



**Government
of South Australia**

**Commissioner for
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Reference
LetterSubmission_CommissionerVictimsRightsSA.docx

22 November 2016

Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001

Dear Commissioners,

Re Consultation paper - Criminal Justice

I apologise for the delay in reply for which after your generous extension I offer only regret. Please note that a full submission on the issues raised in the Royal Commission's discussion paper will be forthcoming; however, by this letter I offer several general observations, which are in addition to my previous written submission on police and prosecution.

Australia's criminal justice systems are grounded on the premise that police investigate victims' allegations and public prosecutors pursue public prosecutions on behalf of the public. There has been, and remains among too many, the view that there is no room for the active participation of victims of crime – which is wrong. Some victims' rights reforms have the potential to expand victims' participation without unduly impacting on the rights of accused people. For example, , the appointment of a Commissioner for Victims' Rights in South Australia with authorities to intervene in certain criminal proceedings.

International and domestic law and policies have challenged, and will continue to challenge, not only the administration of criminal justice throughout Australia (and elsewhere) but also the tenets and principles upon which such rests.

Regarding principles to govern police and prosecutors' responses to victims of crime, I point out that every state and both mainland territories in Australia have a declaration / charter governing treatment of victims of crime. Further, although there is no federal charter there is a national charter on "victims' rights", which Australia's Attorneys-General agreed in the SCAG sessions 1993-1996.

These derive from Australia's endorsement of the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. There are two handbooks to guide the implementation of the UN declaration. An Australia delegate contributed to at least one of the handbooks.

In 2005, Australia's federal senior law officer, the Attorney-General endorsed the Commonwealth nations Statement of Basic Principles of Justice for Victims of Crime that is complimented by the earlier guidelines on the treatment of victims of crime, as published by

the Commonwealth Secretariat. An Australia delegate contributed to the development of the guidelines.

In the late 1980s and throughout the 1990s, the Police Commissioners of Australia produced several policies on police and victims of crime. In the mid-1990s, Australia's Directors of Public Prosecution also engaged in dialogue on prosecutors and victims as witnesses. The policies and practices that directors devised were informed by the aforementioned victims' rights instruments as well as prosecutorial specific discourse such as happened among the International Prosecutors Association.

There has been remarkable improvement in police and prosecutors' treatment of victims of crime; however, there is no doubt that the implementation has been patchy; and, that some police and prosecutors still treat victims ambivalently. Justice for victims has much to do with being treated properly by those to whom they turn for help.

There has been a shift in policing from a focus on 'catching offenders' and being mindful of accused persons' rights, to an ongoing greater focus on the victim and their rights, such as providing assistance. Noting that the Royal Commission has highlighted the plight of vulnerable people, such as children, I point to an initiative in Arnhem and Maastricht, Germany, that will soon be national. On receiving victims' reports about crime, the police complete a 'declaration of standard additional questions' about the victim's personal circumstances. The vulnerability analyses helps the police determine the help and/or protection the victim needs. The procedure complements the domestic and regional victims' rights law.

Australian research on the implementation of victims' rights instruments has revealed shortcomings. In South Australia, two surveys (Gardner 1990; Erez et al 1994) revealed that despite the declaration on victims' rights many victims felt they did not get the information they needed and too many public officials treated them inconsistently. A review of victims of crime (JSU 1999, 2000) revealed similarly negative matters but also positive matters attributable to the declaration and steps taken to implement it. Western Australia reviews done in the same era produced both negative and positive findings (Wilkie, Ferrante & Susilo 1992; Keating 2001). Collectively, positive findings included improvements in police treatment of victims, more support during criminal proceedings and better access to therapeutic assistance, for example, counselling.

The New South Wales statutory review of its victims' legislation (2004; see also Curtis & Pankhurst 2003) noted that "Many victims, friends and families of victims, and victim support groups observed that the terms of the Charter are simply not being followed by government departments and agencies in their dealings with victims" (p47). The ACT Department of Justice and Community Safety (2008) issued a paper on the operation of the Victims of Crime Act 1994 (ACT) and noted similar concerns. It cited the Victims of Crime Support Program Annual Report 2006-07, in which the Victims of Crime Co-ordinator highlighted "...individual cases of agencies failing to adhere to governing principles contained in the Act, inconsistencies between agencies in their application or implementation of the governing principles, and problems in addressing the failures of these bodies to implement the Act's requirements"(p21).

