



The representative voice of crime victim services

A HUMAN RIGHTS CHARTER FOR AUSTRALIA?

Submission from Victim Support Australasia Inc

May 2009

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SUMMARY & RECOMMENDATIONS

Victim Support Australasia Inc is the national association representing crime victim services across the States and Territories. This submission invites the Human Rights Consultation to consider the rights and interests of Australian citizens who have become victims of crime where the commission of a criminal offence is taken to be an abuse of the human rights of one member of the community by another member(s).

The submission further suggests that the civil and human rights of citizens who are victims of crime require stronger recognition and protection within the administration of justice than is currently the case.

In particular, citizens who are victim/witnesses in criminal proceedings have little or no protection for their civil and human rights from public authorities.

Victim Support Australasia Inc, being the national association for crime victim services recommends:

1. Legislation establishing national standards for human rights in Australia.
2. The standards incorporate recognition of obligations in international instruments including the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (see 8.3), and the Convention on the Rights of the Child amongst other contemporary standards.
3. The legislation provides for human rights to be subject to reasonable limits set by law.
4. Standards that make explicit the application of the rights between citizens and not just with regard to the State.
5. Rights promotion, monitoring, investigation and compliance be supported by structures that are accessible to all Australians and are effective in the protection of rights.
6. Effectively training, equipping and resourcing advocacy centres including the provision of legal advice and representation for citizens seeking protection of their rights.

1. VICTIMS' 'RIGHTS' IN AN INTERNATIONAL AND AUSTRALIAN CONTEXT

1.1 The relevant international instrument is the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The document arose from the Seventh Crime Congress as part of the Milan Plan of Action being a concerted response from the community of nations to address socio-economic factors relevant to the commission of crimes. The Declaration was approved by the General Assembly on 29 November 1985 (resolution 40/34).

1.2 The Declaration is not a binding instrument and is not subject to ratification. However, the World Society of Victimology amongst other accredited organisations is proposing a review of the Declaration and its embodiment in Convention status.

1.3 What is the relevance of the UN Declaration of Basic Principles of Justice of Victims of Crime and Abuse of Power to the consideration of a Human Rights Charter for Australia?

- It comprises another part of Australia's international obligations.
- It has been encoded in legislation within Western Australia, the ACT, NSW, Victoria, South Australia and Queensland.
- It accords with developments to establish a stronger National Charter for Victims of Crime.
- It places obligations on the Federal Government and its agencies as well as upon those who administer justice.
- It provides a set of 'rights' standards for all Australia citizens regardless of their personal characteristics, location or conduct.
- It responds specifically to Articles 9, 14, 17, 23, 24 and 26 of the International Covenant on Civil and Political Rights (1966).
- It provides another component of rights promotion and protection in Australia.
- It complements the *Convention on the Rights of the Child* and the *Convention to Eliminate All Forms of Discrimination Against Women*.

1.4 Responses to victims of crime are varied across the States & Territories. Some are primarily located within government and some within the non-government sector. Most jurisdictions maintain a hybrid and functional approach to service delivery and to the delivery of victims' rights. Victim Support Australasia Inc acts as an industry and professional body to the sector.

2. IMPLEMENTATION

2.1 Implementation of the UN Victims Declaration in member countries has been patchy. A 1993 report on this remarked that progress had been insufficient because of two key factors. One being "*the marginalisation or*

compartmentalisation of victim and human rights concerns within the UN system, which hinders effective follow-up work. The other has been the inability or unwillingness of the member states themselves to take action ...” (Groenhuijsen (1999:91).

2.2 In Canada, in 1988, all the Federal, Provincial and Territorial Ministers responsible for justice agreed on a Statement of Principles for Victims of Crime “*that would guide them in promoting access to justice, fair treatment, and provision of assistance to victims of crime*” (Waller 1996:100). Other than Alberta and Ontario, these principles have been placed in provincial legislation. In 2007, a Federal Victims of Crime Ombudsman was established.

2.3 In the USA, all states have victims’ rights legislation that not only encodes the key aspects of the UN Declaration but have moved further into articulating participatory rights. By 1997 twenty-nine states had added victims’ rights to their Constitutions.

2.4 In Europe, Recommendation (85)11 of the Council of Europe recommended member countries adopt the UN Declaration into law. A review, the *Tilburg Study* (Brienen & Hoegen 2000), found that the proportion of European states that had issued one or more victim-oriented reforms since 1985 had increased from 18% to 66%.

