



Charter of Rights for Victims of Crime
Legislation, Policy and Programs
Justice and Community Safety Directorate
GPO Box 158
Canberra ACT 2601

Att: Ms Laura Pound

Via email: jacslpp@act.gov.au

Dear Ms Pound,

Thank you for the opportunity to make a submission in relation to the ACT Government's options paper on the creation of a Charter of Rights for Victims of Crime. The Human Rights Commission warmly welcomes the creation of a victim's charter in the ACT and the chance to provide our views. The creation of a victim's charter is a crucial opportunity to strengthen the ACT's human rights framework and better uphold the rights and interests of victims.

As you are aware, the former Victims of Crime Commissioner (VOCC), John Hinchey, provided the ACT Government with a series of recommendations in his report *A Charter of Rights for Victims of Crime: Consultation Report* (December 2017). Our submission below highlights many of the issues raised by the former VOCC and provides additional information for the government's consideration.

The Charter will only benefit victims of crime if it is practical and enforceable. In developing the Charter, we encourage government to consult closely with the justice agencies that will be accountable for delivering victim rights. It is essential that ACT law, policy and practice align to support the delivery of Charter rights. Agencies must also be appropriately resourced to deliver on promises relating to practical matters such as flow of information, consultation and availability of legal advice and representation.

The Charter must also be grounded in a formal accountability framework that provides victims with the ability to raise concerns and seek redress in circumstances where their rights are breached. The VOCC has a range of statutory responsibilities to uphold the rights and interests of victims. These obligations are combined with responsibility for delivering front-line, specialist victim services. Within the Commission, the VOCC is ideally placed to play a key role in charter accountability measures.

To ensure that victim rights can be enjoyed without discrimination across the territory, the Charter must also be accompanied by resourcing for culturally-appropriate and accessible

supports and resources at all stages of the criminal justice process, including for those who may never choose to make a formal report to police.

Our submission below provides guidance or recommendations on key themes and issues that arise throughout the options paper. We would welcome the opportunity to provide further detail, clarification or feedback on particular issues as the government's work on the Charter continues. To the extent that the recommendations limit human rights, it will be necessary to carefully consider these limitations and include appropriate safeguards to ensure that they are reasonable and proportionate, in accordance with the *Human Rights Act 2004*. The Commission would be happy to provide more detailed input on any human rights issues raised by particular proposals as these are progressed.

Overall, consistent themes in our submission relate to:

- victims maintaining choice and control about their interactions with the justice system and victim support services;
- a strong accountability framework for the Charter, including resourcing of criminal justice agencies to 'action' victim rights and victim access to legal advice and representation; and
- the need for victim rights, as expressed in the Charter, to be situated within a coherent whole-of-ACT rights framework.

Again, the Commission congratulates the ACT Government on its commitment to the rights of victims and looks forward to supporting the formulation of a Charter that strengthens the territory's human rights framework for all people in the ACT.

Regards,



Dr Helen Watchirs OAM

President and Human Rights Commissioner



Jodie Griffiths-Cook

Public Advocate and Children and Young People Commissioner



Karen Toohey

Discrimination, Health Services, and Disability and Community Services Commissioner



Heidi Yates

Victims of Crime Commissioner

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1. A Charter of Rights for Victims of Crime – Strengthening the ACT’s Human Rights Framework

All citizens in the ACT are rights holders under the *Human Rights Act 2004* (HRA). In practice, a Charter of Rights for Victims of Crime (the Charter) will helpfully detail how human rights apply in situations where a citizen is the victim of a crime. Victims, like all people in the ACT, live diverse lives. As expressed by former ACT Victims of Crime Coordinator (VOCC) Robyn Holder “every victim is more than what happens to them at a moment in time”¹ whether that be the moment when they are, for example, attacked in the street by an unknown assailant or sexually assaulted by a family member. Crime often has horrific, life-long impacts on the lives of victims.

The Governing Principles in section 4 of the *Victims of Crime Act 1994* set standards for the treatment of victims in the administration of justice. These principles provide an important starting point for the Charter. If the government chooses to establish the Charter through a legislative framework – replacing the Governing Principles – it is essential that the Charter, at a minimum, encompass the rights and entitlements articulated in the current principles.

In the view of the Human Rights Commission (the Commission), it is useful and important for a person’s rights as a victim of crime to be specifically articulated, particularly where there are rights to privacy, to information and to support in circumstances that are often outside of a victim’s choosing and control. Charter rights will become ‘enlivened’ at the point where a person in the ACT becomes a victim of crime. That person’s broader rights, expressed in the HRA, will remain relevant to them before, during and after their experience as a victim.

The Charter should be a practical document that details the type of treatment that people in the ACT can and should expect if, or when, they become victims. These rights must be closely linked to broader rights contained in the HRA, strengthening the ACT’s human rights framework.

Tiered Rights?

The Commission recognises that it would be preferable for all victims of crime to be accorded the same information, consultation and participation rights. Should the government decide to limit access to rights on a ‘tiered’ basis to certain victims of certain crimes, justification for this approach must be clearly expressed. Should a ‘tiered’ approach be proposed, the Commission would welcome the opportunity to participate in further discussions with government about this including, for example, how or why a ‘particular crime type’ or a victim’s ‘particular vulnerability’ might impact a victim’s access to rights.

¹ Holder, R. (2018). *Just Interests: Victims, Citizens and the Potential for Justice*. Cheltenham, UK: Edward Elgar Publishing, p.12

Recommendation: The Commission recommends that the Charter be structured in a way that clearly links Charter rights to rights contained in the HRA.

2. Resourcing of Justice Agencies

It is likely that the Charter will require agencies involved in the administration of justice and those providing support to victims such as ACT Policing, ACT Courts, the ACT Director of Public Prosecutions (DPP), ACT Corrective Services and the VOCC to 'deliver' or 'implement' victim rights in new ways. It is essential that in deciding what rights to include in the Charter, the government consult closely with agencies to understand the likely resource impact of particular rights. There is great potential for resource efficiencies to be improved through use of technology, an issue explored in many parts of the options paper. That said, there will remain a need at many points in the system for information or support to be provided through direct, personal contact between victims and agencies.

For example, in relation to the possible impact of the Charter on practical resourcing, the Commission highlights the fact that the ACT DPP operates in a significantly different context to prosecutors in other Australian jurisdictions. Unlike many states, the absence of police prosecutors in the ACT means the DPP is responsible for prosecution of all matters in the ACT Magistrates Court and Supreme Court. As such, their work spans a broad range of matters. Within this range, the very limited resources of the two DPP Witness Assistants are primarily devoted to a small minority of complex matters, including sexual assault and serious violent offences. In this context, if Charter rights require the DPP to engage with a broader range of victims in new ways, it will be essential that the resources to undertake this work are in place prior to commencement of the Charter. There are many other examples of ways that Charter rights may impact the day-to-day practices of ACT agencies. It is essential that knowledge about resource implications directly informs Charter planning. Without this knowledge, there remains a substantial risk that Charter rights will not be delivered.

Recommendation: The Commission recommends that in planning the Charter, the ACT Government consult closely with agencies who will be involved in the administration of justice about the resources they will require to deliver specific Charter rights.

3. Inclusion of Victim Rights in the ACT's *Human Right Act 2004* (HRA)

The ACT's HRA contains specific protections for those accused and convicted of a criminal offence. For example:

- s19: The right to humane treatment when deprived of liberty;
- s21: The right to a fair trial in the context of criminal charges;
- s22: The right to be presumed innocent until proved guilty, to communicate with lawyers, to have legal assistance provided and to have the free assistance of an interpreter.

