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**Commissioner for Victims’ Rights: Strengthening Victims’ Rights?**

By

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Crime impacts on victims, their families and witnesses; and, as well affects the social, economic and health of communities (Bard, & Sangrey 1983 & Markesteijn1992). Those victims who choose to report crime expect to be treated with respect for their dignity, amongst other things. Yet, the criminal justice system does not necessarily address their needs or their losses. Rather, it can compound the trauma victims may have suffered causing ‘secondary victimisation’. Many factors have been identified as contributing to this ‘secondary victimisation’, which is also known as ‘second injury’.

With the rise of state-centred criminal justice systems, crime victims lost fundamental rights and their personal satisfaction was substituted by an intangible satisfaction of knowing that justice would be done for the state (Young 2001). Elevating victims’ rights is one way to improve outcomes for victims; however, victims’ rights should not compromise the right of the accused to a fair trial.

Australia’s political system consists of an Australian Parliament; six State Parliaments and two Territory Parliaments. In addition to the two self-governing territories, Australia has six territories that come under the jurisdiction of the Australian Parliament. All States, except one, and both self-governing Territories have promulgated principles on how public officials should treat crime victims. These principles, amongst other entitlements, focus on respect for victims, informing them about the investigation, prosecution and court outcomes and informing them about health and welfare services to help them deal with the effects of crime. It also examines the role of the Commissioner for Victims’ Rights in South Australia. The Commissioner reviews the effect of the law on victims, monitors officials and agencies’ compliance with the Declaration Governing Treatment of Victims of Crime and reports annually to Parliament.

*Commissioner for Victims’ Rights South Australia.*
The Commissioner can also recommend that an agency or public official make a written apology to a victim where there has been a breach of victims’ rights. Notably, the Commissioner has procedural rights in certain criminal proceedings, which is peculiar in common law jurisdictions.

Evolution of Victims’ Rights in Australia

In 1985, the United Nations General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This 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 Commonwealth of Nations Statement of Basic Principles of Justice for Victims of Crime (2005). The Commonwealth of Australia has endorsed both instruments. It is also a signatory to other international instruments that acknowledge crime victims’ rights, for example, the Declaration on the Elimination of Violence against Women; United Nations Convention against Transnational and Organised Crime and the Convention on the Rights of the Child. Contrary to Declarations or Statements, conventions bind those member states that have signed (ratified) the Convention.

Australia’s Constitution distributes political power between the founding States (such as South Australia) and the Commonwealth Parliament, which is sometimes called the Australian Parliament. The States surrendered many powers to the Commonwealth but responsibility for criminal justice and related areas of policy and programs, including victim assistance remained with the States and Territory Governments. Since the 1990s, however, a number of significant Federal criminal laws have been enacted that involve natural persons as crime victims. Currently, on Australian soil there are nine different criminal codes: six State criminal codes, two Territory criminal codes and a Federal criminal code.

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, which set the trend. Nowadays, each State (except Tasmania) and both self-governing Territories have a declaration of victims’ rights. All, except 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 is consulting on a declaration on victims’ rights. All states and territories have provision for victim impact statements in criminal sentence hearings 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. There is no Federal declaration on victims’ rights, yet there has been an encouraging trend in favour of the Commonwealth Parliament enacting one.

A National Charter on Crime Victims’ Rights

Under the auspices of co-operative federalism many bodies have been established such as the Australian Police Ministers Council (APMC) and the Standing Committee of Attorneys-General (SCAG). In 1990 the APMC received a discussion paper on victims’ rights sponsored by the Commissioner of Police for South Australia (Woodberry 1989). The Commissioner argued for a national approach to victims’ rights. A similar debate happened in the SCAG. A discussion paper sponsored by the Attorney-General for South Australia was debated by the Attorneys-General (SCAG 1992). By the mid-90s the SCAG promulgated a National Charter for Victims’ Rights, which was consistent with the United Nations’ Declaration (1985) and modelled on the Declaration on Victims’ Rights in South Australia.

The Charter set minimum standards for the treatment of victims in the criminal justice system. It recognises that crime victims should:

- be treated with compassion and respect for their dignity
- have access to services
- be informed of their rights
- be informed of the progress of proceedings
- be allowed to present their views at appropriate stages of the proceedings
- be afforded measures to protect their privacy, ensure their safety and minimise inconvenience.

