The role and rights of victims of crime in adversarial criminal justice systems: Recommendations for reform in England & Wales

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Foreword

Victims can suffer badly from their treatment by the criminal justice system, worsening any harms the crime has caused. This is often through disregard by agencies like the police and CPS and it is easy to see why.

Crimes are seen as an attack on the state and not against the victim. So proceedings are not there to put right the victim’s wrong but to enable the state to inflict punishment and affirm the rule of law. If a case is brought, the victim can be compelled to be a witness but not to talk about what they have personally suffered, merely, like a bystander, to tell the court what the defendant did.

In the adversarial system, the defendant is at the centre of the court process. The prosecution prosecutes them; the defence defends, the jury determines guilt and the judge ensures that their trial is lawful. This centrality is not to be criticised and defendants’ rights need fully to be protected. However, all the agencies tend to lean in towards this focus and see victims as temporary and marginal – ‘witness fodder’ as one academic has described.

Yet, victims may have suffered serious injury, sexual assault or the death of a loved one. They are intimately involved from the day of the offence through the criminal justice process and often beyond far into their future. The notion that the state prosecutes on behalf of all of the public does not capture that special involvement and by failing to do so it fails to assure the rights needed to support victims.

The criminal justice system, which cannot function without victims, needs to adjust its perspective to see them as valued participants and to support them appropriately. The rights they need are not a challenge to the defence. They include help to understand the process, updates on their case, respectful treatment, procedural justice and support as and when it is needed. Some victims also want their voice to be considered at important stages in the proceedings. The exercise of such rights helps victims to recover from victimhood and restores their confidence in a society which has, after all, failed to protect them from crime in the first place.

It is time for that change to occur. At present all pointers suggest a decline in confidence in the criminal justice system. The Crime Survey for England and Wales 2018-19, for instance, shows that while 73% of victims were happy with initial treatment by the police, over a half (52%) quickly grew dissatisfied with a lack of communication. Just 10% of victims had contact with support services, though police should refer them on in every case. For the sixth year in succession, just one in seven victims recalled being offered a Victim Personal Statement. These are all rights set out in the Victims’ Code but they are not being delivered. It is therefore not

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2 Analysis of the offer and take-up of Victim Personal Statements 2018-19 at www.victimscommissioner.org.uk.
perhaps surprising that this year, across all crime types, 24% of victims decided not to support a prosecution.\(^3\)

I decided to commission research to see whether other adversarial criminal justice systems were better at ensuring victims’ rights without harming those of the defence. I wanted to understand whether a change in perception, perhaps from bystander witness to participant victim might be helpful.

Sisters For Change took up the challenge and have produced this strong and comprehensive report, which takes a wide-ranging look at international institutions and, principally, Commonwealth adversarial systems. It draws out the roots in jurisprudence of triangulating the interests of victims with those of the defence and the public in an adversarial system. In particular, the report writers focus on new legislation in Victoria, Australia which has harnessed that jurisprudence to bring about real change.

Some victims will want a voice in proceedings as well as good treatment. We are already used to that idea in the UK, where there is the – albeit little implemented – right to a Victim Personal Statement about the impact of the crime when the defendant is being sentenced. There are also victims’ rights to review decisions by the police and the Crown Prosecution Service to discontinue prosecutions. In our recent survey of rape survivors we found that those decisions could be personally devastating to victims and recently the High Court has decided that all victims should be entitled not only to ask the CPS to review such a decision but to be allowed to present arguments in favour of a change of mind.

I believe making victims statutory participants in the criminal justice process can redefine their role and ensure they are viewed by everyone as active participants in proceedings that concern them intimately. This status does not make them a party to the proceedings, nor a decision-maker in them, but it does confirm victims as active contributors to the criminal justice process.

My thinking on this issue continues to evolve and I thank Sisters For Change for the immensely stimulating work, which will influence the design of outcomes for victims for many years ahead.

\[\text{\textbf{Dame Vera Baird QC}}\]
\[\text{\textbf{Victims’ Commissioner – England and Wales}}\]

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\(^3\) Home Office Crime Outcomes in England and Wales, 2019-2020, see:

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Sisters For Change (SFC) was founded in 2013 to combat discrimination and violence against women and girls worldwide. Sisters For Change has worked with NGOs, women’s rights organisations, women’s unions and human rights defenders across India, Indonesia and the UK and with a number of governments across the Commonwealth to deliver legal reform, empowerment, accountability and advocacy programmes to end discrimination and violence against women and girls.

For more information visit www.sistersforchange.org.uk
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Executive Summary

The adversarial criminal trial is a central feature of the common law legal system in England and Wales. The victim is not a party to the proceedings. A fair trial in an adversarial criminal justice system is focused on upholding the due process rights of the accused against the right of the state to prosecute in the public interest.

In the past, victims of crime had no role in the criminal trial process unless they appeared as witnesses for the prosecution. They used to have no rights to information, support, to explain the impact the crime had on them or to make representations regarding the decisions of criminal justice authorities. However, the role of the victim of crime has changed. Over the past four decades, the importance of safeguarding the rights of victims of crimes has been progressively recognised and international legal standards and domestic laws have evolved to enable victims to be more involved in the criminal trial process. There is growing international consensus that victims of crime have an inherent interest in the manner in which criminal justice is administered and their rights as a participant in the criminal trial process should be recognised.

We adopt the definition of a victim as a person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by a criminal offence. It includes the parent of a child victim or a family member of a murder victim.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 is the foundational international instrument articulating the rights of victims of crime and abuse of power. The 2005 Principles and Guidelines on the Right to a Remedy and Reparation for Victims sets out the rights of victims of gross violations of international human rights law and serious violations of international humanitarian law to restitution, compensation and rehabilitation. The Rome Statute of the International Criminal Court 1998 signalled a high watermark in recognition of the role and rights of victims in the criminal trial process, including explicit legal rights for victims and witnesses to substantively participate in criminal proceedings. Meanwhile, the European Court of Human Rights has considered cases on the rights of victims in the criminal trial process under Articles 6 (right to a fair trial) and 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR) in the context of fairness to the victim as a participant in criminal proceedings. The issue of the rights of victims has also generated important case law concerning the positive obligation of State authorities under ECHR Articles 2 (right to life), 3 (prohibition against torture) and 8.

This report analyses the development of international and regional standards on the rights of victims of crime and provides an international comparative review of different legislative models for the protection of victims' rights across 5 adversarial jurisdictions – our own, England & Wales, together with Australia, Canada, New Zealand and the United States – in order to identify effective legislative and policy measures that promote the role of victims within the criminal trial process whilst not undermining the status of the adversarial justice system. Australia, Canada, New Zealand and the United States were selected for comparison with England & Wales.
because each of their adversarial justice systems is grounded on the English common law and each country has either fairly recently reformed its criminal justice system to strengthen (to varying degrees) the rights of victims of crime, or has completed consultations, inquiries or reviews to inform intended criminal justice reforms. Each therefore has relevant lessons and examples of good practice for England & Wales.

At the end of our individual country analysis, we provide a comparative review of the service-level rights (access to information, support services and minimum levels of treatment), procedural rights (access to justice processes, including investigation and trial proceedings), protective and privacy rights; substantive participatory rights (enforceable legal rights entitling victims to make submissions to criminal justice bodies and to have those submissions taken into account) and reparative rights accorded to victims of crime in all five jurisdictions. All jurisdictions reviewed recognise the right of victims to fair and dignified treatment by the criminal justice system and all jurisdictions – except England & Wales – have a victims’ charter or law guaranteeing rights for victims of crime to varying levels. All jurisdictions accord victims similar service level rights, including access to information and support services and require criminal justice services engaged in the investigation or prosecution of crime, or providing support services to victims, to ensure that crime victims are notified of, and accorded, their rights. Victims of crime in England & Wales are currently accorded rights to information and support and limited procedural rights in the revised Victims’ Code, but these rights are not enforceable.

Whilst all jurisdictions grant victims similar protective and privacy rights (with the exception of New Zealand) and the procedural right to be present during criminal trial proceedings, there are marked differences in the level of participatory rights accorded to victims of crime. England & Wales is far behind in providing substantive participatory rights to victims of crime which give victims the right to make submissions to the police, prosecutors, the court and parole bodies and to have those submissions taken into account with a view to influencing the outcome of decision-making or criminal proceedings, or to be heard in any court or administrative proceedings relating to charge, sentencing or parole decisions relating to the offender.

At a time when confidence in our criminal justice system and in securing justice outcomes for victims of crime has been seriously eroded due to complaints of institutional racism; critical failings in the criminal justice response to historical sexual abuse cases, child sexual exploitation and domestic abuse; and rape prosecutions falling to a record low, this report sets out to consider what the role and rights of victims of crime should be in the criminal justice system in England & Wales in 2020 and beyond.

Earlier this year, the Ministry of Justice launched a public consultation on a revised Code of Practice for Victims of Crime and has committed to bringing forward a Victims’ Law. This work is necessary and timely and offers an unprecedented opportunity to recognise and strengthen the role and rights of victims of crime and

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4 The Victims’ Code was issued by the Secretary of State for Justice under s.32 of the Domestic Violence, Crime and Victims Act 2004.
help to rebuild trust and confidence in the criminal justice system in England & Wales. This research provides a robust evidence base to inform the development of legislation by the Ministry of Justice to define the role and rights of victims of crime in the criminal justice system in England & Wales.

