

VICTORIAN PARLIAMENT
LAW REFORM COMMITTEE

INQUIRY INTO
RESTITUTION FOR
VICTIMS OF CRIME

FINAL REPORT

MEMBERSHIP

MEMBERSHIP OF THE LAW REFORM COMMITTEE FOR THIS REPORT

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Dr Robert Dean, MP
Hon Bill Forwood, MLC
- Mr Peter Loney, MP
- Hon Jean McLean, MLC
- Mr Peter Ryan, MP
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- Mr Kim Wells, MP
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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 final report of the Parliamentary Law Reform Committee into Restitution for Victims of Crime. It is based on its interim report of November 1993 and responses to that report and its draft recommendations.

It should be understood that the Committee's terms of reference deal with only a small legally defined area of a much wider social question. Nothing that is achieved by way of reparation through the courts is ever going to make victims—including insurance companies—overwhelmingly gratified by the process of attempting to restore the loss and damage caused by largely impecunious offenders. Indeed the immediate victims of crime will continue to be compensated far more reliably and fully by insurance than by curial processes.

In the interim report the Committee made draft recommendations for legislative and administrative changes to the powers, practices and procedure of sentencing courts in ordering restitution or compensation for property loss or damage under Part IV of the *Sentencing Act* 1991. (The term "reparation" has been adopted as a generic term to cover both restitution and compensation.)

The proposals in the interim report concerned the relationship between reparation orders and current sentencing options, the procedures for the enforcement of reparation orders and the place of mediation between victim and offender in bringing about the restoration of victim losses. The Committee proposed that reparation be more fully integrated into the sentencing process and, in particular, that reparation orders be treated as sentencing orders. As a consequence, it was suggested that reparation orders should be enforceable in the same manner as fines.

Responses to the interim report were divided on these proposals. In particular there was considerable resistance from some quarters of the legal profession and the judiciary to the notion of equating reparation orders with sentencing

orders. The Committee has therefore concluded that it is premature to proceed with that particular proposal, but believes that ultimately the approach foreshadowed in the interim report will come about. Alternatively, the use of reparation orders as conditions of sentences, in one or more of the variations to be found in different jurisdictions, may prove to have evolved in a way which best reconciles the competing interests involved in punishment and reparation, despite the objections to that course outlined in the interim report. Furthermore, suggestions that courts might make reparation orders that were in part sentences subject to criminal sanctions and in part civil orders should not be discarded once and for all, not least because the need to prove facts on which a sentence is founded beyond reasonable doubt might thereby be accommodated without unnecessary delay or expense. The interactions of criminal justice and victim interests, of sentencing and reparation, are so complex and so reliant on judgment that the Committee has preferred to be sure of recommending improvements rather than to be dogmatic in prescribing the one best answer.

In practice, sentencing courts use their understanding of community sentiment in achieving a balance of relevant factors in the sentencing process. It is therefore in point to note that community opinion generally considers reparation to be at least as important as the vindication of the state's abstract interest in punishment. Moreover, the notion of "just deserts" is quite compatible with reparation as a sentencing option if it is selectively deployed in accordance with a mandate to ensure that the other purposes of sentencing are not negated. It will be a rare case where an order requiring an offender to make good any loss or damage caused by his or her wrongdoing will be incompatible with the just punishment for the offence. The ability of sentencing courts to deploy a range of sentencing options so as to match the punishment with the crime means that in many cases the dual purpose of victim compensation and offender punishment can be met without greater difficulty than is already inherent in balancing such a difficult consideration as deterrence with rehabilitation and the other purposes of sentencing. It is not at all difficult to envisage members of the lay public saying that an offender who was subjected to no penalty but a substantial and effectively enforced reparation order was "getting his just deserts". Obviously it matters to the discussion whether the crime is armed robbery or criminal damage by a drunken football fan.

It is important to note that reparation already plays a significant part in the sentencing process, both as a factor relevant to sentencing and by reason of the nature of the jurisdiction conferred on sentencing courts. What the Committee has striven to achieve, in both this report and the interim report, is to give proper recognition to that role.

The way in which the distribution between the civil and criminal functions of the courts can work unfairly against the interests of victims was one important reason for the Committee's exploration in the interim report of the possibilities for integrating reparation into the sentencing process. This observation applies not only to the division between punitive and compensatory functions, but also to the powers, practice and procedure governing reparation orders. Accordingly, and consistently with its decision not to recommend in this final report that reparation should be a sentencing option in the strict sense, the Committee has looked at the desirability of incorporating civil liability, proof and procedure into the jurisdiction to order reparation. While some may question the philosophical basis of such developments, an overriding consideration is that they are designed to overcome perceived deficiencies arising from the current division.

There is no doubt that the question of the proper relation of reparation and sentencing, as well as the weight and relative importance of difficulties that arise from any of the options that have been considered in each aspect of the Committee's inquiry, are matters on which reasonable people will have different views. The Committee has therefore sought to modify the initial approach taken in the interim report with a view to achieving, as far as possible, a consensus for its proposals.

Professor Arie Freiberg, whose work as consultant underlay much of the interim report, has again provided valuable assistance, reflected in Chapter 2. However, if one person were to be nominated as author of the report, it would be Sturt Glacken. In fairness to both it should be noted that the Committee has expressed its own views, which are not always those of either of its consultants, however heavily indebted to them the Committee may be.

* * * * *

Since this is a report to Parliament I should point out that it is time to remove one major and one minor procedural impediment to the work of the Law Reform Committee.

For some reports of some Parliamentary committees it may be desirable that they be made public only by way of tabling in Parliament, thereby attaching privilege to publication of their contents. That is very unlikely to be true for a Law Reform Committee report.

The need to table a report before the end of a sessional period to avoid a delay of several months until another opportunity arises is always a threat to quality and is not compensated by the undoubted advantages of having to meet deadlines. The problem has become considerably worse since the number of sitting weeks has been reduced but the number and length of sitting days in each Parliamentary week have increased. This has meant that finalising the most recent reports of the Committee has taken place over three parliamentary sitting weeks when all members are hard pressed by other work and quorums have to be formed in competition with heavy demands on the few hours when neither House is sitting. If this has not yet affected quality, some time it will.

Provision should be made in the *Parliamentary Committees Act* for publication of Law Reform Committee reports without immediate tabling in Parliament, at least in carefully defined cases.

The minor amendment needed would allow a parliamentary committee which chooses to conduct an inquiry as a full committee rather than through a sub-committee of less than the whole number of the committee's members to act flexibly in taking evidence, as only a sub-committee now can. At present, according to advice received by the clerks, at least five members of the Law Reform Committee must be present if the Committee is to take evidence, whereas one or two members may be appointed to take evidence (possibly outside Victoria in the course of travel for other purposes) if a sub-committee is conducting the inquiry.

James Guest,
1 June 1994

OVERVIEW

1. This is the final report of the Victorian Parliamentary Law Reform Committee on its Inquiry into Restitution for Victims of Crime.
2. In November 1993, the Committee tabled an interim report which examined the legislative and administrative arrangements providing for restitution for victims of crime, with particular reference being given to the relationship of restitution orders to current sentencing options, the enforcement procedures for restitution orders and the role of mediation in restitution.
3. Both the interim report and this final report focus on the principles and procedures governing the making of restitution and compensation orders under Part 4 of the *Sentencing Act* 1991. Throughout the report, the phrase "reparation" is used to cover both restitution and compensation. "Restitution" is the act of restoring or giving back a thing to its proper owner and "compensation" involves the making of a monetary payment in recompense for loss or damage.
4. In the interim report, the Committee made a number of draft recommendations and also raised some additional matters and invited submissions from the public on the various proposals put forward in the interim report.
5. The proposals for legislative and administrative change set out in the interim report addressed:
 - Whether the restoration of victim losses should be viewed as an aim of sentencing.
 - Whether reparation orders should be viewed as sentencing orders, or treated as conditions of sentencing orders, or treated as orders ancillary to the sentencing process.

- The powers of sentencing courts to order reparation and the practice and procedure for the obtaining and making of reparation orders.
- The mechanisms for the enforcement of reparation orders.
- The role that victim/offender mediation programs may have in promoting the restoration of victim losses within the criminal justice system.
- Matters relevant to the provision of support and information services to victims of crime.

6. The Committee concluded that more could be done to accord proper recognition to the interests of victims in the criminal justice system. To this end, the Committee formed the view that although the reparation order can have the dual purpose of compensating victims and punishing offenders, the reparation order could be more closely integrated into the sentencing process.

7. The Committee therefore concluded that reparation should be a stated aim of the sentencing process and, to the extent that it might constitute just punishment for the crime, that reparation be viewed as a sentencing sanction in its own right. Flowing from these conclusions, the Committee proposed that reparation orders be enforced in the same manner as that provided for in relation to fines. In addition to these threshold policy matters, the Committee made a number of recommendations relating to the powers, practice and procedure of sentencing courts to order reparation.

8. However, submissions to the Committee have been divided on the issue of whether reparation should be an aim of the sentencing process and whether the reparation order should be treated as a sentencing order. Upon further consideration, the Committee has concluded that the predominant purpose of the reparation order should be viewed as providing compensation to victims and, in this sense, it constitutes a mechanism for providing civil redress within the sentencing context. In the light of the objection taken in some quarters to the proposal that reparation orders be treated as sentencing orders the Committee feels it would be premature to proceed with such a proposal.

9. The Committee has therefore concluded that the reparation order should continue to be treated as an order ancillary to sentencing and should

be enforced in the same manner as a civil order or judgment. This report therefore concentrates on putting forward proposals of a practical nature designed to encourage the making of reparation orders by sentencing courts in appropriate cases. The Committee's recommendations have been embodied in a draft Bill for an Act entitled the *Sentencing (Reparation) Amendment Act 1994*.

10. Nonetheless, the Committee remains of the view that ultimately reparation will be more fully integrated into the criminal justice system as increased recognition continues to be given to the importance of promoting the interests of victims.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Committee recommends that section 5 of the *Sentencing Act* be amended by:

- providing that the making good of any loss or damage caused by an offence is a secondary aim of sentencing;
- requiring sentencing courts to have regard to any efforts to make good any loss or damage when sentencing offenders;

along the lines of that contained in clause 6 of the *Sentencing (Reparation) Amendment Act*.

(Paragraph 2.37 – p.17)

Recommendation 2

The Committee recommends that section 6 of the *Sentencing Act* be amended in the manner set out in clause 7 of the *Sentencing (Reparation) Amendment Act*, 1994, so that efforts to make good any loss or damage will be relevant to an assessment of the offender's character.

(Paragraph 2.38 – p.17)

Recommendation 3

The Committee recommends that, subject to the outcome of the review of redundant legislation by the Scrutiny of Acts and Regulations Committee, proposed section 10(2) and the Schedule to the *Sentencing (Reparation) Amendment Act* be adopted.

(Paragraph 3.10 – p.22)

Recommendation 4

The Committee recommends that the provisions of sections 84A and 84D(2), (3) and (4) of the *Sentencing (Reparation) Amendment Act*—expanding the power to order restitution to cover property generally, proceeds of stolen property in the possession of third parties and by the creation of an auxiliary jurisdiction—be adopted.

(Paragraph 3.15 – p.24)

Recommendation 5

The Committee recommends that the approach contained in sections 84A, 84D(1)(a) and 85A—in enabling an order for compensation for property loss or damage to extend to consequential losses—be adopted.

(Paragraph 3.22 – p.26)

Recommendation 6

The Committee recommends that the present model for the making and enforcing of reparation orders under the *Children and Young Persons Act 1989* not be altered and that the approach adopted in section 9 of the *Sentencing (Reparation) Amendment Act* be adopted.

(Paragraph 3.28 – p.28)

Recommendation 7

The Committee recommends that:

- police and prosecuting authorities be required to develop administrative procedures for:
 - advising victims of their rights to reparation orders;
 - ascertaining whether victims wish to apply for such orders either direct or through prosecuting authorities;
 - collecting information needed in support of reparation applications;
 - informing victims whether a reparation application is to be made and of the outcome of any such application;

- police and prosecuting authorities develop guidelines for the exercise of their discretion to apply for a reparation order.

(Paragraph 3.42 – p.33)

Recommendation 8

The Committee recommends that the approach in section 84E of the *Sentencing (Reparation) Amendment Act*—requiring courts to give a statement of reasons when declining to make a reparation order in proceedings for offences involving property loss and damage—be adopted.

(Paragraph 3.52 – p.37)

Recommendation 9

The Committee recommends that provision be made (in the form of sections 86A(1)(c) and (2) of the *Sentencing (Reparation) Amendment Act*) for reparation orders to be made in the absence of an application and for victims to prevent the making of a reparation order in cases where they wish to pursue civil remedies.

(Paragraph 3.59 – p.39)

Recommendation 10

The Committee recommends that provision (of the type set out in sections 85B, 86C and 86D of the *Sentencing (Reparation) Amendment Act*) be made for sentencing courts to call additional evidence or to transfer the hearing of reparation claims to civil courts, in appropriate cases.

(Paragraph 3.67 – p.41)

Recommendation 11

The Committee recommends that provision (of the type found in section 87A of the *Sentencing (Reparation) Amendment Act*) be made for:

- sentencing courts to be obliged to take into account, as far as practicable, the financial circumstances of an offender when making a reparation order for the payment of moneys;
- reparation orders involving the payment of moneys to be paid by instalments;

- instalment orders to be made in the same manner as instalment orders made under the *Judgment Debt Recovery Act 1984*.

(Paragraph 3.75 – p.45)

Recommendation 12

The Committee recommends that consideration be given to making it clear whether Division 5 of the *Sentencing Act 1991* allows compliance with reparation orders to be made conditions of release with or without conviction and to limiting the power of courts to impose gaol terms where reparation orders are not complied with.

(Paragraph 3.81 – p.46)

Recommendation 13

The Committee recommends that a notice procedure along the lines of that proposed in section 86B of the *Sentencing (Reparation) Amendment Act* be introduced and that consideration be given to merging such a procedure with the victim impact statement procedure introduced by the *Sentencing (Victim Impact Statement) Amendment Act 1994*.

(Paragraph 3.94 – p.52)

Recommendation 14

The Committee recommends that specific provision—of the type set out in section 87D of the *Sentencing (Reparation) Amendment Act*—be made for offenders and victims to appeal decisions on the making or non-making of reparation orders as if such decisions were final civil orders.

(Paragraph 3.102 – p.54)

Recommendation 15

The Committee recommends that provision—of the type set out in sections 85C and 85D of the *Sentencing (Reparation) Amendment Act*—be made to provide that reparation orders can only be made where a person would be liable by civil law to make good loss and damage and the court is satisfied of such matters on the balance of probabilities.

(Paragraph 3.108 – p.56)

Recommendation 16

The Committee recommends that provision be made—along the lines of section 84B of the *Sentencing (Reparation) Amendment Act*—for sentencing courts to have power to order reparation in cases where a person is not found guilty of a relevant offence but is satisfied that the person should make good loss and damage, according to the principles of a fair civil trial.

(Paragraph 3.117 – p.59)

Recommendation 17

The Committee recommends that a provision similar to section 84D of the *Sentencing (Reparation) Amendment Act* be introduced so as to consolidate and rationalise the powers of sentencing courts to order restitution or compensation.

(Paragraph 3.124 – p.61)

Recommendation 18

The Committee recommends that:

- reparation orders be enforceable in the same manner as civil judgments;
- the payment and enforcement of monetary reparation orders by instalments be governed by the *Judgment Debt Recovery Act 1984*;
- sentencing courts have power to make ancillary orders in aid of enforcement;

and that provisions of the type found in sections 87A to 87C of the *Sentencing (Reparation) Amendment Act* be enacted.

(Paragraph 4.27 – p.72)

Recommendation 19

The Committee recommends that express provision be made (in the form of section 87E of the *Sentencing (Reparation) Amendment Act*) for the preservation of the civil rights of victims to the extent that such rights are not given effect by the making or enforcement of reparation orders.

(Paragraph 4.36 – p.75)

Recommendation 20

The Committee recommends that:

- the court based pre-sentence mediation pilot program being conducted by the Correctional Services Division at the Broadmeadows Magistrates' Court be subject to a thorough evaluation as to its effectiveness and its impact on the sentencing process;
- the introduction of any further mediation programs be deferred pending assessment of the effectiveness of current programs and the evaluation of the program at the Broadmeadows Magistrates' Court;
- 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 mediation process, the enforcement of outcomes and the impact of such programs on the sentencing process.

(Paragraph 5.22 – p.84)

Recommendation 21

The Committee recommends that the Victims' Task Force in its examination of victim services and the needs of victims of crime consider:

- the possibility of establishing a central fund for the provision of support and information services to victims of crime;
- the desirability of establishing a central referral service for victims of crime;
- whether there is need for the establishment of a victims' advocacy service.

(Paragraph 6.11 – p.90)

Recommendation 22

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 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*.

(Paragraph 6.16 – p.92)

Recommendation 23

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.

(Paragraph 6.17 – p.92)

Recommendation 24

The Committee 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.

(Paragraph 6.18 – p.92)

Recommendation 25

The Committee recommends that the Judicial Studies Board be given the financial and administrative support needed for it to fulfil its statutory functions.

(Paragraph 6.19 – p.93)

Recommendation 26

The Committee recommends that the implementation of the proposals contained in this Report be the subject of future review and that consideration be given to enacting a provision of the type found in section 11 of the *Sentencing (Reparation) Amendment Act*.

(Paragraph 6.24 – p.94)

THE INQUIRY

1.1 In November 1993 the Interim Report of the Victorian Parliamentary Law Reform Committee on its inquiry into Restitution for Victims of Crime was tabled in the Parliament.

1.2 The Committee had opted for an Interim rather than Final Report so as to allow for further community consultation on the matters raised by the Inquiry.

1.3 At the time of its tabling, the Committee distributed copies of the Interim Report to a number of individuals and organisations with an interest in the Inquiry and invited written submissions on the Draft Recommendations and Additional Matters put forward in the Interim Report.

1.4 Having considered submissions made in response to the Interim Report, the Committee now makes its Final Report and sets out various Final Recommendations for changes to the legislative and administrative arrangements relating to the provision of restitution for victims of crime. In this regard, the Committee's Terms of Reference required it to examine the adequacy of those arrangements, with particular reference to:

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

This Report should be read in conjunction with the Committee's Interim Report in which the Committee explored the possible integration of restitution and compensation for property loss or damage into the sentencing process. To this end, the Committee considered whether restitution and compensation orders could serve both compensatory and punitive aims by treating such orders as sentencing orders.

THE REPORT

1.5 The Terms of Reference and the Committee's Final Recommendations are set out at the beginning of the Report. Throughout the Report, the term "reparation" is used as a convenient generic term to cover both restitution and compensation for property loss and damage under the provisions of Part 4 of the *Sentencing Act* 1991.

1.6 The Report is divided into the following chapters:

- Chapter 1 provides an introduction to the Report.
- Chapter 2 examines the role of reparation in the sentencing process.
- Chapter 3 examines the power, practice and procedure of sentencing courts to make reparation orders.
- Chapter 4 looks at the ways in which reparation orders can be enforced.
- Chapter 5 examines the role of mediation in the criminal justice system and the place of mediation programmes in promoting the restoration of victim losses.
- Chapter 6 considers matters relating to the provision of support and information services to victims of crime.
- Chapter 7 contains the Committee's conclusion.

1.7 The Report has the following Appendices:

- Appendix I lists persons and organisations who made written submissions in response to the Interim Report and previously.
- Appendix II lists persons and organisations who gave evidence to the Inquiry; the minutes of evidence were tabled with the Interim Report.
- Appendix III reproduces the provisions of the *Sentencing Act* 1991 referred to in the Report.
- Appendix IV contains a draft Bill for an Act entitled the *Sentencing (Reparation) Amendment Act* 1994, designed to amend the *Sentencing Act* 1991 in order to give effect to the Recommendations made in the Report.

- Appendix V is a comparative table of the Committee's draft recommendations and final recommendations.
- Appendix VI is a select bibliography of materials mentioned in the body of the Report.

1.8 For ease of reference, throughout this Report, the draft Bill set out in Appendix IV is referred to as the *Sentencing (Reparation) Amendment Act*. It is intended to provide a model for the implementation of those Recommendations made in the Report which require legislative change. It is a working draft only in need of refinement and the expertise of Parliamentary Counsel. Nonetheless, the Committee believes that it is a useful and worthwhile exercise to attempt to give legislative expression to its Recommendations.

INTERESTS OF VICTIMS

1.9 There is a growing recognition that more can be done to accommodate the interests of victims in the criminal justice system. This has been highlighted, in Victoria, with the recent enactment of the *Sentencing (Victim Impact Statement) Act 1994*.

1.10 Although the proposals in this Report reflect the same concern as that legislation and have potential to complement its aims, there are some significant differences. First, victim impact statements contain particulars of any injury (meaning personal injury), loss or damage suffered, whereas this Report focuses on property loss or damage only. Secondly, victims for that purpose mean persons who have suffered loss or damage as a direct result of a proven offence, whether or not it was reasonably foreseeable. The Committee proposes, in contrast, that the power to order reparation be available for loss or damage that would provable at civil loss, that is, loss or damage that would be reasonably foreseeable and hence suggests that a finding of guilt may not necessarily be a precondition to its exercise. The object of victim impact statements is, by that Act, to assist courts in determining an appropriate sentence. Any efforts or willingness by offenders to make good loss or damage is, in the Committee's view, relevant to sentencing with the possibility that the material canvassed by the courts through impact

statements will overlap that which requires consideration for ordering reparation. Thus, there is potential for the process for the obtaining of reparation orders to merge with the use to which victim impact statements are to be put.

1.11 The major difference in the Draft Recommendations of the Final Report and the Final Recommendations made in this Report is that the Committee has not recommended that reparation orders be treated as sentencing orders. It has reached this conclusion primarily because of the objections made to this proposal in response to the Interim Report. However, it is likely, in the Committee's view, that ultimately the restoration of victim losses will become a significant object of the sentencing process.

1.12 Bearing this in mind, the Committee, in this Report, seeks to promote the following objectives:

- Offenders should, wherever possible, make good the harm caused by their wrongdoing.
- The criminal sentencing process, in providing an opportunity for reparation to be effected, should afford 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 context of the sentencing process, alternative procedures for redress must be effective in terms of both time and cost.

1.13 The Committee hopes that the various Recommendations put forward in this Report will go some way towards achieving those objectives.

CHAPTER 2 REPARATION AND SENTENCING

INTRODUCTION

2.0 In Chapters 2 and 3 of the Interim Report, the Committee considered what role reparation may play as an aim of the sentencing process and the relationship between reparation orders and current sentencing options.