The SCAG Secretariat was tasked with monitoring the implementation of the Charter. It issued a report in 1996 that revealed all States and Territories had taken steps towards the implementation of the Charter. Although the Australian Government (that is Commonwealth) had taken no action, some federal agencies – in particular the Commonwealth Office of the Director of Public Prosecutions (Bugg 2004; Commonwealth DPP no date) – had begun to adopt victim-oriented policies and practices. A decade later the Australia Government joined Commonwealth Nations in developing
a Statement of Basic Principles of Justice for Victims of Crime, which was approved in 2005 (South Australian Attorney General’s Media Release 2005). The communiqué on the Statement reflects the good practice guidelines developed by an expert group for the Commonwealth Secretariat (Commonwealth Secretariat 2002). Then in 2008 the Federal Attorney-General’s Department hosted a Summit on Criminal Justice that listed victims and criminal justice as a key theme (See: <http://www.ag.gov.au/www/ags/ags.nsf/Page/Consultations_reforms_and_reviews2008_Federal_Criminal_Justice_Reform_Forum?open&query=Justice_Summit>). The workgroup on victims of crime at that summit recommended the draft convention developed by the World Society of Victimology and partners as a framework to guide the development of a federal declaration on victims’ rights. Also that year, the SCAG established a workgroup to report on a federal declaration on crime victims’ rights and ‘good practice guidelines’ for a national approach to victim assistance (O’Connell 2008; Garkawe & O’Connell 2007).

The SCAG workgroup identified many federal offences that involve natural persons as crime victims. The Criminal Code and Crimes Act, for example, outlaws human trafficking; child sex tourism; slavery and sexual servitude; and terrorism (see also Kelly 2008). It also noted that there are international instruments and issues that concern victims; and benefits and support for crime victims have increased. Emerging issues of national and local significance for law enforcement agencies and crime victim services include the trafficking in human beings into Australia and the exploitation of children, for instance, child pornography facilitated by the Internet. The workgroup also noted that special efforts are required to address the needs of victims of terrorism. Despite the absence of a federal charter on crime victims’ rights, Commonwealth social and justice policy, for example, in education and social security, has impacted positively on crime reduction and prevention victimisation. Furthermore, important federal questions are raised where crimes are committed overseas against Australians or where residents of one Australian jurisdiction are victimised in another jurisdiction. The recommendations of the workgroup are yet to be made known but clearly the proliferation of these issues and others now requires a concerted and coordinated federal response of which a Federal Declaration on Victims’ Rights should be a core element of that response. Notably, the former Labor Government (under Prime Minister Rudd) announced that it would implement a declaration (ABC News 2008; Pearlman 2008 & ALP 2009); whether that happens depends on political will. That Government also revamped the assistance scheme for victims of human trafficking, it funded a Victim-Witness Assistance Officer for

the Office of the Commonwealth Director of Public Prosecutions. Recently, the Federal Attorney-General for the current Labor Government (under Prime Minister Gillard) announced that a federally funded compensation scheme for victims of terrorism will likely be established.

Crime victims’ rights in States and Territories

Charters and declarations enacted by the States and Territories mirror the ten fundamental rights in both the United Nations Declaration and Australia’s National Charter to a significant extent. However, the declaration in New South Wales, South Australian and Queensland respectively has been amended since the former declaration and charter were approved. In New South Wales and South Australia, for instance, there has been greater emphasis on procedural rights such as the right to be consulted before charge decisions are varied. Victoria’s Justice Department reviewed all Australian charters and declarations before enacting its own charter (Victim Support Agency 2004). Queensland and the Australian Territory Governments reviewed their declarations and redrafted them before enacting new legislation. Western Australia is reviewing its charter on victims’ rights that is a schedule under the Victims of Crime Act (Porter 2011; Cordingley 2010). Tasmania adopted the United Nations Declaration, however, its Attorney-General announced in 2010 that State would introduce a local charter on victims’ rights (see http://www.justice.tas.gov.au/victims).

All declarations or charters are intended to ensure a recognised position for victims within the criminal justice system and to minimise any secondary victimisation. They comprise a set of principles (often called rights) that oblige public officials to treat victims accordingly.

