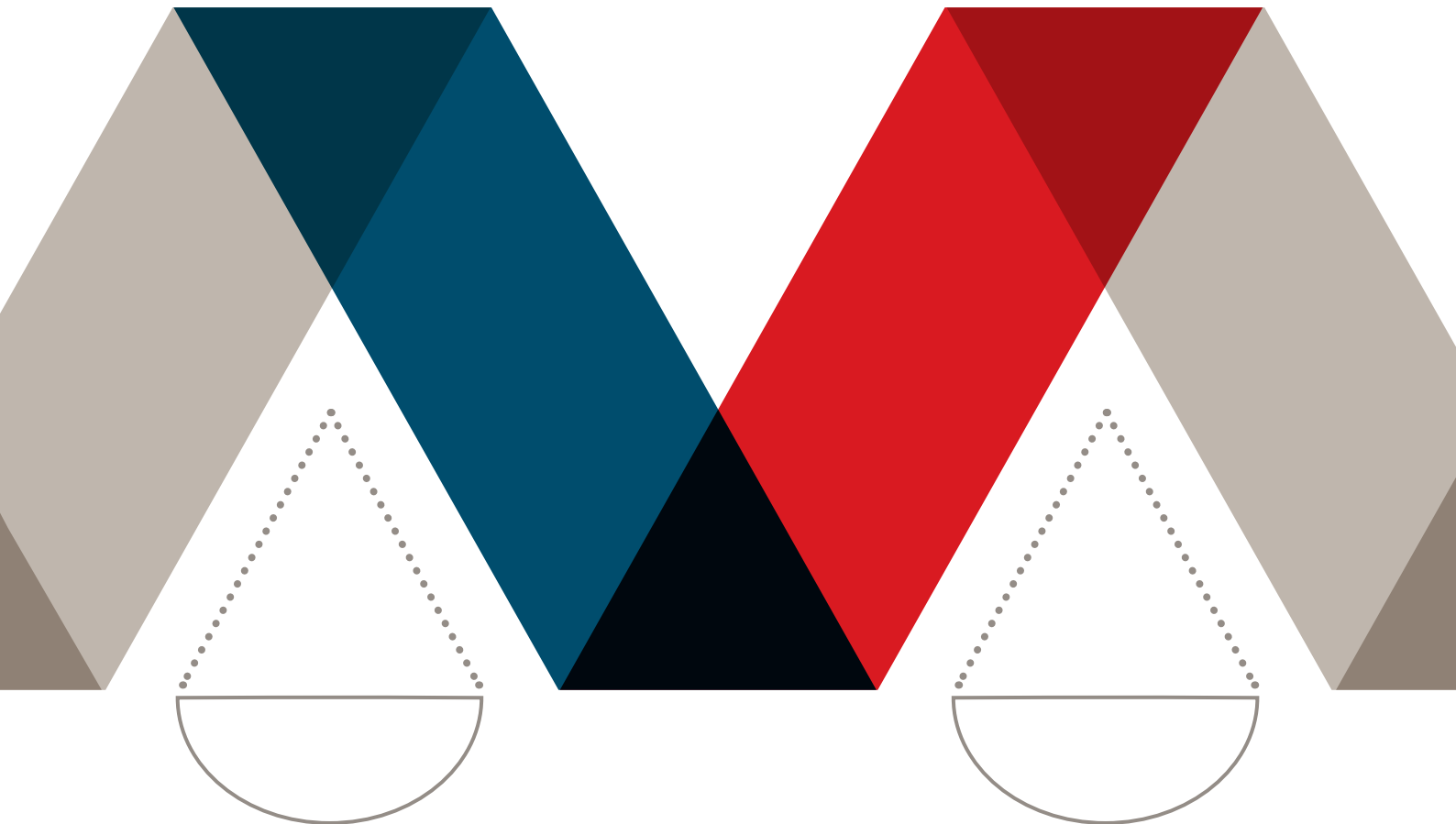


The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 4

Victims' Rights and Human Rights: the International and Domestic Landscape

MAY 2015





Published by the Victorian Law Reform Commission

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This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (3rd ed., 2010).

This report reflects the law as at 4 May 2015.

National Library of Australia Cataloguing-in-Publication data

Title: The Role of Victims of Crime in the Criminal Trial Process
Information Paper 4: Victims' Rights and Human Rights:
the International and Domestic Landscape
/ Victorian Law Reform Commission.

ISBN 9780992595586 (paperback)

Subjects: Criminal justice, Administration of—Victoria—History.
Victims of crimes—Legal status, laws, etc—Victoria.
Legislation—Victoria.
International criminal courts.

Dewey Number: 345.94505

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Preface

On 27 October 2014, the then Attorney-General for Victoria, the Hon. Robert Clark MP, asked the Victorian Law Reform Commission to review and report on the role of victims of crime in the criminal trial process. This important reference goes to the very heart of our criminal justice system, posing the challenging question: ‘What should the role of the victim be in the criminal trial process?’ Throughout this reference, the Commission’s consideration of this question will be informed by two interrelated sources of information—theory and practice.

Many academics and researchers approach the question of the role of victims in the criminal trial process by examining the underlying purposes of the criminal justice system and the relationship between the victim, the accused and the state. Why do we have a criminal justice system at all, what do we (as a society) want it to achieve, and for whom? The lessons of history, developments in human rights law, empirical research and a broad cross-section of academic thought (ranging across law, sociology, philosophy, political theory, and psychology) all make valuable contributions to the task of understanding and imagining a criminal justice system suited to purpose.

Of course, the criminal justice system is not just a theoretical construct. Every year in Victoria, hundreds of criminal trials and thousands of guilty plea hearings impact directly on the lives of victims, accused and witnesses. Listening to the experiences of these people—and of the people who work in the criminal justice system—is crucially important. It allows for a systematic identification of the issues that exist, and an informed consideration of practical initiatives for improvement which have been implemented or championed in Victoria and around the world.

Practice and theory are interrelated. They inform each other. The Commission encourages an approach to this reference which considers what we can learn from theory and what we can learn from practice, both individually and together (see Figure 1).

To facilitate and encourage this approach, the Commission is publishing a series of four information papers prior to consulting widely with the community. This is the fourth in that series. The four papers are:

- 1 The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory
- 2 The Role of Victims of Crime in the Criminal Trial Process: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?
- 3 The Role of Victims of Crime in the Criminal Trial Process: the International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process
- 4 The Role of Victims of Crime in the Criminal Trial Process: Victims' Rights and Human Rights: the International and Domestic Landscape**

The first and second information papers aim to provide background information about the history of the modern criminal trial and its underlying principles and survey the evidence about who victims are and what they need from the criminal justice system. The third and fourth information papers then examine the International Criminal Court as a case study of victim participation, followed by a review of the sources of victims' rights internationally and in Australia. The papers in this series do not necessarily reflect the Commission's views and do not contain policy recommendations.

The Commission will publish a consultation paper on the reference in August 2015. That publication will mark the commencement of public consultation on the reference, and will invite submissions to the Commission. It is hoped that these information papers will assist in the public consultation process by providing relevant background information to the public in a helpful and convenient form. The Commission looks forward to public submissions following publication of the consultation paper.

Terms of reference

The Role of Victims of Crime in the Criminal Trial Process

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 27 October 2014.]

The Victorian Law Reform Commission is asked to review and report on the role of victims of crime in the criminal trial process.

In conducting the review, the Commission should consider:

- a) the historical development of the criminal trial process in England and other common law jurisdictions;
- b) a comparative analysis of the criminal trial process, particularly in civil law jurisdictions;
- c) recent innovations in relation to the role of victims in the criminal trial process in Victoria and in other jurisdictions;
- d) the role of victims in the decision to prosecute;
- e) the role of victims in the criminal trial itself;
- f) the role of victims in the sentencing process and other trial outcomes;
- g) the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process; and
- h) support for victims in relation to the criminal trial process.

The Commission is to report by 1 September 2016.