At present, the HRA does not include specific protections for victims of a criminal offence. Accordingly, the Governing Principles in section 4 of the *Victims of Crime Act 1994* are the current mechanism for setting a 'baseline' for expected treatment of victims in the administration of justice.

Internationally, the 1985 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* establishes international standards for the treatment of victims. The European Court of Human Rights, the House of Lords in England and the Supreme Court of Canada have all considered victim's interests in respect of the right to a fair trial. Additionally, some countries including Canada and the USA have included specific victim's rights in legislation. The European Parliament also issued a directive in 2012 establishing minimum standards on the rights, support and protection of victims of crime for implementation into national law across the European Union by 16 November 2015.

The omission of victim rights in the HRA means that the Act fails to explicitly recognise the rights that should, at a minimum, attach to a victim's role as a witness in criminal proceedings. The criminal justice system cannot function without victims. The absence of explicit recognition of victim's rights in the HRA also fails to recognise their legitimate interests, as a 'private' victim and 'public' citizen, in the outcome of criminal justice processes. Despite having a role and interest in criminal proceedings, victims often report feeling as though they are treated as "instruments for intuitional ends...in a system that espouses principles of respect, rights and equal treatment".² One victim noted that "criminals have got more rights than victims...I don't have the right to be treated like a human being. Where are my basic human rights?"³

Holder (2018) calls for authorities to "recognize and discharge their duties to people – both victims and offenders – as rights-bearing citizens".⁴ In this context, and in recognition of the ACT's role as a national human rights leader, the Commission recommends that the HRA be amended to include specific protections for victims of a criminal offence. This reform would ensure the rights of victims are recognised and protected by the ACT criminal justice system and taken into consideration when drafting and interpreting ACT legislation.

Inclusion of victim rights within legislative human rights frameworks was recommended by the Victorian Law Reform Commission in 2016, who considered it "the next step in the evolution of the criminal trial process"⁵ and recommends the following:

² Ibid, p.5

³ Ibid, p.126

⁴ Ibid, p.221

⁵ Victorian Law Reform Commission (2016). *The Role of Victims of Crime in the Criminal Justice Trial Process*. Melbourne, Victoria: Victorian Law Reform Commission, p.40

Part 2 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*⁶ should be amended to include a right for a victim of a criminal offence that contains the following minimum guarantees: (a) to be acknowledged as a participant (but not a party) with an interest in the proceedings (b) to be treated with respect at all times (c) to be protected from unnecessary trauma, intimidation and distress when giving evidence.⁷

Care is required to ensure any amendment is workable and consistent with existing rights. The Commission is ready to work with the ACT Government to achieve this.

Finally, enshrining victim's rights in human rights legislation in the ACT will ensure the protection of *all* victims, not just those who present as 'ideal' or 'deserving'. This would include David, a former non-violent offender who was threatened with a knife and later assaulted, who reported when questioned about his experience as an offender and a victim: it was "much harder as a victim, I guarantee you that."⁸

Recommendation: The Commission recommends that the HRA be amended to include specific recognition of the rights of victims of crime.

4. Accountability: Enforcement of Charter Rights

The Charter will particularise the nature of rights that all ACT citizens are entitled to if they become a victim of crime. There is then the significant challenge of ensuring that such rights are practically enforceable. In a formal and practical sense, rights are only 'rights' if they are enforceable. There is a stark contrast here between enforceable rights and, for example, an 'aspiration' that victims should be treated in a particular way. The Commission considers that accountability for Charter rights can and should exist at a number of levels.

i) Accountability through express inclusion in the HRA

Express recognition of victim rights in the HRA – as recommended above – would ensure that these rights are expressly taken into account in preparation of a compatibility statement each time a bill is presented to the Legislative Assembly.⁹ This early stage is the ideal time for government to be undertaking the complex task of considering and balancing the rights of different members of the ACT community, including those of victims and offenders.

Express inclusion of victim rights in the HRA would also offer a clearer pathway for victims to commence proceedings in the Supreme Court where they allege that a public authority has

⁶ N.B. In contrast, to the ACT's HRA, the Victorian *Charter of Human Rights and Responsibilities Act 2006* does not include provision for legal proceedings to the Supreme Court in relation to public authority actions (s40C) or incompatibility of legislation with human rights (s32).

⁷ Victorian Law Reform Commission (2016), p.41

⁸ Holder, R. (2018), p.167

⁹ s37 HRA

acted incompatibly with their human rights and/or has failed to give their rights proper consideration.¹⁰

The Commission continues to advocate for the introduction of a mechanism that would allow a person to bring a complaint about breach of their human rights by a public authority directly to the Commission. This option would be far more accessible than the existing requirement to initiate proceedings in the Supreme Court. In the Commission's view, access to the Commission's conciliation processes would provide an efficient, informal and accessible method for people to seek resolution of human rights complaints, including those raised by victims.

ii) Accountability through the VOCC

The VOCC currently has an obligation under the *Victims of Crime Act 1994* to monitor and promote compliance with the Governing Principles. The Commissioner must also try to resolve any concern raised by a victim about non-compliance with the Governing Principles by an agency involved in the administration of justice.¹¹ The VOCC has broad information-gathering powers which require criminal justice agencies to provide information that is 'reasonably required' by the VOCC to resolve a concern.

In exercising these responsibilities, the VOCC currently:

- assists people to assess and clarify problems in the delivery of services by criminal justice agencies and assist in making their concerns known to criminal justice agencies;
- facilitates communication formally or informally between victims and criminal justice agencies towards resolution of the victim's concerns; and/or
- uses information obtained to recommend improvements to criminal justice processes or procedures.

Remedies available to victims who raise a concern with the VOCC include obtaining an explanation as to why a particular set of circumstances took place, formal internal review of a decision made by a criminal justice agency, an apology, a commitment to changes in practice and/or the institution of specific training within justice agencies.

How might these responsibilities change under the Charter?

As the statutory office holder vested with responsibility for protecting victim rights and delivering victim services, the VOCC remains well placed to resolve victim concerns about breaches of their rights. The Commission recommends that if the Charter is to replace the

¹⁰ Part 5A HRA

¹¹ s12(1) *Victims of Crime Act 1994*

Governing Principles, the VOCC's existing powers in relation to the management of concerns should be extended to resolving concerns about breaches of Charter rights.

Recommendation: The Commission recommends that the VOCC's existing role in relation to the management of concerns about the Governing Principles be extended to resolving concerns about breaches of Charter rights.

iii) Access to formal conciliation processes

Where the VOCC is unable to informally resolve a victim's concerns, or where a victim does not wish to raise their concern directly with the VOCC in the first instance, they should also have the option of accessing the Commission's conciliation process via a direct complaint to the Commission. At present, the Discrimination, Health Services, Disability and Community Services Commissioner, Karen Toohey, is empowered to deal with complaints about a range of matters. This role could be expanded to include consideration of complaints from victims about breach of their Charter rights.

Why conciliation?

Existing conciliation processes within the Commission are personal, responsive and accessible. Within a complaint consideration process for a complaint about breaches of Charter rights, the Commission should be empowered to consider the complaint and where appropriate try to resolve the complaint through conciliation.

This approach would align with processes set out in the HRC Act for dealing with complaints that can already be received by the Commission.

Recommendation: The Commission recommends that:

- the ACT Government introduce a mechanism for individuals to bring complaints about breach of their human rights (as contained in the HRA) by public authorities directly to the Commission; and
- victims be given the option of making a complaint to the Discrimination, Health Services, Disability and Community Services Commissioner in relation to breach of their Charter rights.

iv) Recourse to ACT Civil and Administrative Tribunal (ACAT)

Victims who are unsatisfied with the outcome of the VOCC's informal concern resolution process and/or have been unable to reach a negotiated or conciliated outcome via the Commission's conciliation process should have recourse to ACAT for resolution of their complaint. The Commission recognises that the government is currently considering the role of ACAT in relation to the range of complaints dealt with by the Discrimination, Health

Services, Disability and Community Services Commissioner. The Commission would welcome the opportunity to discuss access to ACAT for victims of crime, including the nature of remedies available to victims who commence ACAT proceedings, alongside these ongoing discussions.

