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## nforceable Rights for Victims of Crime in Adversarial Justice

Derechos exigibles para las víctimas de delitos  
en el sistema de justicia adversarial

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### abstract

The response to calls for the better integration of victims into systems of criminal justice has resulted in a range of innovative programs and pilots seeking to reposition the victim. However, crime victims have tended to be managed away from the criminal trial into alternative pathways to justice in order to meet this policy directive. While innovation can be found at the periphery of criminal law and justice, through restorative justice, problem-solving and intervention programs that complement or work alongside normative trial processes, the twenty-first century is witness to the emergence of victim rights and powers that affect trial process in more direct ways. This paper explores the emergence of enforceable rights for victims of crime that impact on normative trial processes in an adversarial context. It does this by considering new powers for victims that impact on decisions made in the pre-trial, trial and sentencing phases of the criminal trial, in addition to extra-crucial powers that lie beyond any one phase of the trial.

### keywords

Victims, Trial Rights, Adversarial Justice

### resumen

Ante las demandas de una mejor integración de las víctimas en los sistemas de justicia penal, han surgido una serie de programas y experiencias piloto innovadoras que tratan de cambiar el papel desempeñado por ellas. Sin embargo, con esta política se tiende a apartar a las víctimas del delito del proceso penal dirigiéndolas hacia otras vías alternativas de justicia. Mientras que la innovación se puede encontrar en la periferia del derecho y la justicia penales, a través de la justicia restaurativa, los programas de resolución de problemas y de intervención que complementan o se desarrollan junto con los procesos judiciales ordinarios, el siglo XXI ha sido testigo de la aparición de los derechos y poderes de las víctimas que afectan, de forma más directa, al proceso judicial. Este artículo explora la aparición de los derechos, exigibles por las víctimas de delitos, que inciden en los procesos judiciales de carácter acusatorio. Para ello se

tienen en cuenta las nuevas prerrogativas de las víctimas respecto de las decisiones previas al juicio, durante el juicio y en la imposición y cumplimiento de la sanción, además de poderes considerables más allá de las fases judiciales.

### **palabras clave**

Víctimas, derechos procesales, justicia adversarial

## 1. Introduction

The integration of the victim into adversarial systems of justice has tended to occur at the periphery of criminal law and procedure. Most common law jurisdictions began the process of reintegration in the 1960s and 1970s, in so far as broad based compensation was made available for injuries consequent upon a range of criminal offences. Support services followed, providing victims with a range of welfare based options that were largely supported by government, or rights based, not for profit movements, or later as combined in agency agreement. Access to counselling, medical treatment, workplace support tended to be provided by the not for profits while court and witness support tended to be provided by the state. The dynamic of who provided these services changed into the 1980s and 1990s as government were keen to utilise not for profits to provide services otherwise funded by the state. The 1985 United Nations Declaration on justice for victims and abuses of power also provided impetus for the restaging of crime victims which influenced the emergence of declarations or charters of victim rights on a local level. While these tended to be declaratory and not enforceable, such charters did lead to the reconsideration of the plight of the victim and placed them in a firmer public policy context. Indeed, by the advent of the twenty-first century, governments were addressing victims as the priority group (Hall, 2009). Arguably, boundaries which once separated the victim from substantive participation in adversarial systems of justice are now being eroded and dismantled in favour of rights and powers that can be enforced against the state or the accused, albeit in an unconventional, fragmented and at times controversial way.

The repositioning of the victim in adversarial systems of justice emerged in three key ways. Firstly, victims emerged as prominent protagonists in public policy debate in the 1960s and 1970s. This was facilitated by increased mobilisation of victims into grassroots movements. This resulted in greater services

for victims provided by government and accompanied the rise of rights based movements that offered complementary services (see Doak, 2008: 12-19). The right to compensation and criminal injuries schemes provided extra-curial rights in administrative law, although some schemes did provide for compensation during the sentencing phase of the criminal trial.

The second development focused on human rights and basic access to justice. These rights sought better levels of respect and treatment for victims, emphasising the need to raise service levels within justice systems as provided by the 1985 UN Declaration. These rights aimed to crystallise those powers and privileges that victims ought to enjoy as universal rights and as participants in the criminal justice system. Rights as provided under the 1985 UN Declaration were later ratified as unenforceable rights by some jurisdictions, albeit unevenly and inconsistently, throughout the 1990s. Some jurisdictions have yet to articulate a charter or declaration, while other are transforming theirs into enforceable rights, as below.

The third wave leading to the repositioning of victims has its roots in the changes inspired by a greater focus on rights in the 1990s but has more firmly come to bear in the twenty-first century. This latest phase sees the emergence of enforceable rights that provide victims a means of actual court participation with a view to impacting the outcomes of substantive decision making processes. The first of these powers emerged in the form of victim impact statements (VIS), although not all VIS were initially tendered with the view that they would impact on the sentence of the offender, and grave concerns were raised by lawyers as to the efficacy of VIS pursuant to the requirements of fair justice to the accused. Tests for offence seriousness were also introduced that required the court to consider the harm done to the victim. The next major development came by way of modifications to the law of evidence, principally with regard to protections offered to sex offences victims in the trial process<sup>1</sup>. These protections, such as alternative ways of testifying where victims are identified as a vulnerable witness, because of age or immaturity, intimidation by the accused or mode of examination in court, was soon expanded to potentially include all offences.

The other movement toward enforceable rights occurred with the transition away from non-enforceable rights as provided under charters or dec-

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1 In certain jurisdictions modification of the trial process and the law of evidence concerning sex offences began in the late 1970s. However, it was not until the late 1990s and early 2000s that such rights and protections became comprehensive for sex offences victims, and then universalised as an entitlement to all vulnerable victims and witnesses (see Kirchengast, 2010).

larations. This transition included the initially fragmented emergence of enforceable powers that either emerged through the repeal and re-enactment of non-enforceable charters as enforceable, or through the inclusion of enforceable rights under discrete legislative instruments. The emergence of Commissioners of Victim Rights in certain jurisdictions helped consolidate this movement towards enforceable rights by providing a statutory office that has the capacity to enforce aspects of the charter, by directing that documents be produced and by holding inquiries where certain rights may be infringed, usually by public officials such as the police, prosecutors or corrections and parole. Where jurisdictions lack a Commissioner, victims may turn to private counsel to help enforce rights against the state or the accused. The third wave also saw greater synergies between restorative and normative trial processes. Rather than be identified as an adjunct to the criminal trial, restorative process, especially at the Magistrates' or Local Court level, are increasingly utilised as a means to determine liability or offence seriousness, as is the case of Forum or Circle sentencing, where victims meet offenders in a conference. Finally, the movement towards human rights under the European Convention on Human Rights ('ECHR'), the jurisprudence of the Strasbourg Court, the European Court of Human Rights ('ECtHR'), and Decisions and Directives of the European Union as ratified by member states, and as interpreted by the European Court of Justice ('ECJ'), demonstrates another significant movement toward enforceable rights, particularly in terms of procedural or evidential standards affecting victim participation in court, and the victim's right to review prosecution decisions not to proceed.

