

## Chapter 8 Responding to the needs of victims

### 8.1 Impact of assault on public officer victims

Several preliminary submissions received by the Council refer to the impact of assaults on victims of these offences. The Queensland Nurses & Midwives' Union acknowledged that beyond the actual victim of the assault, colleagues, patients, the profession, the organisation and the overall quality of healthcare can be negatively impacted by assaults on health workers.<sup>487</sup> The Queensland Teachers' Union also pointed out the significant negative psychological impact that can be experienced by children in schools where violence against teachers and principals has been witnessed.<sup>488</sup>

A recent national survey of the mental health and wellbeing of police and emergency services workers found rates of psychological distress, mental health conditions and suicidal ideation were higher among the 21,014 volunteers and employees who participated in the survey than for members of the general community.<sup>489</sup> Some notable findings arising from the survey include:

- just over half of all employees surveyed (51%) reported having experienced a traumatic event at work that deeply affected them;<sup>490</sup>
- factors associated with poor mental health involved experiences of verbal abuse and physical assault sustained while on duty;<sup>491</sup>

The literature review on assaults of public officers commissioned by the Council identifies a number of implications for individuals who have been victims of workplace assault, such as:

- impacts on emotional and physical wellbeing;
- decreased connection to the organisation and a desire to leave the occupation;
- reduced job performance and increased errors at work; and
- lowered productivity within an organisation and difficulties retaining staff.<sup>492</sup>

The report does, however, make comment about the issue of under-reporting of workplace assault, identifying several studies that report this as a significant issue.<sup>493</sup> The authors summarise the general reasons why victims may choose not to report an assault:

- the complexity of the internal process for reporting the incident;
- a lack of support for the victim following the assault;
- lack of satisfaction with managerial responses;
- a view that workplace violence is seen as 'part of the job'; and
- a view that reporting the incident is unlikely to make any difference.<sup>494</sup>

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<sup>487</sup> Preliminary submission 18 (Queensland Nurses & Midwives' Union) 3.

<sup>488</sup> Preliminary submission 13 (Queensland Teachers' Union) 8.

<sup>489</sup> Beyond Blue Ltd., *Answering the Call National Survey, National Mental Health and Wellbeing Study of Police and Emergency Services – Final Report*, (Beyond Blue Ltd, 2018) 17.

<sup>490</sup> Ibid 31.

<sup>491</sup> Ibid 37.

<sup>492</sup> Christine Bond et al, *Assaults on Public Officers: A Review of Research Evidence* (Griffith Criminology Institute, March 2020) 18.

<sup>493</sup> Ibid 17.

<sup>494</sup> Ibid.

Preliminary submissions received by the Council have also addressed the issue of under-reporting, for example, Queensland Health in its submission commented:

While the number of reported incidents has increased on previous years Queensland Health recognises that under-reporting remains a significant issue. The QOVSU has advised that Queensland Health staff have reported significant barriers to reporting incidents to the Queensland Police Service. Notable barriers include disparity in receiving support to make a complaint; significant delay in time of incident to attending court hearings and sentencing which causes stress for staff and their families; and concern about disparity between sentences for similar incidents.<sup>495</sup>

The Department of Justice and Attorney-General also noted issues that may contribute to under reporting, commenting:

in considering data-based insights as part of this review, we note that factors such as stigma, effectiveness of some reporting systems, management complacency and a perception that 'it's just part of the job' can lead to under reporting across many relevant areas. Therefore, it is likely that the problem of workplace violence and aggression is likely to be more extensive than the data alone might suggest.<sup>496</sup>

The three case studies presented below illustrate both the immediate and longer-term impacts of being a victim of workplace violence.

#### Case study: police officer assaulted after a traffic stop

In 2006, a police officer was assaulted by the driver of a car which resulted in fractures to his right eye socket and another facial bone, a fractured finger, broken and dislodged teeth and general cuts, swelling and bruising to his face. The officer was hospitalised overnight and required three months' sick leave from work. He was assigned to 'light duties' for 12 months after his return to work and continued his role as a police officer after that. The officer wrote about his experience as follows:

As bad as an incident can get the effort to get back to work can be worse. You suddenly find out that you do not have total control over your life anymore and you have to fight hard to get better. Even though you get some understanding from other officers you work with, they do not have the slightest idea what you are going through and of course they can be cynical. But you hope they do not have to go through what you did to understand. What becomes so frustrating is that you see other officers doing regular police duties without a second thought but you find that for you it becomes a terrifying event. I have learnt so much on the issue of mental health over this.

Source: Gabriel Jose , 'A Night in June' [200] (September) *Police Journal* 23.

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<sup>495</sup> Preliminary submission 2 (Queensland Health) 2.

<sup>496</sup> Preliminary submission 27 (Department of Justice and Attorney-General) 1.