2.1 In particular, the Committee:

- Defined the terms "restitution", "compensation", "reparation" and "victim", for the purposes of inquiry.¹
- Gave an overview of the operation of the provisions of Part IV of the *Sentencing Act* in providing for the making of restitution or compensation orders in relation to property loss or damage.²
- Gave an historical overview of the enactment of provisions enabling sentencing courts to order restitution or compensation.³
- Examined the relationships between the state and the offender, the state and the victim, and the victim and the offender.⁴
- Considered whether reparation can be treated as an aim of the sentencing process.⁵
- Examined how the making of reparation may operate as a mitigating factor in sentencing.⁶

¹ Paragraphs 2.1–2.7, Interim Report.

² As to which, see Freiberg A. and Glacken S., "Restitution for Victims of Crime" (1993) 67 *Law Institute Journal* 794.

³ See Hodgson Committee, *Profits of Crime and their Recovery* (London, Heinemann, 1984) Chapter 2.

⁴ Paragraphs 2.44–2.57, Interim Report.

⁵ Paragraphs 2.58–2.64, Interim Report.

⁶ Paragraphs 3.7–3.20, Interim Report.

- Considered whether the reparation order can be treated as an independent sentencing sanction or, alternatively, as a condition of a sentence.⁷
- Examined the experience of other jurisdictions where reparation is more fully integrated into the criminal justice system.⁸
- Looked at the making of reparation orders by Victorian Magistrates Courts in terms of the frequency in which such orders are made and how they are combined with other sentencing options.⁹
- Considered how reparation orders may be combined with particular sentencing options and where reparation orders may fit in the sentencing hierarchy.¹⁰

2.2 The Committee had concluded that the restoration of victim losses could be viewed as an appropriate aim of sentencing. In this regard, it indicated that reparation could be 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.

⁷ Paragraphs 3.21–3.50, Interim Report.

⁸ For the United Kingdom, see Newburn 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). For New Zealand, see Galaway B. and Walker W., *Restitution Imposed on Property Offenders in New Zealand Courts* (Wellington, Department of Justice, 1985) and Galaway B. and Spier P., *Sentencing to Reparation, Implementation of the Criminal Justice Act 1985* (Wellington, Department of Justice, 1992).

⁹ Paragraphs 3.62–3.74, Interim Report.

¹⁰ Paragraphs 3.75–3.91, Interim Report.

- 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.¹¹

2.3 Consistent with this conclusion, the Committee suggested that it would be appropriate to make provision for sentencing courts to have regard to the impact the offence has had on persons affected by the offence when deciding on an appropriate sentencing disposition.¹²

2.4 Similarly, the Committee also concluded that there were good arguments for treating reparation orders as independent sentencing orders which could be made in addition to, or in substitution for, any sentence that can be imposed by sentencing courts. However, it emphasised that having regard to the dual purpose of the reparation order—in terms of victim compensation and offender punishment—it would be a matter for sentencing courts to determine when use of a reparation order (whether alone or in combination with other sentencing orders) may constitute just punishment for the offence. As a sentencing order, the Committee indicated that, in terms of the sentencing hierarchy, it would be appropriate for sentencing courts not to impose a fine unless the purpose served by the imposition of a fine can not be met by the making of a reparation order.

PROPOSALS

2.5 In the light of these conclusions, the Committee made draft recommendations in the following terms:

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.

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.

¹¹ Paragraph 6, Overview and paragraphs 2.47–2.51, Interim Report.

¹² Paragraphs 2.65–2.68, Interim Report.

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.

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.

2.6 Draft Recommendation 1—recognition of reparation as a subsidiary aim of sentencing—sought to interpose in the relationship between state and offender the interests of victims.¹³ It built upon the increased recognition of being given to the interests of victims in the criminal justice system and recognised the role that reparation can play in providing support for the traditional aims of sentencing. It was also designed to reinforce one of the stated purposes of *Sentencing Act*,¹⁴ that is, to ensure that victims of crime receive adequate compensation and restitution.

2.7 Draft Recommendation 2—that sentencing courts have regard to the impact the offence has had on persons affected by the offence—extrapolates the approach of sentencing courts in assessing the gravity of an offence.¹⁵ Indeed, the approach advocated in Draft Recommendation 2 has been implemented recently through amendments made to section 5 (2) of the *Sentencing Act* by the *Sentencing (Impact Statement) Act* 1994.

2.8 Draft Recommendation 3—that reparation orders be treated as independent sentencing orders—sought to build upon the current role reparation plays as a mitigating factor and the current practice of sentencing courts in combining reparation orders with current sentencing options.¹⁶ The option of treating reparation orders as independent sentencing orders, as opposed to conditions of sentencing orders, was preferred, primarily because of the risk the latter proposal had in accelerating the escalation of sentencing orders along the sentencing hierarchy.¹⁷

¹³ See also, Australian Law Reform Commission, *Sentencing* (Report N^o 44, 1988) at 18.

¹⁴ See section 1(i).

¹⁵ The Draft Recommendation also drew on the approach found in section 16A, *Crimes Act* 1914 (Cth).

¹⁶ As to the practice of Victorian Magistrates' Courts, see paragraphs 3.10–3.14 and 3.62–3.74, Interim Report.

¹⁷ Paragraph 3.84, Interim Report.

2.9 Draft Recommendation 4—that reparation orders be placed under fines in terms of the sentencing hierarchy—flowed from the proposal that reparation orders be treated as sentencing orders. It was suggested that reparation orders be given that status in the sentencing hierarchy in the light of the existing priority given to reparation orders over fines under the *Sentencing Act*.¹⁸

REPARATION AND SENTENCING¹⁹

2.10 It is trite to observe that the power of the criminal courts to make a restitution or compensation order is not a sentencing power, but a power in addition to the sentencing process. Part 4 of the *Sentencing Act* refers to these orders as "Orders in Addition to Sentence," and reparation orders have not been seen to be a substitute for the punishment due to an offender. Sentencing and reparation are linked by the common foundation of a finding of guilt, but have lain uneasily together for over a century.

2.11 In fact, the fundamental conflict between punishment and redress and between the criminal and civil branches of the law is now some eight centuries old. While some argue for the "essential homogeneity"²⁰ of civil and criminal sanctions, the historical distinction remains deeply embedded in Anglo-Australian legal culture and practice. Ever since the *Forfeitures For Treason and Felony Act* 1870 (UK) abolished common law forfeitures and empowered the courts to order offenders to compensate victims for loss or damage to property, the issue of the appropriate role of compensation in the criminal justice system has been the subject of debate. But while some legal systems refuse to lend the aid of the criminal courts to the enforcement of civil debts, others recognise that the ethical precept that "crime should not pay" can be given legal force through the criminal law.²¹

¹⁸ Section 50, *Sentencing Act*.

¹⁹ This part of Chapter 2 draws heavily from a paper delivered by Professor Freiberg entitled "Restitution for Victims of Crime" (Court Network, Autumn Lectures, 25 May 1994).

²⁰ Harland A. T., "Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts" (1982) 30 *University of California at Los Angeles Law Review* 52, 53.

²¹ *Ibid* at 54.

2.12 Despite considerable resistance to any move beyond a comfortable historical pragmatism,²² the growing pressures to recognise the victim's role in the criminal justice system have led to calls for the creation of new paradigms in criminal justice which transcend these traditional distinctions, and which attempt in a creative fashion to reconcile the interests of the state, the offender and the victim.²³ This invites a fundamental re-evaluation of the divisions between the criminal and civil law and of the punitive and compensatory functions of the law. The jurisdiction to order reparation is a place where the criminal and civil branches of the law intertwine and the objects of punishment and compensation may mix. Hence it is an area of the law that invites such a re-evaluation.

2.13 The Committee examined the complex relationships between the state, the offender and the victim. It identified the interests of the state, *vis à vis* the offender, as expressed in the traditional justifications for sentencing: punishment, deterrence, rehabilitation, denunciation and community protection.²⁴ It also identified the state's responsibility to the victim through the provision by it of criminal compensation schemes in cases of personal injury, and through its general provision of a fair and just criminal and civil legal system. Finally, it considered important the relationship between the offender and the victim and suggested that not only should the offender have the primary responsibility to make reparation, but also that the state had a real interest in promoting victim/offender reconciliation through compensation mediation schemes.

2.14 In essence, the Committee concluded that while the sentencing system alone could not satisfy all of these competing interests, it could do more to recognise the interests of victims in the sentencing process and suggested that victim compensation should play a greater part in sentencing. It also formed the view that the dichotomy between civil and criminal legal process and their respective spheres of influence of punishment and compensation, can work to the detriment of victims, offenders and society.

²² Which allows, for considerations of convenience and practicality, the making of reparation orders as a means of providing a summary form of civil redress in the sentencing process: see *R v Braham* [1977] VR 104.

²³ Harland, *op cit*, at 56.

²⁴ Section 5, *Sentencing Act* 1991.

2.15 Drawing upon the work of earlier theorists such as Bentham and Garofolo, the Committee attempted to reconcile the paradox of reparation within the criminal justice system²⁵ by redefining the purposes of reparation in terms of the traditional justifications for criminal sanctions. Thus reparation was viewed as possibly serving the aims of deterrence, rehabilitation, denunciation and retribution. These aims transcended those of compensation itself and were thus seen as serving the traditional public purposes of the criminal law, rather than the more limited private purposes of the civil law.

2.16 To this end, the reparation order could serve the traditional purposes of sentencing by being treated as a middle ranking sanction, lying somewhere between, on the one hand, the dismissal, discharge or adjournment and, on the other hand, the fine. Compensation, mediation and settlement could also be seen as a first response to minor offences—resulting in either the withdrawal of charges or a minor sanction.²⁶ This, of course, is not unknown to our own criminal justice system. For example, section 326 of the *Crimes Act* 1958 provides that it is a defence to the offence of concealing a crime against property

...if the only benefit accepted in return for failing to disclose the commission of the offence is the making good of any loss or injury caused by its commission or the making of reasonable compensation for any such loss or injury.

2.17 This type of provision recognises both the existence of informal settlements and the role of the victim in the criminal dispute resolution process. It interposes into the relationships between state and offender, the dynamics of the relationship between victim and offender. It is perhaps this kind of provision that might provide a legal foundation for mechanisms of mediation and dispute settlement, but more importantly, for a sentencing process which might transcend the traditional justifications of the criminal justice system.²⁷

²⁵ See Henderson L. N., "The Wrongs of Victims' Rights" in Fattah E. A. (ed), *Toward a Critical Victimology* (New York, St Martin's Press, 1992) at 135.

²⁶ Rossner D., "Compensation and Sanctioning—The Court Assistance as Aid to the Resolution of Conflicts", Kaiser G., Kury H. and Albrecht H-J. (eds), *Victims and Criminal Justice* (Freiburg i Br., Max Planck Institute, 1991) at 231.

²⁷ See also the discussion in Chapter 6, Interim Report, dealing with mediation programs designed to bring about reconciliation between victim and offender and the provision of both material and non-material forms of reparation.

2.18 In both Australian and overseas jurisdictions where attempts to re-evaluate the role of reparation have taken place, research has found that there is a discrepancy between public and judicial attitudes.²⁸ Whilst the public is generally in favour of compensation either supplementing or replacing punitive responses to crime, the judiciary is much more reserved. This discrepancy has been reflected in responses to the Committee's Interim Report.

2.19 One reason for rejecting a more prominent role for reparation in sentencing is that reparation cannot be sufficiently "punitive" because compensation imposes no "disbenefit" upon the offender. Compensation is generally seen as hindering the furtherance of criminal justice objectives, rather than achieving them.²⁹ In some cases, this may well be so, but in terms of a wider perspective, this is an unnecessarily restrictive view. These arguments are reflected in the writings of a number of leading commentators. Ezra Fattah³⁰ takes it perhaps too far when he writes:

...having punishment as the central focus of the criminal justice system is neither morally legitimate nor practically effective. It can only act to the detriment of the victim. Dispute settlement, mediation, reconciliation, arbitration, reparation are concepts foreign to a system centred on punishment, a system which regards the crime not as human action but as a legal infraction.

2.20 In the new paradigm of criminal justice, the primary purpose of the criminal law would be to heal the injury, repair the harm, compensate the loss and prevent further victimisation. This would require among other things a rethinking and re-examination of the boundaries which have been erected over the years between civil and criminal law, between civil and criminal courts, as well as the distinction between crimes and torts. These distinctions, which seemingly are often taken for granted, can be detrimental to the interests of victims. Some would argue that these distinctions are, to a large extent, artificial.

²⁸ See paragraphs 1.21-1.23, Interim Report.

²⁹ Hertle D., "Compensation in the Context of Sanctioning and Victim's Interest—Results of Court Practices and Victim Survey", Kaiser G., Kury H. and Albrecht H-J. (eds), *Victims and Criminal Justice* (Freiburg i Br., Max Planck Institute, 1991) at 387.

³⁰ Fattah E. A., "The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", Fattah E. A. (ed), *Toward a Critical Victimology* (New York, St Martin's Press, 1992) at 407.

2.21 Rossner's argument³¹ may represent a more moderate and attractive approach to the problem. In his view, the criminal law of today should not be content with having as its aim just the social condemnation of a violation of the law through the imposition of criminal sanctions. Rather, the criminal law must also see the control of social behaviour through the control of conflicts, and their resolution (which may, in turn, decrease the incidence of future crimes), as being more important. Schneider³² sums up this approach:

Restitution must be seen as an interactional process between offender, victim and society which resolves criminal conflicts and creates harmony and peace between the parties involved. This does not simply involve a monetary payment and a few perfunctory apologetic remarks.

The use of restitution, the solution of the criminal conflict and the reconciliation process involving the offender, the victim and society create a sense of justice in society, something far more important for crime control than deterring the population in general with penal legislation and enforcement. Restitution calls for an alteration in the aims of the criminal justice system in its entirety. The police, district attorneys and courts no longer solely concentrate their activities around the offender. ... The concept of restitution thus demands not only an increased effort on the part of the offender, but also of the victim and society, especially with regard their social control function.

2.22 The Committee's proposals sought to justify reparative aims and sanctions within the existing framework of crime and the sentencing process. Perhaps that is not possible. However, as many are now arguing, perhaps the time has come to transform the framework itself, to make it conform to a broader conception of justice which is more inclusive of the interests of the state, the offender and the victim and which can enhance all of those interests without necessarily derogating from the rights of each.

RESPONSES

2.23 Responses to the proposals contained in Draft Recommendations 1 to 4 were divided as to whether it is appropriate to treat reparation as an aim of sentencing and, more importantly, whether reparation orders can be treated as

³¹ Rossner, loc cit.

³² Schneider H-J., "Restitution Instead of Punishment—Reorientation of Crime Prevention and Criminal Justice in the Context of Development", Kaiser G., Kury H. and Albrecht H-J. (eds), *Victims and Criminal Justice* (Freiburg i Br., Max Planck Institute, 1991) at 371.

sentencing orders. Not surprisingly, the most controversial aspect of the Committee's proposals concerned Draft Recommendation 3, whereby reparation orders were to be equated with sentencing orders.

2.24 Submissions that supported³³ the approach reflected in Draft Recommendations 1 to 4 indicated that reparation can play an important part in the criminal justice system as a way of recognising the interests of victims in a balanced fashion. Submissions opposing³⁴ that approach took the view that the true purpose of the reparation order is and should be to provide compensation for victims of crime. It was suggested, for example, that reparation is concerned with the reinstatement of a previous state of affairs but not whether that state of affairs was just or equitable. In contrast, the sentencing process is concerned with the disruption of that state of affairs and the conduct of the disruptor from a community perspective, whereas the focus of reparation is from an individual perspective.³⁵

2.25 Other submissions also pointed out the practical difficulties that may flow from these proposals.³⁶ Equation of reparation orders with sentencing orders would, it was said, be particularly problematical in the area of enforcement, a matter acknowledged by the Committee in the Interim Report.

2.26 The responses to these proposals very much reflect, not only the traditional dichotomy between criminal and civil processes, but also the distinction between culpability and restoration as principles relevant to sentencing. As the Committee noted in the Interim Report, the principle of culpability focuses on the conduct of the offender, whereas the principle of restoration is concerned with the needs and interests of the victim. This both reinforces and reflects the tension between the dual aims of a reparation sanction as to offender punishment and victim service.

2.27 In the light of the strong division of opinion as to the appropriateness of pursuing the approach reflected in Draft Recommendation 3, the Committee is unable to recommend that such an approach be proceeded with at this stage. Although the purposes of offender punishment and victim compensation are not necessarily incompatible, the practical course to adopt

³³ Written Submissions 1, 5, 6, 7 and 9.

³⁴ Written Submissions 4, 10 and 12.

³⁵ Written Submission 10.

³⁶ Written Submission 11.

may be to treat victim compensation as the predominant purpose of the reparation order where a conflict does arise. Reparation orders would therefore continue to be treated as orders ancillary to sentencing. The essence of reparation orders would be to provide a summary means for effecting civil redress within the sentencing process.

2.28 The Committee has therefore concluded that the approach embodied in Draft Recommendation 3, whereby reparation orders would be treated as sentencing orders, should not be proceeded with. For practical reasons, as discussed in Chapter 3 of the Interim Report, reparation as a condition of sentencing may have to find a place, but in general terms, for the reasons discussed in the Interim Report, the Committee does not believe that it is appropriate, as an alternative, to treat reparation as a condition of sentencing orders.³⁷ Further, as a result of these conclusions, Draft Recommendation 4, dealing with the place of a reparation sanction in the sentencing hierarchy, becomes unnecessary.

2.29 Nonetheless, the Committee believes there are good reasons for proceeding with Draft Recommendations 1 and 2.

RELEVANCE OF REPARATION TO SENTENCING

2.30 Although the Committee has concluded that reparation orders should not be treated as sentencing orders, reparation has, and will continue to, play a part in the sentencing process. This is so for at least two reasons. First, attempts by an offender to make good loss or damage resulting from an offence will operate as a mitigating factor in sentencing.³⁸ Secondly, sentencing courts will have regard to the harm or damage caused by an offence when selecting an appropriate sentence.³⁹

³⁷ Along the lines of that found in sections 19B, 20, 20A and 21B, *Crimes Act 1914* (Cth), as to which, see *Johannessen v Lee* (1993) 93 ATC 4001. See also section 42(1)(g), *Criminal Law (Sentencing) Act 1988* (SA) and sections 104 and 116, *Penalties and Sentences Act 1992* (Qld), discussed at paragraphs 3.41–3.50, Interim Report. For support of such an approach, see Written Submission 2.

³⁸ *R v Mickelberg* (1984) 13 A Crim. R. 365.

³⁹ *R v Penn* (Court of Criminal Appeal, Unreported, 29 April 1994) discussing *R v Brannon* (Court of Criminal Appeal, Unreported, 3 February 1982).

2.31 For the reasons discussed in the Interim Report, the Committee believes that reparation can be an appropriate and legitimate aim of sentencing, albeit a secondary or subsidiary aim. In this regard, the primary concern of the sentencing process must be to assess the just punishment for an offence. This is not to say, however, that pursuit of that objective necessarily excludes promoting the restoration of victim losses within the sentencing process. As the Australian Law Reform Commission noted:⁴⁰

Restitution, where this is possible, should 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.

2.32 Thus, clauses 6 and 7 of the *Sentencing (Reparation) Amendment Act* are in the following terms:

6. *Sentencing guidelines*

(1) In section 5(1) of the Principal Act, after paragraph (db) **insert—**

"(ee) to ensure that offenders, as far as is practicable, make good any loss or damage caused by their offences, consistently with one or more of the above purposes."

(2) In section 5 of the Principal Act, after subsection (2E) **insert—**

"(2F) in sentencing an offender, a court may have regard to:

- (a) any effort made by the offender to make good any loss or damage resulting from the offence;
- (b) willingness on the part of an offender to make good any such loss or damage to the extent his or her means allow;
- (c) the terms of any reparation order made or proposed to be made under Part 4 of this Act."

7. *Offender's Character*

In section 6 of the Principal Act, after the reference to "the community," **insert—**

", including efforts made by the offender to make good any loss or damage caused as a result of the offence."

⁴⁰ ALRC at 18.

2.33 Recognising the concern of sentencing courts that offenders should not be able to "buy their way out of sentences",⁴¹ the provisions of clause 6 make it clear that regard should be had not only to the actual making of reparation but also to any attempts or willingness by offenders to do so.

2.34 The provisions of clause 7, in amending section 6 of the *Sentencing Act*, would require courts to have regard, when assessing an offender's character, to any efforts made by the offender to make good any loss or damage resulting from an offence.⁴² Its purpose is to enshrine the relevance of the making or attempting to make reparation as a mitigating factor for the purposes of sentencing.⁴³

2.35 Thus, clauses 6 and 7 of the *Sentencing (Reparation) Amendment Act* are designed to give some form of statutory expression to the reasoning and principles underlying Draft Recommendation 1 of the Interim Report.

2.36 As to the subject of Draft Recommendation 2—the need to take into account the effects of an offence on a victim—this has been dealt with recently by the Parliament through the enactment of the *Sentencing (Victim Impact Statement) Act* 1994.⁴⁴ Section 5 of that Act inserted the following provisions into section 5(2) of the *Sentencing Act* (a section which deals with factors relevant to sentencing):

- (da) the personal circumstances of any victim of the offence; and
- (db) any injury, loss or damage resulting directly from the offence...

It is therefore unnecessary for the Committee to consider this matter any further.

Recommendation 1

2.37 The Committee recommends that section 5 of the *Sentencing Act* be amended by:

⁴¹ See *R v O'Keefe* [1959] QDR 395 and *Victorian Sentencing Manual*, Compiled by Judges of the County Court of Victoria (Melbourne, Law Printer, 1991) Part 19.3.

⁴² For a similar approach see section 12, *Criminal Justice Act* 1985 (NZ).

⁴³ See, generally, *Victorian Sentencing Committee Report* (1988) at 268–271 and paragraphs 3.7–3.19, Interim Report.

⁴⁴ As to the taking into account the effects of an offence of a "direct" victim, see *R v Penn* (Court of Criminal Appeal, Unreported, 29 April 1994).

- providing that the making good of any loss or damage caused by an offence is a secondary aim of sentencing;
- requiring sentencing courts to have regard to any efforts to make good any loss or damage when sentencing offenders;

along the lines of that contained in clause 6 of the *Sentencing (Reparation) Amendment Act*.

Recommendation 2

2.38 The Committee recommends that section 6 of the *Sentencing Act* be amended in the manner set out in clause 7 of the *Sentencing (Reparation) Amendment Act, 1994*, so that efforts to make good any loss or damage will be relevant to an assessment of the offender's character.