The Commission's approach to this reference

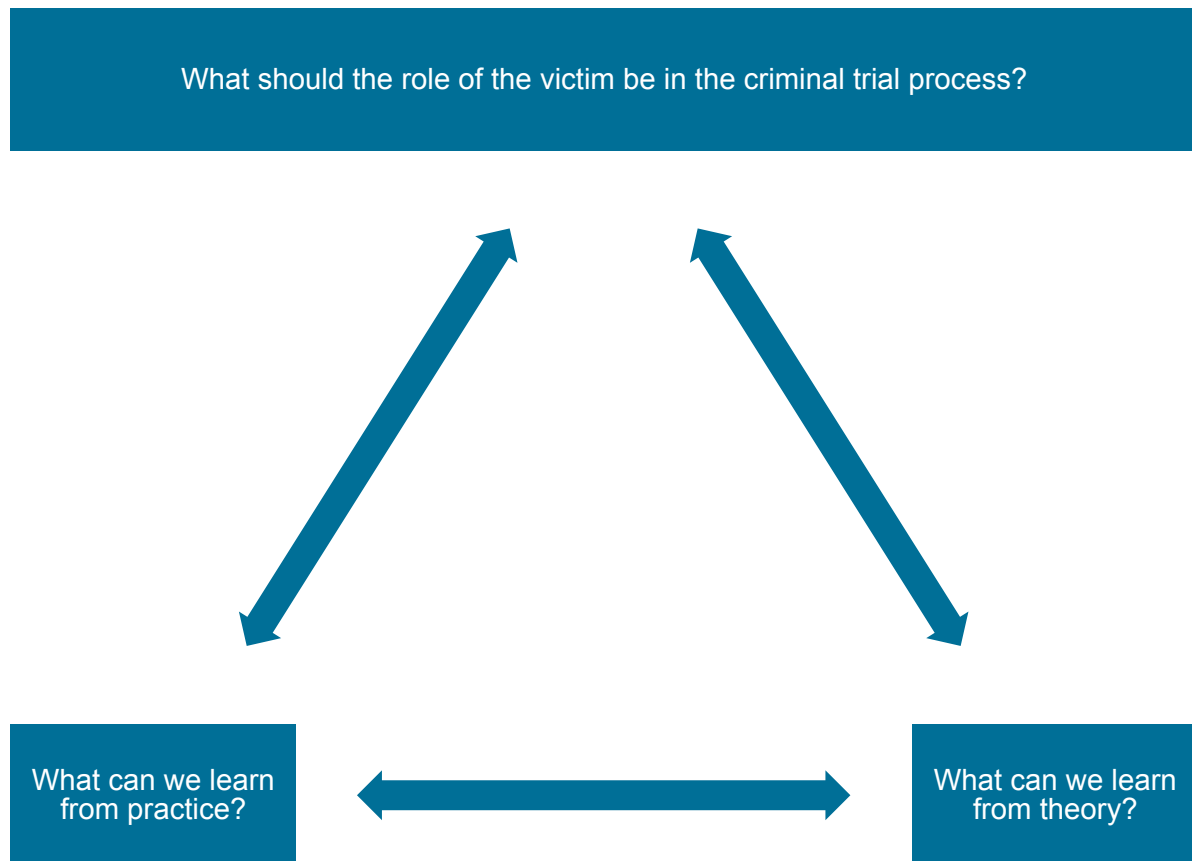


Figure 1: Practice and theory are interrelated

Victims' rights and human rights: the international and domestic landscape

Introduction

- 1 As concern for the experience of victims in criminal justice systems gained increasing prominence during the second half of the last century, so too did the notion that victims have rights in those systems
- 2 A major development in the promotion of victims' rights was the adoption by the United Nations in November 1985 of the Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power. This was followed in many common law countries¹ with legislation or statements acknowledging rights for victims of crime, albeit usually as declarative rather than enforceable rights.
- 3 The European Court of Human Rights has interpreted a number of internationally recognised human rights (such as the right to privacy and the right to be free from cruel, inhuman or degrading treatment) so as to encompass rights for crime victims. This has impacted on the criminal justice processes of many European member states.
- 4 Victim rights can be broadly classified as:
 - Participatory rights: to intervene or express views about a plea or charge negotiations; to separate legal representation at trial; and to be heard in sentencing, bail or parole hearings.²
 - Interactional rights: to be treated fairly and with respect and dignity by the agencies and actors of the criminal justice system.

¹ Common law countries referred to in this paper include Australia, the United Kingdom, Canada and the United States. For a history of the development of adversarial trial practices in common law countries, see the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 1: History, Concepts and Theory* (2015).

² The Commission's terms of reference do not include consideration of the role of victims in bail or parole hearings.

- Protective rights: to effective criminal investigations, to protection from degrading cross-examination; to be protected from confronting an accused; and the effective implementation of criminal laws so as to deter the occurrence of crime.
 - Privacy rights: to keep counselling records confidential; and non-disclosure of a vulnerable witness's identity.
 - Informational rights: to access information about criminal procedure, sources of support and case updates.
 - Reparative rights: to seek material reparation and emotional reparation from an accused; and to seek financial assistance from government.
 - Support rights: to be referred to, and able to access, support services.
- 5 The rise of the victims' rights movement and its impact on the form and content of criminal justice systems has not been without controversy. Debate continues to surround the proposition that victims' rights are compatible with a system that has at its core a criminal trial process where the only parties with standing are the state and the accused.³ Participatory rights are the most contentious in this respect.⁴
- 6 The purpose of this information paper is to provide an outline of the international and domestic victims' rights landscape. It does not purport to be an exhaustive coverage of the jurisprudence and legislation. Nor does it necessarily reflect the views of the Commission. It is intended to inform and assist the consideration of the terms of reference.

The rise of the victims' movement

- 7 Two distinct developments have been identified in the rise of the victims' movement. The first focused on victim welfare and experience in the criminal process, through for example the provision of support for victims of crime and modifications aimed at making the system less traumatic.⁵ The second development has seen a shift to consideration of what a victim's role should be, accompanied by increasing victim participation in the criminal process. This includes more recent proposals 'that the existing criminal justice paradigm should be rethought in terms of dispute resolution and restorative justice'.⁶

³ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford, 2008) 1.

⁴ See for example Erez et al, 'Outsiders Inside: Victim Management in an Era of Participatory Reform' (2014) 20(1) *International Review of Victimology* 169; Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294; Jonathan Doak, 'Participatory Rights for Victims of Crime: In Search of International Consensus' (2011) 15 *Canadian Criminal Law Review* 44.

⁵ Matt Matravers, 'The Victim, the State, and Civil Society' in Anthony Bottoms and Julian V Roberts (eds) *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan Publishing, 2011) 1; Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-making' (2004) 44 *British Journal of Criminology* 967.

⁶ Matravers, above n 5, 1–2.

Each of these themes can be seen in the gradual growth in recognition of ‘victims’ rights’ in international and domestic legal systems.

- 8 There was a shift from private prosecutions to public prosecutions in England from the early 1700s. This resulted in the criminal trial developing into a contest between the prosecution and the accused about whether the state could satisfy a jury of the guilt of the accused.⁷ The justice interests of victims were largely subsumed by the broader justice interests of the community in controlling and punishing criminal activity.⁸ Victims, while intrinsic to the criminal justice system as witnesses for the state, had no standing in this two-cornered contest. As Wemmers describes it:

Victims, who once had a place in laying charges against the accused, have been completely pushed out and replaced by the state. They have been rendered powerless against an omnipotent state that has the power to force them to testify as well as the power to shut them out.⁹

- 9 Since the 1960s, the plight of victims in the criminal justice system has gained increasing attention. Victim advocate groups and victimology research during the 1960s and 1970s pointed to the deep dissatisfaction of victims of crime, and there was a growing call to recognise the interests and agency of victims.¹⁰ National victim of crime surveys, starting in the United States in 1966, highlighted that there were higher levels of victimisation in the community than reported to authorities; a lack of confidence in the criminal justice system; and reluctance on the part of victims to report crimes or act as witnesses.¹¹ Feminist advocacy challenged traditional conceptions of ‘victim’ and ‘crime’, highlighting the victimisation hidden by gendered power imbalances (particularly family violence).¹² Wrongful gender stereotypes that resulted in victim-blaming and secondary victimisation caused by the court experience (particularly for victims of sexual assault and domestic violence) were brought to the fore.¹³

⁷ See the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 1: History, Concepts and Theory* (2015) for a more detailed consideration of the history of the common law adversarial trial and the development of public prosecutions.

⁸ Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan, 2006) 64.

⁹ Jo-Anne Wemmers, ‘Victim Rights are Human Rights: The Importance of Recognizing Victims as Persons’ (June 2012) *Temida* 71, 75.

¹⁰ The reasons and theories behind the rise of victims’ rights movements have been well documented. See for example Joanna Shapland et al, *Victims in the Criminal Justice Process* (1985), Bree Cook et al, ‘Victims’ Needs, Victims’ Rights: Policies and Programs for Victims of Crime in Australia’ (Research and Public Policy Series No.19, Australian Institute of Criminology, 2009); Kirchengast, above n 8.

¹¹ Cook et al, above n 10, 82.

¹² *Ibid.*

¹³ Much of the early victimology literature focused on victim-offender relationships and the contributory role of victims in the commission of crime. See Cook et al, above n 10, 81–2.