### Case study: paramedic assaulted by a concussed patient

In 2016, a paramedic was called to attend to a patient who had been concussed earlier in the day and was wandering the streets in a confused state. The paramedic located the man and approached him to provide assistance, but the man spat in the victim's face. The paramedic reported there was enough saliva that his vision was temporarily impaired and he could taste what the man had been drinking. When the matter was heard in court in 2019, he reported having suffered depression and mood swings since the incident, and the assault had since impacted the way he approached patients, which he can no longer do on his own. He spent nine months undergoing medical tests following the assault. The victim stated:

I have suffered the indignity and suffering of this disgusting act... [and have experienced moods that swing between] inconsolable misery and white hot anger.

Source: Pete Martinelli, "Scumbag Spat on Me" Paramedic Tells Court of Disgusting Action', *Cairns Post* (Cairns, 2 September 2019) 12.

### Case study: Corrections officer assaulted by inmate

In 2014, a Corrections Officer had faeces thrown in his face by an inmate who was infected with Hepatitis C. The officer underwent 10 months of testing, costing his family in excess of \$8,000. The victim's wife described the impact on him and on her family:

it was months of testing which meant we had to put our life on hold... In addition, you go through a two-year court process only to find out the prisoner gets off – it's completely wrong... There are some days where my husband won't want to get out of the car... Sometimes he comes home from two or three days of long shifts and he's not the same person he was before which has an enormous effect on our family.

Source: Unnamed author, 'Violence in QLD Prisons Reaching Tipping Point', *Mareeba Express* (Mareeba, 23 October 2019) 5.

## 8.2 The role of the criminal justice system in responding to victim needs

For most victims of crime, the criminal justice response is a critical aspect of acknowledging the full consequences of the offending they have experienced. For each individual victim of crime, what they seek from the criminal justice system may differ. For some, simply reporting the incident to police regardless of the outcome is a symbol that they have taken an important stance against violence at work. For others, a criminal conviction and a substantial term of imprisonment is the outcome they seek.<sup>497</sup>

The sentencing purpose of denunciation encapsulates the function of sentencing as a means of public condemnation of the offending behaviour thereby reaffirming the core community values that the offender has violated. In publicly denouncing relevant conduct, the court is conveying the

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<sup>497</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I and II* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2017) 159-160. While these comments were made in relation to child sexual abuse victims, they echo the needs of the victim groups more broadly.

community's disapproval. This process is intended to provide an important symbolic acknowledgement that community standards of morality have been offended through the damage done to the dignity of the individual.<sup>498</sup> This was noted in 2013 by the High Court in this way:

the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.<sup>499</sup>

The Queensland Court of Appeal expanded on this sentiment more recently:

The rational connection between sentencing, denunciation and the moral sense of the community has to be explored further in order to understand the role played by s 9(1)(d) of the *Penalties and Sentences Act*. The late Professor Jean Hampton offered an explanation for the relationships between these ideas. Professor Hampton distinguished between wrongs that result only in loss or harm to an individual and wrongs that, whether or not they also cause loss or harm, violate moral standards in a way that constitutes an affront to a victim's value or dignity. Such an affront causes a moral injury. A wrongful act might result in compensable loss but might also be morally excusable – particularly if the wrongdoer accepts responsibility and immediately offers recompense. On the other hand, when a wrong is constituted by an action that treats the victim as worth less as a human being than the offender, or treats the victim as entirely worthless, the commission of the wrong is both an affront to the victim's dignity and an affront to shared community values. The wrong done to the victim constitutes an insult to the community because it disparages one of the community's essential values, namely the value placed upon each precious individual. If permitted, such affronts might eventually corrode general acceptance of such values.<sup>500</sup>

Another interpretation of the principle of denunciation is that in invoking this as part of the sentencing process, it has the effect of 'social rehabilitation':

the process of social and personal recovery which we attempt to achieve in order to ameliorate the consequences of a crime can be impeded or facilitated by the responses of the courts. The imposition of a sentence often constitutes both a practical and ritual completion of a protracted painful period. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator. If the balancing of values and considerations represented by the sentence which, of course, must include those factors which militate in favour of mitigation of penalty, is capable of being perceived by a reasonably objective member of the community as just, the process of recovery is more likely to be assisted. If not, there will almost certainly be created a sense of injustice in the community generally that damages the respect in which our criminal justice system is held and which may never be removed. Indeed, from the victim's perspective, an apparent failure of the system to recognise the real significance of what has occurred in the life of that person as a consequence of the commission of the crime may well aggravate the situation.<sup>501</sup>

In this way, an effective criminal justice response is central to ensuring victims of crime have the confidence in the system to report criminal conduct.<sup>502</sup> In turn, the individual experiences of victims of crime have an important flow-on effect. When a victim of crime has a negative experience (which

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<sup>498</sup> Arie Frieberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Context* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) 39–40.

<sup>499</sup> *Munda v The State of Western Australia* [2013] HCA 38 [54] as cited in Frieberg, Donnelly and Gelb (n 498) 40.