Structure of the report

Chapter 1 of the report discusses definitions and concepts referred to in the report in order to establish a common understanding of key terms and the classification of victims’ rights. Chapter 2 charts the evolution of international standards on the role, rights and protections of victims of crime and the development of specific protections for vulnerable groups of victims, including victims of intimate partner violence, sexual violence and child victims of sexual abuse and exploitation.

Chapter 3 of the report examines and compares different legislative and policy models for the protection of victims’ rights across five countries with adversarial systems of justice – our own in England & Wales, together with Australia, Canada, New Zealand and the United States. The federal framework for the protection of victims’ rights is analysed in detail in Australia, Canada and the United States, with selected case studies demonstrating the strongest models for the protection of victims’ rights at state or provincial level. At the end of the country analysis, we provide a comparative review of the service-level, procedural and substantive rights accorded to victims of crime in all five jurisdictions according to the classification of victims’ rights set out in chapter 1.

Our research relates to all victims of crime but recognises that certain groups of victims suffer a particular imbalance in their rights and how those rights are applied in criminal justice processes. Chapter 4 examines the special protections and rights that should be afforded to specific groups of victims, including victims of sexual offences, domestic abuse and child sexual abuse through consideration of three national reviews and inquiries recently conducted in the United Kingdom and Australia.

In Chapter 5 we set out our conclusions and recommendations.
Introduction and context

In the year ending March 2020, there were over 10.2 million criminal offences experienced by adults aged 16 years and over in England & Wales\(^5\) – equating to a prevalence of around one offence per six people of the population,\(^6\) including an estimated 1.2 million incidents of violent crime. Two per cent of adults aged 16 to 59 years were victims of sexual assault.\(^7\) The Crime Survey for England and Wales (CSEW) estimates that in the year ending March 2019, approximately 3.1 million adults aged 18 to 74 years experienced sexual abuse before the age of 16 years. This is equivalent to 7.5% of the population aged 18 to 74 years. For each type of sexual abuse measured by the CSEW, it was estimated that less than one-quarter (25%) of adults had reported their abuse to the police.\(^8\)

People of Mixed or Multiple ethnic backgrounds were the most likely to have been a victim of crime,\(^9\) with 20% having experienced crime in the year ending March 2020. People of an Asian ethnic background were significantly more likely to have been a victim of crime than those of a White ethnic background, with 15% having experienced crime in the last year.\(^10\)

Experiencing a crime – such as an assault, rape, or the murder of a loved one – causes harm and trauma which can be made even worse by negative experiences during the criminal investigation and trial process. This report sets out to consider what the role and rights of victims of crime should be in the criminal justice system in England & Wales in 2020 and beyond.

Earlier this year, the Ministry of Justice launched a public consultation on a revised Code of Practice for Victims of Crime\(^11\) and has committed to bringing forward a Victims’ Law. This work is necessary and timely – and offers an unprecedented opportunity to recognise and strengthen the role and rights of victims of crime and help to rebuild trust and confidence in the criminal justice system in England & Wales. The most recent statistics on victims’ treatment by the criminal justice system are a serious cause for concern. In the year ending March 2019, only 11% of victims\(^12\) received information, advice or support following an incident of crime. In only a tiny 3.9% of incidents of crime did a victim have contact with victims’ services, regardless of whether the police came to know about the matter, constituting a year on year decline since 2014-15. An even smaller 2.2% of victims had help with reporting the incident or dealing with the police.\(^13\)

\(^5\) The survey covers crimes not reported to the police and is not affected by changes in police recording practice.
\(^6\) The estimated population of England & Wales in 2019 was 59.44m people.
\(^7\) Office for National Statistics (July 2020), Crime in England and Wales: year ending March 2020.
\(^9\) All CSEW crime and personal crime excluding fraud and computer misuse.
\(^11\) The Victims’ Code was issued by the Secretary of State for Justice under s.32 of the Domestic Violence, Crime and Victims Act 2004.
\(^12\) Or anyone else in the victim’s household.
In the year ending March 2019, whilst most victims were satisfied with their initial contact with police (72.6%), dissatisfaction grew over time. Over a third (34%) of victims reported dissatisfaction with the way the police handled their case and 36.2% of victims were dissatisfied with the way the matter was handled by the criminal justice system more generally. Nearly 4 in 10 victims of crime (38.4%) were dissatisfied with the service provided by the police because of a lack of action on their case, with more than half (52.2%) of all victims of crime recording that the police did not keep them well informed.\footnote{Victims’ Commissioner for England & Wales (March 2020), Bulletin, Victims statistics.}

**Context of this review: a criminal justice system in crisis**

An effective criminal justice system – and fair access to it and treatment by it – are cornerstones of our society. Yet the criminal justice system in England and Wales is in a state of crisis. Austerity measures and central government funding cuts have hit all criminal justice agencies, including the police, prosecution, prison and probation services and the courts, as well as funding for legal aid. A recent Bar Council report\footnote{The Bar Council (July 2020), Small Change for Justice. Funding for Justice in England and Wales (2010-2019).} states that cuts to the justice budget by consecutive governments since 2010 has meant that in 2019, just 39p per person per day was spent on protecting the public, the courts and wider justice system. Overall funding for justice was reduced by 24% in real terms between 2010 and 2019.\footnote{Ibid at p.5.}

Confidence in our criminal justice system and in securing justice outcomes for victims of crime has been further eroded by discriminatory treatment of Black, Asian and minority ethnic victims and defendants by criminal justice authorities; failings in the criminal justice response to cases of historical sexual abuse, child sexual exploitation and domestic abuse; and rape prosecutions falling through the floor. The Lammy Review 2017\footnote{The Lammy Review. An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, September 2017 (The Lammy Review).} reported that 51% of people from BAME backgrounds born in England & Wales believe that “the criminal justice system discriminates against particular groups and individuals.”\footnote{The Lammy Review, p.6.} BAME groups are over-represented as suspects or defendants at most stages of the criminal justice system compared with the White ethnic group, with Black individuals the most over-represented.\footnote{Ministry of Justice (28 November 2019), Statistics on Race and the Criminal Justice System 2018 (MOJ Statistics on Race and the CJS 2018).} The greatest disparity appears at the point of stop and search, arrests, custodial sentencing and prison population.\footnote{MOJ Statistics on Race and the CJS 2018, p.2.}

Black people make up around 3% of the general population but accounted for 12% of adult prisoners in 2015/16 and 21% of children in custody.\footnote{The Lammy Review, p.3.} The Lammy Review made 35 specific recommendations for reform, the majority of which remain to be implemented. A similar story applies to Dame Elish Angiolini’s two-year independent review into deaths and serious incidents in police custody.\footnote{Rt. Hon. Dame Elish Angiolini DBE QC (January 2017), Report of the Independent Review of Deaths and Serious Incidents in Police Custody.} The majority of the 110 recommendations for reform remain outstanding.

Criminal justice responses to victims of sexual offences have been the subject of severe criticism in recent years. The latest Crown Prosecution Service (CPS) data on rape offences released in July 2020 makes for disturbing reading. There has been a massive decline in the CPS charging rate in rape cases in the past four years, from 3,671 rape cases charged in 2016-2017 to 1,867 cases charged in 2019-2020, a reduction of 49% in the volume of cases charged annually. In both 2017-2018 and 2018-2019, the CPS charged on average 1,000 fewer rape suspects than they had charged the year before and the number of prosecutions for rape has declined by over 50% in the past 3 years, from 4,517 in 2017-2018 to only 2,102 in the year ending March 2020. This figure is the lowest level since annual reporting began. In 2019, the Government announced the establishment of a Sub-Group of the Criminal Justice Board to conduct a review of the criminal justice response to rape and serious sexual offences in response to widespread concerns regarding the decline in charges, prosecutions and convictions.

The criminal justice system’s response to victims of domestic abuse has also been under serious scrutiny. An estimated 2.4 million adults aged 16 to 59 years (1.6 million women and 0.79 million men) experienced domestic abuse in the year ending November 2019, equating to a prevalence rate of approximately 6 in 100 adults. In 2013, the then Home Secretary commissioned Her Majesty’s Inspectorate of Constabulary (HMIC) to inspect the police response to domestic violence and abuse following profound concerns regarding the levels of domestic abuse and its lack of prioritisation by the police. HMIC’s first report in 2014 found that the police response to victims of domestic abuse was unsatisfactory. In a follow up report in 2017, HMIC reported that police forces across England & Wales were not accurately assessing the risk of victims of domestic abuse and in cases where officers were not arresting and attempting to charge perpetrators, domestic abuse victims were not being properly protected. And in the year ending March 2019, there was an 11% decrease in the number of suspects of domestic abuse-flagged cases referred to the CPS from the police compared to the previous year (from 110,653 to 98,470).

