

Victims' Rights: Integrating victims in criminal proceedings

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

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

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

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

¹ Silberman no date cited by Elias 1986

² Young 2001, p6

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

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

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

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

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

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

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

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

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

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

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

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

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

- Treat victims with respect, compassion and dignity, as well as cultural sensitivity;
- Avoid unnecessary intrusion into victims' privacy, including protecting the identity of the victim;
- Facilitate victims' access to \ medical, psychological and practice assistance;
- Provide information of the criminal justice process and victims' role and responsibilities as witnesses;
- Provide accurate and timely information about: the investigation, the charges laid, about the outcome of a bail application (including information on conditions imposed to protect the victim), the prosecution, the court outcome and the impending released, escape or recapture of the offender;

The more controversial rights are those giving victims opportunities to participate in decisions that affect them, such as taking into account victims on their perceived safety concerns when deciding whether to bail the accused; consulting victims before any decision to modify or not to proceed with charges laid against the accused; permitting victims to make impact statements and, in South Australia, to state a view on sentence; and. the opportunity to make submissions at parole hearings

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

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

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

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

Judgments in the European Court of Human Rights⁹ and the Divisional Courts in England indicate that it may be possible to use judicial review in the future to strengthen victims' rights to consultation on decisions that affect them¹⁰. For example in England, the Divisional Court in *R v DPP ex parte C*¹¹ held that courts could set aside a decision of the Crown Prosecutor not to prosecute on any of three grounds: if the decision was illegal; if the decision conflicted with the DPP's official Code of Prosecutors; and if the decision was perverse. In *R v DPP ex parte Manning*¹² the Divisional Court quashed the decision of the DPP not to prosecute a group of prison officers who appeared to be involved in the death of a prisoner. In this case, the Coroner's jury had returned a unanimous verdict of unlawful killing. In *R (B) v DPP*¹³ the Divisional Court also "quashed the DPP's decision not to prosecute"¹⁴. The Court said the decision was irrational and suggested it was based on either a misunderstanding or unfounded stereotyping of the victim-witness' capacity to give credible evidence. And, in *R (Guest) V*

⁸ Section 84D *Correctional Services Act* 1988

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

¹⁰ O'Connell 2010

¹¹ [1995] 1 Cr App R 136

¹² [2000] 3 WLR 463, [2001] QB 330

¹³ [2009] EWHC 106 (Admin)

¹⁴ Spencer, 2010, p150

*DPP*¹⁵ the Divisional Court also quashed the DPP's decision not to prosecute and suggested that where such a decision is quashed, proceeding with the prosecution would not necessarily be an abuse of process. I hasten to point out that the Court's decision to set aside a decision of the DPP does not guarantee that a prosecution happen. The Court's intervention only requires the DPP to reconsider his or her decision¹⁶.

Likewise in Australia there is judge-made law that opens the way for judicial review of administrative decisions, including (I suspect) decisions made by public prosecutors. Courts already use judicial review to interfere with prosecutors' decisions to proceed with criminal charges – that interference is commonly called a 'stay of proceedings'. Regarding the victims' right to consultation, judicial review could ensure consultation happened but could not, other than staying proceedings, set aside the prosecutorial discretion to prosecute or not until appropriate attention has been paid to the victim's right to consultation.

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

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

The federal Crime Victims' Rights Act 2004 allows the victim to use a writ of mandamus to obtain a court-ordered stay of proceedings until the court is satisfied, for instance, that the victim has been adequately consulted on the plea bargain or heard during sentencing. In *Kenna v US District Court for the Central District of California*, the 9th Circuit Court reviewed the Congressional debates on

¹⁵ [2009] EWHC 594 (Admin)

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

the Crime Victims Rights Act then concluded that there was “a clear congressional intent to give crime victims the right to speak at proceedings [covered by the Act]. The right to be heard at any public proceeding involving sentencing “means that the district court must hear from the victims, if they choose to speak, at more than one criminal sentencing”, which had not happened so the petition was granted. Significantly, the Court remitted the matter to the trial court, set aside the sentence and ordered that court formulate a fresh sentence after the victim had spoken on the effects of the crime (Butler 2006; Baron-Evans 2006).