<sup>500</sup> *R v O'Sullivan; Ex parte A-G (Qld)* [2019] QCA 300, 36-7 [144] (Sofronoff P and Gotterson JA and Lyons SJA) (citation omitted).

<sup>501</sup> *DPP v DJK* [2003] VSCA 109 [18], cited in Frieberg, Donnelly and Gelb (n 498) 40-1.

<sup>502</sup> See *DPP v Twomey* [2006] VSCA 90 [22]–[24], cited in Frieberg, Donnelly and Gelb (n 498) 41.

can exacerbate the trauma of the victim), or where a victim's expectations of the criminal justice response are not met, this can influence the views of other members of the community, leading to broader community dissatisfaction and higher levels of under-reporting of offences. As the Council found during its work on sentencing for child homicide offences, better information and support for victims of crime can greatly enhance their experience<sup>503</sup> and has potential to contribute to building greater public confidence in the criminal justice system.

This rest of this chapter considers the current approach to incorporating the 'voice' or experience of a victim of crime in the prosecution and sentencing of an offence, and alternative approaches.

## 8.3 Current approach

### 8.3.1 The rights of victims of crime

The Queensland Charter of Victims' Rights (the Charter) sets out the rights and entitlements of victims of crime in Queensland.<sup>504</sup> In summary, these rights include:

- to be treated with courtesy, compassion, respect and dignity, taking into account each victim's needs;
- to have their personal information protected from unauthorised disclosure, and to be protected against unnecessary contact with the accused, or violence or intimidation during court proceedings by the accused, defence witnesses and family members and supporters of the accused;
- to be informed at the earliest practicable opportunity about services (including support services) and remedies available to them;
- to be informed about the progress of the criminal justice process, including progress of the investigations, charges brought against the defendant and substantial changes to these charges or acceptance of a plea of guilty to a lesser charge, and details of court proceedings.

Under the Charter and the provisions of the *Penalties and Sentences Act 1992* (Qld) ('PSA'), victims also have a right to make a Victim Impact Statement (VIS), which is described further below.

The rights of victims as outlined in the Charter reflect different aspects of procedural justice. Adherence to these principles is important to victims feeling heard and part of the process.

Criminal justice agencies are required to meet certain minimum standards in providing support and assistance to victims. These standards are set out under the *Victims of Crime Assistance Act 2009* (Qld) or VOCAA. Significant changes were introduced to the VOCAA on 1 July 2017 following a review of the legislation,<sup>505</sup> to ensure the legislation 'continues to provide an effective response to assist victims of crime'.<sup>506</sup>

Changes included replacing the former Fundamental Principles of Justice for Victims of Crime in the Act with the current Charter.<sup>507</sup> The Charter informs victims about what they can expect from government departments and non-government agencies that support crime victims. It also places an onus on relevant agencies to provide information to victims proactively, if appropriate and

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<sup>503</sup> Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report* (Queensland Sentencing Advisory Council 2018) 171–2.

<sup>504</sup> *Victims of Crime Assistance Act 2009* (Qld) sch 1AA, pt 1, divs 1–2.

<sup>505</sup> These amendments were made by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld).

<sup>506</sup> *Explanatory Notes*, Victims of Crime Assistance and Other Legislation Amendment Bill 2016 (Qld) 1.

<sup>507</sup> *Victims of Crime Assistance Act 2009* (Qld) ch 2 and sch 1AA.

practical to do so. The Charter applies to the Queensland Police Service (QPS) and the Office of the Director of Public Prosecutions (ODPP) – the two key agencies involved in investigating and prosecuting offences – as well as to non-government agencies funded to provide support to victims.

Information to be provided under the Charter includes:

- the progress of a police investigation (unless this may jeopardise the investigation);
- major decisions made about the prosecution of an accused person, including the charges brought against the accused person (or a decision not to bring charges), any substantial changes to the charges, and the acceptance of a plea of guilty to a lesser or different charge;
- the name of the person charged;
- information about court processes including hearing dates and how to attend court, and the outcome of criminal court proceedings against the accused person, including the sentence imposed and the outcome of any appeal; and
- if the victim is a witness at the accused's trial, information about the trial process and the victim's role as a witness.<sup>508</sup>

There are processes that provide for a victim to make a complaint if they feel the Charter has not been followed, but the Charter does not create enforceable legal rights. Victim Assist Queensland (VAQ) can receive complaints about breaches of the Charter relating to any agency, although complaints can also be made directly to the agency concerned.

In the case of a serious assault that occurs in circumstances where the victim is a police officer, the QPS's *Operational Procedures Manual* provides that, where practicable, investigation of the offence should be undertaken by an independent investigation office, such as criminal investigation branch, or child protection investigation unit.<sup>509</sup> There are a number of matters set out to which a senior officer, who is not involved in the relevant incident, must have regard when determining whether an independent officer should investigate the assault including the serious nature of the assault, the injuries sustained, the complexity of the incident, the number of victims and witnesses, the number of suspects and the availability of resources.<sup>510</sup> It further states as a relevant consideration 'where practicable the investigator should be senior in rank to the victim'.<sup>511</sup>

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<sup>508</sup> Ibid sch 1AA, pt 1, div 2.