While this paper draws from the first two waves of victim rights as background, it focuses on the third phase of the development of victim rights in detail. It does this by assessing separately the impact of the modern iteration of victim rights as they have transitioned into enforceable rights. One characteristic of the emergence of enforceable rights into the twenty-first century is that they are fragmented, incomplete and at times inconsistent against existing powers and processes. While this seems disparaging, this is arguably the result of the discrete and individual inclusion of victims into the criminal justice process to address micro instances of public policy concern. As such, rather than emerge as a universal, coherent response to the growing concern over victim rights and interests, the twenty-first century movement toward enforceable rights utilise discrete amendment of criminal trial processes, usually by way of human rights instruments, statutory amendment of crimes legislation or court judgements interpreting specific powers or rules. This means that it is not possible to articulate the movement toward enforceable victim rights, either within a jurisdiction or even more so internationally, as unified under one coherent instrument or approach. Indeed, one must embrace the fragmented nature of such rights as they seek to modify, often controversially, different aspects of established trial processes.

## 2. Service, Procedural and Substantive Rights

Before considering the different ways in which victims have been afforded enforceable rights the discourse of rights relevant to victims must itself be interrogated. The extent to which a rights based dialogue can be separated into different types of rights is debatable. This is particularly so given the political context of victim rights (Doak, 2008; Hall, 2009). Rights, however, may be identified as powers that require, allow or mandate a form of treatment, benefit, protection or privilege (Doise, 2013). To speak of different types of rights for defendants, for instance, may be to diminish the significance of the defendant's right to due process and procedural fairness, such that all powers conferred on the defendant, or their counsel, are of equal status in so far as they characterise the fair trial as identified in common law jurisprudence. However, the uneven relocation of the victim into criminal justice has required the use of different rights, or rather, rights that allow different levels of access to justice. Although we increasingly see substantive rights for victims being debated and developed today, certain substantive rights may pre-date participatory rights. Similarly, nothing stops the legislature from developing new service level rights, albeit most jurisdictions are now moving away from non-enforceable rights.

The types of rights afforded to victims in criminal proceedings may be therefore classified according to a typology of rights that allow for incremental levels of substantive participation in criminal proceedings. While this typology may separate rights across three areas, each area may connect with the others, such that a degree of overlap between levels of rights is to be expected. For instance, a VIS may be procedural or enforceable, depending on whether the court is able to utilise the content of the statement when sentencing the accused. The typology of rights include:

- Service level rights that allow for access to processes, information or modes of treatment by justice stakeholders, such as state administrators, criminal justice agencies, the police, prosecutors, and court staff.
- Procedural level rights that grant victims access to trial processes. These rights may allow for participation in proceedings but may not otherwise allow victims to influence decision-making processes relevant to the outcome of court processes. The ability to ask questions; to talk with the police or prosecution; or to provide a statement or VIS where the content of the VIS may not be taken into account by the sentencing court, provide examples of procedural rights.
- Enforceable level rights grant victims substantive rights to consult with stakeholders; make submissions to the police, prosecutors or court; or

to procure evidence which may be taken into account in proceedings with a view to influencing the outcome of proceedings. These are rights enforceable against the accused or state, or that allow the victim to influence the outcome of key decisions made. The right to consult with police or prosecutors to influence decisions made; to instruct counsel to challenge discovery of evidence in court; to seek review of a decision not to prosecute; to be protected from harm; to testify in court with protective measures; and to produce a VIS that may actually affect sentence, are examples of such enforceable rights. Enforceable rights are substantive in character because they influence the charges brought, the court processes used, or outcome of proceedings. Corollary rights may also include the requirement that courts acknowledge the victim in certain proceedings, such as in committal proceedings, where victims must be protected from unnecessary questioning, or in sentencing, where the harm to the victim must now be explicitly factored into sentence in most jurisdictions.

The use of different rights for victims has allowed for the gradual integration of victims into criminal proceedings (see Sumner, 1987). This graduation has, arguably, been required by a legal establishment protecting the exclusive domain of the adversarial criminal trial and justice system. Victims themselves may also feel that a graduated integration into a rights discourse is appropriate, given their historic lack of affinity with justice processes. The history of the victim being displaced means that their reintegration has occurred through a range of mechanisms that have not afforded victims powers of universal application or outcome. Instead the movement to provide victims greater rights and powers has occurred incrementally, responding to different periods of political rule that have sought to reposition the victim in different ways. The 1985 UN Declaration saw the first movement towards declaratory or service level rights that sought a respectable level of treatment from public officials. Although an important milestone for victims given their otherwise unacknowledged or removed status, service level rights were and continue to be an important development. These rights allow for fair and respectable treatment, to be listened to and to be taken seriously, which encourages governments to develop laws which enable victims to engage with the justice system generally. Some jurisdictions are still considering the ratification of a charter of rights inspired by the UN Declaration although many have long moved to legislate such rights into law.

The 1990s saw the movement toward rights that allowed victims to participate in proceedings. Participatory rights are different from service level rights in that they grant the victim allocutory rights, or the right to speak and be heard in court. These rights may allow for direct participation but may

not necessarily allow the victim to make submissions that affect decision making processes. Participatory rights that provide for contact between police and prosecution, per prosecutorial guidelines, usually preclude the victim from influencing pre-trial decisions such as the charges brought against an accused, or plea-deals reached, or in sentencing, the victim recommending a particular punishment. Participatory rights that simultaneously limit substantive impact are often justified out of the importance of providing victims access to the justice process, to foster the potential therapeutic benefits of such participation, or because such participation appeases a political imperative of granting victims closer access to courts.

Certain participatory rights may, however, also provide for substantive input into decision making processes. It is this latter development of victim rights with which this article is primarily concerned. Substantive rights generally emerged by making participatory rights enforceable. The ability to tender a VIS, as a key example of a widely utilised power to relocate the victim into criminal proceedings, grants participatory and substantive rights that can be enforced in court. Impact statements may be read to the court with a view that the content of the statement affects the sentence of the accused. Increasingly, however, victims are being granted substantive rights that allow for more than mere participation. Rights to consultation or to a modified trial process to protect vulnerable victims are key examples.

The following is a non-exhaustive analysis of key enforceable rights that allow the victim to make a substantive impact on decision making in the pre-trial, trial and sentencing process. Extra-curial rights not specifically associated with one phase of the criminal trial, but as adjunctive rights for victims participating in criminal justice processes, are also discussed.

### 3. Pre-Trial Rights: The Victims Right to Review and Access to Counsel

The questioning of a decision of the police or prosecution to charge or proceed on indictment has long been identified as a question to be resolved in the public interest alone. The personal views of the victims are not part of the public interest. Although prosecution guidelines increasingly require victims to be kept informed or even consulted as to charges brought, including charge bargaining or plea deals reached, the decision to settle on a final charge or to not proceed with a charge has been preserved as that of the prosecution, acting alone. However, the Directive of the European Union 2012 (2012/29/EU) provides that member states be able to set a process to allow victims to seek

review of decisions not to proceed with a prosecution. This falls against a background of the consultative rights of the victim in plea bargaining (Verdun-Jones and Yijerino, 2002).

The Criminal Division of the Court of Appeal of England and Wales dealt with the victim's right to review under the Draft EU Directive 2011 in the case of *R v Killick* [2011] EWCA Crim 1608. In 2006, two men suffering from cerebral palsy informed police of anal rape and sexual assault by the accused, Christopher Killick. Information was also received on a third complaint of non-consensual buggery. Due to their disabilities, the complainants required assistance when providing evidence. Killick also suffered from cerebral palsy, though to an extent considered to be less than the complainants. Killick was arrested and interviewed in 2006, and denied any form of sexual activity with two complainants and asserted that the anal intercourse with the third complainant was consensual. The Crown Prosecution Service ('CPS') made the decision in 2007 not to prosecute. The victims then complained about the decision not to proceed against Killick, which resulted in a review pursuant to the CPS complaints procedure. The review determined that Killick could be prosecuted although he had since been informed in writing that he would not be proceeded against. Killick appeared in the Central Criminal Court in 2010. The defence requested that the proceedings ought to be stayed as an abuse of process but this was rejected by the court. The trial continued and Killick was convicted of buggery and sexual assault but acquitted of anal rape, and Killick was sentenced to three years' imprisonment.