2.5 In Australia a number of responses to the Declaration have ensued. In 1996, the Standing Committee of Attorneys-General (SCAG) endorsed a national charter comprising ten clauses or principles in relation to victims of crime. The Secretariat to SCAG is responsible for monitoring the implementation of this charter.

2.6 To date, the States and Territories have had the responsibility to give effect to both the UN Declaration and to the national charter. Two jurisdictions¹ have implemented administrative guidelines or directions, and six have enacted legislation.²

2.7 With the development of the Commonwealth criminal jurisdiction, a new National Charter of Basic Principles of Justice for Victims of Crime is being developed.

2.8 The Rome Statute for the International Criminal Court as well as various of the international and hybrid criminal tribunals have set new standards for the recognition and respect of rights for victims of crime and abuse of power.

¹ Northern Territory and Tasmania.

² ACT *Victims of Crime Act 1994*, Western Australia *Victims of Crime Act 1994*, NSW *Victims Rights Act 1996*, Queensland *Criminal Offences Victims Act 1995*, South Australian *Victims Rights Act 2001*, and the Victorian *Victims Charter Act 2006*.

3. WHAT ARE VICTIMS' RIGHTS?

3.1 Eminent UK criminologist, Joanna Shapland (2000:153) points out that victim' rights documents have tended not to introduce anything new. In the main, those for victims of crime codify the existing responsibilities of citizens as victims to criminal justice agencies. These mirror the existing expectations that criminal justice has of the crime victim – to report crime, to provide a full statement, to cooperate with authorities and to be a good witness for example.

3.2 'Rights' can be categorised in a number of ways. For victims of crime the most common are:

- Human rights (respect for dignity, privacy, bodily integrity for example)
- Information rights (general - about rights, services, process)
- Notification rights (specific - of court date etc)
- Participation rights (different types & levels)

4. THE FORM OF 'RIGHTS' DOCUMENTS

4.1 If the actual content of the various victims of crime documents in Australasia is not particularly radical, what of the form?

4.2 Victims of crime legislation and charters for Australasia are carefully phrased. The instruments for NSW, Victoria, South Australia, Tasmania and New Zealand are named as '*rights*' documents. In other jurisdictions they are couched in terms of '*principle*'. The difference in phraseology is more symbolic than real. There is little by way of consequence that the different terminology provides.

4.3 However, Victim Support Australasia Inc views legislated obligations couched in terms of "rights" as carrying more authority, symbolism, acknowledgment and enforceability. An administrative charter "*is a form of quasi-legislation embodying rules which are not directly enforceable in civil or criminal proceedings* (Brienen & Hoegen 2000:253).

5. PROMOTION OF AND COMPLIANCE WITH RIGHTS'

5.1 The promotion and enforcement of 'rights' are critical to consideration of a national Human Rights Charter. The experience of Victim Support Australasia with victims' rights legislation may be illustrative of this.

5.2 Until recently, no Australian jurisdiction has provided penalties for non-compliance with victim rights by a public officer. Both the NSW and the Queensland Acts prohibit criminal or civil liability being attached for breaches. However, neither Act excludes disciplinary action against a public official for a

breach.³ The South Australian victims' legislation recently introduced provisions requiring an apology from a public official for a breach of the Act.

5.3 Citizens who are crime victims may, in all jurisdictions, access existing bodies such as the Ombudsman and the procedures of the relevant agency when pursuing a complaint. However, none of these bodies monitor the complaint's relevance to the victims of crime instruments. The option of judicial or administrative review in practical terms is usually limited because of the statutory independence of justice agencies and the absence of adequate and informed legal advice and representation.

5.4 This debate notwithstanding, three Australian jurisdictions have established a mechanism to promote compliance and to investigate allegations of a breach.⁴ In the USA, compliance mechanisms vary from an inter-agency committee supported by Department of Justice staff (Colorado), to a specified alternative dispute resolution victim service within Department of Justice (Wisconsin), to a statutory Ombudsman (Minnesota) (Office of Crime Victims, undated). In the UK, the first Victims Charter (1990) contained a statement of 'rights' without articulating either how these would be monitored or how they would be delivered. The second Charter (1996) provided standards for those rights and referred to the existing complaint resolution mechanisms of the relevant agencies (Hoyle, Morgan & Sanders 1999). In 2004, the UK *Domestic Violence, Crime & Victims Act* provided for complaints to the Parliamentary Ombudsman and the establishment of a Commissioner for Victims and Witnesses.