<sup>509</sup> Queensland Police Service, 'Chapter 2 – Investigative Process', *Operational Procedures Manual* (3 April 2020, Issue 75, Public Edition) 26 [2.5.3] 'Investigation of serious assault offences where police officers performing duty are victims'.

<sup>510</sup> Ibid.

<sup>511</sup> Ibid.

### 8.3.2 Victims Impact Statements

The criminal trial in the adversarial legal system is centred on the principle of the independent, impartial and fair prosecution of criminal offending.<sup>512</sup> In the adversarial system, offences are prosecuted by the State rather than by the individual victim of the offence; victims, therefore, appear in court as a witness and/or observer during the process.<sup>513</sup>

As discussed in Chapter 4, where an offence involved the use of, or attempted use of, violence against another person, or that resulted in physical harm, a court must have regard primarily to a number of additional factors. These include the need to protect any members of the community from the risk of physical harm if a custodial sentence were not imposed, the nature and extent of the violence used, or intended to be used, in the commission of the offence, and the personal circumstances of any victim.<sup>514</sup>

The primary way courts currently take the impact on the victim into account is through the use of a Victim Impact Statement (VIS). A VIS is a mechanism for a victim of crime to provide a written account of the impact of an offence on them, which is presented to the sentencing court – most often in a written format to the judge, although sometimes the victim can read the statement to the court, or the prosecutor can read the VIS to the court.<sup>515</sup> This forms part of the court's assessment of the seriousness of the offence and may be accompanied by other evidence of harm tendered to the court in the schedule of facts, a document which generally presents the agreed facts relevant to the case before the sentencing court.

All Australian states and territories have now introduced legislation to facilitate the use of a VIS in the sentencing process, which generally provides:

- who may give a VIS;
- the form a VIS must take; and
- what information a VIS can contain.

There is no mandatory requirement for a person to provide a VIS, nor can a court draw any inference about the level of harm caused to a person if no VIS has been provided. The court has discretion to determine how they take the information contained in a VIS into account and how much weight to give to information provided in a VIS. The content of a VIS may also be challenged, particularly if detail contained in the VIS is inconsistent with information previously provided by the person in a police statement or in evidence given to a court.

The statutory requirements applying to the use of victim impact statements were summarised by the Queensland Court of Appeal in *R v Evans*:<sup>516</sup>

- section 15 of the VOCAA [since omitted – but inserted in a modified form in s 179K of the PSA] allows for a VIS to be given to a sentencing court detailing the harm caused to the victim by the offence for the purpose of informing the sentencing court, with provision for the prosecutor to determine what details (if any) are appropriate to be given to the sentencing court, but having regard to the victim's wishes; however, the fact the details of the harm caused to a victim by the offence are absent at sentencing does not give rise to an inference the offence caused little or no harm to the victim;

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<sup>512</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Victorian Law Reform Commission 2016) 133.

<sup>513</sup> Edna Erez, 'Victim Impact Statements' (1991) *Trends and Issues in Crime and Criminal Justice* (33) 1-8.

<sup>514</sup> *Penalties and Sentences Act 1992* (Qld) ss 9(2A)-(3).

<sup>515</sup> *Ibid* ss 179M-179N.

<sup>516</sup> [2011] 2 Qd R 571.

- section 15 of the PSA provides that ‘In imposing sentence on an offender, a court may receive any information, ... , that it considers appropriate to enable it to impose the proper sentence’;
- in accordance with section 132C of the *Evidence Act 1977* (Qld), a sentencing judge or magistrate may act on an allegation of fact that is admitted or is not challenged or, if the allegation of fact is not admitted or is challenged, to act on it if satisfied on the balance of probabilities that the allegation is true (the level of satisfaction varying according to the consequences, adverse to the person being sentenced, or finding the allegation to be true).<sup>517</sup>

In this same judgment, Chesterman JA acknowledged that a VIS not only may serve a therapeutic purpose, but ‘may serve other purposes, such as informing the court of “details of the harm caused ... by the offence”, which is often a factor relevant to the level of sentence imposed’.<sup>518</sup>

The potential benefits of using a VIS in sentencing have been identified as including that they:

- allow the victim greater input into the formal court process thereby reducing the perception of the victim's lack of involvement in the criminal justice process;
- provide a cathartic and psychological benefit to the victim as the victim is allowed to prepare the statement in their own words with less formality than police statements;
- contribute to proportionality<sup>519</sup> and accuracy in sentencing as a result of information provided about the harm experienced by the victim;<sup>520</sup>
- assist in making the sentencing process more transparent and more reflective of the community's response to crime; and
- aid the sentencing court to make an informed decision; particularly when the offender has pleaded guilty and the court has not had an opportunity to hear the complainant's testimony.<sup>521</sup>