Considering the Draft European Union Directive (now finalised as EU Directive 2012/29/EU), the Court of Appeal of England and Wales (Criminal Division) held that the 'decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance' (*R v Killick* [2011] EWCA Crim 1608, par 48). The Crown contention was that the victims had no right to request a review of a decision not to prosecute, but could utilise the existing CPS complaints procedure<sup>2</sup>. The court held that '[w]e can discern no reason why what these complainants were doing was other than exercising their right to seek a review about the prosecutor's decision. That right under the law and procedure of England and Wales is in essence the same as the right expressed in Article 10 of the Draft EU Directive on establishing minimum stan-

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2 Although characterised as a complaints procedure, the CPS process does not need to involve dissatisfaction with any particular prosecutor, but may be invoked where a questionable decision has been reached.



dards on the rights, support and protection of victims of crime dated 18 May 2011 which provides: Member States shall ensure that victims have the right to have any decision not to prosecute reviewed.' (*R v Killick* [2011] EWCA Crim 1608, par 49). The only other alternative, other than existing CPS policy as to complaints, was for the victims to rely on the individual's right to seek judicial review in the High Court. High Court procedures make judicial review of a decision not to proceed with a charge difficult, with judicial reluctance to get involved in processes leading to the charging of suspects, a process widely accepted as an executive function. Relief would only be granted in the most exceptional cases where the internal policies of the executive, policies mandating a requirement by law, were not followed or defeated by a clear abuse of process. Seeking such relief would be expensive and thus prohibitive for many victims.

The Final Directive of the EU 2012/29/EU sets out the process by which such tests ought to be now made<sup>3</sup>. Following the release of an interim guidance, the Director of Public Prosecutions for England and Wales released the *Victims Right to Review Guidance* in July 2014. This guide explains the circumstances and procedures by which victims may seek review of a decision not to prosecute. The former complaints mechanism seems to have significantly relied upon the drafting of the *Victims Right to Review Guidance*.

The movement towards a more formalised policy of the right to review is supported by a broader albeit rarely used common law power to challenge pre-trial decisions. The power to appoint private counsel to act against the accused independently of the state in the criminal prosecution process is now being supported by a movement toward the ratification of charters of rights that are at least partly enforceable, at least in some jurisdictions<sup>4</sup>. The power of the police and prosecution to charge and make charge related decisions, such as plea deals, generally rests with the executive (see Verdun-Jones and Yijerino, 2002). As such, victims are generally unable to appoint counsel to challenge such deci-

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3 See Art. 11 of the Final Directive of the EU 2012/29/EU. Also see recital 43 of the preamble: «The right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority. The right to a review of a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position».

4 See section on powers available to Commissioners of Victims' Rights.

sion making, unless provided for by statute<sup>5</sup>. However, the victim does have the power to challenge certain pre-trial decisions that affect their dignity or privacy. This includes situations where the accused seeks discovery of information or evidence from the victim that would be of questionable probative value to the court. Access to confidential counselling notes provides one situation where a victim may appoint counsel to oppose discovery, which usually occurs during the pre-trial phase. They may do this on the basis that the information contained in such notes would be of little use to the Crown or accused, and would otherwise exacerbate trauma to the victim.

Section 299A of the *Criminal Procedure Act 1986* (NSW) makes specific reference to the protections afforded to victims of sexual offences and their standing in criminal proceedings. A protected confider is defined as a victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made. A protected confidence refers to a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence. Section 299A provides:

A protected confider who is not a party may appear in criminal proceedings or preliminary criminal proceedings if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider.

The power to compel production of confidential counselling notes is made under s 298 and provides that 'except with the leave of the court, a person cannot seek to compel (whether by subpoena or any other procedure) any other person to produce a document recording a protected confidence in, or in connection with, any criminal proceedings'. *KS v Veitch (No. 2)* [2012] NSWCCA 266 (also see *PPC v Williams* [2013] NSWCCA 286) provides a clear case example where private counsel was engaged to challenge the discovery of counselling communications that should otherwise be protected. In such cases private counsel are included as third parties, with the Director of Public Prosecutions watching the brief and the Attorney General intervening, but otherwise not participating in the hearing. Basten JA refers to the rights of the victim in the context of such challenges:

The person being counselled, if the victim of the alleged offence, is referred to as the 'principal protected confider' and, though not a party to the criminal proceedings, may appear in those proceedings 'if a document is sought to be

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5 See *R v DPP, Ex parte C* [1995] 1 Cr App R 136; *Maxwell v The Queen* (1996) 184 CLR 501; also see s35A *Crimes (Sentencing Procedure) Act 1999* (NSW) as to consultative rights between police and victims where further charged are taken into account upon sentencing.

produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider': s 299A. (*KS v Veitch (No 2)* [2012] NSWCCA 266, [22]).

In *Veitch (No. 2)* the issuing of the subpoena was found to be in contravention of the substantive tests under s 299D and leave to grant the subpoena was not granted. The materials sought should have never been discovered in the first instance and the NSW Court of Criminal Appeal ordered that documents already handed to the trial judge, though not passed on to the defence, be returned to the hospital caring for the victim.

Another substantive right in the pre-trial phase, a corollary of the right to challenge the prosecutions decision not to proceed, is the general right to private counsel. Braun (2014) has argued that legal representation for sexual assault victims need not compromise the accused by aligning with the prosecution, requiring the accused to then answer against multiple adversaries. Rather, the victim's right to substantive relief is qualified as a private right that need not affect the Crown case nor the accused's ability to answer the Crown case at trial (other than potentially failing to secure the counselling notes of the victim) due to the motion being heard interlocutory. Braun (2014) argues:

... the suggested narrow form of legal representation for sexual assault victims does not infringe upon the procedural rights of the defendant. The legal representative of a sexual assault victim in the suggested form cannot exercise the same rights the parties can, but is limited to exercising some rights in relation to the protection of the victim witness at trial. For this reason, the defendant does not face the risk of a victim's legal representative aligning with the prosecutor and having to confront two adversaries. (Braun, 2014: 829).

From 2011, where confidential records are subject to subpoena, NSW provides victims access to publically funded legal representation. Legal Aid NSW hosts the Sexual Assault Communication Privilege Service granting victims access to counsel and advice when their confidential records are subject to a discovery action.

#### 4. Trial Rights: Human Rights, the Law of Evidence and the Vulnerable Victim

Article 6 of the ECHR provides the right to a fair trial<sup>6</sup>. This right has been interpreted in terms of criminal trials and civil hearings and may be ratified

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6 Art. 6 of the ECHR provides: 1 In the determination of his civil rights and obligations or

into domestic law where a court seeks to include the interpretation of the convention as allowed by law, such as permitted under the *Human Rights Act 1998* (UK). Enforceable victim rights have been addressed by the ECtHR in terms of fair trial rights and the right to privacy, both of which apply to modes of victim participation. The right to a fair trial is provided under art. 6, and refers to the proportionality requirements of defendant rights. Article 8 provides the right to privacy<sup>7</sup>. The cases considering the enforceability of the rights of the victim in the criminal trial have been brought under art. 6 and 8 of the ECHR in the context of fairness to the victim as a participant in criminal hearings. Articles 2 and 3 have also raised claims relating to victim interests, with varying degrees of success. Where the victim has been incorporated under art. 6, the ECtHR has been interpreted in terms of the proportionality requirement to the defendant's right to a fair trial.