The impact of the COVID-19 pandemic

On top of these existing structural challenges and the growing confidence deficit in the criminal justice system, the COVID-19 pandemic and national lockdown has had a massive impact on the justice system, with some commentators warning that the crisis of the criminal justice system has become “an unprecedented emergency” due to an alarmingly high backlog of cases; insufficient court sitting days.
exacerbating already lengthy delays in court hearings; systemic issues in processing cases; the decimation of legal aid hindering access to justice for many of the most vulnerable victims; and 86% of barristers chambers earning their income from publicly funded criminal work reporting they will go under within a year.²⁹

The changing role of the victim in the criminal justice system

Society’s understanding of the role of the victim has changed in recent times. In the past, a victim of crime had no role in the criminal trial process unless they appeared as a witness for the prosecution. They used to have no rights to information, support, to explain the impact the crime had on them or to be treated with respect in court. Over the past four decades, international legal standards and domestic laws have evolved to enable victims to be more involved in the criminal trial process.

The adversarial criminal trial is a central feature of the common law legal system in England and Wales. It is a contest between the prosecution, acting as the state’s representative, and the accused, normally represented by a defence lawyer. A fair trial in an adversarial criminal justice system is focused on upholding the due process rights of the accused, against the right of the state to prosecute in the public interest. ECHR Article 6 protects the rights of the accused to a fair trial. This report on the role and rights of victims within the criminal justice system seeks in no way to limit or undermine the fair trial rights of the accused in a criminal trial. Rather, it seeks to build on the now broadly accepted norm that justice cannot be administered effectively without due recognition of the rights and interests of other parties affected by criminal acts³⁰ and reflect developing legal standards on the role and rights of victims in adversarial criminal justice systems.

This report analyses the development of international and regional standards on the rights of victims of crime and provides an international comparative review of different legislative models for the protection of victims’ rights across 5 adversarial jurisdictions – our own, England & Wales, together with Australia, Canada, New Zealand and the United States – in order to identify effective legislative and policy measures that promote the role of victims within the criminal trial process whilst not undermining the status of the adversarial justice system. We also examine the special protections and rights that should be afforded to specific groups of victims, including victims of sexual violence, domestic abuse and child sexual abuse through consideration of three national reviews and inquiries recently conducted in the United Kingdom (Northern Ireland) and Australia.

This research seeks to provide a robust evidence base to inform recommendations regarding the development of legislation by the Ministry of Justice to define the role and rights of victims of crime in the criminal justice system in England & Wales.

1 – Definitions and Key Concepts

Summary

- The adversarial criminal trial is a central feature of the common law legal system in England and Wales. The victim is not a party to the proceedings. A fair trial in an adversarial criminal justice system is focused on upholding the due process rights of the accused, against the right of the state to prosecute in the public interest.

- In this report, we adopt the definition of a victim as a person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by a criminal offence. It includes the parent of a child victim or a family member of a murder victim.

- Special protective measures for vulnerable victims and witnesses have been introduced in many adversarial justice systems, including England & Wales, in recognition of the potential harm caused to vulnerable victims and witnesses of crime through secondary victimisation. Special measures are designed to help victims and witnesses give the best quality evidence they can.

- A ‘triangulation of interests’ in the criminal trial process: there is clear international consensus that victims of crime have an inherent interest in the manner in which criminal justice is administered. In 2001, the House of Lords confirmed that paying due regard to the interest of victims is both a matter of fairness and consistent with the purposes of the criminal justice system when considering what a fair trial requires.

- While victims already have a number of legal rights enforceable within domestic legal systems, not all the ‘rights’ referred to in victims’ charters and codes are of this nature.

- Service level rights provide access to information, support services and modes of treatment. The 1985 UN Declaration was the first international articulation of service level rights that defined a minimum level of fair treatment of victims by public officials but did not provide any enforcement mechanism or remedy for victims whose rights were breached.

- Procedural level rights grant victims access to justice processes, including investigation and trial proceedings, but do not allow victims to influence decision-making processes.

- Substantive level rights give victims the right to make submissions to the police, prosecutors, the court and parole bodies, and to have those submissions taken into account with a view to influencing the outcome of decision-making or criminal proceedings. Such enhanced, enforceable participatory rights allow victims substantive input into the criminal justice process.

Introduction

Chapter 1 of our report discusses definitions and concepts referred to in this report in order to establish a common understanding of key terms. We consider first the
framework of adversarial systems of justice before exploring the definition of a victim of crime and the evolving role of the victim within the adversarial system. Finally, we consider the different types or levels of ‘rights’ accorded to victims in the criminal trial process and the enforceability of these rights.

The adversarial criminal trial

The adversarial criminal trial is a central feature of the common law legal system in England and Wales. It is a contest between the prosecution, acting as the state’s representative, and the accused, normally represented by a defence lawyer. The victim is not a party to the proceedings. A fair trial in an adversarial criminal justice system is focused on upholding the due process rights of the accused, against the right of the state to prosecute in the public interest.

ECHR Article 6 protects the rights of the accused to a fair trial. Article 6(1) provides the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal in criminal cases and the determination of civil rights and obligations. The European Court of Human Rights recognises that the rights of persons accused of or charged with a criminal offence require greater protection than the rights of parties to civil proceedings and that the principles and standards applicable to criminal proceedings must therefore be laid down with particular clarity and precision.31

ECHR Articles 6(2) and (3) set out six additional rights for anyone charged with a criminal offence, as follows:

- The right to be presumed innocent until found guilty.32
- The right to be informed promptly in a language understandable to the suspect of the detail of the nature and cause of the accusation against them.33
- The right to have adequate time and facilities to prepare a defence.34
- The right to defend yourself in person or through legal assistance of your own choosing or, if you cannot afford it, to be given it free where the interests of justice so require.35
- The right to examine, or have examined, witnesses and to obtain their attendance and examination.36
- The right to have the free assistance of an interpreter if you cannot understand or speak the language used in court.37

31 Requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6: Moreira Ferreira v Portugal (No.2) [GC], App. No. 19867/12, 11 July 2017, para.67.
32 ECHR Article 6(2).
33 ECHR Article 6(3)(a).
34 ECHR Article 6(3)(b).
35 ECHR Article 6(3)(c).
36 ECHR Article 6(3)(d).
37 ECHR Article 6(3)(e).
Definition of a victim of crime

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration 1985), 38 defines ‘victims of crime’ as

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States”. 39

This definition includes immediate family members or dependants of a direct victim as well as persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation. A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. 40

The Crown Prosecution Service of England & Wales defines a victim, for the purposes of the Victims’ Right to Review Scheme, as “a person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct”. 41 The revised Code of Practice for Victims of Crime in England and Wales 2020 (Victims’ Code) 42 adopts a virtually identical definition.

In the legislation establishing the role of Victims’ Commissioner for England & Wales, a “victim” is broadly defined for the purposes of the work of the Commissioner as a victim of an offence, whether or not the offence was reported to the police or a suspect was charged or convicted of the offence, or a victim of anti-social behaviour. 43

In this report, we adopt the Victims’ Code definition of a victim as a person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by a criminal offence. It includes the parent of a child victim or a family member of a murder victim. We recognise that the term includes persons alleged by the prosecution to be victims prior to a determination of guilt of the accused. The term does not assume that the accused charged with the unlawful act is guilty of the crime charged or has been convicted.

38 Adopted by UN General Assembly Resolution 40/34 of 29 November 2015.
39 UN Declaration 1985, para 1.
40 UN Declaration 1985, para.2.
41 CPS Legal Guidance (updated May 2020), Victims’ Right to Review Scheme. The term used in the criminal courts in England & Wales until it is admitted or proved that the person making the allegation has indeed suffered harm caused by criminal conduct, is “complainant”.
43 For the purposes of the Code, ‘criminal offence’ means an offence that is committed or subject to criminal proceedings in England and Wales.
44 Domestic Violence, Crime and Victims Act 2004, s.52.
Secondary victimisation

Secondary victimisation of victims of crime refers to the victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim. Institutionalised secondary victimisation is most apparent within the criminal justice system:

“At times it may amount to a complete denial of human rights to victims from particular cultural groups, classes or a particular gender, through a refusal to recognise their experience as criminal victimisation. It may result from intrusive or inappropriate conduct by police or other criminal justice personnel. More subtly, the whole process of criminal investigation and trial may cause secondary victimisation… Secondary victimisation through the process of criminal justice may occur because of difficulties in balancing the rights of the victim against the rights of the accused or the offender. More normally, however, it occurs because those responsible for ordering criminal justice processes and procedures do so without taking into account the perspective of the victim”\(^{45}\) (emphasis added).

Special measures for vulnerable victims

Special protective measures for vulnerable victims and witnesses have been introduced in many adversarial justice systems, including England & Wales, in recognition of the potential harm caused to vulnerable victims and witnesses of crime through secondary victimisation. Special measures are designed to help vulnerable victims and witnesses give the best quality evidence they can and include:

- **screens** to shield the victim from the defendant
- **live link** to enable the victim to give evidence during the trial from outside the courtroom through a visual link to the court.
- **evidence given in private** excluding members of the public and the press from the court in cases involving sexual offences or intimidation by someone other than the accused.
- **removal of wigs and gowns by judges and barristers**
- **visual recorded interview** of a vulnerable victim before the trial admitted as evidence-in-chief
- **pre-trial visual recorded cross-examination or re-examination** admitted as cross-examination and re-examination evidence
- **examination of the witness through an intermediary**
- **aids to communication** to enable a witness to give best evidence.

