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of South Australia**

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

Dear Commissioners,

Re Experiences of Police and Prosecution Services

As Commissioner for Victims' Rights, I base my replies to the Issues Paper 8 – Experiences of Police and Prosecution Services – on my reading of the relevant literature and my dealings with victims of crime.

Q8. What are your observations of, and suggestions for improvements or reforms to, police processes for receiving reports of allegations, and investigating and responding to reports in relation to allegations of child sexual abuse in an institutional context?

Victims play an important role in mobilising the criminal justice system. Most crime is known to police, for instance, because victims (or others for victims) report the matter to the police. Arguably, the extent to which victims report crime is an indicator of their confidence in the police in particular and the system in general. After victims have report crime, the police assume the responsibility for the investigation and the apprehension of the suspect, as well as the decision on what charge is initially laid. Victims are expected to co-operate with the police and to provide information to aid the investigation.

Although victims have suffered the injury or loss and the system would possibly collapse without their co-operation, they are often relegated, especially in adversarial criminal justice systems, to the status of a witness. Contrary, victims who report crime often believe the case to be 'their' own. Thus, victims expect to be kept informed and have some input into their cases. They also expect to be consulted on decisions that affected them. Consistent with these expectations, victims' rights instruments have been promulgated so that victims will get information, will be consulted and will participate in other ways, such as making victim impact statements.

Victims' rights, however, have not necessarily brought about improvement in terms of benefits for victims. Most victims will never get to exercise their rights because they do not report crimes, or reported crimes are not solved (Karmen 2012; O'Connell 2005). Moreover, police and others in crime justice systems too often do not respect victims' rights, which on the whole cannot be enforced.

Running parallel to the evolution of victims over several decades, the police in many modern, developed societies have engaged in a transition from 'force' to 'service' (Eijkman 1994; Stenning & Shearing 2005), which has been dominated by the 'Community policing' (or 'community oriented policing') philosophy (Bradley 1994; Bird 1994; Hunt 1987). The police functions have expanded to not only incorporate crime prevention and law enforcement but also assisting people in times of emergency and providing for potential and actual victims' safety in addition to community security (Stenning & Shearing 2005).

The following highlights victims' criticisms and expectations of police, and suggests ways police can better satisfy victims' needs. It also demonstrates the benefits for victims of the shift from the crime-fighter paradigm to the service-provider paradigm.

A victim-perspective on the meaning of crime

Crime, says van Ness (1986, p3), "is not simply an incident which begins a contest between the State and a defendant, between a prosecutor and a [defence counsel]" Rather, he continues, "[It] is first of all an encounter between a victim and an offender. It is an unexpected personal crisis in the life of one person brought on by another." That personal crisis, which includes physical, emotional, psychological and/or financial effects, is the cost on becoming a victim but they are not the only costs. Van Ness' definition is particularly pertinent to policing in civil societies. Since the 1960s, it has been recognized that "80-90 percent of [police] work is not directly related to law enforcement. Rather, it consists of helping services and order maintenance. Police represent the first line of government when dealing with personal emotional crises of individual citizens." (Sandler & Mintz 1974: 460) Thus, the need to support the victim is integral to policing, yet victim surveys show consistently that from a victim-perspective, many police act ambivalently towards the victim and fail to assist the victim overcome the effects of crime, which can cause a 'second injury', or secondary victimisation.

Crime victims views on police and policing

Many factors that lead to victim dissatisfactions with the criminal justice system are beyond police control; however, a conscientious effort by police to treat victims with dignity and respect their rights may help to reduce the dissatisfaction and encourage co-operation without which the criminal justice system would probably collapse. Most victims have never been involved in the criminal justice system that from their perspective is an unfamiliar and daunting world. On deciding to contact police, victims begin a legal process that in many cases does not deliver victims' desired outcomes. As the first point of contact, the police are in an ideal position to set a positive tone for the entire criminal justice system; yet, some victims report negative experiences.

Victim surveys in modern industrialised countries consistently show that the attitude of the first police officer with whom a victim first has contact can be a major determinant of victim satisfaction. The results of the International Crime Victim Survey (van Dijk et al 2008) reveal that approximately one half of the victims (who reported a crime) were satisfied with the way the police treated their case. Gardner (1990) however, found that although victim satisfaction with South Australia Police was generally high when victims first reported crimes, their satisfaction declined over time. Those victims who were not satisfied with 'police attitude' felt the police: "did not care"; made them "feel 'responsible for the crime'"; or, made them feel "a nuisance." (Gardner 1990, p22) Likewise, over one half of victims across our world (who completed the international crime survey) said they were unhappy about the way police treated them. Many victims stated that police "did not do enough" or "did not recover

the goods"; and, about one in five said the police failed to keep them informed about progress in their case (Van Kesteren et al 2000).

Victims want the police to tell them about services to help them deal with the impact of crime and give them advice on practical assistance, but many state they did not receive advice (Gardner 1990; Curtis & Pankhurst 2002; Justice Strategy Unit (JSU) 2000; VCCAV 1994; Wilkie, Ferrante & Susilo 1992; Shapland et al 1985). Internationally, less than one in ten victims of serious crimes who reported to the police received specialised help. Moreover, about four in ten of those who did not receive such help, expressed a need for support. Victim support agencies provided services to approximately one in five of victims with expressed needs (International Crime Victim Survey 2005).

A comparison of international crime victim survey data reveals that in several countries where levels of satisfaction had, according to previous survey results, been comparatively high, the rates of satisfaction decreased. Paradoxically, this was most obvious in countries such as the USA, Canada, England and Wales, Sweden and the Netherlands where better treatment of victims is actively promoted (van Dijk et al 2008). Reasons for dissatisfaction include indifferent treatment by police officers.

Victims of sexual assault, domestic violence and hate crimes, and victims from marginalised social groups, often feel the police are not sufficiently sympathetic (VCCAV 1994; UNODC & WSV in press). Many of these people are not satisfied with the way police treat them. A British study, for instance, found that persons with disabilities are more likely to be victims of violence or rape but less likely to obtain police intervention, legal or preventive care. Internationally, one in five women victims of domestic violence or sexual assault stated that police were "incorrect" or "impolite". These victims were among the least satisfied with the police because they felt that the police "did not do enough" or "were not interested" (Van Kesteren et al 2000). In South Australia however, it was found that rape victims' satisfaction with the police tended not to decline as happened for other offences. This was attributed to the existence of a Police Sexual Assault Unit, staffed by empathetic officers who provided specialist services (Gardner 1989). Findings such as these have prompted other police departments to establish specialist units and victim liaison officers (see below).

In 2010, Stuart and others reports on the aggregate results of surveys conducted in the ACT, South Australia and Western Australia. All respondents were asked to rate police in relation to procedural factors:

- Voice: "Police allowed me to tell them what I wanted to say"
- Trust: "Police were trustworthy"
- Respect: "Police treated me with respect"
- Neutrality: "Police treated me without prejudice"

Police were rated highest in relation to 'Voice' and lowest in relation to 'Involvement'. Furthermore, those respondents who did not agree police treated them procedurally fair or just, most likely nominated protection or information as the reason for their dissatisfaction. "Despite the finding that victims of sexual assaults were less likely to tell police when the crime happened, their ratings of police on the procedural justice factors were not significantly different from those of other victims" (Stuart et al 2010, p56).

Respondents were also asked to rate their satisfaction with police. More than forty percent stated they were 'very satisfied', and a quarter said they were 'satisfied'. About one in five respondents, however, rated their involvement with police as either 'not at all satisfied' (13%) or 'a little satisfied' (9%). "There were no statistically significant differences in satisfaction ratings between men and women participants, direct and indirect victims, or victims of specific forms of crime" (Stuart et al 2010, p57).

Trust, respect and being kept Informed were the procedural factors most strongly correlated with respondents' satisfaction.

Respondents who elaborated on their rated responses gave examples, which included.