Recommendation: The Commission recommends that where a victim cannot resolve a complaint about breach of their Charter rights with assistance from the VOCC, or through the Commission's formal conciliation process, they have the option of commencing proceedings in ACAT to enforce their Charter rights.

v) *Accountability through the ACT Ombudsman*

The Commission notes the existing role of the ACT Ombudsman in relation to victim complaints, as detailed in part 6.2 of the options paper. The Commission considers that reform to expand victim access to the Commission's existing formal conciliation process and to ACAT should occur alongside, rather than replace, the Ombudsman's existing ability to review administrative compliance of public sector agencies.

Recommendation: The Commission recommends that the ACT Ombudsman retain its existing oversight role in relation to administrative compliance for public sector agencies.

5. Legal Support and Representation for Victims

Crucial to the effectiveness of any new Charter is ensuring that victims can access legal advice and, where appropriate, representation to enforce their rights. As identified in the options paper, access to legal advice is crucial for victims at many points in the criminal justice process including, for example, when:

- a victim is deciding whether to report a crime;
- a victim becomes aware that the defence has subpoenaed their personal health records and is unsure about whether or how to proceed in challenging the subpoena; and
- the relationship between a victim and the DPP has broken down because the DPP is pursuing charges against the victim's wishes.

Case Study 1: Victim Access to Legal Advice

Earlier this year, 'Jen' successfully applied for a family violence order (FVO) against her ex-partner 'Matt' after she decided to end their long-term relationship. The FVO prevents contact between Matt and Jen. Last week, Matt texted Jen and asked her to come out to his uncle's farm on the weekend so they could try to work out what to do with their truck, which was currently in Matt's possession but registered in joint names, and the household furniture. Jen was hopeful that going to the farm and talking to Matt, with his uncle around,

might be a safe way to try and work things out. Jen had borrowed a car from a friend for the last few months but will have to return it shortly and needs the truck to get to work. Jen goes to the farm on Sunday afternoon. Soon after Jen arrives, she realises Matt's uncle is not around. Matt invites Jen out to one of the farm sheds to look at their truck. He then locks her in the shed and violently assaults her over the course of the afternoon. Jen sustains significant injuries. Matt finally lets her out and she drives home. Jen does not sleep that night. She is scared of going to police because she is worried she will get in trouble for helping Matt to breach the FVO. She thinks she would probably lose her job if the police charge her for helping him to breach the FVO but she is hurt, scared and wants legal assistance to find out what might happen if she talks to police. She's unsure who to call or where to go for confidential help and advice.

As explored in part 2.2 of the options paper, there are multiple models for delivery of legal help for victims. In summary, the Commission is of the view that current avenues for legal information and advice are insufficient to meet the needs of victims. Further work should be undertaken to increase access to specifically resourced and tailored legal advice for victims at any point where they seek legal help.

Legal help for family violence (FV) victims in civil matters

In the ACT, Legal Aid ACT provides urgent, expert advice to victims of FV at the ACT Magistrates Court and Family Court in areas including FV and family law. The Women's Legal Centre (ACT) also provides specialist legal advice in the context of FV, including through their Aboriginal and Torres Strait Islander Women's Access to Justice Program. Canberra Community Law provides assistance to FV victims about matters including public housing and Centrelink entitlements whilst the Consumer Law Centre can provide vital help with debt and mortgage issues.

Victim Support ACT works closely with Legal Aid ACT and community legal centres to ensure appropriate referral of FV victims who may require, for example, advice about a FVO, arrangements for children after fleeing the family home, possible eviction from their public housing property due to damage caused by the offender or negotiation about debt arising in circumstances of financial abuse.

Legal help for victims in other circumstances

Outside the context of civil advice relating to FV, victim access to timely and expert legal advice and representation can be less straightforward including legal advice and representation to allow a victim to make submissions to the court about defence-issued subpoenas for their personal records, an issue discussed further below, or about seeking review of a DPP decision not to proceed with charges relating to a sexual offence.

Another group who consistently struggle to access independent advice are those whose partners have been charged with FV offences against their wishes. The Commission notes that as illustrated by the case study of 'Jen', the need for legal help often arises in conjunction with the need for other types of support including health and therapeutic interventions, financial assistance, advocacy relating to a person's engagement with police and the DPP and court support. Ideally, legal advice should be available to victims in an environment where all of these options are readily available. This approach would ensure victims are not further burdened by the responsibility of following up referrals to other services, minimise the likelihood of delay and avoid victims needing to re-tell their stories.

The Commission notes that in South Australia (SA), the VOCC directly funds legal advice and support for victims on a case-by-case basis within specific parameters. This ensures that advice is provided quickly – often on an urgent basis – and in conjunction with other forms of expert, victim-centred support. In the Commission's view, the VOCC would be similarly well-placed to provide, or broker direct access to, specialist legal help for victims whose needs are not met by existing legal service frameworks.

Recommendation: The Commission recommends that the ACT Government undertake further consultation with the VOCC, the legal assistance sector and victims with lived experience about resourcing relevant agencies within the legal assistance sector and/or the VOCC to increase access to specifically-resourced and tailored legal advice for victims.

6. Information, Consultation and Participation Rights

The Charter should uphold victim rights to “accessible, timely and accurate” information.¹² At present, victims frequently report to the VOCC that they have not received relevant information from criminal justice agencies about matters including bail applications and court outcomes. In some cases, victims have only received information after multiple requests to multiple agencies or in a time-frame which leaves them unable to 'act' on it, for example, missing the chance to give a victim impact statement before sentencing.

It is crucial that at the point where crime occurs, victims can access information about their options. Victims need general information about *how* they can report crime, about *what will happen* if they do, and what services are available to support them throughout the criminal justice process.

Once a victim reports a crime to police, it generally follows that they have limited control over the progression of the matter. As outlined in the former VOCC's 2017 consultation

¹² Callanan, M., Brown, A., Turley, C., Kenny, T. & Roberts J. (2012). *Evidence and Practice Review of support for victims and outcome measurement*. London, UK: Ministry of Justice, p.26 & Mossman, E. (2012). *Victims of crime in the adult criminal justice system: A stocktake of the literature*. Wellington, NZ: Ministry of Justice

report, in addition to information, victims also want to know that their views are considered and taken into account in decisions that directly affect them including:

- whether police commence an investigation into a reported incident;
- when an investigation will be closed;
- what kind of charges will be laid;
- plea negotiations between the prosecution and the defence;
- sentencing recommendations; and
- parole.

Being consulted and participating in decision-making provides victims with an opportunity to convey the impact of the crime. Victims want to be heard but recognise that they will not control, only influence, where relevant and appropriate, decisions made and defer to the authority of the relevant agency. The right to consultation and participation, enabled by the right to information aims “to enhance the justice process and not to derail or divert it”.¹³ Therefore, a right to information as well as rights to be consulted and participate in decisions that affect them should be included in the Charter. Specific issues related to information, consultation and participation rights are detailed below.

i) Supporting the provision of information

The options paper explores a number of possible approaches to ensuring that victims have access to the information they need and want about criminal justice processes. The Commission notes that the Victorian Victims Support Agency website¹⁴ offers a helpful model of a user friendly, easy English website for victims of crime. The existing Victim Support ACT’s website currently contains extensive information about the criminal justice system but would be an ideal location for a central online resource for victims of crime.