The Victims’ Commissioner for England & Wales is currently conducting a review into the provision of Special Measures. In the first phase of her review, she published in July 2020 a literature review of existing research.\(^{46}\)


\(^{46}\) Victims’ Commissioner for England & Wales (July 2020), Dr S. Fairclough, *Special Measures Literature Review*. 
The review found:

- A survey of victims and witnesses in 2010 found that 92% of those whose evidence-in-chief was pre-recorded, 89% of those who used a live link and 85% of those using a screen found these measures helpful.
- A view among criminal practitioners, and some witnesses, that evidence given by video link has less of an impact on jurors and is therefore avoided. This is despite any empirical evidence supporting this view.
- Evidence that defence witnesses can be less well supported than prosecution witnesses, despite being equally eligible for special measures.

**Victims’ inherent interest in the criminal justice process**

While it is now broadly accepted that justice cannot be administered effectively without due recognition of the rights and interests of other parties affected by criminal acts, debate continues about the precise nature of the role of the victim of crime within the criminal justice process.

An often-used argument against recognising the rights and interests of victims in the criminal justice process is that they will interfere or undermine the rights of the accused – that is, that rather than making the criminal trial process fairer, victim-centred reforms may come at the expense of fairness by undermining or limiting the accused person’s rights. Jonathan Doak, a leading expert in victims’ rights, is critical of this ‘zero sum game’ approach and argues that it is wrong to state *per se* that the concept of victims’ rights brings about a reduction in the rights of the accused. He maintains that the potential for conflict has been exaggerated – it does not automatically follow that the interests of victims and offenders will always conflict:

> “It is difficult to see how some [victims’] rights, such as the provision of information, support at court, or the provision of good facilities, impact upon defendants at all… there are a number of scenarios in which the victim and the defendant will share mutual concerns, such as the desire for a prompt and efficient trial and to be provided with information about procedure.”

There is strong support for this view that the role of victims can be strengthened without compromising the important protections we have for the innocent.

There is growing international consensus that victims of crime have an inherent interest in the manner in which criminal justice is administered and that their legitimate role within the criminal justice system should be recognised. In its comprehensive three-year inquiry into the rights of victims in the criminal trial process, the Victoria Law Reform Commission concluded:

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48 J. Doak, *op. cit.* at fn 45, p.247.
49 See, for example, the speech of the New Zealand Minister of Justice in December 2019: [New direction for criminal justice reform announcement](#).
A victim’s interest in how the criminal justice system responds arises from the crime and its impact on the victim’s life. This inherent interest is not confined to, or defined by, the criminal trial process. It is evident from the decision to report the crime and can continue after the offender has completed their sentence or any post-sentence monitoring.50

A ‘triangulation of interests’ in the criminal trial process

In a decision of the House of Lords in 2001, the late Lord Steyn, with the approval of the other members of the House, stated:

“The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.”51

Lord Steyn again referred to the ‘triangulation of interests’ and confirmed that paying due regard to the interest of victims is both a matter of fairness and consistent with the purposes of the criminal justice system when considering what a fair trial requires in R v A (No. 2):

“It is well established that the guarantee of a fair trial under art 6 is absolute: a conviction obtained in breach of it cannot stand… The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play.”52

The Victorian Law Reform Commission Report on Victims of Crime in the Criminal Trial Process also adopted Lord Steyn’s language of ‘triangulation of interests’:

“22. Fair trials are in the public interest, as well as the accused’s interest. While it remains crucial that laws and procedures ensure the accused receives a fair trial, fairness to the accused does not preclude recognition of the victim’s interest.

23. Fairness is a dynamic concept, changing over time alongside changes in community values and expectations. Increasingly, it is recognised that the public interest can be served not only by safeguarding the rights of the accused and the independence of the prosecution but also by taking into account the victim’s interest. Procedures and rights that regulate the contest between the prosecution and defence have been supplemented by reforms that allow for the victim’s interest to be taken into account, although only to the extent that fairness permits in an adversarial system.

24… The legitimate rights of victims, properly understood, do not undermine the legitimate rights of the accused or of the community, properly understood. The true

Classification of victims’ rights

Before we consider the different ways in which victims have been recognised and accorded a role within the criminal justice process, it is important to consider first what we mean by ‘victims’ rights’. As a number of experts have commented, “the term ‘right’ tends to be used indiscriminately to describe victims’ entitlements to services and mandated forms of treatment, as well as to define procedural and substantive legal rights. In this report, we classify the rights of victims of crime as follows.

- **Interaction rights**: to be treated fairly and with respect and dignity by criminal justice agencies and service providers.
- **Information rights**: access to information about criminal processes and procedure, support services and updates on the criminal investigation and prosecution.
- **Support rights**: referral and access to appropriate victim support services.
- **Protective rights**: rights to the effective implementation of criminal laws to deter the occurrence of crime; to an effective criminal investigation; to protection from intimidation, degrading cross-examination and to being confronted by an accused.
- **Privacy rights**: to keep medical and counselling records confidential and to non-disclosure of a vulnerable witness’s identity.
- **Participatory rights**: to express views about a charge or plea decision, bail, sentencing and parole and to have those views taken into account; to separate legal representation at trial.
- **Reparative rights**: to seek financial compensation from the state and to emotional and material reparation from an accused.

However, as is made clear in chapters 2 and 3 of the report, it is important to recognise that not all the ‘rights’ listed above are legally enforceable. While victims of crimes and human rights violations may have a number of *legal* rights enforceable within domestic legal systems, not all the ‘rights’ referred to in victims’ charters and codes are of this nature. The rights listed above can be divided into the following levels of rights, with substantive level rights standing as the strongest.

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1. **Service level rights**: comprising interaction rights, information rights and support rights. The 1985 UN Declaration was the first international articulation of service level rights that defined a minimum level of fair treatment of victims by public officials but did not provide any enforcement mechanism or remedy for victims whose service rights were breached.

2. **Procedural level rights**: rights to privacy and protection and access to justice processes, including investigation and trial proceedings, but not allowing victims to influence decision-making processes. Such procedural rights give the victim the opportunity to participate and be heard in court without fear of intimidation.

3. **Substantive level rights**: legally enforceable rights to participation and reparation. Participatory rights include the right to make submissions to the police, prosecutors, the court and parole bodies, and to have those submissions taken into account with a view to influencing the outcome of decision-making or criminal proceedings. Such enhanced, enforceable participatory rights allow victims substantive input into the criminal justice process. Key examples include the right to make a victim impact statement; the right to consultation (for example, with the public prosecutor); and the right to a modified trial process (well beyond existing special measures) to protect vulnerable victims.57

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2 – International and regional legal standards on the rights of victims

Summary

• The importance of safeguarding the rights of victims of crimes has been progressively recognised under international and regional human rights instruments.

• The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 is the foundational international instrument articulating the rights of victims of crime and abuse of power.

• The 2005 Principles and Guidelines on the Right to a Remedy and Reparation for Victims sets out the rights of victims of gross violations of international human rights law and serious violations of international humanitarian law to restitution, compensation and rehabilitation.

• Due diligence obligations under international human rights law require States, even where a non-State actor is the perpetrator, to investigate, prosecute and punish violations of human rights and provide protection and reparation to victims.

• CEDAW Articles 2 and 15 require States to ensure that women have access to the protection and remedies offered through criminal law and that they are not exposed to discrimination within the context of those mechanisms as victims of criminal acts.

• The Rome Statute of the International Criminal Court 1998 includes explicit legal rights of protection and participation for victims in criminal trial proceedings.

• The jurisprudence of the European Court of Human Rights provides that in assessing whether the accused received a fair trial under Article 6, the right to respect for the private life of the alleged victim under Article 8 must be taken into account.

• The 2012 EU Directive establishing minimum standards on the rights, support and protection of victims of crime was introduced to strengthen the rights of victims of crimes and ensure they receive appropriate information, support and protection and are able to participate in criminal proceedings.

Introduction

For a long time, international law paid limited attention to victims as rights-holders and to the availability of effective remedies and reparation for victims. Over time, the exclusion of victims and their lack of opportunity to participate effectively in criminal justice processes that affected their rights were increasingly challenged, with demands for victims to play a more active role and for their rights to be protected. This change in position was initially recognised at the international level through the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.

The importance of safeguarding the rights of victims of crimes has been progressively realised under international and regional human rights treaty bodies,
which have developed authoritative statements and jurisprudence on victims’ rights which recognise the rights of victims of crime to be protected, to have their privacy and psychological integrity safeguarded, to participate in legal proceedings and to have recourse to effective remedies and adequate reparation. In 1998, for the first time the Statute of the International Criminal Court explicitly integrated victims’ rights, including the right to protection and the right to participation, into international criminal law.

In this chapter, we examine the evolution of the rights and protections of victims under international and regional instruments and case law. Our analysis is not intended to be exhaustive but rather to highlight key developments in the rights afforded to victims of crime.

A. RIGHTS OF VICTIMS UNDER INTERNATIONAL LAW

Both customary and conventional international law establish that States have due diligence obligations for preventing, responding to, protecting against and providing remedies for human rights violations, whether such acts are committed by state or non-state actors. The due diligence obligations of States comprise both an individual and systems duty. The individual duty is the obligation States owe to particular individuals, or groups of individuals, to prevent, protect, punish and provide effective remedies on a specific basis. The systems duty is the obligation States have to ensure a holistic and sustained model of prevention, protection, punishment and reparations for acts of violence. The due diligence obligations of States in relation to victims of criminal violence are summarised below.