“Being treated respectfully

- “The police detectives fairly quick to interview me and treated me with a lot of respect due to my injuries”
- “They treated me with respect and kindness”

Being kept informed

- “They kept me informed as to what was happening”
- “I was contacted regularly by the detective investigating the case by phone”
- “They informed me when the DPP were changing the charges”

Listening and providing non-judgmental support

- “Supported my son and assured him it wasn't his fault”
- “They gave me time to tell the experience and were at no time judgmental”

Acting in a caring or empathetic manner

- “sensitive to my feelings and shock”
- “Empathetic handling of my daughter while gathering the evidence”
- “I felt like he actually cared about my situation”

Being responsive

- “Police were always available when I called”
- “They responded immediately”
- “They acted promptly to interview the children”

Providing protection

- “They helped me to feel safe”
- “They spoke to my children's school principal to put safety measures in place”
- “Knowing they were there if he was to come near me again”)

Competence and professionalism

- “The detective that handled the case, [name], was very professional”
- “Their dedication to their job”
- “The police were very thorough” (Stuart et al 2010, p59)

Conversely, the responses (or lack of) that were more likely to 'cause' respondents to be dissatisfied included: not being kept informed; slow or problematic initial responses and slow police processes; lack of empathy or sensitivity; not giving the 'victim' a say; lack of protection; lack of professionalism, incompetency; lack of knowledge about the criminal proceedings; and lack of knowledge about victim assistance programmes or support services (Stuart et al 2010, p60).

Police as first responders to crime victims

Police are available in general 24-hours, 7-days, so they are most likely to have the first contact with victims of crime. As mentioned, the first interaction between the police and the victim impacts significantly on the victim's satisfaction with the police in particular and the criminal justice system as a whole. That first interaction can also affect how the victim copes with the incident and its effects.

Many victims of crime rely on the police for 'immediate crisis care' but crisis care is not the only reason victims report crime to the police. Others reasons include: a desire to retrieve property; a moral obligation; an insurance requirement; to stop re-occurrence or prevent repeat victimisation; a desire for the offender to be arrested; and, a fear of (further) harm. The focus of this section though is on police as crisis interveners. For this purpose, crisis

intervention is defined as an “active but temporary entry into the life situation of an individual, family or group during a period of stress” (New Zealand Police 1997, p27).

It is important that police as first responders are aware that many reactions to trauma are natural and normal, although for some victims the effects can be profound and prolonged, so the coping process, can be long-term. As a general principle police should allow victims to express their feelings. Victims are less likely to cope if the incident or event is particularly traumatic or life-threatening; if the individual has poor coping strategies and inner resources and/or a history of mental health problems; and/or there is a lack of support during and shortly after the incident or event, or little or no help is offered when the victim needs it.

Appropriate crisis intervention seeks to help victims to accept the reality of their experience(s) and to counteract denial of such. It also seeks to encourage victims to feel the pain and to provide reassurance of the normality of their reactions; and, to help victims adjust and adapt to the changes that have taken place in their lives. As well, it seeks to help victims re-direct their emotions and their lives so that they can better cope. Conversely, inappropriate crisis intervention can have an adverse impact on victims’ well-being. For example, a victim who is feeling vulnerable might look to a police officer for advice on dealing with the immediate effects of crime but in light of that officer’s verbal and non-verbal responses, the victim might repress his or her feelings and form the view that it is wrong to express his or her emotions. The victim might become even angrier and more upset; as well, the victim might direct this at the police officer. Over time, if unchecked the victim’s anger and other maladaptive reactions might lead the victim to reject the police officer; for instance, the victim might put up barriers whenever the officer makes contact.

Police officers, as ‘crisis interveners’, therefore should assist by attending to victims’ safety and security needs and also victims’ immediate medical and other practical needs. They should also assist victims locate and mobilise their support resources (for example, family, acquaintances); and, help victims to begin to reorganise and / or regain some control over their lives. In addition, police officers should encourage victims to express and validate their feelings, which could include denial, guilt, anger, and grief. To achieve these tasks, police officers should not blame the victim for the victimisation; and, they should give victims practical advice such as information on making repairs, crime prevention and legal rights (JSU 2000). They should also give victims information on the criminal justice system (Gardner 1990) and on victim-assistance (for example, referral to health and welfare services to help them cope with the effects of crime) as well as compensation (O’Connell 2005; JSU 2000).

Consistent with the concept of police as ‘crisis interveners’, in the late 1980s Australian Commissioners of Police encouraged officers to express their concern for victims in a direct, forthright manner and act with integrity. They suggested that in their first dealings with victims of crime police use words similar to:

- “I am sorry this happened to you.”
- “You are safe now.”
- “You are not to blame.”

The Commissioners also agreed that police should, as reasonably practical, arrange appropriate emergency medical services in cases involving injury. Further, that the police should attend to victims’ emotional needs, which they maintained is an important part of the preliminary investigation. As well, they asserted that police should have proper regard for the feelings and needs of victims. Being victim-oriented, they concluded fosters victim co-operation with the on-going investigation, which has given rise to accusations that the policy and practice is self-serving.

Victims have a right (often, on request) to be certain information about the progress of the police investigation, including in many jurisdictions the right to be told the accused person's name. Victims commonly want to know if the police are actively investigating the crime. If a suspect is apprehended, victims frequently have safety concerns that they want addressed before the suspect is released on, for instance, bail. Victims want to know what steps are to be taken to protect them. If property was stolen, victims expect police to notify them and to advise on when that property will be returned. If their case is handed over to the 'public' prosecutor, victims want to be assured that they will be kept informed and to know who will undertake that task. A female victim of sexual assault (although the prosecution failed to secure a conviction after a trial) summed up victims' expectations aptly, when she said, "I don't regret reporting, I just regret the outcome ... I'm glad I did it; I had to do it for myself. What's important is the quality of support, having enough information about the process, understanding your options ..." (Lievore 2004).

Police serving victims' rights and needs

Victims' rights are mostly not enforceable legal rights but rather they are principles governing treatment of victims of crime. Arguably, these principles do not necessarily guarantee meaningful and appropriate improvements. In the context of police as crime-fighters whose primary function is to enforce law, the focus on the victim and their rights runs the risk that victims could be 'locked' into a "conservative retributive justice" (Eijkman 1994, pp281-83). Restoring victims' personal freedom or autonomy becomes tied to restrictions on suspects' and defendants' freedom, thus demands for longer terms of imprisonment. Police operating in the 'crime fighter' approach tend to relegate victim support to the realm of welfare and social work, which is not 'real' police work. Personal and emotional involvement that can so easily be generated by the many traumatic incidents to which police are exposed is discouraged (Sandler & Mintz 1974). Productive policing becomes the art of promoting to the public those things the police perceive as priorities instead of trying to produce what the public, especially victims, need.

The consequences for victims of crime are far greater than simply a clash of expectations. The central notion of the 'war on crime' exacerbates fear of crime while at the same time detracts from, even de-values, police work that is not considered vital to crime fighting. Bradley (1994) points to other insidious problems such as the legitimisation of inappropriate behaviour under the 'guise of good over evil; and, Lea and Young (1983) reveal that over-policing communities can diminish public confidence in the police and erode victims' preparedness to report crime. Furthermore, linking police performance almost exclusively to crime control sets police up to fail as they have little influence over the 'causes' of crime; and, failing to control crime reflects badly on the public perception of the effectiveness of the police.

The Police mandate is far wider than crime control, even crime prevention; in particular it includes victim assistance and alleviating fear of crime. For most of his era as South Australia Police Commissioner, David Hunt argued that there was a need to rethink past policing strategies. He asserted that the police are in a unique position to observe the trauma and suffering of victims of crime but also agreed that the police may have been serving the criminal justice system more than those suffering (Hunt 1987;1991). He emphasised the importance of preventing criminal victimisation and used this as a cornerstone to support community policing. Drawing on like tenets of civil policing, the Indonesia Police that are in transition from a paramilitary organisation to a more humanist style of policing have a stated commitment to:

- Quality service to the people of Indonesia
- Anti-corruption and anti-violence
- Build the character of the police as guardians and servants of the public

- Excellent service to maintain security
- Excellent service in order to protect and shelter citizens (O'Connell 2010).