5.5 A key aspect that undermines compliance with rights is the availability and accessibility of a complaints and enforcement mechanism. The absence of a mechanism to enforce the 'rights' of crime victims in Australian courts is mirrored by a similar failure to make the International Covenant on Civil and Political Rights (ICCPR) directly enforceable in Australian courts.

5.6 The availability of adequate and informed legal advice and representation, or independent advocacy is a key missing element in respect for victims' human and civil rights. Citizens need to be informed of their rights, and they need assistance when seeking review of a decision, action or omission related to their rights. In France, for example, victims of crime are entitled to independent legal aid in a manner similar to an accused person. In Manitoba, Canada, victims are entitled to independent counsel provided by the Ministry of Justice.

5.7 In all examples related to the 'rights' of crime victims, the powers are relatively limited to a general promotion of victims' rights and of reform to meet

³ In most jurisdictions disciplinary action could be taken against a public officer who has been found to have breached an aspect of the codified 'rights' of a crime victim.

⁴ The NSW Victims of Crime Bureau, the ACT Victims of Crime Coordinator, and the South Australian Victims of Crime Commissioner. The latter two bodies are independent statutory appointments.

the needs of crime victims generally. The strongest powers are those that relate to receiving and investigating complaints. The NSW, ACT and South Australian legislation allows for findings of investigations to be reported to the relevant Minister but not all allow for a report of investigations to be tabled. Nor do they require a response from the relevant Minister outlining actions arising from the investigation of a breach.

5.8 Enforcement mechanisms do not need to contain punitive remedies. Conciliation, agency reform and apology can form far more effective in terms of citizen satisfaction. South Australia has a provision to request an apology and in one US jurisdiction, remedies include the possibility of either a private or a public reprimand, or a fine (Davis, et.al, 2002).

5.9 Part of the consideration of compliance and enforcement mechanisms will be the importance of examining available evidence on the effectiveness of the statutes and of the promotional mechanisms in achieving compliance with rights instruments. Only limited research on the questions of individual enforceability and of compliance with regard to victims of crime legislation is available.⁵

6. VICTIMS OF CRIME AND CIVIL AND HUMAN RIGHTS

6.1 The predatory and de-stabilising aspects of organised and transnational crime that drives much of the work of the UN Commission on Crime Prevention and Criminal Justice is impacting on the fabric of the Australian community and the health of our democratic institutions. It is further acknowledged that, “*domestic crime ... misdirects economic activity, undercuts democracy and social solidarity and threatens the security of individuals and families.*” (United Nations, 1996:1)

6.2 Fundamentally, crime and its consequence deeply affect the health, well-being and social functioning of Australian communities.

6.3 The UN's work on crime and its consequence are considered matters for social policy as much as for justice. It is expressly linked to Articles 1, 3, 12, 17(2) and 28 of the Universal Declaration of Human Rights (United Nations

⁵ Brienens, M. and Hoegen, E. (2000), *Victims of Crime in 22 European Criminal Justice Systems*, www.victimology.nl/onlpub/Brienenshoegen/BH.html; Davis, R., Henderson, N. & Rabbitt, C. (2002), *Effects of State Victim Rights Legislation on Local Criminal Justice Systems*, Vera Institute of Justice, NYC; Hillenbrand, S. & Smith, B. (1989), *Victims Rights Legislation: an assessment of its impact on criminal justice practitioners and victims*, American Bar Association, USA; Holder, R. (forthcoming 2002), *The Quality of Justice: effectiveness of the Victims of Crime Act 1994*, Canberra; Hoyle, C., Morgan, R. & Sanders, A. (1999), *The Victim's Charter – an evaluation of pilot projects*, *Research Findings No.107*, Home Office, London. UK; Kilpatrick, D., Beatty, D. & Howley, S. (1998), *The Rights of Crime Victims – Does Legal Protection Make a Difference?* US Department of Justice, NIJ; Social Systems & Evaluation (1999), *Review of the Victims of Crime Act 1994 (WA)*, Perth; Wemmers, J. (1996), *Victims in the Criminal Justice System*, Kugler Publications, Amsterdam.

1996:6). The UN Crime Commission is of the view that “*effective law enforcement and a fair criminal justice system are a bulwark protecting the rights of people to a secure existence and to develop their economic and social potential*” (1996:10).