However, other commentators have raised concerns about the use and utility of VISs. For example, having the ability to submit a VIS may create unrealistic expectations for victims regarding the level of influence a VIS will have on the sentence outcome.<sup>522</sup> It has been suggested that if victim expectations are not realised in the sentencing process, there is a risk of creating or amplifying victim resentment and disappointment with the criminal justice system which is contrary to the aims of a VIS.<sup>523</sup> There is also potential for inequity based on the literacy competence of the victim preparing the VIS, and the ability for the victim to clearly understand and articulate the likely future impacts of the crime. This is particularly the case where the real impacts on a victim's life are not evident for some period of time, and may not yet have become apparent at the time of sentencing.

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<sup>517</sup> Ibid 574 [4] - 576 [7] (McMurdo P, Chesterman JA agreeing as to this approach at 577 [15]–[19]).

<sup>518</sup> Ibid 577 [17] (Chesterman JA).

<sup>519</sup> Proportionality is a sentencing principle that sets out that the punishment of an offender should fit the crime. See further Chapter 4.

<sup>520</sup> Edna Erez, ‘Victim Participation in Sentencing: Rhetoric and Reality’ (1990) 18(1) *Journal of Criminal Justice* (1990) 19.

<sup>521</sup> Joan Baptie, ‘The Effect of the Provision of Victim Impact Statements on Sentencing in the Local Courts of New South Wales’, (2004) 7(1) *Judicial Review* 73.

<sup>522</sup> Erez (n 520).

<sup>523</sup> Sam Garkawe, ‘The Effect of Victim Impact Statements on Sentencing Decisions’ (Conference Paper, Sentencing: Principles, Perspectives and Possibilities, 10–12 February 2006).



Others have suggested that the subjective contents contained in a VIS may:

- have the effect of skewing an objective process with the inclusion of possible emotional and vengeful content;
- influence the court to give too great a weight to the effect of the crime on the victim, neglecting other considerations such as the rehabilitation of the offender;
- result in inconsistent sentences when one victim complains of greater psychological injury than another more robust victim; and
- undermine the court's impartiality from unacceptable public pressures.<sup>524</sup>

It is not known how many victims of serious assault provide a VIS as part of the sentencing process in Queensland.

### 8.3.3 Financial assistance and support for victims of crime

Victims of an act of violence<sup>525</sup> can apply for financial assistance under the VOCAA of up to \$75,000 to aid in their recovery, which may include reimbursement of medical and counselling expenses, incidental travel expenses, loss of earnings of up to \$20,000, loss or damage to clothing, and other exceptional circumstance expenses (e.g. relocation expenses or costs of securing a place of residence). In addition, they can be eligible to be granted up to \$500 in legal assistance incurred by the victim in applying for assistance under the VOCAA.<sup>526</sup>

However, financial assistance cannot be granted under the VOCAA if the person who is the victim of the crime has, or will receive payment of an amount in relation to the act of violence from another source.<sup>527</sup> For victims of serious assault, therefore, an application for assistance from WorkCover must be made and finalised before applying for financial assistance under the VOCAA.

Chapter 2 presents information from WorkCover regarding applications for assistance by workers who have been victims of workplace violence. The Council will be examining the amount of compensation obtained through WorkCover claims in its final report.

### 8.3.4 Restitution and compensation

As part of the sentencing process, and in addition to any other sentence imposed, a court may order that an offender:

- make restitution of property that has been damaged or taken in association with the commission of an offence (a restitution order);
- pay compensation to a person for loss or destruction of property in connection with the commission of an offence (a compensation order);
- pay compensation for an injury suffered by someone because of the commission of an offence (a compensation order).<sup>528</sup>

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<sup>524</sup> Erez (n 513); William Cox, 'Sentencing and the Criminal Law: Address at the University of Tasmania Faculty of Law Graduation Ceremony' (2005) 24(2) *University of Tasmania Law Review* 173.

<sup>525</sup> See *Victims of Crime Assistance Act 2009* (Qld) s 21.

<sup>526</sup> *Ibid* ss 37-39.

<sup>527</sup> *Ibid* s 21(4).

<sup>528</sup> *Penalties and Sentences Act 1992* (Qld) s 35.