The Service-provider approach to policing complements the public (and victims') perception that the police are a valued community resource (Dussich 2003). Furthermore, it is premised on open, consultative and co-operative relationships. Problem-solving is a central element to enhance non-confrontational aspects in policing a civil society. Service-provider police are market oriented insofar as they attempt to produce what the public wants. They recognise that policing is "one of the most potentially productive ... sources of improved services for victims" (McCormick 1988, p28). They also accept there is "a need for sensitivity, caution, and flexibility in designing any programs for victims" (Gardner 1990, p25).

The Service-provider approach offers more for victims so the consequences for victims of crime are in general positive. For example, the police help with victim restoration and focus on preventing victimisation (not just crime prevention), as well as alleviating fear of crime (which can negatively impact people's standard of living and quality of life). There is not only recognition of victims' rights but also a strong commitment to fulfilling the obligations for the police. Other modifying thrusts are evident as police crime-fighters become police service providers (Newburn 1990).

Effective and efficient police services know their purpose and the functions to be carried out (Garmire 1982). It is evident that to be competent in the 'eyes of victims', police must know what services victims expect to be provided. Police failings have been attributed to the attitudes and behaviours of individual officers but also inadequate policies, which fall short in prioritising victims' rights; allocation of resources that is incongruent with victims' needs; and, improper training. Such failings are not uniquely a problem of policing; for instance, an USA survey showed a mismatch in between victims' needs and victim support agencies (O'Connell 2005). Nevertheless, the International Association of Chiefs of Police tackled the police-victim relationship at a summit in the late 1990s. They determined that with respect to victims – their rights and their needs - the police should provide for:

- Safety: Protection from perpetrators and re-victimisation; crime prevention through collaborative problem solving; a restored sense of individual and community safety
- Access: Ability to participate in the justice system process and obtain information and services, regardless of individual or family circumstances
- Information: Verbal and written information about justice system processes and victim services that is clear, concise, and user friendly
- Support: Services and assistance to enable participation in justice processes, recovery from trauma, and repair of harm caused by crime
- Continuity: Consistency in approaches and methods across agencies; continuity of support through all stages of the justice process and trauma recovery
- Voice: Empowerment to speak out about processing of individual cases; opportunities to influence agency and system-wide policies and practices (International Association of Chiefs of Police 1999, p8)

Mindful of these principles, as well as providing crisis intervention and facilitating access to medical services, police assistance to victims should include but not be limited to (UNODC 1999, (in press); Commonwealth Secretariat 2003; 2011):

- Informing victims on their rights and how to exercise such, if ways accessible to the respective victim.
- Informing victims about the availability of health, welfare and other services to assist them deal with the crime and its effects; and, making referrals to victim support services that complements victims' personal circumstances (for example, age, gender and ethnicity).

- Explaining police procedures and the investigatory process; and, if an apprehension is made explaining detention policies and procedures, including if local law authorises seeking the victim's views regarding their safety concerns should the suspect be released pending court proceedings.
- Explaining entitlements to apply for restitution and/or compensation; and regarding restitution assisting the victim to prepare an application, which might be by victim impact statement.
- Implementing procedures to ensure that victims of crime are periodically informed of the status of investigations, if victims want to be informed; and ensuring that prosecutors are aware that victims want to be kept informed.
- Subject to local procedures and law, arranging for return of property to be returned as soon as reasonably practical, and if there is to be a delay then explaining the reasons and how the victim might retrieve the property in the future.

Good practice in police assistance for victims of crime

There are various approaches to good practice in victim-oriented policing. Muir (1986) identifies four of them and their characteristics as:

- Crisis intervention -- Immediate intervention in crisis situations, with a focus on victims of violence especially interpersonal & family disputes. Timely responses in addition to assessment, referral & counselling.
- Information / Referral – As well as crisis intervention, this approach incorporates information & referral. Information may cover progress of investigation, prosecution & court outcome; may also involve ways to identify victim-clients for referral to a broad range of services. Police and non-police provide service usually during business hours.
- Comprehensive – combines both approaches.
- Generalist – Aim to up-skill police officers and other staff through training on victims needs etc. to improve the quality of service offered to all crime victims. Intention is to change the behaviour of police staff.

A cursory glance of police assistance to victims of crime in developed and developing nations shows elements of all four approaches prevail. In addition to internal policy and procedural reforms, police are increasingly partnering other government agencies, health and welfare professionals and victim assistance providers to deliver a more holistic set of responses to victims of crime. This is particularly true in cases of gender violence (for example, the Family Safety Framework in South Australia); child abuse (for example, in South Australia the Code of Practice on Child Abuse and Neglect); and, the victims with disabilities (for example, the Memorandum of Understanding between South Australia Police, Rape and Sexual Assault Services and Disability SA). These partnerships can be focused on a specific class or category of victim or type of victimisation or locality.

Following is a good practice example from South Australia, which has been a leader in this area in the Australasia – Western Pacific Region since the 1980s.

South Australia

Until the 1970s the South Australia Police had no definitive policies and procedures regarding the treatment of victims. Initially, inroads to change focused on sexual assault and domestic violence. After the promulgation of the first Declaration in 1985, the then South Australian Police Commissioner tasked those officers reviewing police responses to domestic violence and child abuse to explore the implications for the Police. Two years later, he committed the Police to providing a consistent approach to addressing the needs of victims of crime; whilst at the same time developing policies and strategies to reduce actual

victimisation and the risks of victimisation. He also acknowledged that the police had to consider the process of victimisation as a basis for developing crime prevention strategies. The Commissioner issued an instruction that the police should honour victims' rights, which successors have re-issued. This instruction can be taken into account should a victim complain about an officer's attitude and/or behaviour.

The former Commissioner in addition stipulated that police officers should always comply with 6 rights, including treating all crime victims with respect and dignity and keeping victims, who so request, informed about the progress of investigations. As well, he required that sessions on victims' rights and victim assistance be integrated into the recruit training course and in-service training, and supported (indeed participated on) the introduction of Victimology as a core policing elective in the Diploma and Post-graduate Diploma on Business Management (Justice Administration). Currently, as other Commissioners have followed this initiative, all police seeking promotion to sergeant or above in rank must hold an Advanced Diploma in Policing, which incorporates Victimology (15-weeks, 2-hours per week, or equivalent nominal hours) as a compulsory subject.

To drive the police service's victim reorientation, the Commissioner established the Victims of Crime Branch; now known as the Victim Strategy Section. Since the later 1980s, it has been South Australia Police policy and practice that whenever a victim reports an offence s/he should be given a booklet listing victims' rights and outlining the criminal justice process. This policy augments the police policy on victims' rights, thus compensating for the legal omission that there is no 'mandatory' requirement in the declaration on victims' rights to tell victims their rights.

Surveys variously confirm that the South Australia Police are perceived favourably by victims. Gardner (1990) reported that almost 9 in 10 victims were satisfied with the initial police response. Further, over one half of victims felt they received the help, assistance and information they needed initially, during the investigation and other stages in the criminal justice process (JSU 2000). Those victims who did not receive the help, assistance etc. they felt they needed stated various reasons for their dissatisfaction. Common themes were:

- At the time of the offence — a more sympathetic approach from police
- During the investigation — information on the process and progress reports

Conversely, results of the aforementioned victim surveys suggest mixed outcomes. For example, about 25 percent of victims were not satisfied with the information they received about support services (Gardner 1990). Just over 42 percent of victims would have liked more information about support services and other matters at the time they reported offences to the Police; and, about 25 percent of victims who asked for information about their cases did not receive it (JSU 2000). Furthermore, in 2000-01 an audit on the Information for Victims of Crime booklet suggested (as did earlier surveys) that the booklet was not being given to all victims when they reported offences, which police policy requires. Recent data suggests that between 40% and 70% of victims, depending on where they report offences, receive the information booklet at that time. That said, South Australia Police have endeavoured to tackle the omission by working with me to develop a pamphlet and an audio-CD for Aboriginal people on the APY Lands and to distribute the booklet via email when victims report offences by telephone to the 'call-centre' (see below for further comment on strengthening compliance with victims' rights).