6.7 The Australian community’s confidence in the fair administration of justice is affected by the experience and perception of unfairness towards victims.

7. HUMAN RIGHTS FOR VICTIMS OF CRIME

7.1 Article 3 of the Universal Declaration and Article 9 of the ICCPR provide for the “right to life, liberty and security of person” for all. In the main the right to security of person has been interpreted as security from the excesses of state power. However, for the majority of individual citizens, security of person is more usually threatened from other individual citizens.

7.2 Some moves in the European environment seek to extend this notion of security of person to include a more specific “right to bodily integrity”. Attention to this form of words comes from advocates working with people victimised especially by sexual offences but also by other forms of physical violence and abuse. Such a right would obviously need acknowledgment of situations where, for example, invasive medical treatment may be considered without a person’s consent.

7.3 Article 12 of the Declaration and Article 17 of the ICCPR provide that “no-one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”. This right has been sometimes resorted to both by persons accused of sexual and physical violence against another person and the victims of such offences in order to reject the intervention of law enforcement and prosecution authorities. The authority of law enforcement and prosecution agencies to intervene to protect vulnerable people, especially women and children, is critical. More recent international instruments related to children and women will need to be incorporated in a new national Human Rights Charter as will domestic recognition protecting their status as vulnerable witnesses.

8. HUMAN & CIVIL RIGHTS OBLIGATIONS ON JUSTICE AGENCIES

8.1 The ICCPR provides more ‘flesh’ to the ‘bones’ of the Universal Declaration of Human Rights. It is, however, a dated document coming, as it did, 19 years before the UN General Assembly endorsed the Convention on the Elimination of All Forms of Discrimination against Women, 20 years before the UN Basic Principles of Justice for Victims of Crime and Abuse of Power, and 24 years before the Convention on the Rights of the Child.

8.2 Victim Support Australasia disagrees with the incremental approach adopted by existing Australian human rights jurisdictions to provide for some human rights and not others. A national Human Rights Charter must acknowledge the changed and expanded international and domestic legislative environment for rights protection.

8.3 In particular, the Human Rights Consultation is invited to consider including:

- (a) *No one shall be deprived of their right to security of person nor be arbitrarily deprived of their property. Should they be so subjected all persons shall have equal access to the necessary material, medical, legal, psychological and social assistance.*
- (b) *Anyone so subjected shall be treated with courtesy, compassion, cultural sensitivity and respect for the victim's rights and dignity.*
- (c) *Anyone so subjected shall be entitled to make a report of that allegation to a law enforcement authority. They shall be entitled to a timely, full and thorough investigation by such a law enforcement authority and in accordance with such procedures as are established by law.*
- (d) *Anyone whose allegation is subject to criminal proceedings shall have their protection needs realised, their privacy respected, their right to notifications incorporated, and their views and concerns presented and considered at appropriate stages of the process.*
- (e) *Anyone whose allegation of crime results in a conviction shall have the right to provide a full statement of the impact of that crime to a judge or other officer authorised by law to exercise judicial power, and be entitled to apply for reparation in the form of restitution, compensation or acknowledgment from the offender and/or from the State.*

8.4 At the very least these suggested inclusions should specifically read in the Basic Principles of Justice for Victims of Crime and Abuse of Power. None of these notification and participation 'rights' of crime victims is inconsistent with Article 14 of the ICCPR being the right of all persons to a fair and public hearing. Indeed the inclusion of the specific 'rights' for crime victims as the primary person(s) affected by the alleged criminal conduct would be viewed by most as reasonable and fair.

8.5 At the very least, a national Charter should qualify "the rights of a criminal accused in relation to the attendance and examination of witnesses by including the words 'unless otherwise provided by law'." (Victorian Consultative Committee Report 2005:44)

9. CONCLUDING COMMENTS

9.1 Klug (2000) suggests that the incorporation of human rights into a country's legislative framework brings citizens into formal mutual obligation one

to the other. Moreover, it frames the standards of participation through which citizens may engage with the State and its agencies.

9.2 Over the past 200 or more years, citizens who are victimised by another's criminal conduct have been expected by governments to exercise their responsibility to the security and protection of the wider community by reporting such conduct to the relevant authorities. It is time for these expectations to be mirrored, as suggested above, through a set of responsibilities and protections in a proposed national Human Rights Charter.

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