Restitution ‘means the return or redelivery of particular property’, as distinct from ‘compensation for damage to it’.<sup>529</sup> Therefore, ‘It follows that compensation orders for damage or loss to property or the person will be made in the majority of cases’.<sup>530</sup>

Such orders are not a form of punishment [although they are part of the sentence] but a summary and inexpensive method of compensating a person, avoiding the need to institute separate proceedings to establish civil liability. The potentially punitive consequences of such an order are relevant in considering the appropriateness of the overall sentence taking into account here that the applicant might be sent to prison for non-payment of the compensation.<sup>531</sup>

Any order made by the court under section 35 of the PSA can include details as to the amount of money to be paid by way of restitution or compensation, the person to whom the money is to be paid, the timeframe within which the money must be paid, and the details of how the money must be paid.<sup>532</sup> The court may also order that the offender may be imprisoned if they fail to pay the restitution or compensation. On written application to the court, the length of time to pay may be extended.<sup>533</sup>

The PSA twice states that, if necessary, the imposition of a fine comes second to compensating a victim. A sentencing court must give preference to making an order for compensation — but may also impose a sentence other than imprisonment — if the offender cannot pay both the compensation and the fine or similar amount, even though both would be appropriate.<sup>534</sup> Also, where it would be appropriate both to impose a fine and to make a restitution or compensation order, a sentencing court must give more importance to restitution or compensation, if the offender does not have the means to pay both.<sup>535</sup>

The imposition of a term of imprisonment may mean that compensation is not a reasonable prospect. The Court of Appeal has stated that:

In the absence of cogent evidence that an offender has the capacity to pay compensation after release from a term of actual imprisonment imposed as part of a sentence, courts are reluctant to order offenders to pay compensation after serving a term of imprisonment. To do so may jeopardise the offender’s prospects of rehabilitation; it would be apt to amount to a crushing sentence and would risk setting up the offender to fail at the time of release from prison when most in need of support to reintegrate into society.<sup>536</sup>

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<sup>529</sup> *R v Ferrari* [1997] 2 Qd R 472, 475 (McPherson JA, Davies JA and White J agreeing), citing *R v Beldan, Ex parte A-G* [1986] 2 Qd R 179, 198.

<sup>530</sup> John Robertson, Thomson Reuters, *Queensland Sentencing Manual* (online at 3 March 2020) [15.2050].

<sup>531</sup> *R v Allison* [2012] QCA 249, 5 [27] (Douglas J, Fraser and White JJA agreeing), citing *R v Ferrari* [1997] 2 Qd R 472, 477 for the first sentence, and *R v Matauaina* [2011] QCA 344, [35] for the second. As to the statutory power to provide a set period of time within which to pay (or referral under the *State Penalties Enforcement Act 1999* (Qld)) and power to order imprisonment if the offender fails to comply with the order, see *Penalties and Sentences Act 1992* (Qld) ss 36-39.

<sup>532</sup> *Penalties and Sentences Act 1992* (Qld) s 36.

<sup>533</sup> *Ibid* s 38.

<sup>534</sup> *Ibid* s 14.

<sup>535</sup> *Ibid* s 48(4).

<sup>536</sup> *R v Flint* [2015] QCA 275, 9 [24] (McMurdo P, Morrison JA and Jackson J agreeing). See also *R v Jacobs* [2016] QCA 028.

In that case, the default term of imprisonment the offender was liable to serve if he failed to pay the compensation upon his release, would, as a matter of law, be cumulative on the term imposed for the offence itself – ‘the court held that this order made the overall sentence manifestly excessive’.<sup>537</sup>

Court data available from the Courts Database for the period 2012–13 to 2018–19 shows of the 7,912 cases involving a serious assault, 14.5 per cent involved one or more compensation orders (n=1,150). The average amount of compensation ordered was \$773.42, and the highest amount of compensation was \$14,500.00. Unfortunately, the data is unable to differentiate between compensation which relates to property, and compensation which relates to a personal injury, so this detail cannot be provided. These compensation orders relate only to sentencing orders made under section 35 of the PSA and do not include compensation or financial assistance provided to victims that is not part of the sentencing process, such as a victim’s right to seek compensation by making a WorkCover claim and, once their WorkCover application has been finalised, to seek financial assistance under VOCAA.

Restitution orders were imposed in 137 cases involving a serious assault (1.7% of cases) with an average amount of \$729.10 per case.

**Table 8-1: Restitution and compensation orders for serious assaults of a public officer**

Order	N (cases)	% (of all cases)	Average amount (by case)	Min	Max
<b>Compensation</b>	1,150	14.5%	\$773.42	\$10.00	\$14,500.00
<b>Restitution</b>	137	1.7%	\$729.10	\$8.90	\$5,000.00

Data includes: adult and juvenile, lower and higher courts, sentenced 2012-13 to 2018-19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: Orders within a case were summed to create a total compensation amount and a total restitution amount per case and then averaged.