Victims of sex offences

Although some victims still feel the police with whom they dealt treated them ambivalently, other victims feel satisfied or more than satisfied with police treatment. Gardner (1989) reported that victims who dealt with the specialist (then) Sexual Assault Unit were more likely

to be satisfied than victims who did not deal with that Unit. As Commissioner for Victims' Rights, my experiences helping victims or hearing victims' grievances would tend to confirm that victims whose cases are investigated by the Sex Crime Investigation Branch (SCIB) staff are more satisfied than those whose cases are dealt with by police in general. That said, those officers who have worked in SCIB and transferred to other postings tend in many cases to carry-over the skill and knowledge attained into their 'new' workplace. It seems to me that this cross-pollination is an intended consequence of police management.

There is a paucity of methodically sound (scientifically valid) survey data on the experiences of victims of sex offences dealing with the South Australia Police. The sample of victims of violent offences surveyed for the Review on Victims of Crime (JSU 2002) included only 31 victim-respondents out of 222 who completed the survey. Whereas 1 in 5 victims of personal violence other than sexual violence could recall police referring them to a support or counselling service, double (that is 2 in 5) victims of sexual violence could recall police referring them to such. Almost one third of the victims of sexual violence could recall the police giving them information to reduce their risk of becoming a victim again. Seven of the thirty-one victims of sexual violence could recall police mentioning state-funded victim compensation. Twenty-five of the thirty-one victims of sexual violence (82%) wanted to be kept informed throughout the investigation, prosecution process and criminal proceedings – this is not unique to victims of sexual violence.

One half (7 of 13) of the victims of sexual violence whose cases resulted in a criminal prosecution (as known to the victim) recalled being asked to make a victim impact statement; and one third (4 of 13) did not make such statement. Those victims of sexual violence who made an impact statement did so to ensure justice was done or to communicate the impact of the crime to the offender; none stated their primary reason as 'to influence the sentence of the offender'.

I have assisted many victims of 'historical' sex offences. One victim who was a female child-victim in the 1950s was subjected to an ordeal in reporting to the police; however, it was not only the police that she needed to convince she was telling the truth. She was victimised by a parent.

Another two male victims were sexually abused by a teacher in the late 1930s, early 1940s. These males are among a dozen whose victimisation was reported to me several years ago. The victimisation happened in a school that they attended as students. The two males became 'high ranking' police officers in a police service in Australia. To the best of my knowledge, neither reported the offences as children or as adults for reasons private to them. Others of the victims who disclosed their reasons for not reporting often mentioned fear of not being believed; fear of being blamed and/or accused of wrong-doing; worry that they would be punished, not the perpetrator; and shame as well as disgust.

In the 1980s two female victims of sexual offences perpetrated by a police officer reported such to the police. Two decades later, neither complained to me about their treatment at the hands of the officers who investigated the offences. They complained about decisions made that affected them but they had no say in such decisions; and, were aggrieved by the decision of then Commissioner of Police regarding the nature of the internal disciplinary 'action' against the offending officer. Of particular concern to them was the prohibition on prosecuting sex offences after three years from the date of the offence. They perceived this as a denial of access to justice, which is a fundamental right of all citizens.

Two victims of sex offences that happened several decades ago have reported their disappointment that police are unable to retrieve records of the offences to confirm their allegations.

A mother complained about the treatment of her children as victims of sex offences. After the matter was raised with the Commissioner of Police and me, it became evident that the police investigators' conduct was less than satisfactory. On becoming aware of the complaint, a senior police sergeant wrote and hand-delivered a heartfelt apology. The apology was volunteered, so I did not need to resort to making a recommendation pursuant to my authority under the *Victims of Crime Act 2001*.

Contrary to the grievances, victims have complimented the police, as have I. In two recent cases involving victims of sex offences that happened in South Australia when they were children but the adult victims they resided interstate, the police investigating officers asked me to provide financial assistance so the victims could travel to South Australia to make their statements. Each victim could have made his or her statement to the interstate police service but each had developed a rapport with the South Australia police investigator. Thus, the police and I agreed that the victims' need should be a priority. On each occasion, I funded the victim's travel and incidentals.

Strengthening victims' rights by improving compliance

In the Netherlands, Utrecht Police have a 'peer review' system (UNODC 1999). After the victim has been interviewed by the first response police officer, another officer enquires of the victim on how s/he was dealt with by the first officer. The victim's responses are used to inform officers' appraisals and in-service training.

In Japan, the National Police Agency and local police services conduct surveys of citizens regarding, amongst other matter, their treatment by police. The survey results are used to improve police services, including responses to victims.

In New Zealand and Australia, the Police Services also carry out surveys to ascertain citizen satisfaction with the police. In Australia, some survey results are reported publicly in the Productivity Commission's annual report on Justice in Australia. These types of surveys are not uncommon throughout the world and have previously complemented the International Crime Victimization Surveys (see above).

In some countries, monitoring compliance with victims' rights instruments is delegated to an authority. In South Australia the Commissioner for Victims' Rights (currently me) is tasked with that function. I have worked with agencies such as the Police to develop compliance mechanisms in preference to harsher disciplinary regimes. This approach is consistent with the recommendations emanating from the Review on Victims of Crime (JSU 1999).

Commissioners of Police have supported this approach. Whenever a police officer records an offence on the Police Incident Management System (PIMS), s/he must also report whether or not a copy of the Information for Victims of Crime booklet was given to the victim; and, if the victim refused to take a copy that also must be recorded. The officer must as well record if s/he referred the victim to a support service and select what service from a list. Each quarter, the Police give the Commissioner data, by police division, on the number of victims who reported offences and the number of booklets given as well as refused. Over time the data have been used to identify short-comings in police practice and other issues pertaining to victims' rights. The data, for instance, in one police division helped inform the 'business case' to develop an information pamphlet for Aboriginal victims of crime who live in a remote area of South Australia. It has also been cited in the 'business case' to publish a pamphlet on victims' rights and victim assistance for recent immigrants from Southern Sudan who speak 'Dinka'. Data on referrals, although limited in detail, has also informed argument for increased funding being given to other agencies, such as Rape and Sexual Assault

Services and Child Protection Services. Monitoring police compliance with the declaration governing treatment of victims is not the only way to improve outcomes for victims of crime. Empowering victims is also vital.

The Commissioner for Victims' Rights and the South Australia Police have developed a letter-notification system to alert victims that their cases have progressed from investigation to prosecution. Each time a first court date is entered for a case recorded on the BEAMS, a letter is generated in the office for the Commissioner for Victims' Rights. The letter incorporates the Police Reference Number for the prosecution file, the defendant's name and the details for the first court hearing. It also tells victims that: they can attend the court hearing (which is a right) unless there is a specific reason to exclude them; a court companion service or a witness assistance service is available; and they could be entitled to make an impact statement. The letter evolved from concern that victims were not being told about the progress of their cases and in response to data that showed that impact statements were presented in fewer than 5 per cent of sentencing hearings in the Magistrates Court (compared with about 80 per cent in the District and Supreme Courts) (O'Connell 2009). Past victim surveys showed that as many as 8 in 10 victims wanted this information. Thus, collaboration coupled with a technological solution has improved compliance and as a consequence empowered victims.

