecuting authorities to apply for reparation is being exercised differently in the higher and lower courts. The Director of Public Prosecutions informed the Committee that it was rare for prosecutors in his office to apply for reparation in Supreme and County Court cases. This was because in most fraud cases institutional victims are involved who tend to make their own application through separate representation.²¹⁰ In contrast, in evidence to the Committee the police indicated that in the Magistrates' Courts reparation applications were made almost as a matter of course in cases involving property loss or damage.²¹¹ This appears to be confirmed by the Committee's study of reparation orders made in the Magistrates' Courts.

4.72 The Committee believes there should be a consistent approach to the exercise of the discretion given to prosecuting authorities to apply for reparation orders. This can best be done by prosecuting authorities developing guidelines on how the discretion should be exercised in terms of the procedures to be followed in advising victims of their rights to have an application made and for them to be informed as to whether an application is to be made and, if so, the outcome of such an application.

Draft Recommendation 10

4.73 The Committee therefore recommends that prosecuting authorities develop guidelines for the exercise of the discretion to apply for a reparation order and for informing victims of their rights to have an application made and of the outcome of any such application.

4.74 In evidence to the Committee, the Police Association expressed the view that it would be appropriate to place on prosecutors an obligation to make application for reparation orders on behalf of victims, when requested

²¹⁰Hansard 16 September 1993 at 3.

²¹¹Hansard 28 May 1993 at 23.

to do so.²¹² The Victoria Police expressed a similar view. However, representatives of the Victoria Police did indicate that in some cases conflicts of interest may arise which would make it difficult to pursue applications on behalf of victims.²¹³

4.75 In evidence to the Committee²¹⁴, the Director of Public Prosecutions advised that he would be in favour of prosecutors taking a more active role in making applications for reparation on behalf of victims. However, it was said that prosecutors would need to retain some discretion, particularly in complex cases, given that their role is to represent the state in securing convictions and that the pursuit of complex reparation claims may conflict with that role. Furthermore, pursuing complex reparation claims on behalf of victims after the securing of a conviction would have adverse resource implications.

4.76 The Committee has had difficulty in reconciling the interests of victims and the interests of prosecuting authorities. The Committee is of the view that the public interest that prosecutors represent includes the interests of persons affected by crime but, nonetheless, agrees that the relevant public interest is wider and made up of additional elements.²¹⁵ Having regard to the arguments canvassed above, the Committee concludes that there will be cases where it would be inappropriate to oblige prosecutors to pursue reparation applications. In cases where the defence and prosecution negotiate a plea on the basis of an agreed set of facts, such negotiations could be hampered where, for example, a victim claimed that more or different goods were stolen to that admitted or agreed by the accused. In that type of case, there is a very real risk that prosecutors may be faced with a conflict of interest by having to test or investigate the veracity of the victim's claims.

4.77 In light of the Committee's conclusion that there should be a presumption in favour of the making of reparation orders in eligible cases and that courts should be given power to make orders in the absence of an application, the Committee does not recommend that an obligation be placed on prosecutors to apply for reparation in eligible cases.

A PRESUMPTION IN FAVOUR OF REPARATION

²¹²Hansard 17 June 1993 at 23.

²¹³Hansard 28 May 1993 at 23-24.

²¹⁴Hansard 16 September 1993 at 2-3 and 5.

²¹⁵Hansard 16 September 1993 at 16.

4.78 Most victims, if asked, would want some form of compensation.²¹⁶ As has been noted, one of the major reasons why victims do not exercise their rights more often is that they do not know how to obtain compensation.²¹⁷ Shapland's study of victims in the criminal justice system in England found that victims do not view compensation in the same way that the state does; namely, a simple means of obtaining civil redress in the criminal courts. They regard it 'as making a statement about the offence, the victim and the position that the criminal justice system was prepared to give to the victim'.²¹⁸ Victims regarded compensation as part of the sentence and Shapland found that those who received compensation were more satisfied with courts than those who did not.

4.79 Shapland has argued that a 'victim centred system needs to provide practical, informational and emotional supports for victims'.²¹⁹ Such a system would require the police and prosecution to collect evidence in support of a compensation order as part of their routine investigation of a crime. The victim would always be notified of the making of an order and would receive regular reports on the progress of payments of an order and any enforcement action taken.

4.80 As noted above, in 1988 the United Kingdom *Criminal Justice Act* was amended so as to require a court to give reasons for not awarding compensation in cases involving personal injury or property loss or damage. Similarly, section 53(2A)(b) of the South Australian *Criminal Law (Sentencing) Act 1988* provides that:

If the circumstances of the offence are such as to suggest that a right to compensation has arisen, or may have arisen, the court must, if it does not make an order for compensation, give its reasons for not doing so.

4.81 However, even if there is a presumption in favour of compensation, there may be a number of reasons why an order may not be made, including:²²⁰

- the victim may not want compensation;
- the offender has no financial means, even with the use of instalment payments;

²¹⁶See responses of victims to survey in Galaway and Spier at 197 and *Victims and Criminal Justice* (Adelaide, Attorney-General's Department, 1990) at 44-46.

²¹⁷Shapland at 226.

²¹⁸*Ibid* at 227.

²¹⁹*Ibid*.

²²⁰Miers at 273.

- some victims may be better placed than others to pursue civil action;
- a custodial sentence may be imposed and the offender will have no financial means on release; and
- the court may consider that the offender should not be permitted to buy his or her way out of sentence.

4.82A recent study in England on the operation of compensation orders has found that the creation of a presumption in favour of the making of a compensation order has not led to a significant increase in the number of orders made.²²¹ In relation to all property offences, their use went from 32% of cases in 1987-88 to 38% in 1988-9. In the cases in which compensation was not awarded, the study found that in 63% of cases it was not awarded because it was not sought. Despite the presumption, courts are reluctant to make orders in the absence of an indication that the victim is seeking compensation, coupled with lack of information to enable it to assess the amount of the order.²²² In 18% of cases an order was not made because a custodial sentence was awarded; in 17% of cases because of the offender's insufficient means; in 16% the loss had been made good or the property recovered and in 10% of cases the court had inadequate information before it. In 8% of cases the court considered that the victim had an alternative recourse available.²²³ It would seem from this study that the creation of a statutory presumption is not a panacea for the problem of the under utilisation of reparation orders.

4.83The Committee therefore asked whether there should be a statutory presumption in favour of the making of a compensation order. Should courts be required to give reasons for not ordering reparation in cases where there is evidence of loss or damage? Should courts be given power to make reparation orders on their own motion in the absence of an application?

4.84Many submissions to the Committee, both oral and written, supported the view that wherever possible the making of a reparation order should be an automatic consequence of a finding of guilt in cases involving properly loss or damage.²²⁴ It has been put to the Committee that criminal courts should do more to resolve reparation claims in order to make offenders appreciate the consequences of their wrongdoing and to obviate the need

²²¹Moxon at 6.

²²²*Ibid* at viii.

²²³*Ibid* at 14.

²²⁴For example, Written Submissions 10, 13 and 20 and Hansard 17 June 1993 at 18-31, 22 June 1993 and 1 October 1993 at 36-52.

for victims to pursue civil proceedings.²²⁵ One way of achieving this may be through the creation of a presumption in favour of reparation, although the Committee acknowledges that in light of the United Kingdom experience, this may not necessarily result in more reparation orders being made.

4.85 Nonetheless, the Committee believes that there are a number of benefits in having a statutory presumption in favour of the making of reparation orders. In particular:

- It requires police, prosecutors, defence counsel and the courts to turn their minds to the question of victim losses.
- It highlights the need for courts to take into account the interests of victims and the impact of crime on them when passing sentence.
- It may improve police and prosecutor procedures for advising victims of their rights to reparation and for obtaining and presenting information on victim losses.
- It may lead to greater use of the reparation provisions in eligible cases.
- The recording of reasons for declining to make a reparation order will assist offenders, victims and their legal advisers in any subsequent appeal proceedings and will also assist in any future evaluation of the operation of reparation orders.

Draft Recommendation 11

4.86 The Committee therefore recommends that Part 4 of the *Sentencing Act* be amended to provide that in cases where there is evidence of property loss or damage but the court does not make a reparation order, the court should record in writing its reasons for refusing to make the order.

4.87 As noted in Chapter 2, over the years the reparation provisions have varied as to the need for an application in order for a reparation order to be made. Generally, compensation orders could only be made on application whereas restitution orders for the return of property *in specie* could, until the 1991 Act, be made by the court on its own motion and from 1973 onwards, restitution orders dealing with the proceeds of stolen property and money found on the offender could only be made on application.

²²⁵For example, Hansard 1 October 1993 at 36-52.

4.88 For the statutory presumption in favour of reparation to operate, it is necessary to remove the condition that reparation orders can only be made on application by persons claiming entitlement to an order or by the prosecution on their behalf. The Committee is of the view that sentencing courts should be given power to make reparation orders on their own motion. Apart from complementing the presumption in favour of reparation, such a power would enable orders to be made in straightforward cases where an application may not have been made due to some oversight.

Draft Recommendation 12

4.89 The Committee recommends that sections 84 and 86 of the *Sentencing Act* be amended to provide that reparation orders may be made on application or on the court's own motion.

4.90 Because the quantum of a reparation order made by the criminal courts is limited by the offender's means, the amount of the order may not be equal to the amount of the loss. If, as recommended in Chapter 5, reparation orders are to be enforced primarily in the same way as fines, it will be possible for offenders to opt for undertaking community service or serving a term of imprisonment rather than making payment. In such cases, the victim may receive nothing. Since the aim of the reforms in this Report is to empower, rather than disempower victims, it is suggested that victims be given the right to prevent a sentencing court from making a reparation order so as to preserve their right to take civil proceedings in respect of the whole amount of the loss.²²⁶

4.91 Thus, whereas now the obligation is upon the victim to make an application, under the presumptive system, the victim's position will be strengthened by the presumption in favour of reparation, retention of the right to apply for an order and the creation of a right to veto the making of an order.

Draft Recommendation 13

4.92 Accordingly, the Committee recommends that the *Sentencing Act* be amended to provide that in cases where victims wish to pursue their civil rights instead of having a reparation order made in a sentencing court, they may prevent a reparation application being made and that police and prosecuting authorities develop procedures to give effect to this recommendation.

²²⁶For a similar approach, see Hodgson Committee, *Profits of Crime and Their Recovery* (London, Heinemann, 1984) at 60 and 150.

4.93 The rights of victims to pursue civil remedies for property loss or damage arising from criminal conduct are considered in more detail in Chapter 5.

JOINING CRIMINAL AND CIVIL PROCEEDINGS

4.94 In a number of European jurisdictions, the victim of a crime may be made a party to criminal proceedings. The victim may be a 'partie civile' or proceedings may be designated 'adhesive'.²²⁷ In these cases, the principal proceeding is criminal, but the victim may be allowed, at the discretion of the court, to present a claim by way of third party proceedings. The court may then decide the criminal and the civil issues simultaneously or may divert the victim's claim to a separate civil proceeding.²²⁸

4.95 There would appear to be a number of advantages to this type of procedure. It is judicially and administratively economical, it increases the prospect that the civil and criminal decisions will be consistent and, for the victim, the process is more likely to be quick, simple and cheap, particularly as the criminal prosecution relieves the victim from the burden of proving the case again.

4.96 Experience with these procedures varies widely in Europe, working satisfactorily in some jurisdictions, but being used rarely in others.²²⁹ The procedure still requires some initiative by the victim. It may complicate and delay the criminal process especially where the injuries caused to the victim are extensive and may take a long time to settle. There is evidence that even in these jurisdictions, complex cases are transferred to the civil courts.²³⁰

4.97 An example of a hybrid model in Australia which combines elements of civil and criminal procedure can be found in Tasmania. The model applies to both indictable and summary offences, although the procedures and powers differ in respect of each. In relation to indictable offences, section 425A(1) of the *Criminal Code 1924* (Tas.) provides that:

The prosecutor of a crime may, with the written consent of a person who has suffered loss or damage through or by means of the crime (in this section referred to as the 'civil party'), or of a person acting on behalf of the civil party, claim in respect of that loss or damage, the recovery of money due from, or damages against, the person who committed the crime.

²²⁷Joutsen M., 'Listening to the Victim: The Victim's Role in European Criminal Justice Systems' (1981) 34 *Wayne Law Review* 95 at 115.

²²⁸*Ibid.*

²²⁹*Ibid.*

²³⁰*Ibid.*

4.98 Although it is the prosecutor who must make the claim on behalf of the victim, it is the victim who conducts the proceedings in respect of the claim. The claim may be made by notice in writing before trial or orally on conviction. The court may deal with the claim immediately on conviction, but the more usual course of action is that the claim is adjourned and an order made that damages be assessed under the *Supreme Court Civil Procedure Act 1932* (Tas.). The case is then heard in the civil court as an assessment of damages action. The action acts as a bar to any further civil claims for the same loss.

4.99 Reviewing these procedures, which were introduced in 1986, Warner comments:²³¹

These procedures were intended to provide victims of crime with a convenient and rapid means of avoiding the expense of resorting to civil litigation. It was also anticipated that the possibility of orders for compensation at the conclusion of criminal proceedings would provide an inducement for victims to come forward to make complaints and to assist police officers and prosecutors in the performance of their duties. Despite attempts to facilitate claims by removal of anomalies in procedure and substance, the procedures are not widely used, due to the impecuniosity of the majority of defendants.

4.100 The Committee therefore asked whether Victoria should introduce a form of hybrid proceeding for restitution and compensation and what should be the procedures for distributing the determination of victims' claims between the criminal and civil courts.

4.101 The rule adopted by Victorian courts that sentencing courts should not determine reparation applications involving complex questions of law and fact, as such claims are better dealt with in civil courts,²³² has the effect of distributing victims' claims between the criminal and civil courts. However, in that situation the sentencing court does not refer the claim to a civil court but rather leaves it to the victim to initiate and pursue civil action.

4.102 Under sections 84(7) and 86(8) of the *Sentencing Act*, courts cannot make a reparation order unless the 'relevant facts sufficiently appear' from the evidence adduced at the hearing of the criminal charge. The effect of this restriction is discussed in more detail below. For present purposes, the Committee notes that:

²³¹Warner K., *Sentencing in Tasmania* (Sydney, Federation Press, 1990) at 102.

²³²As to which, see the discussion concerning evidentiary matters further below.

- the facts of a case may be clear but there may be disputed questions of law as to ownership, and the statutory restriction goes to questions of fact not law;²³³
- the restriction may operate with respect to both liability and quantum and the appropriate remedy that should be granted; depending on whether the order sought relates to the paying of money or the return of property.

4.103 The restriction could therefore work unfairly in situations where the sentencing court is satisfied as to liability but has doubts as to quantum, value or legal ownership or the appropriate order that should be made.

4.104 The division of functions between criminal and civil courts can work to the disadvantage of victims, particularly where a reparation application has been made and rejected or not considered; thus necessitating the issuing of fresh civil proceedings. The very object of the reparation provisions is to provide a summary form of recovery and relieve victims of the need to incur costs in pursuing civil remedies.²³⁴

4.105 The Committee believes that subject to the rule regarding complex factual and legal issues, sentencing courts should, as far as is practicable, do everything necessary to resolve claims for reparation. It acknowledges, however, that in cases involving significant disputes on liability and/or quantum, the sentencing court may not be able to deal with such cases without calling additional evidence²³⁵ and possibly adjourning the application with or without procedural directions.

4.106 The Committee is anxious to ensure that victims are not left 'in limbo' when a sentencing court declines to make a reparation order due to the complexity of the application. It is therefore desirable that mechanisms

²³³See Macleod J.K., 'Restitution under the Theft Act 1968' [1968] *Criminal Law Review* 577 at 599; although in *R. v Landolt* (1992) 63 A. Crim. R. 220, the Court of Criminal Appeal followed the approach that sentencing courts should not order reparation where there are disputes as to questions of fact or law although the restriction in the 1985 provisions that were under consideration also made reference only to 'facts'.

²³⁴However, *In Re Samuel Clements Ex parte Ralph Brothers* (1895) 21 V.L.R. 237 at 239 Hood J. suggested that the object of the provisions was to avoid inconsistent findings between criminal and civil courts and that criminal courts should therefore call additional evidence to determine a reparation application.

²³⁵That is, evidence in addition to that which would be admissible on the hearing of the criminal charge, a point which is discussed below.

be put in place for the adjournment and referral of complex applications where it is inappropriate for sentencing courts to deal with such applications at the time of sentencing. If such mechanisms are put in place, it is also desirable that the sentencing process itself not be delayed unduly, particularly where the outcome of a reparation application may influence the overall sentence to be imposed.

Draft Recommendation 14

4.107 The Committee therefore recommends that Part 4 of the *Sentencing Act* be amended to provide that where, on hearing a reparation claim, the sentencing court declines to determine the claim due to its complexity, or because of the absence of sufficient evidence, the sentencing court may:

- **adjourn the hearing of the claim in order to call additional evidence and may give directions as to the conduct of the claim; or**
- **in cases where it is satisfied as to liability but there is insufficient evidence to assess the appropriate order, refer the claim to a civil court, with or without procedural directions.**

4.108 The Committee envisages that the referral mechanism would be best suited to cases where the sentencing court makes findings as to liability but is unable to determine the appropriate quantum which can be best assessed by a civil court. The suggested procedure is analogous to that used for the assessment of damages in civil cases where liability is not in issue.²³⁶ It is envisaged that if a reparation claim is referred to a civil court for assessment to take place, the assessment proceedings would be conducted by the victim. The role of the prosecution would end once liability is established.

FACTORS RELEVANT TO THE EXERCISE OF THE DISCRETION

4.109 The making of a restitution or compensation order is within the discretion of the court, whose discretion is guided by both statutory and common law factors. The three most important factors are the means of the offender, the impact of other sentencing orders and the problems of proving the victim's claims.

The Financial Means of the Offender

²³⁶See Order 51, *Supreme Court Civil Procedure Rules*, Chapter 1.

4.110 At civil law, the financial means of a defendant is not a relevant factor in the making of an award of damages. However, the application of that principle in the criminal context resulted in compensation orders being made even where there was no realistic likelihood that the amount would be recovered or even where the obligation to raise funds to meet a compensation order could force the offender back into crime. The Victorian Sentencing Committee was of the view that 'the mechanisms for enforcement of awards of damages are sufficient provided that the offender has the means to satisfy such awards'²³⁷ and supported the recommendations of the Legal and Constitutional Affairs Committee that the means of the offender be taken into account.²³⁸

4.111 The *Sentencing Act* now requires a court making a compensation order to have regard to the financial circumstances of the offender. Section 86(2) states:

If a court decides to make an order under subsection (1) it may in determining the amount and method of payment of the compensation take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.²³⁹

The requirement is expressed in directory rather than mandatory terms through the use of the word 'may'. By section 86(3), a court is not prevented from making an order only because it has been unable to find out the financial circumstances of the offender.²⁴⁰

4.112 The same process of determining means in relation to fines is applicable to compensation orders. A robust view should be taken of an offender's ability to pay. A court may look not just at the present means of the offender, but possible future earnings, providing such predictions are realistic. A degree of care must be exercised where an offender is unemployed in a climate where unemployment levels are very high.²⁴¹ In the United Kingdom, it has been held by the courts that while a court

²³⁷Victorian Sentencing Committee Report 1988 at 358.

²³⁸Legal and Constitutional Affairs Committee, Recommendation 18.

²³⁹No similar requirement exists with respect to 'monetary' restitution orders that can be made under section 84(1)(c) as payment is made direct from money found on the offender at the time of apprehension.

²⁴⁰See section 50(2) of the *Sentencing Act* regarding fines and the *Criminal Law (Sentencing) Act 1988 (SA)*, section 13(1), which also requires the court to consider whether the making of a compensation order would unduly prejudice the welfare of dependants of the defendant.

²⁴¹Miers at 236.

should not order compensation on the basis of vague assertions about the possibility of other sources of income nor on the basis that others will pay it, it may make an order if the offender has assets which may be sold in order to meet the order.²⁴²

4.113 The means of the offender may affect both the amount and the method of payment of the compensation order. Payments by instalments are authorised under section 86(4) of the *Sentencing Act* but default in payment of any one instalment renders the entire amount then owing due and payable.

4.114 The recognition of the fact that an offender's means are relevant to the making of a compensation order does not by itself alter the status of the compensation order by making it a sentence or changing it from civil to criminal. It recognises the reality that the making of an order which cannot be paid by an offender is a futile exercise which can only serve to undermine the authority of the courts.

4.115 The requirement that the courts take the means of the offender into account highlights the tension between the interests of the offender and of the victim in the sentencing process.²⁴³ On the one hand, the victim seeks full compensation for the harm caused by the crime, and in the absence of other compensatory mechanisms such as insurance, seeks it from the offender. The requirement that the financial circumstances of the offender be considered by the court limits the amount of compensation which can be made because of the competing demands on the offender's resources. On the other hand, normal sentencing considerations require consideration of an offender's past and future circumstances. An unduly onerous order may lead to further offending for the purpose of acquiring the funds to make compensation. A crushing order may be incompatible with rehabilitative objectives and orders of very long duration may increase the likelihood of default and require further legal action. It is obvious, therefore, that reparation orders cannot, by themselves, address all of the needs of victims.

4.116 The concept of 'means' is a relative one. It relates not only to the offender's financial circumstances, but to the amount of the loss. As Miers comments:²⁴⁴

The question that arises... is at what point in the possible discrepancies between the offender's means and the ideal assessment of the victim's injury does the insufficiency become so great that a court should refrain from ordering any compensation at all?

²⁴²*Ibid* at 237.

²⁴³*Ibid* at 233.

²⁴⁴*Ibid* at 243.

4.117 In the United Kingdom, provisions requiring courts to take the offender's financial means into account have been in force for some years and the experience there is instructive. The most common reason for reducing the amount of compensation was that the offender lacked sufficient financial means. It amounted to 75% of all the reasons for reduction in Moxon's 1992 study.²⁴⁵ Of unemployed offenders, 59% had orders made against them in comparison with 74% of the employed. Newburn's 1988 study also found that insufficiency of means was the most common reason for refusing to make a compensation order.²⁴⁶ Newburn found that only 19% of orders were lump sum orders while 81% were for payment by instalments. In relation to lump sum orders, periods of up to one month were allowed for payment and of the instalment orders, 90% were for less than £10 per week.²⁴⁷ The majority of instalments were for less than £6 per week. Galaway and Spier found a very similar situation in New Zealand, with 85.5% of reparation payments ordered to be paid by instalments with a median time of 126 days.²⁴⁸

4.118 The question of the length of instalment orders is one of some difficulty. From the victim's viewpoint, there is no reason why reparation orders should not continue until the total amount is paid. As civil judgments they remain enforceable for a period of 15 years under the *Limitation of Actions Act 1958*. The courts, however, have taken a more restrictive approach. In the United Kingdom the traditional view was that there should be a limit of about one year for instalment orders, but recently, the Court of Appeal has upheld orders of two, three and four years,²⁴⁹ subject to the proviso that such payments did not impose an undue burden or involve too severe a punishment.²⁵⁰ A similar, although less restrictive approach, applies to instalment arrangements for the satisfaction of civil judgments under the *Judgment Debt Recovery Act 1984*.²⁵¹

4.119 Recently the Victorian Court of Criminal Appeal in *Director of Public Prosecution v. Jones*²⁵² considered an appeal against the leniency of sentence where the offender, convicted of social security fraud, was given a

²⁴⁵Moxon at viii.

²⁴⁶Newburn at 36.

²⁴⁷*Ibid* at 15.

²⁴⁸Galaway and Spier at 146.

²⁴⁹*Olliver* (1989) 11 Cr. App. Rep. (S) 10; *Bagga* (1990) Crim L.R. 128.

²⁵⁰Miers at 238. Galaway and Spier report (at 146) one case in New Zealand where the offender was ordered to pay \$20 per fortnight for 17.5 years.

²⁵¹See *Cahill v. Howe* [1986] V.R. 630 at 634 that instalment arrangements should not be made where the result may be to create an ever increasing debt due to accruing interest on the principal debt.

²⁵²Unreported, 29 October 1992.

suspended custodial sentence coupled with a recognisance order and a reparation order under the *Crimes Act 1914* (Cth). The reparation order involved the payment of more than \$37,000 by instalments over an eight year period. Although the order was criticised for failing to take account of inflation and interest due on the debt and because the period of the order exceeded the period of recognisance, it was not overturned, partly because it reflected an actual agreement between the Commonwealth and the offender.

4.120 The Committee therefore asked whether courts should be given legislative guidance as to how the financial means of an offender should be taken into account. For example, should there be a minimum protected earnings level? Should there be time limits on the length of instalment arrangements? Should there be specific procedures for ascertaining the financial means of an offender? At what point in the possible discrepancies between the offender's means and the ideal assessment of the victim's injury does the discrepancy become so great that a court should refrain from ordering any compensation at all?

4.121 By the use of the word 'may', section 86(2) confers a discretion on courts as to whether to take into account the financial means of an offender in fixing the amount and method of payment of a compensation order. In cases involving young offenders, however, the courts 'must' take account of the offender's financial means.²⁵³

4.122 Although there has been some suggestion that the primary consideration should be the amount of the loss,²⁵⁴ the Committee is of the view that the courts should take the offender's financial means into account and that courts should not make compensation orders where there is no realistic prospect of the offender having the ability to satisfy the terms of such an order. This is relevant both to the quantum of the order and the terms of instalment arrangements as to amount, frequency and length.

4.123 It has been suggested to the Committee that courts should be required to make findings of fact about an offender's means and apply a 'formula' to determine the amount of compensation payable.²⁵⁵ This, in effect, would involve setting a protected earnings level and requiring that only a certain percentage of disposable income above that level be devoted to the satisfaction of the order.

4.124 The Committee agrees that courts should make inquiries as to the offender's financial means and consider the results of those inquiries in

²⁵³*Children and Young Persons Act 1989*, section 191.

²⁵⁴For example, Hansard 17 June 1993 at 21.

²⁵⁵Written Submission 16.

fixing the amount of compensation payable and the method of payment. However, it has concerns about the adoption of any fixed formula for setting the relevant amount as courts need to retain some flexibility to ensure justice is done in individual cases. The recent United Kingdom experience in having a fixed formula for determining amounts of fines is instructive of the dangers involved in depriving the courts of sufficient flexibility.²⁵⁶

4.125 The Committee also considered whether statutory provision should be made requiring courts to investigate and record their findings on matters relevant to the financial circumstances of an offender; such as their assets and liabilities, income and expenditure and the needs of dependants. Provision of this type was once made in the *Penalties and Sentences Act 1981* but it transpired that a statutory prescription as to the manner for the taking account of relevant financial factors was, in practice, unworkable.²⁵⁷ In view of the fact that the Magistrates' Court deals with the great majority of criminal cases, and must do so expeditiously and often in the absence of the offender, the Committee does not support the enactment of a statutory formula for determining an offender's means but believes these matters should be the subject of guidelines issued by a body such as the Judicial Studies Board.

4.126 As to the appropriate terms of instalment arrangements and the length of time for instalment orders, the Committee does not propose statutory restrictions on these matters as it believes that the courts should retain flexibility to tailor orders to suit the circumstances of individual cases. Further, these are matters which can be influenced by the pronouncements of sentencing and appeal courts in developing case law on the proper exercise of the discretion. They are also matters that could be the subject of consideration by the Judicial Studies Board.

Draft Recommendation 15

4.127 The Committee therefore recommends that section 86 of the *Sentencing Act* be amended to provide that courts 'must' as far as practicable take account of the financial means of offenders in determining the amount of a compensation order and that guidelines be developed to assist courts in having regard to the amount of income offenders need to support themselves and their dependents when determining the amount of a compensation order and the method of payment.

²⁵⁶See *Independent Monthly*, June 1993 at 15.

²⁵⁷See Fox R.G. and Freiberg A. *Sentencing: State and Federal Law in Victoria* (Melbourne, Oxford University Press, 1985) at 137.

4.128 The provisions of section 86(3) would remain in force with the effect that courts would not be prevented from making a compensation order where they are unable to ascertain an offender's financial circumstances because of, for example, an unwillingness on the part of an offender to provide relevant information.

Other Sentencing Orders

4.129 The Legal and Constitutional Committee noted with concern the conflict which may arise from the imposition of both a fine and reparation order. It recommended that preference should be given to the payment of reparation.²⁵⁸ The *Sentencing Act* now requires a court to consider the impact on the offender of the range of pecuniary orders it may make. Thus section 50 provides:

- (3) In considering the financial circumstances of the offender, the court must take into account any other order that it or any other court has made or that it proposes to make -
 - (a) providing for the confiscation of the proceeds of the crime; or
 - (b) requiring the offender to make restitution or pay compensation.
- (4) If the court considers -
 - (a) that it would be appropriate both to impose a fine and to make a restitution or compensation order; but
 - (b) that the offender has insufficient means to pay both -
the court must give preference to restitution or compensation, though it may impose a fine as well.

4.130 Section 50 is modelled on section 35(4A) of the *Powers of Criminal Courts Act 1973* (UK) which was introduced in 1982.²⁵⁹ Experience with this legislation has been paradoxical. Although it is clear from statements in various judgments that compensation should be preferred over fines, the evidence is that compensation orders are often made in addition to a fine. Newburn found that fines were imposed in combination with compensation orders in 50% of cases.²⁶⁰ Moxon²⁶¹ also found that fines were imposed in more than half the cases surveyed, and noted that the imposition of a fine, even where the offender lacked the means to pay, appeared to contravene the legislative provisions which stated that compensation orders should have priority over fines in such cases.

²⁵⁸Legal and Constitutional Committee at 40.

²⁵⁹See also *Criminal Law (Sentencing) Act 1988* (SA), section 14; *Penalties and Sentences Act 1992* (Qld), sections 14 and 48(4).

²⁶⁰Newburn at 13.

²⁶¹Moxon at vii.

4.131 The possible relationship between reparation orders and sentencing options besides fines has been discussed in Chapter 3.

4.132 The Committee therefore asked whether Victorian courts are, as required, giving appropriate priority to reparation orders above fines.

4.133 Anecdotal evidence to the Committee²⁶² suggests that sentencing courts, particularly Magistrates' Courts, may not be:

- paying sufficient regard to the financial means of offenders when fixing the amounts of fines imposed or the quantum of compensation orders;
- giving clear priority to reparation orders when considering the imposition of fines.

4.134 The study conducted by the Criminal Justice Statistics Planning Unit of the Department of Justice tends to reinforce this evidence. In this regard, it found that, per offence category, reparation orders were combined with fines in the following percentage terms:

- property damage - 39.5%;
- theft - 38.8%;
- traffic offences - 71%;²⁶³
- social security - 26%;
- other Commonwealth offences - 27%.²⁶⁴

The details are set out in Table 3, Appendix V.

4.135 These are matters of concern to the Committee. The Committee notes that the legislative directive on these matters is clear and ought to be followed by the courts. The Committee therefore does not recommend any legislative changes but in Chapter 7 addresses the role of the Judicial Studies Board as a possible mechanism for ensuring that such legislative directives are followed properly.

²⁶²For example, Hansard 1 October 1993 at 6.

²⁶³See footnote 59, Chapter 3.

²⁶⁴In relation to Commonwealth offences, the same caveat as that mentioned at footnote 58 of Chapter 3 applies to this situation.

4.136 Furthermore, in Chapters 3 and 5 the Committee addresses in more detail the relationship between fines and reparation orders in terms of their overall impact on sentencing and enforcement procedures.