- 10 Victims' compensation schemes were established in most Australian jurisdictions between 1967 and 1976, including in Victoria by the *Criminal Injuries Compensation Act 1972*. Community-based victims of crime support services followed in the late 1970s in response to the identified need for support on the part of victims, particularly victims of serious violent crimes.¹⁴ Similar developments occurred in England, Canada, the United States and New Zealand.
- 11 The 1980s saw focus broaden from victim welfare to include a critical examination of the role of victims in criminal justice systems. At the international level, it was recognised that key human rights instruments—the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* (ICCPR)—provided important rights for an accused, but did not refer to the rights of a victim of crime. The rights of the accused in these documents reflected the need for pre-trial, trial and detention protections for an individual when faced with the omnipotent power of the prosecuting state. Traditionally, victims were not considered in need of human rights protections because they were not at risk of losing their freedom.¹⁵

Recognition in international law

- 12 The rise of the victims' rights movement saw the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*¹⁶ (UN Declaration) adopted by the United Nations General Assembly in 1985. The UN Declaration contains minimum standards, which are broadly worded to allow flexibility in implementation across the different domestic criminal justice systems. As a Declaration, it is 'soft law', meaning that it is not binding on any country and not enforceable.
- 13 The principles contained in the UN Declaration cover:
 - access to justice and fair and respectful treatment, including:
 - the provision of information to victims about proceedings, their role and the status of their case
 - allowing victims to present their views and concerns and having those views and concerns considered (qualified by the phrase 'without prejudice to the accused and consistent with national criminal justice systems')
 - providing proper assistance to victims during the legal process
 - measures to provide for privacy and safety
 - avoiding unnecessary delays.
 - the provision of redress through informal and formal procedures

¹⁴ Cook et al, above n 10, 83.

¹⁵ Wemmers, above n 9, 74.

¹⁶ United Nations General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/RES/40/34 (adopted 29 November 1985).

- an obligation on offenders to make fair restitution where appropriate
 - the provision of compensation by the state where an offender cannot fully compensate a victim
 - access to victim services
 - training of criminal justice actors and support services about the needs of victims.
- 14 The UN Declaration was progressively followed by the adoption of victims' rights charters or principles in many countries, including Australia. These have tended to mirror the UN Declaration in the sense that they are generally broadly worded, declarative and contain non-enforceable 'rights'. Implementation of the UN Declaration via enforceable rights has taken time to infuse into the structures and cultures of criminal justice systems around the world.¹⁷ This is discussed further below.
- 15 The 2001 *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century* encouraged the development of restorative justice mechanisms 'that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties'.¹⁸ This, together with the subsequent adoption of the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*¹⁹ by the UN Economic and Social Council, are indicative of a shift at the international level towards emphasising and refining the rights of victims to participation and restorative outcomes.²⁰ The International Criminal Court's victim participation and redress regimes represent a practical application of this trend.²¹

European Court of Human Rights developments

- 16 There is a body of European jurisprudence which has located the more modern concepts of victim rights within the traditional human rights contained in the *European Convention on Human Rights* (the Convention).

¹⁷ See M Brienen and E Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers, 2001); Wemmers, above n 9, 76; Marc Groenhuijsen, 'The Development of International Policy in Relation to Victims of Crime' (2014) 20(1) *International Review of Victimology* 31.

¹⁸ United Nations General Assembly, *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, Resolution adopted by the General Assembly, UN doc A/RES/55/59 (17 January 2001), [28].

¹⁹ United Nations Economic and Social Council (ECOSOC), *UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UN doc E/RES/2002/12 (24 July 2002). See also UN Office on Drug Control and Crime Prevention, *Handbook on Justice for Victims* (1999); and United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (2006).

²⁰ Doak, above n 3.

²¹ For more on the ICC, see the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process Information Paper 3: The International Criminal Court: a Case Study in Victim Participation in an Adversarial Trial Process* (2015).

- 17 The Convention was adopted in 1950 and reflects similar provisions to the ICCPR in respect of pre-trial, trial and detention protections for an accused. The European Court of Human Rights (ECHR)²² has considered the rights of victims in the criminal justice system under Article 2 (right to life), Article 3 (prohibition of torture or cruel, inhuman or degrading treatment) Article 6 (right to a fair trial) and Article 8 (right to respect for privacy and family life) of the Convention.

Effective criminal procedures to protect against victimisation

- 18 Numerous ECHR decisions detail the obligations of state governments to ensure that effective criminal laws and procedures are in place to safeguard against victimisation or repeated victimisation.²³ For example, in the case of *X and Y v the Netherlands*²⁴ a 16-year-old cognitively-impaired victim of rape ('Y') was unable to make a complaint that could lead to criminal proceedings, reducing her options to civil proceedings only. In finding a breach of Article 8, the ECHR emphasised that the case raised 'fundamental values and essential aspects of private life'. The Court noted that the concept of 'private life' under Article 8 of the Convention encompasses 'the physical and moral integrity of the person, including his or her sexual life'.²⁵ The ECHR considered that the Netherlands needed criminal laws in place to capture the offending that was alleged to have been perpetrated against Y, which would then act as a means of deterring such criminal behaviour from occurring in the first place.²⁶
- 19 *X and Y v the Netherlands* is an example of the positive obligations that the ECHR has relied upon to extend the coverage of Convention rights to victims of crime. Positive obligations can be contrasted to the more traditional negative obligations imposed on state governments through human rights laws. For example a negative obligation under the right to life is for state authorities, such as police, not to arbitrarily kill a person. In contrast, the government's positive obligations include preventing police and private individuals from arbitrarily killing a person. A breach of either a positive or negative obligation will constitute a violation of the relevant human right.
- 20 A number of cases decided by the ECHR have detailed the positive obligations that form part of the right to life.²⁷ These positive obligations can be understood as relating to the need for governments to have mechanisms in place to prevent victimisation occurring. The ECHR has said that governments must:

²² Decisions of the European Court of Human Rights (ECHR) are binding on the state governments concerned.

²³ For detailed commentary, see generally Doak, above n 3, from 37.

²⁴ (ECHR, Chamber, Application No. 8978/80, 26 March 1985).

²⁵ *X and Y v the Netherlands* (ECHR, Chamber, Application No. 8978/80, 26 March 1985) [22] and [27].

²⁶ *Ibid* [27].

²⁷ *McCann and Others v the United Kingdom* (ECHR, Grand Chamber, Application No. 18984/91, 27 September 1995); *McKerr v the United Kingdom*, (ECHR, Third Section, Application No. 28883/95, 4 May 2001); *Osman v the United Kingdom* (ECHR, Grand Chamber, Application No. 87/1997/871/1083, 28 October 1998).

- have effective criminal law provisions in place²⁸
- ensure that those criminal laws are effectively implemented, through prompt, serious and effective investigations and, where there is sufficient evidence, prosecution²⁹
- where there is a known or clear risk, which is real and immediate, to a victim's life or that of their family, such as from a family member or unrelated individual in the community, authorities must do 'all that could be reasonably expected of them' to circumvent that risk.³⁰

- 21 Similar principles apply in relation to state governments' positive obligations under Article 3. Specifically, the ECHR has said that state authorities must 'take protective measures in the form of effective deterrence', particularly in the case of vulnerable persons.³¹ For example, there needs to be a prompt, serious and effective investigation of credible allegations of serious mistreatment by police as a means of promoting accountability and deterring such conduct from occurring.³² Protective measures are also required to prevent vulnerable individuals from becoming victims of torture, or suffering inhuman or degrading treatment at the hands of private individuals, such as domestic violence.³³
- 22 The ECHR has also found that both Article 3 and Article 8 impose positive obligations on states to have criminal law provisions that effectively punish sexual assault, and to 'apply them in practice through effective investigation and prosecution'.³⁴ Again, this is aimed at deterring such serious offences from being perpetrated in the community and preventing victimisation.
- 23 The following cases are highlighted to provide practical examples of these principles:

²⁸ *X and Y v the Netherlands* (ECHR, Chamber, Application No. 8978/80, 26 March 1985).

²⁹ *McCann and Others v the United Kingdom* (ECHR, Grand Chamber, Application No. 18984/91, 27 September 1995); *Osman v the United Kingdom* (ECHR, Grand Chamber, Application No. 87/1997/871/1083, 28 October 1998) [115]. Note that the ECHR has made it clear that a state's positive obligations extend to criminal proceedings as a whole, including the criminal trial: *Nikolova and Velichkova v Bulgaria* (ECHR Fifth Section, Application No. 7888/03, 20 December 2007) [57].