I hasten to add that neither collaboration nor technology replace the need for police officers to treat victims with respect, dignity and compassion. Policing is grounded on human interactions and the success, or otherwise, of policing depends on staff 'putting human into humanity' at all times in their dealings with victims. Victims want to be believed, not judged by police staff. It seems to me that the police in South Australia strive to continually improve their dealings with victims of crime in general and victims of sex offences in particular. The steps taken to achieve such improve have been remarkable in the past three decades but often that 'remarkable' is not enough for victims.

Victims, police & Victimology

One of the principle objects of penal victimology is to attain equal justice for the victim and the offender. Denying fundamental rights to people accused of crime is not the way to improve the victim's status in the criminal justice system.

The ideal of a civil, helping police service is mysterious, even unknown, to some peoples in our world. In Australia, for example, some immigrants may have come from places where the Police treat women indifferently, even heartlessly, and condemn women for claiming to be victims of domestic violence; and, those seeking asylum might have fled violent political upheaval to escape political crimes perpetrated by police and others who abuse power.

Police, however, when adequately staffed, trained and funded, can provide critical assistance and information to victims as they begin to progress through the 'daunting' criminal justice system. Good practice in policing reveals that police should assign staff to serve as a liaison or contact to victims of crime. In addition, police should forge mutually respectful bonds with other government agencies and victim support organisations so as to collectively provide a comprehensive set of responses to victims' needs.

As well as legal instruments, such as declarations on victims' rights, protocols or guidelines should be developed to govern police treatment of victims. Victimology should be included police training. There should also be appropriate mechanisms to monitor police performance against the law and protocols and avenues for victims to raise their grievances and provide feedback. It is vital that police do no more harm in dealings with victims of crime. The way that police treat victims can influence their perceptions of the rest of the criminal justice

system. That said, many victims are generally satisfied with the initial police response, but this declines as time passes and is correlated with their views on how well the police kept them informed about the progress of their cases. Victims also want the police to tell them about services to help them deal with the impact of crime and give them advice on practical assistance, but many state they did not receive advice.

Paraphrasing a British Law Lord Steyn, the administration of a just justice system requires no less than proper consideration of victims' interests, suspect / offenders' interests and the public interest. According to the International Association of Chiefs of Police (1999), justice will result "If police, the justice system and communities can offer victims of crime safety, access, information, support, continuity and voice."

Q9. What are your observations of, and suggestions for improvements or reforms to, prosecution processes in relation to charges relating to child sexual abuse in an institutional context?

Gardner (1990) reported that 9 out of 10 victims were satisfied with police prosecutors; while Erez et al (1994) reported that 7 in 10 victims were either satisfied or very satisfied with the police prosecutor. She also reported that 6 in 10 victims were either satisfied or very satisfied with the public prosecutor. Furthermore, in a later survey 1 in 3 victims reported that the prosecutor adequately represented their views in court, in particular in submitting information on the effects of the crime and the victim's personal circumstances (JSU 2000). With respect to the latter survey, victims who said they did not receive assistance, service, support or counselling at various stages of the criminal proceedings shared 'common themes' for their views:

- During the prosecution — received no feedback; and were not properly consulted
- During court proceedings — received no feedback; the information wanted was not provided or not provided as often as desired
- After court proceedings — not sure because were not told whether the case was finalised and, if so, the outcome

One victim stated that receiving no information "left a hollow feeling".

In 2013-2014, staff for the Witness Assistance, Director of Public Prosecutions (2014), issued a total of 500 surveys and received 70 replies (36.8% identified as a victim, witness or other involved with a sex offence case). Ninety percent of respondents (who were either victim-witnesses or other witnesses, and in cases where the victim was deceased, family members) reported that staff in the Office of the Director as being professional; and eighty-five percent reported receiving a high quality of service (especially from the Witness Assistance Service). Eighty-three percent stated that they were satisfied with 'being informed / updated about the progress of the prosecution case'.

When asked to choose, respondents ranked the following preferences with 1 being most important and 7 least important:

1. Being Updated
2. Legal Process Explained
3. High Standard of Service
4. Timely Updates
5. Staff Being Professional
6. Receiving Services
7. Access to Services

These findings do not differ from the earlier survey findings. Thus, the data serves as a useful base on which to devise prosecutorial good practice.

Stuart et al (2010) asked 78 respondents who had spoken to the prosecution rate the prosecutor(s) in relation to: respect; voice (i.e. the prosecutor listened to what the respondent had to say; and, neutrality (i.e. the prosecutor treated the respondent without prejudice).

Respondents rated prosecutors most highly when they felt the prosecutor had treated them with respect. Almost forty percent of respondents felt the prosecutor did not protect them from the offender; and, about 29 per cent stated that the prosecutor had not kept them involved in what was happening.

“Nearly one third (29.5%) of the 78 participants who were asked this question were Very satisfied with the prosecution, whilst another third of participants (28.2%) were Not at all satisfied with the prosecution” (Stuart et al 2010, p87). The most commonly stated satisfactory factors were (p.89):

Information/availability

- “she was available for me to call and give my information to her when I called”
- “when we went up to Perth I received a number of calls from the prosecution about how he was going to plea...”

Empathy/compassion

- “compassion outside the court room for us...”
- “He knew where I was coming from and the frustrations I was going through. He was compassionate and recognised that I was angry when it first happened”

Voice-listened

- “I felt they listened to what I had to say and never underestimated what I had experienced”
- “I was listened to when I told them that I was not happy for the offender to please guilty to the assault alone”

Knowledgeable/professional

- “Felt that the prosecutor was well versed / briefed both in our case and law”
- “...I also felt that they had studied my case so well that they knew it backwards”

Other satisfactory factors stated were (p.89):

Respect

- “I was treated with respect by the prosecution”
- “That I was supported and showed respect”

Protection

- “I appreciated the prosecutors attempts to prevent the defence badgering me or making very thinly veiled derogatory remarks”
- “ Stopping the hearing when they thought the man’s lawyer should have asked something relevant”

Support

- “That I was supported and shown respect”
- “The support they provided and the information they supplied”

Stuart et al (2010) in addition examined direct and indirect victims’ perceptions on their court experiences. A ‘successful’ outcome was a determinant of satisfaction for both direct and indirect victims. ‘Losing the case’, on the other hand, was a strong factor among those dissatisfied. Factors to influence direct victims sense of procedural justice and satisfaction included being allowed to tell their story (version of the incident); being treated with respect; being accompanied by a support person; being able to use CCTV or vulnerable witness facilities; and being acknowledged by the presiding judicial officer or court. Indirect victims identified factors such as representation by the prosecutor; being kept informed; having a

support officer explain what was happening; and being treated with respect as important procedural factors.

Both direct and indirect victims were dissatisfied when they felt the prosecutor did not seem to care very much about whether or not he or she had all the necessary paper-work; and, if the prosecutor seemed quite unorganised and/or like he or she would rather be somewhere else. Both also commented adversely on prosecutors' "lack of representation" for them, as victims. Both were critical when they felt counsel for the defence was disrespectful.

Prosecutorial good practice

Prosecutors must not only be respectful, courteous and show understanding; they must also have a sound knowledge of victims' rights law and be prepared at all times to act impartially and independently in the pursuit of justice for all. In accordance with the Commonwealth Guidelines for the treatment of victims of crime (Commonwealth Secretariat 2003) and the Statement of Basic Principles of Justice for Victims of Crime endorsed by the Senior Law Officers of the Commonwealth Nations (2005), including Australia's Attorney-General, prosecutors should:

- At all times show respect for, and courtesy towards, victims of crime.
- Ensure the victim's safety concerns are presented to a bail authority and, in collaboration with the investigating officer, take reasonable steps to tell the victim about any condition set to protect him or her.
- Keep victims informed about the progress of the prosecution and should tell victims their role and responsibilities as witnesses in criminal proceedings.
- Tell victims the reason for decisions not to prosecute, modify charges and other decisions that affect victims.
- Consult (not simply tell) victims of serious offences for these purposes before decisions are made to withdraw a charge or not to continue the prosecution.
- In addressing the court on sentence, present all relevant information including particulars of injury, loss or other harm suffered by the victim, victim's family or other (depending on the applicable law and the view of the affected person (e.g. victim)).
- Inform the victim of the outcome of criminal proceedings, including explaining the sentence.