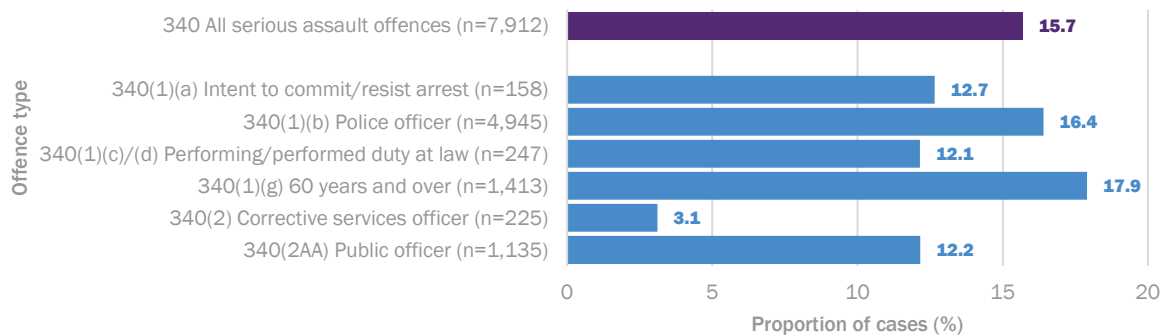
In the subsequent analyses, restitution orders and compensation orders are examined collectively. Due to the small number of cases involving restitution, and the fact that the data does not distinguish between compensation involving property or personal injury, it was not possible to analyse these penalties separately.

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<sup>537</sup> John Robertson, Thomson Reuters, *Queensland Sentencing Manual* (online at 3 March 2020) [15.2125]. See also [15.2120] discussing *R v Silasack* [2009] QCA 88.

Approximately 1 in 6 serious assault cases involved a compensation and/or restitution order (15.7%). This percentage was slightly higher when the offence was serious assault of a person aged 60 years and over (17.9%) or a police officer (16.4%). Assault of a corrective services officer was the least likely to result in a compensation and/or restitution order being made – see Figure 8-1.

**Figure 8-1: Proportion of serious assault cases receiving a compensation and/or restitution order**

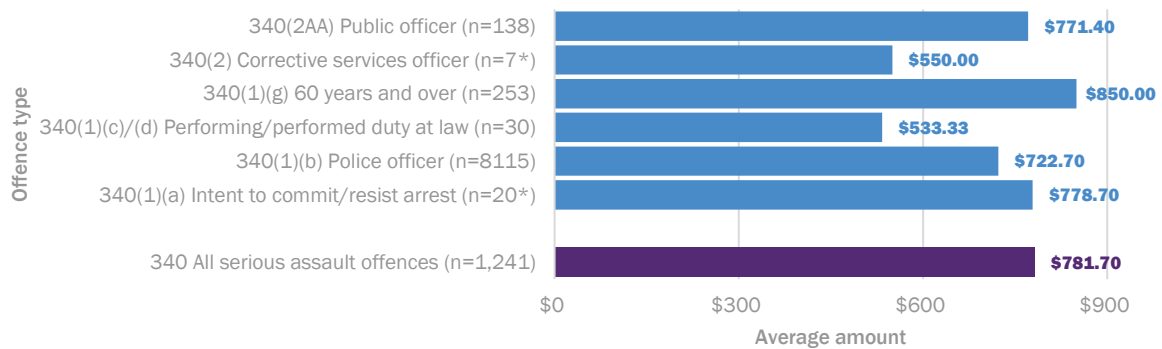


Data includes: adult and juvenile, lower and higher courts, sentenced 2012-13 to 2018-19  
 Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

The average amount of compensation and/or restitution was \$781.70 per case. The average payment was highest when the assault involved a victim aged 60 years and over at \$850.00, and lowest for assault of a person performing/performed a duty at law – see Figure 8-2.

For more information about the amount of restitution and/or compensation for specific subsections of section 340, please refer to Table A4-5 in Appendix 4.

**Figure 8-2: Average amount of compensation and/or restitution ordered for serious assault cases**



Data includes: adult and juvenile, lower and higher courts, sentenced 2012-13 to 2018-19  
 Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.  
 \* Small sample sizes

## 8.4 Alternative mechanisms

Although each victim and victim experience is unique, the relatively passive role victims have played in the trial and sentencing process has resulted in many victims reporting that they feel both confused and alienated from the process, leading to perceptions of injustice.<sup>538</sup> This has led to much debate and discussion about how the experiences and views of victims of crime could be better incorporated into the criminal justice process.

<sup>538</sup> Erez (n 520).

### 8.4.1 Victims' involvement in the criminal trial process

The Victorian Law Reform Commission conducted a significant review of the role of victims in the criminal trial process and provided a comprehensive report in 2016 following extensive consultation with stakeholders and the community. The Commission characterised the views of stakeholders as largely falling into two camps:

- legal stakeholders largely opposed an increased role for victims in court proceedings, concerned that this could undermine the principles of a fair trial and lead to delays and additional complexity in court matters.
- Victims, support workers, academics, some lawyers, Victoria Police and the Victorian. Victims of Crime Commissioner supported an increased role for victims at particular points in the criminal trial process, to contribute to the decision-making of the court.<sup>539</sup>

Among the second group who supported an expanded role for victims, there were arguments that victims of crime should be heard in court proceedings when issues are raised that relate to the personal interests of the victim, although stakeholders were not altogether clear about what constitutes a 'personal interest', and it became clear to the Commission that a definitive list of personal interests could not be adequately made.