2.39 As the Committee recognised in the Interim Report, however, what is of utmost importance is the need to ensure that the process of obtaining reparation is structured in such a way as to encourage the making and satisfaction of reparation orders as much as possible. It is to these matters that the Committee now turns.

INTRODUCTION

3.1 In Chapter 2 of this Report and in Chapters 2 and 3 of the Interim Report the Committee addressed:

- The role reparation can play as an aim in sentencing.
- The relationship between reparation orders and sentencing orders.
- Whether reparation orders should be treated as sentencing orders, conditions of sentencing orders, or orders ancillary to sentencing.

3.2 For the reasons discussed in Chapter 2, the Committee has concluded that reparation for victims of crime should be a stated subsidiary aim of sentencing.⁴⁵ It has also concluded, however, that reparation orders should remain as orders ancillary to sentencing and not be treated as sentencing orders.

3.3 In this Chapter, the Committee examines the powers of sentencing courts to order reparation and the practice and procedure governing the exercise of such powers. In this regard, the Committee will re-examine the matters considered in Chapter 4 of the Interim Report and the draft recommendations put forward in that Chapter.

⁴⁵ See Recommendations 2 and 3 in Chapter 2.

POWER TO ORDER REPARATION

Legislation

3.4 Although it has been suggested to the Committee that there may be a power at common law to order restitution,⁴⁶ the powers to order reparation are, generally, statutory in nature.⁴⁷

3.5 As noted in the Interim Report,⁴⁸ there remain a number of statutory provisions dealing with reparation in differing contexts. These statutory provisions concern the powers of criminal courts,⁴⁹ statutory powers in relation to the equitable remedy of restitution⁵⁰ in the context of civil proceedings⁵¹ and provisions of a hybrid nature relating to quasi criminal regulatory regimes.⁵² There are also a number of provisions dealing with compensation for property damage suffered by employees in the public sector.⁵³

3.6 The Committee concluded that Part 4 of the *Sentencing Act* should have a predominant role in providing reparation powers in the sentencing process—wherever property loss or damage arises from an offence. It was therefore appropriate that any miscellaneous statutory provisions relating to the powers of sentencing courts to order reparation be repealed unless it could be demonstrated that such provisions served particular purposes that are not catered for by Part 4 of the *Sentencing Act*.

⁴⁶ Written Submission 1, citing *Coghill v. Worrell* (1860) 16 VLR 238.

⁴⁷ See Fox R. and Freiberg A., *Sentencing: State and Federal Law in Victoria* (Melbourne, Oxford University Press 1985) Chapter 5.

⁴⁸ See paragraphs 4.1–4.10, Interim Report.

⁴⁹ *Crimes Act 1958*, sections 90 and 570, *Magistrates Court Act 1989*, section 54, *Children and Young Persons Act 1989*, sections 137, 152 and 191, *Crimes (Confiscation of Profits) Act 1986*, section 121, *Transport Accident Act 1986*, section 121, *Environment Protection Act 1970*, section 65A and *Summary Offences Act 1966*, sections 5, 28, 29, 33 and 34.

⁵⁰ See, generally, Spry, *Equitable Remedies*, Fourth Edition (Melbourne, Law Book Company, 1990) and Goff R. and Jones G., *The Law of Restitution*, Third Edition (London, Sweet and Maxwell, 1986).

⁵¹ See, for example, *Stock Diseases Act 1968*, section 42 and *Bees Act 1971*, sections 16 and 17.

⁵² See, for example, *Sale of Goods (Vienna Convention) Act 1987 (Schedule 1)*, and *Fair Trading Act 1985, Part 3*.

⁵³ See the provisions cited at Footnote 7, Chapter 4, Interim Report.

3.7 However, because an exhaustive review of the utility of these provisions was beyond the scope of the Committee's inquiry, and in the light of the expectation that the Scrutiny of Acts and Regulations Committee would conduct a review on redundant legislation, the following draft recommendation was made:

Draft Recommendation 5

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*.

3.8 A number of submissions⁵⁴ have concurred with the suggestion that a review be undertaken in relation to statutory provisions of this nature and that any provisions which duplicate or overlap with Part 4 of the *Sentencing Act* be repealed. Since the tabling of the Interim Report, a reference has been given to the Scrutiny of Acts and Regulations Committee on redundant legislation.⁵⁵ The Committee understands that the Scrutiny of Acts and Regulations Committee will undertake its review on a portfolio by portfolio basis and it is therefore not clear when it might be in a position to consider the matters the subject of Draft Recommendation 5 of the Interim Report.

3.9 Proposed section 10(2) of the draft *Sentencing (Reparation) Amendment Act* provides that the provisions set out in the Schedule be repealed as from 1 January, 1998. The provisions mentioned in the Schedule are those which appeared to the Committee to be redundant in the light of the significant place of Part 4 of the *Sentencing Act* in dealing with the making of reparation orders in the context of property offences. They are put forward as examples only. It may well be that there are other provisions which fall within this category but, for the reasons noted above, the Committee is not in a position to express a considered view on this matter. Therefore, the approach embodied in the draft *Sentencing (Reparation) Amendment Act* should be read in the context of, and subject to, the outcome of that review.

⁵⁴ See, for example, Written Submission 7.

⁵⁵ *Victoria Government Gazette*, G19, 12 May 1994, 1153.

Recommendation 3

3.10 The Committee recommends that, subject to the outcome of the review of redundant legislation by the Scrutiny of Acts and Regulations Committee, proposed section 10(2) and the Schedule to the *Sentencing (Reparation) Amendment Act* be adopted.

Restitution Orders

3.11 At paragraphs 4.15–4.31 of the Interim Report the Committee discussed the operation of section 84 of the *Sentencing Act* in providing for the making of restitution orders in sentencing.⁵⁶ After examining the operation of section 84, the Committee concluded that the power to order restitution should be expanded in terms of the kinds of property that may be restored, the position of third parties in receipt of the proceeds of stolen property, and the need to confer an auxiliary or ancillary power on sentencing courts. The Committee's recommendation was in the following terms:

Draft Recommendation 6

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.

3.12 Generally, the submissions made to the Committee were supportive of the approach embodied in Draft Recommendation 6 of the Interim Report.⁵⁷ However, some reservations were expressed in relation to the proposal to extend the power to the proceeds of stolen property in the possession or control of third parties.⁵⁸ Such reservations were premised on the assumption that the additional power suggested may override the rights of innocent third parties.

⁵⁶ That discussion should also be read with the historical overview of reparation provisions given at paragraphs 2.13–2.38 of the Interim Report.

⁵⁷ See, for example, Written Submissions 7 and 10.

⁵⁸ See, for example, Written Submission 4.

3.13 However, in making Draft Recommendation 6, the Committee had noted⁵⁹ that third parties who had acquired stolen property or property representing the proceeds of stolen property in good faith and for valuable consideration would maintain their rights at law.⁶⁰ Those rights also include the ability of third parties to make consequential claims against offenders or other parties for failing to give good title to such property. It should also be borne in mind that the present provisions of section 84 already allow sentencing courts to make orders that affect third parties. The only extension suggested by the Committee related to a widening of that power so as to include the proceeds of stolen property as well as the stolen property itself.⁶¹

3.14 The Committee has therefore concluded that the approach adopted in Draft Recommendation 6 of the Interim Report should be proceeded with. The *Draft Sentencing (Reparation) Amendment Act* attempts to implement this approach by:

- defining "property" to include the proceeds of any disposal, realisation or dealing in the property – section 84A;
- defining a "third party" to mean a person who has acquired property in good faith and for valuable consideration – section 84A;
- rewriting the existing power to order restitution in cases where a third party is in possession or control of the property (which will include the proceeds of stolen property) – section 84D(2);
- providing that an order for the restoration of property which affects the interests of a third party can only be made where the relevant third party has been given an opportunity to be heard by the court – section 84D(3).
- conferring a general power to make ancillary orders to promote compliance with reparation orders – section 84D(4).⁶²

⁵⁹ See paragraph 4.30, Interim Report.

⁶⁰ See sections 26–31, *Goods Act 1958* and the discussion in Benjamin, *Sale of Goods*, Third Edition (London, Sweet and Maxwell, 1987) at paragraphs 453–564.

⁶¹ For a succinct discussion of third party interests in the context of the making of restitution orders in sentencing, see Lanham D. *et al.*, *Criminal Fraud* (Melbourne, Law Book Company, 1987) at 548–550.

⁶² See also section 87C relating to ancillary enforcement orders.

Recommendation 4

3.15 The Committee therefore recommends that the provisions of sections 84A and 84D(2), (3) & (4) of the Draft *Sentencing (Reparation) Amendment Act*—expanding the power to order restitution to cover property generally,⁶³ proceeds of stolen property in the possession of third parties and by the creation of an auxiliary jurisdiction – be adopted.

Compensation Orders

3.16 At paragraphs 4.33–4.36 of the Interim Report, the Committee discussed the operation of the provisions of section 86 in conferring power on sentencing courts to order compensation for property loss or damage.

3.17 The Committee had noted that:

The relevant offence categories for the compensation power in section 86 were wider than those applying to the restitution power in section 84, the latter being confined to offences "connected with the theft".

The usual meaning of "loss or damage"⁶⁴ would extend to include not only direct losses but consequential losses⁶⁵.

Section 86 may limit the power to order compensation for consequential loss as it provides that the compensation to be paid shall not exceed "the value of the property lost, destroyed or damaged".

3.18 The Committee, having noted that both the amount and method of payment under a compensation order is subject to the financial means of the offender, concluded that the compensation power should extend to consequential losses by way of, for example, interest, finance and legal costs, that flow from the offence.⁶⁶ The Committee therefore made a draft recommendation in the following terms:⁶⁷

⁶³ Land and interests in land have been excluded from the definition of "property" because of the indefeasibility of title provisions of the *Transfer of Land Act 1958*.

⁶⁴ See *G.H. Renton and Co Limited v. Palmyra Trading Corporation of Panama* [1957] AC 149.

⁶⁵ Which is the case under section 21B of the *Crimes Act 1914* (Cth), see *Murphy v. H.F. Trading Co Pty Ltd* (1973) 47 ALJR 198.

⁶⁶ As to the awarding of interest under section 35 of the *Powers of Criminal Courts Act*

Draft Recommendation 7

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.

3.19 Submissions to the Committee on Draft Recommendation 7 were fairly evenly divided as to the appropriateness of removing the limitation currently found in section 86(1) so that the power to order compensation extended to direct consequential losses.⁶⁸ Those submissions which expressed reservations about such an extension reflected a concern that an order for compensation should not be made for the full amount of the loss and damage arising from the offence where an offender did not have sufficient means to meet such an order.⁶⁹

3.20 Although, for the reasons explained in Chapter 2 of this Report, the Committee has concluded that the predominant purpose of reparation orders should be to provide a summary means for civil redress, the Committee remains of the view that the financial circumstances of an offender should continue to be taken into account by sentencing courts when making an order.⁷⁰ Whilst, in the context of civil proceedings, the financial means of a defendant will be irrelevant to ascertaining the extent of his or her liability, different considerations apply in the context of the sentencing process.⁷¹ These matters were discussed in some detail at paragraphs 4.110–4.128 of the Interim Report. The Committee believes that sentencing courts should take the defendant's financial means into account and should not make an order for compensation when there is no realistic prospect of the offender having the ability to satisfy the terms of such an order. To the extent that a reparation order does not satisfy the full amount of the victim's loss or damage, the victim will continue to have available civil remedies for the balance.⁷²

1973 (UK), see *R v. Schofield* [1978] 2 All E.R. 70. Doubts have been expressed as to the power to award costs under section 663B of the Queensland *Criminal Code*, see *R v. Allsopp* [1972] QWN 34.

⁶⁷ The Committee in making that Draft Recommendation was also influenced by the nature of Australia's obligation under the United Nations *Declaration of the Basic Principles of Justice Relating to the Rights of Victims of Crime*, see paragraph 1.11, Interim Report.

⁶⁸ See, for example, Written Submission 4; cf Written Submission 11.

⁶⁹ See, for example, Written Submission 4.

⁷⁰ See the discussion in Chapter 4.

⁷¹ See *Victorian Sentencing Committee Report 1988* at 358.

⁷² See the discussion further below.

3.21 Accordingly, on the basis that the financial means of an offender remains a relevant consideration for the making of an order for compensation (as to both its amount and method of payment) the Committee has concluded that the reparation provisions should extend to cover not only direct losses but consequential losses. The Committee has also concluded that it is not necessary to give any special definition to the phrase "loss or damage" and that all that is required is to remove the words of limitation—"not exceeding the value of the property lost, destroyed or damaged"—found in section 86(1). This approach is reflected in section 84D(1)(a) of the *Sentencing (Reparation) Amendment Act* which enables a sentencing court to order "that the offender pay compensation for the loss or damage suffered". That expression, of course, is to be read in the context of:

- (a) the introductory words found in section 84D(1) in referring to "property loss or damage"; and
- (b) the definition of "property" in section 84A, which is wide enough to include economic loss.

Further, section 85A—which incorporates civil tests of liability—is to have the effect that loss and damage would be measured in accordance with the well established rules under civil law.⁷³

Recommendation 5

3.22 The Committee recommends that the approach contained in sections 84A, 84D(1)(a) and 85A—in enabling an order for compensation for property loss or damage to extend to consequential losses—be adopted.

Young Offenders

3.23 In its Interim Report, the Committee noted that the position of young offenders in reparation schemes assumes importance given that the number of convictions recorded by the Children's Court that related to property offences was somewhere around 50 per cent of the total convictions recorded in that jurisdiction.⁷⁴

⁷³ See *McGregor on Damages* (Fifteenth Edition) at paragraph 26 cited in Written Submission 12 in relation to tortious liability. See also paragraph 4.34, Interim Report.

⁷⁴ This was made up of 39 per cent of convictions relating to property offences and a further 15 percent relating to fare evasion in the year 1992—see Children's Court

3.24 By section 191 of the *Children and Young Persons Act 1989*, the provisions of Part 4 of the *Sentencing Act* apply to proceedings in the Criminal Division of the Children's Court, with the modification that the court "must" take the financial circumstances of the child into account when making an order for compensation.⁷⁵ In addition, unlike the position under Part 4 of the *Sentencing Act*, conditions can be made as to the making of restitution or compensation in relation to orders for probation, youth supervision or youth attendance orders.⁷⁶ Furthermore, non-compliance with such a special condition can result in breach proceedings for the child to return to court for re-sentencing.⁷⁷

3.25 The statutory regime for the making and enforcement of reparation orders is therefore not uniform in its application to all offenders.⁷⁸ Although the Committee felt it desirable that the statutory model be uniform in its application to both adult and young offenders, it acknowledged that special circumstances may apply in the case of young offenders. It was also noted that insufficient material had been placed before the Committee as to whether the system for making and enforcing reparation orders should be consistent, or whether there was a need to differentiate between the position of adult and young offenders. This led the Committee to make a Draft Recommendation in the following form:

Draft Recommendation 8

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.

3.26 Submissions to the Committee have supported the view that different considerations apply in the case of young offenders and that it would be

Statistics 1992, Annual Report, Department of Justice, Case Flow Analysis Section, Table 4 and paragraph 4.41 of the Interim Report.

⁷⁵ Section 192, *Children and Young Persons Act 1989*.

⁷⁶ Sections 159, 164 and 172, *Children and Young Persons Act 1989*.

⁷⁷ See paragraph 4.40, Interim Report.

⁷⁸ The Committee also noted the effect of section 223E of the *Transport Act 1983* relating to graffiti clean-up programs which, arguably, constitute a wide form of reparation of the type discussed in Chapter 6 of the Interim Report in the context of the possible outcomes of mediation between victim and offender—see paragraphs 4.48–4.49, Interim Report.

inappropriate to extend the changes to Part 4 of the *Sentencing Act*, as proposed by the Committee, to the sentencing of young offenders.⁷⁹

3.27 The Committee believes that it would be inappropriate to apply the changes contemplated in this Report to the sentencing of young offenders, at least not until some practical experience is obtained as to the effects of those changes.⁸⁰ Accordingly, section 9 of the *Sentencing (Reparation) Amendment Act*:

- provides that nothing in that Act is taken to affect the operation of the *Children and Young Persons Act 1989*, in so far as that Act applies the provisions of Part 4 of the *Sentencing Act*;
- inserts a declaratory provision in section 191 of the *Children and Young Persons Act 1989* to provide that only the provisions of Part 4 of the *Sentencing Act*, as in force prior to their amendment by the *Sentencing (Reparation) Amendment Act*, apply to the sentencing of young offenders; and
- has a sunset provision so that as from 1 January 2000 the model for making reparation will be uniform for both adult and young offenders.⁸¹

Recommendation 6

3.28 The Committee recommends that the present model for the making and enforcing of reparation orders under the *Children and Young Persons Act 1989* not be altered and that the approach in section 9 of the *Sentencing (Reparation) Amendment Act* be adopted.

⁷⁹ See, for example, Written Submission 11, although the last mentioned point relies somewhat on the threshold policy issue of treating reparation orders as sentencing sanctions.

⁸⁰ See section 11, *Sentencing (Reparation) Amendment Act*, in providing for a review of the changes put forward in this Report.

⁸¹ This will allow sufficient time for the reviews contemplated by section 11 and Recommendation 3 to be completed.

APPLICATION

3.29 In the Interim Report, the Committee (at paragraphs 4.50–4.77) discussed the role of police and prosecuting authorities in promoting the interests of victims in the criminal justice system through the obtaining of reparation orders on behalf of victims.

3.30 In particular, the Committee discussed:

- The discretion conferred on police and prosecuting authorities under Part 4 of the *Sentencing Act* to make application for reparation orders on behalf of victims.
- The important role police have, in often being the first point of contact for victims, in collecting information needed in support of such applications.
- The need for police and prosecuting authorities to put in place appropriate administrative procedures for the exercise of the discretion to apply for reparation orders and for informing victims of their rights in that regard.

3.31 Research conducted in other jurisdictions,⁸² written and oral submissions presented to the Committee⁸³ and the Committee's own research in relation to orders made by Victorian Magistrates' Courts⁸⁴ indicated that one of the most important factors as to whether a reparation order will be made in favour of a victim in an eligible case is the role that police and prosecuting authorities play in providing appropriate assistance. This led the Committee to make draft recommendations in the following terms:

Draft Recommendation 9

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;

⁸² Moxon D., Corkery J.M. and Hedderman C., *Developments in the Use of Compensation Orders in Magistrates' Courts Since October 1988* (London, HMSO, 1992) and Galaway B. and Spier P., *Sentencing to Reparation; Implementation of the Criminal Justice Act 1985* (Wellington, Department of Justice, 1992).

⁸³ See paragraph 4.62, Interim Report.

⁸⁴ See Chapter 5, Interim Report.

- 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.

Draft Recommendation 10

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.

3.32 Submissions to the Committee were, by and large, supportive of the approach contained in these Draft Recommendations.⁸⁵ In this regard, it was acknowledged that victims need to be fully informed of their rights to seek reparation orders⁸⁶ and how such orders may be obtained in their favour. It was also acknowledged that police and prosecuting authorities should accept some responsibility for assisting victims in pursuing reparation claims.⁸⁷ However, some submissions emphasised that the primary responsibility of these authorities is to investigate and prosecute offences and there may be instances where that will place limits on the ability of police and prosecuting authorities to promote the interests of victims.⁸⁸ The first part of Draft Recommendation 9 required the Victoria Police to put in place policies and practices for assisting victims in making applications for reparation orders. In a submission to the Committee,⁸⁹ the Victoria Police noted that:

- Responsibility for the collection and presentation to the court of information in support of a reparation application must rest with the victim.
- The responsibility to inform victims of their rights in respect to reparation should extend to include prosecuting authorities as well as the police.
- Implementation of this proposal would have significant resource implications.

⁸⁵ See, for example, Written Submissions 7, 10 and 11.

⁸⁶ See Written Submission 10.

⁸⁷ See Written Submission 6.

⁸⁸ See Written Submissions 6 and 11.

⁸⁹ Written Submission 6.

3.33 The Committee agrees that if victims wish to pursue their rights to obtain reparation, it is necessary that they be in a position to substantiate such claims. However, to the extent that police investigate an alleged offence and collect or obtain sufficient evidence to be used in the prosecution of an offence,⁹⁰ the Committee believes that the police are in a position to assist victims in compiling the material needed to support a reparation claim. Further, if, which is the practice,⁹¹ police and prosecuting authorities are to make reparation applications on behalf of victims, then it will be necessary for those authorities to obtain the material needed in support of such applications.

3.34 The Committee, however, does not propose that any positive statutory obligation be placed on police and prosecuting authorities. It is necessary that these authorities retain some discretion in the matter so that pursuit of their primary responsibility – the investigation and prosecution of offences – is not hampered unduly.⁹²

3.35 The Committee appreciates that implementation of this proposal will have a significant financial and administrative impact on the operations of police and prosecuting authorities. It is not in a position to assess the quantum of that impact.⁹³ Although the Committee is mindful that the approach reflected in Draft Recommendations 9 and 10 will have significant resource implications, it believes that there is considerable merit in pursuing these objectives. It is to be noted that police and prosecuting authorities have already taken steps in this direction (for example, through the introduction by the Victoria Police of a Victim Service Strategy) and this should be encouraged.

3.36 The third part of Draft Recommendation 9 suggested, in a similar fashion to the first part, that procedures be developed for informing victims as to whether a reparation application is to be made and, if so, of the outcome of the application. The proposal was based on the finding in the Committee's qualitative research into reparation orders made by Victorian Magistrates'

⁹⁰ See Written Submission 6.

⁹¹ Paragraphs 4.71 and 4.74–4.75, Interim Report.

⁹² See section 86D, *Sentencing (Reparation) Amendment Act*.

⁹³ For an indication of some of the likely implications of implementing the proposal, see Written Submission 6.

Courts⁹⁴ that in many cases reparation orders were obtained on behalf of victims without their being informed that an application was to be made or that an order had been made in their favour. The Committee was of the view that this situation was most unsatisfactory. Part 4 of the *Sentencing Act* requires victims to enforce the terms of a reparation order. Without being informed of the existence of a reparation order made in their favour, victims are being deprived of their rights to seek redress through the enforcement of a reparation order.

3.37 The issues arising out of the third part of Draft Recommendation 9 are similar to those in relation to the first part, discussed above. Further, submissions to the Committee have generally been supportive of this aspect of Draft Recommendation 9. The Committee acknowledges, however, that in many respects this proposal is a starting point and that the responsibility for promoting the interests of victims lies also with other participants in the criminal justice system, such as the courts and the legal profession.⁹⁵

3.38 Draft Recommendation 10 suggested that prosecuting authorities⁹⁶ develop guidelines for the exercise of the discretion as to whether those authorities should make application for reparation orders. The proposal was put forward in the light of evidence to the Committee suggesting very different approaches to the exercise of the discretion by the Director of Public Prosecutions and the Victoria Police. In this regard, it was not commonplace for the Director of Public Prosecutions to make applications for reparation orders in the Supreme and County Courts, largely because in most instances institutional victims are involved who tend to make their own application through separate representation. In the Magistrates' Courts, however, evidence to the Committee suggested that reparation applications were made by police prosecutors almost as a matter of course. It was therefore thought desirable that a consistent approach be adopted by these bodies.