In *Y v Slovenia* (2015) ECHR 41107/10, the ECtHR affirmed the centrality of the proportionality requirement, consistent with requirements iterated by the Council of Europe in its Convention on Preventing and Combating Violence against Women and Domestic Violence, Treaty No. 210, which entered into force on 1 August 2014. The ECtHR ruled that the risks of further traumatising the victim should limit the extent to which the accused may cross-examine the victim. The national courts should carefully assess the more

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of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3 Everyone charged with a criminal offence has the following minimum rights: a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b to have adequate time and facilities for the preparation of his defence; c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

7 Art. 8 of the ECHR provides: 1 Everyone has the right to respect for his private and family life, his home and his correspondence. 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

intimate questions that can be put to a victim accordingly. The ECtHR continues to affirm its earlier view that the proportionality requirement of fairness to the accused and the victim is determinative of trial processes under art. 6 of the ECHR. Added here are the rulings of the ECJ called to interpret the Decisions and Directives of the Council of Europe. In *Criminal Proceedings Against Pupino* [2005] EUECJ C-105/03, the ECJ interpreted the Framework Decision of the European Union (2001/220/JHA) as determining that national courts must be able to allow juvenile witnesses or victims, being the subject of maltreatment, to testify in a way that affords them a suitable level of protection. This determination has been since built upon by subsequent decisions of the ECJ. In *Criminal Proceedings Against Magatte Gueye and Valentín Salmerón Sánchez* [2011] EUECJ C-483/09 and C-1/10, the ECJ determined that art. 2, 3 and 8 of CEU FD of 2001 develops the notion of the standing of the victim by allowing for an injunction against persons accused of family violence as an ancillary penalty issued under the criminal law of member states. An injunction taken out against a violent family member may therefore preclude the offender from contacting family members and to stay away from victims for a minimum period.

The rights of the victim to a modified trial process out of fairness, privacy, the taking of life, or out of reference to the prohibition against torture, has a substantial history with the jurisprudence of the ECtHR. The rise of substantive rights for victims begins with the obligation to protect life. The case of *McCann and Ors v United Kingdom* (1995) 21 EHRR 97 is authority for the positive obligation to protect all human life. It is insufficient, under art. 2 of the ECHR, to merely refrain from taking life and states must move to guard against threats made by third parties. *Osman v United Kingdom* (1998) 29 EHRR 245 provides a relevant example. Osman's widow argued that the police did not protect Osman after complaining that threats were received from a teacher. The English courts sought to follow the precedent in *Hill v Chief Constable of West Yorkshire Police* [1999] AC 53, where it was found that the police did not owe the applicant a duty to care to prevent crime. It was held that police were immune from allegations of negligence arising from their investigation. Although the ECtHR did not extend a positive obligation to the police in this instance it did outline a number of measures relevant to the standing of the victim (at par 115-116):

The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction... It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person...

The positive obligations raised by art. 2 are not specifically enforceable against the state. However, *Osman* did raise the standing of victims under the

ECHR and indicated that, albeit in limited circumstances, victims may possess rights enforceable against the state. This is evident in art. 3 applications where the victim has experienced torture. *Razzakov v Russia* (2015) 57519/09 determined that the victim, who was awarded compensation by civil courts for torture, but whose criminal complaint was not the subject of an effective investigation, was entitled to relief. In this case, the applicant alleged that he had been unlawfully deprived of his liberty whilst held in police custody to make him confess to a crime, and that no effective investigation into his complaints was undertaken. The court found that the victim has been subject to torture under art. 3, such that (at par 64):

The Court finds that the significant delay in opening the criminal case and commencing a full criminal investigation into the applicant's credible assertions of serious ill-treatment at the hands of the police disclosing elements of a criminal offence, as well as the way the investigation was conducted thereafter, show that the authorities did not take all reasonable steps available to them to secure the evidence and did not make a serious attempt to find out what had happened... They thus failed in their obligation to conduct an effective investigation into the applicant's ill-treatment in police custody.

The consideration of victim rights under art. 6 and 8 of the ECHR has, however, resulted in considerable changes to normative trial processes and enforceable rights for vulnerable victims. Human rights cases under the ECHR recognise that rape victims are particularly vulnerable (see Ellison, 2002: 78-79). The harm caused to the victim of crime as a result of giving personally distressing evidence has notionally been beyond the consideration of the courts out of adherence to the principles of adversarial justice that allow the accused to challenge the prosecution case. The cases before the ECtHR demonstrate the willingness to extend human rights jurisprudence to processes that involve the victim in order to balance the rights of the victim against the requirement that the defendant receives a 'fair trial'<sup>8</sup>.

In *Baegen v The Netherlands* (1994) 16696/90, a rape victim was granted anonymity following threats of a reprisal attack. The applicant sought to cross-examine the victim, who did not want to be identified in proceedings. In this case, the ECtHR determined that art. 6 had been applied because measures were taken to afford the accused procedural fairness, in particular, by putting questions to the victim at key points throughout the trial and appeal process. The victim's right to anonymity was secured by art. 8, which is read as a positive right such that the court is obliged to protect vulnerable victims and witnesses

on the proviso that there are alternative procedures to secure the due process rights of the accused. Where a victim gives evidence by statement the availability of corroborative evidence will, for example, be a significant determinant in whether a degree of balance between victim and offender has been reached.

*Bocos-Cuesta v The Netherlands* (2005) 54789/00 also demonstrates the ECtHRs disposition to substantive victim rights. This matter relies upon *Finkensieper v The Netherlands* (1995) 19525/92 (17 May 1995), which ruled that anonymous testimony may be tendered if adequate counter measures sought to maintain the accused's right to access and challenge the testimony of the victim. In *Bocos-Cuesta*, the applicant alleged that he did not receive a fair trial under art. 6 §§ 1 and 3(d) of the ECHR. Here, statements provided by four youths were tendered. The accused was not given the opportunity to question the statements. The ECtHR determined (at par 7.1-7.2):

As regards the acts themselves of which the suspect stands accused, the court finds it established that the four children have all been questioned by (or assisted by) investigation officers of the Amsterdam Juvenile and Vice Police Bureau with extensive experience in questioning very young persons. It has become plausible from the records drawn up by them and from the oral evidence given in court by these civil servants that the four children have been questioned in an open, careful and non-suggestive manner.