Community surveys (e.g. Roberts & Indermaur 2009) show that many citizens still believe the criminal justice system does not meet the need of victims; and, victim surveys reveal that many victims are not aware of their rights and many victims, despite victims' rights, and many still feel, as said above, they are treated with ambivalence. In 2013 the National Victims of Crime Working Group (that reports to Australia's Attorneys-General) concluded that in spite of the far-reaching improvements by police, prosecutors and other criminal

justice practitioners treatment of victims of crime, the implementation of victims' rights declarations / charters across Australia was patchy.

Every victim should be aware of their rights but they are not; and, every public official should be aware of their obligations under victims' rights law but they are not. Further, victims' right should know no borders, yet across Australia there are differences in victims' rights law. Conversely, there are many commonalities in the declarations and charters that exist in Australia, for example:

- Treating victims with respect, compassion and dignity, as well as cultural sensitivity
- Providing protection from the accused person (and his or her family and associates)
- Avoiding unnecessary intrusion into victims' privacy, including protecting the identity of the victim
- Providing medical, psychological and practice assistance that is accessible
- Providing information of the criminal justice process and victims' role and responsibilities as witnesses
- Providing accurate and timely information about the investigation, the charges laid, about the outcome of a bail application (including information on conditions imposed to protect the victim), the prosecution, the court outcome and the impending released, escape or recapture of the offender
- Giving victims opportunities to participate in decisions that affect them, such as taking into account victims on their perceived safety concerns when deciding whether to bail the accused; consulting victims before any decision to modify or not to proceed with charges laid against the accused; and the opportunity to make submissions at parole hearings.
- Giving victims the opportunity to make statements on how the crime affected them and giving those who choose to make statements accurate information and appropriate assistance
- Providing for offender paid restitution and, when the offender cannot afford to pay restitution, state-funded compensation for victims of violent crime
- Reducing inconvenience by, for instance, returning victims' property held by the State for the purpose of investigation or evidence

The strength and effective operation of victims' rights, however, should not depend on where you live in Australia.

Mindful of the evolution of victims' rights and in light of the research on such, I urge that the Royal Commission not only recommend guidelines in terms that clearly enunciate obligations but also are stated as mandatory guidance for action, rather than platitudes. Further that there be appropriate governance procedures, including monitoring implementation and evaluation, and commensurate grievance procedures. In addition, I urge a national approach, with the Commonwealth engaged, towards first the harmonisation of victims' rights law and second to the standardisation of such law. I hasten to add that the National Framework on Victims' Rights and Victim Assistance is an important step to attaining harmonisation as are other 'agreements' or 'protocols' such as that governing cross-jurisdictional operation of Victim Registers run by correctional services departments.

Vital victim information should be incorporated into police information management systems. The victim's case should be as readily identifiable as the accused's case. It is important also to have security provisions in place to protect confidential victim information (Sigmon & Seymour 1996). Victim confidentiality is a priority consideration. There should be no unnecessary intrusion on victims' privacy (common right across Australia).

Information management systems should be designed to facilitate victims' access to information about the progress of investigations, prosecutions and criminal proceedings. Research suggests that when victims are given the opportunity to provide information on

their personal circumstances and the effects of the crime, their overall opinion on the criminal justice system improves.

Victims' participatory rights are said to be one way to enhance procedural justice for victims of crime without unnecessarily encroaching on procedural justice for accused and convicted persons. A study involving respondents from the Netherlands and New South Wales, Australia investigated the concept of procedural justice for both sexual assault victims and non-sexual assault victims (Laxminarayan, 2012; see also Laxminarayan, Bosmans, Porter & Sosa 2013, Laxminarayan 2014). The researcher found that procedural justice, "in terms of voice, accuracy and police treatment", impacted the psychological effects of criminal proceedings and was also an important determinant of victims' perceptions of "outcome favourability" (p.133). For victims of sexual assault, procedural justice was more strongly associated with the outcome variable; thus, the researchers recommended that providing victims of sexual assault with means "to voice themselves would be helpful in their recovery" (p.134). Similarly, Kelly (1984) reported that procedural factors, such as fairness of treatment, were more strongly correlated with satisfaction levels among 100 rape victims than the outcome of either the police investigation or the prosecution. Both procedures and outcome, however, were influential on satisfaction.