Prevent
States are required to create effective policies, systems and structures to identify types and prevalence of criminal violence and prevent or reduce incidents of violence.

Protect
States are required to develop appropriate legislative frameworks, policing systems and judicial procedures that will prevent crimes and protect victims, including establishing a safe environment for reporting violent crime. States must ensure that individuals who are victims of violence have access to legal assistance, medical care and support services. In situations where particular individuals are known to be at risk of violence, States must take reasonable steps to protect them from harm.

Investigate
The duty of investigation is not conditional upon the State being guilty, directly or indirectly, of misconduct itself. The duty to investigate is triggered where there is a credible claim that a person has been subjected to serious violence, torture, inhuman or degrading treatment at the hands of a private party.

58 See, for example, Committee Against Torture General Comment No.2 Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008 (CAT GC 2); CEDAW Articles 2(e), 2(f) and Article 5 and CEDAW GR 35. 59 Decisions of the CEDAW Committee under the Optional Protocol have made a substantive contribution to the development of the due diligence standard in relation to violence against women and girls, particularly in relation to rape and domestic violence. See, for example, Fatma Yildirim v Austria CEDAW/C/39/D/6/2005, Şahide Goecke v Austria CEDAW/C/39/D/5/2005, Karen Tayag Vertido v The Philippines CEDAW/C/46/D/18/2008, Isatou Jallow v Bulgaria CEDAW/C/52/D/32/2011.
Punish
The obligation to punish imposes on the State the duty to effectively prosecute and appropriately punish perpetrators of violence.

Remedy and repair
States must provide adequate reparations for criminal acts. This involves providing access to criminal and civil remedies and the establishment of effective rehabilitation and support services for victims of crimes.

The UN has adopted two international instruments addressing the rights of victims – the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which focuses on the victims of domestic crimes, and the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, which focuses on the right of victims of international crimes to restitution, compensation and rehabilitation. In Part A, we discuss these two instruments before highlighting developments in the recognition of the rights of victims by UN human rights treaty bodies and under international criminal law.


The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 198560 (UN Victims Declaration) is the foundational international instrument articulating the rights of victims of crime and abuse of power. The UN Victims Declaration recommends measures to be taken on behalf of victims of crime at the international, regional and national levels to improve access to justice and fair treatment, restitution, compensation and assistance. It also outlines the main steps to be taken to prevent victimisation linked to abuse of power and to provide remedies for the victims.61 The provisions apply “without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.”62 We discuss the key principles of the UN Victims Declaration below.

1. Right to fair treatment and access to justice

The UN Victims Declaration sets out a general overarching right of all victims to be treated with compassion and respect for their dignity and to have access to mechanisms of justice and prompt redress for the harms that they have suffered.63

Principle 6 provides that judicial and administrative processes should meet the needs of victims by:

a. Informing victims of their role and the scope, timing and progress of the criminal proceedings.

60 Adopted by UN General Assembly Resolution 40/34 of 29 November 1985.
62 UN Victims Declaration, Principle A.3.
63 UN Victims Declaration, Principle 4.
b. Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused.
c. Providing proper assistance to victims throughout the legal process.
d. Taking measures to minimise inconvenience to victims, protect their privacy and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.
e. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

2. Right to assistance

The UN Victims Declaration provides that victims should receive the material, medical, psychological and social assistance they need on a non-discriminatory basis and should have access to health and social services and other relevant assistance. Police, justice, health, social service and other personnel coming into contact with victims of crime should receive sensitisation training and guidelines to ensure proper and prompt aid.64

3. Right to participate in the criminal justice process

Principle 6(b) of the UN Victims Declaration provides that the views and concerns of a victim should be presented and considered at appropriate stages of the criminal proceedings where the victim’s personal interests are affected, without prejudice to the accused.

The goal of victim participation is to “ensure that all victims have access to the justice system as well as support throughout the justice process, and that the justice system is designed to minimize the obstacles that victims may face in seeking justice.”65 The UNODC Handbook 1999 defines the general framework for victim participation in the justice system as including the following elements:66

1. Treatment of victims with respect and recognition
2. Protection from harm – protection of the victim’s safety and privacy
3. Victim involvement in decision-making through a range of activities including:
   - Informing victims of their rights and responsibilities
   - Informing victims of developments in the case
   - The victim as witness
   - Consideration of civil claims in criminal proceedings
   - Victim as prosecutor or subsidiary prosecutor
   - Victim impact statements

64 UN Victims Declaration, Principles 14-17.
65 UNODC (1999) Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UNODC Handbook 1999), Chapter II, Section D, p.34. The UNODC Handbook 1999 was developed as a tool for implementing victim service programmes and for developing victim-sensitive policies, procedures and protocols for criminal justice agencies and others who come into contact with victims.
• Victim review of decisions taken, such as the decision not to prosecute the alleged offender.

4. Victim involvement in enforcement of the sentence, including participation in parole hearings.

4. Right to a remedy

Principle 5 of the UN Victims Declaration provides that judicial and administrative mechanisms should be established to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible and that victims should be informed of their rights in seeking redress through such mechanisms.

5. Right to reparation

The goal of victim compensation and restitution is to acknowledge and validate the losses of victims through a system of financial reparation.67 The UN Victims Declaration provides that offenders or third parties responsible for their criminal acts should make fair restitution to victims, their families or dependants.68 When compensation is not fully available from the offender or other sources, States should provide financial compensation to victims who have sustained significant injury or impairment of their physical or mental health as a result of serious crimes or to their family, in particular dependants of persons who have died or become physically or mentally incapacitated.69 For many victims of crime, state crime victim compensation schemes are the only or primary means of financial aid to support the victim in the aftermath of the crime. There is an important distinction between state crime victim compensation and reparation – state victim compensation does not require the apprehension and conviction of the offender to provide financial relief to the victim.

Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law 2005

The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims70 is directed at gross violations of international human rights law and serious violations of international humanitarian law. The Principles affirm the UN Victims Declaration of 1985, adopting the same definition of victim71 and reiterating a number of key principles relating to the treatment of victims. The Principles affirm the obligations of States regarding to gross violations of international human rights law

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67 UNODC Handbook 1999, Chapter II, Section F, p.44.
68 Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights: UN Declaration 1985, Principle 8.
69 UN Declaration 1985, Principle 12.
71 With reference to harm suffered through acts or omissions that constitute gross violations of international human rights law or serious violations of international humanitarian law.
and serious violations of international humanitarian law, notably the obligation to prevent violations, the obligation to investigate, prosecute and punish perpetrators, the obligation to provide effective access to justice to all persons alleging a violation, and the obligation to afford full reparation to victims (Principles 1-4). The larger part of the Principles, which have significant domestic law implications, sets out the status and the rights of victims and defines the right of victims to a remedy and reparation, including the rights to restitution, compensation, rehabilitation and satisfaction (Principles 19-22).

**Convention on the Elimination of All Forms of Discrimination against Women**

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Article 2 requires States parties to take all appropriate measures to guarantee the substantive equality of men and women in all areas of life, including through the establishment of competent national tribunals and other public institutions, to ensure the effective protection of women against any act of discrimination. CEDAW Article 15 provides that women and men must have equality before the law and benefit from equal protection of the law. Taken together, CEDAW Articles 2 and 15 require States to ensure that women have access to the protection and remedies offered through criminal law and that they are not exposed to discrimination within the context of those mechanisms, either as victims or as perpetrators of criminal acts. CEDAW also recognises the due diligence obligations of States.

The right of access to justice for women is essential to the realisation of all the rights protected under CEDAW. The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) has recorded a number of obstacles that impede women from realising their right of access to justice on a basis of equality. They include a lack of effective jurisdictional protection offered by the States parties in relation to all dimensions of access to justice:

“[t]hese obstacles occur in a structural context of discrimination and inequality, due to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. All of these obstacles constitute persistent violations of women’s human rights.”

**General Recommendation No.33 on women’s access to justice**

In its General Recommendation No.33, the CEDAW Committee defines six interrelated and essential components necessary to ensure access to justice for

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72 CEDAW GR 33, para.47.
73 CEDAW Articles 2(e), 2(f) and Article 5.
74 Committee on the Elimination of Discrimination Against Women General Recommendation No. 33 on women’s access to justice, CEDAW/c/GC/33, 3 August 2015 (CEDAW GR 33), para.1.
75 CEDAW GR 33, para.3.
women – justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems.\textsuperscript{76}

In relation to criminal laws and the criminal justice system, the CEDAW Committee recommends that States parties should: \textsuperscript{77}

1. Exercise due diligence to prevent, investigate, punish and provide reparation for all crimes committed against women.

2. \textbf{Take effective measures to protect women against secondary victimisation in their interactions with law enforcement and judicial authorities.}

3. \textbf{Take appropriate measures to create supportive environments that encourage women to claim their rights, report crimes committed against them and actively participate in criminal justice processes and take measures to prevent retaliation against women seeking recourse in the justice system.}

4. Use a confidential and gender-sensitive approach to avoid stigmatisation and secondary victimisation during all legal proceedings in cases of violence, including during questioning, evidence collection and other procedures relating to the investigation.