There are many commonalities in the declarations and charters that exist in Australia, for example,

- Treating victims with respect, compassion and dignity, as well as cultural sensitivity
- Providing protection from the accused person (and his or her family and associates)
- Avoiding unnecessary intrusion into victims’ privacy, including protecting the identity of the victim
- Providing medical, psychological and practical assistance that is easily accessible for the victim
- Providing information of the criminal justice process and victims’ role and responsibilities as witnesses
Enforcement of victims' rights in Australia's States and Territories

Although victims' rights declarations aim to ensure that, wherever possible, victims' rights are received consistently and reliably, there are still gaps in the way the criminal justice agencies and other public officials are seen to respond to victims (Wilkie et al 1993; Cook et al 1999; Curtis & Panhurst 2003; Gardner 1989; Erez et al 1994; JSU 1999 & 2000).

For example, in 2009 the New South Wales Sentencing Council (2009) reported that 62% of residents in that State thought that the criminal justice system did not meet the need of victims. Victim surveys reveal that many victims are not aware of their rights and many victims, despite victims' rights, still feel they are treated with ambivalence (Wilkie et al 1993; Social Systems & Evaluation 1997; Cook et al 1999; Curtis & Panhurst 2003; Gardner 1990; Erez et al 1994; JSU 1999 & 2000; NSW Victim Services 2010).

These short-comings might be because victims continue to be seen as only witnesses. It might also be because the language of 'rights' suggests the declarations or charters carry more weight than in reality (Groenhuizen, 1993). In other words, victims' rights are arguably symbolic and will likely remain so until they are enforceable. Other reasons for the patchy implementation of victims' rights are the attitudes of public officials and inadequate resources that limit the ability and capacity of public officials and public agencies to respond effectively to victims.

In order to raise the profile of victims' rights not only for victims but also for public officials several jurisdictions have enshrined victims' rights in statute law. Arguably a statutory obligation on officials and agencies is a better way to ensure that victims are treated with the respect and dignity afforded to them under a declaration or charter. This, however, has not proven to be as effective as some anticipated. Research indicates that the existence of a set of rights for victims does not in itself ensure that victims are able to exercise the entitlements they provide. Whether victims' rights come through a statutory scheme or administrative direction, there is a need for the principles to be clearly articulated and compliance mechanisms to be established for them to operate effectively. Thus, in addition to affording rights to crime rights States and Territories have introduced ways to resolve victims' grievances when those rights are violated. A brief overview on each follows before an elaboration on South Australia's approach that incorporates the appointment of a Commissioner for Victims' Rights.

The Australian Capital Territory enacted the Victims of Crime...
Act in 1994, which sets out principles that, as far as practical and appropriate, govern the treatment of victims of crime. A public official who breaches a guideline can face disciplinary proceedings within his or her own agency. A Commissioner for Victims of Crime (yet to be appointed) will promote efficient and effective services to victims of crime and investigate alleged breaches of these principles by criminal justice agencies.

In New South Wales the “Victims Services NSW” (within the Attorney-General’s Department) has the authority to receive a complaint, attempt to resolve it and, where this is not possible, to advise the Attorney-General who may table the report in Parliament. This State’s charter applies to public agencies and public officials, as well as non-government organizations and their employees that receive public funds to deliver victim assistance. This is unique to New South Wales.

The Victims of Crime Rights and Services Act in the Northern Territory consolidated a range of victim related legislation. The Act established the new Crimes Victims Services Unit (CVSU) and the Victims Register. The CVSU is charged with promoting and overseeing victims’ rights, including raising public awareness on these rights. Victims with grievances, however, should first utilise existing complaint authorities.

Queensland has appointed a ‘Victims of Crime Co-ordinator’. The Co-ordinator manages “VictimAssist”, which is a government agency, if a victim complains about a violation of his or her rights, there should be an investigation by the respective public agency and the result of the investigation must be reported to VictimAssist. Furthermore, public agencies ought to co-operate with VictimAssist in resolving victims’ complaints.

A Victims Assistance section in the Department of Justice in Tasmania administers the victims register, liaises with other justice agencies, provides information and court support to victims and manages a counselling service for victims of crime. The section monitors compliance with victims’ rights laws but it does not investigate complaints from victims of crime. The Secretary for the Ministry for Justice is tasked with establishing a victim-complaint process. The Secretary has delegated that responsibility to the Victim Support Agency, which operates the Victims Help-line and runs the victim assistance counselling programme.

The Attorney-General for Western Australia currently should report annually on the operation of the Victims of Crime Act, including the Schedule of Guidelines on the Treatment of Crime Victims.