Recommendation: The Commission recommends that:

- the ACT Government support collaboration between justice agencies to produce a comprehensive suite of plain-language, accessible information resources for victims of crime;
- that the above resources be stored on a single website, such as the Victim Support ACT website, to facilitate ease of access.

Currently criminal justice agencies face a number of obstacles when providing up-to-date information to victims of crime about the progress of criminal matters. Increased use of technology provides significant opportunity to improve the current flow of information between agencies and victims. At present, much of this flow is ‘manual’ and official records

¹³ Holder (2018), p.200

¹⁴ <https://www.victimsofcrime.vic.gov.au/victims-support-agency>

are not immediately updated. Invariably, there are times when information does not flow smoothly.

A centralised database that allows for improved communication between justice agencies has the potential to significantly improve information flow to victims. This system would best be linked to an automated notification system which victims can 'opt in' to. Improved use of technology must be supported by 'people-based' modes of communication for those who prefer not to engage with technology-based alerts.

Recommendation: The Commission recommends that the ACT Government:

- develop, in consultation with justice agencies and victims, technology solutions that support timely information flow to victims; and
- examine the resourcing of existing in-person support models, including those available through Victim Support ACT, to improve victim access to consistent support throughout criminal justice processes.

ii) Bail

The *Bail Act* 1992 accords victims the right to have their safety concerns taken into consideration in bail applications¹⁵ and to be given notice of bail decisions if they have expressed safety concerns.¹⁶ As identified at page 28 of the options paper, feedback to the VOCC indicates that such consultation and flow of information often does not occur in practice, or does not occur in a timely way. In the VOCC's observation, practical implementation of the legislation and of any new Charter right to consultation in the context of bail should be considered specifically in the context of:

- what process improvements or additional resources would be required within ACT Policing and the DPP to improve the ability for victim safety concerns to be taken into consideration in bail applications; and
- how technology, such as 'opt-in' text message updates or the ability to log-in to a central system to access court outcomes could be used to aid the provision of timely information to victims about bail decisions.

iii) Decisions about whether to proceed, charges and plea negotiations

In relation to decisions about whether to proceed with charges, victims at the very least want to know that their views are taken into account in decisions that are directly relevant to them. 98% of respondents surveyed by the VOCC in 2008 were supportive of the statement that "prosecution lawyers should consult with victims prior to final decisions being made in

¹⁵ s23A *Bail Act* 1992

¹⁶ s47A *Bail Act* 1992

relation to their case”.¹⁷ At present, the ACT Prosecutions Policy outlines that, in relation to decisions to discontinue a prosecution:

The final decision...rests with the Director. However, **wherever practicable**...the views of the victim will be sought and taken into account in making that decision. Of course, the **extent of that consultation will depend** on the circumstances of the case in question.¹⁸ (emphasis added)

In relation to plea negotiations, the policy states that the DPP will consider, among other things:

...the views of the victim, where those views are available and if it is appropriate to take those views into account.¹⁹

In summary, consultation remains discretionary. Other Australian jurisdictions place stronger obligations on the prosecution to consult with victims in relation to decisions about how or whether a matter is prosecuted. For example, the NSW Prosecution Guidelines state that:

The views of victims will be sought, considered and taken into account in making decisions about prosecutions; but those views will not alone be determinative. It is the general public, not any private individual or sectional interest that must be served. Views expressed should also be recorded on the ODPP file.²⁰

The New South Wales (NSW) *Crimes (Sentencing Procedure) Act* 1999 also requires a certificate verifying requisite consultation be filed, before the court takes into account “any statement of agreed facts that was the subject of charge negotiations”.²¹ The SA Victims’ Charter contained in the *Victims of Crime Act* 2001 outlines specific rights for victims of serious offences to be consulted about decisions including amending charges; withdrawing charges; and applications relating to the alleged offender’s mental competence.²²

Recommendation: The Commission recommends that:

- the Charter strengthen victim rights to provide their views at all stages of the criminal justice process and to have these views taken into account by ACT Policing and the DPP in decision-making processes;
- any new Charter rights to consultation and participation be supported by practical resourcing of justice agencies to ensure that such consultation takes place.

¹⁷ Victims of Crime Coordinator (2008). *The experience and views of victims of crime with their rights in the ACT justice system*. Canberra, ACT: Victim Support ACT, p.9

¹⁸ Office of the Director of Public Prosecutions (2015). *Prosecution Policy of the Australian Capital Territory*, p.7

¹⁹ *Ibid*, pp.9-10

²⁰ Office of the Director of Public Prosecutions (2007). *Prosecution Guidelines – Guideline 19*

²¹ s35A *Crimes (Sentencing Procedure) Act* 1999

²² s9A *Victims of Crime Act* 2001

iv) Subpoena of victim health records

Victims of crime may, at times, have their personal health information subpoenaed by the defence in criminal proceedings. In 2015, the former VOCC prepared a position paper exploring this matter.²³ In some cases, subpoena are broadly cast, reflecting a ‘fishing exercise’ about the victim’s life and/or an opportunity for the accused to access deeply personal information about the victim that would not otherwise be accessible and may be irrelevant to proceedings. Victims have reported to the VOCC their considerable distress at being alerted about provision of their records to the defence *after* this has occurred.

Currently it is possible for a person with a ‘sufficient interest’ in records sought by subpoena to raise an objection to the production of documents or apply to the court for an order to set aside the subpoena.²⁴ There are a number of objections that can be raised in this context including that the documents are unlikely to materially assist the accused’s defence or that the information being requested is broad and non-specific.

However, there is no requirement for anyone to advise the victim that a subpoena relating to their personal health records has been issued. Nor is there a clear pathway for victims to seek advice and representation on their capacity to challenge such a subpoena.

Recognising that a victim’s right to privacy is highly vulnerable in the context of criminal proceedings, victims should have the right to be notified where the defence is seeking access to their personal health records. There are a number of ways that this could occur. Options should be explored with a view to upholding victim privacy and safety, for example, it would be impracticable to require the defence to serve the subpoena directly on a victim whose address and contact details remain confidential.

Recommendation: The Commission recommends that reform occur to ensure that:

- victims are advised where a subpoena has been issued relating to material that includes personal health information; and
- where a victim received such an alert, there is a clear pathway for victims to access expert legal advice and representation to determine what standing they may have to object to the subpoena or request that it be set aside.

v) Protection of records provided to the VOCC

For many victims, the possibility of their records being subpoenaed from agencies such as Victim Support ACT for use in criminal proceedings can be a significant barrier to their engagement with much-needed therapeutic support and the making of an application for

²³ Victims of Crime Commissioner (2015). *Position Paper – Protecting privacy of victims in court and tribunal proceedings of subpoenaed personal health information*. Canberra, Australia: Victims of Crime Commissioner

²⁴ Regs 6604 & 6609 *Court Procedures Rules 2006*

financial assistance. To address this issue, s113 of the NSW *Victims Rights and Support Act 2013* limits the admissibility of records held by NSW Victim Services in certain circumstances. Introduction of a similar provision in the ACT would afford important privacy protection for victims of crime who may otherwise choose not to engage with services aimed at assisting them to recover from harm.

Recommendation: The Commission recommends that the ACT adopt measures similar to those in s113 of the *Victims Rights and Support Act 2013* NSW to limit admissibility of Victim Support ACT records in legal proceedings.

vi) Victim Impact Statements (VIS)

VIS are an important part of the sentencing process and provide victims with an opportunity to inform the court and the offender of the physical, financial, emotional and social harm that results from crime. Where a complainant has not been required to give evidence in a hearing or trial, a VIS is often the victim's *only* chance to tell the court about how their life has been impacted by the crime. A VIS can provide cathartic and psychological benefit to the victim as they express themselves in their own words, with less formality than that required by police statements. VIS can also provide a useful aid to the court in the sentencing process, especially where an offender has pled guilty before the court has directly heard the victim's evidence.