When present as a vulnerable participant, the ECtHR is therefore willing to consider alternative processes to support the needs of the victim. However, the court is mindful that any departure from normative criminal process is limited so as to maintain the rights of the accused to the state case. In *Kostovski v The Netherlands* (1989) 12 EHRR 434, anonymous evidence was introduced as hearsay by a magistrate. The ECtHR ruled that this departure from nominal processes did not provide sufficient protection for the accused as the defence was unable to examine the source of the information. The ECtHR ruled that evidence should be tendered in the presence of the accused because it was important that the accused be given the opportunity to examine evidence against them. Statements obtained during the investigation or pre-trial process may be tendered at trial if the defence has an opportunity to challenge the contents of the statements by putting questions to the witnesses. The ECtHR determined (at 4477-448):

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings

*Van Mechelen and Ors v The Netherlands* (1998) 25 EHRR 657 similarly raised the issue of the permissible limits of departing from normative trial stan-



dards. In *Van Mechelen v Netherlands*, the applicants were convicted following tenure of anonymous statements made by the police. The investigating judge admitted the statements on the basis that the anonymous witnesses could be questioned by defence lawyers by audio link. The ECtHR ruled that this was an unusual departure from trial processes, and that art. 6 had been breached because the defence could not observe the police as they gave anonymous evidence, nor properly test the reliability of such evidence. The ECtHR is guided by the processes that establish the legitimacy of the trial taken as a whole (see Doak, 2008: 74) over any substantive law that prescribes any particular departure from its form. The jurisprudence of the ECtHR thus tends toward an interpretation of art 6. as maintaining fair trial rights for all participants in the criminal trial process.

The accused's right to challenge the Crown case is well recognised under English domestic law. *R v Camberwell Green Youth Court* [2005] 1 All ER 999 examines s 21 of the *Youth Justice and Criminal Evidence Act 1999* (UK) which allows for a departure from in court evidence for young or vulnerable witnesses. However, the right of the accused to examine witnesses 'with a view to adversarial argument' is maintained. *Green* questions whether s 21 complies with art. 6 of the ECHR because the section did not require that 'special measures' be determined on an individual case basis. The section allows young witnesses to sexual offences and violence to give evidence by live television link and video recording without the need to consider the unique circumstances of each case. Drawing from the jurisprudence of the ECtHR, Lady Hale of Richmond ruled (at par 49):

The accused has every opportunity to challenge and question the witnesses against him at the trial itself. The only thing missing is a face to face confrontation, but the appellants accept that the Convention does not guarantee a right to face to face confrontation. This case is completely different from the case of anonymous witnesses. Even then the Strasbourg Court has accepted that exceptions may be made, provided that sufficient steps are taken to counterbalance the handicaps under which the defence laboured and a conviction is not based solely or decisively on anonymous statements...

In England and Wales, modification of normative criminal trial processes by affording victims and witnesses access to protected or special measures has been found to be able to exist alongside the rights of the accused to a due trial process. In *Green*, Lord Roger of Earlsferry argued that the ECtHR did not limit their reading of art. 6 as requiring the accused be present in the same room as the testifying witness, if the accused is granted an adequate opportunity to examine and challenge the witness. Similarly, s 23 of the *Criminal Justice Act 1988* (UK) allows for the tenure of hearsay evidence if the witness is a 'frightened witness'. *R v Sellick and Sellick* [2005] 2 Cr App R 15 holds that where



the witness is in fear of the accused, the witness's statement could be tendered without the capacity to call the witness for cross-examination in court. This could be the case where a statement became significantly determinative against the accused. Lord Justice Waller, with whom Mr Justice Owen and Mr Justice Fulford agreed, held, dismissing the appeal (at par 57):

Where intimidation of witnesses is alleged the court must examine with care the circumstances. Are the witnesses truly being kept away by fear? Has that fear been generated by the defendant, or by persons acting with the defendant's authority? Have reasonable steps been taken to trace the witnesses and bring them into court? Can anything be done to enable the witnesses to be brought to court to give evidence and be there protected? It is obvious that the more 'decisive' the evidence in the statements, the greater the care will be needed to be sure why it is that a witness cannot come and give evidence.

However, in *R v Martin* [2003] 2 Cr App R 21, the Court of Appeal of England and Wales did not allow a similar statement where the witness was intimidated because the court had concerns that it was unreliable evidence. The court also found that as the accused was unfit to stand trial, he could not testify in his defence. Lord Justice Potter, Mr Justice Mackay, and His Honour Judge Mellor, held (at par 61):

[W]hile it was plainly in the interests of justice so far as the prosecution was concerned that the statements should be before the jury, it was also in the interests of justice from the point of view of the defendant that he should not be unduly disadvantaged by admission of the statements in circumstances where they could not be made the subject of cross-examination.

The 'special measures' available to vulnerable victims include the use of screens, live TV link, giving evidence in private (though this is restricted to sexual offences and those involving intimidation), having counsel remove wigs and gowns, and the use of video recorded interviews as evidence-in-chief<sup>9</sup>.

In 2003, the *Criminal Justice Act 2003* (UK) was amended to enable admission of hearsay evidence where it releases an intimidated witness from cross-examination. Section 116(1) provides that a statement, not given in oral evidence in the proceedings, is admissible as evidence of any matter stated if (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter, (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and (c)

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9 See *Youth Justice and Criminal Evidence Act 1999* (UK) ss 23-30. Also see Ministry of Justice (2011) *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures*, Ministry of Justice, UK.

any of the five conditions mentioned in subsection (2) is satisfied. Sub-section 2(e) provides the condition:

that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

The introduction of s 116 of the 2003 Act broadened the circumstances in which statements of intimidated witnesses would be admissible. Unlike s 23 of the 1988 Act, s 116 applies to oral and written evidence. Statements do not need to be made to a police officer. The term 'fear' is also read broadly, to encompass a range of potential reasons for not wishing to testify, including the suggestion that the witness is intimidated by the court in which they are called to give evidence. As Lord Justice Waller said in *Sellick* (at par 53):

In our view, having regard to the rights of victims, their families, the safety of the public in general, it still cannot be right for there to be some absolute rule that, where compelling evidence is the sole or decisive evidence, an admission in evidence of a statement must then automatically lead to a defendant's Article 6 rights being infringed. That would lead to a situation in which the more successful the intimidation of the witnesses, the stronger the argument becomes that the statements cannot be read.

However, throughout the course of the latter part of the twentieth century, trial processes have been increasingly modified across common law jurisdictions that are not signatories to any particular human rights framework. In these jurisdictions, the law of evidence has been increasingly shaped by human rights discourse, as a means of facilitating law reform. The modification of defendant rights in favour of victim interests can be demonstrated most strikingly in the case of rape law reform in NSW and the other states and territories of Australia. Most common law jurisdictions now specifically cater for the vulnerable victim of rape out of the need to recognise the sensitive nature of rape prosecutions. Rape victims are a particularly vulnerable class of victim, not only because rape is such a private and violent offence, but because consent to intercourse in rape trials is largely determined on the basis of conflicting perspectives between victim and defendant. It is out of the realisation that rape victims are especially vulnerable in the adversarial context of the trial that most governments have now moved to protect rape victims by directly modifying standard trial process. As indicated above, numerous common law jurisdictions now cater for the needs of rape victims in the trial process out of recognition of the significant impact of the trial upon them, leading to their potential re-victimisation on the witness stand.

In NSW, Australia, for instance, rape victims have been increasingly protected as vulnerable witnesses since the 1981 reforms abrogating the common

law offence of rape for sexual assault (see above discussion, ss 293–294C *Criminal Procedure Act 1986* (NSW)). Out of the need to recognise the autonomy of the person, the gendered and sexualised nature of rape at common law, the under-reporting of rape as a serious offence, and the re-victimisation most witnesses experience through exposure to police and court processes, various rights and privileges available to the defendant at common law have been wound back or limited. The defendant's right to cross-examine the victim on their sexual history as evidence potentially relevant to the victim's tendency to consent to intercourse has been significantly limited out of need to respect the integrity of the victim and to re-focus the trial away from the character of the victim, and on the incident in question, which may now be characterised as sexualised violence. In the NSW context, reform to the law of rape has continued into the twenty-first century as it has in other states and territories<sup>10</sup>.