³⁰ *Osman v the United Kingdom* (ECHR, Grand Chamber, Application No. 87/1997/871/1083, 28 October 1998) [115]; *Opuz v Turkey* (ECHR, Third Section, Application No.33401/02, 9 June 2009).

³¹ *Opuz v Turkey* (ECHR, Third Section, Application No.33401/02, 9 June 2009) [176].

³² *Razzakov v Russia* (ECHR, First Section, Application No. 57519/09, 5 February 2015). Mr Razzakov made claims of serious police mistreatment and was successful with a claim for civil compensation in Russia. The ECHR found a violation of Russia's positive obligations under Article 3 for the failure to take reasonable steps and conduct a serious criminal investigation into credible claims of serious police mistreatment.

³³ *Opuz v Turkey* (ECHR, Third Section, Application No.33401/02, 9 June 2009).

³⁴ *MC v Bulgaria* (ECHR, First Section, Application No. 39272/98, 4 December 2003) [153].

- *Osman v the United Kingdom*³⁵: the father of a teenage victim of stalking was shot and killed by the stalker. The family of the deceased claimed a violation of the UK's positive obligations under Article 2 for the failure of the authorities to comprehend and take action (such as laying charges) in respect of a series of clear signs that the stalker posed a serious threat to the safety of the family.³⁶ Despite finding no breach of Article 2 in the particular circumstances of this case, the ECHR stated that a violation of Article 2 may be found where it is established that the authorities knew, or ought to have known, of a real and immediate risk to life to a victim or victim's family from the criminal acts of another person but failed to take measures that could have circumvented that risk.³⁷
- *Opuz v Turkey*³⁸: the mother of the applicant was murdered by the applicant's husband, HO. There was substantial evidence of serious violence and death threats being made by HO against the applicant and her mother. Prosecutions were commenced on a number of occasions, but discontinued after the complaints were withdrawn due to alleged death threats and pressure by HO. HO shot and killed the applicant's mother in 2002 and was convicted in 2008 but released because of time spent in pre-trial detention and because the case would be reexamined on appeal. Upon release he began threatening the applicant. The ECHR found that Turkey's criminal laws in this case 'did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts by HO against the personal integrity of the applicant and her mother and thus violated their rights under Articles 2 and 3 of the Convention.'³⁹

Victim participation

- 24 There has been comparatively little ECHR jurisprudence directly concerned with victim participation in the criminal trial process.
- 25 Some decisions have considered the right of the family of deceased victims to participate in the investigation of alleged violations of Article 2. The ECHR has found that involvement of next-of-kin 'to the extent necessary to safeguard his or her legitimate interests' is required.⁴⁰ This includes the provision of information and documentation in

³⁵ (ECHR, Grand Chamber, Application No. 87/1997/871/1083, 28 October 1998).

³⁶ *Osman v the United Kingdom* (ECHR, Grand Chamber, Application No. 87/1997/871/1083, 28 October 1998) [10].

³⁷ *Ibid* [116].

³⁸ (ECHR, Third Section, Application No.33401/02, 9 June 2009).

³⁹ *Opuz v Turkey* (ECHR, Third Section, Application No.33401/02, 9 June 2009) [199]. Note that the Court also concluded that the violence experienced by the applicant and her mother constituted gender-based violence and found that they had experienced discrimination on the basis of their gender in violation of Article 14.

⁴⁰ *Paul and Audrey Edwards v the United Kingdom*, (ECHR, Third Section, Application no. 46477/99, 14 March 2002) [73], in which the family of a deceased victim were only permitted to attend an inquiry on the days that they were required to give evidence, were unrepresented and unable to put questions to witnesses, and who had to wait until publication of the final report to discover the

- relation to the investigation or inquiry and being able to question witnesses at an inquest or inquiry (not a criminal trial) into a death involving state authorities.
- 26 The involvement of family in investigations and inquests has been described as ‘more akin to an observer or a recipient of information rather than a true participant’.⁴¹
- 27 In *Ogur v Turkey*⁴² the family of a deceased victim, killed by state security forces, was not informed of a decision not to bring criminal proceedings until some 18 months after the decision. The investigation file had been inaccessible to the victim’s family. This exclusion of the victim’s family from the investigation and decision not to prosecute contributed to a finding that Turkey had failed to ensure an effective investigation of the killing in violation to Article 2. The failure to inform the family of the decision not to prosecute was noted as having denied them an opportunity to appeal.⁴³
- 28 In the case of *Opuz v Turkey*, noted above at [23], the ECHR considered the obligations of state authorities to prosecute in circumstances where a victim withdraws a complaint. The action of withdrawing a complaint may be considered an exercise of Article 8 rights in the sense that the victim is indicating that they want to treat the matter as a private matter, meaning that any action by public authorities may constitute interference in private or family life contrary to Article 8. The ECHR emphasised that interference with Article 8 rights in the context of domestic violence may be justified where necessary to protect health, human rights or to prevent a criminal offence occurring.⁴⁴ It considered that the state should have been able to prosecute after withdrawal of a victim’s complaint in the context of serious domestic violence.⁴⁵
- 29 In relation to victim involvement in sentencing, in *McCourt v the United Kingdom*⁴⁶, the mother of a murdered young woman unsuccessfully argued that the UK had violated her Article 8 rights by not allowing her to participate in the sentencing process. Whilst a victim’s opinion was considered relevant to a Parole Board’s determination about early release of an offender, it was determined that it would not be appropriate for victims to be involved in determining a sentence tariff.⁴⁷

substance of the circumstances surrounding the death of their son [84]. In *McKerr v the United Kingdom* (ECHR, Third Section, Application No. 28883/95, 4 May 2001) the Court considered that the considerable difficulty and delay experienced by the victim’s family in accessing witness statements placed them at a disadvantage in terms of participating in an inquest and that their interests in respect of the inquest were not adequately protected, at [148]. See also *Gul v Turkey*, (ECHR, Fourth Section, Application No. 22676/93, 14 December 2000) [100].

⁴¹ Doak (2011), above n 4, 49.

⁴² (ECHR, Grand Chamber, Application No. 21594/93, 20 May 1999).

⁴³ *Ogur v Turkey* (ECHR, Grand Chamber, Application No.21594/93, 20 May 1999) [92].

⁴⁴ *Opuz v Turkey* (ECHR, Third Section, Application No.33401/02, 9 June 2009), [144].

⁴⁵ *Ibid* [145].

⁴⁶ (Application No. 20433/92, 2 December 1992).

⁴⁷ Doak (2009), above n 4, 49.

- 30 While the ECHR has generally refrained from specifying procedural requirements in relation to the sentencing process in European countries⁴⁸, the ECHR has permitted family members of a murdered child to appear before it, make oral argument through a representative, and to be personally present in the Court, during its consideration of an application made by the offenders.⁴⁹

Protecting victims as witnesses

- 31 The conflict between an accused's right to a fair trial (Article 6) and protecting the interests of vulnerable witnesses has been considered in a number of cases before the ECHR. The Court has ruled that while the right to a fair trial provides an accused with the right to challenge and examine witnesses, it does not guarantee an unlimited right to a face-to-face challenge in court.⁵⁰

- 32 In *Doorson v the Netherlands*,⁵¹ the ECHR considered that maintaining the anonymity of a witness, where reprisal by the accused is genuinely feared, may be consistent with the right to a fair trial, so long as counterbalancing safeguards are in place to ensure an accused still receives a fair trial. The ECHR noted that although Article 6 does not expressly require the interests of witnesses to be taken into account:

... their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8... States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.⁵²

- 33 In *SN v Sweden*,⁵³ the ECHR highlighted the potentially traumatic nature of sexual assault criminal proceedings, especially where the victim is a minor. It was held that the accused had been afforded a fair trial in circumstances where the child victim was the only witness and the defendant's counsel had only had the opportunity to put questions to the victim via a police officer in an audiotaped interview. The ECHR stated:

⁴⁸ Ibid; See also John Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68 *Modern Law Review* 737, 750.

⁴⁹ *T v the United Kingdom* (ECHR, Grand Chamber, Application No. 24724/94, 16 December 1999), [4].

⁵⁰ See *Doorson v the Netherlands* (ECHR, Chamber, Application No. 20524/92, 26 March 1996); *SN v Sweden* (ECHR, First Section, Application No. 34209/96, 2 July 2002); *Bocos Cuesta v the Netherlands* (ECHR, Third Section, Application No. 54789/00, 10 November 2005).

⁵¹ (ECHR, Chamber, Application No. 20524/92, 26 March 1996). For commentary see Jackson, above n 48, 760.