Issues raised with the VOCC in relation to VISs include:

- victims who are entitled to make a VIS under the *Crimes (Sentencing Act) 2004* routinely not being given the opportunity to provide a VIS; and
- victims reporting that their VIS was redacted without their consent prior to being presented to the court.

As highlighted in part 4.2.9 of the options paper, a 2015 Family Violence Intervention Program Review found that in a sample of 28 victims, at least 10 were not given the opportunity to make a VIS.²⁵ Some victims report missing out on opportunities to provide a VIS in circumstances where the offender has pled guilty in the Magistrates Court and has been sentenced on the same day. In another matter, the victim advised the VOCC that even where they had prepared a VIS and provided it to police, the police did not deliver it to the prosecutor to allow it to be presented to the court before sentence.

In situations where a victim has not been given the opportunity to provide a VIS and the matter has been finalised, very little can be done. Post-sentence restorative justice processes can provide an opportunity for victims to express their views, however, requirements relating

²⁵ The Family Violence Intervention Program Coordinating Committee reviewed 28 finalised family violence matter in 2015-2016.

to participation in a restorative conference, including the need for offender consent, can limit victim access to this option.

In other cases, victims have advised that parts of their VIS were redacted without their knowledge or consent, despite it being 'their' statement. One victim stated that if she had been aware that so much of the content was being redacted, she would have chosen not to have it presented at all.

Other issues communicated to the VOCC in relation to VIS include a victim being incorrectly advised by the prosecutor immediately before presenting her VIS in court that her statement was not relevant to sentencing, it was just a chance for her to feel 'heard'. This advice left the client feeling upset and deflated.

In the past, practical attempts by police to support victim's opportunity to provide a VIS have included attempts to work with victims soon after their initial report to prepare their VIS. This practice raised two key issues. Firstly, if there was a long delay between the report and sentencing of the offender, the VIS did not appropriately characterise the extent and nature of the impact of the crime on the victim's life over time. Secondly, police observed defence lawyers subpoenaing draft VISs for use in criminal proceedings. This caused victims significant distress, particularly given that the statements often included information of a personal nature that was not otherwise available to the defence. The Commission is of the view that whilst victims can be cross-examined on their statement at the time when it is presented to the court, VIS should be protected from subpoena prior to the offender pleading or being found guilty.

The Commission notes the potential resource impact associated with implementing a victim's right to make a VIS and have it put before the court. Resourcing impacts include ensuring that police or others can work with victims within relevant timeframes to prepare their VIS. Other resourcing issues arise in circumstances where an offender has pled guilty and the court is ready to sentence but the DPP does not know whether the victim has been consulted and offered the opportunity to prepare a VIS. Any adjournment granted by the court to allow such consultation to take place potentially contributes to court delays and requires additional resources associated with re-listing the matter.

In the Commission's view, introduction of the Charter should, at a minimum, protect the opportunities currently available to victims under the *Crimes (Sentencing Act) 2004* in relation to the making of VIS. The Charter should ideally be used as an opportunity to *strengthen* victim rights in relation to the making of VIS, including the right to have a matter adjourned if the victim has not been given the opportunity to prepare a VIS.

If the ACT Government is not minded to draft the Charter in this way, consideration should at least be given to ensuring that the right to prepare and present a VIS is guaranteed for victims of serious matters, including sexual and homicide offences.

Recommendation: The Commission recommends that the Charter specify that victims have the right to:

- be informed about the opportunity to prepare a VIS;
- be advised about matters including what can be included in a VIS, the fact that they can be cross-examined about it and how it can be considered by the court; and
- have ultimate control over the content of their VIS, including the right to choose not to have it put before the court in a redacted form.

The Commission also recommends that a provision, similar to the sexual offence communication privilege, be enacted to prevent access to prepared VIS by the defence prior to the determination of guilt.

vii) Participation in parole inquiries

The *Crimes (Sentence Administration) Act 2005* (CSA) provides registered victims with the opportunity to make a written submission to the Sentence Administration Board in the context of a parole inquiry. Victim submissions can address:

- the likely effect on the victim, and their family, of the offender being released on parole; and;
- concerns relating to the need for protection from violence and harassment.²⁶

a) Information available to victims

Information that is available to registered victims impacts on their ability to meaningfully participate in parole inquiries. The CSA indicates that the notice to a victim about the parole inquiry should include “information about the offender to assist the victim...to make a submission” and one of the examples of information is “the offender’s conduct while serving the sentence”.²⁷ The inclusion of such a provision recognises that victims need information about the offender’s conduct to make an informed submission. The Commission understands that in practice, it is very rare for victims to be provided with any information about the offender’s conduct during the course of the sentence.

In New Zealand (NZ), victims are entitled to request information about the offender to assist them in their parole submissions where the offender has served a sentence of imprisonment

²⁶ s124 CSA

²⁷ s244(1)(c) CSA

over 12 months. Information that can be provided to victims includes a list of programs the offender has engaged in or completed and any additional offender convictions since commencing the sentence.²⁸

Recommendation: The Commission recommends that Part 7.2 of the CSA be amended to provide victims of certain violent offences with explicit entitlements to obtain information relating to the offender’s behaviour and rehabilitation whilst serving the sentence.

b) Format for giving submissions

In NSW²⁹ and NZ³⁰ victims are expressly entitled to give their submission relating to parole in person rather than in writing. The CSA uses the confusing words “tell the board, in writing”.³¹

Recommendation: The Commission recommends that the CSA be amended to provide victims of crime in the ACT the opportunity to provide submissions in relation to a parole application in person as well as in writing.

7. Barriers to Realisation of Victim Rights

After consultations with victims of crime from a range of diverse backgrounds, former VOCC John Hinchey recommended that the Charter:

...include a specific obligation on agencies to be responsive to the particular needs of victims with different needs relating to, at minimum: Aboriginal and Torres Strait Islander status, physical and intellectual ability, sexuality or gender identity, cultural background and language; and age.³²

Table 2 in the options paper helpfully summarises key issues and barriers for diverse groups being: Aboriginal and Torres Strait Islander people; children and young people; culturally and linguistically diverse (CALD) people; lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people; people living with disabilities; and young adults aged 18 to 25 years.

These barriers can often prevent people from reporting their experience of violence to police. Where people *do* report to police and their experience of the justice system does not take into account their specific needs, they are less likely to report future incidents. In a small jurisdiction like the ACT, word can travel fast. The sharing of one person’s bad experience in a tight-knit community can result in that entire community losing confidence in the reporting process.

²⁸ New Zealand Parole Board (2004). *New Zealand Parole Board Hearings – information for victims*, p.6

²⁹ s145 *Crimes (Administration of Sentences) Act 1999*

³⁰ New Zealand Parole Board (2004), p.6

³¹ s124 CSA

³² Hinchey, J. (2017). *A Charter of Rights for Victims of Crime – consultation report*. Canberra, Australia: VOCC, pp.5-6

The Charter has the potential to significantly improve the way justice agencies interact with and assist victims from diverse backgrounds. Systemic responses need to evolve and embrace more flexible ways of working with diverse victims. The Commission recognises that it has an important role to play in finding better ways to provide appropriate information, support and advocacy in response to diversity.

The recommendations in this section aim to support victims to access their rights including to recognition before the law, protection from degrading treatment and right to a fair trial.

i) Intermediaries

The establishment of an intermediary scheme in the ACT has the potential to significantly reduce justice barriers experienced by vulnerable victims, including those with complex communication needs.³³ Use of intermediaries can reduce the stress and trauma experienced by victims when giving evidence. Intermediaries can also improve the capacity of police to gather accurate and detailed evidence from vulnerable complainants and witnesses.