Every victim should have the right, "at any stage of the criminal justice process, to make representations in writing to the relevant prosecuting authority about any matter, and to receive a written reply giving reasons for the decisions taken" (Commonwealth Secretariat 2003, p16). Furthermore, where the competent authority decides not to prosecute, the victim should be entitled to have the decision reviewed.

Integrating victims into criminal justice

With respect to improving the criminal justice system, I am a strong advocate for victims as participants, rather than merely witnesses for the state-as-prosecutor. I enclose a paper I gave on integrating victims into criminal justice that begins to 'flesh-out' my case for victims as participants. I am particularly drawn towards the International Criminal Court model because it is a compromise between the adversarial and civil-inquisitorial approaches to criminal justice. It seems to me strange that many nations of the world we share accept that victims of the most heinous crimes against humanity should have a genuine voice (through legal counsel) from pre-chamber to sentence in criminal proceedings, yet there is such opposition to giving victims of crime a similar voice.

As I point out in the enclosed paper, in South Australia some 'limited' inroads have been made to secure a voice for victims and to use the Courts to strengthen the operation of victims' rights.

Concluding comment

Most of the survey findings cited above refer to measures of victims' satisfaction. It seems to me, however, that satisfaction is not necessarily a 'true' measure of victims' experiences. The surveys tend to treat victims' rights in much the same way as customer charters, so the surveys might be likened to customer satisfaction surveys. If instead, questions were framed in a manner that highlighted the 'obligation' and enquired if that obligation was met, I suspect victims' overall satisfaction would be lesser than the current findings suggest.

Victims' rights are, in my view, better understood, if taken in the context of the 'victim-obligatee' and 'public official-obligated' relationship. Instead of simply asking – often with prompted questions – whether a victim was satisfied with the police officer's or the prosecutor's treatment; perhaps, the victim should be asked: did the police officer or prosecutor do ... and one by one list the officials obligations, then ask victims questions about their sense of procedural justice, we might have a better insight into how to reform our criminal justice processes and systems to ensure they are fair, just and equitable for those harmed by crime and those who endure the effects of crime.

Many of those victims who report offences have their hopes set on being treated with respect, dignity and compassion; on being given a genuine voice and heard; on being acknowledged; and, on securing justice. Too often their hopes are dashed by those victims expect to help them.

Victims' rights are right because they are right – right for those affected by crime and right for Australia. Victims' rights are human rights, and those obligated to honour such rights should do so – ever time. As John F Kennedy said, "The rights of every person are diminished when the rights of one person are threatened."

Remarkable changes have been made in the past three decades. South Australia Police and South Australia's Directors of Public Prosecutions have been at the forefront of such changes, and in my experience are committed to improving the ways their staff address the plights of victims. The challenge, however to prevent violence (especially sexual violence against children and other vulnerable human beings) and injustice as well as to secure a better justice for victims continues.

Yours faithfully,

Michael O'Connell | Commissioner for Victims' Rights

Victims' Rights: Integrating victims in criminal proceedings

Michael O'Connell
Commissioner for Victims' Rights
South Australia

Crime hurts individuals and groups of people. Crime also "threatens the social order"¹. According to the common law jurist Blackstone, when ever a crime happens there are two victims: the actual person who is harmed or suffers a loss and the state whose law is violated. Yet, until three decades ago the victim was largely ignored, even forgotten some say. The victim was {to quote Young} "saddled with enforcement and prosecutorial responsibilities for a process that did not address their needs or their losses"². The absence of a precise role for the victim, other than as a prosecution witness, is (however) inconsistent with the victim's actual importance to the criminal justice system.

Too many victims felt, and still feel, alienated. Disregard for the victim has resulted in secondary victimization, sometimes referred to as the second injury. Elevating victims' rights is intended to reduce that victimisation or alleviate that injury, and raise victim satisfaction. Victims' procedural rights are intended to make victims integral players in criminal justice, rather than mere bystanders.

Over the last three decades across our world there have been many positive changes to criminal justice systems. In this paper I will give an brief overview of the evolution of crime victims' rights. Most of my paper however, reports on ways victims are being integrated into criminal proceedings with a focus on my role as the Commissioner for Victims' Rights in South Australia.

In 1985, the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.³ The Declaration is based on the philosophy that victims should be adequately recognised and accorded access to justice and prompt redress for the harm they have suffered. It is a non-binding international declaration; however, it is complimented by other international instruments, such as the Rome Statute (and Rules and Procedures) of the International Criminal Court, as well as multi-nation Commonwealth of Nations *Statement of Basic Principles of Justice for Victims of Crime*⁴; the *European Convention on the Compensation of Victims of Violent Crimes*⁵ and the

¹ Silberman no date cited by Elias 1986

² Young 2001, p6

³ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/RES/40/34 (1985) art 6(b).

⁴ Commonwealth (Senior Law Officers) Communiqué Meeting of Commonwealth Law Ministers and Senior Officials: Accra, Ghana, 17-20 October 2005.

⁵ European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116).

*Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure*⁶.

In broad terms, a set minimum standards for the treatment of crime victims can be distilled from the various instruments. It is widely recognised across our world, for instance, that crime victims should:

- be treated with compassion and respect for their dignity, irrespective of characteristics like age, gender, race, religion and so on
- have access to justice, including being allowed to present their views at the appropriate stages of the proceedings
- be informed of the progress of investigation and criminal proceedings, as well as court outcomes
- be afforded measures to protect their privacy, ensure their safety and minimise inconvenience.

The push for the recognition of victims as an integral component of the criminal justice system in Australia began in the 1980's in South Australia. Thereafter, the trend filtered into other jurisdictions. Each State (except Tasmania) and both self-governing Territories have a declaration or charter of victims' rights. All, except the Northern Territory have enshrined their declaration in law. Northern Territory has a legal provision that authorises the incorporation of a declaration on victims' rights in law but its declaration is an administrative statement. Tasmania's Government announced in 2010 that it was consulting on a declaration on victims' rights. All states and territories have provision for victim impact statements in criminal proceedings and financial assistance or compensation schemes for crime victims. These schemes vary considerably from jurisdiction to jurisdiction. Each jurisdiction also has service networks some of which are located within the government sector and some within the non-government sector.

Although there is also a national charter on victims' rights that was endorsed as an administrative statement by Australia's Attorneys-General in the mid-90s, there is no Federal charter (or declaration) on victims' rights. Notwithstanding that omission, the Commonwealth Office of the Director of Public Prosecutions has embodied key elements of that national charter in a Victims of Crime Policy⁷. And, presently a work-group reporting to the Standing Committee of Attorneys-General is examining the need for and content of a federal charter on victims' rights.

Charters and declarations enacted by the States and Territories mirror the ten fundamental rights in both the United Nations Declaration and Australia's

⁶ Recommendation No. R (85) of the Committee of Ministers to member states on the Position of the Victim in the Framework of Criminal Law and Procedure (Adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies).

⁷ Bugg 2004; no date. See also: Commonwealth DPP <http://www.cdpp.gov.au/Victims-and-Witnesses/> & <http://www.cdpp.gov.au/Publications/Victims-of-Crime-Policy/>

National Charter to a significant extent. All declarations or charters are intended to minimise secondary victimisation and address victims' needs. A few rights (and I use the word 'rights' cautiously) are meant to ensure a recognised position for victims within the criminal justice system. I will have more to say about these participatory rights later.