⁵² *Doorson v the Netherlands* (ECHR, Chamber, Application No. 20524/92, 26 March 1996) [70]. The difficulties the anonymity of witnesses presented to the defence would not result in a breach of Article 6 if there were sufficient counter-balancing procedures followed by the court (see [72]).

⁵³ *SN v Sweden* (ECHR, First Section, Application No. 34209/96, 2 July 2002).

In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim ... [I]n criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours.⁵⁴

- 34 Keir Starmer, former Director of Public Prosecutions for England and Wales, has suggested that as a result of the *Doorson* decision, the ECHR effectively read 'free standing' rights for victims as witnesses into the fair trial provisions of Article 6, which are 'capable of practical application in the courtroom'.⁵⁵ An alternative view is that the ECHR has inserted a requirement for the interests of victims and witnesses (including their interest in having other Convention rights respected) to be built into fair trial principles, rather than creating a free standing right per se.⁵⁶
- 35 *Z v Finland*⁵⁷ tested the right of victims to respect for privacy in the context of the use of confidential medical records in criminal trials. The ECHR found that, while the use of confidential medical records obtained without the consent of the victim did interfere with the victim's rights, that interference was justified because of the public interest in the prosecution of serious crime. However, any public disclosure of the transcript of the evidence given by the victim's medical practitioners or disclosure of her records would violate Article 8. The accidental disclosure of the applicant's identity and medical condition in a court judgment was also found to violate her Article 8 rights.

European Union

- 36 In 2001, the Council of the European Union (EU) adopted the *Council Framework Decision On The Standing Of Victims In Criminal Proceedings* (Framework Decision), setting out basic rights for victims in the European Union, to be incorporated into member states' laws by 2006. This was a binding document on EU member states. In *Pupino*⁵⁸ the European Court of Justice ruled that the Framework Decision required that the court be able to authorise a manner of giving evidence by children that ensured an 'appropriate level of protection, for example outside the trial and before it takes place.'⁵⁹

⁵⁴ *SN v Sweden*, (ECHR, First Section, Application No. 34209/96, 2 July 2002), [47] (citations omitted).

⁵⁵ Keir Starmer, 'Human Rights, Victims and the Prosecution of Crime in the 21st Century' (2014) 11 *Criminal Law Review* 777, 785.

⁵⁶ Jackson, above n 48, 760.

⁵⁷ (ECHR, Chamber, Application No. 22009/93, 25 February 1997).

⁵⁸ (16 June 2005) Case c-105/03 (ECJ [Grand Chamber]).

⁵⁹ *Pupino*, (16 June 2005) Case c-105/03 (ECJ [Grand Chamber]) [61].

- 37 Serious shortcomings in implementation of the Framework Decision⁶⁰ led to the adoption of Directive 2012/29/EU (the EU Directive) in 2012.⁶¹ This is also a binding document and supersedes the Framework Decision.⁶² The EU Directive restates minimum standards on access to information, support, protection and procedural rights for victims in criminal proceedings, but also contains more specific and comprehensive rights for victims. For example:
- a right to have a decision not to prosecute reviewed
 - a right to be heard during criminal proceedings and to provide evidence
 - a right to have a decision made about compensation from the offender as part of criminal proceedings⁶³
 - a right to be protected from secondary victimisation
 - a right to an individual assessment of protection needs
 - obligations on police to facilitate referrals to victim services
 - obligations on state authorities to ensure safeguards against secondary victimisation, intimidation or retaliation in the context of restorative justice processes.
- 38 Paragraph 5 of the preamble to the Directive observes that crime is not only a wrong against society, but 'a violation of the individual rights of victims'. This recognition was absent from the previous Framework Decision. It has been suggested that this is a 'huge step forward' because it represents specific recognition of the harm caused to victims' rights by crime.⁶⁴
- 39 On the other hand, Marc Groenhuijsen argues that the Directive is unlikely to lead to real change for victims because of the lack of compliance mechanisms. He contends that the Directive's focus should have been on enforcing existing standards and providing remedies for victims whose rights are not respected.⁶⁵

⁶⁰ Marc Groenhuijsen and Antony Pemberton, 'The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?' (2009) 17(1) *European Journal of Crime, Criminal Law and Criminal Justice* 43; Groenhuijsen, above n 17.

⁶¹ Directive 2012/29/EU of the European Parliament and of the Council, of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ('EU Directive').

⁶² Directives become binding after being published in the official journal of the European Union. More information can be found on the European Commission website, http://ec.europa.eu/justice/criminal/victims/rights/index_en.htm.

⁶³ Note that EU member states are also legally bound by the *European Convention on the Compensation of Victims of Violent Crime*, Strasbourg (24 November 1983).

⁶⁴ Wemmers, above n 9, 79.

⁶⁵ Groenhuijsen, above n 17, 41–42.

The United Kingdom (UK)

- 40 The *Human Rights Act 1998* (UK) (HRA) was enacted to give effect to the rights and freedoms contained in the Convention, to which the UK is a party. The HRA requires UK courts to interpret laws consistently with the Convention and decisions of the ECHR.⁶⁶
- 41 In order to protect the welfare of vulnerable victims in their role as trial witnesses, the UK courts have accepted modifications to traditional adversarial evidence procedures in a manner that reflects ECHR jurisprudence. In *R v Camberwell Green Youth Court*⁶⁷ the House of Lords found that a law providing vulnerable young witnesses with the option of giving evidence via a pre-recorded statement or contemporaneous video link was consistent with Article 6, observing that Article 6 does not 'guarantee a right to face to face confrontation'.⁶⁸
- 42 A more novel right for victims, at least from an Australian perspective, is the right to apply for judicial review of a Crown Prosecution Service (CPS) decision to discontinue a prosecution. Although the UK courts had allowed judicial review of CPS decisions prior to the enactment of the HRA,⁶⁹ the provisions of the HRA, and more recently the EU Directive, have provided another ground for review. In *R (On the application of B) v DPP*⁷⁰ the High Court considered whether a decision to discontinue a prosecution in the context of a serious assault violated the UK's positive obligations under Article 3 of the Convention. It held that:

The decision to terminate the prosecution on the eve of the trial, on the ground that it was not thought that FB could be put before a jury as a credible witness, was to add insult to injury ... Looking at the proceedings as a whole, far from them serving the State's positive obligation to provide protection against serious assaults through the criminal justice system, the nature and manner of their abandonment increased the victim's sense of vulnerability and of being beyond the protection of the law. It was not reasonably defensible and ... there was a violation of his rights under Article 3.⁷¹

⁶⁶ *Human Rights Act 1998* (UK), ss2 and 3.

⁶⁷ [2005] 1 All ER 999.

⁶⁸ *R v Camberwell Green Youth Court* [2005] 1 All ER 999, [49].

⁶⁹ See *R v DPP ex parte C* [1995] 1 Cr App R 136.

⁷⁰ [2009] EWHC 106 (Admin). Note that the European Court of Human Rights has read a duty into Article 2 on the state to give reasons for a decision not to prosecute in limited situations. See Fiona Leverick, 'What Has the ECHR Done for Victims? A United Kingdom Perspective' (2004) 11 *International Review of Victimology* 177, 186.

⁷¹ *R (On the application of B)* [2009] EWHC 106 (Admin), [70]. See also *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB) where the failure of the police to effectively investigate the crimes of the 'black cab rapist' in London was held to violate Article 3.

- 43 Subsequently, in *R v Christopher Killick*⁷² the Court of Appeal noted that the decision not to prosecute was in effect a final decision for a victim, and that a right of a victim to have such a decision reviewed had been included in the (then) draft EU Directive.⁷³ The Court considered it 'disproportionate' for the CPS not to have an internal system of review in light of the right to apply to a court for judicial review, and recommended clear guidelines on timeframes.⁷⁴
- 44 As a result of the *Killick* decision and Article 11 of the EU Directive, the CPS enacted the *Victims' Right to Review Scheme* in June 2013.⁷⁵ The Scheme provides for an internal system of review, including timeframes, in relation to decisions not to charge and decisions to discontinue. The wording of the scheme makes it clear that plea negotiation decisions are not included in the scheme. Victims retain the right to apply to the High Court for judicial review of a decision not to lay charges or to discontinue a prosecution.⁷⁶
- 45 More recently, the application of ECHR jurisprudence on Article 3 positive obligations in the context of sexual assault was considered by the High Court in *DSD v Commissioner of Police of the Metropolis*.⁷⁷ The case was brought by two rape victims (DSD and NBV), attacked by a London taxi driver who was implicated in over 105 sexual assaults between 2002 and 2008. In finding that the investigation of DSD and NBV's claims by police fell short of the requirements of Article 3 of the Convention, the High Court summarised the obligations on UK authorities that stem from Article 3. In the case of NBV, whose victimisation occurred after that of DSD, the court found that the 'prior systemic and operational failures to investigate caused her to be raped.'⁷⁸
- 46 The High Court confirmed that Article 3 imposes a duty on police to investigate credible or arguable claims of grave or severe crimes, such as sexual assault by private individuals, in an 'efficient and reasonable manner which is capable of leading to the identification and punishment of the perpetrator(s).'⁷⁹ Whether an investigation is deemed efficient and reasonable may depend on the promptness of the investigation and on whether there was an adequate prosecution. The High Court made clear that this duty is one

⁷² [2011] EWCA Crim 1608.