A study in the ACT has also shown an association between voice and procedural justice (Holder 2014). Consistent with other studies (Laxminarayan 2012), this study suggested giving victims a voice (as happens in mediation (see Wemmers and Cyr 2006) and in victim impact statements (Erez 1994; O'Connell 2006)) appears to contribute to higher confidence levels among victims, so long as such a voice is listened to and responded to appropriately. For some victims, the right to voice their views might be adequate, but others might exercise their right to voice to influence decision outcomes. Holder (2013) explains that victims' concept of justice rests on substantive and procedural elements. "Moreover, this conception [draws] on core values associated with the public role of the criminal justice system, especially those of fairness, equality and respect" (p.1; see also Tyler 1987, 1988; Wemmers 1998). These principles might underpin the responses victims' made to surveys (Erez et al., 1994; JSU, 2000; see also Wemmers & Cyr 2004) in which victims identified ways to improve the criminal justice system. Their lists included, as mentioned, more information about their cases and the system but also information about their standing in it and their entitlement to legal counsel. As I said elsewhere during a lecture on victims and legal representation, "Victims want a voice. They want to be heard. They want a say on decisions that affect them but do not necessarily want to make or control these decisions".

Victims should not be mere spectators or at best witnesses in our criminal justice systems. These systems, as wholes, should be sensitive to victims' rights. Moreover, experiences (including some statements by victims to the Royal Commission) show that victims or victims' families when the victim is a child or suffers a cognitive or intellectual disability, or families of deceased victims are at the mercy of prosecutors (including police prosecutors, DPP solicitors and prosecutors).

Victims should be consulted on key decisions that affect them, such as charge decisions, and when their views differ from the police as prosecutors or prosecutors for the Director of Public Prosecutions, there should be open and visible reporting on the decision-making. Victims, for instance, should be entitled, if they choose, to make their views on a charge bargain known to the court. This might be done in the statement of agreed facts, by the prosecutor in submissions, or in a victim impact statement.

When dealing with a victim grievance about the prosecutor's manner during a 'proofing – consultation session', the prosecutor stated that they were trained in law, not in social service. The prosecutor wanted to do better. To effectively and compassionately address

victims' rights and needs and provide satisfactory responses, prosecutors must have a sound understanding of the effects of crime on its victims. Like other police, prosecutors who have direct contact with victims should participate in Victimological training. Victims' rights law, established policies and practices on dealing with victims as well as on victims' needs and concerns should be core elements of a compulsory subject for students studying law.

Returning to the Royal Commission's observations on guidelines, similar argument can be put regarding guidelines and prosecutors. I concur, however, that guidelines (if known to the criminal justice practitioner) serve as a reminder to prosecutors on issues victims may be facing as a result of the crime and provide helpful suggestions (regarding some rights I would argue mandatory obligations) on: strategies for communicating with the victim, appropriate settings for interviewing victims, the importance of being properly prepared, referral to services for victims, appropriate response to victims with 'special needs'.

Courts should have discretion when reviewing victims' claims that a right – for example, the right to consultation (that imposes an obligation to confer before a decision is made) on charge bargain decisions – has not been upheld. In the USA under federal law, whenever a victim is denied any of his or her enumerated rights, the victim may petition the court of appeals for a writ of mandamus. . . . [which] [t]he court . . . shall take up and decide . . . forthwith . . . “. In other words, there is a form of judicial review. Supreme Courts across the USA have acted in accord with the law, even allowing a victim to have legal counsel present for the purpose of ensuring the conferring happened justly, fairly and equitably; see below for further comment on the USA federal law.