As recently stated by the ACT Director of Public Prosecutions, Jon White:

...intermediaries have professional qualifications to assist in communication with children and other witnesses with a communication difficulty. The intermediary assesses the witness's abilities, and – as a professional and impartial adviser – assists the court and the parties in how best to communicate with the witness. The intermediary can intervene in a court examination where they observe that a communication breakdown has occurred.³⁴

Intermediaries generally come from four key disciplines: social work, speech pathology, occupational therapy and psychology. As an impartial participant, intermediaries undertake a thorough assessment of a victim's/witness' communication needs and can assist in the context of police investigations as well in a pre-trial 'ground rules' hearing where they report to the court and the parties on the witness' communication requirements. Ground rules hearings identify the questions that need to be put to the witness and how they can be asked in ways that meet the witness' communication needs. This process can also lead to a narrowing of the issues, creating trial efficiencies. Communication needs identified might stem from an adult's disability or a child's age, cultural background or disability.

Intermediary schemes have been in operation across England and Wales since 2008 and NSW are part-way through a three year intermediary pilot for child witnesses in sexual offence matters, implemented by NSW Victims Services within the Department of Justice. Victoria

³³ For a helpful example of how 'vulnerable victim' may be defined, see s21A of the *Evidence Act 1977* (QLD); for an example of how 'complex communication needs' may be defined, see the Attorney-General's Department SA (2014). *Disability Justice Plan: Supporting vulnerable witnesses in the giving of evidence: Guidelines for securing best evidence for investigative interviewers working with vulnerable witnesses*. Adelaide, SA: Attorney-General's Department.

³⁴ White J. (6 May 2018). 'Calls for child victims of sexual offences to have intermediaries'. *The Canberra Times*

commenced an intermediary pilot on 1 July 2018 which is available to children and to adults with a cognitive impairment in sexual offence and homicide matters.

The Commission welcomes the ACT Government's in-principle acceptance of the Royal Commission into Institutional Responses to Child Sexual Abuse recommendation about the use of intermediaries. In the long term, the Commission supports the use of intermediaries for vulnerable accused in appropriate circumstances. However, care must be taken to ensure that any extension of intermediaries to assist vulnerable accused persons is not used in a way that is contrary to the right to a fair trial in s 21 of the HR Act.³⁵

Recommendation: The Commission recommends establishment of an ACT intermediary scheme. A staged roll-out should prioritise availability of intermediaries for:

- child complainants and witnesses; and/or
- adult complainants and witnesses with complex communication needs

in matters involving sexual offences and/or serious violent offences.

ii) Special measures

a) Special measures for children and young people and their families

The ACT has been a leading jurisdiction in the use of special measures to support vulnerable witnesses when they give evidence. Existing measures include allowing someone to give evidence remotely by audio-visual link, with a support person present and/or via a pre-trial hearing. These measures aim to minimise trauma for witnesses and to ensure the most accurate evidence is before the court.

There remain a number of gaps in the ACT's special measures framework when it comes to child complainants and witnesses. Further exploration of these gaps should focus on the following:

- extension of pre-trial hearings to children and young people giving evidence in homicide matters, particularly where a child or young person has witnessed the killing of a parent or family member;
- extension of pre-trial hearings to close family members of child sex-offence complaints. This would address the current situation where a child's parents or carers may have to wait many months to give their evidence, delaying the family's ability to talk openly about the incident and work constructively towards the child or young person's recovery;

³⁵ Section 21 of the HR Act requires an accused person to be able to effectively participate in their trial, including understanding the nature of the trial process, and the significance of any penalty imposed (with assistance if necessary). If an accused person is unable to do all those things, then the use of intermediaries cannot cure that defect. An accused person in those circumstances should not be judged fit to plead.

- recording the evidence of child complainants and child witnesses in violent offence proceedings, including FV matters, to ensure this evidence can be played at any retrial. This would avoid the child or young person having to give evidence again;
- requiring courts to be closed when children give evidence in sexual offences, which often occur in a FV context. This includes where evidence given by a child at a pre-trial hearing is replayed at the actual trial.

Recommendation: The Commission recommends that existing special measures for vulnerable witnesses be extended to children and young people and their families in a broader range of circumstances. Such reform would minimise trauma for children and young people who are required to give evidence about FV, including sexual violence perpetrated by family members.

b) Special measures for adult complainants and witnesses

The DPP has previously recommended a number of additional reforms to special measures in relation to the following gaps:

- family members in homicide matters and sexual offence proceedings are not, as a matter of course, able to give evidence in court via audio-visual link;
- the evidence of victims of serious violent offences given in court is not recorded so their evidence can be replayed at trial (this currently only applies to sexual offence victims);
- the court is only required to consider whether to close the court for a witness of a sexual or violent offence. It would be preferable if victims of sexual assault could request a closed court and be given it as a matter of course.

The current legislative provisions relating to special measures for vulnerable witnesses are difficult to decipher. Some provisions potentially require victims to prove they have a vulnerability or 'mental disability' in order to have access to the provision. In the Commission's view, it would be preferable for the special measure provisions in the *Evidence (Miscellaneous Provisions) Act 1991* to be re-drafted with a view to improving consistency and accessibility for victims and victim advocates.

Recommendation: The Commission recommends that:

- The 'special measures' provisions of the *Evidence (Miscellaneous Provisions) Act 1991* be amended to improve consistency and accessibility to victims.
- That existing 'special measures' be extended to include:
 - the option for family members of homicide and sexual offences proceedings to give evidence remotely via audio-visual link;
 - the recording of evidence given by victims of violent crime in court proceedings so that the evidence can be replayed at a retrial- noting that it will be important that

the court retain a level of discretion to ensure a fair trial, consistent with s 21 of the HR Act, in the individual circumstances of a case³⁶;

- o providing victims of sexual assault with the right to request that the court be closed whilst they give their evidence.

iii) Specific responses for Aboriginal and Torres Strait Islander people

A complex array of historical, contemporary and personal experiences can be at play for Aboriginal and Torres Strait Islander people when they consider reporting to police or are forced to interact with the justice system. This can include:

...inter-generational trauma from the legacy of Australia's colonial history...leading to a profound mistrust in police and the legal system...; lack of understanding of legal rights...; poor police responses and discriminatory practices within police in relation to the enforcement of family violence orders...; risk of renewed or escalating violence and threats by the perpetrator...to re-exert control over the victim/survivor...; indirect discrimination across the support sector including for example discriminatory practices within police and child protection agencies.³⁷

In a bid to improve visibility and service delivery for Aboriginal and Torres Strait Islander victims of crime, Victim Support ACT recently secured short-term funding to employ a part-time Aboriginal Victim Liaison Officer (AVLO) role. Significant achievements by the existing AVLO have highlighted the level of need in the community and the additional demand on all areas of service delivery. Victim Support ACT requires additional resources to better meet this demand and improve the agency's advocacy for Aboriginal and Torres Strait Islander victims of crime at every stage of the criminal justice process.

Recommendation: The Commission recommends that:

- Victim Support ACT be resourced to employ two full-time AVLOs;
- with support from the VOCC, the ACT Government consult with ACT Policing, the DPP and the Courts to explore the resources they require to deliver culturally responsive services to Aboriginal and Torres Strait Islander victims of crime.

³⁶ For example, where an appeal has led to a retrial and the recorded evidence of the victim cannot be edited to exclude any inadmissible evidence and still convey to a jury the relevant evidence, it would be appropriate for the court to retain a discretion to not use the recording.