Evidentiary and Procedural Considerations

4.137 A significant factor which influences courts in deciding whether or not to make a restitution or compensation order is the complexity of the application before it. The Legal and Constitutional Committee noted that courts are reluctant to make restitution and compensation orders where the amounts sought are not readily quantifiable.²⁶⁵ Sections 84(7) and 86(8) of the *Sentencing Act* provide that:

A court must not exercise the powers conferred by this section unless in the opinion of the court the relevant facts sufficiently appear from the evidence given at the hearing of the charge or from the available documents, together with admissions made by or on behalf of any person in connection with the proposed exercise of the powers.

4.138 The restrictive effect of these provisions has already been discussed briefly in the context of the possible merging of civil and criminal procedures to allow for relief where quantum but not liability is in issue.

4.139 The reference to 'available documents' means written statements or admissions that would be admissible on the hearing of the charge and written statements or depositions used in committal proceedings.²⁶⁶ By sections 84(7) and 86(8), the sentencing courts may only rely on the evidence adduced in the criminal proceedings and arguably cannot entertain additional or separate evidence on the reparation application, although the Committee understands that in practice this does happen.²⁶⁷

4.140 Even when the facts are sufficiently clear, questions of possessory rights may still give rise to difficult questions of law and the criminal courts are loath to become involved in the resolution of complex issues relating to the ownership of stolen property.²⁶⁸ In *Church*²⁶⁹ the English Court of Appeal stated:

²⁶⁵Legal and Constitutional Committee at 41.

²⁶⁶*Sentencing Act*, sections 84(8) and 86(9).

²⁶⁷For example, Hansard 28 May 1993 at 10 and 16 September 1993.

²⁶⁸The view is also reflected in the conclusion of the United Kingdom Criminal Law Revision Committee that the question of title should depend entirely on the civil law and not be affected by conviction for theft; *Eighth Report: Theft and Related Offences* (1966, Cmnd. 2977) at 76-79. The recommendations of the Criminal Law Revision

If there is any doubt at all as to whether the money or goods in question belong to a third party, the criminal courts are not the correct forum in which that issue should be decided. It is only in the plainest cases when there can be no doubt that the jurisdiction shall be exercised ... it is to be emphasised that this summary jurisdiction cannot appropriately be exercised where the matter is one which would more properly be litigated under the procedure, including discovery, available in a civil court.

4.141 Similarly, reparation orders under sections 84 and 86 of the *Sentencing Act* will not be made in relation to matters which demand extensive investigation. The criminal courts are wary of embarking upon complex and potentially protracted reparation hearings at the end of the trial, particularly when they are aware that civil proceedings are available to resolve such disputes. In *Braham*²⁷⁰ the Court of Criminal Appeal of Victoria said:

... it would be a proper exercise of the discretion to refuse to make an order where there was involved a complicated or extensive investigation into the conditions of its exercise or the circumstances to be regarded in exercising it. For example, if there were required to be undertaken a complicated or extensive inquiry in order to ascertain whether there had been a loss or destruction of or damage to property, or in order to ascertain whether it or a part of it had arisen through or by means of the offence, or in order to determine what was the value of the property lost, destroyed or damaged, that would be a consideration proper to be regarded as a ground for refusing to make an order and leaving the matter to other processes. We should not, however, be understood as saying that the mere raising of an issue as to whether part of a loss or destruction or damage had been suffered through or by means of the offence, however tenuous the argument might be, would in itself be sufficient to justify the refusal of an order. We would adopt the view taken of the operation of the related English provisions that the machinery of a compensation order is intended for clear and simple cases since the civil rights of the victim remain.

4.142 Although sections 84(7) and 86(8) deal with questions of fact and not law, the view that sentencing courts should not investigate complex questions of fact or law has been re-affirmed recently by the Court of Criminal Appeal in *Landolt*.²⁷¹ In that case, the appellant had pleaded guilty to one count of burglary. A considerable amount of valuable property was stolen and later recovered, but six watches with a claimed value of \$20,000 and a satchel were not returned. The offender was sentenced by the County Court to nine months' imprisonment. The victim made application for compensation and gave sworn evidence as to the value of the property which had not been recovered. He was cross-examined as to his statement but it was accepted by the court. Prior to the application the victim had

Committee are discussed in Chapter 2.

²⁶⁹(1970) 55 Cr. App. R. 65, 73.

²⁷⁰[1977] V.R. 104 at 110.

²⁷¹(1992) 63 A. Crim R. 220.

issued civil proceedings in the Magistrates' Court claiming \$23,850 for damages and wrongful detention of the same goods but those proceedings were unresolved at the time of the application. After the sentence had been imposed, however, the appellant's solicitor was approached by two persons with information about the value of the watches to the effect that the watches were fakes valued at about \$50 each. A late application for extension of time to lodge an appeal against sentence was made. The appellant had by that time served his custodial sentence. On the hearing of the appeal counsel for the victim made a submission, although he was not formally given leave to appear, as the victim was not in law a party to the proceedings for the purpose of an appeal against sentence pursuant to section 566 of the *Crimes Act 1958*.²⁷² Counsel for the victim had argued that because the victim was in the position of a judgment creditor, he therefore had a real interest in the appeal proceedings.

4.143 The Court of Criminal Appeal granted the application for leave to appeal on the basis that the issues raised by the fresh evidence would have justified a refusal to entertain the claim for compensation. It observed that the object of the reparation provisions is:

... to enable the court to order compensation to the victim in cases in which both liability to compensation and quantum can be simply determined. The procedure is not designed to require a court sitting in its criminal jurisdiction to engage in what amounts to a contest requiring the examination and cross-examination of witnesses, including the convicted person against whom the compensation order is sought. ... If upon an application for a compensation order it appears to the court that there is a real issue to be determined, it should decline to make an order and leave the question to be determined by a civil court in accordance with its normal procedure.

Accordingly, the order for compensation was quashed.

4.144 The Legal and Constitutional Committee suggested the development of a process whereby the amount of loss or damage could be agreed to prior to sentencing, so that only in cases of extreme complexity would the court refuse to make such an order. No such formal procedure has been established. It is arguable that such a procedure might reduce the number of applications for reparation orders that are refused due to evidentiary disputes over liability and quantum. This argument could also apply to the invoking of procedures for the giving of notice of such applications, as discussed below.

4.145 Evidence from the United Kingdom indicates that after the insufficiency of the offender's means, the next most common reason for a refusal to order compensation was a lack of evidence or a dispute over the quantum of loss. In Newburn's study, where compensation was refused or reduced, in 18% of cases there was no clear quantum and in 12% of cases

²⁷²See the discussion below dealing with appeals from reparation orders.

there was disagreement over quantum.²⁷³ Moxon found that in 28% of cases where the sum was reduced, there was insufficient evidence to substantiate the amount sought or the victim was unable to produce documentary evidence in support of the claim.²⁷⁴ Moxon noted that victims were sometimes vague about estimates of damage and often little attempt had been made to substantiate claims with documentary evidence. Where there was a dispute in court, the amount awarded could be reduced or the court could adjourn the hearing for further information. Some courts called victims to give evidence whilst others refused to resolve disputes about value.²⁷⁵

4.146 In New Zealand, a court considering imposing a reparation sentence may order a probation officer, or any other designated person, to prepare a report relating to, among other matters, the value of loss or damage to property. The person preparing the reparation report is required 'to attempt to seek agreement between the offender and the person who suffered loss or damage on the value of that loss or damage and the amount that the offender should be required to pay by way of reparation.'²⁷⁶ If no agreement can be reached, the officer may determine an amount or may advise the court that the matter is unresolved.

4.147 Even in jurisdictions where civil and criminal actions can be combined, questions of complexity arise and this problem is particularly acute where courts have a power to award compensation for physical injury. In such cases, complex questions of causation and the assessment of damages are not infrequent.

4.148 It is clear that a court must properly decline to make an order in the absence of a proper evidentiary foundation and in the absence of the requisite degree of proof of the claim. However, it may be that sections 84(7) and 86(8) of the *Sentencing Act* restrict unduly the ability to present the evidence needed to support a reparation claim.

4.149 The Committee therefore asked whether, in the absence of agreement between the parties as to the quantum of compensation, the court which hears the criminal proceedings should be required to determine the amount of loss or whether it should be resolved in the civil courts. It also asked what systems can be introduced to improve the procedure for the obtaining of reparation orders, for example, by the giving of early notice of an intention to make application. Further, should it be made clear that

²⁷³Newburn at 22.

²⁷⁴Moxon at viii.

²⁷⁵*Ibid* at 22.

²⁷⁶*Criminal Justice Act 1985* (NZ), sections 22 and 23; See Galaway and Spier at 23.

sentencing courts can receive additional written and oral evidence on the hearing of a reparation claim? If so, to what extent?

4.150 As noted above, the Committee is concerned to ensure that the perceived complexity of reparation applications does not, in cases where sentencing courts may decline to determine such applications, leave victims without effective remedies. The Committee has therefore already suggested that mechanisms be put in place to enable sentencing courts to adjourn applications with directions on evidence and procedure or to refer such applications to civil courts.

4.151 During the conduct of the inquiry, a number of interested parties were asked their views on the suitability of devising pre-hearing procedures for the formulation of reparation applications which would involve the giving of written notice with supporting material and allowing accused persons an opportunity to dispute the claim made, prior to the mention hearing. By and large, these proposals received a favourable response; the notable exception being the Victoria Police.²⁷⁷ A favourable response was also given to the proposition that sentencing courts should be allowed to call evidence in relation to a reparation claim in addition to that which would be admissible on the hearing of the criminal charge.²⁷⁸

4.152 The Committee believes that these measures, if adopted, would:²⁷⁹

- give accused persons and their legal advisers appropriate notice of an intention on the part of prosecutors or victims to apply for reparation orders;
- facilitate greater opportunities for accused persons and victims to reach agreement on issues relevant to liability and quantum, or at least to narrow the issues in dispute;
- enable parties, at an early stage, to assess whether it may or may not be appropriate for the sentencing court to deal with a reparation application and to assess what directions, if any, may need to be sought as to the conduct of such applications;
- encourage sentencing courts to dispose of reparation applications as much as possible without the need for victims to issue fresh civil proceedings or at least for sentencing courts to refer claims to civil courts.

²⁷⁷Hansard 28 May 1993 at 26.

²⁷⁸For example, Hansard 1 October 1993 at 36-52.

²⁷⁹For a similar approach, see Hodgson Committee, *Profits of Crime and Their Recovery* (London, Heinemann, 1984) at 48-49 and 56-61.

It is suggested that the notice procedure be grafted onto existing procedures so as to minimise the administrative and financial impact of these changes. Accordingly, in the Magistrates' Courts notice could be included in the charge sheet or information²⁸⁰ and in the higher courts in the presentment or further presentment.

Draft Recommendation 16

4.153 The Committee therefore recommends that:

- (a) the *Sentencing Act* and the Rules of the Supreme, County and Magistrates' Courts be amended to prescribe procedures for the making of reparation applications;**
- (b) the prescribed procedures include provision for:**
 - the giving of written notice by prosecutors, informants or victims to accused persons of an intention to make a reparation application;
 - such written notice to specify the terms of the reparation order being sought and to be accompanied by supporting material setting out details of the loss or damage claimed;
 - accused persons to have an opportunity to give a written response (including, if necessary, the delivery of affidavit material) setting out the grounds on which the claim is disputed.
- (c) the steps described at (b) be completed prior to the first mention day of a charge;**
- (d) sections 84(7) & (8) and 86(8) & (9) of the *Sentencing Act* be amended to:**
 - remove the current restriction that courts are only to order reparation where the relevant facts appear from the evidence that would be admissible on the hearing of the criminal charge; and
 - make it clear that sentencing courts may call for additional evidence on the hearing of reparation claims in order to dispose of such claims.

²⁸⁰See Hansard 17 June 1993 at 29.

4.154 Notwithstanding this Draft Recommendation, the Committee believes that sentencing courts should retain their discretion to decline to determine complex reparation orders in appropriate cases.²⁸¹ However, in the Committee's view, sentencing courts should be prepared to deal with complex applications as much as possible and should only decline to do so where it is manifestly clear that the claim is best dealt with in civil courts through the use of civil pre-trial procedures such as full pleadings, discovery, interrogation, notices to admit and the like. Further, in those situations, sentencing courts should utilise the referral mechanism discussed above.

4.155 In Chapter 6, the Committee considers other possible ways for parties to reach agreement on the making and the appropriate terms of reparation orders and for courts to be provided with the factual information necessary for the exercise of its discretion to make orders in the context of victim/offender mediation programs.

4.156 It should be noted that the discretion that sentencing courts have to decline to determine complex reparation applications is based partly on the view that reparation orders are not sentencing orders and are designed to facilitate civil recovery. If, as is recommended by the Committee, reparation orders are elevated to the status of sentencing orders, and if the statutory restriction on relevant evidence is repealed, it could be argued that the present discretion of sentencing courts to deal with reparation applications has been removed or otherwise modified.

4.157 Although, as noted, the Committee believes that sentencing courts should be encouraged to make reparation orders in eligible cases, it is desirable that the present discretion be preserved so as to ensure that consideration of complex and disputed reparation claims does not cause undue delays in sentencing. It is also necessary to preserve the discretion for cases that require utilisation of civil pre-trial procedures.

4.158 The Committee has considered whether it may be desirable to have a declaratory provision in Part 4 of the *Sentencing Act* making it clear that the present discretion is to be retained. On balance, however, it has decided that this is unnecessary in light of the use of the word 'may' in sections 84 and 86 which reflects the courts' discretion as to whether to order reparation. Nonetheless, as part of the consultative process on the draft recommendations of this Report, the Committee invites submissions on the matter.

²⁸¹Although the Committee shares the view of the Hodgson Committee (at 56-61) that the clear case requirement is based as much on expediency than principle, it supports its retention whilst there remains a back-log in the courts' lists. See also Written Submission 19 and Draft Recommendation 14.

APPEALS

4.159 Restitution and compensation orders are sentences for the purposes of appellate review under Part VI of the *Crimes Act 1958* since the general definition of a sentence in section 566 of the *Crimes Act* includes any order made under Part 3, 4 or 5 of the *Sentencing Act*. Part VI of the *Crimes Act* makes provision for appeals from the County Court to the Full Court of the Supreme Court. Further, section 570(1) of the *Crimes Act* suspends the operation of any order relating to any property or its restitution, or the payment of money made in relation to a conviction on indictment for ten days from the date of conviction. Where a notice of appeal or leave to appeal has been given, the operation of the order is suspended until the determination of the appeal.

4.160 Where a sentencing order has been made in the Magistrates' Court, a person against whom a sentencing order has been made may appeal to the County Court by way of rehearing under section 83 of the *Magistrates' Court Act 1989*, or to the Supreme Court on a question of law under section 92. Section 3 of that Act defines sentencing orders to include compensation and restitution orders made under Part 4 of the *Sentencing Act*. The Crown also has a right of appeal against a sentencing order under section 84 of the *Magistrates' Court Act*.

4.161 In the United Kingdom, there is some doubt as to whether a victim in whose favour a compensation order was not made, or in relation to which an inadequate order is made, can appeal.²⁸² In Victoria, section 83 of the *Magistrates' Court Act* refers only to appeals against sentencing orders by the person against whom the order has been made.

4.162 As noted, a party to a summary criminal proceeding in the Magistrates' Court may appeal to the Supreme Court on a question of law from a final order of the court in that proceeding. A 'final order' may include an ancillary sanction such as a restitution or compensation order, but it is doubtful whether a victim of a crime would be considered a 'party' to the proceeding as the law stands at present.

4.163 In light of the Committee's views on the desirability of there being a presumption in favour of reparation orders being made where there is evidence of victim losses, the question of a right of appeal on the part of victims assumes importance.

²⁸²Miers at 272.

4.164 The Committee therefore asked that if a court is under an obligation to give reasons for failing to make an order, and fails to do so, how should this failure be remedied? Also, if an offender appeals a reparation order for the purposes of an appeal on sentence, should victims be allowed to participate in such an appeal?

4.165 Whether victims should be able to utilise appeal or review procedures in relation to the making or non making of reparation orders raises difficult questions about the proper place for the interests of victims in the criminal justice system. It also has implications for the status of reparation orders as being separate to or as part of the overall sentence and their relevance to assessing the severity of sentence. In this respect, in *Braham's Case* the Court of Criminal Appeal, having decided that reparation orders were additional to sentence, held that regard could not be had to their combined impact with a custodial sentence to assess the severity of sentence on appeal.²⁸³

4.166 The right of appeal is a creature of statute.²⁸⁴ The Committee recognises that statutory rights of appeal are designed to serve specific purposes. In the context of sentencing, prosecuting authorities are conferred a right of appeal in the public interest to ensure that sentences imposed are appropriate and adequate. In the case of offenders, the right of appeal is given to ensure that sentences imposed are not excessive. Accordingly, if victims are to be given a statutory right of appeal, such a right must be designed to serve a specific and well defined purpose.

4.167 In *Landolt's Case* (discussed above) the Court of Criminal Appeal did not rule on the victim's application to participate in the appeal initiated by the offender, although it allowed his counsel to take part in the argument. Whilst that may represent a practical solution, the Committee is concerned that in some cases it may be appropriate to give formal recognition to the interests of victims. Analogous to principles of standing developed in public law, it would seem that often a victim will have a real or special interest in the making of a reparation order and in the outcome of an appeal from such an order²⁸⁵ and, as such, would be entitled to participate in any such appeal.

4.168 It is necessary to consider both the purpose of the appeal right and the appropriate grounds of appeal. In *Landolt's Case*, the appeal initiated by the offender concerned fresh evidence which, if available at the time of

²⁸³[1977] V.R. 104 at 108-109; the threshold conclusion that reparation orders are additional to sentence turned on an interpretation of the relevant statutory provisions.

²⁸⁴*Commissioner of Railways v. Cavanough* (1935) 51 A.L.R. 304.

²⁸⁵See Aronson M. and Franklin N., *Review of Administrative Action* (Sydney, Law Book Company, 1987) Chapter 15.

sentencing, would have justified a refusal to exercise the discretion to order reparation because of the existence of a significant factual dispute. It would seem logical that the victim, who stood as a judgment creditor under the order, be entitled to participate in the appeal to challenge the offender's attempt to set aside the order. As a judgment creditor, arguably the victim had an interest distinct to that of the prosecution.

4.169 In other situations, it is conceivable that victims would have a special interest in challenging a refusal to exercise the discretion to order reparation because of vitiating factors such as jurisdictional errors or the consideration of irrelevant factors; in the same way that offenders have a special interest in challenging a wrongful exercise of the discretion to order reparation. Added to that would be situations where both victims and offenders may wish to challenge the amount and method of the reparation ordered.

4.170 Having regard to the Committee's draft recommendations that:

- restoration or reparation should be a stated subsidiary aim in sentencing;
- reparation orders should be available not only in addition to sentencing options but as an alternative;
- courts should be required to give reasons when a reparation order is not made in cases involving evidence of property loss or damage;

the Committee believes an argument can be made out that victims should have limited rights to appeal or to participate in appeals relevant to reparation orders. The Committee, however, does not believe that victims should be able to appeal the adequacy of an overall sentence.

4.171 The Committee has considered whether victims should be given a right to:

- appeal on the grounds that a sentencing court failed to give any or any sufficient reasons for not making a reparation order; and
- participate, with leave of the appeal court, as third parties in any appeal on sentence initiated by offenders or prosecuting authorities insofar as the grounds of appeal concern the making of a reparation order.

The Committee believes victims should not be able to initiate appeals on the appropriateness of a sentence nor on any error of law in the exercise of the discretion, but with leave of the appeal court should be able to participate as a third party.

4.172 Given the relationship between reparation orders and sentencing and the Committee's proposals discussed in Chapter 3, it would not be appropriate to extend victims' rights to initiate appeals beyond the two situations mentioned above, as appeals on reparation orders may affect the overall sentence. A refusal to give any or any sufficient reasons for declining to order reparation, however, should, arguably, be reviewable if the statutory presumption in favour of reparation is to be effective. Although that situation may lead to cases being remitted back to sentencing courts for the giving of reasons, that may not necessarily result in a reconsideration of the overall sentence. Alternatively, if it does, the Committee believes that the availability of the appeal ground will be limited as sentencing courts should be in a position to provide sufficient reasons. Further, exercise of the right of appeal will be subject to the prosecution's powers to take over the conduct of such appeals in the public interest.²⁸⁶

4.173 The Committee has had difficulty in determining whether it may be necessary to make specific statutory provision for victims to be able to appeal a court's failure to provide reasons for not ordering reparation and for victims to participate in offender or prosecution initiated appeals as third parties.

4.174 Accordingly, the Committee does not recommend that specific statutory provision be made for the appeal rights of victims as present law and practice may provide sufficient avenues of redress for aggrieved victims. It is therefore a matter on which the Committee invites further submissions.

OTHER MATTERS

Jurisdictional Limits

4.175 Although reparation orders are seen as providing a summary means for civil relief, it seems that the monetary civil jurisdictional limits on the courts²⁸⁷ do not apply in terms of the amount of a compensation order or the value of property the subject of a restitution order.

²⁸⁶As to which, see section 9, *Director of Public Prosecutions Act 1982* and sections 567A and 577, *Crimes Act 1958*.

²⁸⁷\$25,000 for the Magistrates' Court (section 3(1), *Magistrates' Court Act 1989*), \$200,000 for the County Court (sections 3(1) and 37, *County Court Act 1958*) and unlimited for the Supreme Court.

4.176 Material considered as part of the Committee's study on the enforcement of reparation orders made in Magistrates' Courts showed orders being made in excess of the civil jurisdictional limit of \$25,000. A perusal of sentencing judgments involving reparation orders in the County Court also reveals cases where the monetary value of the order has exceeded the civil jurisdictional limit of \$200,000.²⁸⁸ These jurisdictional limits can be waived by the consent of the parties, subject to the discretion of the court.²⁸⁹

4.177 Pecuniary penalty orders under the *Crimes (Confiscation of Profits) Act 1986* are, if made in the Magistrates' Court, subject to the monetary jurisdictional limit of that court²⁹⁰ but, in the case of orders made in the County Court, not subject to such limits.²⁹¹ In the case of fines, the *Magistrates' Court Act 1989* does not place any limits on the monetary amounts that may be imposed in the Magistrates' Courts by way of a fine. Apart from provisions dealing with the conversion of fines on default, the *Sentencing Act* does not prescribe jurisdictional limits.

4.178 Recent changes to the *Summary Offences Act 1966* make it clear that the powers of the Magistrates' Court to order restitution *in specie* of stolen livestock is exercisable irrespective of the value of the livestock in question.²⁹²

4.179 The Committee has had some difficulty in deciding whether it is appropriate that the powers of sentencing courts to order reparation should be subject to civil monetary jurisdictional limits.

4.180 Given that reparation orders, whether or not they are integrated into sentencing by treating them as sentencing orders, have a civil element and affect the property interests of parties, including third parties, it is arguable that their availability be subject to normal jurisdictional limits. However, imposition of these limits may cause injustices in cases where a victim's loss exceeds the relevant jurisdictional limit and the claim is otherwise made out to the satisfaction of the sentencing court. In the absence of the offender consenting to the order, the victim would either

²⁸⁸See, for example, *D.P.P. v. Bramley* (total of \$310,023.33 on four counts) and *D.P.P. v. Reed* (\$237,193.90 on a single count).

²⁸⁹See, for example, *Courts (Case Transfer) Act 1987*, section 21.

²⁹⁰Section 6.

²⁹¹Section 6A.

²⁹²Section 28(14) as inserted by the *Summary Offences (Stolen Cattle) Act 1993*.

need to abandon that part of the claim in excess of the jurisdiction or issue fresh civil proceedings in a higher court.

4.181 On balance, the Committee believes that it may be appropriate that the powers of sentencing courts to order reparation should be subject to civil monetary jurisdictional limits, bearing in mind that it is always open to the parties to consent to orders being made in excess of such limits. However, it is a matter on which the Committee wishes to canvass the views of interested parties.

4.182 Accordingly, the Committee invites submissions on whether the *Sentencing Act* should be amended to make it clear that the powers of sentencing courts to order reparation are subject to the jurisdictional limits applicable to civil cases.

Standard of Proof

4.183 By sections 84(7) and 86(8) of the Sentencing Act, courts must not make reparation orders unless the 'relevant facts sufficiently appear' from the evidence given at the hearing of the criminal charge. Compensation orders under section 86(1) can be made if the court is 'satisfied' as to the elements of liability, which connotes the need for clear and convincing evidence.

4.184 It is unclear whether, before a court can exercise its discretion to order reparation, the applicant need establish the elements of the claim on the civil standard of balance of probabilities or according to the higher criminal standard of beyond reasonable doubt and there are not, as far as the Committee is aware, any reported decisions on the issue.

4.185 Although not addressing the question, sentencing courts have indicated that the discretion should only be exercised in straightforward cases where there are no legal or factual doubts about the appropriateness of making a reparation order. Arguably, this approach can have the effect of exacting high standards of satisfaction.

4.186 Commenting on the civil standard of proof, Sir Owen Dixon once explained that:

At common law two different standards of persuasion developed. It became gradually settled that in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt of the issues the burden of proving which lie upon the prosecution. In civil cases such a degree of certainty is not demanded ... The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence

before it can be found. It cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.²⁹³

4.187 Having regard to the language of sections 84 and 86, and given that reparation orders are founded on claims for civil liability, it would seem that before the discretion can be exercised, courts need to be reasonably satisfied as to the establishment of facts that give rise to an entitlement to relief.

4.188 Comments by sentencing courts that the discretion should only be exercised in clear cut cases are concerned with the need for there to be a sufficient evidentiary basis for the making of an order which can sometimes best be established through the use of civil pre-trial procedures. The Committee has already discussed the possibly restrictive effect of sections 84(7) and 86(8) and has suggested that it be made clear that sentencing courts can call additional evidence to resolve a reparation dispute.

4.189 The Committee believes that it is appropriate that reparation applications be determined in accordance with the civil standard of proof. Satisfaction of a claim on the balance of probabilities is consistent with the object and wording of sections 84 and 86 and for this reason any specific declaratory provision may be unnecessary.

4.190 The main difficulty with the existing provisions is the difference in wording between section 84, dealing with restitution, and section 86, providing for compensation in that only the latter, with use of the word 'satisfied' connotes a test of evidentiary persuasion according to the civil standard of proof. The Committee believes that it is desirable that the two sections be brought into line and that it be made clear that sentencing courts should be satisfied of the existence of a loss and of a claimant's entitlement to recover the property in question.

Draft Recommendation 17

4.191 The Committee therefore recommends that section 84 of the *Sentencing Act* be amended to provide that a restitution order can only be made where the sentencing court is 'satisfied' that there has been property loss and that the claimant is entitled to recover the property in question.

²⁹³*Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336 at 360; see also *Rejtek v. McElroy* (1965) 112 C.L.R. 517 and *Cunning Smith & Co. Ltd v. Westralian Farmers Co-operative Ltd* [1979] V.R. 129 at 147 c.f. *T.N.T. Management Pty Ltd v. Brooks* (1979) 53 A.L.J.R. 267.

Proof of Ownership

4.192 It has been suggested to the Committee that consideration be given to making provision for ownership to be proved readily by the use of statutory declarations, conclusive certificates or the like. In the case of stolen livestock, it was suggested that brands or ear marks could constitute *prima facie* evidence of ownership.²⁹⁴

4.193 This matter was considered by the Legal and Constitutional Committee in its *Report upon Law Relating to Stolen Goods (Livestock)*²⁹⁵ which addressed possible modes for establishing proof of ownership. That Committee rejected various proposals for legislative change noting that 'proof of ownership is primarily a practical problem and not a legal one'.²⁹⁶

4.194 Similarly, this Committee is unable to accept that there is a need for specific legislative provision of this type and notes that the matters raised touch upon the rules of evidence, a general review of which is beyond the Committee's terms of reference. Further, the Committee believes that a number of its proposals, if implemented, would simplify the conduct of reparation applications and in Chapter 5 it notes the recent modification of the rule in *Hollington v. Hewthorn Co. Ltd*²⁹⁷ so that civil plaintiffs do not have to re-establish the facts proven in the criminal trial.

4.195 Nonetheless, the Committee would welcome submissions on this matter as part of its consultations on this Report so that it may have placed before it more material than that put forward to date.

Return of Property

4.196 The power of sentencing courts to order restitution or compensation under the *Sentencing Act* is confined to situations where an accused has been convicted of, or pleaded guilty to, an offence involving property loss or damage.

4.197 There are, however, a number of statutory provisions enabling the restoration of property in the context of criminal proceedings. These include

²⁹⁴Written Submission 20 and Hansard 23 July 1993 at 46-47.

²⁹⁵Parliamentary Paper No. 160 (1991).

²⁹⁶*Ibid* at 21.

²⁹⁷[1943] 1 K.B. 587.

section 443A of the *Crimes Act 1958* (allowing the Director of Public Prosecutions to release property that is to be used as an exhibit), Rule 2.18 of the *Criminal Appeals and Procedures Rules 1988* (empowering a trial judge to preserve exhibits), section 125 of the *Police Regulation Act 1958* (providing for interpleader proceedings as to the ownership of goods) and section 28 of the *Summary Offences Act 1966* (dealing with the return of stolen livestock from the possession of another person). Further, the making of a compensation award for personal injury under the *Criminal Injuries Compensation Act 1988* does not depend upon the apprehension and conviction of an offender.²⁹⁸

4.198 The Committee is concerned that in cases where the accused is acquitted or where there are delays in the conduct of criminal proceedings, the interests of owners of property the subject of such proceedings may be affected adversely. This will be the case particularly where the relevant property is of an income producing nature. Further, as discussed above, Part 4 of the *Sentencing Act*, as presently drawn, does not allow for claims in relation to any consequential loss arising from the loss of use of the property in question.

4.199 In the context of stolen livestock, these problems have been addressed recently by the Parliament through amendments to section 28 of the *Summary Offences Act 1966* brought about by the *Summary Offences (Stolen Cattle) Act 1993*. The amendments allow a person claiming to be entitled to stolen livestock in the possession of another to apply to the Magistrates' Court for an order for delivery of the livestock. The procedure can be invoked pending the determination of any relevant criminal charges.²⁹⁹

4.200 The Committee believes that it is appropriate that the current statutory provisions dealing with the power of the courts and police and prosecuting authorities to deal with property, pending the outcome of criminal proceedings or upon acquittal, should be rationalised. It suggests that this matter should be given further consideration in the context of its earlier draft recommendation for a review of miscellaneous reparation provisions.

Rationalisation of Part 4

²⁹⁸Section 21.

²⁹⁹See also section 24, *Second-Hand Dealers and Pawnbrokers Act 1989*.

4.201 As noted in this Chapter and elsewhere in the Report, there are some anomalies in the drafting of sections 84 and 85 (restitution) and 86 and 87 (compensation) of the *Sentencing Act*. These include:

- the preservation, under section 86 only, of victims' civil rights to the extent they remain unsatisfied by the making of a reparation order;³⁰⁰
- the admissibility, under section 86 only, of findings of fact made by the criminal court;³⁰¹
- the relevance of an offender's financial means to the quantum of a compensation order under section 86 whereas no similar consideration applies to monetary restitution orders made under section 84;³⁰² and
- the possible overlap between section 84(1)(c) dealing with monetary restitution and the compensation provisions of section 86.³⁰³

Further, the Committee has made a number of draft recommendations for changes to Part 4 relating to the powers of sentencing courts to order reparation.³⁰⁴

4.202 The Committee therefore believes that it may be appropriate to rationalise sections 84 to 87 to avoid any possible limitations on the powers of courts to order restitution or compensation because of the different wording of the empowering provisions.