The charters or declaration govern public officials (and in New South Wales some non-government staff) treatment of victims of crime. For example, public officials should

- Treat victims with respect, compassion and dignity, as well as cultural sensitivity;
- Avoid unnecessary intrusion into victims' privacy, including protecting the identity of the victim;
- Facilitate victims' access to \ medical, psychological and practice assistance;
- Provide information of the criminal justice process and victims' role and responsibilities as witnesses;
- Provide 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;

The more controversial rights are those 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; permitting victims to make impact statements and, in South Australia, to state a view on sentence; and. the opportunity to make submissions at parole hearings

I said before that I used the word rights cautiously. In accord with *Magna Carta*, a legal right is one that when violated the state has an obligation to provide a remedy and means to restore that right. Few victims' rights in Australia pass the test of a legal right.

Victims can complain if their rights are not honoured. In South Australia, Victoria and New South Wales public officials are obliged to give victims information about making a complaint about a breach of their rights. Generally victims who do complain must do so via existing complaint mechanisms that have administrative authorities but rarely enforcement powers. No Australian jurisdiction has provided penalties for non-compliance with victim rights legislation by a public officer, except in South Australia the *Correctional Services Act 1988* sets a maximum penalty of \$10,000 for officials who breach confidentiality with respect to certain information, including information about

victims that is kept on the Victims Register⁸. Notably, the New South Wales, Queensland and South Australia victims' rights legislation prohibit criminal or civil liability being attached for breaches of their respective charter or declaration on victims' rights. Compliance mechanisms are an important tool to strengthen victims' rights.

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.

Judgments in the European Court of Human Rights⁹ 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 them¹⁰. For example in England, the Divisional Court in *R v DPP ex parte C*¹¹ 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*¹² 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*¹³ the Divisional Court also "quashed the DPP's decision not to prosecute"¹⁴. 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*

⁸ Section 84D *Correctional Services Act* 1988

⁹ See for example *Q on the Application of TB (Claimant) and Combined Court at Stafford and Crown Prosecution Service (Defendant), South Staffordshire Healthcare NHS Trust (Interested Parties)* [2006] EWHC 1645 (Admin)

¹⁰ O'Connell 2010

¹¹ [1995] 1 Cr App R 136

¹² [2000] 3 WLR 463, [2001] QB 330

¹³ [2009] EWHC 106 (Admin)

¹⁴ Spencer, 2010, p150

DPP¹⁵ 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 decision¹⁶.

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.

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."

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

¹⁵ [2009] EWHC 594 (Admin)

¹⁶ Gibbs, J (R (*Faithful*) v Crown Court at Ipswich [2007] EWHC (Admin)) said, "It is clear that the interests of the victim are rightly afforded great (and growing) importance in the criminal process ... However, the general position is that it is still the prosecution's responsibility to ensure that the interests of victims are properly catered for in the criminal process. We do not have a system in which the victims are parties to it ..." @ para 30.

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).

Against this backdrop of strengthening victims’ rights, I now explain my role as Commissioner for Victims’ Rights.

The *Victims of Crime Act* 2001 in South Australia incorporates the Declaration of Principles Governing Treatment of Victims of Crime and provides for the Governor to appoint a Commissioner for Victims’ Rights (who currently is me).

As the Commissioner, I am an independent of direction or control by the Crown or a Government Minister. The Act makes it clear that any directions or guidelines given to me about the carrying out of my functions must, as soon as practicable after they have given, be published in the Gazette and laid before each House of Parliament.

My functions include:

- advising the Attorney-General on how to use available government resources to effectively and efficiently help victims of crime.
- assisting victims in their dealings with the criminal justice system
- consulting with the Director of Public Prosecutions in the interests of victims and in particular cases about matters including victim impact statements and charge bargains
- consulting with the judiciary about court practices and procedures and their effects on victims
- monitoring the effect of the law on victims and victims' families.
- making recommendations to the Attorney-General on matters arising from the performance of these functions.

Several of these functions are, as a politician stated, “interesting developments”¹⁷, that have afforded me avenues to intervene in criminal proceedings in ways traditionally associated with civil (inquisitorial) criminal justice systems rather than common law systems. Victim participation is a central aspect of the Commissioner’s role.

British academic Ian Edwards distinguishes for types of the victim participation in criminal justice systems. First, simply information provision; second, a right to express a view or communicate feelings; third, consultation with out giving

¹⁷ Redmond, Hon (Shadow Attorney-General) 2007

victims the power to determine outcomes; and, fourth, decision-making control that would oblige public officials to ascertain and apply the victim's preference in that particular case.

The first and second types of victim participation are the least controversial¹⁸, and are often encapsulated in declarations or charters on victims' rights in common law jurisdictions such as exist in Australia. The third is an evolving feature of victims' rights discourse in several jurisdictions; for instance, in New South Wales prosecutors should consult with victims before charge decisions are made but victims do not have control over the final decision. Indeed, no Australian Parliament has given victims formal legal status as a party in criminal proceedings, except in certain matters in South Australia as I will explain later. For the moment, I simply observe that victim participation, without control over critical decisions, is also a core element of many of the so-called restorative justice programmes that are touted as delivering victims procedural justice. The fourth is partially evident in several European jurisdictions – notably Germany – as well as in Japan (which has a form of adversarial criminal justice) where victims are entitled to act as co-accusers, or auxiliary prosecutors. Similarly, victims under US federal law can actively participate, if they chose, in key decision-making; sometimes with legal representation.

Regarding victim participation - that requires victim integration - in criminal proceedings, one of my primary endeavours is to change the legal culture with respect to observance of victims' rights. For this purpose, amongst other strategies, I have provided direct legal representation for individual victims in consultation with prosecution, in criminal and civil proceedings and coronial inquests as well as initiated legal matters that affect victims in general.

Rather than simply state the law, the following cases illustrate my interventions. You will have to excuse me for identifying the victims by initials which is a practice magistrates and judges adopt, like me, to avoid unnecessary intrusion into victims' privacy.

{THESE CASES ARE NOT FOR REPORTING IN THE MEDIA.}

[REDACTED]

¹⁸ The right to information is not absolute; rather public officials usually have discretion whether to give the victim information, such as the police who can refuse the victim information that might jeopardise the investigation. There are also occasions when the victim's right to information impinges on the suspect's / defendant's / offender's right to privacy.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

My interventions augment the entitlement to legal representation available to victims of sexual assault when an application is made to disclose details of a protected communication that happened in a therapeutic context¹⁹ as well as the entitlement to legal representation available to a person seeking a suppression order, such as a victim who asserts that publication of certain information will cause him or her “undue hardship”²⁰.

¹⁹ Section 67F (7) of the *Evidence Act* 1935 requires the court to take into account, amongst other factors, the attitude of the victim or alleged victim to whom the communication relates (or the guardian of the victim or alleged victim) to the admission of the evidence, when determining whether or not to order disclosure of a ‘protected communication’.

²⁰ Section 69A of the *Evidence Act* 1935 provides that any person who has, in the opinion of the court, a proper interest in the question of whether a suppression order should be made, is entitled to make submissions to the court on the application.

The presence of victims' lawyers has, in my view, increased attention to victims' rights by police officers, prosecutors, magistrates and judges – and defence counsel. It is important to have an inclusive understanding of the principle of a fair trial that has regard to the position of not only the defendant but also the positions of victims and witnesses²¹. As Wolhuter and others aptly said, "victim empowerment and the reduction of secondary victimisation require procedural rights during both the pre-trial and trial stages".²² Victim studies and my experiences convince me that there is nothing less empowering for a victim (who wants to be involved in decision-making) than being unable to influence any decision that affects him or her.