⁷³ *R v Christopher Killick* [2011] EWCA Crim 1608, [48]-[49].

⁷⁴ *Ibid* [48]-[55].

⁷⁵ Crown Prosecution Service, *Victims' Right to Review Guidance*, issued by the Director of Public Prosecutions (July 2014), 2. Note that the EU Directive was formalised and became binding on EU member states, including the UK, on 25 October 2012.

⁷⁶ *Ibid* 10. A similar Victim Right to Review Scheme also appears to have been implemented in relation to police decisions not to prosecute as of 1 April 2015. See for example <http://www.essex.police.uk/contact_us/reporting_crime/victim_right_to_review.aspx>.

⁷⁷ [2014] EWHC 436 (QB).

⁷⁸ *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), [312].

⁷⁹ *Ibid* [216].

focused on the process of the investigation, not on the ultimate outcome, and spans from investigation through to the end of criminal proceedings, including the trial.⁸⁰

- 47 The *Domestic Violence, Crimes and Victims Act 2004* (UK) provides, amongst other things, for the appointment of the Victims' Commissioner for England and Wales and mandates the issuing of a victims' code of practice. The *Code of Practice for Victims of Crime*, issued in October 2013, is intended to implement 'relevant provisions' of the EU Directive⁸¹ and includes the right to make a Victim Personal Statement at sentencing and read it aloud.⁸² Breaches of the Code do not create legal rights. However, a failure to comply with the Code may be used as evidence and considered by a court in criminal or civil proceedings.⁸³ The Code also sets out a complaints process, specifying that complaints may be escalated to the Parliamentary and Health Service Ombudsman.⁸⁴

Canada

- 48 The *Canadian Charter of Rights and Freedoms*⁸⁵, like the HRA in the UK, enshrines basic human rights into federal Canadian law. Similarly to the ICCPR, the Convention and the HRA, it does not confer specific rights on victims of crime. The Supreme Court of Canada has however noted that there needs to be 'a just and proportionate balance' of an accused's rights against the competing rights of the victim based on the particular facts of a case, for example the right to freedom of expression (as expressed by wearing a hijab when giving evidence).⁸⁶ The Supreme Court has recognised the need to balance an accused's right to a fair trial with the rights of victims to privacy and equality in the context of access to a victim's medical records,⁸⁷ and with rules of evidence designed to protect vulnerable victims, such as children.⁸⁸
- 49 The contents of the UN Declaration were largely replicated in Canada in the non-binding *Canadian Statement of Basic Principles of Justice for Victims of Crime* and in victims' bills of rights enacted in a number of Canadian provinces.⁸⁹

⁸⁰ Ibid [212]–[224].

⁸¹ Ministry of Justice, *Code of Practice for Victims of Crime* (United Kingdom, October 2013), 1. EU Directive provisions incorporated into the *Code of Practice for Victims of Crime* include information rights, entitlement to a needs assessment and referral to support services and a right to review of a decision not to prosecute.

⁸² Ibid 16–17.

⁸³ *Domestic Violence, Crime and Victims Act 2004* (UK), s 34.

⁸⁴ *Code of Practice for Victims of Crime*, above n 81, 31 and 58.

⁸⁵ *Constitution Act 1982*, Part 1.

⁸⁶ *R v NS* [2012] 3 SCR 726, [31].

⁸⁷ *R v Mills* [1999] 3 SCR 668.

⁸⁸ See for example *R v L (DO)*, [1993] 4 SCR 419; *R v F (WJ)* [1999] 3 SCR 569.

⁸⁹ Wemmers, above n 9, 76.

- 50 The enforceability of the Ontario Victims' Bill of Rights was directly challenged in 1999 by the mother of a deceased victim and by a victim of domestic violence who strongly objected to plea bargains reached by the prosecution. The Ontario Supreme Court of Justice held that the Victims' Bill of Rights did not grant any legal right to a victim to control a prosecution or be consulted about that prosecution. The Court stated that the Victims' Bill of Rights is a 'statement of principle and social policy, beguilingly clothed in the language of legislation'.⁹⁰
- 51 The federal *Canadian Victims Bill of Rights*⁹¹ was assented to on 23 April 2015. The Bill of Rights provides for statutory rights to information, protection, participation and restitution and includes a complaints process.⁹² The Bill of Rights qualifies the rights of victims by requiring that the rights be applied in a reasonable manner and in a manner not likely to interfere with police or prosecutorial discretion, cause excessive delay, compromise an investigation or prosecution, or otherwise interfere with the administration of justice.⁹³

United States

- 52 Fifty states in the United States have enacted statutory rights for victims and over 30 have amended their state constitutions to reflect victims' rights.⁹⁴ Victims have been granted general rights, such as rights to fairness, dignity, respect, privacy, due process, reasonable protection and freedom from abuse.⁹⁵ Victims have also been granted specific rights such as the right to receive notice of proceedings and be present, rights to speak in sentencing hearings and the right to confer or communicate with the prosecution about charging or disposition.⁹⁶
- 53 Writing in 2005, American academic Douglas Beloof argued that the rights of victims of crime in state constitutions are 'illusory' because victims have no standing to enforce

⁹⁰ *Vanscoy and Even v Her Majesty the Queen in Right of Ontario* [1999] O.J. No. 1661 (OntSupCtJus) [22], as cited in Joan Barrett, 'Expanding Victims' Rights in the Charter Era and Beyond' (2008) 40 *Supreme Court Law Review* 627, 633. See also Wemmers, above n 9, 78, who notes that Manitoba is the only province whose victims' rights instrument provides a complaints mechanism. The complaint goes to the director of victims' services. There is no further legal remedy beyond the complaint.

⁹¹ *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, C-32 (assented to 23 April 2015).

⁹² *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, C-32, ss 6-17, 25 and 26. Note that breach of a right does not create a cause of action or right to damages (section 28). The Bill of Rights does not grant (or remove from) a victim party, intervener or observer status (section 27).

⁹³ *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, C-32, s 20.

⁹⁴ Douglas E Beloof, 'Judicial Leadership at Sentencing under the *Crime Victims' Rights Act*: Judge Kozinski in *Kenna* and Judge Cassell in *Degenhardt*' (2006) 19(1) *Federal Sentencing Reporter* 36, 37.

⁹⁵ See generally Douglas E Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' (2005) *Brigham Young University Law Review* 255, 261-267.

⁹⁶ *Ibid.* Note that the right to confer or communicate with prosecutors does not mean victims are given decision-making responsibility; rather they are permitted to express concerns, preferences or to receive information.

them and no access to a review or remedy for violation, for a number of reasons, including legislative wording, judicial discretion or judicial interpretation.⁹⁷

- 54 However, the federal *Crime Victims' Rights Act*⁹⁸ (CVRA) appears to give victims enforceable rights. It provides that a victim, or victim's representative, may assert the rights contained in the CVRA in court and if a right is denied, may apply to a higher court for a plea or sentence to be re-opened.⁹⁹ The Act provides a victim with the right to be 'reasonably heard' in release, plea, sentencing or parole hearings.¹⁰⁰ There is no right to be heard in the trial. Although victims have a right under the CVRA to confer with the prosecution on plea negotiations,¹⁰¹ this has been interpreted as requiring the prosecution to 'confer in some reasonable way with the victims before ultimately exercising its broad discretion'.¹⁰² As the CVRA does not confer party or intervener status on victims during the criminal trial process, in practice victims are reliant on prosecutors and judges to uphold their obligations to inform and afford victims their rights.¹⁰³ The enforceability of the CVRA stems from the right of a victim to seek an order from a court requiring the prosecutor, or a lower court, to afford the victim their CVRA right.
- 55 Application of the CVRA has seen some differences in the interpretation of the extent to which victims can participate at different stages of the criminal trial process. In *Kenna v United States District Court*,¹⁰⁴ a fraud victim sought review of the sentencing judge's ruling that he could not speak at the offender's sentencing hearing. The victim had previously participated in the sentencing hearing of the co-accused and the judge felt that he would not be able to provide additional relevant information. The reviewing court upheld the victim's complaint, and considered that the only way to give effect to the victim's right to speak was to conduct a new sentencing hearing where the victim was to be provided with his right to be heard.¹⁰⁵ In contrast, in the earlier case of *United*

⁹⁷ Beloof, above n 95.