3.39 Submissions to the Committee were also supportive of the approach adopted in Draft Recommendation 10.⁹⁷ Questions were raised, however, with respect to:

⁹⁴ See paragraph 4.65, Interim Report.

⁹⁵ See Written Submissions 4 and 11.

⁹⁶ Which includes both the Victoria Police and the Director of Public Prosecutions.

⁹⁷ See, for example, Written Submissions 7, 10 and 11.

- the need to ensure that prosecuting authorities retain a discretion in cases where it would be inappropriate to make an application;⁹⁸
- the position of the victim where prosecuting authorities decline to make an application.⁹⁹

3.40 The first matter is addressed by section 86D of the *Sentencing (Reparation) Amendment Act* which makes it clear that police and prosecuting authorities are not obliged to make an application for a reparation order. This is consistent with the Committee's conclusion in the Interim Report¹⁰⁰ that it is unnecessary and undesirable to place a statutory obligation on prosecuting authorities to apply for reparation in eligible cases, particularly in the light of the proposal for the creation of a presumption in favour of reparation.¹⁰¹ The second matter is addressed by a combination of sections 84E, 86A(1)(c) and 86C of the *Sentencing (Reparation) Amendment Act*. In this regard, where application is not made by a prosecuting authority in an eligible case:

- the court will have power to make an order on its own motion – section 86A(1)(c);
- the court will be required to give reasons if it declines to make a reparation order – section 84B; and
- the court will have power to transfer the matter for further hearing in a civil court – section 86C.

These provisions are discussed in further detail below.

3.41 The Committee has therefore concluded that Draft Recommendations 9 and 10 of the Interim Report should be implemented, although with some modification.

⁹⁸ Written Submission 6.

⁹⁹ Written Submission 11.

¹⁰⁰ Paragraph 4.77, Interim Report.

¹⁰¹ Paragraphs 4.78–4.86, Interim Report.

Recommendation 7

3.42 The Committee recommends that:

- police and prosecuting authorities be required to develop administrative procedures for:
 - advising victims of their rights to reparation orders;
 - ascertaining whether victims wish to apply for such orders either direct or through prosecuting authorities;
 - collecting information needed in support of reparation applications;
 - informing victims whether a reparation application is to be made and of the outcome of any such application;
- police and prosecuting authorities develop guidelines for the exercise of their discretion to apply for a reparation order.

A PRESUMPTION IN FAVOUR OF REPARATION

3.43 In some jurisdictions provision is made requiring sentencing courts to give reasons for not awarding compensation in cases involving personal injury or property loss or damage where the circumstances of the case suggest that there is a right to such an order.¹⁰²

3.44 A provision of this nature serves a number of useful purposes, including:

- requiring police, prosecutors, defence counsel and the courts to turn their minds to the question of victim losses;
- highlighting the need for courts to take into account the interests of victims and the impact of crime on them when passing sentence;
- encouraging greater use of the reparation provisions in eligible cases.¹⁰³

¹⁰² Section 37, *Powers of Criminal Courts Act 1973* (UK) and section 53(2A)(b), *Criminal Law (Sentencing) Act 1988* (SA).

¹⁰³ Paragraph 4.85, Interim Report.

Experience in other jurisdictions indicates, however, that the creation of a presumption in favour of the making of a reparation order may not lead to a significant increase in the number of orders made.¹⁰⁴ There may be several reasons why a reparation order is not made by a court in an eligible case. Research indicates that the major reason for this, however, is that reparation is simply not sought either by a victim or on the victim's behalf.¹⁰⁵

3.45 The Committee therefore concluded that the creation of a statutory presumption would not necessarily solve the problem of the under-utilisation of reparation orders.¹⁰⁶ Nonetheless, the Committee concluded that such a statutory presumption should be created for the reasons set out above. Accordingly, the Committee made a Draft Recommendation in the following terms:

Draft Recommendation 11

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.

3.46 Many submissions to the Committee supported this proposal, primarily for the reason that it would help promote the interests of victims in the criminal justice system in a balanced manner.¹⁰⁷ However, concerns have been expressed as to:

- the suggestion that the reasons for declining to make a reparation order should be recorded in writing;¹⁰⁸
- the possibility that a statement of such reasons may give rise to a claim of *res judicata* or issue estoppel and prejudice a victim who pursues subsequent civil remedies.¹⁰⁹

¹⁰⁴ Miers D.R., *Compensation for Criminal Injuries* (London, Butterworths, 1990) at 273 and Moxon *et al* at 6.

¹⁰⁵ Moxon *et al* at 6–14.

¹⁰⁶ As to which, see paragraphs 1.40–1.43, 3.10–3.14 and Appendix IV, Tables 4.1 and 4.2, Interim Report.

¹⁰⁷ See, for example, Written Submissions 9 and 11.

¹⁰⁸ Written Submissions 2 and 4 in the context of the Magistrates' Courts; cf Written Submission 10 in relation to existing practices in the Supreme and County Courts.

¹⁰⁹ Written Submission 11. For a discussion on the operation of the doctrine of *res judicata* and issue estoppel, see *Port of Melbourne Authority v. Anshun Pty Ltd* (1981) 147 CLR 589; [1981] VR 81.

3.47 The Committee acknowledges that the requirement to set out the reasons for declining to make a reparation order in writing will, in the case of the Magistrates' Courts, give rise to practical problems of possible delay and could also impose a significant administrative burden. The same cannot be said with respect to the Supreme and County Courts where transcript facilities will ordinarily be available. The Committee has therefore concluded that the requirement for the reasons to be recorded in writing should not be pursued.

3.48 As to the second concern, this raises more difficult issues. Abolition of the rule in *Hollington v. Hewthorn & Co Ltd*¹¹⁰ – which required a plaintiff in a civil proceeding to re-establish all the facts which may have been proved at the trial of any relevant offence – may be viewed as a two-edged sword. In this regard, findings of fact made by criminal courts which are admissible in subsequent civil proceedings will be relevant both to the existence and absence of civil liability.¹¹¹ In giving reasons for declining to make a reparation order, a sentencing court may make certain findings of fact which may tend to indicate that the victim cannot establish liability on the part of an offender to make good loss or damage. Such a finding will, with the abolition of the rule in *Hollington v. Hewthorn & Co Ltd*, be relevant in any subsequent civil proceeding.

3.49 The Committee believes that these difficulties are best approached by providing that findings of fact made in a criminal proceeding should be prima facie evidence of such facts and may be rebutted by appropriate evidence and through the discharge of an evidentiary as opposed to a persuasive burden. This is the approach adopted in section 85A of the *Sentencing (Reparation) Amendment Act*, in so far as findings of fact in the hearing of the proceeding for the offence may be admissible in the hearing of a reparation claim. That provision will apply to a statement of reasons given under section 85E where the statement of reasons includes findings of fact.

3.50 In Chapter 4, the Committee discusses the operation and abolition of the rule in *Hollington v. Hewthorn & Co Ltd*. It is suggested that the approach adopted in section 85A of the *Sentencing (Reparation) Amendment Act* could be

¹¹⁰ [1943] 1 KB 587, abolished by section 90 of the *Evidence Act 1958* as inserted by the *Evidence (Proof of Offences) Act 1993*, discussed at paragraphs 5.29–5.43, Interim Report.

¹¹¹ A matter noted by the Committee at paragraph 5.37, Interim Report.

extended to the provisions of section 90(1) of the *Evidence Act 1958*, the latter being the provision which abolishes, in Victoria, the rule in *Hollington v. Hewthorn & Co Ltd*.

3.51 The Committee has therefore concluded that there should be a statutory presumption in favour of the making of a reparation order. Section 84E of the *Sentencing (Reparation) Amendment Act* seeks to implement this proposal by requiring courts to give a statement of reasons when declining to make a reparation order in an eligible case.

Recommendation 8

3.52 The Committee recommends that the approach in section 84E of the *Sentencing (Reparation) Amendment Act*—requiring courts to give a statement of reasons when declining to make a reparation order in proceedings for offences involving property loss and damage—be adopted.

3.53 As discussed in the Interim Report, there are two further issues related to the manner in which reparation orders may be obtained, namely:

- whether courts should have power to make reparation orders in the absence of an application; and
- whether victims should have power to prevent the making of reparation orders where they wish to pursue civil remedies.

3.54 In the Interim Report, the Committee made draft recommendations on these matters in the following terms:

Draft Recommendation 12

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.

Draft Recommendation 13

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.

3.55 In many jurisdictions sentencing courts have the power to make reparation orders on their own motion and in the absence of a specific application being made.¹¹² In Victoria, prior to the enactment of the *Crimes (Theft) Act 1973*¹¹³ restitution orders could be made by sentencing courts on their own motion.¹¹⁴ Further, it is arguable that a restitution order *in specie* under section 84(1)(a) of the *Sentencing Act* can be made on the court's own motion.¹¹⁵ It has always been necessary, in the case of compensation orders, for an application to be made.

3.56 Some submissions to the Committee supported enactment of a provision allowing courts to make reparations on their own motion. However, one submission¹¹⁶ opposed this proposal on the basis that the presumption in favour of reparation orders being made in eligible cases "should embrace the concept of notional application" and such an additional provision was therefore unnecessary. The Committee is unsure whether this is correct. It believes the matter should be beyond doubt and that it is appropriate for the courts to have such a power, the use of which, of course, would be a matter for the courts' discretion.

3.57 The proposal in Draft Recommendation 13, that victims have power to prevent the making of an application for reparation on their behalf, has received support in submissions to the Committee.¹¹⁷ The purpose of this proposal is to preserve the rights of victims to take civil proceedings for loss and damage suffered as a result of an offence.¹¹⁸ Although a victim will have the benefit of the evidentiary and transfer mechanisms contemplated by section 85A and 86C of the *Sentencing (Reparation) Amendment Act 1994*, recent

¹¹² See, for example, section 53(2)(a), *Criminal Law (Sentencing) Act 1988* (SA) and section 719, *Criminal Code* (WA).

¹¹³ Based on the *Crimes (Theft) Act 1968* (UK), enacted as a result of recommendations made by the Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences* (1966, Cmnd 2977) discussed in Macleod J.K., "Restitution under the Theft Act 1968" [1968] *Criminal Law Review* 577.

¹¹⁴ Section 471 (Restitution), cf section 546 (Compensation) of the *Crimes Act 1958*.

¹¹⁵ See paragraph 4.87, Interim Report.

¹¹⁶ Written Submission 10.

¹¹⁷ For example, Written Submissions 6 and 7.

¹¹⁸ Such an approach was also recommended in the United Kingdom by the Hodgson Committee, *Profits of Crime and Their Recovery* (London, Heinemann, 1984) at 60 and 150.

changes¹¹⁹ to the use of findings of fact made in criminal proceedings will assist in the conduct of a subsequent civil action.

3.58 Accordingly, the *Sentencing (Reparation) Amendment Act* makes provision for:

- sentencing courts to make reparation orders in the absence of an application, but the power is not to be used where a victim does not want a reparation order to be made – section 86A(1)(c);
- victims to give written notice to informants or prosecutors that a reparation order is not wanted and, in those situations, neither an application nor an order may be made – section 86A(2).¹²⁰

Recommendation 9

3.59 The Committee recommends that provision be made (in the form of sections 86A(1)(c) and (2) of the *Sentencing (Reparation) Amendment Act*) for reparation orders to be made in the absence of an application and for victims to prevent the making of a reparation order in cases where they wish to pursue civil remedies.

JOINING CRIMINAL AND CIVIL PROCEEDINGS

3.60 In many cases, sentencing courts may not make a reparation order due to the insufficiency of evidence or because of the complexity of the factual and legal issues in dispute.¹²¹ In its Interim Report, the Committee expressed concern that in such a situation a victim may be left "in limbo". Given that the 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, the division of functions between criminal and civil courts may work to the disadvantage of victims in requiring the issuing of fresh civil proceedings.

¹¹⁹ Sections 90–91, *Evidence Act* 1958, discussed above.

¹²⁰ See also section 86B(8) dealing with the power to make a reparation order where notice of application has not been given in accordance with that section.

¹²¹ *R. v. Braham* [1977] VR 104 and *R. v. Landolt* (1992) 63 A Crim R. 220, discussed *infra*.

3.61 In some jurisdictions, provision is made for a sentencing court to transfer a reparation claim to a civil court for further hearing.¹²² The procedure is used mostly in cases where a sentencing court is satisfied as to liability but is unable to assess the quantum of the loss or damage. Accordingly, the transfer procedure operates along similar lines to procedures for the assessment of damages in civil cases where liability is not in issue.¹²³

3.62 Furthermore, under sections 84(7) and 86A of the *Sentencing Act*, a reparation order cannot be made unless the "relevant facts sufficiently appear" from the evidence adduced at the hearing of the criminal charge. This restriction may, on its face, prevent a sentencing court from calling additional evidence in order to resolve a disputed reparation claim.¹²⁴

3.63 The Committee therefore concluded that it should be made clear that sentencing courts have power to adjourn the hearing of a reparation claim in order to call additional evidence and that a transfer procedure be introduced. This led the Committee to make a draft recommendation in the following terms:

Draft Recommendation 14

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.

3.64 A number of submissions to the Committee supported the approach adopted in Draft Recommendation 14.¹²⁵ However, concern was expressed as

¹²² For example, section 525A of the *Criminal Code 1924* (Tas), discussed in Warner K., *Sentencing in Tasmania* (Sydney, Federation Press, 1990) at 102.

¹²³ See Order 51, *Supreme Court Civil Procedure Rules*, Chapter 1.

¹²⁴ However, in Written Submission 10, the County Court has suggested that the power to adjourn a proceeding to allow for further evidence to be called may already exist.

¹²⁵ Written Submissions 10, 11 and 12.

to the impact these proposals might have in delaying the sentencing process generally and the hearing of reparation claims in particular.¹²⁶

3.65 The Committee is conscious of the possibility that the adjournment and transfer procedures proposed by it may cause delays in the sentencing process. However, it is necessary to weigh that disadvantage against the benefit of introducing such procedures with a view to encouraging the final resolution of reparation claims.

3.66 The Committee has therefore concluded that it is appropriate for provision to be made enabling sentencing courts to adjourn the hearing of reparation claims for the calling of additional evidence and for the transfer of reparation claims to civil courts. Sections 85B and 86C of the *Sentencing (Reparation) Amendment Act* give effect to these proposals by:

- empowering sentencing courts to direct or allow any party to call further evidence;¹²⁷
- providing that additional evidence may be called with or without an adjournment;
- allowing sentencing courts to transfer the further hearing of a reparation claim to a civil court without the need for the victim to file and serve originating process for the commencement of a civil proceeding;
- providing that transfer orders may be accompanied by a record of findings made by the sentencing court and with directions as to the issues that need to be determined by the civil court.

It is also proposed that the transfer procedure can be invoked where a sentencing court makes a reparation order for only part of the loss and damage suffered. This may arise in cases where the sentencing court is of the view that the financial circumstances of the offender render it impractical to make a reparation order for the full amount of the loss and damage, a matter discussed in further detail below. Section 86D of the *Sentencing (Reparation) Amendment Act* also provides that where a matter is adjourned or transferred,

¹²⁶ Written Submissions 6 and 11.

¹²⁷ That is, evidence in addition to that adduced at the hearing of the proceeding for the relevant offence, as set out in section 85A of the *Sentencing (Reparation) Amendment Act*.

police and prosecuting authorities are not obliged to conduct the further hearing of the matter. It will therefore be necessary for the victim to appear in person or to arrange for representation on the return date of the further hearing of the claim.¹²⁸

Recommendation 10

3.67 The Committee recommends that provision (of the type set out in sections 85B and 86C of the *Sentencing (Reparation) Amendment Act*) be made for sentencing courts to call additional evidence or to transfer the hearing of reparation claims to civil courts, in appropriate cases.

FACTORS RELEVANT TO THE EXERCISE OF THE DISCRETION

3.68 At paragraphs 4.109–4.158 of the Interim Report the Committee discussed the effects that the financial means of the offender, the imposition of other sentencing orders and evidentiary considerations may have on the discretion to order reparation.¹²⁹

The Financial Circumstances of the Offender

3.69 Although civil courts will not be concerned with the financial means of a defendant when making an award of damages, because reparation orders are made in the context of the sentencing process, sentencing courts are required to have regard to the financial circumstances of the offender when making a reparation order. This requirement, in Victoria, has come about as a result of recommendations made by the Legal and Constitutional Committee and the Victorian Sentencing Committee.¹³⁰

3.70 Accordingly, section 86(2) of the *Sentencing Act*—in dealing with the making of compensation orders—provides that in determining the amount and method of payment of the compensation, sentencing courts may take into

¹²⁸ This is modelled on the Tasmanian provisions, noted above.

¹²⁹ See generally, Freiberg A. and Glacken S., "Restitution for Victims of Crime" (1993) 67 *Law Institute Journal* 794.

¹³⁰ Legal and Constitutional Committee, *Report Upon Support Services for Victims of Crime*, Parliamentary Paper N^o 59 (1987) Recommendation 18, and *Victorian Sentencing Committee Report* 1988 at 358.

account, as far as practicable, the financial circumstances of the offender and the nature of the burden that payment of a compensation order may impose.¹³¹ However, the requirement is expressed in directory rather than mandatory terms through the use of the word "may". In contrast, when deciding to impose a fine, sentencing courts "must" take into account the financial circumstances of the offender.¹³² In the case of young offenders, the Children's Court "must" take the financial circumstances of the offender into account when making a reparation order.¹³³ Finally, no similar requirement applies in the case of monetary restitution orders that can be made under section 84(1)(c) of the *Sentencing Act*, presumably because such an order is to relate only to moneys "taken from the offender's possession on his or her arrest".

3.71 As the Committee pointed out in the Interim Report, the financial circumstances of an offender will be relevant both to the amount ordered to be paid and to the manner of payment, which will include the length of any instalment arrangements. Traditionally, sentencing courts would not make instalment orders where the effect would be to subject the offender to arrangements for payment over a long period.¹³⁴ However, more recent authorities suggest that sentencing courts will make an order for instalment arrangements over a fairly long period, at least in cases where the offender has consented to the arrangements.¹³⁵ The Committee noted that this approach may be different to that applied in relation to instalment arrangements for the satisfaction of civil judgments under the *Judgment Debt Recovery Act 1984*.¹³⁶

3.72 The Committee concluded that it is appropriate for sentencing courts to take into account the financial circumstances of an offender in making a reparation order that involved the payment of moneys. This conclusion was also influenced by the Committee's suggestion that reparation be integrated more fully into the sentencing process and that reparation orders operate as sentencing orders. Accordingly, the Committee made a draft recommendation in the following form:

¹³¹ See also section 13(1), *Criminal Law (Sentencing) Act 1988* (SA).

¹³² Section 50(2), *Sentencing Act*.

¹³³ Section 191, *Children and Young Persons Act 1989*.

¹³⁴ *R. v. Olliver* (1989) 11 Cr.App.Rep. (S) 10 and *R. v. Bagga* (1990) Crim. LR 128.

¹³⁵ *DPP v. Jones* (Court of Criminal Appeal, Unreported, 29 October, 1992).

¹³⁶ *Cahill v. Howe* [1986] VR 630 at 634, paragraphs 4.118–9, Interim Report.

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.

3.73 A number of submissions to the Committee supported this proposal.¹³⁷ It was supported primarily because of the view that sentencing courts should not make reparation orders unless there is a realistic prospect of offenders complying with the terms of such orders.¹³⁸ Although one submission pointed out that to some extent this proposal flows from treating reparation orders as sentencing orders,¹³⁹ it is arguable that, consistent with the present position, the financial circumstances of an offender should remain relevant even if the predominant purpose of the reparation order is to provide a means of civil redress. However, the same submission pointed out the difficulty in having orders for limited compensation in criminal courts when no similar limitation operates in civil courts. This difficulty may be overcome, in the Committee's view, by the operation of the transfer procedure (discussed above) and the preservation of civil rights, provided for in section 87E of the *Sentencing (Reparation) Amendment Act*.

3.74 Although the Committee is not persuaded as a matter of logic that a court which is exercising civil jurisdiction in relation to property loss or damage should have regard to the offender's financial circumstances when making, or refusing to make, a reparation order it accepts that the Victorian Sentencing Committee Report, cited above, is a weighty authority. Moreover a court which is prepared to give priority to reparation may need to know what the offender can afford to pay before also imposing a fine. It also believes that, as far as possible, there should be consistency in the approach to instalment arrangements in both criminal and civil courts. Accordingly, section 87A of the *Sentencing (Reparation) Amendment Act* provides that:

- sentencing courts "must" take into account the financial circumstances of an offender when making a reparation order that involves the payment of moneys;

¹³⁷ See, for example, Written Submissions 4, 7, 10 and 11.

¹³⁸ See, for example, Written Submissions 4 and 7.

¹³⁹ Written Submission 10.

- sentencing courts, however, are not precluded from making a reparation order for the payment of moneys when they have been unable to ascertain the financial circumstances of an offender;
- reparation orders for the payment of a sum of money may be on terms that the sum be paid by instalments;
- instalment orders must be made in accordance with and have the same effect as instalment orders made under the provisions of the *Judgment Debt Recovery Act 1984*.¹⁴⁰

Recommendation 11

3.75 The Committee recommends that provision (of the type found in section 87A of the *Sentencing (Reparation) Amendment Act*) be made for:

- **sentencing courts to be obliged to take into account, as far as practicable, the financial circumstances of an offender when making a reparation order for the payment of moneys;**
- **reparation orders involving the payment of moneys to be paid by instalments;**
- **instalment orders to be made in the same manner as instalment orders made under the *Judgment Debt Recovery Act 1984*.**

Imposition of Fines

3.76 In Chapter 2 of this Report and in Chapter 3 of the Interim Report, the Committee discussed the relationship between reparation orders and sentencing orders generally. Of particular concern is the relationship between the imposition of a fine and the making of a reparation order. Section 50 of the *Sentencing Act*¹⁴¹ provides that preference must be given to the making of a reparation order in cases where it might be appropriate also to impose a fine but the offender has insufficient means to satisfy both orders.

3.77 In the Interim Report, the Committee concluded that it was appropriate that reparation orders be given priority over fines. As section 50

¹⁴⁰ This provision is discussed in more detail in Chapter 4.