On victims having legal counsel, the Victoria Law Reform Commission (2016) recently observed that the “prosecution is unable to assist victims in asserting substantive entitlements if doing so conflicts with its duty to act impartially and independently. There is no designated legal service in Victoria for victims to access. The Commission therefore recommends that “Victoria Legal Aid should be funded to establish a service for victims of violent indictable crimes, modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW. It should provide legal advice and assistance, in accordance with the Legal Aid Act 1978 (Vic), in relation to: (a) substantive legal entitlements connected with the criminal trial process; (b) asserting a human right, or protecting vulnerable individuals, in exceptional cases.”

I have previously advocated that public prosecutors (including the police) should be subject to judicial review. Counter argument has focused on establishing formal review and complaint processes.

The European Union Victims Directive came into force in 2015. Since then the Irish DPP has received 554 requests for reasons to case decisions, and 192 applications for decisions to be reviewed. Only one decision was reversed. A spokesperson for the Irish DPP is reported as stating that the DPP said the right to request reasons for case decisions is “a very important process”. “It promotes greater understanding of sometimes significant decisions affecting victims.” (Keena 2016). It is, however, unclear how many victims were satisfied with the review process and / or the outcome.

The Irish data also differs from the earlier data from the Crown Prosecution Service (CPS) in England that showed about 140 of 1000 decisions were amended or revealed as wrong. In 2016, a police officer accused the CPS of denying justice for victims. The officer referring to 'honour crimes' is reported as stating that sometimes prosecutors discontinue a case in part because they assume that victims will not complain due to their vulnerability. In reply to the officer's specific grievance the CPS wrote an apology for not consulting him before the decision to withdraw the charge was made. The dropping of the charge – that appears to be

grounded on misinformation about the victim's whereabouts – denied the victim of honour-based violence access to justice.

Judgments in the European Court of Human Rights and the Divisional Courts in England indicate that it may be possible to use judicial review in the future to strengthen victims' rights to consultation on decisions that affect them. For example in England, the Divisional Court in *R v DPP ex parte C11* held that courts could set aside a decision of the Crown Prosecutor not to prosecute on any of three grounds: if the decision was illegal; if the decision conflicted with the DPP's official Code of Prosecutors; and if the decision was perverse. In *R v DPP ex parte Manning* the Divisional Court quashed the decision of the DPP not to prosecute a group of prison officers who appeared to be involved in the death of a prisoner. In this case, the Coroner's jury had returned a unanimous verdict of unlawful killing. In *R (B) v DPP* the Divisional Court also —quashed the DPP's decision not to prosecute. The Court said the decision was irrational and suggested it was based on either a misunderstanding or unfounded stereotyping of the victim-witness' capacity to give credible evidence. And, in *R (Guest) V DPP* the Divisional Court also quashed the DPP's decision not to prosecute and suggested that where such a decision is quashed, proceeding with the prosecution would not necessarily be an abuse of process. I hasten to point out that the Court's decision to set aside a decision of the DPP does not guarantee that a prosecution happen. The Court's intervention only requires the DPP to reconsider his or her decision.

Likewise in Australia there is judge-made law that opens the way for judicial review of administrative decisions, including (I suspect) decisions made by public prosecutors. Courts already use judicial review to interfere with prosecutors' decisions to proceed with criminal charges – that interference is commonly called a stay of proceedings'. Regarding the victims' right to consultation, judicial review could ensure consultation happened but could not, other than staying proceedings, set aside the prosecutorial discretion to prosecute or not until appropriate attention has been paid to the victim's right to consultation. I concede the High Court has made observations on this pointer; however, I add that the High Court has when appropriate argument is put held that other decisions, such as that made by a minister on immigration and refugee matters can be reviewed.

Consistent with the pointers above, I suggest one 'amended' right and three 'new' victims' rights. Victims throughout Australia should have a right to confer and to be consulted before charge decisions are made; rather than merely the right to have such decision explained. Victims of serious offences should have the right to trial, albeit not a right to veto if the prosecutor decides not to proceed to trial. Further, prosecutors' decisions should be reviewable and for the purpose of review, the victim should be entitled to ask a court to stay proceedings until the review is complete. All victims in addition should have a legal right to an apology – from a public official, such as a prosecutor, who has failed to comply with their victims' rights obligations; and, from offenders who hurt them.