⁹⁸ *Crime Victims' Rights Act* 18 U.S.C. § 3771 (2004).

⁹⁹ *Ibid* (d)(1), d(3) and (d)(5). Note that 18 U.S.C. § 3771(d)(5) requires that a victim asserted the right to be heard and was denied, applied to the court of appeals within 10 days, and in the context of a plea, that the accused has not pled guilty to the highest charge.

¹⁰⁰ *Ibid* (a)(4).

¹⁰¹ *Ibid* (a)(5).

¹⁰² *In re Dean* 527 F.3d 391 (5th Cir. 2008), 395. See also Erin Blondel, 'Victims' Rights in an Adversary System' (2009) 58 *Duke Law Journal* 237, 268.

¹⁰³ Blondel, *ibid*, 259 (arguing that because the CVRA does not confer party status on victims it places obligations on prosecutors and trial courts to vindicate victims' rights, often in ways which sit uncomfortably with the principles and obligations of the parties and the court in an adversarial trial; and that it does not give victims full exercise of their purported rights or any real influence on the trial).

¹⁰⁴ 435 F.3d 1011 (9th Cir.2006).

¹⁰⁵ *Kenna v United States District Court* 435 F.3d 1011 (9th Cir.2006), 1017-18. See also Beloof, above n 94, 41.

*States v Marcello*¹⁰⁶ the court ruled that district courts retain discretion to require a victim's input to be in writing rather than orally at a release hearing.¹⁰⁷

- 56 According to Beloof, these divergent interpretations are characteristic of the difficulty of changing the values and culture within the criminal justice system to incorporate victim participation. The current system is steeped in a history that sees the accused and prosecutor as the only parties.¹⁰⁸

Australia

- 57 Each jurisdiction in Australia, except the Northern Territory and Tasmania, has enshrined victims' rights in legislation, albeit as principles or guidelines. Tasmania has a non-legislative *Charter of Rights for Victims of Crime*, while the Northern Territory has a *Charter for Victims of Crime* produced in booklet form.¹⁰⁹
- 58 The rights declared in Australian jurisdictions relate generally to access to information, respectful and dignified treatment, privacy, safety and minimising inconvenience. As such, they replicate the themes of the 1985 UN Declaration. None provide victims with recourse to the courts for any breach.
- 59 Each Australian jurisdiction provides for some level of victim participation in sentencing via the provision of a victim impact statement, and for access to compensation or financial assistance by way of a government funded scheme.
- 60 The South Australian declaration of principles, contained in the *Victims of Crime Act 2001* (SA), provides for some unique rights compared to other Australian jurisdictions. Victims of serious crimes have a non-enforceable right to be consulted in relation to decisions to charge, amend a charge or not to proceed with a charge.¹¹⁰ All victims have a non-enforceable right to request that the prosecution consider an appeal.¹¹¹ Beyond the declaration, South Australian victims are able to exercise any rights that they have in any law through a representative, such as a lawyer or the Commissioner for Victims' Rights.¹¹² The Commissioner can require a public agency or official to consult with the Commissioner in relation to a particular victim and, if a failure to comply with one of the

¹⁰⁶ 370 F.Supp. 2d 745 (N.D.Ill. 2005).

¹⁰⁷ *United States v Marcello* 370 F.Supp. 2d 745 (N.D.Ill. 2005), 750. See also Beloof, above n 94, 37. See also Blondel, above n 102, 271.

¹⁰⁸ Beloof, above n 94, 37.

¹⁰⁹ Section 30 of the *Victims of Crime Rights and Services Act* (NT) provides that the Minister may issue a Charter of Victims' Rights.

¹¹⁰ *Victims of Crime Act 2001* (SA), s 9A. Section 5 states that the principles contained in the declaration are not enforceable in criminal or civil proceedings, cannot affect the conduct of criminal proceedings and cannot found a cause of action for damages for breach.

¹¹¹ *Victims of Crime Act 2001* (SA), s 10A.

¹¹² *Ibid* s 32A.

declaration rights is found, recommend that the agency or official issue a written apology.¹¹³

Victoria

- 61 The *Victims' Charter Act 2006* (Vic) (Victims' Charter) sets out non-enforceable principles governing the interaction of the criminal justice system and victims' services with victims of crime. The principles cover respectful treatment, the provision of information, respect for victims' privacy, protecting victims from contact with an accused in court, access to compensation and victim impact statements. Victims have no right to legal recourse when they suffer a breach of any of the principles.¹¹⁴ The Victims' Charter requires appropriate processes to be established for complaints and for victims to be informed of these processes. However, no specific complaints mechanism or body is specified.¹¹⁵ While the Victims' Charter states that compliance with the Victims' Charter must be monitored and reviewed, the regularity and mechanisms for this are not stated.
- 62 A Victorian Victims of Crime Commissioner was appointed in October 2014. The functions of the Commissioner are progressively being developed.¹¹⁶
- 63 Victims' rights are recognised in other Victorian laws and in policy documents:
- Section 8K of the *Sentencing Act 1991* (Vic) provides a participatory right for victims, including family members of deceased victims, to make a victim impact statement during a sentencing hearing. Section 8Q allows a victim to read that statement out in court.
 - Part 4 of the *Sentencing Act 1991* (Vic) provides for compensation and restitution orders to be made as ancillary orders to the criminal proceedings after sentencing.

¹¹³ Ibid s 16A. Section 16A also provides that the Commissioner can require a public agency or official to consult in relation to victims in general or a particular class of victims.

¹¹⁴ *Victims' Charter Act 2006* (Vic), s 22.

¹¹⁵ *Victims' Charter Act 2006* (Vic), ss 19 and 20(c). In contrast, in the Australian Capital Territory, New South Wales, Queensland and South Australia, mechanisms for resolving complaints are provided for in legislation and involve a victims' commissioner or coordinator.

¹¹⁶ The Victorian Victims of Crime Commissioner's mandate, as described by the then Attorney-General, the Hon. Robert Clark, is 'to ensure that the rights and needs of victims are recognised and respected across all government agencies, support services are well-coordinated and effectively directed, and victims are readily able to find or be put in touch with the most appropriate support and advice ... The Commissioner will also be an advocate for the interests of victims of crime in their dealings with government agencies, and provide advice on how the justice system can be further improved to meet the needs of victims.' See 'About Victoria's First Victims of Crime Commissioner', Victims of Crime Commissioner, last accessed 5 May 2015 at <<http://www.victimsofcrimecommissioner.vic.gov.au/>>

This saves a victim the 'time, trouble and expense and possible additional trauma'¹¹⁷ of having to start a separate civil case, but does not exclude them from doing so.¹¹⁸

- The *Victims of Crime Assistance Act 1996* (Vic) sets out a state-funded scheme for access to financial assistance for victims of crime for loss and injury. This scheme is limited, however, to victims of specific offences against the person.
- The *Criminal Procedure Act 2009* (Vic) contains a range of protective provisions aimed at making the giving of evidence less traumatising for child complainants, complainants with a cognitive impairment and complainants in general in sexual offence trials. This includes the use of remote witness facilities, pre-recorded evidence and evidentiary restrictions on questioning.
- Division 2A of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) limits an accused's access to the medical and counselling records of a victim of a sexual offence for use at trial. The Act provides that 'confidential communications' are not to be released to an accused or used at trial without the leave of the court. The victim may, with the leave of the court, appear at any hearing to oppose production or use of their records. The court may order the suppression of any evidence relating to a confidential communication and that the evidence be given in closed court.
- The Director of Public Prosecutions' policy, *Victims and Persons Adversely Affected by Crime*,¹¹⁹ places a number of obligations on prosecuting solicitors and counsel in respect of their interactions with victims. These include respectful treatment; protection of privacy; referral to victim services; provision of information; access to a conference with the Witness Assistance Service if required to give evidence; and consultation with victims prior to any decision being made to substantially modify charges, not to proceed with charges or to accept a plea of guilty to a lesser charge.¹²⁰

64 The Supreme Court of Victoria's decision of *RK v Mirik and Mirik*¹²¹ is one of the few Australian cases to consider the concept of victims' rights as contained in the UN Declaration.¹²² The case concerned an application for compensation under Part 4 of the *Sentencing Act 1991* (Vic). Part 4 of the Sentencing Act allows a victim of crime to seek compensation directly from an offender, as an ancillary order after sentencing. Such a

¹¹⁷ *RK v Mirik and Mirik* [2009] VSC 14, [11].