The incumbent Liberal Attorney-General has announced that Government intends to establish a crime victims advocate or similar position. The statutory officer’s functions would be based on South Australia’s Commissioner for Victims’ Rights (see below).

Most Australian jurisdictions have a designated entity to receive, inquire into and attempt to resolve victims’ complaints. The limited information publicly available suggests that the majority of victims’ complaints are resolved by providing information or referrals, or reminding public officials of their obligations. At first glance, none of Australia’s declarations or charters creates legally enforceable rights. Rather, all victims’ rights declarations or charters state that violation of a right does not create a civil or criminal cause of action against a public official or agency.

Establishment of a Commissioner for Victims’ Rights in South Australia

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. A Commissioner for Victims’ Rights was conceived as a response to the fact, that - despite victims’ rights legislation - many victims still are not receiving the rights to which they are entitled under that law. The Premier and Attorney-General for South Australia asserted that victims should no longer be bystanders in the criminal justice system.

The Commissioner is independent of direction or control by the Crown or a Government Minister. The Act makes it clear that any directions or guidelines given to the Commissioner about the carrying out of his or her functions must, as soon as practicable after they have given, be published in the Gazette and laid before each House of Parliament. Then Attorney-General, Hon. Michael Atkinson MP (2007) said, “This will help to ensure that the Commissioner is free to make independent recommendations for change that arise from any review of laws and practices”, amongst other things. This level of separation from government ensures objectivity (Uhrig Review 2003). According to Holder (2008), a statutory advocate for victims must be free to act within the criminal justice system, with enabling legislation, to ensure individual’s interests and rights are upheld and to allow victims effective engagement with the system.

Furthermore, she stated that independence from government is one means by which a Commissioner for Victims’ Rights can undertake the statutory duties with “due diligence, objectivity, efficiency,
competence, specialisation and equity”.

The Commissioner for Victims’ Rights is an *ex officio* member of the Victims of Crime Ministerial Advisory Committee. That Committee is appointed by the Attorney-General under section 15 of the *Victims of Crime Act 2001*. It is required to advise on:

- practical initiatives that the Government might take to ensure that victims of crime are treated with proper consideration and respect in the criminal justice system;
- to help victims of crime to recover from harm suffered by them;
- to advance the interests of victims of crime in other ways; and
- any other matter referred to the Advisory Committee by the Attorney-General for advice.

The Committee is made up of public officials, representatives for non-government organisations and a community member. The Attorney General ensured that any public official on the Committee is at the appropriate level to make decisions on behalf of his or her agency. The Attorney-General also appoints the chair, after consultation with the Commissioner for Victims’ Rights. The Committee facilitates liaison between public agencies and non-government organisations. It has developed initiatives to assist agencies in complying with the Declaration Governing Treatment of Victims of Crime. A statement of commitment (known as an Administrative Agreement) endorsed by most chief executives of public agencies and the Commissioner of Police to collaborate in light of their obligations to victims of crime is a prime example (O’Connell 2009). The Committee has also conducted a review on training and education on victim assistance and criminal justice. It has overseen the preparation of an inventory of crime prevention and victimisation prevention programmes funded by government. It has in addition produced a list of victim-oriented priorities such as funding victim assistance for specific ‘at risk’ groups.

The Commissioner in addition:

- advises the Attorney-General on how to use available government resources to effectively and efficiently help victims of crime.
- assists victims in their dealings with the criminal justice system
- consults with the Director of Public Prosecutions in the interests of victims and in particular cases about matters including victim impact statements and charge bargains
- consults with the judiciary about court practices and procedures and their effects on victims
- monitors the effect of laws on victims and victims’ families.
- makes recommendations to the Attorney-General on matters arising from the performance of these functions.

Several of these functions, which the leader of the Opposition in the South Australia Parliament described as “interesting developments” (Redmond 2007), have afforded the Commissioner avenues to intervene in criminal proceedings in ways traditionally associated with civil (inquisitorial) criminal justice systems than common law systems.

Since his appointment, the Commissioner has sought to change the legal culture with respect to observance of victims’ rights. For this purpose, amongst other strategies, he has 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. (The Commissioner has about $A250,000 per year to engage legal representation for his or her office and for victims.) The presence of victims’ lawyers has increased attention to victims’ rights by police officers, prosecutors, magistrates and judges – and defence counsel.