Draft Recommendation 18

4.203 The Committee therefore recommends that consideration be given to consolidating sections 84 to 87 of the *Sentencing Act* so as to make consistent the powers of sentencing courts to order restitution or compensation.³⁰⁵

4.204 The Committee now turns to consider the enforcement of reparation orders.

³⁰⁰See para. 5.29.

³⁰¹See para. 5.34.

³⁰²See para. 4.111 and footnote 84. This difference could possibly be justified on the grounds that either the moneys seized represent direct proceeds of the stolen goods or that the money, having been seized, *ex hypothesi*, is not needed for the offender's subsistence.

³⁰³See Hodgson Committee at 89-91.

³⁰⁴See particularly, Draft Recommendations 6, 7, 11, 12, 13, 14, 15, 17 and 20.

³⁰⁵Consolidation may also allow for the enactment of a more general power to order restoration as discussed at para. 4.31.

INTRODUCTION

5.1 The essence of current concern about reparation orders is whether or not they are effective in providing compensation to victims. This raises the question of whether, if reparation orders are not satisfied, present procedures for their enforcement are adequate. In Victoria, three different techniques could be used to enforce restitution or compensation orders. They are enforcement by civil procedures, use of a criminal model of enforcement or satisfaction through property seized from an offender.

5.2 Submissions to the Committee were fairly divided as to whether reparation orders should be enforced by civil or criminal means. Those advocating the adoption of a criminal model of enforcement suggested that it provided a more cost effective means of enforcement and would lead to higher compliance rates.³⁰⁶ Those supporting the retention of a civil model of enforcement expressed concern that a criminal model of enforcement might lead to offenders being punished because of an inability (as opposed to unwillingness) to meet the debt owing under a reparation order.³⁰⁷ The views expressed were also influenced by a perception as to whether reparation orders should form part of sentencing or whether they simply provide a summary means for civil redress.³⁰⁸

CIVIL MODEL

5.3 One method by which reparation orders can be enforced is to treat the order as enforceable in the same manner as a civil judgment. This is the method provided for under sections 85 and 87 of the *Sentencing Act*. This

³⁰⁶See, for example, Hansard 28 May 1993 at 28-29, 17 June 1993 at 24-27, 22 June 1993 at 26 and 10 September 1993 at 26-27.

³⁰⁷See, for example, Hansard 28 May 1993 at 4 and 1 October 1993 at 6.

³⁰⁸For example, Hansard 28 May 1993 at 9 c.f. 22 June 1993 at 26.

means that the victim must initiate civil enforcement proceedings to procure compliance with the terms of a reparation order in the event of default.

5.4 Under the Rules of the Supreme, County and Magistrates' Courts³⁰⁹, the methods of enforcement available will depend on whether the relevant reparation order involves the delivery of property (restitution) or the payment of money (compensation).

5.5 Judgments for the payment of money may be enforced by one or more of the following means:

- warrant of seizure and sale;
- attachment of debts;
- attachment of earnings;
- charging of securities;
- appointment of a receiver.

5.6 Judgments for the delivery of goods may be enforced by warrant of delivery of goods or recovery of their assessed value.

5.7 Both money judgments and judgments for the delivery of goods may, in cases where persons disobey such judgments, be enforced by the committal of the person or sequestration of property of the person. These provisions, however, operate subject to the *Imprisonment of Fraudulent Debtors Act 1958*, as amended by the *Judgment Debt Recovery Act 1984* with the effect that imprisonment for default will only arise if the judgment creditor can persuade the court that there has been a persistent and wilful default on the part of the judgment debtor.

5.8 Because sections 85 and 87 say that reparation orders 'may be enforced in the court' which made the order, it is not open to victims to initiate bankruptcy proceedings in the Federal Court under the *Bankruptcy Act 1966* (Cth) on the basis that non satisfaction of a demand for payment of a money judgment constitutes an act of bankruptcy.³¹⁰ It is also arguable that the procedures set out in section 112 of the *Magistrates' Court Act 1989* for the registration of judgments in the Supreme Court for the seizure and

³⁰⁹See Order 66, *Supreme and County Court Civil Procedure Rules*, Chapter I and Order 27, *Magistrates' Court Civil Procedure Rules*.

³¹⁰See Written Submission 16.

sale of land, is not available where the order has been made in the Magistrates' Court.³¹¹

5.9 As the Victorian Sentencing Committee pointed out, the civil mechanisms for the enforcement of reparation orders are adequate 'provided' offenders have sufficient financial resources to satisfy such an order. The Committee, however, would add another proviso to that conclusion, namely; that the sufficiency of civil enforcement mechanisms also depends on the resources at the disposal of the victim/judgment creditor. In this regard, for victims to initiate civil enforcement proceedings entails the incurring of significant costs by way of filing fees, stamp duty and legal costs.³¹² Further, in the majority of cases, victims will need to seek legal advice and assistance to initiate and pursue enforcement proceedings and, invariably, the costs incurred will not be recovered in full.

5.10 Few, if any, evaluations of the effectiveness of civil enforcement mechanisms have been carried out. In the context of the civil enforcement of reparation orders, reference is made to the studies conducted under the auspices of the Committee's inquiry, the results of which are discussed below.

5.11 In 1986 the United Kingdom Lord Chancellor's Department commissioned a study of debt enforcement procedures in the County and High Courts. The main findings of the study were that:

- in the County Court 30% of judgment creditors were paid in full and a further 40% had received some payment;
- in the High Court 40% of judgment creditors were paid in full and a further 20% had received some payment.³¹³

The study also found that the smaller the debt, the greater the chance of payment in full. In the County Court, of judgment debts under £100, 41% were paid in full, compared to 13% for judgment debts over £2,000.³¹⁴

³¹¹*Ibid.*

³¹²The scale fees for enforcement in the Magistrates' Courts include, for example, \$105.00 for Sheriff's fee on execution of a warrant, \$22 for a summons for oral examination and \$32 for a warrant of commitment: *Magistrates' Court (Fees, Costs and Charges) Regulations 1990*. Significant professional legal costs would be incurred in addition to these fees.

³¹³Lord Chancellor's Department, *Civil Justice Review: Study of Debt Enforcement Procedures* (December 1986) at 85.

³¹⁴*Ibid* at 11.

5.12 On the operation of specific execution procedures in the County Court, the study found that use of warrants to seize goods resulted in 45% of judgment debts being paid in full, 4% in part and 48.1% remaining unpaid.³¹⁵ The duration of most warrants were concluded within one month.³¹⁶ Use of attachment of earnings resulted in one third of debtors receiving 75% of their debts, one third between 25% and 75% and one third less than 25%.³¹⁷ Garnishee orders resulted in 37% of cases being paid in full.³¹⁸

5.13 The Institute of Law Research and Reform, Alberta, Canada, published a similar study in 1986.³¹⁹ The study examined civil judgments that resulted in enforcement proceedings being taken and found that:

- in cases where execution proceedings were taken through the Sheriff's Office, 22.5% resulted in enforcement to the satisfaction of the judgment creditor;
- in cases where writs for the sale of land were issued, 19.2% were discharged.

5.14 However, the authors of the study pointed out that the above figures did not necessarily represent cases of the judgment debt being paid in full. In this regard, it was found that 'the overwhelming majority of judgment creditors in the sample recovered little or nothing on their judgments. 1585 judgements (86%) fell into the "no recovery" category; only 74 judgments (4%) fell into the "over 90%" recovery class.'³²⁰ It was concluded that:

In many cases, creditors chose to carry their claims to judgment and often to enforcement and then to discontinue their efforts. Perhaps they had learned more about their debtors as they pursued their lawsuits. If the knowledge was discouraging (e.g., the debtor had no assets), the creditors may have terminated their collection efforts rather than wasting more of their own money on a profitless exercise.

A creditor may abandon his claim because it is too small to bother about or because he knows that the debtor has nothing. Another reason for writing off a

³¹⁵*Ibid* at 16.

³¹⁶*Ibid* at 15.

³¹⁷*Ibid* at 19.

³¹⁸*Ibid* at 20, dealing with County Court cases.

³¹⁹Institute of Law Research and Reform, *The Operation of the Unsecured Creditors' Remedies System in Alberta*, Research Paper No. 16, March 1986. See also; *Remedies of Unsecured Creditors*, Discussion Report No. 3, May 1986 and Alberta Law Reform Institute, *Enforcement of Money Judgments*, Report No. 61, March 1991.

³²⁰Institute of Law Research and Reform (March 1986) at 10.

debt is that the creditor believes that the legal system will fail to collect the money for him.

Even where creditors sued and carried their remedies as far as possible, many still got nothing. This may be less a fault of the system than a reflection of the fact that many debtors have little or no assets and income above their exemptions.³²¹

CRIMINAL MODEL

5.15 At common law, a person sentenced to pay a fine by a superior court could be imprisoned in default of payment. Under the writ of *capias ad satisfaciendum*, the ordinary remedy by which successful litigants secured the imprisonment of judgment debtors, imprisonment was authorised until the fine had been paid. The period served did not reduce the liability to pay. Imprisonment for debt has long been abandoned in Victoria³²² and current legislative policy in respect of fines is that imprisonment should be used as a sanction of last resort, being reserved for fine defaulters who have the means and ability to pay the fine, but wilfully refuse to do so.

5.16 Present criminal procedures for the enforcement of fines in relation to natural persons require them to be arrested if they are in default for more than one month. The defaulter must not be arrested unless given at least 7 days notice of the prospect of being arrested and written advice about the alternatives. This allows the offender an opportunity to obtain an instalment order, or an order for time to pay, or the chance of discharging or converting the fine by way of a community-based order involving unpaid community service.

5.17 Section 62(10) of the *Sentencing Act* provides that once the person is arrested, the court before which he or she is brought has the following options:

- make a community-based order requiring the offender to perform unpaid community work;
- order that the offender be imprisoned;
- order that property of the offender be seized under warrant to be sold to meet the unpaid fine;
- vary any existing arrangements for payment by instalments; or

³²¹*Ibid* at 187.

³²²See *Imprisonment of Fraudulent Debtors Act 1958* and *Judgment Debt Recovery Act 1984*.

- adjourn the hearing for up to 6 months on any terms it thinks fit.

5.18A court may exercise any of these powers even in the absence of the offender, if that person has failed to attend before the court in accordance with the terms of bail.³²³ By section 62(11), the court must not order imprisonment if the fine defaulter does not have the capacity to pay the fine or had some other reasonable excuse for non-payment. Section 62(12) states that imprisonment is a last resort and can only be ordered if the court is satisfied that no other order is appropriate in the circumstances.

5.19In evidence to the Committee, the Sheriff of Victoria advised that in cases where warrants are issued for fine default, about 50% of defaulters are located. Of those located, 75% discharge liability by the payment of money with the remainder facing the possibility of further enforcement proceedings. Of the remaining 25%, half of those defaulters opt for conversion of the liability into a community based order. The Sheriff also advised that, of approximately 200,000 warrants of enforcement issued, about 800 fine defaulters have received prison sentences but that, for the vast majority, imprisonment has come about for other reasons such as re-offending. Accordingly, it was thought that very few people would be imprisoned because of a failure to pay a fine.³²⁴

5.20A compensation order may be enforceable as a fine or monetary penalty imposed by the court in its criminal jurisdiction. In South Australia, for example, the payment of a pecuniary sum is enforceable by imprisonment in default.³²⁵ This is a departure from the understanding that a compensation order is entirely civil in nature because subsequent imprisonment on default may ultimately extinguish the obligation to discharge the criminal compensation order. However, in South Australia, if, on default of a reparation order, the court orders an offender to serve a term of imprisonment, the victim retains civil rights to pursue the debt or liability formerly represented by the reparation order.³²⁶

5.21In Tasmania, where compensation orders made in the court of summary jurisdiction are enforceable by imprisonment in default, it has

³²³*Sentencing Act*, section 62(10A). The court may also proceed if the warrant was not issued or executed within a reasonable period of time because the offender was not in Victoria; section 62(10B).

³²⁴Hansard 10 September 1993 at 23-24.

³²⁵*Criminal Law (Sentencing) Act 1988 (SA)*, section 61; see also *Penalties and Sentences Act 1992 (Qld)*, section 36(2).

³²⁶*Criminal Law (Sentencing) Act 1988 (SA)*, section 70.

been held that 'an order for damages is inappropriate where the defendant is not in a position to pay damages and the only effect of such an order would be liability to an inappropriate additional term of imprisonment in default'.³²⁷

5.22 In England, a compensation order is enforceable as a fine. But compensation orders are subject to the same limitation that the means of the offender must be taken into account. The relevant provisions have been described as a 'statutory jungle'.

5.23 The Legal and Constitutional Committee was of the view that civil enforcement was not an effective means of ensuring that victims were restored to their position and recommended that the criminal process of enforcement be adopted.³²⁸ It was critical of civil enforcement because it increased the cost of and delay in obtaining restitution and required the victim to shoulder the financial risk of civil proceedings.³²⁹

5.24 This recommendation was strongly opposed by the Victorian Sentencing Committee³³⁰ which said that such orders represented a 'privilege' enjoyed by victims of crime, but as private civil rights, they were appropriately enforced by all the means available to a civil litigant. The Victorian Sentencing Committee made a number of points with respect to the recommendation of the Legal and Constitutional Committee:

- to give victims of crime the advantage of criminal enforcement procedures would give them an advantage over ordinary civil litigants which would be arbitrary and capricious and could lead to dissatisfaction with the civil system;
- it would lead to undue pressure on the criminal justice system if civil plaintiffs were tempted to utilise the criminal law to obtain satisfaction;
- it would revive the idea of 'debtor's prisons' which was no longer appropriate in Victoria;

³²⁷*Grein* (1988) 35 A. Crim. R. 76; Warner K., *Sentencing in Tasmania* (Sydney, Federation Press, 1990) at 105.

³²⁸Legal and Constitutional Committee, *Report upon Support Services for Victims of Crime*, Parliamentary Paper No. 59 (1987), recommendation 18.

³²⁹*Ibid* at 37.

³³⁰*Victorian Sentencing Committee Report 1988* at 356-358.

- it would not amount to a fair and efficient use of the correctional resources of the community;
- the law of contempt was adequate to deal with cases of wilful disobedience to court orders in civil proceedings.

DIRECT PAYMENT

5.25 Legislation may allow the award to be enforced by direct payment to the victim out of money found in the offender's possession at the time of his apprehension. This is the technique relied upon in section 84(1)(c) of the *Sentencing Act* (monetary restitution orders) and for the satisfaction of pecuniary penalty orders from assets of the offender seized under the *Crimes (Confiscation of Profits) Act 1986*.

5.26 It may be possible to extend the notion of direct payment by allowing, for example, sentencing courts to order payment by an offender through an attachment of earnings order or even under warrant of seizure and sale at the time of imposing the order. In effect, this would involve conferring on sentencing courts powers of enforcement exercisable by courts hearing default proceedings and for sentencing courts to exercise such powers at the time of initial sentencing.³³¹

5.27 As noted in the Introduction to this Report, it is beyond the Committee's terms of reference and resources to examine in detail the substantive and procedural law relating to the confiscation and forfeiture of assets belonging to offenders. The Committee, however, would welcome submissions on the relationship between forfeiture legislation and reparation orders with particular reference to the possibility of utilising powers under proceeds of crime legislation to satisfy reparation orders.

5.28 The Committee returns to the respective merits of civil and criminal models of enforcement after consideration of the retention of victims' civil rights and empirical studies on the enforcement of reparation orders.

VICTIMS' CIVIL RIGHTS

5.29 The Legal and Constitutional Committee noted that legislation sometimes failed to make clear that the civil rights of the victim are preserved insofar as the right of civil action is not satisfied by the criminal

³³¹See, for example, Hansard 1 October 1993 at 41.

reparation order.³³² It recommended clarification of that right. Presently, it appears that no matter what enforcement action is taken under statute, the victim's right to bring independent civil action remains. Section 86(10) of the *Sentencing Act*, in relation to compensation orders, provides that:

Nothing in this section takes away from, or affects the right of, any person to recover damages for, or to be indemnified against, any loss, destruction or damage so far as it is not satisfied by payment or recovery of compensation under this section.

No similar proviso is made with respect to restitution orders under section 84.

5.30 While it is the case that a finding of guilt is a pre-condition for the making of a reparation order, there is some doubt as to whether there is need for civil liability to be established.³³³ In the United Kingdom, there have been differences of opinion as to whether a compensation order can be made in the absence of civil liability, although such situations are likely to be rare as most crimes give rise to civil liability.³³⁴ The issue generally arises in the context of personal injuries caused by regulatory offences, and so is unlikely to be of significant relevance in Victoria, but there are cases where financial harm may be caused through a breach of a statute where there is no civil liability.³³⁵

5.31 The position under the *Sentencing Act* is further complicated as no provision is made as to how the court should satisfy itself that a person is entitled to recover stolen property, its proceeds or value (section 84) or has had property lost, destroyed or damaged (section 86) and what standard of proof should apply. The only relevant test is that provided in sections 84(7) and 86(8) that a court must not make a reparation order 'unless the facts sufficiently appear' from the evidence adduced, or from that evidence which could have been adduced, on the hearing of the criminal charge. Further, criminal courts have taken the view that reparation orders should only be made in the 'plainest cases' where there are 'no doubts' as to liability and quantum. The Committee has addressed this issue in Chapter 4.

5.32 A person who has suffered loss or damage as a result of a crime and who wishes to pursue a civil remedy is, at the moment, because of the rule

³³²Legal and Constitutional Committee at 38.

³³³Miers D.R., *Compensation for Criminal Injuries* (London, Butterworths, 1990) at 200.

³³⁴*Ibid* at 201.

³³⁵See *R. v. Thompson Holidays Ltd* (1974) Q.B. 592 (compensation for ruined holiday as result of false statements in brochure); *R. v. Chappell* (1985) 80 Cr. App. Rep 31 (compensation under V.A.T. legislation).

in *Hollington v. Hewthorn & Co. Ltd.*³³⁶ required to re-establish all the facts which may have been proved at the trial of the offence. The rule prevents the admissibility of a conviction in other proceedings as proof of the facts it was founded on, that is, guilt of the offence charged. This can act as a major disincentive to persons who wish to recover compensation through the civil courts. However, the rule has not been followed by courts in other jurisdictions³³⁷ and has also been amended by statute³³⁸ in other jurisdictions. At the Federal level, legislation was introduced in the last Parliament to implement recommendations of the Australian Law Reform Commission for modification of the rule.³³⁹ In Victoria, the Legal and Constitutional Committee, in the context of restitution, also recommended reform of the rule.³⁴⁰

5.33 It should be noted that in practical terms, the United Kingdom studies of the operation of compensation orders indicate that in only a very small percentage of cases a compensation order will not be made because of the availability of alternative (civil) recourse for the victim. This reason amounted to 13% of Newburn's sample³⁴¹ and only 7% of Moxon's sample.³⁴²

5.34 To some extent the rule in *Hollington v. Hewthorn & Co. Ltd* has been altered by section 86(7) of the *Sentencing Act* which says that in relation to compensation orders:

On an application under this section -

³³⁶[1943] 1 K.B. 587. In Victoria, the rule is to be abolished from 1 January 1994; see para. 5.40.

³³⁷*Mickelberg and Mickelberg* (1985) W.A.R. 365; *Hunter v Chief Constable of the West Midlands Police* (1982) A.C. 529; *Jorgensen v. News Media (Auckland) Ltd* (1969) N.Z.L.R. 961.

³³⁸See *Evidence Act 1898* (NSW), section 23; *Evidence Act 1929-1974* (SA), section 34(a); *Evidence Act 1977-1979* (Qld), section 78-82; *Evidence Act 1910* (Tas.), section 76.

³³⁹Evidence Bill 1991 (Cth); Australian Law Reform Commission, Report No. 26 (Interim) *Evidence* (1985) Volume I, Chapter 16 and Report No. 38 *Evidence* (1987) Chapter 13. The Bill was introduced in the House of Representatives but lapsed with the proroguing of Federal Parliament in December 1992.

³⁴⁰Legal and Constitutional Committee at 32, recommendation 17.

³⁴¹Newburn T., *The Use and Enforcement of Compensation Orders in Magistrates' Courts* (London, HMSO, 1988) at 22.

³⁴²Moxon D., Corkery J.M. and Hedderman C., *Developments in the use of Compensation Orders in Magistrates Courts Since October 1988* (London, HMSO, 1992) at viii.

- (a) a finding of any fact made by a court in a proceeding for the offence is evidence and, in the absence of evidence to the contrary, proof of that fact; and
- (b) the finding may be proved by production of a document under the seal of the court from which the finding appears.

However, that alteration of the rule only relates to the powers of sentencing courts to make reparation orders and does not affect the powers of civil courts to deal with subsequent claims concerning the same subject matter. It is unclear why no similar provision appears in section 84 with respect to the making of restitution orders.

5.35 If a criminal court, on the hearing of a contested charge or on the hearing of sentence on a guilty plea, makes findings of facts as to the ownership or possession of property and its loss, destruction or damage, the Committee believes that those findings are relevant to any subsequent civil proceedings touching on the same factual matters.

5.36 The object of the reparation provisions is to provide a quick and economical means of redress to avoid the time and expense of fresh civil proceedings. If that objective is not fulfilled in eligible cases, any subsequent and alternative civil process must also seek to meet that object. Where an application for reparation is dismissed or results in an order for something less than the victim's full loss, or where an application or order is not made in an eligible case, it is important that a victim be able to pursue alternative civil remedies in a timely and cost effective manner.

5.37 The Committee endorses previous calls for modifications of the rule in *Hollington v. Hewthorn Co. Ltd* and notes that in the present context modification would affect the conduct of civil cases by both criminal victims/civil plaintiffs and criminal offenders/civil defendants. In this regard, findings of fact made by criminal courts would be relevant in subsequent civil proceedings to both the existence and absence of civil or tortious liability.

5.38 In considering abolition or modification of the rule in *Hollington v. Hewthorn Co. Ltd*, issues arise as to the distinctions between:

- the admissibility in civil cases of findings of fact made in criminal cases and the weight to be accorded to such findings;
- the use of such findings as between the same parties as opposed to third parties;
- findings of fact made following a plea of guilt compared with findings made on the hearing of a contested charge.

A distinction also needs to be made between a judgment or conviction and the facts upon which they are founded.³⁴³

5.39 The authors of *Cross on Evidence*, after reviewing authorities on the rule, statutory modifications of the rule and previous proposals for legislative reform, conclude that proposals for reform should provide for:

- admission or use of evidence that a party, or a person claiming through the party, to civil proceedings has been convicted of an offence;
- extension of such admissibility to third parties;
- recognition of judgments, orders or convictions as prima facie evidence of the facts on which they were founded.

As to convictions after a plea of not guilty, the authors suggest that the offender or party seeking to deny the facts on which they were based be required to disprove those facts beyond reasonable doubt.³⁴⁴ However, the Committee would not propose that findings of fact by criminal courts be *conclusive* evidence of such facts.

5.40 Recently, the Parliament of Victoria passed the *Evidence (Proof of Offences) Act 1993* which inserted a new section 90(1) into the *Evidence Act 1958* in the following terms:

In a civil proceeding (other than for libel or slander) the fact that a person has been found guilty of an offence by a court in Victoria or elsewhere is admissible in evidence for the purpose of proving, where to do so is relevant to an issue in that proceeding, that the person committed the offence, whether or not the person is a party to the civil proceeding and whether or not the person pleaded guilty to the offence.

The 1993 Act also introduced a new section 91 dealing with the conclusiveness of convictions for the purposes of civil defamation proceedings. The amendments are to apply to civil proceedings commenced after 1 January 1994.

5.41 It is unclear to the Committee what the effect of section 90 will be in terms of the evidentiary weight that is to be accorded to a conviction and whether a party, wishing to displace the proof of fact afforded by the conviction, is under a persuasive or evidentiary burden to do so. It is also unclear as to how the new provision will operate in allowing for the proof

³⁴³See generally Byrne D. and Heydon J.D., *Cross on Evidence: Fourth Australian Edition* (Sydney, Butterworths, 1991) at 156-166.

³⁴⁴*Ibid* at 164.

of relevant facts or issues in civil proceedings through the admissibility of a conviction as the section speaks of 'proving ... that the person committed the offence'. The Committee notes the views of the authors of *Cross on Evidence* that reform of the rule in *Hollington v. Hewthorn Co. Ltd* should be concerned with facilitating the proof of relevant facts by recognising the distinctions between a conviction and the facts giving rise to it and between an offence and the facts making up the offence. The latter distinction is particularly relevant bearing in mind that it is possible for an offence to have a different factual basis to an analogous civil or tortious claim.

5.42 The Committee therefore suggests that the effect of the recent changes to the *Evidence Act 1958* be monitored. The issues for further consideration raised by authorities such as *Cross on Evidence* include whether:

- The changes to the rule in *Hollington v. Hewthorn Co. Ltd* should be further modified by providing that where a criminal court makes findings of fact on the hearing of a claim for reparation or on the hearing of a criminal charge involving property loss, destruction or damage those findings of fact shall, in any subsequent civil proceedings involving the same subject matter, be admissible as prima facie evidence of those facts.
- Provision should be made for the admissibility in civil proceedings of findings of fact made by criminal courts by, inter alia, the production of records under the seal of the court that made the findings.
- Provision should be made that such findings of fact may be displaced by the other party adducing or pointing to evidence that suggests a reasonable possibility that the evidence, if accepted, is contrary to the findings relied on so that the party with the persuasive burden retains that burden and the rebutting party has only an evidentiary burden.³⁴⁵

5.43 Towards the end of this Chapter, the Committee considers the possibility of sentencing courts certifying civil judgment or debts where they decline to make a reparation order or where the order does not represent the full loss of the victim or where the order remains unsatisfied.

ENFORCEMENT PRACTICE

³⁴⁵See the provisions of section 130 of the *Magistrates Court Act 1989* which codify the distinction between persuasive and evidentiary burdens in the context of defences by way of exceptions. See also *Harris v. Macquarie Distributors Pty Ltd* [1967] V.R. 257 at 261.

5.44 The Committee has had to consider what may be the most effective means of securing the enforcement of restitution orders, bearing in mind the practical limitations arising from the inability of victims to pursue compliance and the inability or unwillingness on the part of some offenders to comply with such orders.

5.45 Whether either a criminal or civil model of enforcement should be adopted will depend largely upon whether it can be shown that one model results in higher rates of satisfaction or compliance. The Committee has therefore considered studies on the success rates of criminal and civil enforcement of court orders. The Committee is not aware of any research having been done in Australian jurisdictions on the effectiveness of the various procedures for the enforcement of reparation orders although studies have been undertaken in the United Kingdom and New Zealand, the results of which are noted below. In both jurisdictions, reparation orders have the status of sentencing sanctions and are enforceable like any other sentence under the criminal model of enforcement. Reference has already been made to studies of enforcement procedures for civil debts, and their results are discussed in comparative terms further below.

5.46 The Committee also commissioned a study from the Department of Criminology at the University of Melbourne examining the compliance with compensation orders, enforceable under a civil model, made over a one month period in the Magistrates' Courts in Victoria.

United Kingdom

5.47 In 1988 Newburn examined a sample of compensation orders from four courts, comprising a total of 550 orders. Each case was followed through the enforcement records of the court. He found that 80% of orders were paid in full within 18 months and 60% required no enforcement action at all. One third resulted in enforcement action, requiring a letter of demand, a summons, a means inquiry, distress or a warrant of commitment and execution. His study did not compare the cost of enforcing such orders with the amount actually recovered. Only 8% of all the cases resulted in custodial action. He found that distress warrants were regarded by some as harsh and were as unpopular with bailiffs and police as they were to those subject to them.³⁴⁶ Attachment of earnings was seldom used because a large proportion of offenders were unemployed.³⁴⁷

³⁴⁶Newburn at 43.

³⁴⁷*Ibid* at 39.

5.48 In 1992 Moxon, in a similar survey, found that the proportion of offenders completing payment within a year ranged from 56% to 86%, depending upon the court. It was the speed of action, rather than the type, which was the key to successful enforcement. However, default was a particular problem in relation to the unemployed.³⁴⁸ The median order was about £60 to £100, with 86% of orders due to be paid within 12 months and 40% within 6 months. Almost 75% were ordered to be paid by instalments. Of those who should have paid in full, 33% failed to do so and 11% of cases were 'written off' within the 12 month follow up period, most often because the offender had been imprisoned, occasionally for other offences, but more likely for failing to pay the order. The larger the amount, the longer it took to pay off. Almost 33% of orders were still outstanding over a year. The courts were reluctant to set higher limits than 12 months for payment, other than in exceptional circumstances.³⁴⁹ Moxon notes that in 1992, legislation was introduced which allowed social security benefits paid to unemployed offenders to be attached to satisfy reparation orders.

New Zealand

5.49 In 1985 Galaway and Walker followed up 252 persons ordered to pay compensation. One year after the order was made, 62% of offenders had paid in full, 9% were still paying and 5% had payment remitted. Of the total amount ordered to be paid by the courts, 48% had been paid. Of those that had not paid, the major reason was financial hardship, because of lack of employment, further offending resulting in imprisonment and continuing payment of fines from previous offending.³⁵⁰

5.50 In their 1992 study, Galaway and Spier found that after one year, 48% of the total amount of reparation due to be paid was actually paid, with enforcement action being required in 76% of all cases.³⁵¹ The larger the amount of reparation, the less likelihood there was of full compliance. Only 31% of offenders ordered to pay between \$1000 and \$5000 were in full compliance.³⁵² Courts used a range of enforcement actions. In 10% of cases seizure warrants were used, in 11% a report was made to the judge for further action, in 27% a warrant for arrest was issued and in 5% a committal

³⁴⁸Moxon at ix.

³⁴⁹*Ibid* at 27.

³⁵⁰Galaway B. and Walker W., *Restitution Imposed on Property Offenders in New Zealand Courts* (Wellington, Department of Justice, 1985).

³⁵¹Galaway B. and Spier P., *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* (Wellington, Department of Justice, 1992) at 16.

³⁵²*Ibid* at 149.

warrant was issued.³⁵³ In 30% of these cases, all or part of the reparation amount was remitted.

Victoria

5.51As part of the qualitative study of reparation orders made in the Magistrates' Courts, a survey was forwarded to 254 victims in whose favour reparation orders were made in November 1991. A total of 101 responses were received, the majority of which were from private individuals. It is worth noting that of 53 individual responses, 12 people did not even know of the existence of the order made in their favour. The implications of this finding have been discussed in Chapter 3.

5.52Because the response rate to the survey amongst institutional victims in both the public and private sectors was low, the survey tended to focus on smaller reparation orders as it was institutional victims which had larger amounts ordered in their favour. Accordingly, the vast majority of victims surveyed had orders made in their favour for amounts less than \$200.

5.53Of 61 'known responses' (forming that part of the total 101 responses where respondents had details of the order and of its satisfaction) 20 had been paid in full, 35 had received no payment and 6 had received some payment.

5.54Unlike research conducted overseas, the study failed to establish any necessary pattern or correlation between the amount of orders and their rates of satisfaction or whether use of instalment arrangements led to greater satisfaction rates. The absence of a correlation between the quantum of the order and compliance may be due to the fact that the majority of responses concerned orders under \$200. There was, however, a slight indication that instalment arrangements resulted in higher rates of satisfaction.