¹⁴¹ Modelled on section 35(4A), *Powers of Criminal Courts Act 1973* (UK), as amended in 1982. See also section 14, *Criminal Law (Sentencing) Act 1988* (SA) and sections 14 and 48(4), *Penalties and Sentences Act 1992* (Qld).

of the *Sentencing Act* already made provision for this priority, the Committee did not recommend any legislative change.

3.78 The priority given to reparation over fines creates or maintains an anomaly when taken in conjunction with the decision not to make reparation orders sentences which might be enforced in default by CBO or gaol term. For example, a court which might regard a \$2000 fine as appropriate but for the need to require an impecunious offender to pay a similar sum in reparation will be vexed by the possibility that an offender may compound his debt to the victim (possibly an insurance company by subrogation) by arranging prompt payment of a much smaller sum, or may simply make recovery too difficult for the victim to bother about.

3.79 The Committee understands that different views are taken among magistrates concerning the proper construction of Division 5 (Dismissals, discharges and adjournments) of the *Sentencing Act* 1991. On one view the courts can already make compliance with a reparation order, which sections 74 and 77 expressly provide for, a condition of release with or without conviction.¹⁴² The alternative view is that the express power given by sections 74 and 77 impliedly excludes the making of reparation as a possible condition under Subdivisions 2 and 3 of Division 5. However, those who take the latter view sometimes adjourn proceedings to allow reparation to be made.

3.80 Notwithstanding its reservations about achieving reparation by way of a conditional order the Committee acknowledges that the power to impose conditions may be logically necessary if courts are not to be confounded by the hiatus described in paragraph 3.79 above whereby an offender might escape his "just deserts" because of an ineffectual attempt to give reparation its due priority. However, the Committee would be concerned if enforcement of reparation could escalate into a gaol term where none would have been contemplated in the first instance as a sentence, except in the most flagrant cases of contempt of court.

Recommendation 12

3.81 The Committee recommends that consideration be given to making it clear whether Division 5 of the *Sentencing Act* 1991 allows compliance

¹⁴² See Written Submission 2.

with reparation orders to be made conditions of release with or without conviction and to limiting the power of courts to impose gaol terms where reparation orders are not complied with.

The Clear Case Requirement

3.82 In a number of authorities, sentencing courts have made it clear that reparation orders should not be made other than "in the plainest cases when there can be no doubt" that it is appropriate to make an order.¹⁴³

3.83 The reasons for this approach include:

- that the reparation provisions are viewed primarily as providing a summary mechanism for the provision of civil redress;
- a perception that civil courts are better equipped, through pre-trial procedures, including discovery, to make investigations into complex questions of fact and law relating to the ownership and value of stolen property;
- that the civil rights of the victim remain and therefore the non-making of a reparation order will not deprive a victim of his or her rights to obtain redress.

In addition, arguably the restrictive wording of sections 84(7) and 86(8) of the *Sentencing Act* (discussed above) support the clear case requirement.

3.84 As the Victorian Court of Criminal Appeal explained in *D.P.P. v. Landolt*,¹⁴⁴ 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.

However, in *R. v. Braham* it noted that:¹⁴⁵

¹⁴³ See *R. v. Church* (1970) 55 Cr.App.R.65 at 73.

¹⁴⁴ (1992) 63 A.Crim.R. 220, following *R. v. Braham* [1977] VR 104.

¹⁴⁵ [1977] VR 104 at 110.

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 [not] in itself be sufficient to justify the refusal of an order.

3.85 In the United Kingdom, the Hodgson Committee¹⁴⁶ concluded that the clear case requirement was based as much on expediency as principle and only supported its retention whilst there remained a backlog in the courts' business. By a majority, the Hodgson Committee concluded that the clear case requirement should be abolished. In contrast, the Criminal Law Revision Committee was of the view that criminal courts should not become involved in the resolution of complex issues relating to questions of title to property and that these matters are best resolved by civil courts.¹⁴⁷

3.86 In the Interim Report, the Committee concluded that it would be desirable to maintain the present discretion that sentencing courts have to deal with disputed reparation claims, so as to ensure that consideration of complex and disputed claims does not cause undue delays in sentencing. It also concluded that in some instances it may be more appropriate for civil pre-trial procedures to be utilised and therefore that the clear case requirement should be preserved to cater for this sort of case. However, in order to reduce the need for the clear case requirement to be invoked by sentencing courts, the Committee, in addition to canvassing transfer and adjournment procedures, suggested that a pre-hearing notice procedure be considered and made a draft recommendation in the following terms:

Draft Recommendation 16

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;

¹⁴⁶ Hodgson Committee at 56–61. See also the discussion in Lanham *et al* at 556–557.

¹⁴⁷ Criminal Law Revision Committee at 76–79.

- 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.

3.87 In putting forward that proposal, the Committee also suggested that it would be appropriate for the notice procedure to be grafted onto existing procedures so as to minimise the administrative and financial impact of these changes.¹⁴⁸

3.88 Submissions to the Committee on this proposal were divided. Submissions supporting the approach in Draft Recommendation 16¹⁴⁹ reflected a concern that certainty in the procedure for the obtaining of reparation orders be introduced. Submissions opposing this proposal¹⁵⁰ expressed concerns with the costs and delay that might arise and the financial and administrative impact such a system may have on police and prosecuting authorities. Concerns were also expressed¹⁵¹ about the difficulty in engrafting such a procedure onto the Magistrates' Court mention system and it was doubted whether appropriate notice could be given prior to the first mention day.

3.89 The Committee acknowledges that the introduction of a notice procedure will give rise to some additional costs and delay. However, it remains of the view that the benefits of such a system outweigh its disadvantages.¹⁵² It also notes that with the introduction of victim impact statements through the *Sentencing (Victim Impact Statement) Amendment Act*

¹⁴⁸ Through inclusion in a supplementary charge sheet or information or, in the higher courts, by way of a further presentment. See also Hodgson Committee at 48–49 and 56–61.

¹⁴⁹ See, for example, Written Submissions 7 and 10.

¹⁵⁰ See Written Submissions 4 and 5.

¹⁵¹ See Written Submission 11.

¹⁵² As to which, see paragraph 4.152, Interim Report.

1994, and through changes made by the *Crimes (Criminal Trials) Act 1993*,¹⁵³ the criminal justice system is now encouraging parties to exchange information in support of their respective cases prior to the hearing. It believes that a notice procedure for reparation claims is consistent with these developments. It also emphasises that if police have obtained sufficient information to lay a charge for a property offence, they should be in the position to give offenders notice of the likelihood that a reparation application will be made.

3.90 Accordingly, the Committee believes that it is desirable for a notice procedure to be introduced. Section 86B of the *Sentencing (Reparation) Amendment Act* attempts to do this. It is convenient to set out the section in its entirety:

86B. Notice of application

- (1) Where an application is to be made pursuant to section 86A, notice in the prescribed form of an intention to make such an application must be given to the offender or the person against whom a reparation order is sought.
- (2) The notice referred to in subsection (1) must:
 - (a) be in writing and be signed by the victim or on the victim's behalf by any of the persons mentioned at section 86A(1)(b).
 - (b) have attached a notice of objection in the prescribed form.
 - (c) set out:
 - (i) the grounds in support of the application for the reparation order;
 - (ii) a description of the property to which the application relates, including particulars of the property loss or damage;
 - (iii) an address for service of a notice of objection.
 - (d) be served on the offender or the person against whom a reparation order is sought no later than 14 days before the hearing of the proceeding for the offence.
- (3) Upon being served with the notice of intention in accordance with subsection (1), the person served must within 7 days serve a notice of objection setting out the grounds on which the application will be disputed.

¹⁵³ See, in particular, sections 4, 8 and 11, *Crimes (Criminal Trials) Act 1993*.

- (4) Where a person fails to serve a notice of objection in accordance with subsection (3), that person is, subject to subsection (4), taken to admit the claim set out in the application.
- (5) An admission pursuant to subsection (4) may be withdrawn by leave of the court.
- (6) A notice of application and notice of objection must be filed with the court but shall not be filed until the court has heard the charge and has found the person charged guilty or not guilty of the offence.
- (7) Where notice of an application has not been served in accordance with this section, an application for a reparation order may still be made with the leave of the court.
- (8) The court may grant leave under subsection (7) on such conditions as it thinks fit but shall not grant leave if section 86A(2) applies.

3.91 The objectives of the notice procedure include:

- the need to give offenders appropriate notice of an intention on the part of prosecutors or victims to make application for a reparation order;
- increasing the opportunities for the parties to reach agreement on issues relevant to liability and quantum, or at least to narrow the issues in dispute.

Thus, the notice of application and notice of objection procedure is designed to elicit, in advance, the grounds in support of and in opposition to a reparation application. Sections 86B(3), (4) & (5) are modelled on the civil notice to admit procedure.¹⁵⁴ Thus, where an offender fails to deliver a notice of objection, the offender will be taken to admit the claim set out in the application. However, such a deemed admission may be withdrawn by leave of the court¹⁵⁵ so as to avoid any injustice through mere inadvertence. Further, section 86B(6) provides that the notices of application and objection shall not be filed with the court until the court has dealt with the offence. This is to avoid the risk of any prejudicial material being placed on the court file. Finally, section 86B(7) provides that a reparation order may still be made with the leave of the court in cases where a notice of an application has not been served.

¹⁵⁴ See Order 35.02, Supreme Court Civil Procedure Rules, Chapter 1.

¹⁵⁵ See *Cooper's Brewery Ltd v. Panfida Foods Ltd* (1992) 26 NSWLR 738.

3.92 The Committee wishes to emphasise, however, that section 86B is a working model and it appreciates that it may be necessary for there to be further refinements in order to minimise any costs and delay that might arise as a result of the introduction of such procedure. Changes may also be necessary so as to simplify the procedure to take into account the constraints of time in the Magistrates' Courts jurisdiction. Alternatively, as suggested in the Interim Report, it might be more appropriate for the detail of the procedure to be prescribed by the Rules of the Courts so as to allow for greater flexibility in adapting the procedure to suit the requirements of the Courts.

3.93 Further, it may be both possible and desirable to graft the notice procedure onto the procedures introduced recently for the serving and filing of victim impact statements under the *Sentencing (Victim Impact Statement) Amendment Act 1994*. This would have the benefits of introducing a single procedure and reducing the administrative and financial impact of these changes. Section 86B of the *Sentencing (Reparation) Amendment Act* refers to "prescribed forms"¹⁵⁶ for notices of application and objection so as to simplify the drawing of such notices. Consideration could be given to adopting a similar approach in relation to victim impact statements.

Recommendation 13

3.94 The Committee recommends that notice procedure along the lines of that proposed in section 86B of the *Sentencing (Reparation) Amendment Act* be introduced and that consideration be given to merging such a procedure with the victim impact statement procedure introduced by the *Sentencing (Victim Impact Statement) Amendment Act 1994*.

APPEALS

3.95 Although reparation orders are not treated as sentencing orders for punishment, for the purposes of appellate review they are treated as sentences. In this regard, section 566 of the *Crimes Act 1958* picks up a more

¹⁵⁶ Which could be prescribed under the regulation making power in section 116 of the *Sentencing Act*.

general definition of a sentence to include any order made under Parts 3, 4 or 5 of the *Sentencing Act*.

3.96 Sentencing orders made in the Magistrates' Court may be appealed against to the County Court by way of re-hearing, or to the Supreme Court on a question of law, pursuant to sections 83 and 92 of the *Magistrates' Court Act* 1989, respectively. Appeals may be brought by any person against whom a sentencing order is made, that is, the offender, or by the Crown under section 84 of the *Magistrates' Court Act*.

3.97 In the Interim Report, the Committee noted that whether victims should be able to utilise appeal or review procedures in relation to the making or non-making of reparation orders raised difficult questions about the proper place for the interests of victims in the criminal justice system. Reference was made to *D.P.P. v. Landolt*¹⁵⁷ where the Victorian Court of Criminal Appeal did not rule on the victim's application to participate in an appeal initiated by the offender in relation to the making of a reparation order. The Committee noted that arguably a victim had a special interest in a reparation order and for that reason it might be thought that victims should be able to initiate or participate in appeals dealing with reparation orders. However, the Committee pointed out that victims should not be able to appeal the adequacy of an overall sentence and that any appeal rights they have should be restricted to reparation orders. The Committee did not, however, recommend that any specific statutory provision be made for the appeal rights of victims, but invited further submissions on the matter.

3.98 Some submissions to the Inquiry¹⁵⁸ opposed the notion of victims having appeal rights in this area. In this regard, it was pointed out that appeal rights in relation to sentencing should be confined to offenders and prosecuting authorities. It was also noted that any dissatisfaction on the part of victims could be addressed by pursuing civil remedies. One submission,¹⁵⁹ however, suggested that a conferral of appeal rights on both victim and offender would be appropriate if reparation orders are treated as civil orders. Accordingly, the rights of appeal available from civil judgments could apply to reparation orders.

¹⁵⁷ (1992) 63 A.Crim.R. 220.

¹⁵⁸ Written Submissions 7 and 11.

¹⁵⁹ Written Submission 12.

3.99 The Committee has concluded that it might be appropriate to make specific provision for persons affected by the making or non-making of a reparation order to have specific rights of appeal. In this regard, section 87D of the *Sentencing (Reparation) Amendment Act* provides that:

- any person whose interests are affected by a decision to make or not make a reparation order may appeal that decision – section 87D(1);
- such appeals shall be conducted in the same manner as if the relevant decision was a final civil order – section 87D(2);
- the appeal rights would not affect the rights of offenders and prosecuting authorities to appeal sentencing orders – section 87D(3).

3.100 If reparation orders are not treated as sentencing orders, a civil right of appeal might be consistent with the current position as to appeals against sentences where a reparation order has been made. In this respect, in *R. v. Braham*¹⁶⁰ it was held that, as reparation orders were not sentencing orders, regard could not be had to their impact in order to assess the severity of sentence.

3.101 The Committee has been advised that the general law would treat a victim as estopped by election if he or she were to appeal against a court's failure to make a reparation order sought by the victim and subsequently sought to relitigate the matter in a civil court. The Committee has not formed a concluded view on this. Whether or not some form of estoppel might operate against a victim who chooses to appear or be represented in an appeal court, whether or not the appeal has been initiated by the victim, is not likely to be of great practical significance but, in so far as there remains any doubt when a bill is prepared for introduction to the Parliament proposed section 87E might be extended to exclude specifically the operation of an appeal to bar the litigation of any issue.

Recommendation 14

3.102 The Committee recommends that specific provision – of the type set out in section 87D of the *Sentencing (Reparation) Amendment Act* – be made

¹⁶⁰ [1977] VR 104 at 108-109.

for offenders and victims to appeal decisions on the making or non-making of reparation orders as if such decisions were final civil orders.

OTHER MATTERS

Jurisdictional Limits

3.103 In the Interim Report,¹⁶¹ the Committee considered whether the monetary civil jurisdictional limits on the courts should apply to the making of reparation orders in terms of the amount of a compensation order or the value of property the subject of a restitution order.

3.104 The Committee concluded that, on balance, it would be appropriate for the powers of sentencing courts to order reparation to be subject to these jurisdictional limits. It queried whether there might be a need to make specific provision in the *Sentencing Act* to this effect. However, submissions to the Committee¹⁶² suggested that those limits already apply and further supported the notion that such limits should remain in force.

3.105 The Committee has therefore concluded that the powers of sentencing courts to order reparation should be subject to existing civil monetary jurisdictional limits and has further concluded that it is unnecessary to make any specific statutory provision in that regard.

Standard of Proof

3.106 The Committee had noted that, by the combination of the clear case requirement and sections 84(7) and 86(8) of the *Sentencing Act*, there was some doubt as to the standard of proof that should apply in a reparation claim. It was the Committee's view that as the power to order reparation should arise only where civil liability has been established,¹⁶³ it was appropriate that the civil standard of proof upon the balance of probabilities apply. It noted that there was some inconsistency between sections 84 and 86 of the *Sentencing Act*, with only the last mentioned provision adopting a civil standard by use

¹⁶¹ Paragraphs 4.175–4.182, Interim Report.

¹⁶² See Written Submissions 11 and 12.

¹⁶³ However, see the discussion in Lanham *et al* at 560–561 concerning *R. v. Chappel* (1985) 80 Cr. App. R. 31.

of the word "satisfied". The Committee therefore made a draft recommendation in the following terms:

Draft Recommendation 17

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.

3.107 It has been suggested to the Committee that the civil standard does apply¹⁶⁴ and that if there was any doubt, it would be appropriate to make it clear that the civil standard of proof operates in this area.¹⁶⁵ Sections 85C and 85D of the *Sentencing (Reparation) Amendment Act* give effect to these suggestions. It is convenient to set out the sections in full:

85C. Civil liability

A reparation order can only be made where the court is satisfied that the person who has suffered property loss or damage would, in a civil proceeding, be entitled to the order sought and the person against whom the order is sought would, if a party to such a civil proceeding, be liable to make good the loss and damage.

85D. Civil standard

Where in any proceeding a court must determine whether a person has suffered loss and damage as a result of an offence and is entitled to a reparation order under this Part, the court must be satisfied of such matters on the balance of probabilities.

Recommendation 15

3.108 The Committee recommends that provision—of the type set out in sections 85C and 85D of the *Sentencing (Reparation) Amendment Act*—be made to provide that reparation orders can only be made where a person would be liable by civil law to make good loss and damage and the court is satisfied of such matters on the balance of probabilities.

¹⁶⁴ Written Submission 1, citing *R. v. Field* [1982] 1 NSWLR 488.

¹⁶⁵ Written Submissions 10, 11 and 12.

Proof of Ownership and Return of Property

3.109 The Committee had considered whether specific provision should be made for ownership to be proved readily by the use of statutory declarations, conclusive certificates or the like. It also considered current statutory provisions dealing with the powers of courts and police and prosecuting authorities to deal with property pending the outcome of criminal proceedings or upon acquittal.

3.110 The Committee had concluded that it was unnecessary, particularly in the light of recent changes to the rule in *Hollington v. Hewthorn & Co Ltd*,¹⁶⁶ to make specific provision for the manner in which ownership may be proved, noting that this was a matter for the rules of evidence, consideration of which is beyond the Committee's Terms of Reference.¹⁶⁷

3.111 With respect to statutory provisions dealing with the powers of the courts and police and prosecuting authorities to deal with property outside of the context of the *Sentencing Act*,¹⁶⁸ the Committee suggested that a rationalisation of such provisions could be considered further in the context of its earlier recommendation for a review of miscellaneous reparation provisions.

3.112 The Committee has also considered whether the power to order reparation should be exercisable in the case of acquittal. Thus, section 84B of the *Sentencing (Reparation) Amendment Act* provides as follows:

84B. Acquittals

- (1) A reparation order may be made in accordance with this Part notwithstanding that a court has found that the person charged with the offence is not guilty of the offence.
- (2) An order cannot be made under sub-section (1) unless the person against whom the order is to be made has been given the opportunity to challenge and

¹⁶⁶ [1943] 1 KB 587.

¹⁶⁷ See also Legal and Constitutional Committee, *Report Upon Law Relating to Stolen Goods (Livestock)*, Parliamentary Paper N^o 160 (1991) at 21.

¹⁶⁸ See, for example, section 443A, *Crimes Act 1958*, rule 2.18, *Criminal Appeals and Procedures Rules 1988*, section 125, *Police Regulation Act 1958* and section 28, *Summary Offences Act 1966*.

call evidence in relation to any findings relied on in support of the proposed order.

3.113 However, it may be argued that such a provision is unnecessary. In this regard, it is thought that there is power at common law to order restitution in cases where a defendant has been acquitted.¹⁶⁹ The provision would only therefore extend that power to the awarding of monetary compensation. Use of such a power may be necessary, for example, where a court is not satisfied beyond reasonable doubt that a theft has taken place but is, however, satisfied on the balance of probabilities that there has been conversion or detinue of goods. In that type of case, there are obvious benefits in sentencing courts being able to order the return of the property without the need for the victim commencing a civil proceeding seeking injunctive relief and damages.¹⁷⁰

3.114 One difficulty, however, with the approach reflected in section 84B of the *Sentencing (Reparation) Amendment Act* is that such a provision is at odds with the general structure of the *Sentencing Act*, it being premised on the finding of guilt. An alternative approach may therefore be to make specific provision in the *Magistrates' Court Act*, *County Court Act* and *Supreme Court Act* for such a power. However, the Committee, on balance, believes that this approach would be more cumbersome than the insertion of an acquittal provision in Part 4 of the *Sentencing Act*. It also notes that the power of sentencing courts to order reparation in cases of acquittal exists in other jurisdictions, and that these provisions appear not to have given rise to any particular difficulties.¹⁷¹

3.115 A more practical concern might arise where an alleged offender has elected to put the prosecution to proof and not call evidence in relation to the hearing of the charge. In that situation, it would be inappropriate for a court to make a reparation order without allowing the person against whom it is proposed to be made to challenge the findings made in the court. It would be

¹⁶⁹ *Coghill v. Worrell* (1860) 16 VLR 238, cited in Written Submission 1.

¹⁷⁰ Use could not be made in the subsequent civil proceeding of any findings made in the criminal court, as the provisions of sections 90-91 of the *Evidence Act* 1958, discussed above, require a conviction.

¹⁷¹ For example, section 438 *Crimes Act* 1900 (NSW) and section 201, *Criminal Law Consolidation Act* 1935 (SA), discussed in Lanham *et al* at 550-551. Note therefore the definition of "offence" to include an alleged offence in section 84A, *Sentencing (Reparation) Amendment Act* 1994.

more appropriate in that situation for the court to utilise the further evidence transfer procedures under sections 85B and 86C of the *Sentencing (Reparation) Amendment Act*. In an endeavour to avoid this problem, section 84B(2) would require courts to ensure that persons against whom it is proposed to make a reparation order are given sufficient opportunity to challenge such findings.

The Committee's recommendation on the question of reparation orders where a defendant is found not guilty is premised on the conduct of a fair trial of the issues.

3.116 The Committee acknowledges that the creation of a power of the type contemplated by section 84B is problematical. On balance, however, it believes that the approach has some merit and should be explored further.

Recommendation 16

3.117 The Committee recommends that provision be made—along the lines of section 84B of the *Sentencing (Reparation) Amendment Act*—for sentencing courts to have power to order reparation in cases where a person is not found guilty of a relevant offence but is satisfied that the person should make good loss and damage, according to the principles of a fair civil trial.