5. Review rules of evidence and their implementation, especially in cases of violence against women, and \textbf{adopt measures with due regard to the fair trial rights of victims and defendants in criminal proceedings, to ensure that the evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes.}

\textbf{General Recommendation No.35 on gender-based violence against women}

In General Recommendation No.35,\textsuperscript{78} the CEDAW Committee recommends that States parties implement the following measures with regard to prosecution and punishment for gender-based violence against women (GBVAW):\textsuperscript{79}

- Ensure effective access for victims to courts and that authorities adequately respond to all cases of GBVAW, including by applying criminal law to bring alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties. Fees or court charges should not be imposed on victims/survivors;

- Ensure that GBVAW is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation.

\textsuperscript{76} CEDAW GR 33, para.s 14-20.
\textsuperscript{77} CEDAW GR 33, para.51.
\textsuperscript{78} Committee on the Elimination of Discrimination Against Women General Recommendation No. 33 on gender-based violence, updating general recommendation no.19, CEDAW/C/GC/35, 26 July 2017 (CEDAW GR 35).
\textsuperscript{79} CEDAW GR 35, para.32.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\(^{80}\) aims to prevent acts of torture committed by both State and non-State actors, imposes obligations on State Parties to investigate acts of torture being committed in any territory under their jurisdiction and provides specific rights to victims of torture. States parties which know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors must exercise due diligence to prevent, investigate, prosecute and punish such acts and provide remedies to victims of torture. This principle also applies to the failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking. \(^{81}\) CAT provides that any individual who alleges they have been subjected to torture has the following rights:\(^{82}\)

i. right to complain to state authorities;
ii. right to have their case promptly and impartially examined;
iii. right to protection against all ill-treatment or intimidation as a consequence of the complaint or any evidence given;
iv. right to redress: the restoration of the dignity of the victim is the objective of the redress process and the process should enable victim participation. The obligations to provide redress are both procedural and substantive;\(^{83}\)
v. right to fair and adequate compensation, including the means for rehabilitation. In the event of the death of the victim as a result of an act of torture, the victim's dependants are entitled to compensation;
vi. right to participate in judicial proceedings\(^{84}\) and
vii. right to privacy.\(^{85}\)

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\(^{81}\) Committee Against Torture General Comment No.2, Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008 (CAT GC 2), para.18.

\(^{82}\) CAT, Articles 13 and 14 and Committee Against Torture General Comment No.3, Implementation of article 14 by States parties, CAT/C/GC/3, 13 December 2012 (CAT GC 3).

\(^{83}\) Procedural obligations require States parties to enact legislation and establish effective and accessible complaints mechanisms and investigation bodies, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture or ill-treatment. The five substantive elements of reparation include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition: CAT GC 3, para.s 4-6.

\(^{84}\) States parties are required to provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress. States parties must also make available to victims all evidence concerning acts of torture or ill-treatment upon the request of victims, their legal counsel, or a judge: GC 3, para.30.

\(^{85}\) States parties are required take measures to prevent interference with victims’ privacy and to protect victims, their families and witnesses and others who have intervened on their behalf against intimidation and retaliation at all times before, during and after judicial, administrative or other proceedings that affect the interests of victims: CAT GC 3, para.31.
Rome Statute of the International Criminal Court

Article 68 of the Rome Statute
Protection of the victims and witnesses and their participation in the proceedings

“…3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

The Rome Statute of the International Criminal Court 1998\(^\text{86}\) heralds a high water mark in the evolution of the rights of victims of crime. It is the first international instrument to include explicit legal rights of protection and participation for victims in criminal trial proceedings. During the negotiations on the Rome Statute, emphasis was placed on ensuring that the core values of the Court, to promote greater peace and security through accountability for crimes, as well as respect for the rights and the dignity of the victims, were to be respected.\(^\text{87}\)

Reflecting the wording of the 1985 UN Victims Declaration, Article 68(3) of the Rome Statute states that victims may participate in the proceedings before the Court at any stage provided that their personal interests are affected. This is an important step forward – victims have the right to participate in criminal proceedings through the presentation of their views and concerns independently from the Prosecution. In order to be able to participate effectively and taking into account the complexity of the proceedings before the Court, victims are free to choose their legal representative.\(^\text{88}\)

Victims, through their legal representatives, are entitled to:

- Attend and participate in the hearings before the Court.\(^\text{89}\)
- Make opening and closing statements.\(^\text{90}\)
- Present their views and concerns.\(^\text{91}\)
- Make representations in writing to a Pre-Trial Chamber in relation to a request for authorisation of an investigation.\(^\text{92}\)
- Submit observations in the proceedings dealing with a challenge to the jurisdiction of the Court or the admissibility of a case.\(^\text{93}\)


\(^{88}\) Provided the legal representative meets the following criteria: (i) 10 years of professional experience in criminal proceedings whether as judge, prosecutor, advocate or in other similar capacity; (ii) ability to speak one of the working languages of the Court; (iii) not have been convicted for a criminal offence or subject to disciplinary proceedings in his or her country of residence.

\(^{89}\) Rule 91(2) of the Rules of Procedure and Evidence.

\(^{90}\) Rule 89(1) of the Rules of Procedure and Evidence.

\(^{91}\) Article 68(3) of the Rome Statute and Rule 89 of the Rule of Procedure and Evidence.

\(^{92}\) Article 15(3) of the Rome Statute and Rule 50(3) of the Rules of Procedure and Evidence.

\(^{93}\) Article 19(3) of the Rome Statute.
• Provide their views before a Pre-Trial Chamber imposes or amends conditions restricting the liberty of the person in the custody of the Court.94
• Request a Chamber to order measures to protect their safety, psychological well-being, dignity and privacy.95
• Request a Chamber to order special measures.96

The Court is required to take measures “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” having regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, where the crime involves sexual or gender violence or violence against children.97 Rules 87 and 88 of the Rules of Procedure enable victims to request protective or special measures. Special attention is given to the most vulnerable groups of victims, in particular children, the elderly and victims of gender crimes when providing for special protective measures. Where the disclosure of evidence or information may endanger the security of a witness or his or her family, the Prosecutor may withhold such evidence or information and instead submit a summary.98 An exception to the principle of public hearings is made to protect victims and witnesses – any part of the proceedings may be conducted in camera and evidence may be presented by electronic or other special means, in particular for vulnerable victims of sexual violence and child victims or witnesses.99

B. EUROPEAN LEGAL STANDARDS ON THE RIGHTS OF VICTIMS

Council of Europe: European Convention on Human Rights

Whilst the European Convention on Human Rights (ECHR) has no specific provision dealing with the rights of victims of crime, Articles 2 (right to life), 3 (prohibition against torture, inhuman or degrading treatment), 4 (prohibition against slavery), 5 (liberty and security of the person), 6 (right to a fair trial) and 8 (right to respect for private life) all provide sources of rights and protections for victims of crime.

Case law on rights of victims in the criminal justice process

“Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting 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

95 Article 68(1) of the Rome Statute and Rule 87(1) of the Rules of Procedure and Evidence.
96 Article 68(1) of the Rome Statute and Rule 88(1) of the Rules of Procedure and Evidence.
97 Rome Statute, Article 68(1).
98 Rome Statute, Article 68(5).
99 Rome Statute, Article 68(2).
The European Court of Human Rights has considered cases on the enforceability of the rights of victims in the criminal trial process under ECHR Article 6 and Article 8 in the context of fairness to the victim as a participant in criminal proceedings. The issue of the rights of victims has also generated important case law concerning the positive obligation of State authorities under Articles 2, 3 and 8 to take preventive operational measures to protect an individual whose life was at risk from the criminal acts of another individual;\(^{101}\) the procedural obligation of domestic authorities to conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible where an allegation of a grave or serious crime is made;\(^{102}\) balancing the interests of the accused and the victim in criminal proceedings; and the privacy rights of victims and witnesses. The special need to protect victims in cases of sexual violence has also been recognised on multiple occasions.

The European Court of Human Rights has recognised on a number of occasions that the conduct of criminal proceedings should be organised in such a way so as not to unjustifiably risk the life, liberty, security and privacy interests of victims who are called upon to testify provided the measures taken can be reconciled with an adequate and effective exercise of the rights of the defence. Such measures include:

- the investigating judge taking the victim’s statement in the absence of the accused/defendant;
- the prevention of the public from seeing victims when testifying and the prohibition of their personal details (identity and address) being reported or otherwise published;
- the exclusion of the public from the hearing when the victim testifies;
- the withholding of the identity of victims from the defendant;
- a restriction on the defendant’s ability to put questions to the victim and to make remarks about him or her during cross-examination;
- the removal of the defendant from the courtroom when the victim testifies;
- the prevention of a particular lawyer from conducting the cross-examination of a victim because of a potential conflict of interest;
- a restriction on access to the court record.\(^{103}\)

\(^{100}\) Doorson v The Netherlands App. No. 20524/92, European Court of Human Rights, 26 March 1996, para.70.


\(^{102}\) MC v Bulgaria (2005) 40 EHRR 20, which established the positive obligation under ECHR Articles 3 and 8 of State authorities to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

Protection of victims in sexual offences cases

There is well established line of case law of the European Court of Human Rights providing that in assessing whether the accused received a fair trial under Article 6, the right to respect for the private life of the alleged victim under Article 8 “must be taken into account” and that in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim:

“[c]riminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In assessing whether the accused received a fair trial, the right to respect for the private life of the alleged victim must be taken into account. Therefore, in 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 the adequate and effective exercise of the rights of the defence.”