5.55Comparison was also made between the satisfaction of reparation orders and court imposed fines in the same sample of cases. In the case of fines, it was found that the total percentage recovered was 39.45% where instalments had been granted and 29.44% where no instalments had been ordered. These figures support the oral evidence given by the Sheriff of Victoria to the Committee in that they exclude fines that may have been converted into community based work or discharged by serving a term of imprisonment.

³⁵³*Ibid* at 161.

5.56 Comparison of the results of the United Kingdom and Alberta studies on civil debt enforcement procedures, the United Kingdom and New Zealand studies on the enforcement of reparation orders and research on the satisfaction of reparation orders and fines in Victoria illustrate some common themes.

5.57 First, the extent to which a debt is paid in full and the speed with which it is satisfied will depend on the amount involved; with higher amounts taking longer to be paid and having a lower percentage rate of satisfaction. The converse applies to lower amounts and the smaller the debt, the greater the chance of payment in full. Secondly, the extent and speed of satisfaction will depend on the financial circumstances of the debtor and will be further influenced by any adverse changes to those circumstances, particularly in cases of imprisonment. Thirdly, although it is difficult to make accurate comparisons, full compliance for debts enforceable by criminal means is higher than for the enforcement of civil debts. The overall full compliance rate for civil debts is in the range of 20% to 40% and for criminal orders around two thirds.

5.58 The Committee is of the view that although these studies point to slightly higher overall rates of satisfaction for the criminal model of enforcement, it is not possible to draw firm conclusions from the results due to the differences in sampling, methodology and enforcement procedures involved. Further, the data obtained in Victoria is incomplete and inconclusive due to the way in which information is compiled by courts and other agencies and the criminal/civil dichotomy between the making of a reparation order and its method of enforcement. In particular, the use of different case numbers between criminal proceedings for the making of reparation orders and civil proceedings for their enforcement makes it impractical, if not impossible, to conduct an effective 'follow up' enforcement study in Victoria.

5.59 The Committee is therefore unable to base its conclusions on the preferred enforcement model solely on the results of these studies, nor would it be appropriate to do so, for regard must be had to conceptual and practical issues relating to the aim of restoration in sentencing and the purposes of reparation orders. Further, the Committee is of the view that there will always be cases where offenders or debtors will lack the ability or willingness to comply with court orders and neither model will have a significant effect on such persons.

5.60 The Committee is also concerned to ensure that any future evaluation of the use and enforcement of reparation orders has, as its proper foundation, appropriate qualitative and quantitative information on compliance rates.

5.61 In Chapter 7 the Committee discusses the roles in Victoria of the Criminal Statistics Bureau and the Judicial Studies Board in collecting,

analysing and disseminating information on the operation of the criminal justice system and notes some matters relevant to the making and enforcement of reparation orders which require further research and investigation.

5.62 Before considering the appropriateness of criminal and civil models for enforcing reparation orders, the Committee notes two matters about the enforcement provisions of Part 4 of the *Sentencing Act*. First, sections 85 and 87 say that a reparation order is taken to be a civil judgment and 'may be enforced in the court by which it was made'. Secondly, the instalment compensation provisions in section 86(4) state that 'in default of payment of any one instalment the whole of the compensation remaining unpaid shall become due and payable'.

5.63 The Victorian Sentencing Committee, in opposing the Legal and Constitutional Committee's recommendation for criminal enforcement and supporting civil enforcement, noted that it was 'entirely proper that all the means of enforcing a civil judgment are made available to victims of crime to enable them to enforce restitution and compensation orders'. The wording of sections 85 and 87, however, has the effect of treating reparation orders differently to other civil judgments for enforcement purposes by restricting enforcement options to those available in the court making the order.

5.64 In Victoria, the options for enforcing civil judgments are, by and large, the same for the Magistrates', County and Supreme Courts and in some instances provision is made for judgments of the lower courts to be enforceable in higher courts. It would seem that sections 85 and 87 displace the availability of bankruptcy proceedings in the Federal Court under the *Bankruptcy Act 1966* (Cth); an option which is available for non compliance with civil judgment debts.

5.65 Although there is some controversy over the appropriateness of bankruptcy as an enforcement mechanism for fine default,³⁵⁴ the Committee is concerned with the incongruous situation of reparation orders being equated with civil judgments without there being all of the enforcement options normally available for civil judgments.

5.66 If reparation orders are to be enforceable as civil judgments, subject to there being a power to cancel or vary reparation orders on default, the Committee believes that sections 85 and 87 should be amended to provide that reparation orders may be enforced in the same manner as any civil

³⁵⁴See, for example, Hodgson Committee, *Profits of Crime and Their Recovery* (London, Heinemann, 1984) Chapter 10 and Written Submission 16.

judgment or order and that enforcement options not be restricted to those available in the court which made the order.

5.67 Further, under the *Judgment Debt Recovery Act 1984*, provision is made for the payment of civil judgment debts by instalments and for instalment arrangements to be cancelled or varied in the event of default. It is only upon cancellation of existing instalment arrangements without any alternative arrangements in substitution that the whole of the balance of the judgment debt becomes due and payable. This can only take place where, on default of the instalment arrangement, the debtor has been summoned to appear before the court to explain the default.

5.68 In light of the absence of provision in the *Sentencing Act* for variation of reparation instalment arrangements and the wording of section 86(4), rendering liability for the whole debt on one default, the variation procedures available under the *Judgment Debt Recovery Act* for judgment debt instalment arrangements would not be available. Again, this is an incongruous situation.

5.69 Accordingly, if reparation orders are to be enforceable as civil judgments, the Committee believes that section 86(4) of the *Sentencing Act* be amended and, insofar as it deals with instalment arrangements, be brought into line with the *Judgment Debt Recovery Act 1984* and that provision be made for reparation instalment arrangements to be varied on default.

CONVERGENCE OF CIVIL AND CRIMINAL MODELS

5.70 In this section the Committee considers:

- the enforcement implications of having restoration as an aim in sentencing, reparation as a sanction and of the integration of reparation into the sentencing process;
- the arguments for and against adoption of the civil or criminal models of enforcement;
- the possible ways of improving the civil enforcement of reparation orders, in addition to those already suggested; and
- the possible interaction of the two models of enforcement.

Reparation as a Sanction or Condition

5.71 If, as recommended in Chapter 3, reparation is to operate as a sanction in its own right, it is possible to adopt either a civil or a criminal model of enforcement. In this regard, reparation orders would still be made to the favour of a victim who has an interest in securing compliance with orders made by the courts.

5.72 If satisfaction of a reparation order is made a condition of an overall sentence, adoption of the criminal model more or less follows as default would lead to breach proceedings (and resentencing). The exact penalty for default would depend on the fresh sentence imposed on resentencing which could include cancellation, variation, conversion and/or substitution of both the reparation order and any other sentence imposed initially.

5.73 It may also be possible, however, to combine and apply both models so that victim initiated civil enforcement proceedings could operate in conjunction with criminal breach proceedings, but it would be necessary to avoid any overlap and consequential hardship by the application of both models.

5.74 The possible interaction of the two models is discussed further below.

Civil v. Criminal Enforcement of Reparation

5.75 The arguments in support of the use of civil enforcement procedures for reparation orders include:

- reparation can be seen as a personal civil right and not a public right and it would be unfair for persons in whose favour reparation orders are made to have the advantage of state criminal enforcement over the enforcement options available to civil litigants;
- the function of state coercive powers of enforcement is to secure compliance with public criminal law and not to secure satisfaction of individual rights;
- civil enforcement procedures provide adequate means of achieving compliance.

5.76 The arguments in favour of using criminal enforcement procedures include:

- there is a public interest in ensuring the restoration of victim losses;
- it is unfair to expect victims to incur the costs of securing compliance with court orders;
- the state has an interest in ensuring compliance with orders made by the courts whether they be civil or criminal in nature;
- criminal enforcement procedures are more effective and economical.

5.77 The arguments for and against each model are also influenced by the characterisation of the aims of reparation orders in terms of offender punishment and/or as a victim service; a matter discussed in Chapter 3.

5.78 As the Committee has tentatively recommended that the reparation order be made a sentencing order and integrated into the sentencing process, and that it be equated to the fine in terms of the sentencing hierarchy, it considers that the order be enforceable in the same manner as a fine, and that the existing provisions of sections 61-66, dealing with the enforcement of fines, apply, with necessary changes, to compensation orders and monetary restitution orders.

Draft Recommendation 18

5.79 The Committee therefore recommends that reparation orders should be subject to the same enforcement procedures as that applicable to fines.

Improving Existing Civil Enforcement Procedures

5.80 The Committee is of the view that a number of measures can be taken to improve existing civil enforcement procedures.

5.81 One of the major criticisms of the use of civil enforcement procedures for reparation orders is that it imposes an unfair burden on victims who have to initiate and pursue such procedures, often in cases involving small amounts and where the prospects of recovery are slight. The Committee believes that part of this burden can be alleviated by requiring courts to play a more active role in enforcement.

5.82 It has been suggested that procedures be introduced for court officers to conduct periodic reviews of an offender's financial circumstances by use of the oral examination procedure.³⁵⁵

5.83 The Committee endorses this suggestion and, by way of elaboration, would add:

- the review procedure should be initiated either at the request of victims or on a periodic basis of say, every three months for the time in which a reparation order remains unpaid;
- the results of the review should be provided to victims together with a proposal by the court officer as to what enforcement strategy should be followed;
- in the absence of advice to the contrary from the victim, the enforcement strategy proposed by the court officer should take effect, say, within one month of the review being conducted;
- both victims and court officers should provide each other with progress reports as to payments made in satisfaction of a reparation order.

5.84 The Committee therefore believes that consideration should be given to introducing procedures for periodic review of an offender's financial circumstances and that such reviews be conducted by court officers and that court officers be given power to propose or make enforcement orders.

5.85 It has also been suggested that sentencing courts should play a more active role in securing compliance at the time reparation orders are made.³⁵⁶ For example, after having made inquiries about the financial means of an offender, the sentencing court could direct that the order be satisfied by the seizure and sale of property or by an attachment of earnings order.

5.86 The Committee believes that there is some merit in the notion of sentencing courts addressing how a reparation order is to be satisfied at the time the order is made. The major benefit, under the civil enforcement model, is that it would obviate the need for victims to return to court to seek an enforcement order at a later stage.

5.87 However, the Committee is concerned that such a proposal, if implemented, may cause undue delays in sentencing. It is therefore a matter on which the Committee invites further submissions.

³⁵⁵Written Submission 16.

³⁵⁶Hansard 1 October 1993 at 41.

Interaction of Civil and Criminal Models

5.88 Some overriding considerations, in the Committee's view, are:

- to the extent that a victim's loss is not restored by a reparation order, a victim should be able to pursue alternative civil remedies to achieve full restoration;
- that the victim not be disadvantaged by any change in the method of enforcement;
- that only realistic reparation orders capable of satisfaction should be made;
- in the event of default of a reparation order there should, particularly in cases of changed circumstances, be provision for cancellation or variation of the order;
- offenders who are simply unable (as opposed to unwilling) to satisfy reparation orders should not be imprisoned for default.

5.89 If reparation orders are to be sentencing sanctions, it could be possible to fuse civil and criminal models of enforcement in a manner consistent with the considerations noted above. Such a hybrid model could have the following elements:

- if a reparation order is cancelled on default, a victim would be able to invoke civil enforcement mechanisms upon the entering of a civil judgment in the terms of the former reparation order;
- if a reparation order is varied by a reduction in the overall amount as opposed to the time or method of payment, a victim could enter a civil judgment for the difference between the reduced and former amounts of the order;
- in cases where the terms of a reparation order did not restore victim losses in full, a victim could pursue civil proceedings for the balance;
- consideration could also be given to devising a procedure whereby in cases where sentencing courts decline to make a full reparation order or any order because of the offender's financial or personal circumstances or the impact of other sentences, sentencing courts, if satisfied as to liability and quantum, could certify judgment to the

favour of a victim which could be entered and enforced in civil courts at the initiative of the victim.

5.90 Additional components of such a hybrid model could be:

- preservation of the current limitation period of 15 years for enforcing ordinary civil judgments;
- provision that the 15 year period not commence to run until:
 - the entering of a civil judgment in the ordinary course of civil litigation; or
 - the entering of a civil judgment pursuant to a certificate of a sentencing court entered at the time of initial sentencing;
- sentencing court certificates for civil liability could relate to the whole or part of a victim's loss depending on the terms of any reparation order;
- the civil limitation period of 15 years would be suspended pending the performance of the terms of any reparation order.

5.91 In developing a hybrid model of enforcement of the type outlined above, it would be necessary to ensure that victims are advised of the progress of criminal enforcement proceedings and of any payments made by offenders. Systems of this type operate in New Zealand and the United Kingdom.

5.92 If, as recommended, reparation orders are to be treated as sentencing orders and are to be enforced in the same manner as that provided for fines, a dilemma arises as to the rights of victims to pursue civil rights in cases of default. In this respect, if an offender fails to satisfy the terms of a reparation order, it will be possible, among other things, to 'convert' the order by undertaking community based work or by serving a term of imprisonment. In the case of fines, the liability to pay the fine becomes extinguished upon conversion. By analogy, adoption of the fine enforcement model for reparation orders could lead to an offender's liability to make reparation becoming extinguished upon conversion after default.

5.93 In addressing this issue, the Committee has considered the following options:

- The model for the enforcement of fines could apply without modification to reparation orders so that in the event of default and any subsequent conversion the debt formerly represented by the

order becomes extinguished. The difficulty with this approach is that the object of enhancing the prospects of compensating victims of crime could be frustrated.

- The fine enforcement model could be modified so that notwithstanding any default and subsequent conversion of a reparation order, the offender remains liable to the victim under the terms of the reparation order. The problem here is that an offender can be penalised for failing to satisfy a reparation order yet still remain civilly liable under the terms of that order.
- A third possibility, as a variation on the second option, would be to apply the fine enforcement model with the proviso that to the extent the civil rights of a victim remain unsatisfied, those rights are preserved; thus leaving it to the victim to pursue civil remedies by the issuing of fresh proceedings. As noted above, this is the model which applies in South Australia with the effect that notwithstanding any default and subsequent conversion of the reparation sentence, it is open to victims to initiate and pursue civil proceedings for the debt once represented by the converted order.
- Another possibility would be to adopt the first option of having civil liability extinguished on default and conversion of the reparation sentence but allow victims first the choice of whether a reparation sentence should be sought in cases where victims may wish to rely wholly on their civil rights. This approach has been discussed in Chapter 4.

5.94 After much reflection, the Committee has decided to adopt the third option with an additional variation. That variation is that instead of victims having to initiate civil proceedings through the issuing of a writ or summons, the liability represented by the reparation sentence can be treated, on default and conversion, as constituting a civil judgment. It would then be up to the victim to commence civil enforcement proceedings but it would be unnecessary to first commence civil litigation in order to obtain a judgment. What would be needed is a procedure for informing a victim of the fact that a reparation sentence has been converted on default and that it is up to the victim to pursue civil enforcement.

Draft Recommendation 20

5.95 The Committee therefore recommends that if reparation orders are to be enforced in the same manner as fines, the civil rights of a victim are to be preserved notwithstanding any conversion by an offender of the reparation order on default.

5.96 However, in making this draft recommendation, the Committee notes that sentencing courts will need to be aware of the potential difficulties that may arise if an unrealistic reparation order is made which can not be satisfied by an offender. It is therefore of importance that regard be had to an offender's financial means when determining the amount of an order and its method of payment.

5.97 Further, the Committee's draft recommendations that reparation orders be enforced in the same manner as a fine and that any conversion on default result in a deemed civil judgment in favour of the victim, will have an administrative and financial impact on the courts, the Sheriff's Office, Correctional Services and other agencies. In particular, procedures will need to be devised for payments to be remitted to victims and for victims to be informed of their rights on default and conversion. The Committee therefore welcomes further submissions on these matters.

OTHER OPTIONS

5.98 If the major purpose of the law is to ensure that victims are adequately compensated, then it is apparent that the criminal law is not an effective means of doing so. Ultimately, any system which relies upon compensation from the offender will be dependent upon the offender's financial means.

5.99 Other than the means outlined above, a number of other mechanisms for increasing the prospects of reparation orders being satisfied have been suggested:

- *attachment of prison earnings*: this would only be of value where prison work is adequately remunerated, which is not the case in Victoria. Further, the Committee has suggested that it is not appropriate for reparation orders to be made in cases where custodial sentences are imposed and in such situations it would be left to victims to pursue civil remedies.
- *attachment of social security payments*: such a step would be symbolic only as the amount which would be available to meet a compensation payment after all other expenses are met would be very small. Further, having regard to the need for courts to take into account an offender's financial circumstances, in most cases where the only source of an offender's income is social security benefits, it would not be appropriate to make reparation orders. Again, it would be up to victims to pursue civil remedies.

- *payment from central funds*: it has been suggested on a number of occasions that compensation from a central fund should be paid in those cases where the offender is unable to pay or can not be found. If the state compensates victims from the fund it could then (theoretically) seek contribution or indemnity from the offender.³⁵⁷ Proposals, in the form of victim compensation funds which could be financed from fines, victim levies on offenders, proceeds from the sale of forfeited property as well as money paid by the offender,³⁵⁸ usually relate to funding compensation for personal injuries rather than property loss or damage. It may be both highly expensive and a misallocation of resources to employ any such funds to provide what would in effect become a public insurance scheme for property losses.

5.100 As part of its consultation on this Report, the Committee invites submissions on these matters.

5.101 The Committee now addresses the potential for mediation between victim and offender to bring about reparation.

³⁵⁷Such action is unlikely to reap great rewards. In South Australia in 1991/92, recoveries from offenders amounted to 4% of payments made under the Criminal Injuries Compensation Scheme. See also the discussion in Legal and Constitutional Committee at 26-27.

³⁵⁸Newburn T., 'Victim Compensation by the Offender and the State' in Viano E.C. (ed) *The Victimology Handbook* (New York, Garland, 1990).

INTRODUCTION

6.1 By its terms of reference, the Committee is required to consider the role of mediation between victim and offender in bringing about the restoration of victim losses.

6.2 In most mediation programs involving victims and offenders, the making of reparation to victims by offenders plays some part. However, these programs take a wide view of reparation as including not only direct material restitution or compensation, but also indirect reparation, like community work, or psychological reparation through, say, an exchange of views and the making of an apology. They also have wider aims whereby the actual process of mediation is viewed as being important as any specific outcome. Sometimes, forms of reconciliation between victims and offenders can be viewed as reparation. Further, mediation programs are not confined to the sentencing context and may take place any time between the commission of an offence and the discharge of sentence.

6.3 In this Chapter, the Committee examines the relationship between victim/offender mediation and the sentencing process and the place of reparation as a possible aim of mediation. Reparation, in this sense, is not confined to restitution or compensation in the form found in Part 4 of the *Sentencing Act*, but can include offenders making amends for the harm done by crime in other ways by, for example, community work. Because the outcome of mediation can be determined by the parties, it is possible for the (civil) conflict between victim and offender to be resolved differently than the resolution of the (criminal) conflict between offender and state. Accordingly, there is greater scope for wider forms of reparation through the consensual process of mediation than are available through the adjudicatory process of sentencing.

6.4 Although the Committee's focus remains on the restoration of property loss or damage, in considering the role of mediation it adopts the wider meaning of reparation in terms of possible mediation outcomes. Further, the Committee is concerned with the role of mediation in effecting

reparation or resolving disputes between victims and offenders both as a mechanism separate to formal sentencing and as part of sentencing.

Mediation

6.5 There are various definitions of mediation.³⁵⁹ Although there is some disagreement over the extent to which the mediator should intervene, the concept of facilitated negotiation is fundamental. For the purposes of this Report, the Committee views mediation as being a form of dispute resolution in which an impartial third-party facilitates negotiations between people in dispute. It is a process in which the parties retain control over their dispute and develop a solution that is acceptable to all parties. Mediation generally is voluntary and confidential, and agreements reached may be legally binding or non-binding.³⁶⁰

6.6 The role of the mediator therefore is to help the parties design their own solution to their dispute by bringing them together and by helping them to present their own views, understand the views of others involved, clarify issues of concern, develop options, consider alternatives and reach a mutually acceptable and workable agreement. The mediator controls the process of mediation but not the content of the dispute nor its outcome.

6.7 Mediation, in this form, may be contrasted with the other major non-judicial forms of dispute resolution, namely, conciliation and arbitration. In conciliation, the third party contributes more directly to generating options for settlement. He or she is more of an inventor of solutions³⁶¹ and therefore may need to have some substantive knowledge of the issues in dispute. In arbitration, the third party is presumed to have expertise in the content of the dispute and acts as the decision maker.³⁶²

³⁵⁹For comprehensive discussions of mediation theory, see Folberg J. and Taylor A., *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco, Jossey-Bass, 1990) and Moore C.W., *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco, Jossey-Bass, 1986, 1991).

³⁶⁰This definition draws on the mediation model used in Victoria by the former Dispute Settlement Centres.

³⁶¹Bryson D., 'Mediator and Advocate: Conciliating Human Rights Complaints' (1990) 1 *Australian Dispute Resolution Journal* 136.

³⁶²See generally, Goldberg S.B., Green E.D. and Sander F.E.A., *Dispute*

6.8 Mediation may be seen as 'interest based'. Interests can be defined as people's feelings about what is basically desirable - the things they care about or want; their needs, desires, concerns, fears and values. Adjudication and arbitration, on the other hand, may be defined as 'rights based', for they are based on determining who is correct according to some generally accepted authority, in this case the legal system of the state. Conciliation, depending on the extent to which it takes place in the context of legal systems and rights, may combine elements of both.³⁶³

6.9 Disputes are most likely to be mediated successfully where the parties have an on going relationship, the balance of power between them is roughly equal, the level of conflict is moderate, the motivation to reach agreement is fairly high and the parties have a commitment to the process.³⁶⁴

Mediation in the Victim/Offender Context

6.10 Notwithstanding the existence for some time of victim/offender reconciliation programs in North America, the United Kingdom and Europe, the application of mediation in the victim/offender context is still problematic.³⁶⁵ As discussed below, victim/offender mediation generally takes place within the framework of the existing criminal justice system, which is clearly based on rights, rather than interests. Moreover, the criminal justice system has a distinct retributivist orientation focussing on punishment of proven offenders, rather than addressing the needs and interests of victims.³⁶⁶ Furthermore, a criminal offence involves not just a dispute between private individuals but involves the state as well. Often the victim and offender may not have an on going relationship and their

Resolution (Boston and Toronto, Little, Brown, 1985). For the Australian context, see Astor H. and Chinkin C.M., *Dispute Resolution in Australia* (Sydney, Butterworths, 1992).

³⁶³For a discussion on the concepts of 'interest-based' and 'rights-based' dispute settlement methods, see Ury W.L., Brett J.M. and Goldberg S.B., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco and London, Jossey-Bass, 1988).

³⁶⁴See Kressel K. and Pruitt D.G., 'Conclusion: A Research Perspective on the Mediation of Social Conflict', in Kressel and Pruitt (eds), *Mediation Research* (San Francisco and London, Jossey-Bass, 1989) at 404-405.

³⁶⁵These are often referred to as 'VORPs'. For ease of reference, the term victim/offender program will be used.

³⁶⁶Australian Law Reform Commission, Report No. 44, *Sentencing* (1980), paras 22-28.

relative power may not be well balanced. Questions of confidentiality and voluntariness are also sensitive issues in the use of mediation within the criminal justice system.

6.11 Despite these difficulties, victim/offender mediation does take place in a number of jurisdictions and the potential benefits of mediation include:

- material and emotional reparation for the victim;
- acknowledgment of wrongdoing by the offender;
- rehabilitation of the offender;
- training in conflict resolution skills for both parties;
- procedural justice for both parties; and
- reduction of social tensions for the community.

Proponents of victim/offender mediation also claim more specific benefits for the criminal justice system, such as diversion of appropriate offenders, reduction of incarceration rates and decreases in recidivism³⁶⁷.

6.12 Although some had reservations about the appropriate form that victim/offender mediation should take and its relationship to sentencing, most who made written or oral submissions to the Committee supported the aims of such programs.³⁶⁸ In particular, it was felt that the potential for mediation to bring about reparation by consensual means and to enhance the participation of victims and offenders in the criminal justice system deserved further consideration and exploration.

VICTIM/OFFENDER RECONCILIATION PROGRAMS

Models and uses

³⁶⁷Evidence suggests that recidivist rates for persons sentenced to imprisonment are high. The Victorian Office of Corrections estimates that for persons who have served a term of imprisonment, some 70% will re-offend. See *Office of Corrections Annual Report 1991-1992*, at 71.

³⁶⁸See, for example, Written Submissions 6, 9, 10, 12, 15 and 25.

6.13 Victim/offender reconciliation programs³⁶⁹ started with the Victim/Offender Reconciliation Program (VORP) in Kitchener, Ontario, in 1974.³⁷⁰ Since then they have spread to 126 locations in North America,³⁷¹ and a similar number exist in the United Kingdom and Western Europe. In New Zealand, victim/offender programs are an integral component of the juvenile justice system and focus upon reintegration of the offender into society and the restoration of victim losses.³⁷²

6.14 In Australia, there have been pilot projects in Queensland and Victoria, both using community mediation services. The initial phase of the Queensland project ran from February to November 1992 as a co-operative effort between the Beenleigh Magistrate's Court and the Logan Dispute Resolution Centre.³⁷³ In Victoria, a similar project took place in 1992-1993 involving Dispute Settlement Centres in Frankston and Geelong.³⁷⁴ The Victorian Correctional Services Division of the Department of Justice has also designed a pilot program based at the Broadmeadows Magistrates' Court which is to commence at the end of October 1993³⁷⁵. In addition, the Department of Corrective Services in Western Australia has operated a court based mediation service since August 1992.³⁷⁶

³⁶⁹See Fisher T., 'Victim/Offender Mediation: A Survey of Overseas Practices and Research' (1993) 4 *Australian Dispute Resolution Journal* at 125-138.

³⁷⁰See Peachey D.E., 'The Kitchener Experiment', in Wright M. and Galaway B. (eds), *Mediation and Criminal Justice: Victims, Offenders and Community* (London, Sage, 1989) at 221-235 and Gretton J., *Can Victim-Offender Mediation Change the Face of Criminal Justice?* (United Kingdom, 1988).

³⁷¹Umbreit M.S. and Coates R.B., *Victim Offender Mediation: An Analysis of Programs in Four States of the U.S.* (Minneapolis MN: Minnesota Citizens Council on Crime and Justice, 1992), 'Executive Summary Report' at 1.

³⁷²See Morris A. and Maxwell G.M., 'Juvenile Justice in New Zealand: A New Paradigm', (1993) 26 *Australian and New Zealand Journal of Criminology* 72.

³⁷³Alternative Dispute Resolution Division, Department of Justice and Attorney-General, *Report on the Crime Reparation Project Beenleigh Magistrates Court and The Crime Reparation Project Advisory Committee Report* (November 1992) - the 'Advisory Committee Report'. The Committee is grateful to Ms Marg Herriot, Legal & Policy Officer, Alternative Dispute Resolution Division, for supplying these and other materials.

³⁷⁴Reference material supplied by Ms Evi Kadar, former Project Manager in former Ministry for Police and Emergency Services and Mr Stuart Ross, Acting Director, Criminal Justice Statistics Planning Unit, Department of Justice. The Committee is grateful for their assistance.

³⁷⁵'Program Description' supplied by Mr Daryl Kidd, Correctional Services Division, Department of Justice, whose help the Committee gratefully acknowledges. See also Hansard 17 June 1993 at 4, 7-9.

³⁷⁶Wauchope M., *Victim-Offender Mediation Unit Interim*

6.15 The Queensland Crime Reparation Project Advisory Committee notes that victim/offender mediation programs may be classified according to the point at which a dispute is referred to mediation, in the following terms:

- *Pre-Court*: referral of cases of a defined type to mediation instead of charging;
- *Pre-Adjudication*: discretionary referral by the prosecutor of suitable cases after charges have been laid and the first court appearance but prior to a finding of guilt;
- *Court Based*:
 - *Pre-Sentence*: referral by court to mediation either after a plea of guilty is entered, or after a finding of guilt is made by the court. Sentencing is deferred until mediation takes place and the outcomes of the mediation can be taken into account in sentencing.
 - *Part of Sentencing*: offenders take part in mediation as part of their sentence and the performance of any agreement reached may also be incorporated into the sentence.
- *Post-Court*: mediation takes place independently of the criminal justice system and depends upon self referrals by victims and offenders and is completely divorced from justice system outcomes.³⁷⁷

The possible application of the two court based models in Victoria is discussed in more detail below.

Underlying Assumptions

6.16 Underpinning most of the victim/offender reparation schemes is a set of principles or assumptions about the nature of conflict, criminal justice, and the social roles of victim and offender.

Report (unpublished, 1993). A 'protective' mediation service involving violent crimes has also been introduced in Western Australia: Grant D., *Victim-Offender Contact Policy* (1992).

³⁷⁷*Advisory Committee Report*, at 26-42. See also Coates and Gehm at 261-262.

6.17 Some argue that crime can be dealt with in a restorative, rather than a punitive manner and that reparation is a legitimate response to crime and has some advantages over punishment, which can be seen as 'the deliberate infliction of pain, or at least inconvenience, on a convicted person'.³⁷⁸ In the current adversarial criminal justice system, both victims and offenders can be left out of the settlement of their cases.³⁷⁹ The theory and practice of 'restorative justice', that is 'repairing (as far as possible) or making up for the damage done and hurt caused by the crime' either to the individual victim or the wider community, has gained some currency.³⁸⁰ A restorative criminal justice model aims to provide:

For the victim, support and reparation (with mediation if required); for the offender, reparation to the victim or the community, including co-operating in any needed rehabilitation, with restrictions or detention only if necessary.³⁸¹

6.18 Though not retributive, this model would not exclude other aims of the current system, such as denunciation, prevention, deterrence, and protection. The role of the state would be to return to the community the opportunity to resolve their own conflicts - but by negotiation, with the help of mediators, if necessary, not by force. The state would ensure that such negotiations were fair and would retain powers in respect of those who tried to abuse the process or did not wish to participate.³⁸²

6.19 It has been argued that legal conflicts, even criminal, rightfully belong to the participants themselves but have been taken from them by lawyers and other professionals in the criminal justice system, where the state has supplanted the victim as a party to the dispute.³⁸³ The assumptions underlying one actual victim/offender program in Finland are therefore said to be:

³⁷⁸Wright M., *Justice for Victims and Offender: A Restorative Response to Crime* (Buckingham and Philadelphia: Open University Press, 1991) at 15. See also Braithwaite J., *Crime, Shame and Reintegration*, (Cambridge, Cambridge University Press, 1989).

³⁷⁹Wright at 12-15.

³⁸⁰*Ibid* at 41. Also see Fattah E.A., *From Crime Policy to Victim Policy* (London, Macmillan, 1986); Walklate S., *Victimology: The Victim and Community Justice Process* (London, Law Book Co., 1989); Elias R., *The Politics of Victimisation: Victims, Victimology, and Human Rights* (New York, Oxford University Press, 1986); Fattah E.A., 'From Crime Policy to Victim Policy: The Need for a Fundamental Change', (1991) 29 *International Annals of Criminology* at 43-60.

³⁸¹Wright at 117.

³⁸²*Ibid* at 131-132.

³⁸³Christie N., 'Conflicts as Property' (1977) 17 *British Journal of Criminology* at 1-15.