³⁷ National Family Violence Prevention Legal Services Forum (2017). *Submission to the Committee for Social Policy and Legal Affairs Parliamentary Inquiry into a Better Family Law System to Protect those Affected by Family Violence*, pp.9-10. Retrieved from http://www.nationalfvpls.org/images/files/NFVPLS_submission_family_law_parl_inquiry_-_final.pdf

iv) Specific responses for culturally and linguistically diverse (CALD) people

a) Cultural Liaison Officer (CLO)

Factors such as limited English proficiency, limited social networks and uncertain migration status make some members of CALD communities more vulnerable to crime. In addition, members of these communities are less likely to report crime and seek help to aid their safety and recovery. When interacting with the formal justice system, CALD community members often experience additional barriers including:

- not understanding what kind of conduct constitutes a crime;
- being afraid of, or not trusting, police based on experiences in another country or negative interactions with Australian authorities; and
- lack of access to information about how to report crime and what will happen after they have made a statement.

In collaboration with colleagues across the Commission, Victim Support ACT seeks to make victim services more accessible to members of CALD communities. Victim Support ACT also recognises that improved advocacy is required at a systemic level to minimise barriers to reporting of crime the provision of culturally-responsive information about victim support services.

Employment of CLOs has the potential to significantly improve engagement between justice agencies and CALD community members and has been recommended as ‘best practice’ for victim service agencies.³⁸ CLOs can deliver outreach services and help people to understand the justice system in culturally-appropriate ways. CLOs can increase community knowledge about available supports and build trust between diverse community members and agencies. The expertise of CLOs can also contribute to ensuring that all agency services are culturally-responsive.

Recommendation: The Commission recommends that justice agencies including Victim Support ACT, ACT Policing and the DPP be resourced to employ CLOs who can support agency engagement with CALD communities.

b) Interpreter funding and use

Lack of access to interpreters can be a significant justice barrier for CALD communities, limiting engagement with police and the quality of evidence available in relation to a criminal incident. The Domestic Violence Prevention Council’s review of domestic and FV deaths highlighted a key issue in relation to language barriers:

³⁸ National Framework of Rights and Services for Victims of Crime 2013-2016 (no date). *Good practice for accessible and appropriate services to victims of crime from culturally and linguistically diverse backgrounds*. Unpublished

It appears that speaking some English was equated with understanding all English, including technical, legal, medical and bureaucratic terms, despite staff themselves having difficulty understanding the client....It should also not be assumed that if a service provider understands the client that the client automatically understands the service provider.³⁹

The ACT Government's Safer Families investment in translating and interpreting services in the court and FV services⁴⁰ is a welcome initiative for victims of FV. Gaps remain, however, in relation to the provision of interpreter services in certain situations and for certain victims. For example, victims who apply for FVO can access an interpreter funded through the Safer Families Initiative whilst victims applying for Personal Protection Orders do not enjoy guaranteed access to an interpreter.

Recommendation: The Commission recommends that:

- agencies involved in the administration of justice be resourced to provide staff with regular, quality training in effective use of interpreters;
- ACT Courts be resourced to use interpreters as required, including in personal protection order matters;
- the VOCC be resourced to fund a language or Auslan interpreter for victims who wish to observe court proceedings relating to offences committed against them.

v) Specific responses for people with disabilities

The Commission welcomes the ACT Government's commitment to progressing a Disability Justice Strategy. As recognised by the Australian Human Rights Commission:

Negative assumptions and attitudes, coupled with a lack of support services and minimal provision of adjustments, often means that people with disabilities are viewed as not credible, not capable of giving evidence or unable to participate in legal proceedings.⁴¹

The strategy must explore how the ACT can better support people with disabilities who need communication supports or who have complex and multiple support needs. Development of the Charter should also take account of the specific needs of witnesses and complainants with a disability, including the provision of appropriate, accessible information about justice

³⁹ Domestic Violence Prevention Council (2016). *Findings and recommendations from the review of domestic and family violence deaths in the Australian Capital Territory*, p.37. Retrieved from http://www.cmd.act.gov.au/_data/assets/pdf_file/0003/864714/DVPC-Review-of-Domestic-and-Family-Violence-Deaths.pdf

⁴⁰ ACT Revenue Office (2017). 'Safer families levy'. Retrieved from <https://www.revenue.act.gov.au/levies/safer-families-levy>

⁴¹ Australian Human Rights Commission (2014). *Equal Before the law: Towards Disability Justice Strategies* Synopsis. Retrieved from <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>

processes. The Commission is pleased to be working with the Justice and Community Safety and Community Services Directorate on the development of the strategy.

Recommendation: The Commission recommends that development of the Charter occur in concert with work being undertaken to develop an ACT Disability Justice Strategy to ensure:

- the availability of appropriate supports for complainants and witnesses with disability support needs; and
- the development of plain-language, accessible resources about the justice process and victim support options including the Victims of Crime Financial Assistance Scheme (FAS) and the Victim Services Scheme.

vi) **Role of the Public Advocate**

a) Advocacy assistance

To facilitate access to justice and service supports for victims, particularly those who have a disability, mental health concerns, or are children and young people, additional advocacy support may be required. Advocacy work is undertaken by the VOCC and the staff of Victim Support ACT on a case-by-case basis. As part of the integrated Commission, the Public Advocate also plays a key advocacy role for victims through its statutory advocacy, monitoring/oversight and engagement work. This enables the referral of matters when a victim requires additional support, improving service integration and service coordination, particularly where this is inadequate, fragmented, lacking in cohesion or siloed.

In protecting, upholding and advocating for the rights and interests of victims, the Public Advocate can attend court hearings, participate in case conferences or meetings, and convene multi-agency panel meetings to resolve service coordination concerns. Further, liaison can occur with other agencies to achieve improved service outcomes for a victim where they are involved with the disability, mental health or child protection sectors. The capacity to undertake a broad range of advocacy functions, which can extend beyond the criminal justice system, is a key advantage of the advocacy model used by the Public Advocate.

Case Study 2: Management Assessment Panel (MAP) for young person aged 14 years

Victim Support ACT referred a 14 year old victim with disability to the Public Advocate for advocacy assistance as there were limited support services involved with the young person and her family were struggling to care for her at home. This young person had complex support needs, an intellectual disability and had experienced significant trauma. She was at risk of being relinquished into care due to the challenging behaviours she exhibited. The Public Advocate convened a MAP, which facilitates coordinated and integrated service

delivery in high risk or complex cases. The MAP was able to engage appropriate services to support the young person, including respite care and other specialist disability services that could work with the family to care for and support the young person. The MAP action plan was critical in facilitating coordinated supports and service delivery so that the young person could remain at home.

b) Public Advocate as litigation guardian

In addition to the provision of advocacy, the Public Advocate can act as litigation guardian for children and young people who are victims of crime in situations where there are no other independent adults who are well placed to undertake this role. When acting in the capacity of litigation guardian, the Public Advocate must do everything that is necessary in a legal proceeding to protect the child or young person's interests and rights. This can include instructing a solicitor and managing a legal process on behalf of a child or young person. As litigation guardian, the Public Advocate stands in the place of the child or young person and is responsible for ensuring that their views and wishes are put to the court. This work is often intensive with considerable resource implications.

Case Study 3: Litigation guardian and advocacy for 16 year old young person

The VOCC referred a 16 year old victim to the Public Advocate as she required help to apply for financial assistance related to a crime. The young woman wanted to have her privacy protected. In particular, she did not want her family to become aware of the specifics of the crime. As there was no other suitable adult who could perform the role, the Public Advocate agreed to become the young person's litigation guardian for the purpose of making a Victims of Crime FAS application.⁴² The Public Advocate worked with the young person's lawyer and her Victim Support caseworker to ensure that all relevant evidence in support of the application was before the court. The Public Advocate also ensured that the young person was kept informed about court processes and progress of the application. The application was successful, reflecting the effective wrap-around approach used by the team to support this young person through the court process.