The Commission also outlined the view of some victim supporters that a victim of crime should be able to participate in the proceedings via a legal representative, who should have the ability to protect and advocate for the personal interests of the victim, for example by protecting the victim from improper questioning. The Commission further explored the question of expanding the functions of victims in proceedings to give them equal footing to prosecutors – enabling them to introduce evidence or to cross-examine witnesses, although there was little support in submissions to the review for this approach.

While the Commission concluded that expanding the participation for victims of crime in the court would ultimately impact on the central principle of a fair trial, it nevertheless conceded there may be circumstances where the interests of the prosecution and a victim of crime may diverge, presenting a legitimate right for the victim to be heard by the court on a matter that affects them. The Commission commented that interventions of this nature can already be accommodated by the courts.<sup>540</sup>

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<sup>539</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Victorian Law Reform Commission 2016) 158–9.

<sup>540</sup> *Ibid* 163–4.

### 8.4.2 Restorative justice approaches

The Victorian Law Reform Commission also explored in some detail the potential for restorative justice conferencing to deliver improved outcomes for victims of crime. Restorative justice conferencing involves a dialogue between the parties (victim and offender) directly affected by a criminal offence, whereby the harm suffered by the victim can be expressed, acknowledged by the offender and an agreement reached about the way to repair the harm, where possible.<sup>541</sup> These processes have been consistently evaluated as resulting in high levels of victim satisfaction for those who elect to participate in this process, and of being beneficial for offenders who accept responsibility for their actions.

While the Commission recognised that this approach is not appropriate or desirable for all victims and offenders, the Commission concluded that it has the potential to deliver a much more meaningful and effective outcome for victims of crime, provided appropriate safeguards are in place and it is treated as ‘supplementary, not diversionary’ in the case of more serious offences.<sup>542</sup> The Commission went on to recommend that the Victorian Government introduce a scheme for restorative justice conferencing for indictable offences in the following circumstances:

- where a decision is made by the Director of Public Prosecutions to discontinue a prosecution;
- after a guilty plea and before sentencing; and
- after a guilty plea and in connection with an application for restitution or compensation orders by a victim.<sup>543</sup>

The recommendations of the Victorian Law Reform Commission in respect of restorative justice conferencing have not been adopted by the Victorian Government thus far.

To date in Queensland, restorative justice conferencing has been formalised as a process in Childrens Court matters, and is also a service offered by the Dispute Resolution Branch within the Queensland Department of Justice and Attorney-General (DJAG). Adult Restorative Justice Conferencing (ARJC) is a service for adult offenders, their victims and their respective families and provides support in the aftermath of a criminal offence. A conference of this nature can occur at any stage of the criminal justice process, such as:

- prior to charges being laid;
- prior to a matter being heard in court;
- after a finding has been made in the court but before a sentence is imposed; or
- post-sentence, either while a person is serving a term of imprisonment or some other community-based correctional order, or after the person has completed their sentence.<sup>544</sup>

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<sup>541</sup> Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report for the Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016) 9.

<sup>542</sup> Victorian Law Reform Commission (n 539) 182–183 [7.275]–[7.278].

<sup>543</sup> *Ibid* Recommendation 32.

<sup>544</sup> Dispute Resolution Branch, Submission No 37 to Queensland Sentencing Advisory Council, *Review of Sentencing for Criminal Offences Arising from the Death of a Child* (14 August 2018) 1.

The Dispute Resolution Branch has advised the Council that they conduct restorative justice conferences for victims and offenders in serious assault cases, including where a victim of serious assault may be a public officer.<sup>545</sup>

Under most restorative justice schemes, even where a victim does not wish to participate directly in a conference, they may participate in a different way or send a representative to the conference to represent their interests.<sup>546</sup>

#### Questions: Responding to the needs of victims

4. Does the current sentencing process in Queensland adequately meet the needs of public officer victims?
5. Should any changes be considered to the current approach to better respond to victim needs? If so, what reforms should be considered?

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<sup>545</sup> Email from Practice Manager, Dispute Resolution Branch to Director, Queensland Sentencing Advisory Council, 19 March 2020.

<sup>546</sup> For example, the legislative restorative justice conference scheme in the Australian Capital Territory allows for a substitute participant to take part instead of the victim provided the victim asks for, or agrees to this and the convenor agrees: *Crimes (Restorative Justice) Act 2004* (ACT) s 43. The Queensland restorative justice conference scheme for child offenders under the *Youth Justice Act 1992* (Qld) also allows for a representative of the victim (at the victim's request), or an organisation that advocates on behalf of victims of crime, to attend in their place, as well as the use of pre-recorded communication: *Youth Justice Act 1992* (Qld) ss 34(1)(g)-(h) and 35(1)(b).