The Court can also play a crucial role to strengthen, even enforcing victims' rights but to often have shied away from doing so. Occasionally, magistrates and judges have advocated greater attention be given to victims' needs and victims' rights. Justice Cummins, for example, specifically spoke about the place of victims' rights in criminal proceedings in his sentencing remarks in the Dupas case - which was a murder trial before the Supreme Court of Victoria. His Honour stated that every victim matters. He said (quote), —The law has always given, and rightly so, scrupulous attention to a proper process to insure accused persons receive fair trials. That process should never be deflected or diluted or diminished. Further, the criminal law is found in upon the protection of society as a whole. It is a public, not a private, matter thus proceedings are brought by the state, not by the victim. Even so, I do not think the law has given sufficient attention to the rights of victims {underline my emphasis}. He added that he felt that it would be appropriate for consideration to be given to

adding to the purposes of sentencing that sentences may be imposed for the vindication of the rights of victims. He maintained that there should be a fairer balance between the rights of offenders and the rights of victims.

United States federal law (some say) authorises a court to appoint counsel for victims to ensure that victims' rights are afforded, which has happened. The federal court in *United States V Stamper* appointed counsel to represent the victim. In another case, *Hughes V Bowers*, the federal court held that the presence of a lawyer for the victim is not constitutionally improper.

Courts have acted to strengthen victims' rights in the United States in other ways. For example, the Appeal Court in the *US v Degenhardt*, up-held the victim's right to speak directly to the judge at sentencing and concluded that a victim's right to speak is mandatory, and is not subject to the discretion of the court unless there are so many victims involved that the court's ability to function effectively would be threatened. As well, in *US v Ashburn* the court rejected the defendant's claim that the victims' impact statements prejudiced his due process right to fair sentence. The court perceived —no violation of due process in the 'emotional appeal' presented by the victim impact statements. The court said, —While it may be true that the statements presented a compelling account of the harms allegedly wrought by Ausburn's conduct, this is inherent in the victim's right to attend court and present his or her own account of the crime and its impact.

Furthermore, the federal Crime Victims' Rights Act 2004 allows the victim to use a writ of mandamus to obtain a court-ordered stay of proceedings until the court is satisfied, for instance, that the victim has been adequately consulted on the plea bargain or heard during sentencing. In *Kenna v US District Court for the Central District of California*, the 9th Circuit Court reviewed the Congressional debates on the Crime Victims Rights Act then concluded that there was —a clear congressional intent to give crime victims the right to speak at proceedings [covered by the Act]. The right to be heard at any public proceeding involving sentencing —means that the district court must hear from the victims, if they choose to speak, at more than one criminal sentencing, which had not happened so the petition was granted. Significantly, the Court remitted the matter to the trial court, set aside the sentence and ordered that court formulate a fresh sentence after the victim had spoken on the effects of the crime (Butler 2006; Baron-Evans 2006).

I add two more pointers about the courts' obligations. First, in addition to victims having their own legal counsel, even if only to the extent the Victoria Law Reform Commission recommends (see above), courts should be empowered to enquire on whether victims' rights have been honoured. For example, courts hearing a bail application should be able to ask prosecutors if the victim has perceived safety concerns, when such concerns are not presented by the prosecutor in accordance with victims' rights law; and, to ask whether a victim was given the opportunity to make an impact statement when such statement is not presented during the sentencing hearing. Second, appeal courts should, on application by the victim (or victim's legal counsel or the prosecutor) be able to order an offender pay restitution when a sentencing court failed to do so.

On criminal justice reform, I also concur with the Victoria Law Reform recommendation that there should be a right for victims in criminal proceedings to be acknowledged as a participant, treated with respect and protected from unnecessary trauma.

Yours faithfully,

A handwritten signature in black ink that reads "Michael O'Connell". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

Michael O'Connell | Commissioner for Victims' Rights, South Australia