The most recent reforms allow the victim to provide testimony behind a screen or via video-link; limit the defendant's capacity to cross-examine the rape victim personally, without counsel; and, quite controversially, provides for the re-trial of offenders on the basis of the tendering of the transcript of the evidence in chief where, on appeal, the court overturns a conviction and orders a re-trial. The tendering of the original trial transcript essentially removes the victim from the re-trial altogether, saving the victim from having to testify all over again, but denying the defendant the ability to face their accuser and cross-examine them, via counsel, on their original testimony (see Friedman and Jones, 2005; Powell, Roberts and Guadagno, 2007; as to hearings for non-criminal sexual harassment, see *Ewin v Vergara (No 3)* [2013] FCA 1311).

*Roberts v The Queen* [2012] VSCA 313 reflects on the amendment of the law of evidence in Victoria, particularly in terms of the insertion of Pt 8.2 of the *Criminal Procedure Act 2009* (Vic) regarding special provisions for the protection of witnesses in criminal trials. In the context of the Victorian Law Reform Commission's inquiry into sexual offences, Tate JA remarks that:

While acknowledging that 'cross-examination of witnesses is an essential feature of an adversarial criminal justice system', the Commission also recognised that 'the focus on the complainant's behaviour and credibility during cross examination can also cause significant distress'. The Commission identified several features of trials for sexual offences that made them particularly distress-

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10 See generally ss 339–365 *Criminal Procedure Act 2009* (Vic); ss 290–306ZP *Criminal Procedure Act 1986* (NSW); ss 36B–36BC *Evidence Act 1906* (WA). As to current provisions prohibiting the accused from cross-examining a vulnerable witness, see ss 356 and 357 *Criminal Procedure Act 2009* (Vic), s 294A *Criminal Procedure Act 1986* (NSW) and s 106G *Evidence Act 1906* (WA).

ing for complainants, and these included the ‘traumatic effect of unnecessarily intimidating or confusing cross examination’.

The extent to which the *Charter of Human Rights and Responsibilities Act 2006* (Vic) modifies or extends the provision of victim rights in Victoria remains unclear. In *Slaveski v State of Victoria & Ors* [2009]VSCA 6 the Court of Appeal of the Supreme Court of Victoria was asked to consider the applicant’s human rights pursuant to ss 9, 10, 17 of the 2006 Act. The sections provided basic rights to life, to be free from torture, cruel, inhuman or degrading treatment, and state protection for families and children, respectively. The court declined to consider this ground of appeal on the basis that the issue was not raised at first instance but the case does raise the prospect that the Victorian Human Rights Act may apply to victims of crime. In so doing, it may extend the rights available to victims in accordance with known principles of human rights.

Human rights otherwise foreign to the common law, including those now relevant to victims, defendants, witnesses and others involved in the criminal process promulgated under the ECHR, or where available by statutory framework, now inform the very processes by which we determine the guilt of the accused. It is not that the common law is not concerned with certain human rights prescribed under the ECHR. To a significant extent, the right to a fair trial under art. 6 of the ECHR mirrors the requirements of a right to a fair trial at common law: *Barton v The Queen* (1980) 147 CLR 75; *Maxwell v The Queen* (1996) 184 CLR 501. The ECHR has, however, informed new directions in trial procedure beyond that previously affirmed at common law. Victim interests other than those traditionally secured by an adversarial criminal trial are increasingly cited as impetus for modifying standard trial processes. This grants victims the capacity to ask for alternative measures and allows victims to access those measures, as an enforceable right afforded by law. The modification of the accused’s right to a fair trial at common law by the introduction of special measures to protect the integrity of the victim from, for example, giving evidence of a distressing or embarrassing nature, indicates how human rights discourse may effectively elevate the standing of the victim as a trial participant. Victims are now possessed of enforceable rights of substantive consequence for criminal trial evidential determinations.

## 5. Sentencing: Victim Impact Statements, Harm to the Victim and Restorative Intervention

The first inroads to substantive participation for victims were in the form of processes that allowed for the presentation of an impact or personal statement, after conviction but before sentencing. Such schemes were introduced into legislation

in the 1990s, although courts were accepting VIS from sex offences victims in the 1980s. Impact statements were initially limited to serious offences of interpersonal violence – homicide, rape and serious assaults heard on indictment. The availability of VIS for minor offences or for summary proceedings followed. Impact statements demonstrate the movement of victim rights from procedural to substantive rights, in that courts were initially reluctant to accept evidence in the form of an unsworn statement from the perspective of the victim. Although courts take the content of such statements into account in their discretion, VIS originally tended to avail itself as a process that afforded the victim some degree of personal, perhaps therapeutic participation. Early research into the reception of VIS indicates that judges tolerated such statements out of respect for the victim and the perceived therapeutic benefits it delivered (Erez, 2004). Over time, following successive appeals on the admissibility of VIS and its veracity as a mode of evidence, sentencing courts began to take aspects of victim statements into account in sentence. In 2014, NSW permitted for the first time the taking into account of a VIS prepared by a family member in a homicide case. The 2014 amendments set aside the common law ruling of *R v Previtera* (1997) 94 A Crim R 76 prohibiting the taking into account of VIS prepared by family members of the deceased<sup>11</sup>. Section 28(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) now provides:

A victim impact statement given by a family victim may, on the application of the prosecutor and if the court considers it appropriate to do so, be considered and taken into account by a court in connection with the determination of the punishment for the offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.

With leave of the prosecutor and court, and subject to the law of evidence, NSW family members now enjoy substantive rights to justice by permitting the court to take account of the harm occasioned to them as members of the community. Although courts will only take account of such harms in its discretion, this raises the standing and dignity of family victims to holders of substantive, enforceable rights. Once victims acquired the right to have their statement taken into account in sentence, victims gained a right that bore substantive relevance to the sentencing decision being made even though that right was not exercised in every case<sup>12</sup>.

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11 *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014* (NSW). As of March 2015 no family impact statements have been explicitly referred to as representing harm to the community.

12 While the VIS process could be subject to enforcement most courts would allow victims (or the prosecution) to present their statement. It was only when courts began to utilise VIS as a source

Victims were further empowered by the introduction of mandatory considerations on the harm done to the victim in sentencing law. While sentencing courts have long been able to consider the harm done to the victim at common law, legislative changes in the 1990s saw the introduction of mandatory tests for harm and, in certain jurisdictions, for standard minimum non-parole periods or head sentences where certain types of harm is occasioned. In NSW, the *Crimes (Sentencing Procedure) Act 1999* provides that the sentencing court must recognise the harm done to the victim and the community, as well as aggravating circumstances under ss 3A(g) and 21A. While these requirements of sentencing are not strictly rights assigned to the victim, and thus are not rights which can be enforced by the victim personally, they do follow the statutory requirement that courts must make explicit reference to victims when sentencing, which reinforces the movement toward enforceable, substantive rights that may be actioned by the prosecution.

Similarly, appeal courts will not interfere with a sentence where the accused contends that the sentencing judge considered general harm that was an expected but otherwise not exceptional result of the offence. In *Shane Stewart Josefski v R* [2010] NSWCCA 41, the court ruled that the sentencing court did not err by taking into account harm to the victim that was expected as a result of the offence.

In respect of the break and enter offence the complaint is that his Honour erred in taking into account as aggravating factors that the emotional harm to Ms Wickham was substantial and that the offence was committed in the presence of a child under the age of 18 years...