Recommendation: The Commission recommends that the ACT Government review the adequacy of resourcing available to the Public Advocate to undertake advocacy, including as litigation guardian, for children and young people and adults with impaired decision-making ability who are victims of crime.

vii) Therapy Dogs

The use of therapy dogs in courts can significantly reduce stress and anxiety for some witnesses. Ideally, therapy animals should be available to victims in the ACT Magistrates

⁴² This application was made prior to introduction of the new administrative Victims of Crime Financial Assistance Scheme in 2016.

Court and the ACT Supreme Court whether they are giving evidence in the courtroom or through a remote witness facility. A recent trial of therapy dogs in NSW Courts found that in addition to lowering victim stress, therapy animals can have a positive effect on the well-being of others in the court including staff, police and lawyers.⁴³

Recommendation: The Commission recommends that relevant steps be taken to provide victims of crime with the choice of being accompanied by a therapy dog when giving evidence.

8. Victims Register & 'No Contact List'

i) Victims register

Victims registers are a crucial element of the criminal justice process, recognising that victims have a strong interest in information about the whereabouts and rehabilitation of an offender, particularly as this information relates to their own safety and the safety of the broader community.

The former VOCC, John Hinchey, highlighted a number of concerns in relation to the operation of the victims register. He also recommended expansion of a number of legislative provisions relating to who is eligible to be on the register and what information is made available to registered victims.⁴⁴

a) Visibility and location of the victims register and information available to victims

Victims need to know that victim registers exist. The registers must also operate in a way that gives victims confidence that their personal information – recorded in the register – will remain confidential. At present, many victims report to the VOCC that they are not willing to join the adult victims register for reasons including the fact that it is currently located within, and administered by, ACT Corrective Services, an agency that they align with the interests and needs of the offender. The young offenders victims register is maintained by the Community Services Directorate and has a particularly low profile and resourcing. Indeed, the VOCC is not currently aware of any victims who are registered on the young offenders register.

Section 216 of the CSA provides examples of information that can be made available to registered victims. It also states that the Director General of the Justice and Community Safety Directorate, may also disclose “information about the offender...if satisfied the disclosure is appropriate in the circumstance.” In practice, it appears to the VOCC based on victim reports that this discretion regarding disclosure is interpreted narrowly. A review of

⁴³ 'Every dog has its day...' (16 March 2018). Retrieved from <https://www.justice.nsw.gov.au/Pages/media-news/news/2018/therapy-dogs-for-ten-nsw-courts.aspx>

⁴⁴ Hinchey, J. (2017), pp.37-39

the operation of the registers may assist in identifying the types of information regularly provided to victims and the timeliness of such alerts.

Registered victims are most frequently contacted by ACT Corrective Services at the point when the offender applies for parole. The VOCC notes that flow of this information often raises a range of support needs for the victim, including the need for assistance drafting a submission to the Sentencing Administration Board, possible financial assistance to implement additional safety measures such as installation of home security, or the need for further therapeutic support, such as counselling, to help the victim prepare for possible release of the offender back into their community. The confluence of these factors raises the possibility that it would be most helpful, from a victim perspective, for the registers to operate in closer connection to, or as a part of, Victim Support ACT. Co-location could also increase access to the register – with victims feeling more comfortable that their information was being held by a trusted victim-focused agency. The VOCC understands that this approach is currently under consideration in other Australia jurisdictions.

Recommendation: The Commission recommends that the ACT Government review the operation of both victim registers with a view to maximising access for victims. This review should include consideration of re-locating the registers within a victim-focused service such as Victim Support ACT.

b) Eligibility for the victims register

The existing victim registers impose strict eligibility criteria in relation to who can register and receive information about an offender. This measure represents a balancing of a victim right's to privacy and safety with the rights of the offender. Victim registers in Queensland⁴⁵ and Victoria allow people who have experienced FV to be 'registered victims' in relation to an offender, even where the sentence being served does not relate directly to offences committed against them. Both of these jurisdictions also allow for someone who has a connection to the offence, and has genuine safety concerns, to be registered and receive information. This allows, for example, those who have given evidence against the offender to receive information about the offender's whereabouts and release. Whilst involving a balancing of rights, this approach recognises the genuine safety concerns of particular victims and their need to know the whereabouts of an offender.⁴⁶

Recommendation: The Commission recommends that the ACT Government consider extending eligibility for the victims register to:

- FV victims where the sentence being served does not relate to the FV victim;

⁴⁵ s320 *Corrective Services Act 2006*

⁴⁶ s30 *Corrections Act 1986*

- people who can demonstrate a connection to the offence so as to cause them to have a need for safety in relation to the offender; and
- provide an option for registered victims of sexual offences and homicide to remain on the register to receive information about an offender for subsequent unrelated offences.

ii) 'No Contact List'

During 2018, a number of victims raised concerns in relation to contact by offenders on remand or serving sentences in the Alexander McConachie Centre (AMC). There is not, currently, a clear process for members of the community to apply to the AMC to prevent the offender from contacting them.

Recommendation: The Commission recommends formalisation of the AMC 'no contact list' including development of a concise information resource for victims about how to apply to be added or removed from the list.

9. Enforcement of Reparation Orders

In some criminal matters, the prosecution will apply for a reparation order to address a victim losses or expenses incurred as a direct result of the offence. The court has discretion to order that the offender make reparation to the injured person via a monetary payment or other means. For stolen property, the court can order that the person with custody or possession of the stolen property return it to the victim, or that the offender pay the victim an amount equal to the value of the property.

The VOCC has been contacted by several victims who have been awarded a reparation order but have not been paid. At present, there is limited information available for victims as to what steps they may take to have a reparation order enforced. Whilst a victim may enforce the order through civil proceedings, many victims are not in a position to involve themselves in the additional distress, inconvenience and expense associated with civil enforcement proceedings.

Chapter 6A of the CSA also provides for a victim to sign-away their right to civil enforcement and exchange for a request that the Director-General enforce the reparation order as a fine owed to the territory. Any funds collected are then paid to the victim. The success of the fine enforcement is not guaranteed. In the view of the VOCC, it would be helpful if there was clearer information available to victims about options for enforcing reparation orders. This may assist in minimising additional effort and distress for victims.

One option to increase the likelihood of reparation orders being paid once a victim has chosen to convert the order to a 'fine' would be to make provision for ACT fines to be paid using Centrepay. Currently, if an offender seeks to pay a fine under a payment plan, they

usually enter a direct debit arrangement. Direct debits are difficult to manage and often 'bounce'. If they bounce more than twice, the court has to undertake additional work to cancel the arrangements and re-engage the offender regarding default. This can lead to further attempts at direct debit or, ultimately, a summons to return to court. The ACT Courts have advised the VOCC that a significant number of offenders have indicated it would be easier for them to pay directly out of their Centrelink benefit, rather than via direct debit. The VOCC is aware that use of Centrepay to pay court fines is an option available in other jurisdictions.

A further option would be to resource the VOCC to:

- fund civil recovery proceedings, on a cost-recovery basis where, for example, the amount is above a specific sum and the VOCC has assessed that recovery proceedings are likely to have reasonable prospects of success; and/or
- if civil proceedings are unlikely to be successful or cost effective, to enable the VOCC to pay the reparation order out of discretionary funds or as an exceptional circumstances payment under the FAS. This would require an amendment to the legislation as eligibility for FAS is currently limited to victims who have been subjected to a violent crime resulting in an injury.

Recommendation: The Commission recommends that the ACT Government explore options to improve the enforcement of reparation orders.