- many problems can be best handled by the community without referring them to the formal justice system;
- community members make suitable mediators;
- direct negotiation produces high levels of satisfaction for the participants;
- mediation can provide better community understanding of the social context of crime; and
- mediation programs can provide a critical view of the formal justice system.³⁸⁴

6.20 Most current schemes try to graft a reparative dimension for certain kinds of crimes on to what is, in essence, a retributive system.³⁸⁵ Although there are differences in practice, common to most programs is an attempt to have the parties determine, to some extent, the resolution of the matter that brought them together in the first place.

Goals of Existing Overseas Programs

6.21 The long-term goals of most victim/offender mediation programs include providing material and psychological benefits to the victim, social rehabilitation of the offender, education in conflict handling for all parties, diversion of offenders from the criminal justice system, reduction in the rates of incarceration and recidivism, the strengthening of community social relations and the incorporation of reparation into a criminal justice system built on punishment. However, programs may place different emphasis on the aims of mediation. For example:

- American programs highlight reconciliation and provision of an alternative to incarceration. In addition, staff members of one program stressed goals like 'humanizing the criminal justice process', increasing 'the offender's personal accountability' and providing 'meaningful roles for victims in the criminal justice process'.³⁸⁶

³⁸⁴Gronfors M., 'Ideals and Reality in Community Mediation', in Wright and Galaway at 142-143.

³⁸⁵Watson D., Boucherat J. and Davis G., 'Reparations for Retributivists', in Wright and Galaway at 212-228.

³⁸⁶Coates R.B. and Gehm J., 'An Empirical Assessment', in Wright and Galaway at 253.

- European programs have diverse goals, amongst them restoring the solution of the problem to the community, aiding victims of crime and enabling ordinary community members to regain the power of regulating disputes,³⁸⁷ conflict resolution between victims and offenders to make punitive reaction unnecessary, and concentration on the conflict itself rather than the offender.³⁸⁸
- Goals of English programs include helping victims come to terms with the offence, confronting offenders with the effects of crime³⁸⁹, developing effective policies for the prevention of youth crime and diverting juvenile offenders from the criminal justice system and courts.³⁹⁰

Goals of Australian Pilot Projects

6.22 The goals of the Queensland Crime Reparation Project include:

- providing an opportunity for offenders to take responsibility for the consequences of their actions;
- enhancing the possibility of an offer of reparation or compensation from the offenders to victims; and
- providing a chance for both victims and offenders to participate directly in the resolution of the conflict between them that arose because of the criminal act.³⁹¹

6.23 The aim of the Victorian Victim Offender Mediation Program is:

To address the needs of victims and offenders in a manner which personalises the process of justice at a community level by bringing offender and victim together through a mediation process which aims at reaching a mutual understanding and agreement on what can be done about the offence.³⁹²

³⁸⁷Bonafe-Schmitt J.P., 'Alternatives to the Judicial Model', in Wright and Galaway at 186-187.

³⁸⁸Dunkel F. and Rossner D., 'Law and Practice of Victim Offender Agreements,' in Wright and Galaway at 165-168.

³⁸⁹Launay G. and Murray P., 'Victim/Offender Groups', in Wright and Galaway at 113.

³⁹⁰Veevers J., 'Pre-Court Diversion for Juvenile Offenders', in Wright and Galaway at 69. As to the aims of the New Zealand program, see paras 6.37-6.38.

³⁹¹Herriot A.M., 'Crime Reparation Project: Information Paper' (unpublished, 1992). The list has been expanded in both Alternative Dispute Resolution Division at 5, and the 'Advisory Committee Report' at 23-24.

³⁹²Ministry of Police and Emergency Services,

Its basic objectives include:

- to divert young offenders from the criminal justice system;
- to redress matters between the offender and the victim;
- to provide an active role for victims of crime in the justice process;
and
- to enable both parties to determine their own negotiated outcomes.³⁹³

6.24 The Victorian Correctional Services Division has been interested in developing a victim/offender reconciliation program since 1989 and is expected to commence a pilot project at the Broadmeadows Magistrates' Court at the end of October 1993. The aims of the pilot project include achieving reconciliation between victim and offender, providing reparation and an increased role for the victim, rehabilitation for the offender by personalising the consequences of the act and enhancing public confidence in the criminal justice system.³⁹⁴

Restoration as part of Victim/Offender Mediation

6.25 Restorative justice may be defined as repairing, as far as possible, or making up for the damage done and hurt caused by the crime either to the individual or the community. This concept is broader than that of material reparation for it includes concrete and symbolic acts that may address the social, psychological, emotional and moral needs of all concerned; not just material reparation for the individual victim. This wider form of restoration allows greater scope for the mediation process to work.

6.26 The Broadmeadows pilot project, for example, defines reparation, as a possible outcome of mediation, to include an apology, replacement, return or repair of goods, monetary compensation or community work.³⁹⁵

'Juvenile Mediation Program'. See also the Ministry's brochure entitled 'Victim Offender Mediation Program'.

³⁹³*Ibid.*

³⁹⁴Hansard 17 June 1993 at 1-17. The Western Australian program has similar goals and its establishment was influenced by the introduction of a Charter of Victims' Rights in that state in 1991: Ministry of Justice, *The Victim-Offender Mediation Unit, Reparative Mediation Operational Outline*.

³⁹⁵*Ibid.*

6.27 Clearly, restitution, or even reparation, does not require mediation to be successful. A court may order restitution and compensation to crime victims without there being any process of mediation between victim and offender. It is difficult, however, to envisage how wider forms of reparation could occur without some sort of mediated or conciliated intervention that involves the victim.

Advantages of Victim/Offender Mediation

6.28 Restorative justice and mediation between victim and offender may benefit the victim, the offender, the community and the state for the following reasons:³⁹⁶

- First, it brings the victim back into the process of decision making regarding the events that victimised him or her. The victim can both express anger and grief directly and in personal terms to the offender and may also gain some insight into the offender's personal situation and perceptions. The victim, who often has an unrealistically frightening image of the offender,³⁹⁷ is thus better able to return to the emotional status quo existing before the crime and may gain material reparation as well.
- Secondly, it provides an opportunity for the offender to appreciate the damage he or she has caused to other human beings and to take personal responsibility for it. Thus, it becomes more difficult for the offender to portray himself as the 'victim' of a faceless entity called the 'state' or 'society' and employ techniques of 'neutralisation'.³⁹⁸ It thus becomes less likely that he or she will offend again.

³⁹⁶See O'Malley P. and Fisher T., *Alternative Dispute Resolution Strategies for Dealing with Young Offenders: A Report on Existing Models and Community Receptiveness to Them in the Preston Area* (Melbourne, National Centre for Socio-Legal Studies, La Trobe University, 1992) at 2.

³⁹⁷See United Kingdom, Home Office, *Reparation: A Discussion Document* (London, 1986) at 2.

³⁹⁸The idea that offenders can develop particular techniques to 'neutralise' the guilt that one would expect to normally follow from the commission of a crime was first developed by Matza D. and Sykes G. in 'Techniques of Neutralisation: A Theory of Delinquency', (1957) 22 *American Sociological Review* at 664-670. See also Fattah E.A., 'Victimisation and Fear of Crime Among the Elderly: A Possible Link?', *Keynote Address to the Crime and Elder People Conference, Adelaide, 23-25 February 1993*, (unpublished) at 25.

- Thirdly, not only is the outcome important, but so is the process, for it respects the feelings and humanity of both parties and offers them an opportunity to resolve the incident.
- Fourthly, third parties, especially if they are trained community mediators, learn about criminal behaviour and its effects and thus become better informed. It is also claimed that people involved in mediation processes gain a more positive view of the criminal justice system.³⁹⁹
- Fifthly, the state benefits from a lessening in the number of repeat offenders and there can be possible savings in time and costs due to reductions in court lists and incarceration rates.

Concerns about Victim/Offender Mediation

6.29 Critics of mediation programs have raised a number of important concerns⁴⁰⁰ relating to:

- *Victims*: Many victims may not want to face their offender and may, in fact, be afraid of further retaliation by the offender. They therefore might be prepared to accept too little by way of reparation from the offender.
- *Offenders*: They too may be disadvantaged, particularly if they feel pressured to participate in a mediated settlement by pleading guilty when they believe they might have been acquitted. Therefore, they might end up with a liability greater than they would otherwise have, had their case gone to hearing. Also, 'net widening' may occur, bringing into the formal justice system people, particularly young offenders, who would normally just be cautioned.
- *Process*: The process itself lacks the predicability, equity, and procedural rectitude attributed to the formal criminal justice system.⁴⁰¹

³⁹⁹Davis R., 'Mediation: The Brooklyn Experiment' in Tomasic R. and Feeley M. (eds) *Neighbourhood Justice: Assessments of an Emerging Idea* (New York, Longman, 1982).

⁴⁰⁰See O'Malley and Fisher.

⁴⁰¹One of the generally accepted criteria by which to evaluate criminal 'justice' is the extent to which the system maintains consistency. See Sallmann P. and Willis J., *Criminal Justice in Australia* (Melbourne, Oxford University Press, 1984) at 60-61.

- *Community*: Communities, particularly in today's fluid urban Australian society, really do not exist as stable units of shared social experience.
- *State*: Since criminal offences are seen as acts against the state, the reduction of state intervention is an abdication of its responsibility. Moreover, net widening would actually mean a greater involvement of the state in some ways, and the 'privatisation' of justice would undercut the deterrent effect sometimes attributed to public court hearings.

Australian Pilot Projects

6.30 The Australian pilot projects have, to some degree, taken into account the issues discussed above. The design and implementation of the Queensland project, in particular, was preceded by the production of a comprehensive discussion paper⁴⁰² which canvassed these sorts of issues.

6.31 The Queensland project was run by the Community Justice Program in conjunction with the Beenleigh Magistrates' Court. This court was selected because of the high rate of property crime in the surrounding area, its heavy caseload, its proximity to the Logan Dispute Resolution Centre and because of the support of the local magistrates. It employed a pre-sentence adjournment model where the magistrate adjourned a matter for sentence after a plea of guilty had been entered so that mediation could be attempted. After the completion of mediation, the offender returned to court for sentencing, where participation in mediation and its outcomes could be taken into account.⁴⁰³

6.32 Although initially it targeted only adult offenders, the project was later broadened to include young offenders as well. The criteria for offender participation specified that the offence be a minor property one, that offenders enter a guilty plea and that adults be non-habitual offenders. Referral procedures for adults and juveniles differed in that the former were referred directly to the Centre by the Court, while the latter involved

⁴⁰²Murray G., *Mediation and Reparation Within the Criminal Justice System: A Discussion Paper Which Explores Issues Surrounding Victim-Offender Mediation and Reparation* (Brisbane, Department of the Attorney-General, 1991).

⁴⁰³Alternative Dispute Resolution Division at 5-6. See also Hansard 28 September 1993.

referral from a Child Care Officer. In addition, the presence of an observer (not a parent) was required in mediation involving juvenile offenders and work based and community service agreements were excluded for that group for insurance reasons.⁴⁰⁴

6.33 In Victoria, the Victim Offender Mediation Program has been a co-operative enterprise between the Ministry of Police and Emergency Services and Dispute Settlement Centre (DSC) Project, funded by the Department of Justice. The program operated in Frankston and Geelong⁴⁰⁵ and targeted juveniles aged 10-17 who had already received at least one caution and faced the prospect of being charged for a new offence, with referrals coming directly from the police.⁴⁰⁶ Mediation was voluntary for both victim and offender. The nature of offences considered suitable for mediation were not specified, but there had to be 'an identifiable victim', either an individual or a representative of an organisation against whom an offence had been committed. There also had to be 'sufficient admissible evidence to establish the offence', and the juvenile had to admit 'responsibility for the offence'. Both victim and offender could bring a family member or friend to the mediation, subject to the approval of the mediator. The DSC provided some information to the police on the results of the mediation who then had to decide whether or not to lay charges. Agreements could involve material reparation directly related to the offence, indirect material reparation, and emotional reparation through reconciliation in the form a frank exchange of views or through an apology.⁴⁰⁷

6.34 Though the Queensland and Victorian pilot projects had many features in common, particularly the use of a community based mediation model and a concern to prevent net widening, there were also significant differences. Queensland's program was a court based pre-sentence model and included both adult and juvenile offenders. The Victorian program was police based, pre-court and operated only with respect to young offenders.

6.35 The Victorian Correctional Services Division pilot project for the Broadmeadows Magistrates' Court, like the Queensland project, is court based and pre-sentence in nature. It proposes to target property offences and some minor assaults committed by offenders without regard to their age or criminal history. After an admission of guilt or conviction, the court or either of the parties will be able to request mediation, which must be

⁴⁰⁴*Ibid* at 7-11.

⁴⁰⁵Hansard 23 July 1993 at 1-18.

⁴⁰⁶*Ibid*.

⁴⁰⁷Ministry of Police and Emergency Services, 'Victim Offender Mediation Program' and 'Victim/Offender Mediation Program Process Guidelines'. See also Fisher T., *Victoria's Dispute Settlement Centres in 1992* (Melbourne, National Centre for Socio-Legal Studies, La Trobe University, 1993).

voluntary for both. The results of the mediation and details of any restitution or reparation arrangements will be reported to the court, which can either monitor the agreement or incorporate it into its sentencing disposition. Mediation will be voluntary for both parties and would be carried out by trained Correctional Services Division personnel.⁴⁰⁸

6.36 In New South Wales a diversionary pre-court project has been operating under the auspices of the Wagga Wagga Cautioning Program. Starting in 1991, this program has aimed to 'maximise the impact of juvenile cautions' by having the offender better understand the seriousness of the offence and accepting responsibility for it, allowing the victim to participate, involving family members and others and encouraging restitution or compensation for victims. The hearing of cases in the program is conducted by the cautioning sergeant. The sergeant calls for the offender to admit responsibility and then seeks input from the victim as a prelude to negotiations for compensation, the results of which must be approved by the arresting police officer, who is also present. The Wagga program is thus police based and pre-court and is clearly aimed at diversion as well as reparation.⁴⁰⁹ Because of the prominent and interventionist role of the police, the process used is closer to conciliation than mediation.

The New Zealand Family Group Conference

6.37 As part of the *Children, Young Persons and Their Families Act 1989*, New Zealand has instituted an innovative program that includes as its aims the integration of indigenous and Western approaches to juvenile justice, the empowerment of families and young people, the involvement of victims, and group consensus decision making.⁴¹⁰ The Family Group Conference (FGC) is convened by a Youth Justice Co-ordinator after a young person has received a warning by the police, or after charging, or where there has been a plea or finding of guilt or, alternatively, there can be referrals from other agencies. The FGC consists of the young person, his or her advocate if one has been arranged, members of the family and whoever they invite, the victim or his or her representative, the police, the social worker, if one has been involved with the family, and the Youth Justice Co-ordinator.⁴¹¹ Decisions are reached consensually and, in cases where no arrest has been made, are 'limited only by the imagination of the parties' and are treated as binding. In some cases, agreements require the approval of the court.⁴¹²

⁴⁰⁸Hansard 17 June 1993 at 1-17. The Western Australian court based mediation reparation program also has similar elements: Ministry of Justice (W.A.).

⁴⁰⁹O'Connell T., 'Juvenile Justice: Effective Police Cautioning - An Examination of the Wagga Wagga Police Experience' (unpublished, 1992).

⁴¹⁰Morris and Maxwell at 72 and 76.

⁴¹¹*Ibid* at 82.

⁴¹²*Ibid* at 81-82.

6.38 The aim of the FGC is diversionary, and available research concludes that it has been successful on that score, for only 10% of a sample of juvenile offenders had appeared in court again after participating in a FGC.⁴¹³ There are high rates of satisfaction on the part of offenders and the police, and high rates of fulfilment of agreements. On the other hand, research has also shown much lower levels of satisfaction for victims, many of whom do not attend the FGC. There are also indications of pressures on young people to admit guilt.⁴¹⁴ On balance, it appears that the process employed, like those in many of the English programs, is more interventionist than that which may be appropriate for mediation and may be closer to conciliation.

EXPERIENCE TO DATE

Evaluation of Overseas Programs

6.39 Though there have been many evaluations of mediation programs, until very recently they have been uneven in quality, tending to be highly descriptive, measuring only short term outcomes and lacking a comparative basis for analysis. Since 1990, however, the situation has improved considerably with the publication of studies on projects in England and Wales and with a comparative study of four American programs.⁴¹⁵ The results of these studies are discussed below.

General Goals

6.40 Given the relative newness of most mediation programs and the emphasis on short term goals that characterises many of the evaluations, there is still relatively little known about the long term effects of such programs. Nevertheless, the general aims of these programs are:

- *For victims:* A meeting between victim and offender is significant 'as a psychological event' that will help heal the wounds of the victim.⁴¹⁶
- *For offenders:* Offenders can gain 'emotional relief through the expiation of guilt and the experience of social re-acceptance by

⁴¹³*Ibid* at 84.

⁴¹⁴*Ibid* at 84-87.

⁴¹⁵The latter work now supplements the study by Coates and Gehm mentioned above.

⁴¹⁶Marshall and Merry at 179, 183. They tend to downplay material reparation, something for which they are criticised by Davis (see below).

being forgiven (and in many cases by being the subject of active concern)⁴¹⁷.

- *Broader social and legal reforms:* Despite small signs of change, it is far too early to make any definitive statement about this area.⁴¹⁸ However, many researchers express optimism about the potential of victim/offender programs to reduce crime and retributive tendencies in most Western societies.⁴¹⁹
- *Quality of mediation:* Mediated justice involves concepts like how fair the parties find the process and solution, the level of their participation and the extent to which they are aware of and able to select alternatives.⁴²⁰ Thus, in comparing court based and police based projects in the United Kingdom, there is evidence that while the latter achieved higher rates of agreement, the quality of mediation in the former, which was often face to face rather than indirect, was higher.⁴²¹

Organisation and Structure

6.41 Funding for programs may come from a variety of governmental criminal justice and social welfare agencies or from private sources. All have some paid professional staff, but some depend to a large extent on trained volunteers, while others are run totally by paid professional staff.

6.42 A survey of mediation programs in the United States found that the majority of mediators were paid program staff, and mediator training was almost always used. For those working with juveniles, financial support came largely from local, state, and federal grants or allocations.⁴²² The major British projects are funded by the Home Office. The police based schemes are carried out by professionals from different agencies involved in juvenile justice, while the court based ones combine professional management with largely trained volunteer mediation staff.⁴²³ Other

⁴¹⁷*Ibid* at 187-188. This viewpoint shares some of the thrust of Braithewaite's concept of 'reintegrative shaming', though the process of mediation is more private than what he has in mind.

⁴¹⁸Marshall and Merry at 206-213.

⁴¹⁹Despite his criticisms of the practice of victim/offender reparative programs in England and Wales, this is true even of Davis.

⁴²⁰Marshall and Merry at 214-215.

⁴²¹*Ibid* at 218.

⁴²²Hughes S. and Schneider A.L., 'Victim-Offender Mediation: A Survey of Program Characteristics and Perceptions of Effectiveness', 35 *Crime & Delinquency* at 231-232.

⁴²³Marshall T. and Merry S., *Crime and Accountability: Victim/Offender Mediation in Practice* (London, HMSO, 1990), Chapters 2-3.

European programs vary as to sources of funding and mediator qualifications.⁴²⁴

Types of Cases Handled

6.43 Mediation programs can handle a variety of cases, though most focus on minor theft in which the offender is a teenager or young adult. Others, however, also take up cases of adult offenders and include burglary and minor assault, and some deal with crimes of serious violence, including rape and attempted murder.

6.44 North American programs deal overwhelmingly with property offences rather than offences involving violence, but German programs include violent criminal acts.⁴²⁵ In the United Kingdom, police based schemes deal mainly with theft and criminal damage cases. The court based projects deal less with theft and more with burglary and violent offenders.⁴²⁶

Specific Findings

6.45 Given that in some jurisdictions mediation programs have been operating for some time now, there has been greater scope for the development of short term and intermediate research observations, although the research varies and is difficult to assess and reconcile. The Committee has considered some of the specific findings of the research touching on referral rates, victim and offender profiles, participation and reparation outcomes.

6.46 Referral rates for British projects have been low, averaging well under 10 cases per month and representing no more than a maximum of 12% of indictable cases.⁴²⁷ In North America, however, the situation seems to be different, though it is hard to generalise. One well established program averaged 20 mediations per month, and the average across four programs was 12 per month.⁴²⁸

6.47 Victim profiles reveal that the ratio of individual to corporate victims varies from 33% to 67% in the different programs in North America and Great Britain. The majority of individual victims were male and aged between 25 and 60.⁴²⁹ Offender profiles show that in general the selection of offenders in North American programs inclines towards younger, first time

⁴²⁴For Finland, see Karkkainen H., 'Treatment of Delinquent Youth in Finland', (1989) 68 *Child Welfare* at 183-187, and Gronfors; and for France, see Bonafe-Schmitt at 188.

⁴²⁵Marshall and Merry at 103; Dunkel and Rossner at 165.

⁴²⁶Marshall and Merry at 104-106.

⁴²⁷*Ibid* at 90-92.

⁴²⁸Umbreit and Coates, Chapter 4.

⁴²⁹*Ibid* at 93-96.

offenders who show some signs of remorse. British police based schemes concentrate exclusively on juvenile offenders, while in the British court based projects 80% of offenders referred were under the age of 26. In both of these programs, offenders were overwhelmingly male and most already had a police record.⁴³⁰ Research on the relationship between victim and offender shows that anywhere between 15% and 50% of victims and offenders had a relationship prior to the offence being committed.⁴³¹

6.48 Participation of victims and offenders has been strikingly different.

- The number of cases referred that actually resulted in mediation varied between 50% and 90%, with mediation more likely to occur when there was a criminal charge involved and when the victim was a corporate body.⁴³²
- Reasons given for participation in programs included:
 - Victims participated to recover their losses, help offenders 'stay out of trouble' and 'participate meaningfully in the criminal justice system'.
 - Offenders took part to 'avoid harsher punishment', 'get the whole experience of crime and consequences behind them', and 'make things right'.⁴³³
- When direct (face to face) mediation took place, which often was not the case in England and Wales, rates of reaching agreement were higher, being between 80% and 95%, and full agreement was less likely when offenders were not under threat of official legal action.⁴³⁴

6.49 As to the type of reparation agreements reached:

- In North American cases, some sort of restitution took place, but only 56% of agreements reached involved full compensation. Over 50% of agreements studied required monetary payment, and about one third involved some sort of service to the victim being provided.⁴³⁵ In the Minneapolis-St. Paul program, 52% of

⁴³⁰*Ibid* at 97-100.

⁴³¹*Ibid* at 102-103.

⁴³²*Ibid* at 108-114; Galaway at 674.

⁴³³Coates and Gehm at 253.

⁴³⁴Marshall and Merry at 115-125; Umbreit and Coates at 11-12. In some British schemes the mediator goes back and forth between the two parties, who do not negotiate face to face.

⁴³⁵Coates and Gehm at 255-256.

agreements reached were for monetary payment, and other agreements involved the provision of personal service, community service and apologies.⁴³⁶

- In contrast, 57% of agreements in British police based projects involved only an explanation and an apology, and just over one quarter involved some kind of future undertaking.⁴³⁷
- The scale of reparation varied widely. In the American programs agreements to pay money have ranged from US\$3 to US\$10,000, with half being for US\$71 or less. The mean sum in the Minneapolis-St. Paul program was US\$253.⁴³⁸ Agreements to provide personal service averaged 31 hours of work.⁴³⁹
- The rate of fulfilment of agreements has been high, where surveyed. For example, two North American program studies showed compliance rates of over 80%.⁴⁴⁰

6.50 In about one-third of the cases surveyed in one American study, there was a change in perception in which participants saw each other as 'real people'.⁴⁴¹ Another study concluded that the process contributed to a lessening of fear and anxiety among crime victims.⁴⁴² Both victims and juvenile offenders have been said to 'experience mediation as having a strong effect in humanizing the justice system'.⁴⁴³

6.51 There seems to have been little impact so far of mediation programs on diversion rates.⁴⁴⁴ However, there does seem to be some mitigating effects on sentencing. Though there was little difference in the incarceration rates shown in a comparative study involving North American programs, there was a significant reduction in the incidence and amount of time spent in higher level prison institutions.⁴⁴⁵ In the United Kingdom, 18% of those offenders referred from courts to the reparation schemes probably had their sentences affected by such action, with offenders who participated in face to face mediation faring better than those who had not been able to talk

⁴³⁶Galaway at 674-676.

⁴³⁷Marshall and Merry at 119-120.

⁴³⁸Galaway at 674.

⁴³⁹Coates and Gehm at 256.

⁴⁴⁰Coates and Gehm at 256; Umbreit and Coates, Chapter 9.

⁴⁴¹Coates and Gehm at 255.

⁴⁴²Umbreit and Coates, 'Executive Summary', at 2.

⁴⁴³*Ibid.*

⁴⁴⁴Marshall and Merry at 131.

⁴⁴⁵Coates and Gehm at 258-259.

directly with their victims.⁴⁴⁶ On the other hand, 'there are some signs that a poor outcome to the intervention can have a negative impact on sentence'.⁴⁴⁷ Figures from the United Kingdom and the United States concerning recidivism are not conclusive, though there are indications that juvenile offenders participating in mediation programs committed considerably fewer crimes than a matched sample of similar offenders who did not participate in mediation, although 'this finding of lower recidivism ... was not statistically significant'.⁴⁴⁸

Costs and Efficiency

6.52 Many projects have not been established for very long and measures of efficiency are therefore not very reliable. Most do have problems getting sufficient numbers of referrals; and the timing of mediation sessions, especially if they take place after the holding of initial court hearings, may not have allowed the process to take place at the most opportune moment for both victim and offender.⁴⁴⁹

6.53 Any assessment of the costs and benefits of the programs cannot rely solely on matters like the number of cases handled or agreements reached. Additional factors like lower rates or shorter periods of custodial sentencing also need to be considered. Thus, financial measures do not provide much more than a starting point for comparisons with other forms of dispute resolution.⁴⁵⁰ In addition, social costs and benefits must be taken into account. On these criteria, what is important, ultimately, 'is the degree to which parties are helped to a constructive, revealing and influential experience that relieves the pain of victimisation on one side while it assists self-realisation and behavioural reform on the other'.⁴⁵¹

Attitude Surveys

6.54 According to a general outline of attitude surveys toward crime and punishment in the United Kingdom, Europe and the United States:

Many members of the public, including victims, are ready to shift the whole basis of the debate. Instead of debating, as judges and magistrates do, whether to use harsh or lenient punishment, a substantial number of people are beginning to say use reparative sanctions instead of punishment.⁴⁵²

⁴⁴⁶Marshall and Merry at 139-141.

⁴⁴⁷*Ibid* at 141.

⁴⁴⁸Marshall and Merry at 197; Umbreit and Coates at 20.

⁴⁴⁹Marshall and Merry at 225-228.

⁴⁵⁰See Umbreit and Coates at 138ff, for some examples of costs in the US.

⁴⁵¹Marshall and Merry at 224.

⁴⁵²Wright, M., 'What the Public Wants,' in Wright and Galaway at 268.

A survey of the attitudes both of community members and professionals in Preston indicates the same may be true for Australia.⁴⁵³

6.55 Despite some variation, client satisfaction with mediation has been high, with 60% to 95% of victims and offenders responding positively to questions about outcomes and fairness of the process, though offenders tended to be more satisfied than victims.⁴⁵⁴

6.56 Victims in the United Kingdom schemes generally have seen the mediation process as one of confronting the offender with the harm done and helping the offender to reform; that is, mediation is seen as a sort of 'moral encounter'.⁴⁵⁵ In the United States, research has shown a similar effect: 'The opportunity for the victim to tell the offender [about] the effect of the crime, to get answers and to negotiate restitution were the most important issues to victims'.⁴⁵⁶

6.57 Nevertheless, some surveys of crime victims show that only between one-third and one-half of respondents would agree to personal meetings with offenders.⁴⁵⁷ In a South Australian survey, 45% of victims favoured meeting the offender in a mediation setting. The willingness of victims to participate in mediation differed according to offence categories with six out of ten property offence victims favouring mediation but only a minority of victims of violent offences were willing to participate. Those favouring the idea of mediation expressed interest in meeting the offender so that the offender could appreciate the effects of crime. Those against mediation were concerned about the possibility of conflict and felt it was the state's responsibility to deal with the offender.⁴⁵⁸

6.58 Judging by rates of participation and satisfaction, offenders tend to be more enthusiastic about mediation programs than victims.⁴⁵⁹ What they find satisfying from mediation is the opportunity for 'telling the victim what happened, apologising, negotiating and paying restitution'.⁴⁶⁰

⁴⁵³O'Malley and Fisher, Part 2. See also *Victims and Criminal Justice* (Adelaide, Attorney-General's Department, 1990) at 46-47.

⁴⁵⁴For the United States, see Coates and Gehm at 254-256, and Umbreit and Coates at 13-16; for the United Kingdom, see Marshall and Merry at 152, 162.

⁴⁵⁵Marshall and Merry at 171.

⁴⁵⁶Umbreit and Coates at 17-18.

⁴⁵⁷Reeves H., 'The Victim Support Perspective', in Wright and Galaway at 50-52.

⁴⁵⁸*Victims and Criminal Justice* at 46.

⁴⁵⁹Marshall and Merry at 152-156, 166.

⁴⁶⁰Umbreit and Coates at 18, although the experience in Queensland may be different: Hansard 28 September 1993 at 1-17.

General Assessments

6.59 Research on American and British victim/offender programs provides generally positive assessments. A British Home Office study concludes that many victims welcome the opportunity to meet their offender and that most participants are satisfied with the experience.⁴⁶¹ A recent American comparative evaluation concurs,⁴⁶² while another American assessment echoes this view and adds that 'concerns that victims do not want to participate, the mediation session might become explosive, or victims will make unreasonable demands ... are exaggerated and are not supported by experience or research'.⁴⁶³ There is even some evidence that mediation can be extended to fairly serious offences, including selected instances of violence⁴⁶⁴ and there seems to be no reason to concentrate on the young offenders.⁴⁶⁵

6.60 Nevertheless, researchers have raised a wide variety of concerns about the practical aspects of mediation programs. These include the following issues:

- Probably the major question is the relationship between the programs and the current criminal justice system. One writer asks: 'Can mediation and reparation be successfully grafted on to an essentially retributive criminal justice system?'⁴⁶⁶ Others contend that reparative justice in the United Kingdom has been 'marginalised', in part, because of the tensions between the two approaches, but argue that: 'If retributivists were to acknowledge that a breach of public law is also a wrong done to a victim, reparative justice might be achieved within a framework of retribution.'⁴⁶⁷ It is therefore suggested that a base independent of criminal justice agencies is a necessary pre-condition to effective mediation.⁴⁶⁸ The recent critique of reparative mediation in England and Wales demonstrates that the programs studied were essentially diversion exercises and paid little attention to the needs of victims. Nevertheless, it is argued that reparation is a legitimate

⁴⁶¹Marshall and Merry at 239.

⁴⁶²Umbreit and Coates at 2-3.

⁴⁶³Galaway at 676. See also Hansard 28 September 1993 at 1-17.

⁴⁶⁴Umbreit M., 'Violent Offenders and Their Victims', in Wright and Galaway at 109. See also footnote 18.

⁴⁶⁵Marshall and Merry at 235. Nevertheless, the same research seems to indicate that victims are more likely to agree to meet face to face with juveniles than other adults (at 109-113).

⁴⁶⁶Harding J., 'Reconciling Mediation with Criminal Justice', in Wright and Galaway at 42.

⁴⁶⁷Watson, Boucherat and Davis at 226.