But there is no general principle that injuries to a victim should be ignored or discounted because they are no more than would be expected as the result of the crime committed upon that type of victim. (*Shane Stewart Josefski v R* [2010] NSWCCA 41, [17]; [46-47]).

The legislation that refers sentencing courts to harm to the victim generally or to specific types of aggravated harm does not displace reference to harm to the victim as a common law consideration. The legislation builds upon the common law in that it determines as relevant those specific, additional or unexpected harms occasioned to the victim, which may aggravate sentence. Sentencing courts therefore need to be mindful that the requirements of any statutory reference to the victim do not displace the common

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of evidence that victims gained a capacity to influence sentence. This gave rise to the VIS as a substantive right, whereby victim input could potentially influence the decision being made.

law requirement that allows expected or notional harm to be factored into a proportionate sentence.

The empowerment of the victim in sentencing is further evidenced by the inclusion of victims in intervention programs that seek to restore the offender and the victim. The victim is able to exercise more direct powers by participating in intervention programs and hearings because they are participating in those hearings directly. In this way, victims have the ability to affect the outcome of intervention proceedings relevant to an offender. Progress toward the successful completion of such programs, where relevant and available to a particular offender, is then factored into sentencing orders made by the court. There are several intervention and restorative justice programs that invite participation from the victim directly. Forum and Circle sentencing provide a role for the victim in the sentencing process where the offender has committed an eligible offence, entered a guilty plea and offered a willingness to be sentenced before the Circle or Forum. The Forum, where the offender meets with the victim, police, a facilitator and other invited participants, is now commonly referred to as a conference<sup>13</sup>. Young offenders may participate in a Youth Justice Conference as a diversion from court proceedings.

Where an offender is before the Local Court and where Forum Sentencing is deemed relevant and available, the offender proceeds to participate in a conference where they prepare an 'intervention plan'. A magistrate then approves this plan as part of the offender's sentence. An intervention plan which may include an apology or reparation payment to the victim; work performed for the victim; participating in an education or rehabilitation program; or other measures to help offenders address their offending behaviour and reintegrate into the community. As the victim is invited to participate in the conference, any decision as to how to proceed to structure the intervention plan, and whether this will continue to involve contact between victim and offender, is made subject to the consent of the victim. If the offender fails to complete the program subject to the intervention plan, including anything promised or owed to the victim, the offender may be resentenced by the court.

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13 Participation in Forum Sentencing in NSW is available for adult offenders in Local Courts, where the court considers a conviction likely and the offender would be required to otherwise serve: a sentence of imprisonment (which may be suspended), an intensive correction order or home detention, perform community service work, or enter into a good behaviour bond. Eligible offences include: common assault; break and enter; malicious damage; drink driving; theft (shoplifting, possess stolen property, steal from employer); and fraud.



## 6. Adjunctive and Extra-Curial Rights: An Enforceable Charter of Rights, Commissioners of Victim Rights and the Power to Compel

Charters or Codes of Victim Rights soon came to be ratified on a domestic basis following the 1985 UN Declaration. In England and Wales, the *Domestic Violence, Crime and Victims Act 2004* (UK) creates the office of the Commissioner for Witnesses and Victims, otherwise known as the Victims' Commissioner. The powers of the Victims' Commissioner are contained under s 48 and can be summarised as promoting the interests of victims and witnesses; encouraging good practice in the treatment of victims and witnesses; and reviewing the Victims' Code. The Victim's Code is made pursuant to s 32 of the *Domestic Violence, Crime and Victims Act 2004* (UK). It does not extend to judicial officers or to officers of the CPS when exercising duties involving discretion. Further, s 51 provides that the Victims' Commissioner is unable to represent a particular victim or witness; bring individual proceedings in court; or do anything otherwise performed by a judicial officer. The legislation also provides that there be no legal cause for action where a provision of the Victims' Code has not been performed or maintained. Section 34(1) provides that 'If a person fails to perform a duty imposed on him by a code issued under section 32, the failure does not of itself make him liable to criminal or civil proceedings'. The Victim's Code covers a victim's right to respectful treatment, to information to be kept updated as to key developments regarding arrest, court dates, sentencing outcomes and when leave to appeal is granted. Witness Care Units have been established to ensure victims gain access to the advice and information sought.

Although the Victim's Code is not enforceable and the Victims' Commissioner has no direct power of enforcement or individual representation, s 34(2) may affect the tenure or veracity of evidence in court, or the standards expected of an officer of the Crown in the discharge of their duties. The subsection provides that 'the code is admissible in evidence in criminal or civil proceedings and a court may take into account a failure to comply with the code in determining a question in the proceedings'. While the connection between the Victims' Code and the tenure of evidence in a criminal matter is tenuous, the requirement to cater for the needs of the victim, including their right to be kept informed, may be at issue where a failure to keep a victim informed leads to direct harm. This may occur where an offender harms a victim following release or escape, where the victim has previously sought to be kept informed as to all offender movements. This would most likely raise a civil rather than criminal liability. The rights provided under the Victims Code, therefore, are firmly located as service rights. Some progression toward participatory rights may be evidenced where you see a requirement to keep victims informed or to



provide types of court support, however, this does not create a legal expectation that the victim gains a mode of participation in court.

The establishing of a Commissioner of Victim Rights in South Australia, however, allows for substantive access to justice. The *Victims of Crime Act 2001* (SA) establishes a declaration of victims' rights as well as the office of Commissioner. Section 16A allows the Commissioner of Victims' Rights to represent an individual victim where they complain that a right afforded to them under Pt 2 has not been maintained or upheld. This section prescribes that the remedy is limited to a written apology to the victim from the infracting party. However, s 32A allows the victim to appoint a representative to exercise their rights under Pt 2. Representation may include an officer of a court, the Commissioner for Victims' Rights or a person acting on behalf of the Commissioner for Victims' Rights, an officer or employee of an organisation whose functions consist of, or include, the provision of support or services to victims of crime, a relative of the victim, or another person who, in the opinion of the Commissioner for Victims' Rights, would be suitable to act as an appropriate representative. It is this section which allows the victim to seek counsel, from the Commissioner himself, a personal representative or lawyer. Notes attached to s 32A provide some guidance on the ambit of the scope of representational rights, specifically '[s]uch rights would include (without limitation) the right to request information under this or any other Act, the right to make a claim for compensation under this or any other Act and the right to furnish a victim impact statement under the *Criminal Law (Sentencing) Act 1988*'. However, such representation may be necessary where certain rights under Pt 2 have not been extended to the victim or where the Crown has neglected to consult with the victim as required under s9A. Although these rights refer to pre-trial proceedings, they manifest in the Office of Commissioner and flow from the availability of declaratory rights that seek to complement trial processes.

Section 9A of the *Victims of Crime Act 2001* (SA) requires that the victim of a serious offence be consulted before any decision is made:

- (a) to charge the alleged offender with a particular offence; or
- (b) to amend a charge; or
- (c) to not proceed with a charge; or
- (d) to apply under Part 8A of the *Criminal Law Consolidation Act 1935* for an investigation into the alleged offender's mental competence to commit an offence or mental fitness to stand trial.

This section refers directly to pre-trial decision-making involving public prosecuting authorities. The then Attorney-General for South Australia, the

Hon MJ Atkinson, said in his second reading speech on the *Statutes Amendment (Victims of Crime) Bill 2007 (SA)*:

Victims of some serious crimes will have the right to be consulted before the Director of Public Prosecutions enters into a charge bargain with the accused or decides to modify or not proceed with the charges. Victims of crime will also have the right to more information about the prosecution and correction of offenders.... (Attorney-General Atkinson, *Hansard*, Legislative Assembly, 24 July 2007, 609-610).