Regarding my functions, I also have the authority to appear in person, or through legal counsel, before a sentencing court to make a victim impact statement, neighbourhood impact statement or social impact statement. This has resulted in me appearing before the District Court to answer questions the judge asked during sentencing that the prosecution felt inappropriate to answer. In particular, the judge wanted to know if there was any chance of reconciliation between the victims and the defendant. The victims were the defendant's parents. As well, I have participated in a sentencing hearing that initially was intended to be an Aboriginal (Circle) Sentencing Hearing but due to the prevailing circumstances proceeded as an ordinary sentencing hearing. On this occasion, on the victim's instructions I suggested to the court that the convicted defendant should probably be sentenced to a term of imprisonment; however, that term should not be "crushing as everyone deserves a second chance". On another occasion, a Justice of the Supreme Court asked me to attend several hearings to determine conditions of licence to be imposed on a 'mentally incompetent' offender who stabbed two victims many times. Over several years, the offender has applied for variations to the licence conditions. The presiding justice has allowed me to represent the victims' interests at those hearings. Moreover, the justice also facilitated the passage of the offender's apology, which I communicated to the victims and later reported their reaction to the court.

As well, I can appear in-person, or through legal representation, before a court hearing a 'dangerous offender' application on parole and before the Criminal Court of Appeal hearing an application for a sentencing guideline. These procedural functions that give victims as individuals and in general 'limited' representation in criminal proceedings are unique in Australia's common law jurisdictions, and possibly in most other jurisdictions.

Another of my functions is likened to an ombudsman. I monitor compliance with the *Declaration of Principles Governing Treatment of Victims in the Criminal Justice System*. Each year several hundred victims raise grievances with me²³.

²¹ Wolhuter, Olley and Denham 2009, p196.

²² Ibid 2009, p198.

²³ In 2010-11 the Commissioner received 143 complaints; 583 inquires about compensation, including grievances; 201 inquires and/or requests for advocacy (often as a result of a public

Many grievances focus on the attitude or behaviour of public officials that are contrary to the governing principles, as opposed to negligent behaviour on the part of the respective agency. The most common grievances raised with me are about the failure to keep the victim informed and that the victim has been left out of the criminal justice process (for example, not asked to provide information about their perceived safety concerns to a bail authority; not consulted by the prosecutor; or not given an opportunity to make a victim impact statement). Some victims complain that they are only provided with *ad hoc* measures that are predominantly aimed at facilitating the criminal investigation; thus, police priorities dominate victims' needs.

A public official or agency must, if I request, consult me on steps that might be taken by the official or agency to advance the interests of victims of crime in general or a particular victim or class of victim. If, after consulting with a public official or agency, I am satisfied that official or agency has not complied with the *Declaration of Principles Governing Treatment of Victims*, I may recommend that the official or agency to make a written apology to the victim. I can report on compliance with a recommendation in my annual report to Parliament.

I have also used (for want of a better word) other avenues to pursue systemic change when confronted with a series of like complaints. For example, I held several victims' complaints alleging incomplete or unsatisfactory preliminary investigations by police officers. One of these complaints involved the shooting murder of a male youth, so I funded a lawyer to represent the victim's mother at the Coronial Inquest. The bulk of the Coroner's findings were against the police and he recommended changes in police procedures and practice²⁴. I also had a complaint from the father of a male youth killed in a motor vehicle collision. A jury acquitted the driver accused of driving in a culpably negligent manner; however, questions about the driver's competence remained unanswered, so the Commissioner attained legal advice that showed grounds for a coronial inquest - that advice also queried the jury's verdict but that is another issue no for today. I approved the release of that advice to the Coroner. An inquest was held and I provided funding for a lawyer to represent the deceased's family. The inquest afforded the family with an opportunity to discover more information about the circumstances of their son's death²⁵, and the findings exposed short-comings in the Department of Transport procedures on assessing vision-impaired drivers. On another occasion, I paid a small (in terms of legal costs that is relatively speaking) contribution towards the cost of representing the interests of a murder victim's family during a coronial inquest. The deceased was killed by a mentally ill person and questions were to be asked on decisions made by mental health

official not responding to a victim's request for information, assistance and so on); and 519 other inquiries from victims, students and others.

²⁴ Coroner's Court 2008, see:

www.courts.sa.gov.au/courts/coroner/findings/findings_2008/Wilson_Christopher_Stuart.pdf

²⁵ Coroner's Court 2011, see:

www.courts.sa.gov.au/courts/coroner/findings/findings_2011/Raphael_Daniel_Buddy.pdf

workers and on the mental health system in general. Some of the Coroner's findings should have fostered changes in mental health.

I have also helped a victim's family by urging the Government to fund legal representation for the victim's family at a Royal Commission inquiring into the circumstances of the death of a cyclist resulting from a road crash. The Royal Commission's recommendations resulted in several reforms, including the imposition on the defence to disclose certain information to the prosecution before a trial begins.

The *Victims of Crime Act* 2001 does not prevent disciplinary action being taken against an official under the agency's, or the Government's, code of conduct, or via another statutory authority such as the Police Complaints Authority or the Ombudsman. This, coupled with my authority, may be sufficient to ensure victims' grievances are in most cases satisfactorily resolved²⁶. Sometimes, however, an act or omission on the part of a public official amounts to negligence resulting in, for example, a material loss to a victim or a substantial impairment of the rights of a victim. A police investigator, for instance, might fail to help a victim prepare a victim impact statement; a prosecutor might fail to apply for a court order that requires the convicted offender to compensate his or her victim; or a court might refuse an adjournment to allow the victim to be present to hear the sentencing remarks and sentence, despite the victim's right to be present. After the criminal proceedings have ended, I cannot re-open proceedings to correct the omissions so the violation of the victim's right cannot be undone. Such situations may call for rights that are actionable by the aggrieved victim.

Victims have had limited success in pursuing complaints against lawyers through professional bodies like Legal Practitioners Boards. There are no independent complaint mechanisms for victims to take up grievances against public prosecutors (other than writing to the Director of the relevant Office of Public Prosecutions) or members of the judiciary and magistracy. As Commissioner, I am authorised to consult with the Director of Public Prosecutions and the Court on the effects of their decisions and practices on victims.

In conclusion, I want first to state clearly that victims' rights should be disentangled from the punitive, law and order rhetoric. Instead the focus should be on victims as people and victims' rights as fundamental to justice. Victims are people who, in many cases, have endured the traumatic crisis of crime. They should be treated with respect and dignity, and not treated as an after-thought.

²⁶ For overseas experiences on strengthening victims' rights see: Report to Congressional Committees 2008, Crimes Victims Rights Act. Increasing awareness, Modifying the Complaint Process and Enhancing Compliance Monitoring will improve implementation of the Act, USA Accountability Office, December; Kilpatrick, D., Beatty, D. & Howley, S. 1998, *The Rights of Crime Victims – Does Legal Protection Make a Difference?* US Department of Justice, NIJ; Wemmers, J. 1996, *Victims in the Criminal Justice System*, Kugler Publications, Amsterdam.

Victims' rights charters and declarations in Australia, like elsewhere, can be vague, difficult for victims to understand, lack clarity and, even when there is a degree of specificity, rarely provide remedies to victims whose rights are not honoured. Australia is not immune from calls to strengthen victims' rights, including calls for recognition as a party in criminal proceedings and rights to initiate process and to legal representation in that process. With few exceptions in common law countries like Australia, victims in general have no legally enforceable right to participate in criminal proceedings, which is another cause of secondary victimisation.

Although historically victim participation has been frowned upon in common law jurisdictions that is not so in civil, inquisitorial jurisdictions. In those jurisdictions victims' rights to participate variously include the right to join criminal proceedings as parties; the right to act as prosecutor; and, the right to serve as a 'subsidiary prosecutor', where the victim can submit evidence and make suggestions and comments on material submitted in court.

It seems to me that for there to be certainty of justice, victims must be integrated into criminal proceedings. For this to happen, victims should be given the right to participate when they choose and when they are affected by the decisions to be made or the evidence before the court.

I am not alone in reaching this conclusion. Bill Clinton, as President of the USA, said "Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them."

To attain this virtue of democracy does not require us to sacrifice public justice and install private justice. It does require us, however, to acknowledge victims as real people with real needs and real rights – and, if we get it all right, we will attain a better justice.