The European Court has made clear that due to the special features of criminal proceedings concerning sexual offences, Article 6(3)(d) (right of the accused to examine witnesses) cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel through cross-examination or by other means. The Court has also held that since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims risks further traumatisation of the victim, personal cross-examination by defendants should be subject to the most careful assessment by the national courts. Two key cases are discussed below.

**Baegen v the Netherlands 1995**

A rape complainant was granted anonymity and was permitted not to testify in the trial against the accused, for fear of reprisals, which fear the investigating judge considered well-founded. The accused was convicted of rape. He complained to the European Commission of Human Rights that he had not had a fair trial in that he had been convicted on the basis of statements made by an anonymous witness. Further, he alleged that the rights of the defence had been unduly restricted since neither he nor his counsel had been able to question the witness directly.

The Commission noted that Article 6 “does not grant the accused an unlimited right to secure the appearance of witnesses in court”. Having regard to the special features of criminal proceedings concerning rape and other sexual offences, the Commission accepted that “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.”

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108 Ibid., para.74.

109 Ibid., para.77.
concluded that the criminal proceedings, considered as a whole, could not be regarded as unfair.

**Finkensieper v the Netherlands 1995**\(^{110}\)

The applicant was a psychiatrist who had worked as director of a psychiatric ward where minors with mental problems were treated. He was accused by an ex-patient of having sexually abused her. Other anonymous complaints of sexual abuse of patients had been made in the past. The applicant was convicted of multiple charges of abuse of four former patients and sentenced to 6 years imprisonment. The applicant complained to the European Commission of Human Rights that he did not have a fair trial under ECHR Article 6(1) (right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law) and 6(3)(d) (right of the accused to examine witnesses) because his requests to examine the four alleged victims were rejected.

The Commission noted the special features of criminal proceedings concerning rape and other sexual offences and found:

i. 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 victim’s private life.

ii. In 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.\(^{111}\)

The Commission concluded that the Court of Appeal’s decision could not be considered as arbitrary or unreasonable.\(^{112}\)

**European Union: Directive on the rights of victims of crime**

To ensure a consistent minimum level of victims’ rights, the European Union (EU) has adopted several legal instruments to protect and assist victims of crime. The 2012 EU Directive establishing minimum standards on the rights of victims of crime\(^{113}\) was introduced to strengthen victims’ rights and ensure they receive appropriate information, support and protection and are able to participate in criminal proceedings.\(^{114}\) The Directive requires Member States to ensure that their national criminal justice system recognise, on a systematic basis, “the victim as an individual with individual needs, with a key role in the criminal proceedings, while ensuring the fair trial principle and bearing in mind that the rights set out in the

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\(^{111}\) Ibid., para.66.

\(^{112}\) Ibid., para.62.


\(^{114}\) EU Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 November 2015: EU Directive 2012, Article 27.
Directive are without prejudice to the rights of the offender\textsuperscript{115} (emphasis included in the DG Justice Guidance Document). The Directive gives special support and protection for victims of certain crimes, including victims of gender-based violence, recognising the high risk of secondary and repeat victimisation, intimidation and retaliation. The Directive also insists on a child sensitive approach, whereby the best interests of a child victim is the primary consideration throughout the child’s involvement in criminal proceedings. The Directive requires that Member States provide appropriate training on victims’ needs to all officials who come into contact with victims.

The UK has sought to incorporate the Directive into domestic law through the Code for Victims of Crime.

**Protections for victims of gender-based violence, child sexual abuse and trafficking**

The EU has adopted two instruments\textsuperscript{116} to ensure the mutual recognition of criminal and civil protection measures issued in EU countries so that victims of crime can rely on restraint or protection orders issued in one EU country if they travel or move to another EU country. The instruments specifically recognise the need to protect victims of gender-based violence, including victims of domestic abuse, stalking and harassment, but apply to protection measures ordered for all victims of crime. The *Directive on the European Protection Order* applies to protection orders “which aim specifically to protect a person against a criminal act of another person which may, in any way, endanger that person’s life or physical, psychological and sexual integrity, for example by preventing any form of harassment, as well as that person’s dignity or personal liberty, for example by preventing abductions, stalking and other forms of indirect coercion, and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts.” The *Regulation on mutual recognition of protection measures in civil matters* applies to protection measures ordered “to protect a person where there exist serious grounds for considering that that person’s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion.”

The EU Directive on combating sexual abuse and sexual exploitation of children and child pornography\textsuperscript{117} is a comprehensive legal framework which covers prevention, investigation and prosecution of crimes and assistance to and protection of victims.


\textsuperscript{116} Directive 2011/99/EU on the European Protection Order, 13 December 2011 and EU Regulation No 606/2013 on mutual recognition of protection measures in civil matters, 12 June 2013. EU countries were required to incorporate both the Directive and the Regulation into national law by 11 January 2015.

\textsuperscript{117} Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, 13 December 2011, replacing Council Framework Decision 2004/68/JHA. EU Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 13 December 2013.
The Directive defines 20 offences, sets minimum levels for criminal penalties and facilitates reporting, investigation and prosecution.

The EU has also adopted a comprehensive, gender-specific and victim-centred framework on combating and preventing trafficking.\textsuperscript{118} The Directive establishes minimum standards for the protection, assistance and support of victims of trafficking, as well as provisions on prevention and prosecution of the crime.

\textsuperscript{118} Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011, replacing Council Framework Decision 2002/629/JHA.
3 – Comparative review of the role and rights of victims in adversarial criminal justice systems

Summary

- The rights of victims of crime in England and Wales are mainly service-level rights to information and support and procedural rights, including the right to make a victim impact statement and to request a review of a police or prosecution decision not to prosecute or otherwise to stop a case. England & Wales is far behind in providing substantive legal rights to victims of crime to participate in the criminal trial process.

- Australia has no federal Victims’ Charter or Bill of Rights but each state and territory has its own charter or declaration of rights to provide support to victims of crime. The states of South Australia and Victoria have adopted progressive legislation on victim’s rights.

- In 2014-2016, the Victorian Law Reform Commission completed an expert review of the role of victims of crime in the criminal justice process and made 51 authoritative and evidence-based recommendations to create a coherent legislative and policy framework establishing the victim as a participant in the criminal trial process and defining minimum guarantees for victims in the Victoria Charter of Human Rights and Responsibilities. The Commission recommended that victims be given substantive participatory rights in criminal trial proceedings. Significant changes to the rights of victims of crime were made through the introduction of legislation in 2018 to implement key recommendations made by the Commission.

- The South Australian Commissioner for Victims Rights has the power to recommend that a public agency or official make a written apology to the victim where the Commissioner considers they have breached a victim’s rights and not adequately redressed the breach.

- Every federal criminal justice department or agency in Canada must have a complaints mechanisms that provides for a review of complaints by victims of infringements or denials of their rights under the Victims’ Bill of Rights Act; has the power to make recommendations to remedy such infringements or denials; and includes an obligation to notify victims of the result of the review of the complaint and any recommendations made.

- The Canadian Province of Manitoba provides some of the most extensive participatory rights for victims of crime, including the rights to give views on the use of pre-charge alternative measures, on prosecution decisions and on conditions for the release of the offender and the right to free and independent legal representation when access to personal information about the victim is sought by a third party.

- Victims of federal crimes in the United States have the statutory right to be heard in relation to charge, plea, sentencing and parole decisions and the right to assert their rights in the district court in which a defendant is being prosecuted for the crime.

- The Californian Constitution includes an enforceable Bill of Rights for victims of crime.
Introduction

The recognition and “reintegration”\(^{119}\) of the victim into adversarial systems of justice began in the 1960s and early 1970s with the introduction of state-funded criminal injury compensation schemes. This was followed in the later 1970s with the establishment of refuges for domestic violence victims and rape crisis services as a result of concerted advocacy and activism by local women’s movements. With the advent of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985, governments globally faced demands for more concerted action on victims’ rights, resulting in a range of legislative and policy measures.

Chapter 3 of the report examines and compares different legislative and policy models for the protection of victims' rights across five countries with adversarial systems of justice – our own, England & Wales, together with Australia, Canada, New Zealand and the United States. The latter four countries were selected in light of the fact that each of their adversarial justice systems is grounded on the English common law and each country has either fairly recently reformed its criminal justice system to strengthen (to varying degrees) the rights of victims of crime or has completed consultations, inquiries or reviews to inform intended criminal justice reforms. Each therefore has relevant lessons and examples of good practice for England & Wales. The federal framework for the protection of victims' rights is analysed in detail in Australia, Canada and the United States, with selected case studies demonstrating the strongest models for the protection of victims’ rights at state or provincial level. At the end of the country analysis, we provide a comparative review of the service-level, procedural and substantive rights accorded to victims of crime in all five jurisdictions according to the classification of victims’ rights set out in chapter 1.