¹¹⁸ *Sentencing Act 1991* (Vic), s 85L.

¹¹⁹ Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014), last accessed 5 May 2015 at <<http://www.opp.vic.gov.au/Resources/DPP-s-policies>>. The obligations contained in the policy generally reflect obligations under the Victims' Charter.

¹²⁰ *Ibid* [30], but note that whilst a victim's view is to be taken into account, it is not determinative.

¹²¹ [2009] VSC 14.

¹²² See also *Hohn v King* [2004] 2 Qd R 508, [97]; *Australian Capital Territory v Pinter* [2002] FCAFC 186; *R v Atwell, ex parte Jullie* [2002] 2 Qd R 367; and *JJ (by Litigation Guardian J) v AI* [2001] QCA 510.

claim would otherwise have to be made as a separate cause of action and potentially require a civil trial. Justice Bell characterised Part 4 of the Sentencing Act as serving part of the law's function to ensure respect for the fundamental human dignity of every person, including victims of crime. The judge further observed that 'the common law courts act to vindicate the inherent human dignity of every individual without exception.'¹²³

- 65 Justice Bell considered the compensation and restitution provisions of the Sentencing Act as reflective of 'developments in legislative policy and social attitudes about how the courts should take greater account of the interests of the victims of crime'.¹²⁴ In ordering a substantial compensation order against the co-offenders in this case, despite their lack of money, the judge stated:

The crimes grievously offended against the victim's common law right to personal inviolability and his human right to personal integrity. In this case, the interests of the victim should receive substantial recognition.¹²⁵

- 66 Victoria, like the UK, has specific human rights legislation.¹²⁶ The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Human Rights Charter) largely replicates the rights contained in the ICCPR and European Convention, with a number of sections providing protections for an accused from the power of the state. Unlike the *Human Rights Act 1998* (UK) and the European Convention, the Human Rights Charter does not create any free standing rights; rather a legal cause of action needs to already exist and be pursued before Human Rights Charter arguments may be considered by the courts.¹²⁷ There is no reference to victims of crime in the Human Rights Charter. However the rights are founded on a number of principles applicable to both victims and accused persons, such as human dignity.¹²⁸
- 67 There has been limited consideration of victims' rights under the Human Rights Charter. In the Victorian Supreme Court case of *Bare v Small*,¹²⁹ the question was raised as to whether positive obligations relating to the effective investigation of breaches of the right to protection from cruel, inhuman or degrading treatment apply in Victoria in the context of alleged police ill-treatment. This was rejected by the judge, Justice Williams. The decision has gone on appeal to the Victorian Court of Appeal. At the time of writing, the decision is reserved.

¹²³ *RK v Mirik and Mirik* [2009] VSC 14, [147].

¹²⁴ *Ibid* [6].

¹²⁵ *Ibid* [177].

¹²⁶ As does the Australian Capital Territory. See *Human Rights Act 2004* (ACT).

¹²⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39.

¹²⁸ See the Preamble and s 7 which provides that the principals of human dignity, equality and freedom are relevant considerations when considering any limitation of rights. See also Bell J in *RK v Mirik and Mirik* [2009] VSC 14, [7].

¹²⁹ [2013] VSC 129.

- 68 Arguably, the case law in the UK and the ECHR may indicate that there is some scope for the following Charter rights to apply to victims in Victoria's criminal justice system:
- Right to life¹³⁰ to the extent that it requires effective criminal law provisions to deter crime; prompt and effective investigations; and effective operational measures to avert a known or clear risk posed to the life of a victim or their family as a result of the behaviour of a private individual.¹³¹
 - Protection from cruel, inhuman or degrading treatment¹³² to the extent that it imposes a duty on police to investigate, in an efficient and reasonable manner, credible or arguable claims of grave or severe crimes by private individuals.¹³³ It has also been suggested that section 10(b) could be used to ensure protection from degrading treatment for all participants in the criminal process, including victims in their role as witnesses.¹³⁴
 - Right to privacy and reputation¹³⁵ in the context of protecting confidential medical information being accessed without consent by an accused or accused's representative; and to protect the welfare and reputation of victims as witnesses in court.
 - Right to a fair hearing,¹³⁶ for example, the reading of victims' welfare interests into the understanding of a fair trial.

Victims' rights into the future

- 69 Over the last 50 years, the landscape has changed dramatically for victims of crime. The welfare of victims is now a central concern to governments, as reflected in the enactment of victims' rights charters, victims' compensation schemes and victim support services. It is well-recognised, although perhaps inconsistently implemented, that victims deserve respectful treatment and to be kept informed. In addition, human rights laws have been extended from their traditional concern with protecting the rights of accused persons to recognise rights and interests of victims. Participatory rights for victims, while contentious, exist in limited contexts such as sentencing and their expansion continues to be debated.

¹³⁰ *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 9.

¹³¹ Note however the rejection of a procedural right to an effective investigation by Justice Williams in *Bare v Small* [2013] VSC 129 in the context of s 10(b) of the Human Rights Charter, and the pending appeal judgment.

¹³² *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 10(b).

¹³³ This is in contrast to *Bare v Small* [2013] VSC 129 in which the alleged serious ill-treatment was claimed to have been perpetrated by an agent of the state, the police.

¹³⁴ Jeremy Gans, et al, *Criminal Process and Human Rights* (Federation Press, 2011); Leverick, above n 70, 180; Doak, above n 3, 111.

¹³⁵ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 13.

¹³⁶ *Ibid* s 24.

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- 70 Taken as a whole however, the development of enforceable victims' rights has been described as fragmented and inconsistent and not informed by 'a systematic rationale'.¹³⁷
- 71 At the international level, it has been argued that the poor treatment of victims should be viewed as requiring human rights protection and the creation of a UN Convention on Victims' Rights.¹³⁸ A UN Convention, in contrast to a Declaration, would be binding on all countries of the UN. Concerns have been raised, however, that implementation of UN Conventions is a deeply problematic issue and that such a convention may therefore achieve little for victims of crime in their day-to-day interactions with criminal justice systems.¹³⁹
- 72 At the domestic level, it appears that where victims are given mechanisms to enforce their rights, whether through enforceable victims' rights laws, human rights laws, criminal procedure laws or other laws, there has been a careful expansion of formal recognition of the needs and interests of victims of crime. Courts have emphasised the importance of protecting the rights of an accused and remaining cognisant of the resources of criminal justice agencies.
- 73 At a practical level, the extension of some rights to victims, particularly those relating to participation, directly confront traditional notions of the accused's right to a fair trial. Fair trial protections for the accused existed in law long before the enactment of human rights laws or victims' rights laws and charters. Victims' rights charters in Australia and most other common law jurisdictions remain unenforceable. Even where a right is made enforceable, cultural change within the criminal justice system can be slow, as the following observation by Edna Erez et al highlights:

Legal reforms alone, particularly when expressed as legal rights, are not equipped to address the multitude of challenges that are posed by long ingrained structures, institutions and cultures. At the same time, merely opening the floodgates to victim inclusion through legislation does little to preclude unresponsive or insensitive encounters that can lead to victim disillusionment or harm; nor does it address the vulnerabilities that can stem from increased victim participation.¹⁴⁰

¹³⁷ Antony Pemberton, 'Respecting Victims of Crime: Key Distinctions in a Theory of Victims' Rights' in Inge Vanfraechem, Antony Pemberton, Felix Ndahinda (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Abingdon, 2014) 32. See Starmar, above n 55, 786 (for similar analysis specific to the United Kingdom).

¹³⁸ Sam Garkawe 'The Need for a Victims' Convention' (2005) 9 *The Victimologist* 4. See The World Society of Victimology and INTERVICT, *Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power* (2006), last accessed 22 April 2015 at <<http://www.tilburguniversity.nl/intervict/undeclaration/convention.pdf>> at 22 July 2009.

¹³⁹ Groenhuijsen, above n 17. As noted above, Groenhuijsen argues that it might be wiser to invest in ensuring compliance with existing standards (at 41).

¹⁴⁰ Erez et al, above n 4, 185.

Conclusion

- 74 The notion of victims' rights is as broad as it is contentious. While noting some of the contours of the debate, this information paper has not attempted to engage with the arguments for and against the introduction of legislative, enforceable victims' rights into adversarial common law trial systems. Rather, this paper has provided a brief overview of some victims' rights and human rights instruments and jurisprudence to inform future debate.
- 75 The Commission will publish a consultation paper in August 2015 inviting public submissions, and will then commence a period of public consultation on the reference. The Commission looks forward to public submissions following publication of the consultation paper.

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The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 4

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