Rationalisation of Part 4

3.118 There are a number of anomalies in the drafting of sections 84 and 85 (restitution) and 86 and 87 (compensation) of the *Sentencing Act*. These may have arisen due to the differing amendments made to the restitution and compensation provisions over the years.¹⁷² Some of these anomalies include:

- when a victim's civil rights may be preserved;¹⁷³
- when findings of fact made by the criminal court may be admissible on the hearing of the reparation claim;¹⁷⁴
- the possible overlap between section 84(1)(c) dealing with monetary restitution and the compensation provisions of section 86.¹⁷⁵

¹⁷² Discussed in Chapter 2, Interim Report.

¹⁷³ Paragraph 5.29, Interim Report.

¹⁷⁴ Paragraph 5.34, Interim Report.

3.119 The Committee therefore suggested that it might be appropriate to consolidate sections 84–87 of the *Sentencing Act* and made the following draft recommendation:

Draft Recommendation 18

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.

3.120 Submissions to the Committee generally supported such a rationalisation.¹⁷⁶ Accordingly, section 84D of the *Sentencing (Reparation) Amendment Act* is in the following terms:

84D. Reparation orders

- (1) In making an order for the restoration of property loss or damage suffered as a result of an offence, the court may order that:
 - (a) the offender pay compensation for the loss or damage suffered; or
 - (b) the property be restored to the victim if the offender is in possession or control of the property.
- (2) Where a third party is in possession or control of the property and the court is satisfied that:
 - (a) the third party has better title to the property than the victim, the court may order that the offender pay compensation to the victim and allow the third party to retain the property; or
 - (b) the victim has better title to the property than the third party, the court may order that the third party restore the property to the victim and order the offender to pay compensation to the third party.
- (3) An order of the type mentioned in subsection (2) can only be made where the relevant third party has been given an opportunity to be heard by the court.
- (4) Where the court makes a reparation order under this section, it may also make any ancillary order designed to give effect to, or to otherwise promote compliance with, the reparation order.

3.121 Section 84D attempts to combine and re-write the existing provisions of sections 84 and 86 of the *Sentencing Act*. Section 84D(1)(a) deals with the

¹⁷⁵ Hodgson Committee at 89–91.

¹⁷⁶ For example, Written Submissions 7 and 10.

power to order compensation, currently found in existing section 86. Section 84D(1)(b) is similar in terms to the existing restitution power found in section 84(1)(a).

3.122 Section 84D(2) seeks to simplify the application of the restitution provisions found in section 84(1)(b) & (c), (2), (3) and (4) of the *Sentencing Act* to situations where a third party may be in the possession or control of the property the subject of the reparation claim. "Third party" is defined in section 84A to mean a person who has acquired property in good faith and for valuable consideration, in contrast to a person who takes the property with notice of its tainted status or without having given valuable consideration, who is covered by the definition of offender. The issue of whether a third party or the victim has better title to the property is to be determined by operation of civil rules.¹⁷⁷ Where a third party has better title, it is envisaged that the court may order the offender to pay compensation to the victim and allow the third party to retain the property. Conversely, if the victim has better title, the court may order that the third party restore the property to the victim and further order that the offender pay compensation to the third party for the offender's failure to give good title. An additional provision has been made in the form of section 84D(3) so that orders which affect the interests of third parties can only be made where the relevant third party has been given an opportunity to be heard by the court.

3.123 Finally, an ancillary power is conferred on the courts by section 84D(4). This is intended to apply in situations where in order to restore property something more than the mere return of the property is required, for example, by the execution of title documents.

Recommendation 17

3.124 The Committee recommends that a provision similar to section 84D of the *Sentencing (Reparation) Amendment Act* be introduced so as to consolidate and rationalise the powers of sentencing courts to order restitution or compensation.

¹⁷⁷ See Criminal Law Revision Committee at 76–79.

3.125 Having dealt with the powers, practice and procedure governing the obtaining and making of reparation orders, the Committee now turns to consider the question of how reparation orders might be enforced.

CHAPTER 4 ENFORCEMENT PROCEDURES

INTRODUCTION

4.1 One of the most difficult aspects of the Committee's inquiry has been the issue of how reparation orders should be enforced.

4.2 As noted in the Interim Report, there are three models for the enforcement of reparation orders—enforcement by civil procedures, the use of a criminal model of enforcement similar to that applicable to fines, or satisfaction through property seized from the offender.¹⁷⁸

4.3 The Committee had concluded that the state should assume greater responsibility for the enforcement of reparation orders. Further, consistent with its earlier proposal that the reparation order be integrated into the sentencing process by its elevation as a sentencing sanction, the Committee suggested that reparation orders be enforced in the same manner as fines. Thus, the Committee made a draft recommendation in the following terms:

Draft Recommendation 19

The Committee therefore recommends that reparation orders should be subject to the same enforcement procedures as that applicable to fines.

4.4 Under the current system for the enforcement of fines, it may be possible for an offender, with or without intervention of the courts, to convert liability under the order through the performance of unpaid community service. This left the Committee with the difficult issue of what should be done about a victim's civil rights in that situation.¹⁷⁹ This reflected also the difficulty in reconciling the dual purpose—victim compensation and offender

¹⁷⁸ For the reasons noted at paragraphs 5.25–5.28 of the Interim Report, any detailed examination of the operation of the *Crimes (Confiscation of Profits) Act* 1986 is beyond the Committee's Terms of Reference and is a matter which would require separate consideration. The Committee has, however, addressed some options for the making of direct enforcement orders at the time reparation orders are made.

¹⁷⁹ See the discussion of options at paragraphs 5.92–5.94, Interim Report.

punishment—of the reparation order. The Committee concluded, with some reservation, that it would be appropriate to preserve the civil rights of a victim so as to promote the object of victim compensation. It therefore made a draft recommendation in the following terms:

Draft Recommendation 20

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.

4.5 Not surprisingly, submissions to the Committee were divided on these matters. Those submissions¹⁸⁰ supporting the approach reflected in Draft Recommendations 19 and 20 emphasised the importance of the state playing a greater role in procuring reparation for victims. Submissions opposing¹⁸¹ this approach expressed a concern that Draft Recommendation 20 could involve a form of "double jeopardy"¹⁸² and viewed reparation orders as being, in essence, civil judgments and therefore the enforcement of civil orders should be uniform.¹⁸³

4.6 In this Chapter, the Committee examines the options for the enforcement of reparation orders in the light of its conclusion in Chapter 2 that the predominant purpose of reparation orders should be the provision of victim compensation.

CIVIL MODEL

4.7 Sections 85 and 87 of the *Sentencing Act* adopt a civil model for the enforcement of reparation orders. It is necessary for persons in whose favour reparation orders are made to initiate, in the event of default, civil enforcement procedures. However, as discussed below, the words "enforced in the court" which made the reparation order may have the effect that not all of the procedures ordinarily available for the enforcement of civil judgments apply to the enforcement of reparation orders.

180 Written Submissions 6, 7 and 9.

181 Written Submissions 4, 10, 11 and 12.

182 An issue canvassed in the Interim Report at paragraph 5.93.

183 See Written Submissions 10 and 11.

4.8 The method for the enforcement of a reparation order under Part 4 of the *Sentencing Act* will, at the moment, depend on whether the order involves the delivery of property (section 85—restitution) or the payment of money (section 87—compensation). A restitution order can be enforced by a warrant of delivery of goods or recovery of their assessed value. Compensation orders can be enforced by a warrant of seizure and sale, the attachment of debts or earnings, the charging of securities or the appointment of a receiver.¹⁸⁴ Wilful disobedience of a civil order can, ultimately, result in the committal of the person in default.

4.9 Ordinarily, non-compliance with a civil judgment for the payment of a sum of money exceeding \$3000 will constitute an act of bankruptcy with the effect that a judgment creditor may place a judgment debtor in bankruptcy.¹⁸⁵ Further, a money judgment may be the subject of an application for instalment arrangements under the *Judgment Debt Recovery Act* 1984. That Act also provides for certain procedures to be followed in the event that an instalment arrangement is broken. It is arguable, however, that neither of these sets of provisions are available in relation to restitution or compensation orders made by sentencing courts because of the words of limitation found in sections 85 and 87.¹⁸⁶

4.10 The initiation and pursuit of civil enforcement procedures rests with the person in whose favour the reparation order is made. The costs involved¹⁸⁷ in securing compliance with the court order therefore fall on that person.

CRIMINAL MODEL

4.11 Division 4, Part 3 of the *Sentencing Act* sets out the system currently in place for the enforcement of fines imposed by sentencing courts.¹⁸⁸

¹⁸⁴ Order 66, Supreme and County Court Civil Procedure Rules, Chapter 1 and Order 27, Magistrates' Court Civil Procedure Rules.

¹⁸⁵ Section 40, *Bankruptcy Act* 1966 (Cth).

¹⁸⁶ See paragraph 5.8, Interim Report. Also, it may be that the procedure under section 112 of the *Magistrates' Court Act* 1989 for the registration of judgments in the Supreme Court for the seizure and sale of land is not available if the order is made in the Magistrates' Court.

¹⁸⁷ See paragraph 5.9 and Footnote 7, Interim Report.

¹⁸⁸ As to the PERIN procedure, see Schedule 7, *Magistrates' Court Act* 1989.

4.12 Where a fine has been ordered to be paid through instalments, or an extension has been given as to the time to pay the fine, section 61 allows an offender to apply to the court for a variation of the order. Alternatively, the court may cancel the order and deal with the offender for the relevant offence with respect to which the fine was imposed. In the event of default, section 62(10) prescribes an enforcement procedure whereby a court may:

- 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
- adjourn the hearing for up to 6 months on any terms it thinks fit.

Section 62(11) prevents a court from imprisoning a fine defaulter where the person does not have the capacity to pay the fine or has some reasonable excuse for the default, and section 62(12) makes it clear that imprisonment is an order of last resort.

4.13 In some jurisdictions, reparation orders are enforceable in a similar manner to other pecuniary penalties.¹⁸⁹ In Victoria, other bodies which have reviewed the enforcement of reparation orders have disagreed as to the appropriate model to be adopted. In 1987, the Legal and Constitutional Committee¹⁹⁰ recommended that the criminal processes of enforcement be adopted. In contrast, the Victorian Sentencing Committee¹⁹¹ opposed this recommendation and proposed that reparation orders should continue to be enforced by the person in whose favour the order is made in the same manner as a civil judgment.

¹⁸⁹ For example, section 61, *Criminal Law (Sentencing) Act 1988* (SA), section 36(2), *Penalties and Sentences Act 1992* (Qld), *Criminal Justice Act 1988* (UK) and *Criminal Justice Act 1985* (NZ).

¹⁹⁰ Legal and Constitutional Committee, *Report Upon Support Services for Victims of Crime*, Parliamentary Paper No. 59 (1987) Recommendation 8.

¹⁹¹ Victorian Sentencing Committee Report 1988 at 356–358.

ENFORCEMENT PRACTICE

4.14 In the Interim Report, the Committee noted that there is insufficient empirical evidence on the relative success or compliance rates of civil and criminal models of enforcement. Further, of the research available, it was difficult to draw meaningful conclusions from the findings of such research due to differences in sampling and methodology and, more importantly, differences in the practice and procedure both within and between those models.

4.15 The Committee considered studies on the enforcement of civil judgments conducted in the United Kingdom¹⁹² and Alberta, Canada.¹⁹³ As to the enforcement of reparation orders, consideration was also given to research conducted in New Zealand¹⁹⁴ and the United Kingdom.¹⁹⁵ In both of those jurisdictions, reparation orders are enforced in the same manner as fines. The Committee also arranged for an examination of a small sample of reparation orders made in Victorian Magistrates' Courts.¹⁹⁶

4.16 Subject to the caution given above about making comparisons between these studies, the Committee noted that the results of such research suggested that:

- First, the higher the amount of payment involved, the longer it will take for the amount to be paid and the percentage rate of overall satisfaction will be lower.
- Secondly, the extent and speed of satisfaction will depend on any changes to the financial circumstances of the debtor.

¹⁹² Lord Chancellor's Department, *Civil Justice Review: Study of Debt Enforcement Procedures* (December 1986).

¹⁹³ Institute of Law Research and Reform, *The Operation of the Unsecured Creditors' Remedies System in Alberta*, Research Paper No. 16, March 1986, *Remedies of Unsecured Creditors*, Discussion Report No. 3, May 1986 and *Enforcement of Money Judgments*, Report No. 61, March 1991.

¹⁹⁴ Galaway B. and Walker, W., *Restitution Imposed on Property Offenders in New Zealand Courts* (Wellington, Department of Justice, 1985) and Galaway B. and Spier P., *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* (Wellington, Department of Justice, 1992).

¹⁹⁵ Newburn T., *The Use of 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).

¹⁹⁶ See paragraphs 5.51–5.54, Interim Report.

- Thirdly, full compliance with debts enforceable by criminal means may be slightly higher than that applicable to the enforcement of civil debts.

REPARATION AND SENTENCING

4.17 In the Interim Report, the Committee had suggested that reparation should be more fully integrated into the sentencing process by treating reparation orders as sentencing orders. It had noted that 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 may provide adequate means of achieving compliance.

It also noted that 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, especially when made in the context of the sentencing process;
- 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 may be more effective and economical.

4.18 Treatment of the reparation order as a sentencing order led the Committee to conclude that it would be appropriate for reparation orders to

be enforced in the same manner as fines.¹⁹⁷ However, for the reasons discussed in Chapter 2, the Committee has recommended that reparation orders remain as orders ancillary to sentencing and hence that the predominant purpose of the reparation order be viewed as providing victim compensation. It would therefore be inappropriate, in the Committee's view, to equate the enforcement of reparation orders with the enforcement of fines.

IMPROVING EXISTING CIVIL ENFORCEMENT PROCEDURES

4.19 Accordingly, the Committee has concluded that reparation orders should continue to be treated as civil judgments for the purposes of enforcement. It will therefore remain necessary for persons in whose favour reparation orders are made to seek the enforcement of the reparation order in the event of default. However, the Committee has also considered some ways in which current enforcement procedures may be improved.

4.20 Division 4, and particularly sections 87A–87C, of the *Sentencing (Reparation) Amendment Act* sets out suggested provisions relevant to the enforcement of reparation orders. It is convenient to set out sections 87A–87C in their entirety.

87A. Financial means

- (1) Where a court proposes to make a reparation order against an offender that involves the payment of a sum of money, the court must, in determining both the amount and method of payment, take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that payment under the order will impose.
- (2) A court is not prevented from making an order against an offender that involves the payment of a sum of money on the ground that it has been unable to ascertain the financial circumstances of the offender.
- (3) A reparation order against an offender for the payment of a sum of money may be on terms that the sum be paid by instalments.
- (4) An instalment order under subsection (3):
 - (a) must be made in accordance with; and

¹⁹⁷ See also Written Submissions 10 and 11.

(b) has the same effect as;

an instalment order under the provisions of the *Judgment Debt Recovery Act* 1984.

87B. *Reparation order as civil order*

A reparation order operates as a civil judgment or order and may be enforced by the person in whose favour it has been made by the same means available for the enforcement of other civil judgments or orders.

87C. *Enforcement orders*

- (1) At the time a court makes a reparation order, the court may make an ancillary order as to how the reparation order is to be enforced or otherwise satisfied.
- (2) An ancillary order under subsection (1) means an order of any type that could be made by a civil court in aid of the enforcement of a civil judgment or order, including an order for:
 - (a) the attachment of the offender's earnings;
 - (b) the seizure and sale of property belonging to the offender;
 - (c) the attachment of debts owed to the offender.
- (3) An order of the type referred to in subsection (2) can only be made if a civil court would have, in similar circumstances, the power to make such an order.
- (4) At the time a court makes a reparation order, in so far as the reparation order involves payment of a sum of money, the court may also order that the sum be paid out of monies found on the offender at the time of apprehension.
- (5) Section 87A does not apply to an order of the type mentioned in subsection (4).

4.21 In Chapter 3 of the Report, the Committee discussed the need for sentencing courts to take into account the financial circumstances of offenders when making reparation orders. This is given effect in section 87A(1)–(3).

4.22 Section 87A(4) alters the present position in section 86(4) of the *Sentencing Act*, which provides that where a compensation order is to be paid by instalments, default in payment of any one instalment will render the balance immediately due and payable. The effect of proposed section 87A(4) is two-fold. First, the *Judgment Debt Recovery Act* 1984 will apply to the manner in which an instalment order is made. Secondly, once an instalment order is

made, it has effect as if it were an instalment order made under the *Judgment Debt Recovery Act*. Therefore, the procedures for the enforcement (by way of affirmation, cancellation or variation) under that Act for instalment orders in the event of default will apply to reparation orders. The Committee notes that the assimilation of reparation orders to other civil judgments means that the period for payment by instalments is likely to be less than under the criminal model for enforcing payment of fines, and that the question of interest on moneys to be paid by way of reparation will be necessarily addressed.

4.23 Section 87B restates the general provisions of sections 85 and 87 of the *Sentencing Act* that reparation orders are enforceable as civil judgments or orders. However, it removes the restriction found in those sections as to the available methods of enforcement and makes clear that all the means available for the enforcement of civil judgments or orders will apply to the enforcement of reparation orders.

4.24 In the Interim Report,¹⁹⁸ the Committee canvassed the possibility of sentencing courts playing a more active role in promoting compliance with reparation orders. Section 87C endeavours to pursue this objective by conferring on sentencing courts an ancillary power to make orders in aid of the enforcement of a reparation order. Such ancillary orders may include orders for the attachment of the offender's earnings, the seizure and sale of property belonging to the offender and the attachment of debts owed to the offender. Its advantage is that it may obviate the need for victims to make subsequent applications for the initiation of enforcement procedures. Its disadvantage is that consideration of the exercise of such a power may lead to delays in sentencing. However, exercise of the power will be a matter for the discretion of sentencing courts and the preservation of the clear case requirement will mean that sentencing courts can decline to undertake investigations needed for the making of such an order.

4.25 Section 87C(4) picks up the power found in section 84(1)(c) of the *Sentencing Act*, allowing for monetary restitution powers to be satisfied by the seizure and forfeiture of moneys found on the offender at the time of arrest. Consistent with section 84 of the *Sentencing Act*, in that situation the offender's financial circumstances are not, by section 87C(5), treated as relevant.

¹⁹⁸ See paragraphs 5.80–5.87 and 5.98–5.100, Interim Report.

4.26 The Committee must emphasise that the provisions of sections 87A–87C represent a working model only. There may be room for further improvement of the system for the civil enforcement of reparation orders, but an exhaustive consideration of civil enforcement mechanisms is beyond the Committee's Terms of Reference.¹⁹⁹

Recommendation 18

4.27 The Committee recommends that:

- **reparation orders be enforceable in the same manner as civil judgments;**
- **the payment and enforcement of monetary reparation orders by instalments be governed by the *Judgment Debt Recovery Act 1984*;**
- **sentencing courts have power to make ancillary orders in aid of enforcement;**

and that provisions of the type found in sections 87A to 87C of the *Sentencing (Reparation) Amendment Act* be enacted.

4.28 In the Interim Report, the Committee had also canvassed other options for the enforcement of reparation orders.²⁰⁰ These included the attachment of prison earnings and social security payments and the possibility of payment from a central fund. The latter proposal could involve the state compensating victims from a fund and then seeking recovery from offenders.²⁰¹ The manner in which a central fund could be established was explored in Chapter 7 of the Interim Report.²⁰² This involved the creation of a victim levy,²⁰³ the use of moneys realised under the *Crimes (Confiscation of Profits) Act 1986* and the hypothecation of fine revenue.²⁰⁴

¹⁹⁹ As to which, see Australian Law Reform Commission, *Debt Recovery and Insolvency*, Report N° 36, 1987, which has not been acted on.

²⁰⁰ Paragraphs 5.98–5.100, Interim Report.

²⁰¹ A similar system of recovery is available under section 27, *Criminal Injuries Compensation Act 1983*. However, it has been found that the recovery system does not work well in practice: Legal and Constitutional Committee at 26–27.

²⁰² Paragraphs 7.3–7.15.

²⁰³ For example, see section 65C, *Victims Compensation Act 1987* (NSW).

²⁰⁴ See Victim Advisory Council, *Report to the Minister for Police and Emergency Services* (1992) at paragraph 3.5.

4.29 However, experience in other jurisdictions indicates that there is little prospect of a central fund raising sufficient moneys to meet reparation orders.²⁰⁵ Apart from these practical limitations, there is also the argument that such a scheme would, in effect, involve the state providing public insurance for property losses.

4.30 Accordingly, the Committee is not in a position to make recommendations that these additional options be implemented. It does suggest, however, that further consideration be given to these matters. Also, in Chapter 6 of this Report, the Committee explores the possibility of the creation of a central fund with a view to providing a financial underpinning for victim support and information services.

CIVIL RIGHTS

4.31 Section 86(10) of the *Sentencing Act* preserves the rights of victims to bring independent civil proceedings for loss or damage suffered as a result of an offence to the extent that such loss or damage is not satisfied by the payment or recovery of compensation under the relevant order. There is no express provision saving the civil rights of victims in relation to restitution orders made under section 84.

4.32 At paragraphs 5.29–5.43 of the Interim Report, the Committee considered the place of the civil rights of victims in the context of:

- the rule in *Hollington v Hewthorn & Co Ltd*;²⁰⁶
- the recent modification of that rule in Victoria;²⁰⁷
- the use in reparation applications of findings of fact made by criminal courts.²⁰⁸

²⁰⁵ As to the experience in New South Wales under Part 5 of the *Victims Compensation Act 1987* (NSW), see Bureau of Crime Statistics and Research, *Review of the Victims Compensation Act* (March 1993).

²⁰⁶ [1943] 1 KB 587.

²⁰⁷ Section 90, *Evidence Act 1958*, inserted by the *Evidence (Proof of Offences) Act 1993*.

²⁰⁸ Section 86(7), *Sentencing Act*.

It also considered the possibility of findings of fact made by criminal courts being used in subsequent civil proceedings.²⁰⁹

4.33 These matters have already been dealt with in Chapter 3 of this Report in the discussion on the following provisions of the *Sentencing (Reparation) Amendment Act*:

- section 85A – use of evidence and findings of fact in criminal courts;
- section 86C – transfer orders accompanied by findings of fact made by criminal courts.

4.34 As noted at the beginning of this Chapter, in the Interim Report the Committee considered whether it was necessary or desirable to preserve the civil rights of victims if reparation orders were to be enforced in the same manner as fines. The Committee has now concluded that reparation orders should be enforced in the same manner as civil judgments or orders. It therefore concludes that it is appropriate to preserve the civil rights of victims to the extent that those rights are not addressed by the making or enforcement of reparation orders. In terms of the present position, the only matter to be addressed is the anomaly between sections 84 (restitution) and 86 (compensation) in that only the latter provision makes express provision for the saving of civil rights. This is addressed in section 87E of the *Sentencing (Reparation) Amendment Act* which is as follows:

87E. Civil rights

Nothing in this Part affects the rights of any person to bring a civil proceeding for any loss or damage suffered as a result of an offence in so far as such loss and damage is not satisfied by the making or enforcement of an order under this Part.