⁴⁶⁸Marshall and Merry at 233.

goal and is not at total odds with the existing system, in which an appropriate sentence can be reduced by acts of reparation as representing expressions of remorse.⁴⁶⁹

- Several writers note the difficulty that programs have had in retaining their original reformist or alternative aims.⁴⁷⁰ For example, one project director has complained that 'mediation changed its focus from being a conflict resolution process to being one aiding the official legal system in deciding on compensation'.⁴⁷¹
- Another important concern is 'net widening', particularly for programs that operate after arrest and an admission of responsibility by the offender, for they may actually increase the number of offenders brought into the formal criminal justice system as such programs do not depend on a formal finding of guilt by the courts.⁴⁷²
- Interestingly, critics express contradictory fears about possible outcomes. On the one hand, reparative mediation might be seen as an easy option, which would both be unfair and cause offenders to plead guilty when it may not be to their advantage. On the other hand, it may produce a settlement more severe than what a court would have ordered. Furthermore, a judge may disregard or modify the terms of the agreement.⁴⁷³ Therefore, some question the relationship between reparation and mediation, arguing either that they be kept entirely separate⁴⁷⁴ or that reparation agreements should be regarded as no more than proposals, subject to review by the courts.⁴⁷⁵
- Both major studies of the British schemes note a possible bias toward offenders, with victims asked to help in the rehabilitation of the offender without getting, in return, much more than an apology (sometimes clearly scripted by the mediators themselves).⁴⁷⁶

⁴⁶⁹Davis at 205.

⁴⁷⁰See Marshall and Merry at 244-245.

⁴⁷¹Gronfors at 148. This fear is also expressed in Umbreit and Coates at 3.

⁴⁷²Coates and Gehm at 260-262; Wright (1991); Harding at 41; O'Malley and Fisher at 53-54; and *Advisory Committee Report* at 79-80.

⁴⁷³Wright (1991) at 109-110; Harding at 41.

⁴⁷⁴Marshall and Merry at 248-250.

⁴⁷⁵Watson, Boucherat and Davis at 227.

⁴⁷⁶This is a major theme in the work of Davis; especially in Chapter 8; see also Marshall and Merry at 245 and in the Queensland context see Mason B., *Reparation and Mediation Programs: The Perspective of the Victim of the Crime*, (1992) 16 *Criminal Law Journal* 402.

- There is also a range of specific criticisms of current practices, including problems with referrals and the effect on the criminal justice system through the timing of mediations, as mentioned above.⁴⁷⁷ Others include a failure to make the most of situations involving related parties and poor training for mediators.⁴⁷⁸
- The role of the police in victim/offender reparation work also poses questions. The mediation practices of the police based Home Office projects, though they may have resulted in high rates of agreement, have been quite perfunctory, 'superficial and artificial', probably because their major aim was simply diversion.⁴⁷⁹

Evaluation of Recent Australian Pilot Projects

6.61 Due mainly to low rates of referrals, neither the Queensland nor the Victorian pilot projects have generated sufficient data for formal evaluations to be undertaken at this stage.⁴⁸⁰ Nevertheless, preliminary analyses based mainly on particular outcomes and responses by participants give rise to some optimism.

Queensland

6.62 Of the small adult offender group surveyed, all responded that they thought the outcome was fair and more than half reported that they felt more involved in the criminal justice process through participating in mediation. The majority of respondents who were victims of adult offenders thought the outcome fair, with none thinking it was unfair. All victims responded that they would use the service again in similar situations. Both victims and offenders exhibited a more positive impression of the justice system.⁴⁸¹

6.63 The Alternative Dispute Resolution Division of the Department of Justice and Attorney-General concludes that 'the results of the pilot show the potential for mediation in the criminal justice context' but draws

⁴⁷⁷*Ibid* at 240-242.

⁴⁷⁸*Ibid* at 203-205.

⁴⁷⁹*Ibid* at 232; see also the case studies in Davis, Chapter 4.

⁴⁸⁰For the position in Western Australia, see Wauchope and para. 6.71.

⁴⁸¹*Advisory Committee Report* at 31.

attention to the need for greater support from a whole range of agencies and greater flexibility in relation to target groups and referral points.⁴⁸²

6.64 Evidence to the Committee from the Director of the Division indicated that the success of such programs very much depends on the support given by others involved in the criminal justice system, particularly the police, defence lawyers and magistrates. Lack of support or co-operation from these parties can have a direct effect on levels of participation.⁴⁸³

6.65 The Queensland projects have been extended beyond the court based pre-sentence model with the implementation of a pre-charge, pre-court diversionary program. To avoid the risk of there being low referral rates, the Queensland Alternative Dispute Resolution Division has sought and obtained the support of police, who will be the main source of referrals for the additional program.⁴⁸⁴

6.66 Both the extended pre-sentence programs and the new diversionary program will be evaluated by a survey of participants in one hundred cases. The survey will concentrate on the expectations and experiences of the participants. In addition, consultation will take place with the police, defence lawyers, magistrates and others involved in the programs.⁴⁸⁵

Victoria

6.67 The only evaluation material on the Victorian project at the time of writing is a 'Progress Report' compiled after only three months of its operation. Its chief finding is that referral rates were far below expectations⁴⁸⁶ although it was thought that there were high levels of participant satisfaction with the program.⁴⁸⁷

6.68 An apparently uneasy relationship between the mediation program and the Police Cautioning Program probably has affected police referral rates, which are crucial to the viability of the project as originally designed. In addition, police have been dissatisfied with the amount of feedback received from the referrals they have made.⁴⁸⁸

⁴⁸²*Ibid* at 32.

⁴⁸³Hansard 16 September 1993 at 4-7.

⁴⁸⁴*Ibid* at 6.

⁴⁸⁵*Ibid* at 13-14.

⁴⁸⁶*Victim-Offender Mediation Program Evaluation Progress Report*: October 1992.

⁴⁸⁷Interview with Stuart Ross, Criminal Justice Statistics Planning Unit, Department of Justice, 5 July 1993.

⁴⁸⁸*Ibid* and *Evaluation Progress Report*.

6.69 Although there were insufficient cases for the pilot program in Geelong to allow for a proper evaluation, the Co-ordinator of that program advised the Committee that there were a number of difficulties. These included the program's relationship to the Police Cautioning Program, matching mediated outcomes with appropriate potential sentences, enforcement of reparation agreements and equity for offenders. Indeed, the Co-ordinator of that program advocated the adoption of the pre-sentence model in preference to the diversionary model on which that program was based.⁴⁸⁹

6.70 The Committee understands that the community based victim/offender mediation programs have been suspended whilst new arrangements for the centralisation of Victorian mediation services are being implemented.⁴⁹⁰

Western Australia

6.71 An interim review of the court based Western Australian mediation program records sixty court referrals in the period August 1992 to June 1993 and thirty one referrals from other sources. Ninety one per cent of mediated cases led to agreements being reached. Of the initial court referrals, 86% of offenders and 68% of victims agreed to participate. All participants surveyed were satisfied with the process and, if asked, would recommend that others participate in the service.⁴⁹¹

PRE-CONDITIONS FOR SUCCESSFUL MEDIATION

6.72 Experience gained from victim/offender mediation programs shows that whether mediation will be successful in any case depends on, among other things, the offence involved, the voluntary nature of participation, the characteristics of the victim and offender, the neutrality and quality of the mediator, the parties' perceptions of other options and the procedures for selecting cases.

6.73 In practice most mediation programs focus on minor offences committed by juveniles. However, researchers in England have concluded that there is no reason to concentrate on the younger offender⁴⁹². Moreover, their data does not demonstrate a correlation between the seriousness of the offence or the offender's record and a successful outcome,⁴⁹³ a point also raised in a American study of mediation and violent crime.⁴⁹⁴ Therefore, in

⁴⁸⁹Written Submission 8 and Hansard 23 July 1993 at 12-13.

⁴⁹⁰Hansard 23 July 1993.

⁴⁹¹Wauchope.

⁴⁹²Marshall and Merry at 234-235.

⁴⁹³*Ibid* at 234-235.

⁴⁹⁴See Umbreit M.S., 'Violent Offenders and Their Victims', in Wright and Galaway at 109.

selecting appropriate cases, 'the major determinant should rather be how much seems to be gained from mediation, in having an impact on the offender or in helping victims'.⁴⁹⁵

6.74 The need to maintain the voluntary nature of mediation is a feature of existing programs, in theory at least.⁴⁹⁶ However, in practice, in the British projects, particularly the police based ones, there have been pressures on both victims and offenders to co-operate, mainly for the benefit of the latter.⁴⁹⁷ The most obvious incentives for offenders to undertake mediation include the withdrawal and modification of charges or the mitigation of sentence, depending on what stage the intervention occurs. Thus, it is possible that offenders, having these expectations in mind, will not undertake the process in good faith.⁴⁹⁸ However, so long as the requirements of reparative justice are met, arguably there may be no reason not to provide such incentives.⁴⁹⁹ As pointed out above, satisfaction rates among offender participants are very high (and higher than those of victims). One report even raises the possibility that mediation should be compulsory for the offender, arguing that it may be seen as a duty 'according to simple natural justice',⁵⁰⁰ though it does not explore the ramifications of this for the mediation process.⁵⁰¹

6.75 To be a voluntary process, it is necessary that the parties provide informed consent and that they are not induced or pressured to participate in any way. This causes problems for victims or offenders who may be vulnerable to pressure or who may not be properly informed as to their options. This has been raised in evidence to the Committee in terms of the special needs of young persons⁵⁰² and disabled persons⁵⁰³. In these cases,

⁴⁹⁵Marshall and Merry at 234-235.

⁴⁹⁶The Queensland project's Advisory Committee has recently reiterated this point, while realistically assessing the role of inducements for the offender. See *Advisory Committee Report* at 51-54. See also Hansard 28 September 1993 at 1-17.

⁴⁹⁷Marshall and Merry at 219. This point is made more strongly by Davis.

⁴⁹⁸See also Hansard 17 June 1993 at 18-31.

⁴⁹⁹A point acknowledged in the Queensland projects: Hansard 28 September 1993 at 1-17.

⁵⁰⁰Marshall and Merry at 249 c.f. Grillo T., 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545 on divorce related issues.

⁵⁰¹Major points related to these issues are summarised in the Queensland *Advisory Committee Report* at 51-54. See also Hansard 28 September 1993 at 1-17.

⁵⁰²Written Submission 21 and Hansard 1 October 1993 at 20-35.

⁵⁰³Written Submission 24 and Hansard 1 October 1993 at 53-61. See also New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Policing Issues*, Discussion Paper No. 29, September 1993, Chapters 7 and 9.

special consideration needs to be given to providing safeguards to ensure that any participation in mediation is equitable and fair.

6.76 Those taking a broad view of the scope for mediated reparation think that the personal characteristics of the victim and the offender will be more influential than the level of legal seriousness assigned to the crime.⁵⁰⁴ To a certain extent, the Victorian program has taken this into account by screening offenders for signs of remorse and victims for not appearing to want any form of vengeance.

6.77 The design of procedures for selecting cases is an important element in determining the suitability for mediation of referred cases regardless of the seriousness of the offence. There is variety in practice, with the English programs generally using justice system personnel and North American ones often operating independently. The Australian projects leave the final decision to accept a case for mediation to the relevant mediation service.

Selection, Training, Qualifications and Certification

6.78 Mediation involves specific skills that many people can learn and which do not rely on any specific academic or formal qualifications.⁵⁰⁵ Although mediation addresses underlying issues, it differs from forms of therapy, such as counselling, in that it focuses directly on solving a particular problem, rather than eliminating the causes of the problem.⁵⁰⁶ A knowledge of the legal context in which the mediation takes place may be useful, but lawyers, with their background in adversarial negotiation in acting on behalf of their clients, may require further training to operate effectively as facilitators encouraging co-operative problem solving.⁵⁰⁷

⁵⁰⁴Marshall and Merry at 103. This claim has also been made with respect to the likelihood of success in mediation divorce-related disputes. See Kressel K., 'Research on Divorce Mediation', *The Role of Mediation in Divorce Proceedings: A Comparative Perspective* (S. Royalton, VT, Vermont Law School, 1987) at 219-233.

⁵⁰⁵See New South Wales Law Reform Commission, *Training and Accreditation of Mediators*, Report 67 (1991) at 30-31.

⁵⁰⁶Kressel, for example, refers to the mediation of divorce-related matters as 'task-oriented'. See Kressel K., *The Process of Divorce: How Professional and Couples Negotiate Settlements* (New York, Basic Books, 1985) at 231.

⁵⁰⁷For a discussion of a number of related issues, see Astor and Chinkin at 185-188. There is well developed American literature on lawyers and mediation. See, for example, Sato G., 'The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance - A Proposal for Ethical Considerations' (1986) 34 *UCLA Law Review* at 507-535. For an example of a local formulation, see the New South

6.79 Though settlement rates may indeed be higher when authority figures, such as judges, mediate, genuine contrition on the part of the offender is more likely to occur if it comes from within the offender rather than in response to any perceived authority. Agreements, too, are more likely to be adhered to.⁵⁰⁸ In addition, some believe that matching a mediator's characteristics, where possible, with some of those of the disputants help promote successful mediation.⁵⁰⁹ Adopting this point of view, as the Australian community mediation services have, necessitates the development and maintenance of a large and diverse pool of mediators.

6.80 Selection criteria for mediators should emphasise personal qualities that will make their training easier, as well as develop a heterogeneous group of mediators with respect to gender, age, ethnicity and other socio-economic factors. Personal qualities that enhance mediation skills include self-confidence, assertiveness, flexibility, communication skills, empathy, tolerance, objectivity, impartiality, and co-operativeness (especially if a co-mediation model is adopted).⁵¹⁰

6.81 Skills required for mediation include:

- *Investigation*: effectiveness in identifying and seeking out relevant information.
- *Empathy*: rapport, awareness and consideration of the needs of others.
- *Inventiveness*: the generation of options consistent with the facts of the dispute and the needs of the disputants.
- *Discussion*: effectiveness of verbal expression, gestures, and body language as aspects of active listening and personal assertiveness.

Wales Law Society Dispute Resolution Committee, 'Guidelines for Solicitors Who Act as Mediators' (1988) 26 *Law Society Journal* at 29-32.

⁵⁰⁸See McEwen C.A. and Maiman R.J., 'Mediation in Small Claims Court: Consensual Processes and Outcome', in Kressel and Pruitt at 55-59.

⁵⁰⁹See Dispute Resolution Project Committee, *Neighbourhood Mediation Service* (Melbourne 1985) at 36. This point is also made in evidence to the Committee; see Hansard 23 July 1993 at 4-7.

⁵¹⁰*Dispute Settlement Centre Program Mediator Selection Guidelines*, Vol. 2. (Melbourne, Attorney General's Department, 1991) at 20-26. The co-mediation model was used in the Geelong and Frankston pilot projects; see Hansard 23 July 1993 at 1-18.

- *Intervention*: effectiveness in developing strategies, managing the process, and working with the parties⁵¹¹

Many mediator training courses also have a component in related ethical issues.⁵¹²

6.82 Although formal qualifications may not be useful as selection prerequisites, training for specialised applications of mediation must include the acquisition of relevant knowledge and skills. The community mediators in New South Wales, Victoria, and Queensland undergo an initial training program of at least 60 hours.⁵¹³ Community mediators in these programs also receive on going training and work in pairs, which facilitates quality control. Both the Queensland and Victorian programs have provided specialised training for the already qualified community mediators selected for their programs, just as the Victorian Dispute Settlement Centres did for mediators dealing with divorce-related and planning permit disputes. Training manuals for victim/offender mediators are available from the programs in Australia and overseas.⁵¹⁴

6.83 Certification of mediators is a difficult issue both in Australia and overseas. The Society for Professionals in Dispute Resolution, the alternative dispute resolution umbrella organisation in the United States, has concluded that qualification criteria should be based on experience and ability rather than formal qualifications.⁵¹⁵ The New South Wales Law Reform Commission in its report on the *Training and Accreditation of Mediators* did not recommend formal certification of mediators, arguing that not enough is known about the factors promoting effective mediation.⁵¹⁶ In Victoria, training and accreditation of alternative dispute resolution practitioners has also been identified as an important issue,⁵¹⁷ but to date no

⁵¹¹'Mediation Assessment Process' (Honolulu, Hawaii Centre for ADR, 1991). The most comprehensive discussion of the mediation process appears in Moore, Chapters 8-14.

⁵¹²New South Wales Law Reform Commission at 33.

⁵¹³Hansard 23 July 1993 at 1-18.

⁵¹⁴See, for example, *Fraser Region [Canada] Community Justice Initiatives Association Victim Offender Reconciliation Program* and Herriot A.M., 'Crime Reparation Project [Queensland] Mediator Training' (Updated 22 June 1992).

⁵¹⁵Report of the SPIDR Commission on Qualification', *Dispute Resolution Forum* (May 1989), at 5-10.

⁵¹⁶New South Wales Law Reform Commission at 49-51.

⁵¹⁷*Attorney General's Working Party on Alternative Dispute Resolution Report* (Melbourne, 1990), Chapter 5. See also *Alternative Dispute Resolution Specialist Accreditation 1993* (Law Institute of Victoria, 19 April 1993).

decision on the matter has been made. Nevertheless, Victoria has legislated to gazette qualified community mediators.⁵¹⁸

Safeguards for Victims, Offenders and Mediators

6.84 Protection of mediators includes both legal and physical dimensions. If confidentiality is accepted as fundamental to mediation, then mediators must be protected from having to reveal information about what transpired during a mediation. In Victoria, for example, the *Evidence Act 1958* has been amended not only to preserve confidentiality but also to exempt Dispute Settlement Centre mediators from any liability arising in the course of a mediation.⁵¹⁹

6.85 The physical protection of both mediators and disputants is an issue that victim/offender programs have in common with other forms of mediation in which tensions run high, for instance, divorce related cases, or even some neighbourhood disputes. The likelihood of physical violence to those directly involved in mediation can be reduced by a combination of measures, including the selection of appropriate types of cases, thorough intake procedures, voluntary participation of both parties, training for mediators, the use of co-mediators and an appropriate physical layout for mediation facilities. Where the threat of violence exists, mediators can terminate the mediation. They can also ensure that the threatened party leaves first and is escorted to his or her means of transport, as is routinely done in divorce related disputes.

Consultation

6.86 Research on the use of alternative dispute resolution processes for dealing with crime shows that professionals and members of the community have legitimate concerns about their use.⁵²⁰ Moreover, both Australian and overseas experience attests to relatively low referral rates,

⁵¹⁸*Evidence (Dispute Settlement Centres) Act 1990*, amending section 21K of the *Evidence Act 1958*.

⁵¹⁹*Evidence (Dispute Settlement Centres) Act 1990*, amending sections 21L and 21N of the *Evidence Act 1958*. On the importance of confidentiality in divorce proceedings, see Grillo.

⁵²⁰O'Malley and Fisher.

which often may be related to the level of confidence of referral agencies in mediation programs. It is therefore imperative that any new program be implemented only in consultation with a wide variety of groups that have an interest in such programs, particularly potential referral sources.⁵²¹ Those concerned would vary with the nature of the program, but may include victim support groups, community legal services, civil rights groups, the police, members of the judiciary and magistracy, the Director of Public Prosecutions, Victorian Court Information and Welfare Network, youth workers, local business organisations, local government, and related community services.

THE ROLE OF REPARATION IN VICTIM/OFFENDER PROGRAMS

6.87 Both the narrower concept of restitution and the broader one of reparation appear in various mediation programs. In general, American programs pay more attention to restitution, especially in monetary form, than do the British schemes.⁵²² In North America over 50% of victim/offender agreements involved monetary restitution and, in an additional one third, the provision of some sort of service to the victim. On the other hand, English programs place more emphasis on reparation in the form of greater understanding and the giving of an apology and 57% of agreements there involved only an explanation and apology and just over one fourth some kind of future undertaking.

6.88 The lack of emphasis on material restitution in British programs has been defended on the basis that such a focus disrupts the interpersonal dynamics of the mediation process. It is also claimed that many victims, in fact, do not wish to act in a punitive way⁵²³ and will accept restitution so long as it is part of an apology package.⁵²⁴ However, some argue that restitution is a primary focus of the criminal justice system and should therefore be part of victim/offender programs. Further, it is contended that greater stress on material reparation would help legitimise victim/offender programs within existing justice systems, a point which is made by the Queensland Project Advisory Committee.⁵²⁵

⁵²¹Hansard 28 September 1993 at 1-17.

⁵²²Marshall and Merry at 175.

⁵²³*Ibid* at 248; *Advisory Committee Report* at 56.

⁵²⁴Marshall and Merry at 162, 179-81; Reeves, 'The Victim Support Perspective', in Wright and Galaway at 52.

⁵²⁵Davis at 143-144, 168-71, 204-205; *Advisory Committee Report* at 58.

6.89 In the United States, restitution plays a more prominent role and is seen as an important outcome, with research showing that victims are more likely to actually receive restitution if they participate in a mediation session with their offender than by just going to court.⁵²⁶ Nevertheless, it is said that some mediators focus too much on the issue of material restitution.⁵²⁷

6.90 Among the earliest Queensland mediations financial restitution, return of goods and offers of work occurred in seven of eight agreements involving adult offenders, but only in one of five agreements in which the offender was a juvenile.⁵²⁸

6.91 The Victorian Pilot Project Steering Committee, however, chose to emphasise the mediation process as the primary objective, rather than focusing on reparation or restitution as an outcome.⁵²⁹ There has been no evaluation of agreements reached in that project as yet. Restitution could take place under the Correctional Services Division proposal but would not, as an outcome, be mandatory.⁵³⁰

6.92 The differences among the programs may reflect differing values placed on helping the victim, the offender and the community. The British schemes, with less emphasis on restitution, have been more oriented toward the offender. The American programs, though quite varied, may reflect a greater concern with the victim.⁵³¹

6.93 The effect on the community of the different emphases on restitution is unclear. Certainly some sort of direct service to individual members or wider groups has obvious benefits, but perhaps not at the expense of leaving a bitter taste in the mouth of an offender who may feel pressured to make such restitution or, conversely, dissatisfaction of a victim who may feel that his or her suffering has not been acknowledged appropriately by the offender or by state agencies.

MEDIATION AND SENTENCING

⁵²⁶Umbreit and Coates at 125.

⁵²⁷*Ibid* at 103.

⁵²⁸Alternative Dispute Resolution Division at 25. In one agreement, the offender, a professional panel-beater, completed 50 hours of work for the victim, including panel beating the victim's car.

⁵²⁹*Juvenile Mediation Program Mediation Agreements - Discussion Paper* (unpublished).

⁵³⁰Hansard 17 June 1993 at 1-17.

⁵³¹Marshall and Merry at 245-246.

6.94 Although mediation can be made available well before the adjudication stage of criminal proceedings (for example, as part of a police based or community based diversion program), this section of the Report considers mediation only in the post-adjudication stages of criminal proceedings.

6.95 The two options for mediation within sentencing discussed in this section are considered in light of:

- the extent to which the use of mediation is consistent with current sentencing principles;
- the extent to which mediation could be used within the current sentencing framework without any legislative changes; and
- the type of changes (legislative or otherwise) required to implement the use of mediation in the sentencing process.

6.96 The term 'mediation' does not appear in legislation dealing with sentencing or in case law on sentencing. The *Sentencing Act* simply does not refer to mediation. The reasons for this include:

- Sentencing traditionally has been regarded as a matter going way beyond the interests of the victim. Sentencing practices and processes have been based upon a retributivist approach, emphasising punishment of the offender as the rationale for sentencing.⁵³² Sentencing also seeks to protect society in general (through the application of the various sentencing aims such as deterrence, denunciation and rehabilitation), rather than meeting the needs of the individual victim.
- To be effective, sentencing orders have to be capable of being enforced by the state. For this reason, sanctions exist for breaches of sentencing orders. In the case of mediation, it is difficult to conceive of forcing the offender to enter into a meaningful mediation with the victim. The voluntary co-operation of the offender and victim is essential to mediation.
- The courts are increasingly concerned as much about consistency in sentencing in terms of the application of the same principles or approaches as in the sentencing outcome itself.⁵³³ Mediation, which emphasises the needs of individual cases, does not sit comfortably with this conceptual framework.

⁵³²*Victorian Sentencing Committee Report* 1988 at 85-89.

⁵³³See, for example, *Lowe v. R.* (1984) 154 C.L.R. 606 at 610.

The two options for integrating mediation into the sentencing process are; first, use of mediation as part of a sentence or, secondly, participation in mediation as a pre-condition to sentencing.

Part of Sentencing Disposition

6.97 Participation in mediation, as opposed to the outcome of mediation, could be viewed as part of a sentence in the same way that other programs with rehabilitative objectives are at the moment.

6.98 Division 5 of Part 3 of the *Sentencing Act* provides for dismissals, discharges, and adjournments. Section 70 states that these orders may be made so as:

- (a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;
- (b) to take account of the trivial, technical, or minor nature of the offence committed;
- (c) to allow for circumstances in which it is inappropriate to record a conviction;
- (d) to allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment;
- (e) to allow for the existence of other extenuating circumstances that justify the court showing mercy to an offender.

Although these orders are technically sentencing orders, the punishment is largely nominal or symbolic.

6.99 Section 75 provides for release on adjournment without conviction. Section 75(2)(c) permits the court to impose any 'special condition' as part of the adjournment. There seems no reason why a court could not order that the offender attend mediation as a special condition of the adjournment, assuming of course the voluntary agreement of the offender and the victim. Similar arrangements could apply under section 72 regarding adjournments following conviction. If the court did adjourn a case for the purpose of mediation, a specific time frame would have to be included. Some guidance on this issue can be obtained from the English experience where the courts have adjourned such cases for a period of 28 days.⁵³⁴

6.100 Section 76 enables a court to dismiss the charge without recording a conviction even though satisfied that the person is guilty. Section 77 states that compensation or restitution can be ordered in addition to a section 76

⁵³⁴U.K. Home Office, *Reparation: A Discussion Document* (1986) at 3.

dismissal order. In these circumstances, mediation may be an appropriate part of the order. The court would have to be satisfied that both the offender and the victim agree to mediation and that appropriate facilities and personnel are available.

6.101 If mediation was to form part of these sentencing orders, it would be appropriate that some type of report be filed with the court upon completion of mediation, regardless of the particular outcome.

6.102 In deciding which offences may be appropriate for mediation, arguably cases which currently result in Division 5 sentences would be suitable. However, this should be regarded as a minimal position. It is therefore appropriate to consider the possibility of incorporating mediation into other types of sentences:

- *Imprisonment:* In Victoria, there are currently no statutory provisions permitting mediation as a condition of imprisonment.⁵³⁵
- *Intensive Correction Order:* By section 21(1), a pre-sentence report can recommend as a special condition that an offender attend a specified prescribed program.⁵³⁶ These programs are defined in section 97(1)(j) to include 'any courses, programs, treatment, therapy or other assistance that could be available to the offender and from which he or she may benefit'. Section 21(2) states that a prescribed program as a special condition of an intensive correction order can be residential or community-based and 'must be designed to address the personal factors which contribute to the offender's criminal behaviour'. This appears to be consistent with the purposes of mediation.
- *Suspended Sentence of Imprisonment:* In Victoria, there are currently no statutory provisions permitting mediation as part of this sentencing option. Under section 20(1) of the *Crimes Act 1914* (Cth), a sentence of imprisonment can be suspended if the offender agrees to comply with conditions including 'reparation, restitution, or compensation'. No similar provision exists in the *Sentencing Act* for imposing conditions on a suspended custodial sentence, other than section 28 dealing with drunkenness or drug addiction.

⁵³⁵In theory, a condition of parole could be that the offender take part in a mediation program if the victim agrees and the Parole Board considers it appropriate.

⁵³⁶An intensive correction order is provided for in sections 19-26 of the *Sentencing Act*. The court will order an ICO if it is considering imposing a term of imprisonment (up to one year) but considers it appropriate for the offender to serve that term in the community under intensive supervision.

- *Community Based Order*: Section 38(1)(g) of the *Sentencing Act* allows a court to impose 'any other condition that the court considers necessary or desirable, other than one about' restitution or compensation. If at the time of sentencing, both the victim and the offender agree to mediation, appropriate facilities are available and the court is of the view that the case is suitable for mediation, then mediation could be a possible condition of a community based order.
- *Fines*: In Victoria, there are currently no statutory provisions permitting mediation as part of, or in addition to, a fine.

6.103 However, because mediation is a consensual process, the Committee believes that the imposition of mediation as a condition of a sentence would be inappropriate.

Precondition to Sentencing

6.104 As explained in Chapter 3, any remorse, contrition, shame, or restitution made by the offender is a relevant factor in assessing the appropriate sentence.⁵³⁷ Arguably, participation in mediation could fall within the mitigating category of 'contrition'. Section 1 of the *Powers of Criminal Courts Act 1973* (UK) recognises reparation (which could include participation in mediation) as an aspect of the offender's conduct which the courts can have regard to in passing sentence. Under this section, the court cannot however impose any requirements on the offender.⁵³⁸

6.105 Sections 96 to 97 of the *Sentencing Act* govern pre-sentence reports. Under section 96(2), a pre-sentence report is mandatory if the court is considering making an intensive correction order, a youth training centre order or a community based order. Otherwise, use of the pre-sentence report is discretionary. The author of the report varies according to the seriousness of the sentence the court is considering imposing, being the Director-General of Community Services for youth training centre orders, the Chief General Manager for suspended sentences and the Director-General of Corrections for all other cases.

6.106 Section 97(1) lists specific matters to be included in a pre-sentence report and section 97(2) says:

⁵³⁷See, for example, *R. v. Neal* (1982) 42 A.L.R. 609 and *R. v. Pope* [1978] Crim. L.R. 303.

⁵³⁸U.K. Home Office Report (1986) at 7.

The author of a pre-sentence report must include in the report any other matter relevant to the sentencing of the offender which the court has directed to be set out in the report.

For participation in and outcome of mediation to be included in a pre-sentence report, the court must therefore have directed that it form part of the report. A copy of the mediation outcome report could be annexed to the pre-sentence report.

CONCLUSIONS

6.107 The Committee believes that there is scope for greater participation of both victims and offenders in the criminal justice system and the sentencing process and that mediation programs have potential for achieving this aim. Under suitable conditions, victims, offenders and the criminal justice system itself can benefit from such a participatory process. Mediation in sentencing can also provide the means for bringing about the restoration of victim losses which, for reasons explained in Chapters 2 and 3, the Committee believes is an appropriate aim of the sentencing process. To be effective, mediation must be voluntary and confidential, the mediators must be well trained in the process of mediation, and they must both be and be seen to be impartial and neutral. Victims, offenders, and mediators must be protected physically and emotionally and their legal rights must be safeguarded.

6.108 The suitability of certain cases for mediation may depend more on the characteristics of the case itself and of the parties involved than on the seriousness of the offence. For example, some cases may be excluded on the basis of there being a gross power imbalance between the parties or because of an overriding interest on the part of the state, rather than because of the seriousness of the offence.

6.109 The timing of mediation in current programs seems to be determined by the aims of the programs and their target groups. Offender oriented mediation programs tend to be pre-court and diversionary in nature. Programs directed more toward the needs of victims tend to be offered before sentencing. There is no reason, however, why a program cannot serve both groups. Pre-adjudication use of mediation has already occurred in several pilot programs in Australia like, for example, the Queensland Community Justice Program and the Victorian Victim Offender Mediation Program. The Wagga Wagga Caution Program, which relies on conciliation, is also pre-adjudicative in nature. To the extent that the mediation outcome could represent the disposition of the case, then mediation in this context can be seen as an alternative to formal sentencing.