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

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

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

My functions include:

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

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

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

¹⁷ Redmond, Hon (Shadow Attorney-General) 2007

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

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

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

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

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

Case A — A's parent was killed in a motor vehicle crash. The offending driver was charged with driving in a culpably negligent manner causing the death of a person. A was unsure about her rights and wanted information about the implications of participating in a victim-offender impact conference that was suggested by the offender and an offender advocacy organisation. I engaged a lawyer to meet A and address her questions. 'A' later stated that the conversation with the lawyer had been helpful and

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

she felt better informed to exercise her rights and make the decision on whether to participate in the conference. The lawyer said he found the experience enlightening and declined to charge a fee. Sometime later, post-sentence, I personally represented the 'As' and her family's view to Correctional Services when staff were contemplating whether to initiate proceedings because the offender had failed to complete the court ordered community service.

Case B — B, an adolescent, was the victim of an alleged sexual offence. While the prosecutor 'proofed' B to assess their ability and capacity to give testimony at trial, B disclosed that she was terrified and did not want to give evidence. Despite B's pleas, her mother insisted that the prosecution happen. I engaged a lawyer to represent B's interests as the victim. Before the lawyer intervened, however, B's mother, on hearing about my response, talked with and (importantly) listened to her daughter. Rather than insist on the prosecution continuing, the mother agreed to support B's point of view, so the prosecutor withdrew the charge; and, the victim was not revictimised.

Case C — The police on behalf of C, a victim of domestic violence, attained an anti-violence (restraining) order against C's husband. C agreed with the conditions of the order. Later C's husband applied to vary a condition and the prosecutor agreed without first consulting C. C complained but the prosecutor refused to alter his stance, so C asked the Commissioner to help. Yet again, I engaged a lawyer to act on C's instructions. The lawyer challenged the prosecutor to either withdraw his agreement to support the variation or face the prospect of an application to set the variation aside in court. The prosecutor conceded that he had not consulted the victim C and on doing so, withdrew from the agreement struck with the defendant, C's husband.

Case D — D testified at a Commission of Inquiry into Sexual Abuse in State Care. All evidence gathered by the Commission was protected by public interest immunity. D later gave evidence in a criminal trial involving the person he had accused of sexual offences that were the subject of his testimony at the Commission. The defendant's legal counsel asked the prosecution to disclose the record of D's testimony. The prosecution elected not to invoke the immunity; however, this resulted in D having to decide whether he would rely on the immunity or agree to waive it. The prosecutor submitted that the court might adjourn to allow D time to attain legal advice. The court approved that the prosecutor contact me, which happened. I then in company with a lawyer attended the courtroom and approached the court. On the lawyer's application, the court approved an adjournment so that D could attain legal advice and, if necessary, have legal representation whilst the court examined argument for and against

the defendant's application for disclosure. D disclosed the record of his testimony.

Case E — E, a registered victim, made a submission to the Parole Board that was hearing an application for release on parole by a prisoner who committed a crime that affected E. The Parole Board refused the prisoner's release, so the prisoner asked for the Board's reasons. The Parole Board's report included information that the prisoner (not the Parole Board) attributed to the victim E but also he denied. The prisoner used that information as grounds to lodge a private prosecution alleging that E's submission to the Parole Board was libelous. Although the Crown Solicitor was able to represent the State, the E had no legal representation until I intervened. I funded legal representation for the victim E because I feared that if the prisoner successfully sued E then all victims who made submissions to the Parole Board would be disadvantaged. The prisoner's case was struck down and later Parliament amended the law to prevent similar acts by prisoners.

Case F — F was an adolescent victim of an alleged sexual assault. Before the assault happened, the defendant allegedly showed F pornography via the Internet using F's lap-top. The police seized the lap-top and conducted an analysis of the hard-drive. Defence counsel applied for a 'shadow' copy of all data on the hard-drive. In addition to some data being the intellectual property of other users of the lap-top, not all data belonging to F was (arguably) relevant to the criminal case. I asked a lawyer to intervene, which he did. Both he and I attended the court. First we spoke with the prosecutor and alerted him to the prohibition (in international and local law) on unnecessary intrusion into a victim's privacy. Second, the my lawyer applied to intervene in the criminal proceedings, which the judge permitted. After hearing submissions from prosecution, defence counsel and the lawyer for me (on behalf of F), a compromise was reached that avoided unwarranted intrusion into F's privacy.

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

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

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

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

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

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

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

²¹ Wolhuter, Olley and Denham 2009, p196.

²² Ibid 2009, p198.

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

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

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

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

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

²⁴ Coroner's Court 2008, see:

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

²⁵ Coroner's Court 2011, see:

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

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

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

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

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

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

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

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

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

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

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

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