4.35 Given that the Committee is not proceeding with the proposal to equate reparation orders with fines for the purposes of enforcement, and therefore the risk of "double jeopardy" is removed, it is entirely appropriate that the civil rights of victims be preserved.

²⁰⁹ See paragraphs 5.89–5.91, Interim Report.

Recommendation 19

4.36 The Committee recommends that express provision be made (in the form of section 87E of the *Sentencing (Reparation) Amendment Act*) for the preservation of the civil rights of victims to the extent that such rights are not given effect by the making or enforcement of reparation orders.

4.37 The Committee notes that it has already recommended proposed section 86A(2) of the *Sentencing (Reparation) Amendment Act*, which would allow victims to prevent reparation orders being made and to choose reliance solely on civil remedies from the outset.

4.38 The Committee now turns to consider the role of mediation in promoting the restoration of victim losses.

CHAPTER 5 MEDIATION AND REPARATION

INTRODUCTION

5.1 In Chapter 6 of the Interim Report the Committee discussed in some detail the role that mediation between victim and offender may have in promoting the restoration of victim losses within the criminal justice system.

5.2 The Committee had defined "mediation" as being a process or form of dispute resolution in which an impartial third party facilitates negotiations between the parties in dispute. It is of the essence of mediation that the parties retain some degree of control over their dispute and develop a mutually acceptable solution. Generally, mediation should also be viewed as a voluntary and confidential process and the outcome of mediation in terms of any agreements reached may be treated as binding or non-binding at law.²¹⁰

5.3 Mediation is therefore to be contrasted with other non-judicial forms of dispute resolution, namely, conciliation and arbitration. Conciliation involves the third party contributing more directly to the solution. Arbitration involves the third party acting as the decision maker.²¹¹

5.4 The Committee also noted that, in the context of reparation in the sentencing process, "reparation", as an outcome of mediation may not be confined to restitution or compensation in the form found in Part 4 of the Sentencing Act. In this regard, as the outcome of mediation is consensual in nature, it may be possible for the parties to agree that an offender make amends for the harm caused by his or her wrongdoing in other ways, such as by the performance of community work.

²¹⁰ See Astor, H. and Chinkin C., *Dispute Resolution in Australia* (Sydney, Butterworths, 1992).

²¹¹ For a useful discussion of the concept of arbitration, see Walton A., *Russell on Arbitration*, Nineteenth Edition (London, Stevens & Sons, 1979), Chapter 1.

5.5 Schemes for mediation between a victim and an offender, either within or ancillary to prosecution, adjudication and sentencing, seek to promote reconciliation between the victim, offender and society. They therefore have a potential for accommodating the sometimes competing interests of the relationships between state, offender and victim. The focus of resolving criminal conflicts is therefore, unlike the formal criminal justice system, on the offender alone. Flowing from that, however, the material restoration of victim losses is not usually seen as a predominant aim of the mediation process.

MEDIATION PROGRAMS

5.6 In its Interim Report, the Committee examined a number of victim/offender mediation programs in both Australian and overseas jurisdictions and considered:

- the various models adopted;
- the assumptions or premises underlying these models;
- the objectives of victim/offender mediation programs;
- the role of restoration of victim losses as a possible outcome of mediation;
- the advantages and disadvantages of such mediation programs.

5.7 The Committee also addressed the training and qualifications of suitable mediators, the need for protecting the interests of victims, offenders and mediators and the desirability of having wide and varied community consultation in the lead up to the establishment of any mediation programs. It also considered how participation in mediation might be viewed as part of a sentencing disposition or, alternatively, as a pre-condition to sentencing²¹² in the context of the traditional aims of sentencing²¹³ and the statutory framework of the *Sentencing Act*.²¹⁴

²¹² For example, section 1, *Powers of Criminal Courts Act 1973* (UK).

²¹³ See *R. v. Neal* (1982) 42 ALR 609 and *R. v. Pope* [1978] Crim. LR 303, discussed at paragraph 6.104, Interim Report.

²¹⁴ Particularly the provisions of Division 5, Part 3—Dismissals, Discharges and Adjournments—and the procedure for pre-sentence reports under sections 96–97 of the *Sentencing Act*.

Conditions for Mediation

5.7 After considering the matters noted above, the Committee concluded²¹⁵ that mediation programs 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 (and preferably by two mediators) with appropriate qualifications, 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 the results into a sentencing disposition.
- In so far 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.
- 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 fully by all those involved in the criminal justice system, including police, prosecutors, defence lawyers, magistrates and court officers.

²¹⁵ Paragraph 6.112, Interim Report.

It also noted that special considerations will apply in the case of young and disabled offenders²¹⁶ to ensure that the process is truly voluntary and consensual in nature.

Models of Mediation

5.9 The precise application of these principles in practice will depend on the model that is used for the mediation. The Committee explained that mediation programs involving victims and offenders may be classified, according to the stage at which the dispute is referred to mediation, in the following terms:

- *Pre-Court*: referral of cases of a defined type to mediation instead of formal 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.²¹⁷

²¹⁶ Paragraphs 6.75 and 6.117, Interim Report.

²¹⁷ See Alternative Dispute Resolution Division, Department of Justice and Attorney-General *Report on the Crime Reparation Project at Beenleigh Magistrates' Court and the Crime Reparation Project Advisory Committee Report* (November 1992) at 26–42.

5.10 The Committee concluded that, in the context of its Terms of Reference, the most appropriate model was the court based pre-sentence model. It concluded that such a model had the following advantages:

- 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.²¹⁸

PROPOSALS

5.11 At the time of the Interim Report, the Correctional Services Division of the Department of Justice was in the process of implementing a pilot mediation program in the Broadmeadows Magistrates' Court involving adoption of the court based pre-sentence model. The Committee noted²¹⁹ that it had some concerns with this program in terms of:

- possible delays in the sentencing process;

²¹⁸ Paragraph 6.113, Interim Report.

²¹⁹ Paragraphs 6.114–6.115, Interim Report.

- the effect mediation may have on sentencing patterns;
- whether officers of the Correctional Services Division may be perceived as entirely neutral mediators.

5.12 Notwithstanding those concerns, the Committee made a draft recommendation in the following terms:

Draft Recommendation 21

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 process, the enforcement of outcomes and the impact on the sentencing process.

5.13 In essence, the Committee could not support any further extension of mediation programs until the long-term effects of such programs on sentencing patterns could be assessed.²²⁰

RESPONSES

5.14 A number of submissions to the Committee expressed support for the introduction of mediation programs and concurred with the view that such programs may help to promote the restoration of victim losses.²²¹ However, most submissions had some reservations about these programs and also emphasised that their primary objective should be that of reconciliation. Therefore, the restoration of victim losses is viewed as a secondary outcome.

²²⁰ See paragraph 14, Overview, Interim Report.

²²¹ See Written Submissions 4, 7, 9, 10, 11 and 12.

5.15 Some submissions²²² opposed the concept of community based pre-court diversionary mediation programs. These submissions highlighted the risk of the authority of the courts being undermined through the diversion of offenders from the criminal justice system. Concerns were also expressed about the possible adverse implications for the rights of offenders. The Committee sympathises with these concerns. However, it does believe that community based pre-court diversionary programs may serve a number of useful purposes and, in particular, may have the benefit of involving communities in the resolution of their own disputes.²²³

5.16 Some submissions²²⁴ also emphasised the importance of any participation in mediation being voluntary on the part of both victims and offenders. The Committee entirely agrees with this proposition. Other submissions²²⁵ expressed some caution in extending any mediation programs until further experience with existing programs was gained. Again, the Committee concurs with this view.

5.17 As to the costs of conducting mediation programs, the Committee has been advised by the Correctional Services Division that the cost of the program at the Broadmeadows Magistrates' Court is \$120 per case plus the cost of training mediators. It is estimated that the cost of training sufficient mediators to service the State of Victoria would be \$23,000.²²⁶

5.18 In its submission, the Correctional Services Division also addressed the Committee's comments about whether its officers may be perceived as entirely neutral mediators. The Correctional Services Division has put forward a number of reasons as to why its officers may make suitable mediators. The Committee accepts those reasons but emphasises that its comments related to the possible *perceptions* that offenders and victims may have about the neutrality of these officers.

²²² Written Submissions 4 and 11.

²²³ For example, see the discussion of the New Zealand Family Group Conference procedure conducted under the *Children, Young Persons and their Families Act 1989* (NZ), at paragraphs 6.37–6.38, Interim Report. See also, in the context of aboriginal communities, Grose P. R., "Towards a Better Tomorrow: A Perspective on Dispute Resolution in Aboriginal Communities in Queensland" (1994) 5 *Australian Dispute Resolution Journal* 28.

²²⁴ See, for example, Written Submission 9.

²²⁵ For example, Written Submission 12.

²²⁶ Written Submission 9.

CONCLUSIONS

5.19 Although, for the reasons discussed in some detail in Chapter 6 of the Interim Report, the Committee has a number of reservations about mediation programs between victims and offenders, it believes that such programs should be explored further.

5.20 It must be emphasised, however, that the primary aim of mediation should be reconciliation between victim and offender, and therefore reparation as an outcome of mediation is to be viewed as a secondary aim.²²⁷

5.21 In the light of the submissions made to the Committee, it is appropriate that the approach in Draft Recommendation 21 be adopted, although with some modification. That modification relates to the introduction of a community based pre-court diversionary mediation program. Given that some opposition to such a program has been expressed, it would seem appropriate to defer introduction of such a program until first, the evaluation of the pilot program at Broadmeadows Magistrates' Court has been carried out,²²⁸ and second, greater experience is gained of programs that adopt the diversionary model.

Recommendation 20

5.22 **The Committee recommends that:**

- **the court based pre-sentence mediation pilot program being conducted by the Correctional Services Division at the Broadmeadows Magistrates' Court be subject to a thorough evaluation as to its effectiveness and its impact on the sentencing process;**
- **the introduction of any further mediation programs be deferred pending assessment of the effectiveness of current programs and the evaluation of the program at the Broadmeadows Magistrates' Court;**
- **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 mediation process,**

²²⁷ See Written Submission 9.

²²⁸ As to which, see Written Submission 9.

the enforcement of outcomes and the impact of such programs on the sentencing process.

5.23 The Committee now turns to deal with issues relevant to the provision of support and information services to victims of crime.

INTRODUCTION

6.1 Chapter 7 of the Interim Report touched on a number of issues related to its terms of reference, namely:

- 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 operation 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.

A CENTRAL FUND

6.2 The Committee considered the use of a victims levy, proceeds of crime and the hypothecation of fines as mechanisms for the establishment of a central fund. It also considered whether such a dedicated fund could be used for or towards the satisfaction of property loss or damage suffered by victims in a manner analogous to the personal injury compensation scheme under the *Criminal Injuries Compensation Act 1983*.

6.3 In this regard, the Committee examined a number of varying schemes in other jurisdiction relating to the creation of a dedicated victims' fund and

the use to which moneys from such a fund are applied.²²⁹ The Committee concluded that because of the amount of compensation that would be awarded in this area and existing demands in relation to personal injury compensation schemes, a central fund would have insufficient resources for it to be applied towards the satisfaction of property loss or damage. The Committee, however, went on to consider the possibility of the application of such a fund towards financing the provision of support and information services to victims of crime. It made a draft recommendation in the following terms:

Draft Recommendation 22

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.

6.4 The Committee will return to this issue after considering the issue of support and information services for victims of crime.

SUPPORT AND INFORMATION SERVICES

6.5 The Committee considered three matters relevant to the provision of support and information services to victims of crime,²³⁰ namely:

- the creation of a central referral service;
- the establishment of a victim advocacy service; and
- the provision of advice on enforcement procedures.

6.6 The Committee did not recommend the establishment of a victim advocacy service nor did it recommend that special provision be made for the giving of advice to victims on enforcement procedures. Both of these conclusions were influenced by the Committee's proposals for the integration of reparation into the criminal justice system and for police, prosecutors and the courts to play a more active role in promoting the restoration of victim

²²⁹ See paragraphs 7.4–7.8, Interim Report and Chapter 4 of this Report.

²³⁰ See generally, Clarke G., *Crime Victims Pilot Project 1992–93* (Melbourne, Victorian Court Information and Welfare Network Inc, 1993).

losses. It did, however, recommend the establishment of a central referral service and thus made a draft recommendation in the following terms:

Draft Recommendation 23

The Committee therefore recommends that a central referral service be established to provide initial counselling, information, advice and referral services to victims of crime.

6.7 A number of submissions to the Committee²³¹ addressed these issues. Some of those submissions also drew an obvious link between the proposal for establishing a central fund and the provision of support and information services to victims of crime. Further, reference was made to the introduction of victim impact statements²³² as supporting the need for the establishment of a victim advocacy service.²³³

6.8 A statutory form of such a fund already exists in the Crime Prevention and Victims Aid Fund established by the *Crimes (Confiscation of Profits) Act* 1986.²³⁴ Moneys confiscated from non drug offences are to be paid into the fund²³⁵ and such moneys may be applied to, amongst other things, the provision of support and information services. It may be possible, for example, to build on this statutory model through employment of a victims levy²³⁶ or the hypothecation of fine revenue.²³⁷

6.9 However, the Committee has been advised²³⁸ that these matters are being examined by the Victims' Task Force of the Victorian Community Council Against Violence. In January 1994 the Attorney-General and the Minister for Police and Emergency Services requested the Victims' Task Force "to undertake an extensive review of victim services and the needs of victims

²³¹ Written Submissions 2, 3, 4 and 5.

²³² *Sentencing (Victim Impact Statement) Amendment Act* 1994, discussed in Chapters 2 and 3.

²³³ See Written Submission 3.

²³⁴ Section 15A, discussed at paragraph 7.10, Interim Report.

²³⁵ Being a portion of moneys of the balance left after payments into the Drug Rehabilitation and Research Fund by sections 125-126, *Drugs, Poisons and Controlled Substances Act* 1981.

²³⁶ See, for example, section 65C, *Victims Compensation Act* 1987 (NSW) discussed in Bureau of Crime Statistics and Research, *Review of the Victims Compensation Act 1987* (NSW).

²³⁷ Discussed in Victim Advisory Council, *Report to the Minister for Police and Emergency Services* (1992).

²³⁸ Written Submission 7.

of crime". The Victims' Task Force has advised that as part of that inquiry, it will examine the matters the subject of Draft Recommendations 22 and 23.

6.10 Accordingly, the Committee does not express any concluded views on this matter and notes that they are to be taken up by the Victims' Task Force.

Recommendation 21

6.11 The Committee recommends that the Victims' Task Force in its examination of victim services and the needs of victims of crime consider:

- **the possibility of establishing a central fund for the provision of support and information services to victims of crime;**
- **the desirability of establishing a central referral service for victims of crime;**
- **whether there is need for the establishment of a victims' advocacy service.**

OTHER MATTERS

6.12 In the balance of Chapter 7 of the Interim Report, the Committee addressed the following matters:

- whether sentencing courts should have power to award compensation in cases involving personal injury;²³⁹
- the desirability of establishing an independent bureau of crime statistics for Victoria;²⁴⁰
- the need for further research to be conducted on the use and enforcement of reparation orders in Victoria;
- the need for the Judicial Studies Board to be given appropriate financial and administrative support;²⁴¹

²³⁹ Which is the case in many jurisdictions: section 53, *Victims Compensation Act 1987* (NSW), section 35, *Penalties and Sentences Act 1992* (Qld), section 719, *Criminal Code* (WA), section 393, *Criminal Code Act* (NT), section 425A(1), *Criminal Code 1924* (Tas) and section 35, *Powers of Criminal Courts Act 1973* (UK).

²⁴⁰ See Legal and Constitutional Committee, *Report upon a Bureau of Crime Statistics for Victoria*, Parliamentary Paper N^o 173 of 1991.

- the possible financial and administrative impact of the proposals contained in the Interim Report.

6.13 On these matters, the Committee made the following draft recommendations:

Draft Recommendation 24

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 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*.

Draft Recommendation 25

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.

Draft Recommendation 26

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.

Draft Recommendation 27

²⁴¹ *Victorian Sentencing Committee Report 1988 at 185–192 and 223–230 and Judicial Studies Board Act 1990.*

The Committee recommends that the Judicial Studies Board be given the financial and administrative support needed for it to fulfil its statutory functions.

6.14 In relation to the financial and administrative impact of the Committee's proposals, it invited further submissions on that matter. The Committee has been given some information as to the financial and administrative effects that might flow from the earlier draft recommendation.²⁴² However, it is not in a position to quantify these effects and therefore suggests that it is a matter for the Government, when responding to this Report, to consider further.

6.15 As to Draft Recommendations 24, 25, 26 and 27 the Committee is of the view that, in the light of submissions made in response to the Interim Report, these proposals should be proceeded with. It therefore reaffirms, without modification, those proposals.

Recommendation 22

6.16 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 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*.

Recommendation 23

6.17 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.

Recommendation 24

²⁴² See Written Submissions 6 and 9, discussed in Chapters 3 and 5 respectively.

6.18 The Committee 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.**

Recommendation 25

6.19 The Committee recommends that the Judicial Studies Board be given the financial and administrative support needed for it to fulfil its statutory functions.

6.20 It adopts the discussion contained in Chapter 7 of the Interim Report in support of these Final Recommendations.

FUTURE REVIEW

6.21 As noted above, the Committee believes that it is desirable for further research to be conducted in relation to the use and enforcement of reparation

orders. The reasons for this were discussed in some detail in Chapters 5 and 7 of the Interim Report.

6.22 The Committee has also considered that it might be appropriate to ensure that the changes proposed in this Report are the subject of future review. In this regard, the Committee acknowledges that some of the changes contemplated will have an effect on current practices and procedures. It is desirable that such effects be monitored with a view to assessing the merits of the relevant changes.

6.23 Thus section 11 of the *Sentencing (Reparation) Amendment Act* suggests that the changes brought about by that legislation be the subject of a future review and report.²⁴³ However, the Committee recognises that there may be arguments against entrenching the requirement for such a review by way of a statutory provision. Nonetheless, the benefit of such a provision is that it will ensure that the Executive and the Parliament will be cognisant of the need for the legislative changes to be evaluated.

Recommendation 26

6.24 The Committee recommends that the implementation of the proposals contained in this Report be the subject of future review and that consideration be given to enacting a provision of the type found in section 11 of the *Sentencing (Reparation) Amendment Act*.

²⁴³ The provision is modelled on section 9 of the *Corporations Legislation (Evidence) Amendment Act 1992* (Cth), as to which see Joint Statutory Committee on Corporations and Securities, *Report on Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law*, Parliamentary Paper N° 483 of 1991 and the Attorney-General's Second Reading Speech on the legislation, *Hansard*, House of Representatives, 26 February 1992 at 190. For an example of a similar approach to legislative review in Victoria, see section 26, *Retail Tenancies Act 1986*.

7.1 As the Committee noted in its Interim Report, the sentencing system alone cannot satisfy the sometimes competing interests of the state, the offender and the victim. No system of compensation, whether it operates within or outside the sentencing process, will ensure that all victim losses are restored in full.

7.2 There are good reasons for integrating reparation more fully into the sentencing process, either by treating the restoration of victim losses as an aim of sentencing or by equating reparation orders as sentencing orders. However, in the light of the current resistance to such an approach, the Committee cannot recommend the equation of reparation orders to sentencing orders.

7.3 Therefore, the focus of this Report has been to suggest processes of a practical nature by which the interests of victims will be accorded greater recognition in the criminal justice system. This can be done by ensuring that, wherever possible, sentencing courts turn their minds to the restoration of victim losses and by creating a statutory framework which encourages the making of reparation orders in appropriate cases.

7.4 Ultimately, however, the Committee believes that the criminal justice system will move further toward making the restoration of victim losses an integral aspect of the criminal justice system. Such a result would build on recent developments concerning the promotion of the interests of victims within that system.

7.5 The Committee therefore hopes that the matters raised in this Report and in its Interim Report can provide the foundations for further accommodation by the criminal justice system of the interests of victims, whilst maintaining an appropriate balance between those interests and those of offenders and the state.

June 1994
Committee Room

INITIAL SUBMISSIONS—*Tabled with Interim Report*

N°	Date of Submission	Name
1	March 1993	Mr Howard G Draper, Solicitor
2	11 March 1993	Confidential
3	12 March 1993	Mr Norman T Sims, Citizen
4	15 March 1993	The Police Association
5	17 March 1993	Correctional Services Division, Department of Justice
6	20 March 1993	Professor Arie Freiberg, Criminology Department, University of Melbourne
7	29 March 1993	Victims of Crime Assistance League Incorporated
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 Incorporated
11	5 April 1993	Supporters of Law and Order
12	16 April 1993	Victorian Court Information and Welfare Network Incorporated
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	22 June 1993	Mr Jeff Giddings, Department of Legal Studies, La Trobe University
18	25 June 1993	County Court of Victoria
19	20 June 1993	Mr Norman T Sims, Citizen

N°	Date of Submission	Name
20	23 July 1993	Mr Norman T Sims, Citizen
21	10 September 1993	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

SUBMISSIONS RESPONDING TO INTERIM REPORT

N°	Date of Submission	Name
1	10 December 1993	Professor David Lanham, Law School, University of Melbourne
2	14 February 1994	Mr L H Brear, Magistrate
3	17 February 1994	Victims of Crime Assistance League Inc
4	18 February 1994	Federation of Community Legal Centres (Vic) Inc
5	18 February 1994	Victorian Court Information and Welfare Network
6	4 February 1994	Victoria Police
7	18 February 1994	Victorian Community Council Against Violence
8	18 February 1994	Mrs L Gunawan, Citizen
9	21 February 1994	Minister for Corrections
10	24 February 1994	County Court of Victoria
11	21 March 1994	Law Institute of Victoria
12	20 May 1994	Victorian Bar Council

APPENDIX II

ORAL EVIDENCE

Date	Witness	Hansard Reference
25 March 1993	Associate Professor George Clarke, Monash University and Ms Carmel Benjamin, AO, Victorian Court Information and Welfare Network Inc.	25 March 1993, 1-32
28 May 1993	Mr Remy van de Wiel, Barrister, Victorian Council of Civil Liberties. Chief Inspector Ashley Dickinson, and Senior Sergeant Colin Moffitt, Victoria Police.	28 May 1993, 1-19 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. Mr Danny Walsh, Secretary, and Mr Ken Serong, Assistant Secretary, The Police Association.	17 June 1993, 1-17 17 June 1993, 18-31
22 June 1993	Dr D.M. Thomson, Convenor, Legal and Social Policy Committee, Victorian Association for the Care and Settlement of Offenders. Mr Melvyn Barnett and Ms Susan Barnett, Victims of Crime Assistance League.	22 June 1993 1-17 22 June 1993 18-36
23 July 1993	Mr Keith Windle, (Former) Co-ordinator, Dispute Settlement Centre (Geelong) Inc. Mr Tony MacKintosh, Regional Manager, and Mr Ron Baxter, Technical Manager, Victoria, Insurance Council of Australia Ltd.	23 July 1993, 1-18 23 July 1993, 18-32

23 July 1993	Mr Norman Sims, Citizen Mr Robert Steele, Citizen Mr Peter Neil, Citizen Ms Ruth Lack, Citizen	23 July 1993, 33-49
10 Sept 1993	Mr Jeff Giddings, Lecturer in Legal Studies, La Trobe University Mr Peter Duncan, Sheriff of Victoria	10 Sept 1993 1-12 10 Sept 1993 13-32
13 Sept 1993	Mr Bernard Bongiorno, QC, Chief Administrator, and Ms Janet Atkinson, Manager, Policy and Research, Office of the Director of Public Prosecutions	16 Sept 1993 1-21
28 Sept 1993	Ms Marg O'Donnell, Director, Alternative Dispute Resolution Division, Department of Justice and Attorney General, Queensland	28 Sept 1993 1-17
1 October 1993	Mr Greg Smith, Legal Aid Commission of Victoria Mr Milt Carroll, Juvenile Justice Section, Health and Community Services Mr Tony MacKintosh, Regional Manager, Victoria, Insurance Council of Australia and Mr David Letcher, Solicitor, Morris, Coates and Herle Mr Peter McMullin and Ms Dymphna Laurie, Office of the Public Advocate	1 October 1993 1-19 1 October 1993 20-35 1 October 1993 36-52 1 October 1993 53-61

Minutes of Evidence tabled with Interim Report, November 1993.