6.110 Mediation could be used as part of the pre-sentence process and the outcome of mediation could be included in a pre-sentence report, as has been suggested in the Victorian Correctional Services Division proposed pilot project. This is also the practice in the Queensland pilot project and in the Western Australian program. Alternatively, courts could use their powers to adjourn proceedings for a specified period to enable parties to explore the possibility of mediation.

6.111 Having regard to the experience gained so far from overseas and Australian mediation programs and the evidence, both written and oral, in the inquiry,⁵³⁹ the Committee believes that mediation between victim and offender can be an appropriate vehicle for promoting the restoration of victim losses in the criminal justice system. In particular, if victims and offenders can reach agreement on an appropriate form of reparation, it appears more likely that victims will receive satisfaction than in cases where reparation is imposed directly by the courts. However, in the light of the wider aims of such mediation, the Committee does not believe that reparation (even in a wide form) should be the primary aim of mediation but rather a subsidiary aim. The object and process of reconciliation should be viewed as the primary aim of mediation between victims and offenders.

6.112 In the Committee's view, programs for mediation between victims and offenders should:

- rely on the voluntary participation of both offender and victim and any pressures or inducements for participation should, as far as practicable, be avoided;
- be conducted by well trained mediators (preferably by two mediators) with appropriate qualifications and proven experience in mediation processes and an appropriate understanding of the criminal justice system;
- be confidential in nature, except to the extent the parties agree to the release of information as to its outcome, or to the extent necessary for the enforcement of any agreement as to reparation, or for the incorporation of its results into a sentencing disposition;
- insofar as reparation is an aim of the process, adopt a wide definition of reparation (beyond the making of material restitution or compensation in the form of that covered by Part 4 of the *Sentencing Act*) to include the making of an apology and the carrying out of community work;

⁵³⁹See, generally, Written Submissions 6, 9, 12, 15, 16, 24 and 25 and Hansard 25 March 1993 at 1-32, 17 June 1993 at 1-17, 23 July 1993 at 1-18, 28 September 1993 at 1-17 and 1 October 1993 at 53-61.

- wherever practicable, result in agreements for material reparation that are enforceable either as part of a sentencing disposition or as a contract enforceable by civil means at the option of either party;
- not operate to penalise offenders for refusing to participate or for their conduct in mediation and not disturb what would otherwise be the just punishment for an offence, except to the extent that participation in mediation and any outcome as to reparation can be viewed as evidence of remorse or rehabilitation;
- be supported by all those involved in the criminal justice system, including police, prosecutors, defence lawyers, magistrates and court officers.

6.113 The application of these considerations will differ depending on the mediation model adopted. In this regard, the Committee believes that the court based pre-sentence model of the type advocated by the Correctional Services Division has a number of advantages over other models. These include:

- it removes possible inequities and pressure for offenders, particularly young offenders, associated with the pre-court diversionary model;
- the process of referral can be more certain;
- as it follows from a formal finding of guilt by the courts, it minimises the chance of net widening;
- to the extent that the outcomes of mediation are conveyed to the sentencing court, it may minimise any possible disparity in the treatment or sentencing of offenders arising from participation;
- the results of mediation can be incorporated into sentencing, thus maximising the prospect of any agreement on reparation being complied with;
- the suitability of cases for referral need not be limited by particular offence categories and can be a matter for the discretion of the court and the views of the parties;
- the *Sentencing Act*, particularly those parts dealing with pre-sentence reports, provides an appropriate statutory framework, although the issue of confidentiality needs to be addressed by legislative protection.

6.114 The Committee's major concerns with the court based pre-sentence model, however, relate to possible delays in the sentencing process⁵⁴⁰ and the effect mediation may have on sentencing patterns. However, the Committee believes that both of these concerns can best be addressed by sentencing courts retaining some control over the process. Also, in the context of the program being implemented by the Correctional Services Division, the Committee has some concern that its officers may not be perceived as entirely neutral mediators. From the victim's point of view, correctional officers could be seen as being too closely associated with offenders. From the offender's perspective, correctional officers could be seen as representing the state's interests in ensuring compliance with sentencing orders.⁵⁴¹

6.115 The Committee believes that the former community based pilot projects should be renewed and that the Correctional Services Division project should be put in place. Because the long term effects of mediation on sentencing are not fully known, the Committee could not recommend any further extensions to existing programs until further experience has been gained. It is necessary that there be a thorough evaluation of both the Broadmeadows pilot project and of any further programs. Regard should also be had to developments in the Queensland, Western Australian, Wagga Wagga and New Zealand programs mentioned in this Chapter, as well as the Victorian Police Cautioning Program for young offenders.

Draft Recommendation 21

6.116 The Committee therefore recommends that:

- **the court based pre-sentence mediation pilot program being implemented by the Correctional Services Division be the subject of a thorough evaluation as to its effectiveness and its impact on the sentencing process;**
- **after appropriate consultation, consideration be given to introducing a community based pre-court diversionary mediation program;**
- **the introduction of any further mediation programs be deferred pending assessment of the effectiveness of current programs;**
- **any future mediation programs be based on the considerations outlined by the Committee in terms of the aims of such programs, the training and selection of mediators, the confidentiality of the**

⁵⁴⁰See, for example, Written Submission 19.

⁵⁴¹However, a similar condition exists in the Western Australia program: see Wauchope.

process, the enforcement of outcomes and the impact on the sentencing process.

6.117 Furthermore, as part of its consultations on this Report, the Committee welcomes submissions on the issues discussed in this Chapter. In particular, the Committee wishes to address in more detail the need for mediation programs to take account of the different circumstances of adult and young offenders. Although that matter has been touched on in the inquiry,⁵⁴² the Committee believes it requires more material relating to the position of young offenders before it can assess properly the implications of mediation programs for young offenders.

6.118 The Committee now turns to consider a number of issues relevant to the provision of support and information services to victims of crime.

⁵⁴²See, for example, Hansard 1 October 1993 at 20-35.

INTRODUCTION

7.1 In this chapter, the Committee considers a number of issues related to its terms of reference that concern the recognition and promotion of the interests of victims.

7.2 The matters considered include:

- state satisfaction of reparation orders through the use of a victim levy, utilisation of proceeds of crime legislation or the hypothecation of fines;
- the provision of support and information services to victims of crime;
- the provision of personal injury compensation schemes through the operation of the *Criminal Injuries Compensation Act 1983*;
- the role in Victoria of the Crime Statistics Bureau and the Judicial Studies Board;
- the possible financial and administrative impact of proposals contained in the Committee's draft recommendations.

STATE SATISFACTION OF REPARATION ORDERS

Victim Levy

7.3 The Committee noted earlier the possibility of the establishment of a Victim Compensation Fund, but has concerns about its use for compensating property loss or damage. However, it is appropriate to examine this proposal in the context of a review of the funding of criminal injuries compensation and support services for victims of crime.

7.4 In New South Wales, section 65C of the *Victims Compensation Act 1987* (NSW) creates a compensation levy of \$50 in relation to convictions in the Supreme and District Courts and \$20 for convictions in the Local Courts. It applies to all offences punishable by imprisonment and dealt with by a court and is enforceable by the attachment of prison earnings of convicted persons and the imposition of community service orders on persons who fail to pay. The money is paid into a Victims Compensation Fund, into which is also paid all proceeds under the *Confiscation of Proceeds of Crime Act 1989* (NSW), appropriated funds from consolidated revenue and any other funds. In 1991/92 the levy raised \$1.76m.⁵⁴³

7.5 Under Part 5 of the *Victims Compensation Act 1987* (NSW) compensation paid to victims of crime for personal injury may be recovered from convicted offenders or fraudulent claimants. Of compensation awarded under the Act, 51.2% related to convicted offenders; the remainder being for cases where no offender was convicted for the offence causing the injury. In the period commencing 15 February 1988 and ending 31 October 1992, \$144m had been paid to victims yet only \$667,591 had been recovered from convicted offenders.⁵⁴⁴

7.6 In 1992/93, total revenue raised in New South Wales from the victim levy, confiscated proceeds of crime and recoveries from convicted offenders amounted to \$3.5m. In contrast, compensation paid under the Act for that period amounted to \$49.89m.⁵⁴⁵

7.7 In the Northern Territory, section 25A of the *Crimes (Victims Assistance) Act 1992* (NT) creates a Victims' Assistance Fund, into which are paid appropriated funds from consolidated revenue, a proportion of fines and the total of the amount raised by way of levy. A levy is imposed on all persons convicted other than where they are sentenced to imprisonment, on infringement notices and on those against whom enforcement orders are made. The levy is set at \$30 for indictable offences, \$20 for other offences and \$10 for cases dealt with by the juvenile courts.⁵⁴⁶

7.8 In South Australia, a victim levy is imposed on every person convicted of a criminal offence. It is wider in operation than the New South Wales levy, the latter being confined to court convictions. The South Australian levy amounts to \$5 in relation to traffic offences, \$10 in relation

⁵⁴³Bureau of Crime Statistics and Research, *Review of the Victims Compensation Act* (March 1993) at 53.

⁵⁴⁴*Ibid* at 51.

⁵⁴⁵Letter to the Committee from the Director General, New South Wales Attorney General's Department, dated 25 August 1993.

⁵⁴⁶*Crimes (Victims Assistance) Act 1992* (NT), section 25B.

to summary offences and \$20 in relation to indictable offences. In 1990/91 it raised \$3.59m.⁵⁴⁷

7.9 The Victim Advisory Council considered arguments for and against a victim levy. It saw as its advantages that it may establish a secure funding source, ensure that criminal offenders as a class provide redress to crime victims as a class and that it appeared to work satisfactorily elsewhere.⁵⁴⁸ Its disadvantages were perceived to be that it may be construed as distorting relativities between different classes of victims, that it might be inconsistent with the *Sentencing Act* in that a court is required to take the means of an offender into account and that such a levy may allow governments to abrogate their responsibility to provide adequate funding from general revenue for victims of crime.

Proceeds of Crime

7.10 In Victoria, under section 15A of the *Crimes (Confiscation of Profits) Act 1986*, monies confiscated as a result of non drug offences is paid into the Crime Prevention and Victims' Aid Fund. Into this trust fund is paid:

- the prescribed proportion of all money realised under a confiscation order that is not required to be paid into the Drug Rehabilitation and Research Fund under sections 125 or 126 of the *Drugs, Poisons and Controlled Substances Act 1981*, less conversion costs;⁵⁴⁹
- all moneys appropriated by Parliament for the purposes of the Fund;
- all moneys received by the state from the Confiscated Assets Trust Fund established under the *Proceeds of Crime Act 1987 (Cth)*;
- all other monies received for the purposes of the fund.

The Minister may pay out of the fund amounts for or towards:⁵⁵⁰

⁵⁴⁷See Victim Advisory Council, *Report to the Minister for Police and Emergency Services* (1992) at para. 3.3.1.

⁵⁴⁸Victim Advisory Council at para. 3.3.1.

⁵⁴⁹'Conversion costs' are the reasonable costs and expenses incurred after the making of the confiscation order in locating, storing, maintaining or disposing of, or otherwise in connection with the conversion into money of, property to which the order applies: *Crimes (Confiscation of Profits) Act 1986*, section 15B. These costs are paid to the person or body that incurred the costs.

⁵⁵⁰*Crimes (Confiscation of Profits) Act 1986*, section 15A(2).

- organisations involved in providing information, support or assistance to victims of crime;
- development or co-ordination of programs or services for the information, support or assistance of victims of crime;
- development, implementation, co-ordination or evaluation of crime prevention and control programs;
- criminological research;
- the costs of administering the Act.

All money not required to be paid into any of these bodies is to be paid into the Consolidated Fund.⁵⁵¹

Hypothecation of Fines

7.11 Hypothecation involves the allocation of a proportion of the revenue recovered from fines and diverting it from Consolidated Revenue for a particular purpose. In South Australia, in addition to the victim levy, 20% of revenue from all fines is allocated for victims' services. The Victim Advisory Council considered arguments for and against such a system. In its favour, it found that this system was not inconsistent with the imposition of a fixed penalty for an offence and established a secure funding base for victims. However, it noted that the community may have other priorities for the use of such funds, including legal aid, court facilities or correctional facilities and programs and that by tying up these funds, government policy was effectively pre-empted. Although the Victim Advisory Council was unable to reach consensus upon this matter it recommended that:⁵⁵²

There should be a secure and adequate funding source for victims of crime. The Government should explore the establishment of a dedicated fund for victim related purposes: support agencies, education and training courses, research and monitoring of victims services.

7.12 An alternative to hypothecation may be to permit a court to order that all or part of a fine be paid to the victim as compensation. This is possible in

⁵⁵¹*Crimes (Confiscation of Profits) Act 1986*, section 15A(3).

⁵⁵²Victim Advisory Council at para. 3.5.

New Zealand⁵⁵³ in relation to emotional and physical harm, but is used very rarely.⁵⁵⁴

7.13 The Committee endorses the view of the Victim Advisory Council that consideration be given to the establishment of a dedicated fund for the provision of victim support and information services.

7.14 In the Committee's view, a dedicated victims' fund could be sourced by proceeds from:

- the imposition of a victims' levy on all offenders who are sentenced by the courts;
- a proportion of revenue obtained from fines;
- moneys realised from the use of proceeds of crime legislation.⁵⁵⁵

7.15 As to the use of a dedicated fund, its application should be along the lines of that provided for by the Victims Aid Fund under the *Crimes (Confiscation of Profits) Act 1986*, namely; to fund support and information services for victims of crime. If moneys from the dedicated fund are to be applied to compensatory schemes, the Committee believes priority should be given to funding of the personal injuries compensation scheme under the *Criminal Injuries Compensation Act 1983*.

Draft Recommendation 22

7.16 Accordingly, the Committee recommends that further consideration be given to the establishment of a mechanism for the provision of support and information services to victims of crime.

7.17 The Legal and Constitutional Committee, in its *Report Upon Support Services for Victims of Crime*, rejected proposals for the establishment of a dedicated source for the funding of the Crimes Compensation Tribunal on the basis that 'the increased administrative costs necessary for their implementation would probably outweigh any consequent benefit'.⁵⁵⁶ This

⁵⁵³See, for example, *Criminal Justice Act 1985 (NZ)*, section 28.

⁵⁵⁴Galaway and Spier's survey found that it was used in only 5% of cases that involved offences against the person, with the average amount being \$224; Galaway B. and Spier P., *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* (Wellington, Department of Justice, 1992) at 73.

⁵⁵⁵This would only relate to non-drug offences for the reasons discussed at paragraph 7.10.

⁵⁵⁶Legal and Constitutional Committee, *Report Upon Support Services for Victims of Crime*, Parliamentary Paper No. 59

Committee, however, believes that there is potential for the establishment of a dedicated fund for the provision of support and information services to victims of crime. As to whether the administrative costs in establishing such a dedicated fund would outweigh its potential benefits, the Committee invites submissions on this matter as part of its further consultation on the draft recommendations of this Report.

7.18 In light of the experience in New South Wales, discussed above, it is clear, however, that a dedicated fund for victims of crime would not raise sufficient monies to cover either awards for personal injury made under the *Criminal Injuries Compensation Act 1983* or reparation orders made under the *Sentencing Act*. In November 1991, a total amount of \$836,084.65 was awarded by Victorian Magistrates' Courts in favour of victims pursuant to reparation orders under the *Sentencing Act*. This suggests that the annual figure for reparation orders may be around \$10m. Awards for the compensation of personal injuries made under the *Criminal Injuries Compensation Act*, for the year ending 30 June 1993, amounted to \$29,998,023, with the average award being \$5,537.09; although 11.6% of awards were under \$1,000, 32% were under \$3,000 and 21% were under \$5,000.⁵⁵⁷ Having regard to the experience in both New South Wales and South Australia, it is clear that any monies raised from a dedicated victims' fund would be insufficient to meet these amounts.

7.19 However, as noted in Chapter 5, the average amount of reparation orders made in the Magistrates' Courts in Victoria is relatively small, the median in the sample studied being \$650.60 and the most common order being for around \$200. The Committee has therefore considered whether it may be possible for victims to receive compensation from a central fund in cases where enforcement mechanisms against offenders have been exhausted and have failed to result in any payment by the offender to the victim. In this regard, such a system for compensation would be subject to an upper limit of, say, \$500. Further, any payments made from the central fund could be deemed to constitute a debt owed by the offender to the Crown, with the Crown having the option of seeking recovery from the offender.⁵⁵⁸ The process of recovery could be the same as that which applies to fines.

7.20 The Committee has not been in a position to assess the costs of establishing such a scheme and what its impact may be on other priorities relating to the provision of support and information services to victims of

(1987) at 26.

⁵⁵⁷Crimes Compensation Tribunal, 21st Annual Report, 1992/1993 at 2 and 11-12.

⁵⁵⁸The power of recovery under section 27 of the *Criminal Injuries Compensation Act* does not seem to be effective in practice. See Legal and Constitutional Committee at 26-27.

crime and the funding of personal injuries compensation under the *Criminal Injuries Compensation Act*. It is therefore a matter on which the Committee invites further submissions.

SUPPORT AND INFORMATION SERVICES

7.21 In Chapter 4 of its *Report Upon Support Services for Victims of Crime*, the Legal and Constitutional Committee made a number of recommendations for improving the provision of support and information services to victims of crime. Some of these recommendations have been implemented but others have not.

7.22 In the context of its inquiry, the Committee has considered three specific proposals for improving support and information services to victims of crime in the context of the obtaining, making and enforcement of reparation orders. Those proposals are:

- the creation of a central referral service;
- the establishment of a victim advocacy service; and
- the provision of advice on enforcement procedures.

Central Referral Service

7.23 There are, at the moment, a large number of support services for victims of crime provided by both government and private agencies. In many instances, victims have difficulty in ascertaining what services are available and what particular services may be relevant to their individual needs.⁵⁵⁹ It has been suggested to the Committee that it would be desirable to establish a central referral service that victims of crime could approach with a view to receiving advice as to what services are available, having regard to their individual circumstances.⁵⁶⁰

7.24 The Committee believes that it is vital that victims be made aware of their legal rights and of the support services available to assist them in coping with the trauma associated with the effects of crime. A recent study of victims of crime in Melbourne found that many victims are unaware of

⁵⁵⁹Hansard, 25 March 1993.

⁵⁶⁰*Ibid*; see also Clarke G., *Crime Victims Pilot Project 1992-93* (Melbourne, Victorian Court Information and Welfare Network Inc., 1993) at 53-54.

the services available to them, that existing services are poorly integrated, and that the quality of services varied greatly.⁵⁶¹

7.25 Unless victims receive adequate information about the type of matters provided for in the *Declaration of Rights for Victims of Crime* and of their rights to seek compensation for the harmful effects of crime, it cannot be expected that the proposals contained in this Report, if implemented, will have any meaningful chance of enhancing the prospects of victims obtaining adequate compensation.⁵⁶²

7.26 The Committee is of the view that the most effective means of ensuring that victims are informed as to their rights and entitlement to support services is through the establishment of a central advice and referral service.

Draft Recommendation 23

7.27 The Committee therefore recommends that a central referral service be established to provide initial counselling, information, advice and referral services to victims of crime.

Victims' Advocacy Service

7.28 It has been suggested to the Committee that there should be a victims' advocate to appear in Court on behalf of victims in relation to the obtaining of reparation orders and other matters relevant to the conduct of criminal cases affecting victims.⁵⁶³ In effect, a victim advocacy service would operate along similar lines to the service provided by Duty Lawyers of the Legal Aid Commission and Community Legal Services to offenders. The perceived need for a victims' advocate is related to the concern that victims are often treated no differently to other witnesses in a criminal case; an issue arising out of the debate as to what recognition should be given to the interests of victims in the criminal justice system.

7.29 The Committee, however, has concerns about such proposal for two main reasons. First, in recent years the strain on legal aid resources has resulted in many offenders appearing in the criminal courts unrepresented. That strain has been highlighted by the High Court's decision in *Dietrich v. R.*⁵⁶⁴ which the Government has sought to address by the insertion of section 360A into the *Crimes Act 1958* by the *Crimes (Criminal Trials) Act 1993*.⁵⁶⁵ In the Committee's view, therefore, it is impractical to expect

⁵⁶¹Clarke at 53.

⁵⁶²Hansard 1 October 1993 at 1-19.

⁵⁶³Hansard 22 June 1993 at 18-36.

⁵⁶⁴*Dietrich v. R.* (1992) 109 A.L.R. 385.

⁵⁶⁵As to which, see Lynch, J., 'Section 360A and the Dietrich Dilemma' (1993) 67 *Law*

additional funding for victim advocacy services unless the costs can be met by the establishment of a dedicated fund of the type discussed above. Secondly, the Committee has made a number of recommendations in Chapter 4 designed to encourage police, prosecutors and the courts to make more reparation orders in eligible cases. As part of those recommendations, it is expected that police and prosecuting authorities will assume greater responsibility for promoting the interests of victims, particularly in the context of the obtaining and making of reparation orders. The establishment of a separate victim advocacy service would therefore, in that context, be unnecessary.

7.30 Accordingly, the Committee does not recommend the establishment of a victim advocacy service.

Advice on Enforcement Procedures

7.31 It has been suggested to the Committee that consideration be given to making provision for special legal aid assistance to victims of crime in order to advise victims as to the procedures they can utilise to enforce reparation orders made in their favour.⁵⁶⁶ The research on the enforcement of reparation orders in Victoria carried out by the Committee, as discussed in Chapter 5, illustrates that in many cases victims are unaware of the options available to them in relation to the civil enforcement of reparation orders and, worse still, are often unaware of the fact that an order has been made in their favour.

7.32 The need for special assistance or advice to victims on the enforcement of reparation orders is therefore apparent in the context of a model whereby such orders must be enforced at the option of the victim pursuant to civil methods of enforcement. If, however, as recommended in Chapter 5, reparation orders are to be enforced in the same way as fines, the Committee believes that there is far less need for such assistance.

7.33 Accordingly, the Committee does not recommend the provision of special legal aid assistance or advice to victims of crime for the enforcement of reparation orders on the premise that the enforcement of those orders should be changed from the current civil model to a criminal fine model. However, procedures for informing victims of their civil rights of enforcement need consideration in the context of cases where victims pursue civil remedies and this is a matter on which the Committee invites comment.

PERSONAL INJURY COMPENSATION SCHEMES

7.34 As explained in Chapter 2, in Victoria separate provision is made for the compensation of personal injuries arising through criminal conduct under the *Criminal Injuries Compensation Act 1983*. In other jurisdictions, however, provision is made for sentencing courts to make compensation orders for personal injuries in the same way that reparation orders are made under Part 4 of the *Sentencing Act*.⁵⁶⁷

7.35 The Committee notes that the Law and Justice Policy of the current Government says that a detailed review should be conducted on the operation of the *Criminal Injuries Compensation Act 1983* in the light of the changes to that jurisdiction made in 1990, the principal effect of which was to abolish the former separate Administrative Tribunal and to confer its functions on Magistrates' Courts.⁵⁶⁸

7.36 The Committee believes that there is some merit in conferring on sentencing courts powers to make compensation orders for personal injuries, particularly in straightforward cases.⁵⁶⁹ It would also be appropriate to confer such a power if Magistrates' Courts are to retain the current jurisdiction conferred by the *Criminal Injuries Compensation Act 1983*. However, consistent with the approach in other jurisdictions, the Committee would suggest that any power to award compensation for personal injuries should be subject to an upper limit. The appropriate upper limit would be \$5,000, which is the civil monetary jurisdiction that applies to personal injury cases in the Magistrates' Courts.⁵⁷⁰

Draft Recommendation 24

7.37 Accordingly, the Committee recommends that, subject to the outcome of the review of the *Criminal Injuries Compensation Act 1983* to be undertaken by the Government, consideration be given to conferring on sentencing courts a power to order compensation for personal injury in

⁵⁶⁷See, for example, *Powers of Criminal Courts Act 1973* (UK), section 35; *Victims Compensation Act 1987* (NSW), section 53; *Penalties and Sentences Act 1992* (Qld), section 35; *Criminal Code* (WA), section 719; *Criminal Code Act* (NT) section 393; *Criminal Code 1924* (Tas), section 425A(1).

⁵⁶⁸For a discussion on some of the matters that may be considered as part of that review, see Garkawe S., 'Criminal injuries compensation in the Magistrates' Court' (1993) 67 *Law Institute Journal* 46 and Victim Advisory Council at paras 2.1 - 2.6.7.

⁵⁶⁹See, for example, Hansard 22 June 1993 at 4-5 and 31-32 and 10 September 1993 at 3.

⁵⁷⁰Section 3(1), *Magistrates' Court Act 1989*.

straightforward cases, subject to an upper monetary limit, in the same manner as that currently provided for in relation to property damage under Part 4 of the *Sentencing Act*.

CRIME STATISTICS BUREAU AND JUDICIAL STUDIES BOARD

7.38 In this Report, the Committee has made several recommendations relating to the need for police, prosecuting authorities and the courts to develop effective procedures for the promotion of reparation in the sentencing process. The Committee has been concerned that in some instances it has had to consider policy issues without a sufficient empirical foundation. In this context, the role of a Crime Statistics Bureau and the Judicial Studies Board assumes importance.

Crime Statistics Bureau

7.39 The Legal and Constitutional Committee, in its *Report Upon A Bureau of Crimes Statistics For Victoria*⁵⁷¹, considered the provisions of the *Criminal Justice (Boards) Bill 1989* which sought to establish the Judicial Studies Board and the Bureau of Crime Research and Statistics. The Report, however, was concerned with the provisions for a Bureau of Crime Statistics and not with the provisions for establishing the Judicial Studies Board. In this regard, during debate on the 1989 Bill, Part 2 of the Bill dealing with the establishment of the Judicial Studies Board was separated from the Bill and subsequently enacted in the form of the *Judicial Studies Board Act 1990*, whereas Part 3, dealing with the Bureau of Crimes Statistics, was referred to the Legal and Constitutional Committee for examination.

7.40 In its Report, the Legal and Constitutional Committee made a number of recommendations dealing with the structure, membership and functions of the Bureau of Crime Statistics. Its main concern was to ensure that the Bureau operated as an independent body. The Legal and Constitutional Committee accepted the need for a Bureau of Crime Statistics and made a number of recommendations as to its composition and functions.

7.41 The recommendations of the Legal and Constitutional Committee were accepted by the previous Government in a ministerial response tabled pursuant to the *Parliamentary Committees Act 1968*.⁵⁷²

⁵⁷¹Parliamentary Paper No. 173 (1991).

⁵⁷²*Response to the 46th Report of the Legal and Constitutional Committee on a Bureau of Crime Statistics for Victoria* tabled by Hon. Jim Kennan,

7.42 Consistent with the Committee's discussion in Chapter 5 of this Report about the need for the collection and dissemination of information relating to reparation orders, the Committee supports the previous recommendations made by the Legal and Constitutional Committee for the establishment of an independent Bureau of Crime Statistics.

Draft Recommendation 25

7.43 Accordingly, the Committee recommends that the Government act on the recommendations made by the Legal and Constitutional Committee for the establishment of an independent Bureau of Crime Statistics for Victoria.

7.44 Further, for the reasons discussed in Chapter 5, the Committee believes that several matters relevant to the making and enforcement of reparation orders require further research and investigation.

Draft Recommendation 26

7.45 The Committee therefore recommends that further research be conducted on the use and enforcement of reparation orders in Victoria and that such research encompass, in both qualitative and quantitative terms:

- **the frequency with which reparation orders are made in eligible cases;**
- **the factors which cause courts not to make reparation orders;**
- **the ways in which reparation orders are combined with sentencing options;**
- **the operation of reparation as a mitigating factor in sentencing;**
- **the consideration of the financial means of offenders in making reparation orders;**
- **the number and monetary amounts of reparation orders;**
- **the extent to which reparation orders are satisfied and the time and costs involved in achieving compliance and the steps taken to enforce such orders;**
- **the differences in compliance rates (including an analysis of the extent of satisfaction, the time taken and the public and private**

costs of compliance) between the criminal enforcement of fines and the civil enforcement of reparation orders and judgment debts.

Judicial Studies Board

7.46 The *Judicial Studies Board Act 1990* commenced operation on 26 February 1992. By section 5 of the Act, the Board's functions include:

- The preparation of sentencing guidelines for circulation among judges and magistrates.
- The conduct of research into sentencing matters.
- The development and maintenance of computerised statistical sentencing data for use by the courts.
- The monitoring of present trends and the initiation of future developments in sentencing.
- The provision of assistance to the courts designed to give effect to the principles contained in the *Sentencing Act*.
- Consultation on sentencing matters.
- The provision of advice to the Attorney General on sentencing matters.

7.47 The background to the establishment of the Judicial Studies Board includes discussion on the role of such a body by the Victorian Sentencing Committee⁵⁷³ which recommended the establishment of a Judicial Studies Board for Victoria.

7.48 In this Report, the Committee has mentioned, in a number of places, the need for sentencing guidelines to be developed to assist in the implementation of the changes proposed to the *Sentencing Act*.⁵⁷⁴

⁵⁷³*Victorian Sentencing Committee Report 1988* at 185-192 and 223-230.

⁵⁷⁴See, for example, para. 4.126 dealing with the financial means of offenders.

7.49 The Committee therefore believes that for this and other reasons the Board has an important part to play in the development of sentencing principles and practices.

Draft Recommendation 27

7.50 The Committee recommends that the Judicial Studies Board be given the financial and administrative support needed for it to fulfil its statutory functions.

FINANCIAL AND ADMINISTRATIVE IMPACT

7.51 The Committee is aware that many of its draft recommendations, if implemented, would lead to an increase in the financial and administrative burden placed on various government agencies including the police, prosecuting authorities and the courts. It therefore realises that before a decision can be made as to the implementation of those draft recommendations, consideration must be given to the financial and administrative impact flowing from them.

7.52 In particular, the Committee acknowledges that there could be significant costs involved with respect to the following proposals:

- Changes to police procedures concerning the provision of advice to victims.
- The creation of a presumption in favour of the making of reparation orders.
- The need for sentencing courts to determine, as far as possible, complex reparation applications.
- The development of guidelines for taking into account an offender's financial means.
- The prescribing of procedures for the conduct of reparation applications.
- The need for further research to be conducted on the making and enforcement of reparation orders.
- The application of criminal enforcement mechanisms to reparation orders.

- The introduction and continuation of pilot victim/offender mediation projects.
- The establishment of a dedicated fund for the provision of support and information services to victims of crime.
- The establishment of a central referral and advice service for victims of crime.

7.53 For example, it is estimated that the unit cost of the pilot mediation program at Broadmeadows Magistrates' Court will be \$125 per case. It is also estimated that the costs of bringing breach proceedings for offenders who fail to comply with a community based order (brought about by conversion of a reparation order like a fine) would be \$204 per offender.⁵⁷⁵

7.54 In the conduct of public hearings for its inquiry, the Committee endeavoured to ascertain from interested parties the likely financial and administrative impact of proposals of this type. Not surprisingly, it was difficult for those parties to provide any firm indications on this question in the absence of the material of the type produced in this Report.

7.55 Accordingly, as part of its further consultation, the Committee invites submissions on the likely financial and administrative impact flowing from the draft recommendations.

⁵⁷⁵Letter to the Committee from Correctional Services Division, Department of Justice, dated 29 September 1993.

8.1 No system designed to compensate victims of crime, whether through the provision of a central compensation scheme or the making of orders by sentencing courts, will result in all victims of crime being compensated adequately. There are severe practical and financial constraints which militate against achievement of such an objective.