In spite of these victims’ rights advances, the tradition of excluding victims from criminal proceedings in Australia prevails. Although a court room is a public place, unless the court is closed, victims are not even afforded the same entitlement as members of the public in most States and Territories.

Victim presence in court is traditionally discouraged when the victim is likely a prosecution witness. The tradition is justified primarily as essential to ensure the integrity and quality of the ‘fact-finding’ process. The Commissioner’s interventions have sought to strike a balance between the defendant’s right to due process and the victim’s legitimate interest.

The Commissioner monitors compliance with the Declaration of Principles Governing Treatment of Victims in the Criminal Justice System. It was evident to the Commissioner that, despite the police giving an *Information for Victims of Crime* booklet to victims who report offences, too many victims were unaware of their rights and how to exercise them.

Therefore, in September 2008 the Commissioner implemented a victim-letter notification programme. The South Australia Police provide data for the letter whenever a first court date is registered in its computer. Since the programme began, the Commissioner has posted approximately 1,000 letters per month. A “Common Questions Fact Sheet” enclosed with each letter, informs victims on how to exercise their rights to information about, for instance, the progress of the prosecution and the court outcome. In 2009-10
(financial year), about 1300 victims followed up the letter seeking further information from the Commissioner.

In order to inform victims on their right to complain and to whom they should complain, a chapter was inserted into the Information for Victims of Crime booklet that the police and other agencies distribute. A pamphlet summarizing the role of complaint authorities, including the Commissioner for Victims’ Rights, has been produced. Each year several hundred victims raise their grievances with the Commissioner. In 2010-11, for instance, the Commissioner received 143 complaints; 583 inquiries about compensation, including grievances; and, 201 inquiries and/or requests for advocacy (often as a result of a public official not responding to a victim’s request for information, assistance and so on). 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 agency. The most common grievances raised with Commissioner 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. They felt that police priorities dominate victims’ needs.

In appropriate cases, the Commissioner may recommend that the official or agency make a written apology to the victim. The Commissioner can report on compliance with a recommendation in his or her annual report to Parliament.

Encouraging compliance or urging a genuine apology when a grievance is substantiated is seen as more effective than the threat of punishment. The aim of the actions of the Commissioner is to bring about attitudinal change or behaviour modifications. These changes are seen necessary to improve respect for victims’ rights and improve practical outcomes for victims. The Commissioner has not had to recommend an apology since he acquired the authority to do so in July 2008. Several public officials, however, have volunteered apologies.

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 the Commissioner’s authority, may be sufficient to ensure victims’ grievances are in most cases satisfactorily resolved.

The appointment of the Commissioner happened at a time when the main political parties in South Australia embarked on a ‘law and order’ campaign. The Commissioner from this perspective could be seen as having much to do with the war on crime (see Harding 1994).

The Commissioner in particular and victims’ rights in general however should be disentangled from that war. Instead the focus should be on victims as people and victims’ rights as human rights. Victims are people who, in many cases, have endured the traumatic crisis of crime. Crime is a violation of a person’s human rights. Human rights require that people are treated with respect. Victims’ rights also require the people as victims be treated with respect and not treated as an after-thought. In this context, the role of the Commissioner for Victims’ Rights is better understood as being about transforming the brute power of the state. The Commissioner’s primary challenge is to urge others take victim seriously and to respect the rights of victims of crime. If there is systemic change then, as Dubber (2002, p342) concluded, respect for victims’ rights will become more important than protecting their rights.

Conclusion

Crime victims’ rights have increased exponentially in the years since 1985 when the first declaration was promulgated in South Australia. In reality, however, all the declarations and charters in Australia have been drafted to give victims information and participatory rights in our criminal justice systems but – perhaps deliberately - not control of them. Thus, another way of looking at the victim status in general is to say that the victim has been re-introduced into the criminal justice process that they once dominated.

Enshrining victims’ rights into legislation may not necessarily achieve the outcomes sought. It is the complaints and compliance mechanisms in place which give effect to the ‘rights’. Important as well is appropriate training for public officials in relation to their obligations in accordance with the declarations and charters on victims’ rights.
Reference List


Gardner, J. 1989 'Victims' Satisfaction with the Criminal Justice System', paper presented at the 5th Annual Conference of the Australian and New Zealand Society of Criminology, July.