Provisions of the *Sentencing Act 1991* relevant to the inquiry are set out below.

PART 1 – PRELIMINARY

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.

PART 2 – GOVERNING PRINCIPLES

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.

PART 3 – SENTENCES

Division 1 – General

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.

Division 3 – Community-Based Orders

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.

Division 4 – Fines

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.

Division 5 – Dismissals, Discharges and Adjournments

Subdivision 2 – Release on Conviction

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.

Subdivision 3 – Release without Conviction

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.

PART 4—ORDERS IN ADDITION TO SENTENCE

Division 1—Restitution

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.

Division 2 – Compensation

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.

Sentencing (Reparation) Amendment Bill 1994**EXPLANATORY MEMORANDUM**

Clause 1 states the purpose of the Bill.

Clause 2 states the short title of the Bill once it becomes enacted.

Clause 3 is a commencement provision, stating that the Act commences on 1 January 1995.

Clause 4 refers to the **Sentencing Act 1991** as the Principal Act.

Clause 5 is a definition section and inserts definitions of "reparation" and "reparation order" into section 3 of the Principal Act.

Clause 6 inserts new criteria into section 5 of the Principal Act to include the making good of loss and damage caused by an offence as a subsidiary aim of sentencing and for efforts by an offender to make good any loss or damage to be taken into account in sentencing.

Clause 7 inserts new criteria into section 6 of the Principal Act to include efforts made by the offender to make good any loss or damage as relevant to an assessment of the offender's character.

Clause 8 inserts a new Part 4 entitled "Reparation Orders" into the Principal Act, consisting of:

Division 1 – General

- Section 84A defines "offence", "offender", "property", "reparation", "reparation order", "third party" and "victim" for the purposes of Part 4.

- Section 84B allows for reparation orders to be made in cases where there has been no finding of guilt.
- Section 84C allows sentencing courts to make reparation orders where satisfied that a person has suffered property loss or damage.
- Section 84D sets out the types of reparation orders that may be made by sentencing courts.
- Section 84E requires sentencing courts to state reasons when reparation orders are not made in cases involving property loss or damage.

Division 2 – Evidence and Proof

- Section 85A allows sentencing courts to rely on findings of fact made in the hearing of offences for the purposes of reparation claims.
- Section 85B allows for further evidence to be called on the hearing of reparation claims.
- Section 85C requires sentencing courts to only order reparation in situations where civil courts could order compensation or the restoration of property.
- Section 85D requires sentencing courts to apply the civil standard of proof in reparation claims.

Division 3 – Procedure

- Section 86A allows for reparation orders to be made on application by victims or on their behalf or on the court's own motion.
- Section 86B prescribes the procedure for the service of notices of application and objection in relation to reparation claims.
- Section 86C allows sentencing courts to transfer the hearing of reparation claims to civil courts.
- Section 86D limits the obligations of police and prosecutors in relation to the conduct of reparation claims.

Division 4 – Enforcement

- Section 87A requires sentencing courts to have regard to the financial circumstances of offenders when making monetary reparation orders.
- Section 87B provides that reparation orders may be enforced in the same manner as civil judgments or orders.
- Section 87C allows sentencing courts to make enforcement orders at the time reparation orders are made.
- Section 87D allows for reparation orders to be appealed against in the same manner as final civil orders.
- Section 87E preserves the civil rights of victims.

Clause 9 amends the **Children and Young Persons Act 1989** so that it provides that, until 1 January 2000, the provisions of Part 4 of the Principal Act, as in force prior to 1 January 1995, continue to apply in the Criminal Division of the Children's Court.

Clause 10 repeals Part 4 of the Principal Act on 1 January 1995 and the provisions in the Schedule on 1 January 1998.

Clause 11 sets out a procedure for a review and report to be conducted in relation to the changes brought about by the Act.

The *Schedule* sets out the provisions to be repealed by Clause 10 on 1 January 1998.

Sentencing (Reparation) Amendment Bill 1994

No.

TABLE OF PROVISIONS

Clause

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2. Short title
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Schedule

Consequential Repeals

A BILL

to amend the **Sentencing Act 1991**.

Sentencing (Reparation) Amendment Act 1994

The Parliament of Victoria enacts as follows:

1. Purpose

The purpose of this Act is to amend the **Sentencing Act 1991** to reform the procedures for the provision of reparation for victims of crime.

2. Short title

This Act may be cited as the **Sentencing (Reparation) Amendment Act 1994**.

3. Commencement

This Act commences operation on 1 January, 1995.

4. Principal Act

In this Act, the **Sentencing Act 1991** is called the Principal Act.

5. Definitions

In section 3 of the Principal Act, the following subsections are **inserted**—

"(3) In this Act a reference to restitution or compensation or to a restitution or compensation order is a reference to reparation and a reparation order respectively.

(4) In this Act a reference to reparation or to a reparation order has the meaning given by Part 4 of this Act."

6. Sentencing guidelines

(1) In section 5(1) of the Principal Act, after paragraph (db) **insert**—

"(ee) to ensure that offenders, as far as is practicable, make good any loss or damage caused by their offences, consistently with one or more of the above purposes."

(2) In section 5 of the Principal Act, after subsection (2E) **insert—**

"(2F) in sentencing an offender, a court may have regard to:

- (a) any effort made by the offender to make good any loss or damage resulting from the offence;
- (b) willingness on the part of an offender to make good any such loss or damage to the extent his or her means allow;
- (c) the terms of any reparation order made or proposed to be made under Part 4 of this Act."

7. Offender's Character

In section 6 of the Principal Act, after the reference to "the community," **insert—**

", including efforts made by the offender to make good any loss or damage caused as a result of the offence."

8. Insertion of new Part 4

Part 4 of the Principal Act is repealed and the following Part is **substituted—**

"Part 4 – Reparation Orders

Division 1 – General

84A. Definitions

In this Part, unless the contrary intention appears—

"**offence**" includes an alleged offence.

"**offender**" means a person charged with an offence relating to property and includes any person claiming an interest in the relevant property through the offender.

"**property**" means all property of any description, other than land or interests in land, and includes property that represents directly or indirectly the proceeds of any disposal, realisation or dealing in the property.

"**reparation**" means restitution or compensation for property loss or damage.

"**reparation order**" means an order of the type mentioned in section 84D.

"**third party**" means a person who has acquired the relevant property in good faith and for valuable consideration.

"**victim**" means a person who has suffered property loss or damage as a result of an offence relating to property and includes any person claiming an interest in the relevant property through the victim.

84B. *Acquittals*

- (1) A reparation order may be made in accordance with this Part notwithstanding that a court has found that the person charged with the offence is not guilty of the offence.
- (2) An order cannot be made under sub-section (1) unless the person against whom the order is to be made has been given an opportunity to challenge and call evidence in relation to any findings relied on in support of the proposed order.

84C. *Reparation*

Where in any proceeding for an offence relating to property a court is satisfied that a victim has suffered property loss or damage as a result of the offence and is entitled to compensation for the loss or damage or to have the property restored, the court may make a reparation order.

84D. *Reparation orders*

- (1) In making an order for the restoration of property loss or damage suffered as a result of an offence, the court may order that:
 - (a) the offender pay compensation for the loss or damage suffered; or
 - (b) the property be restored to the victim if the offender is in possession or control of the property.
- (2) Where a third party is in possession or control of the property and the court is satisfied that:
 - (a) the third party has better title to the property than the victim, the court may order that the offender pay compensation to the victim and allow the third party to retain the property; or

- (b) the victim has better title to the property than the third party, the court may order that the third party restore the property to the victim and order the offender to pay compensation to the third party.
- (3) An order of the type mentioned in subsection (2) can only be made where the relevant third party has been given an opportunity to be heard by the court.
- (4) Where the court makes a reparation order under this section, it may also make any ancillary order designed to give effect to, or otherwise to promote compliance with, the reparation order.

84E. *Reasons*

Where on hearing a proceeding for an offence related to property it appears to the court that the offence has resulted in property loss and damage but the court declines to make a reparation order for that loss or damage, the court must give a statement of its reasons for so declining to make a reparation order.

Division 2 – Evidence and Proof

85A. *Evidence*

- (1) In any proceeding in which a court may make a reparation order, a finding of fact made by a court in the hearing of the proceeding for the offence is evidence for the purpose of the making of a reparation order and, in the absence of evidence to the contrary, prima facie proof of that fact.
- (2) For the purposes of subsection (1), a finding of fact may:
 - (a) be proved by production of a document under the seal of the court from which the finding appears; and
 - (b) also be proved by the evidence contained in documents available at the hearing of the proceeding for the offence, including:
 - (i) written statements or admissions admissible as evidence on the hearing of the charge;
 - (ii) depositions taken at the committal proceeding; or
 - (iii) any written statements or admissions used as evidence in the committal proceeding.

85B. *Further evidence*

- (1) Where a court is not satisfied from evidence of the type mentioned in section 84C that a reparation order should be made the court may, if it thinks fit, direct or allow any party to call further evidence.
- (2) A direction under subsection (1) may be given on such conditions as the court thinks fit, including conditions as to the adjournment of the hearing of the matter and the costs of the adjournment.

85C. *Civil liability*

A reparation order can only be made where the court is satisfied that the person who has suffered property loss or damage would, in a civil proceeding, be entitled to the order sought and the person against whom the order is sought would, if a party to such a civil proceeding, be liable to make good the loss and damage.

85D. *Civil standard*

Where in any proceeding a court must determine whether a person has suffered loss and damage as a result of an offence and is entitled to a reparation order under this Part, the court must be satisfied of such matters on the balance of probabilities.

Division 3 – Procedure

86A. *Making order*

- (1) Subject to sub-section (2), a reparation order may be made:
 - (a) on application in accordance with this Part –
 - (i) by the victim;
 - (ii) on the victim's behalf by the Director of Public Prosecutions (if the court is the Supreme Court or the County Court) or by the informant or police prosecutor (if the court is the Magistrates' Court);
 - (b) on the court's own motion.
- (2) An application for a reparation order or a reparation order must not be made if the victim has given notice in writing to the informant or prosecutor that the victim does not want a reparation order to be made and the notice has not, at the time of the application or the making of the order, been withdrawn.

- (3) An application must be made as soon as practicable after the conclusion of the hearing of the proceeding for the offence.

86B. Notice of application

- (1) Where an application is to be made pursuant to section 86A, notice in the prescribed form of an intention to make such an application must be given to the offender or the person against whom a reparation order is sought.
- (2) The notice referred to in subsection (1) must:
 - (a) be in writing and be signed by the victim or on the victim's behalf by any of the persons mentioned at section 86A(1)(a)(ii).
 - (b) have attached a notice of objection in the prescribed form.
 - (c) set out:
 - (i) the grounds in support of the application for the reparation order;
 - (ii) a description of the property to which the application relates, including particulars of the property loss or damage;
 - (iii) an address for service of a notice of objection.
 - (d) be served on the offender or the person against whom a reparation order is sought no later than 14 days before the hearing of the proceeding for the offence.
- (3) Upon being served with the notice of intention in accordance with subsection (1), the person served may within 7 days serve a notice of objection setting out the grounds on which the application will be disputed.
- (4) Where a person fails to serve a notice of objection in accordance with subsection (3), that person is, subject to subsection (4), taken to admit the claim set out in the application.
- (5) An admission pursuant to subsection (4) may be withdrawn by leave of the court.
- (6) A notice of application and notice of objection must be filed with the court but shall not be filed until the court has heard the charge and has found the person charged guilty or not guilty of the offence.
- (7) Where notice of an application has not been served in accordance with this section, an application for a reparation order may still be made with the leave of the court.

- (8) The court may grant leave under subsection (7) on such conditions as it thinks fit but shall not grant leave if section 86A(2) applies.

86C. Transfers

- (1) Where a court is satisfied that a victim has suffered property loss and damage as a result of an offence but is not satisfied:
- (i) that the victim has good title to the property;
 - (ii) of the quantum of loss or damage suffered;
 - (iii) after taking into account the financial circumstances of the offender, that it is appropriate to make an order for the full amount of the loss or damage;
 - (iv) that it is otherwise appropriate, due to the complexity of matters of fact or law in issue, to make a reparation order;

the court may, instead of making a reparation order, order that the matter be transferred to and heard by a civil court without the need for the victim filing and serving originating process for the commencement of a civil proceeding.

- (2) A transfer order under subsection (1) may be:
- (a) accompanied by:
 - (i) a record of findings made by the transferor court including findings of fact and liability;
 - (ii) directions from the transferor court as to the issues that need to be determined by the transferee court;
 - (iii) directions as to evidence or other matters which the transferor court considers desirable or expedient;
 - (b) made in substitution of an order for further evidence under section 85B or may be made after the further hearing of the matter in accordance with that section.
- (3) Where sub-section (1)(iii) applies, the court may make a reparation order for part of the loss and damage and may, in addition or in substitution, make a transfer order.

86D. Role of police and prosecutors

Sections:

(a) 86A(1)(a)(ii) and 86B(2);

(b) 85B and 86C;

do not require:

(i) an application or notice of application to be made;

(ii) the further hearing of the matter to be conducted;

by the Director of Public Prosecutions, police informant or police prosecutor (as the case may be).

Division 4 – Enforcement and Appeals

87A. *Financial means*

(1) Where a court proposes to make a reparation order against an offender that involves the payment of a sum of money, the court must, in determining both the amount and method of payment, take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that payment under the order will impose.

(2) A court is not prevented from making an order against an offender that involves the payment of a sum of money on the ground that it has been unable to ascertain the financial circumstances of the offender.

(3) A reparation order against an offender for the payment of a sum of money may be on terms that the sum be paid by instalments.

(4) An instalment order under subsection (3):

(a) must be made in accordance with; and

(b) has the same effect as an instalment order under

the provisions of the **Judgment Debt Recovery Act 1984**.

87B. *Reparation order as civil order*

A reparation order operates as a civil judgment or order and may be enforced by the person in whose favour it has been made by the same means available for the enforcement of other civil judgments or orders.

87C. Enforcement orders

- (1) At the time a court makes a reparation order, the court may make an ancillary order as to how the reparation order is to be enforced or otherwise satisfied.
- (2) An ancillary order under subsection (1) means an order of any type that could be made by a civil court in aid of the enforcement of a civil judgment or order, including an order for:
 - (a) the attachment of the offender's earnings;
 - (b) the seizure and sale of property belonging to the offender;
 - (c) the attachment of debts owed to the offender.
- (3) An order of the type referred to in subsection (2) can only be made if a civil court would have, in similar circumstances, the power to make such an order.
- (4) At the time a court makes a reparation order, in so far as the reparation order involves payment of a sum of money, the court may also order that the sum be paid out of monies found on the offender at the time of apprehension.
- (5) Section 87A does not apply to an order of the type mentioned in subsection (4).

87D. Appeals

- (1) Any person whose interests are affected by a decision to make or not make a reparation order may appeal against the decision.
- (2) An appeal under subsection (1) shall be conducted in the same manner as if the decision were a final order made by a civil court.
- (3) Nothing in this section affects the rights of a party to appeal against a sentencing order.

87E. Civil rights

Nothing in this Part affects the rights of any person to bring a civil proceeding for any loss or damage suffered as a result of an offence in so far as such loss and damage is not satisfied by the making or enforcement of an order under this Part."

9. Children and Young Persons Act 1989

- (1) Nothing in this Act is taken to affect the operation of the **Children and Young Persons Act 1989** in so far as that Act applies the provisions of Part 4 of the Principal Act to a proceeding in the Criminal Division of the Children's Court.

- (2) In section 191 of the **Children and Young Persons Act 1989**, after the reference to "the **Sentencing Act 1991**" insert—

", as in force prior to their amendment by the **Sentencing (Reparation) Amendment Act 1994** "
- (3) This section is repealed as from 1 January, 2000.

10. Repeals

- (1) Part 4 of the Principal Act is repealed as from 1 January, 1995.
- (2) The provisions set out in the Schedule are repealed as from 1 January, 1998.

11. Attorney-General to arrange for review and report

- (1) The Attorney-General must cause a person to review, and to report to the Attorney-General in writing about, the operation of this Act.
- (2) The person must be someone who, in the Attorney-General's opinion, is suitably qualified and appropriate to conduct the review.
- (3) The review and report must relate to the period beginning at the commencement of this Act and ending after the period of 4 years.
- (4) The person must give the report to the Attorney-General as soon as practicable, and in any event within 6 months after the end of that period.
- (5) The review and report must include an examination of:
 - (a) the effects of this Act on sentencing practices and principles;
 - (b) the frequency in which orders are made under Part 4 of the Principal Act, as amended by this Act;
 - (c) the enforcement of orders made under Part 4 of the Principal Act, as amended by this Act;
 - (d) the financial and administrative impact of this Act.
- (6) The report may include proposals for changes to the legislative and administrative arrangements governing the operation of Part 4 of the Principal Act, as amended by this Act.
- (7) The person must provide a reasonable opportunity for members of the public to make submissions to him or her about matters to which the review relates.

- (8) The Attorney-General must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Attorney-General receives the report.

SCHEDULE

CONSEQUENTIAL REPEALS

The following provisions are to be repealed as from 1 January, 1998 –

<i>Number of Act</i>	<i>Title of Act</i>	<i>Extent of Repeal</i>
7405	Summary Offences Act 1966	section 52(2).
7724	Stock Diseases Act 1968	section 42.
8056	Environment Protection Act 1970	section 65A.
8216	Bees Act 1971	sections 16 and 17.
111/1986	Transport Accident Act 1986	section 121.
51/1989	Magistrates' Court Act 1989	section 54.

APPENDIX V

COMPARATIVE TABLE OF DRAFT AND FINAL RECOMMENDATIONS

Draft Recommendation	Topic	Interim Report	Adopted	Rejected	Modified	Final Report	Draft Bill	Final Recommendation
1	Sentencing Purposes	Para. 2.63	√	x	√	Para. 2.37–8	cl. 6 & 7	1 & 2
2	Effects of Offence	Para. 2.68	—	x	—	Para. 2.36	—	—
3	Sentencing Order	Para. 3.85	x	√	—	Para. 2.28	—	—
4	Sentencing Hierarchy	Para. 3.91	x	√	—	Para. 2.28	—	—
5	Redundant Legislation	Para. 4.10	√	x	√	Para. 3.10	cl. 10 & Sch	3
6	Restitution Orders	Para. 4.32	√	x	x	Para. 3.15	ss. 84A, 84C, 84D	4
7	Consequential Loss	Para. 4.37	√	x	x	Para. 3.22	ss. 84A, 84D, 85A	5
8	Young Offenders	Para. 4.46	√	x	x	Para. 3.28	cl. 9	6
9	Police Procedures	Para. 4.66	√	x	√	Para. 3.42	—	7
10	Prosecutor's Discretion	Para. 4.73	√	x	√	Para. 3.42	—	7
11	Presumption	Para. 4.86	√	x	√	Para. 3.52	s. 84E	8
12	Order without Application	Para. 4.89	√	x	x	Para. 3.59	s. 86A	9
13	Victim's Veto	Para. 4.92	√	x	x	Para. 3.59	s. 86A	9
14	Adjourn or Transfer	Para. 4.107	√	x	x	Para. 3.67	ss. 85B, 86C	10

Draft Recommendation	Topic	Interim Report	Adopted	Rejected	Modified	Final Report	Draft Bill	Final Recommendation
15	Financial Circumstances	Para. 4.127	√	x	x	Para. 3.75	s. 87A	11
16	Procedure	Para. 4.153	√	x	√	Para. 3.90	s. 86B	12
—	Appeals	Paras. 4.159–4.173	√	x	√	Para. 3.97	s. 87D	13
17	Civil Standard	Para. 4.191	√	x	x	Para. 3.103	ss. 85C, 85D	14
—	Acquittals	Paras. 4.196–4.203	√	x	√	Para. 3.112	s. 84B	15
18	Consolidation	Para. 4.203	√	x	√	Para. 3.119	s. 84D	16
19	Enforcement	Para. 5.79	x	√	√	Para. 4.27	ss. 87A–87C	17
20	Civil Rights	Para. 5.95	√	x	√	Para. 4.37	s. 87E	18
21	Mediation	Para. 6.116	√	x	√	Para. 5.22	—	19
22	Central Fund	Para. 7.16	√	x	√	Para. 6.11	—	20
23	Central Referral Service	Para. 7.27	√	x	√	Para. 6.11	—	20
24	Personal Injury	Para. 7.37	√	x	√	Para. 6.16	—	21
25	Bureau of Crime Statistics	Para. 7.43	√	x	x	Para. 6.17	—	22
26	Further Research and Review	Para. 7.45	√	x	√	Paras. 6.18, 6.21–6.24	cl. 11	23 & 25
27	Judicial Studies	Para. 7.50	√	x	x	Para. 6.19	—	24

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