Section 9A thus provides a basis for substantive rights for crime victims. Section 10A allows the victim, or their representative, to request that the prosecution considers an appeal against an outcome in a criminal proceeding. Attorney-General Atkinson indicates in his second reading speech that s 10A does not displace the Crown's discretion to make a decision in the public interest. However, it is clear from the legislation and its introduction into parliament, that ss 9A and 10A provides the victim with consultative powers that extend beyond the requirement to keep the victim informed of outcomes. Rights to consultation, and what counts as meaningful consultation with victims, has a developed history in United States Federal Courts. The United States Code provides for the right for victims to confer with the state attorney pursuant to 18 USC s 3771. *In re Dean* (2008) 527 F 3d 39 is authority for the granting of relief by way of mandamus requiring the prosecutor to consult with the victim prior to making key decisions in the pre-trial process, including plea deals, in Federal District Courts (see Beloof, 2005).

The Commissioner of Victims' Rights is established in NSW under the *Victims' Rights and Support Act 2013* (NSW). The office of the Commissioner of Victims' Rights in NSW is prescribe under Pt 3 but was developed out of the former office of the Director of Victims Services and thus is required to coordinate the Department of Victims Services, NSW, as well as enforce, to the extent permitted, those aspects of the Act that afford victims some degree of redress. Specifically, the Commissioner must oversee support services for victims (as well as family of missing persons), promote and oversee the implementation of the Charter of Victims' Rights, to make recommendations to assist agencies to improve their compliance with the Charter of Victims' Rights, receive complaints from victims of crime (and family members of missing persons) about alleged breaches of the charter, recommend that agencies apologise to victims of crime for breaches of the charter, and must determine applications for compensation and support for victims and prescribed family members.

Part 2 of the *Victims' Rights and Support Act 2013* (NSW) provides the Charter of Victims' Rights and prescribes its implementation across those officials, other than judicial officers, who administer the affairs of the state. This

includes those involved in the administration of justice, the police, persons involved in the administration of any department of the state, in addition to any agency funded by the state that provides services to victims. Section 11 allows the Commissioner to make inquiries and undertake investigations as the Commissioner considers necessary. This is a broadly stated power and the extent to which it may extend to victims, and the representation of individual victims either personally or by counsel, is unknown. Section 12 provides the Commissioner with the power to compel the production of information from any government agency including those working within an agency agreement, such as private service providers. This power can be used to compel production of information relevant to a determination of the breach of the charter or where information is required for a determination of victim assistance under the legislation. It is an offence to provide false or misleading information. Although the exact status and reach of the powers of the Commissioner are at present untested and unknown, they may be used to compel adherence to the charter with regard to access to information, representation, support and compensation. As some of these services are delivered by Victims Services and given that the Commissioner consults widely with government and service agencies, it is anticipated that the powers of the Commissioner to investigate and compel production may only need to be used on rare occasions, if at all.

## 7. Discussion and Conclusions

The central argument contented by this paper considers the gradual movement toward enforceable victim rights that may have an impact on decision making process. Although victims continue to enjoy service and procedural rights that may not be enforced against the state or accused, the trend is toward rights that provide victims with some capacity to insist upon a substantive outcome. However, this outcome may come about by a range of mechanisms and may not always be in the victims' favour. This raises two important issues: the consequences of the fragmented and incoherent nature of the development of enforceable rights on an international and domestic basis, and the exposure of the victim to decision making, often litigious processes that do not necessarily guarantee a favourable outcome or therapeutic intervention. Instead, victims are increasingly subject to a minefield of rules, determinations and processes, drawing on different sources and discourses of law, and where no guarantee is made as to a favourable outcome for the victim should they choose to press their rights at law.

The law traced in this paper demonstrates that the movement of victims toward enforceable rights is occurring in a fragmented way. This fragmentation is largely the result of the existence of normative criminal processes that cannot

be easily modified to accommodate the victim, who has never been afforded a significant role in adversarial systems of justice. As such, the integration of victims, especially where victim rights are enforceable and determinative against the state and accused, must work around existing powers that grant the accused a fair trial and the state the power to administer the criminal justice process. Enforceable rights can be grouped according to the phases of the criminal trial and most are developed in response to discrete concerns for victim rights and interests as they become relevant during the different phases of the criminal trial process. For example, processes surrounding the law of evidence may be modified out of need to secure the testimony of a victim of sexual violence. Victim rights are also fragmented by reason of the jurisprudence from which they draw. Victim rights may be informed by local needs and politics but the advent of human rights frameworks, most notably the 1985 UN Declaration and the implementation of EU Directives and the ECHR, has fostered the consideration of victim rights as human rights. This reasoning has increasingly influenced domestic law by statutory reform or by, where permitted, the consideration of human rights decisions in common law courts. This process of the slow inclusion of discourses of human rights as a basis for procedural and substantive legal change has accentuated in the uneven and fragmented integration of victim interests and explains how different jurisdictions have worked in different ways, and with different levels of urgency, to modify statutory and common law processes that otherwise afforded the victim few rights and privileges.

The raising of the standing of victim rights to enforceable rights comes with real consequences for victims. Service and procedural rights grant the victim some degree of standing without the requirement to convince the court of a position – and then to potentially suffer the consequences of an adverse decision. However, confining the victim to service and procedural rights – to promote participation without substantive impact or consequence but perhaps to allow for a therapeutic intervention or justice experience – is to arguably invite victims to participate in way that fundamentally undermines their capacity as an actual participant and stakeholder of justice. Not only are lawyers and judicial officers uncomfortable with the idea of accommodating victim participation to enhance a therapeutic outcome in order to satisfy victim disquiet and the political imperative that results, it exposes courts and the criminal process to alternative discourses for which they may not be suited. Arguably, courts are not ideal places of therapy. This is not to say that victim participation should not be therapeutic. However, therapeutic interventions as a justification for victim involvement ought to be a secondary consideration behind the actual business of the criminal process – determinations of wrongdoing. Arguably, therapeutic interventions for victims will result from the integration of victims as holders of enforceable rights. Courts and the people who participate in them will need to take victims seriously because they will have enforceable rights

that may impact on the substantive decisions to be made. Being taken seriously as a valid stakeholder in a process is foundational and ultimately supports modes of participation that can lead to a therapeutic intervention.

This paper has demonstrated the rise of enforceable victim rights out of a history of service and procedural rights. Other participants in the criminal process – lawyers, judicial officers, prosecutors, police and court staff – will take victims more seriously and potentially as equal participants once they know that they hold rights that will have a real impact on the outcomes to be determined. Arguably, this provides the best chance for a therapeutic intervention, but only so long as victims are aware that enforceable rights bring the possible outcome of disappointment, as with non-enforceable rights. Like offenders, who risk adverse decisions based on the submissions they make at trial, victims will need to understand that participation as a stakeholder of justice possessed of enforceable rights will not always result in the desired outcome and that some decisions will be averse to their interests. Although the issue of impact of enforceable rights on therapeutic justice requires further research and consideration, victim support networks will have an essential role ameliorating harms from adverse enforceable decisions on rights because such networks are already very good at managing victim expectations in a system that ill affords victims opportunities for real participation. Victim support, including access to support people, counselling and compensation, will continue to maintain victim needs even where an application for an enforceable rights fails.

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