8.2 While the restoration of victim losses represents an appropriate aim of sentencing, normally reparation as a sanction cannot, on its own, meet all the aims of sentencing nor can it be expected to satisfy all of the needs and interests of the victims. Further, the sentencing system alone cannot satisfy the sometimes competing interests of the state, the offender and the victim.

8.3 The Committee's examination of the place of the restoration of victim losses in the criminal sentencing process through the use of reparation orders highlights the present position of victims and raises fundamental policy questions about the relationships between the state, offenders and victims. Recognition of the legitimacy of restoration as an aim in sentencing and the elevation of the reparation order as a sentencing sanction will not, judging on experience in other jurisdictions, have the effect of displacing other aims of sentencing. What it will do, however, is ensure that police, prosecutors and the courts are mindful of the needs and interests of victims and that the question of victim compensation is not treated as a mere afterthought.

8.4 The Committee also notes that many of its recommendations do not turn upon its conclusions concerning the place of restoration as an aim of sentencing or the treatment of the reparation order as a sanction. Many of the Committee's recommendations are of a practical nature which can stand alone. The Committee makes this point bearing in mind that the thrust of its position on policy questions has implications for the traditional dichotomy between the criminal and civil functions of the courts. The Committee, of course, takes the view that the distribution of those functions need not be rigid, especially in cases where that division works against the interests of victims.

8.5 In conclusion, the Committee believes that more can be done to accommodate the interests of victims in the criminal justice system in a balanced way and that the various proposals contained in this report go some way towards meeting that aim.

8 November 1993
Committee Room

APPENDIX I: WRITTEN SUBMISSIONS

| | | |
|----|-------------------|---|
| 1 | 29 January 1993 | Victims of Crime Assistance League |
| 2 | March 1993 | Mr Howard Draper, Solicitor |
| 3 | 11 March 1993 | Confidential |
| 4 | 12 March 1993 | Mr Norman Sims, Citizen |
| 5 | 15 March 1993 | The Police Association |
| 6 | 17 March 1993 | Correctional Services Division, Department of Justice |
| 7 | 20 March 1993 | Professor Arie Freiberg, Criminology Department, University of Melbourne* |
| 8 | 30 March 1993 | Mr Peter Duncan, Sheriff |
| 9 | 5 April 1993 | Dispute Settlement Centre (Geelong) Inc. |
| 10 | 5 April 1993 | Victims of Crime Assistance League |
| 11 | 5 April 1993 | Supporters of Law and Order |
| 12 | 14 April 1993 | Victorian Court Information and Welfare Network |
| 13 | 30 April 1993 | Insurance Council of Australia Limited |
| 14 | May 1993 | Victoria Police |
| 15 | 3 May 1993 | Victorian Association for the Care and Resettlement of Offenders |
| 16 | 18 May 1993 | Victorian Council for Civil Liberties |
| 17 | 20 June 1993 | Mr Norman Sims, Citizen |
| 18 | 22 June 1993 | Mr Jeff Giddings, Department of Legal Studies, La Trobe University |
| 19 | 25 June 1993 | County Court of Victoria |
| 20 | 23 July 1993 | Mr Norman Sims, Citizen |
| 21 | 10 September 1993 | Department of Health and Community Services |
| 22 | 13 September 1993 | Legal Aid Commission of Victoria |
| 23 | 20 September 1993 | Kmart Australia Ltd |
| 24 | 28 September 1993 | Office of the Public Advocate |
| 25 | 13 October 1993 | Law Institute of Victoria |

* The submission was provided prior to the Committee engaging Professor Freiberg to act as consultant to the inquiry.

APPENDIX II: ORAL SUBMISSIONS

| Date | Witness | Hansard Reference |
|---------------|---|-------------------------|
| 25 March 1993 | Associate Professor George Clarke, Monash University and Ms Carmel Benjamin, AO, Victorian Court Information and Welfare Network | 25 March 1993 1 - 32 |
| 28 May 1993 | Mr Remy van de Wiel, Barrister, Victorian Council of Civil Liberties. | 28 May 1993 1 - 19 |
| | Chief Inspector Ashley Dickinson, and Senior Sergeant Colin Moffitt, Victoria Police. | 28 May 1993 20 - 32 |
| 17 June 1993 | Mr Denbigh Richards, General Manager, Community Services Branch, and Mr Daryl Kidd, Centre Manager, Coburg Community Corrections Centre, Correctional Services Division, Department of Justice. | 17 June 1993 1 - 17 |
| | Mr Danny Walsh, Secretary, and Mr Ken Serong, Assistant Secretary, The Police Association. | 17 June 1993 18 - 31 |
| 22 June 1993 | Dr Don Thomson, Convenor, Legal and Social Policy Committee, Victorian Association for the Care and Resettlement of Offenders | 22 June 1993 1-17 |
| | Mr Melvyn Barnett and Ms Shaynee Barnett, Victims of Crime Assistance League | 22 June 1993 18-36 |
| 23 July 1993 | Mr Keith Windle, (Former) Co-ordinator, Dispute Settlement Centre (Geelong) Inc. | 23 July 1993 1-18 |

| | | |
|-------------------|---|----------------------------|
| | Mr Tony MacKintosh, Regional Manager, and Mr Ron Baxter, Technical Manager, Victoria, Insurance Council of Australia Ltd. | 23 July 1993 18-32 |
| | Mr Norman Sims, Citizen Mr Robert Steele, Citizen Mr Peter Neil, Citizen Ms Ruth Lack, Citizen | 23 July 1993 33-49 |
| 10 September 1993 | Mr Jeff Giddings, Lecturer in Legal Studies, La Trobe University | 10 September 1993 1-12 |
| | Mr Peter Duncan, Sheriff of Victoria | 10 September 1993 13-32 |
| 16 September 1993 | Mr Bernard Bongiorno, QC, Chief Administrator, and Ms Janet Atkinson, Manager, Policy and Research, Office of the Director of Public Prosecutions | 16 September 1993 1-21 |
| 28 September 1993 | Ms Marg O'Donnell, Director, Alternative Dispute Resolution Division, Department of Justice and Attorney General, Queensland | 28 September 1993 1-17 |
| 1 October 1993 | Mr Greg Smith, Deputy Director of Education and Information, Legal Aid Commission of Victoria | 1 October 1993 1-19 |
| | Mr Milt Carroll, Juvenile Program Advisor, Juvenile Justice Section, Department of Health and Community Services | 1 October 1993 20-35 |
| | Mr Tony MacKintosh, Regional Manager, Victoria, Insurance Council of Australia, and Mr David Letcher and Ms Rima Elia, Solicitors, Morris, Coates and Herle | 1 October 1993 36-52 |
| | Mr Peter McMullin and Ms Dymphna Laurie, Office of the Public Advocate | 1 October 1993 53-61 |

APPENDIX III: RELEVANT PROVISIONS OF THE SENTENCING ACT 1991

1. Purposes

The purposes of this Act are –

- (a) to promote consistency of approach in the sentencing of offenders;
- (b) to have within the one Act all general provisions dealing with the powers of courts to sentence offenders;
- (c) to provide fair procedures –
 - (i) for imposing sentences; and
 - (ii) for dealing with offenders who breach the terms or conditions of their sentences;
- (d) to prevent crime and promote respect for the law by –
 - (i) providing for sentences that are intended to deter the offender or other persons from committing offences of the same or a similar character; and
 - (ii) providing for sentences that facilitate the rehabilitation of offenders; and
 - (iii) providing for sentences that allow the court to denounce the type of conduct in which the offender engaged; and
 - (iv) ensuring that offenders are only punished to the extent justified by –
 - (A) the nature and gravity of their offences; and
 - (B) their culpability and degree of responsibility for their offences; and
 - (C) the presence of any aggravating or mitigating factor concerning the offender and of any other relevant circumstances; and
 - (v) promoting public understanding of sentencing practices and procedures;
- (e) to provide sentencing principles to be applied by courts in sentencing offenders;
- (f) to empower the Full Court to give guideline judgements;
- (g) to provide for the sentencing of special categories of offender;
- (h) to set out the objectives of various sentencing and other orders;
- (i) to ensure that victim of crime receive adequate compensation and restitution;
- (j) to provide a framework for the setting of maximum penalties;
- (k) to vary the penalties that may be imposed in respect of offences under the **Crimes Act 1958**;
- (l) generally to reform the sentencing laws of Victoria.

5. *Sentencing guidelines*

- (1) The only purposes for which sentences may be imposed are –
 - (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
 - (b) to deter the offender or other persons from committing offences of the same or a similar character; or
 - (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
 - (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
 - (e) to protect the community from the offender; or
 - (f) a combination of two or more of those purposes.
- (2) In sentencing an offender a court must have regard to –
 - (a) the maximum penalty prescribed for the offence; and
 - (b) current sentencing practices; and
 - (c) the nature and gravity of the offence; and
 - (d) the offender's culpability and degree of responsibility for the offence; and
 - (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
 - (f) the offender's previous character; and
 - (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.
- (2A) In sentencing an offender a court –
 - (a) may have regard to a forfeiture order made under the Crimes (Confiscation of Profits) Act 1986 in respect of property-
 - (i) that was used in, or in connection with, the commission of the offence;
 - (ii) that was intended to be used in, or in connection with, the commission of the offence;
 - (iii) that was derived or realised, directly or indirectly, from property referred to in sub-paragraph (i) or (ii);
 - (b) must not have regard to a forfeiture order made under that Act in respect of property that was derived or realised, directly or indirectly, by any person as a result of the commission of the offence;
 - (c) may have regard to a pecuniary penalty order made under that Act to the extent to which it relates to benefits in excess of profits derived from the commission of the offence;

- (d) must not have regard to a pecuniary penalty order made under that Act to the extent to which it relates to profits (as opposed to benefits) derived from the commission of the offence.
- (2B) Nothing in sub-section (2A) prevents a court from having regard to a confiscation order made under the Crimes (Confiscation of Profits) Act 1986 as an indication of remorse or co-operation with the authorities on the part of the offender.
- (3) A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.
- (4) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.
- (5) A court must not impose an intensive correction order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community-based order.
- (6) A court must not impose a community-based order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by imposing a fine.
- (7) A court must not impose a fine unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a dismissal, discharge or adjournment.

6. *Factors to be considered in determining offender's character*

In determining the character of an offender a court may consider (among other things) –

- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and
- (b) the general reputation of the offender; and
- (c) any significant contributions made by the offender to the community.

7. *Sentencing orders*

If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence and subject to this Part –

- (a) record a conviction and order that the offender serve a term of imprisonment; or
- (b) record a conviction and order that the offender serve a term of imprisonment by way of intensive correction in the community (an intensive correction order); or
- (c) record a conviction and order that the offender serve a term of imprisonment that is suspended by it wholly or partly; or

- (d) record a conviction and order that the offender be detained in a youth training centre; or
- (e) with or without recording a conviction, make a community-based order in respect of the offender; or
- (f) with or without recording a conviction, order the offender to pay a fine; or
- (g) record a conviction and order the release of the offender on the adjournment of the hearing on conditions; or
- (h) record a conviction and order the discharge of the offender; or
- (i) without recording a conviction, order the release of the offender on the adjournment of the hearing on conditions; or
- (j) without recording a conviction, order the dismissal of the charge for the offence; or
- (k) impose any other sentence or make any order that is authorised by this or any other Act.

38. Program conditions

- (1) Program conditions of a community-based order are –
 - (g) any other condition that the court considers necessary or desirable, other than one about the making of restitution or the payment of compensation, costs or damages.

50. Exercise of power to fine

- (1) If a court decides to fine an offender it must in determining the amount and method of payment of the fine take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.
- (2) A court is not prevented from fining an offender only because it has been unable to find out the financial circumstances of the offender.
- (3) In considering the financial circumstances of the offender, the court must take into account any other order that it or any other court has made or that it proposes to make –
 - (a) providing for the confiscation of the proceeds of the crime; or
 - (b) requiring the offender to make restitution to pay compensation.
- (4) If the court considers –
 - (a) that it would be appropriate both to impose a fine and to make a restitution or compensation order; but
 - (b) that the offender has insufficient means to pay both- the court must give preference to restitution or compensation, though it may impose a fine as well.

- (5) A court in fixing the amount of a fine may have regard to (among other things) –
- (a) any loss or destruction of, or damage to, property suffered by a person as a result of the offence; and
 - (b) the value of any benefit derived by the offender as a result of the offence.

53. *Instalment order*

If a court decides to fine an offender it may order that the fine be paid by instalments.

54. *Time to pay*

If a court does not make an instalment order it may at the time of imposing the fine order that the offender be allowed time to pay it.

55. *Application by person fined*

An offender who has been fined by a court may, at any time before the commencement of a hearing under section 62(10), apply to the proper officer of that court in the manner prescribed by rules of that court for –

- (a) an order that time be allowed for the payment of the fine; or
- (b) an order that the fine be paid by instalments; or
- (c) an order for the variation of the terms of an instalment order.

56. *Order to pay operates subject to instalment order*

While an instalment order is in force and is being complied with, the order requiring the fine to be paid operates subject to it.

61. *Variation of instalment order or time to pay order*

- (1) If on an application under this sub-section the court which made an order that a fine be paid by instalments or that an offender be allowed time for the payment of a fine is satisfied –

- (a) that the circumstances of the offender have materially altered since the order was made and as a result the offender will not be able to comply with the order; or
- (b) that the circumstances of the offender were wrongly stated or were not accurately presented to the court or the author of a pre-sentence report before the order was made; or
- (c) that the offender is no longer willing to comply with the order –

it may vary the order or cancel it and, subject to sub-section (2), deal with the offender for the offence or offences with respect to

which it was made in any manner in which the court could deal with the offender if it had just found the offender guilty of that offence or those offences.

- (2) In determining how to deal with an offender following the cancellation by it of an order, a court must take into account the extent to which the offender had complied with the order before its cancellation.

72. *Release on adjournment following conviction*

- (1) A court, on convicting a person of an offence, may adjourn the proceeding for a period of up to 60 months and release the offender on the offender giving an undertaking with conditions attached.
- (2) An undertaking under sub-section (1) must have as conditions—
 - (a) that the offender appears before the court if called on to do so during the period of the adjournment and, if the court so specifies, at the time to which the further hearing is adjourned; and
 - (b) that the offender is of good behaviour during the period of the adjournment; and
 - (c) that the offender observes any special conditions imposed by the court.
- (6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.

73. *Unconditional discharge*

A court may discharge a person whom it has convicted of an offence.

74. *Compensation or restitution*

A court may make an order for compensation or restitution in addition to making an order under this Subdivision.

75. *Release on adjournment without conviction*

- (1) A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceeding for a period of up to 60 months and release the offender on the offender giving an undertaking with conditions attached.
- (2) An undertaking under sub-section (1) must have as conditions—
 - (a) that the offender appears before the court if called on to do so during the period of the adjournment and, if the court so specifies, at the time to which the further hearing is adjourned; and

- (b) that the offender is of good behaviour during the period of the adjournment; and
 - (c) that the offender observes any special conditions imposed by the court.
- (6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must dismiss the charge without any further hearing of the proceeding.

76. Unconditional dismissal

A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) dismiss the charge.

77. Compensation or restitution

A court may make an order for compensation or restitution in addition to making an order under this Subdivision.

84. Restitution order

- (1) If goods have been stolen and a person is found guilty or convicted of an offence connected with the theft (whether or not stealing is the gist of the offence), the court may make—
 - (a) an order that the person who has possession or control of the stolen goods restore them to the person entitled to them;
 - (b) an order that the offender deliver or transfer to another person goods that directly or indirectly represent the stolen goods (that is, goods that are the proceeds of any disposal or realisation of the whole or part of the stolen goods or of goods so representing them);
 - (c) an order that a sum not exceeding the value of the stolen goods be paid to another person out of money taken from the offender's possession on his or her arrest.
- (2) An order under paragraph (b) or (c) of sub-section (1) may only be made in favour of a person who, if the stolen goods were in the offender's possession, would be entitled to recover them from him or her.
- (3) The court may make an order under both paragraphs (b) and (c) of sub-section (1) provided that the person in whose favour the order is made does not thereby recover more than the value of the stolen goods.
- (4) If the court makes an order under paragraph (a) of sub-section (1) against a person and it appears to the court that that person in good faith bought the stolen goods from, or loaned money on the security of the stolen goods to, the offender, the court may, on the application of the purchaser or lender, order that a sum not exceeding the purchase price or the amount loaned (as the case

requires) be paid to the applicant out of money taken from the offender's possession on his or her arrest.

- (5) An order under this section –
 - (a) may be made on an application made as soon as practicable after the offender is found guilty, or convicted, of the offence; and
 - (b) may be made in favour of a person on an application made –
 - (i) by that person; or
 - (ii) on that person's behalf by the Director of Public Prosecutions (if the sentencing court was the Supreme Court or the County Court) or the informant or police prosecutor (if the sentencing court was the Magistrates' Court).
- (6) Nothing in sub-section (5)(b)(ii) requires the Director of Public Prosecutions or the informant or police prosecutor (as the case requires) to make an application on behalf of a person.
- (7) A court must not exercise the powers conferred by this section unless in the opinion of the court the relevant facts sufficiently appear from evidence given at the hearing of the charge or from the available documents, together with admissions made by or on behalf of any person in connection with the proposed exercise of the powers.
- (8) In sub-section (7) "**the available documents**" means –
 - (a) any written statements or admissions which were made for use, and would have been admissible, as evidence on the hearing of the charge; or
 - (b) the depositions taken at the committal proceeding; or
 - (c) any written statements or admissions used as evidence in the committal proceeding.
- (9) References in this section to –
 - (a) stealing must be construed in accordance with sub-sections (1) and (4) of section 90 of the **Crimes Act 1958**; and
 - (b) goods include references to a motor vehicle.

85. Enforcement of restitution order

- (1) An order made under sub-section (1)(c) or (4) of section 84 must be taken to be a judgment debt due by the offender to the person in whose favour the order is made and payment of any amount remaining unpaid under the order may be enforced in the court by which it was made.
- (2) An order made under section 84, other than an order referred to in sub-section (1), may be enforced in the court by which it was

made by any means available to that court of enforcing an order made by it in a civil proceeding.

86. Compensation order

- (1) If a court finds a person guilty of, or convicts a person of, an offence it may, on the application of a person suffering loss or destruction of, or damage to, property as a result of the offence, order the offender to pay any compensation for the loss, destruction or damage (not exceeding the value of the property lost, destroyed or damaged) that the court thinks fit.
- (2) If a court decides to make an order under sub-section (1) it may in determining the amount and method of payment of the compensation take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.
- (3) A court is not prevented from making an order under sub-section (1) only because it has been unable to find out the financial circumstances of the offender.
- (4) In making an order under sub-section (1) the court may direct that the compensation be paid by instalments and that in default of payment of any one instalment the whole of the compensation remaining unpaid shall become due and payable.
- (5) An order under sub-section (1) –
 - (a) may be made on an application made as soon as practicable after the offender is found guilty, or convicted, of the offence; and
 - (b) may be made in favour of a person on an application made –
 - (i) by that person; or
 - (ii) on that person's behalf by the Director of Public Prosecutions (if the sentencing court was the Supreme Court or the County Court) or the informant or police prosecutor (if the sentencing court was the Magistrates' Court).
- (6) Nothing in sub-section (5)(b)(ii) requires the Director of Public Prosecutions or the informant or police prosecutor (as the case requires) to make an application on behalf of a person.
- (7) On an application under this section –
 - (a) a finding of any fact made by a court in a proceeding for the offence is evidence and, in the absence of evidence to the contrary, proof of that fact; and
 - (b) the finding may be proved by production of a document under the seal of the court from which the finding appears.

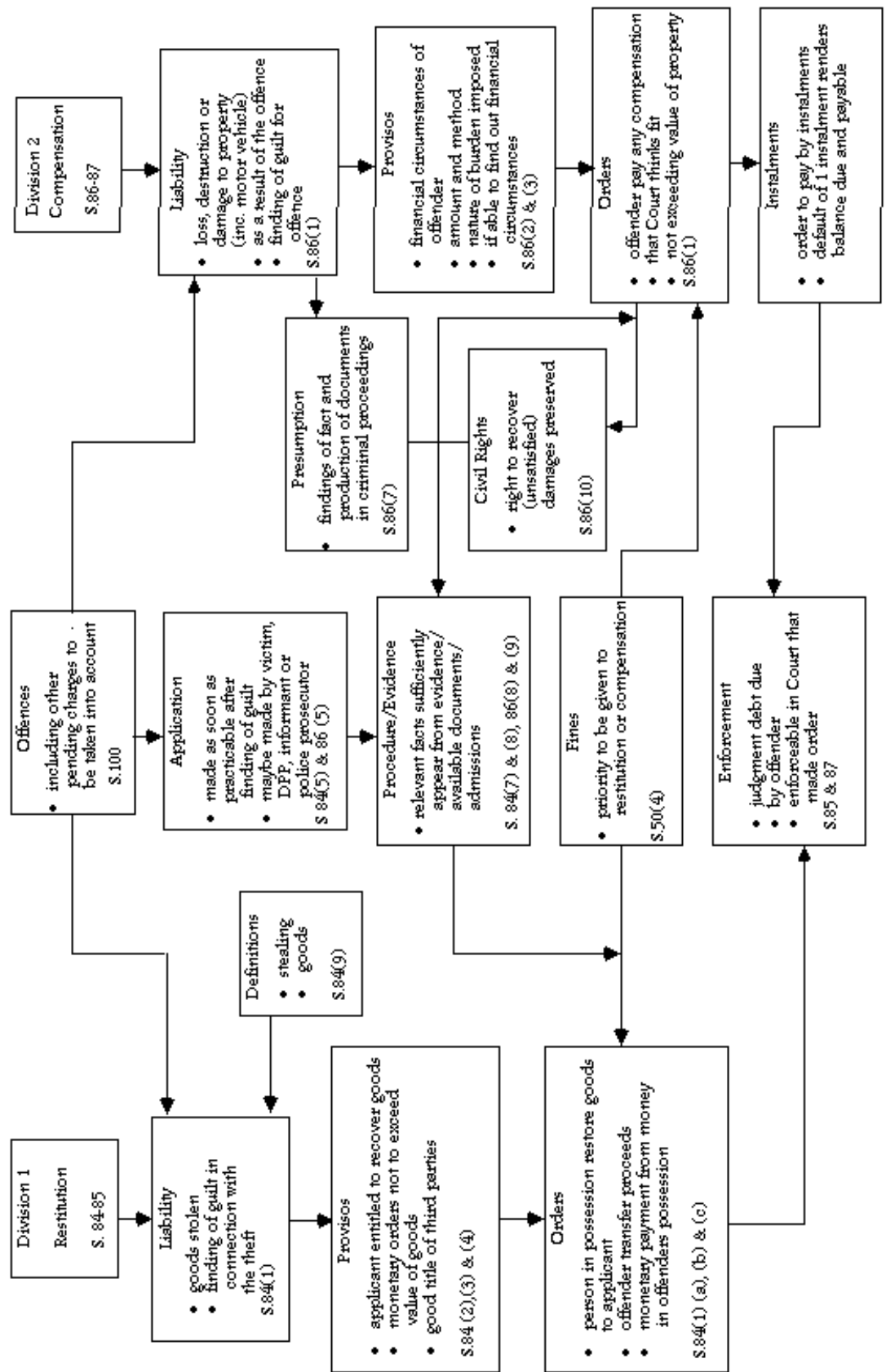
- (8) A court must not exercise the powers conferred by this section unless in the opinion of the court the relevant facts sufficiently appear from evidence given at the hearing of the charge or from the available documents, together with admissions made by or on behalf of any person in connection with the proposed exercise of the powers.
- (9) In sub-section (8) "**the available documents**" means-
 - (a) any written statements or admissions which were made for use, and would have been admissible, as evidence on the hearing of the charge; or
 - (b) the depositions taken at the committal proceeding; or
 - (c) any written statements or admissions used as evidence in the committal proceeding.
- (10) Nothing in this section takes away from, or affects the right of, any person to recover damages for, or to be indemnified against, any loss, destruction or damage so far as it is not satisfied by payment or recovery of compensation under this section.
- (11) References in this section to property include references to a motor vehicle.

87. *Enforcement of compensation order*

An order under section 86(1) must be taken to be a judgment debt due by the offender to the person in whose favour the order is made and payment of any amount remaining unpaid under the order may be enforced in the court by which it was made.

APPENDIX IV

RESTITUTION FOR VICTIMS OF CRIME OPERATION OF PART 4, SENTENCING ACT 1991 EXISTING MODEL



APPENDIX V

TABLE 1 — DEFENDANTS WITH REPARATION ORDERS (CMP'S)

ORDERS MADE FROM 1 JANUARY 1993 TO 30 JUNE 1993

(Magistrates' Courts, Victoria, Australia)

| | | |
|----------------------|-------|---|
| Number of Defendants | 2,118 | First half of 1993 |
| CMP Orders | 2,632 | Number of charges receiving one or more cmp order |
| Total | 4,750 | |

Comment

1. Ratio of CMP Orders to Defendants is 1.24 to 1.
2. Ratio of Offences to separate CMP Orders is 1.8 to 1.
(Global CMP Orders).

CMP ORDERS AS A PERCENTAGE OF ALL OTHER SENTENCES
FOR CASES COMPLETED 1 JANUARY 1993 TO 30 JUNE 1993
(Eligible Offences Only)

TABLE 2 — For those offences where a CMP Order is a possible outcome, what percentage of all the sentences given are CMP Orders?

| | ORDERS | CMP'S | % | RATIO |
|--------------------------------|---------|-------|-------|---------|
| Other C'wealth Offences | 969 | 115 | 11.9 | 8.5 : 1 |
| Social Security | 637 | 247 | 33.8 | 2.5 : 1 |
| Property Damage | 4,214 | 1,090 | 25.9 | 4 : 1 |
| Theft | 55,478 | 2,783 | 5 | 20 : 1 |
| Driving and Traffic | 21,451 | 48 | 0.22% | 447 : 1 |
| Railway Offences | 355 | 49 | 13.8 | 7.2 : 1 |
| Other | 47,190 | 442 | 0.93 | 106 : 1 |
| Total | 130,294 | 4,774 | 3.6 | 27 : 1 |

TABLE 3 — For all cases completed between 1 January 1993 and 30 June 1993 where a CMP Order was actually imposed, what other sentences were also imposed?

| | CUSTODIAL SENTENCES | SUSPENDED SENTENCES | BONDS | COMMUNITY CORRECTIONS | LICENCE | FINES | TOTAL OTHER SENTENCES | CASES WITH A CMP ORDER |
|--------------------------------|----------------------------|----------------------------|--------------|------------------------------|----------------|--------------|------------------------------|-------------------------------|
| Other C'wealth Offences | 31 27% | | 51 44% | 24 21% | | 31 27% | 135 | 115 |
| Social Security | 43 17.4% | | 77 31% | 93 37% | | 64 26% | 277 | 247 |
| Property Damage | 79 7.3% | 43 4% | 115 10.6% | 406 37.6% | 10 0.9% | 426 39.5% | 1,079 | 1,078 |
| Theft | 542 18% | 279 10% | 166 6% | 1,379 50% | 133 5% | 374 13.8% | 2,873 | 2,710 |
| Driving and Traffic | 4 8.6% | 1 2.1% | 3 6.5% | 5 10% | 9 19.5% | 33 71% | 55 | 46 |
| Railway Offences | | | | 86 175% | | 3 6% | 89 | 49 |
| Total | 796 17% | 345 7% | 431 29% | 2069 44% | 154 3.2% | 1136 24% | 4931 | 4,673 |

1. As more than 1 additional penalty can be imposed, percentages total more than 100%.
2. This table follows from the previous one. The number of CMP Orders is essentially the same.

How is receiving a CMP Order related to the other sentences imposed?

TABLE 4.1 — Theft

OFFENCE CATEGORY BY SENTENCE

| | Sentence Custody | Suspended Sentence | Bonds | Community Corrections | Licence | Fines | Total |
|-----------------|-----------------------------|-------------------------------|--------------|----------------------------------|----------------|--------------|--------------|
| All Offences | 7,146 | 4,313 | 6,248 | 11,787 | 161 | 5,931 | 36,586 |
| | 22.3 | 11.8 | 17.1 | 32.2 | .4 | 16.2 | 97.1 |
| CMP Orders only | 236 | 82 | 67 | 436 | 129 | 151 | 1,101 |
| | 21.4 | 7.4 | 6.1 | 39.6 | 11.7 | 13.7 | 2.9 |
| Column Total | 8,382 | 4,395 | 6,315 | 12,223 | 290 | 6,082 | 37,687 |
| | 22.2 | 11.7 | 16.8 | 32.4 | .8 | 16.1 | 100.0 |

TABLE 4.2 — Property Damage Offences

OFFENCE CATEGORY BY SENTENCE

| | Sentence Custody | Suspended Sentence | Bonds | Community Corrections | Licence | Fines | Total |
|-----------------|-----------------------------|-------------------------------|--------------|----------------------------------|----------------|--------------|--------------|
| All Offences | 757 | 404 | 1,087 | 1,650 | 31 | 2,035 | 5,964 |
| | 12.7 | 6.8 | 18.2 | 27.7 | .5 | 34.1 | 84.7 |
| CMP Orders only | 79 | 43 | 115 | 406 | 10 | 426 | 1,079 |
| | 7.3 | 4.0 | 10.7 | 37.6 | .9 | 39.5 | 15.3 |
| Column Total | 836 | 447 | 1,202 | 2,056 | 41 | 2,461 | 7,043 |
| | 11.9 | 6.3 | 17.1 | 29.2 | .6 | 34.9 | 100.0 |

TABLE 4.3 — Social Security Offences**OFFENCE CATEGORY BY SENTENCE**

| | Sentence Custody | Bonds | Community Corrections | Fines | Total |
|-----------------|-------------------------|--------------|------------------------------|--------------|----------------|
| All Offences | 174 19.6 | 397 44.7 | 115 12.9 | 203 22.8 | 889 76.2 |
| CMP Orders only | 43 15.5 | 77 27.8 | 93 33.6 | 64 23.1 | 277 23.8 |
| Column Total | 217 18.6 | 474 40.7 | 208 17.8 | 267 22.9 | 1,166 100.0 |

TABLE 4.4 — Other Commonwealth Offences**OFFENCE CATEGORY BY SENTENCE**

| | Sentence Custody | Suspended Sentence | Bonds | Community Corrections | Fines | Total |
|-----------------|-------------------------|---------------------------|--------------|------------------------------|--------------|----------------|
| All Offences | 187 20.4 | 7 .8 | 292 31.8 | 118 12.9 | 314 34.2 | 918 87.0 |
| CMP Orders only | 31 22.6 | | 51 37.2 | 24 17.5 | 31 22.6 | 137 13.0 |
| Column Total | 218 20.7 | 7 .7 | 343 32.5 | 142 13.5 | 345 32.7 | 1,055 100.0 |

TABLE 4.5 — Railway Offences**OFFENCE CATEGORY BY SENTENCE**

| | Sentence Custody | Suspended Sentence | Bonds | Community Corrections | Licence | Fines | Total |
|-----------------|-------------------------|---------------------------|--------------|------------------------------|----------------|--------------|--------------|
| All Offences | 1 .2 | 2 .5 | 39 9.2 | 13 3.1 | 20 4.7 | 351 82.4 | 426 82.7 |
| CMP Orders only | | | | 86 96.6 | | 3 3.4 | 89 17.3 |
| Column Total | 1 .2 | 2 .4 | 39 7.6 | 99 19.2 | 20 3.9 | 354 68.7 | 515 100.0 |

APPENDIX VI: SELECT BIBLIOGRAPHY

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