1. UNITED KINGDOM – ENGLAND AND WALES
Victims of crime and their treatment by the criminal justice system

There were over 10.2 million offences experienced by adults aged 16 years and over in the year ending March 2020, with 1.2 million incidents of violence.\(^{120}\) 2.2% of adults aged 16 to 59 years were victims of sexual assault.\(^{121}\) In the year ending November 2019, the latest data available, an estimated 2.4 million adults aged 16 to 74 years experienced domestic abuse (1.6 million women and 0.79 million men).\(^{122}\)

As Table 1 indicates that Black, Asian and Minority Ethnic groups (BAME) had the highest proportion of adults who were victims of crime in the year ending March 2020.\(^{123}\)

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\(^{120}\) Office for National Statistics (July 2020), Crime in England and Wales: year ending March 2020.


\(^{123}\) All CSEW crime and personal crime excluding fraud and computer misuse.
Table 1: Victims of crime by ethnic group for the year ending March 2020

<table>
<thead>
<tr>
<th>Victims by ethnic group</th>
<th>% victims</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>12.9</td>
</tr>
<tr>
<td>Mixed/multiple ethnic groups</td>
<td>19.5</td>
</tr>
<tr>
<td>Asian/Asian British</td>
<td>14.9</td>
</tr>
<tr>
<td>Black/African/Caribbean/Black British</td>
<td>14.3</td>
</tr>
<tr>
<td>Other ethnic group</td>
<td>15.5</td>
</tr>
</tbody>
</table>

Treatment of BAME people by the criminal justice system

Black, Asian and minoritised ethnic groups (BAME) are over-represented as suspects/defendants at most stages of the criminal justice system compared with the White ethnic group, with Black individuals the most over-represented.\(^{124}\) The greatest disparity appears at the point of stop and search, arrests, custodial sentencing and prison population.\(^{125}\) Black people make up around 3% of the general population but accounted for 12% of adult prisoners in 2015/16 and more than 20% of children in custody.\(^{126}\) The Lammy Review 2017 into the treatment of, and outcomes for, BAME individuals in the criminal justice system noted that 51% of people from BAME backgrounds born in England and Wales believe that ‘the criminal justice system discriminates against particular groups and individuals.’\(^{127}\) The Lammy Review made 35 specific recommendations for reform, the majority of which remain to be implemented.

Treatment of BAME women victims of violence by criminal justice authorities

Similar concerns regarding discriminatory treatment arise in relation to BAME women victims of crime. \(^{128}\) Sisters For Change work with frontline BAME VAW support services\(^{128}\) evidences significant concerns regarding the response by criminal justice authorities to violence against BAME women, gender and racial stereotyping and discrimination by police services across England in their responses to BAME women victims of violence, routinely failing to assess levels of risk, identify indicators of coercive control and sexual exploitation or to properly investigate reports of marital rape resulting in the humiliation and criminalisation of BAME women.\(^{129}\) The lack of trust in criminal justice agencies response to BAME women victims of violence has


\(^{125}\) MOJ Statistics on Race and the CJS 2018, p.2.

\(^{126}\) The Lammy Review, p.3.

\(^{127}\) The Lammy Review, p.6.

\(^{128}\) Between 2016-2019, Sisters For Change conducted a legal accountability project investigating public authority responses to violence against BAME\(^{128}\) women and the adequacy of support services provided to BAME women victims\(^{128}\) of violence. In 2016-2017, Sisters For Change, in partnership with five BAME VAW service providers,\(^{128}\) completed an in-depth review of six local authority areas in England. Our report, Unequal Regard, Unequal Protection: Public authority responses to violence against Black and Minority Ethnic women in England, provided a detailed legal analysis of weaknesses and failings in public authority and criminal justice responses to BAME women victims of violence. In 2018-2019, Sisters For Change in partnership with The Manchester Maya Project, a consortium of BAME VAW service providers in Manchester, conducted extensive research examining local authority approaches and responses to BAME victims of domestic abuse across Greater Manchester.

resulted in a chilling effect in relation to BAME women disclosing and reporting violence. It is also a reason for victims later withdrawing their complaint or retracting statements.

**Criminal justice system response to domestic abuse offences**

The police recorded a total of 1,316,800 domestic abuse-related incidents\(^\text{130}\) and crimes in England and Wales in the year ending March 2019. Of these, 43% (570,581 incidents) were not subsequently recorded as a crime. The remaining 57% (746,219 incidents) were recorded as domestic abuse-related crimes, a volume increase of 24% from the previous year. Violence against the person offences made up the majority (78%) of all domestic abuse-related crimes. Referrals of suspects of domestic abuse-flagged cases by the police to the Crown Prosecution Service (CPS) fell 11%, from 110,653 in the year ending March 2018 to 98,470 in the year ending March 2019.\(^\text{131}\)

‘Decriminalisation of rape’: criminal justice system response to rape offences

The Office of National Statistics (ONS) Crime Survey for England and Wales provides a more reliable measure of the long-term trends in sexual offences than police recorded crime data\(^\text{132}\) for the simple reason that the majority of rape and other sexual offences committed in England & Wales are not reported to the police. For example, in 2018, the latest overview of sexual offending in England and Wales provided by the ONS, approximately 700,000 people aged 16 to 59 years reported that they were victims of a sexual assault\(^\text{133}\) but less than one in five victims of rape or assault by penetration reported their experience to the police. Of those that were reported, 50% of all sexual offences recorded by the police did not proceed further through the criminal justice system than the police investigation due to “evidential difficulties”.\(^\text{134}\)

Tables 2 – 5 below set out statistics for 2015 – 2020 for the following:

- Police recorded rape offences and numbers of rape suspects referred to the Crown Prosecution Service (CPS).
- The number of rape cases considered for charging by the CPS on an annual basis, together with charging decisions and prosecution outcomes.

Table 2 shows the number of rape offences (including historical rape offences) recorded by the police and the number of rape suspects referred by the police to the CPS annually. The table shows a significant gap between the number of rape offences recorded each year and the number of rape suspects referred to the CPS. The number of rape offences recorded has increased year on year since 2015/16. The number of rape suspects referred to the CPS remained consistent between 2015 and 2017 at around 4,400 suspects referred each

\(^{130}\) Domestico abuse-related incidents cover reports where, after initial investigation, the police have concluded that no notifiable crime was committed.
\(^{132}\) Office for National Statistics (July 2020), *Crime in England and Wales: year ending March 2020*.
\(^{133}\) Office for National Statistics (December 2018), *Sexual offending: victimisation and the path through the criminal justice system*.
\(^{134}\) Ibid.
year, but dropped off sharply over the last two years, with only 2,747 rape suspects referred by the police to the CPS in the year ending March 2020 despite over 55,000 recorded rape offences.\textsuperscript{135}

Table 2 Police recorded rape offences and referrals to the CPS 2015 – 2020\textsuperscript{136}

<table>
<thead>
<tr>
<th>Year</th>
<th>Police recorded rape offences (including non-recent offences)</th>
<th>Rape suspects referred to the CPS</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015-2016</td>
<td>36,286</td>
<td>4385</td>
</tr>
<tr>
<td>2016-2017</td>
<td>42,015</td>
<td>4595</td>
</tr>
<tr>
<td>2017-2018</td>
<td>54,760</td>
<td>4370</td>
</tr>
<tr>
<td>2018-2019</td>
<td>55,771</td>
<td>3375</td>
</tr>
<tr>
<td>2019-2020</td>
<td>55,130</td>
<td>2747</td>
</tr>
</tbody>
</table>

Table 3 shows prosecutorial decisions and outcomes for rape suspects between 2016 and 2020. There has been a significant reduction of 36.7\% in the annual volume of rape cases considered by the CPS for charging over the period, from 6,611 cases in 2016-2017 to just 4,184 cases in 2019-2020. There has been an even sharper decline in the CPS charging rate, which has fallen from 3,671 rape cases in 2016-2017 (55.5\% of the total number of cases considered for charging) to 1,867 cases in the year ending March 2020 (44.6\% of the total number of rape cases considered for charging). \textbf{This represents a reduction of 49\% in the volume of rape cases charged annually over the past four years and means the CPS now charges a much smaller number of rape cases annually.}

Table 3 Annual number of rape cases considered for charging decision and % charged by CPS 2016 – 2020\textsuperscript{137}

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of rape cases CPS considered for charging</th>
<th>Total number of rape cases charged</th>
<th>% charging rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016-2017</td>
<td>6611</td>
<td>3671</td>
<td>55.5</td>
</tr>
<tr>
<td>2017-2018</td>
<td>6012</td>
<td>2822</td>
<td>46.9</td>
</tr>
<tr>
<td>2018-2019</td>
<td>5114</td>
<td>1758</td>
<td>34.4</td>
</tr>
<tr>
<td>2019-2020</td>
<td>4184</td>
<td>1867</td>
<td>44.6</td>
</tr>
</tbody>
</table>

Table 4 shows the number of rape suspects charged on an annual basis by the CPS over the last 10 years. Around 3,000 rape cases per year have been charged since records began. \textbf{The highest volume of rape suspects were charged by the CPS in 2015-16 (3910 cases) and 2016-17 (3671 cases). However in 2017-2018 and}

\textsuperscript{135} April 2019 – March 2020.


\textsuperscript{137} CPS VAWG data.
2018-2019, the CPS charged on average 1,000 fewer rape suspects than they had charged the year before. It is claimed that this reflects an unlawful change of prosecution rape charging policy by the CPS. Following the significant drop in the CPS charging rate in 2017-2018, the volume of police referrals of rape suspects reduced dramatically (see Table 2).

Table 4 Total number of rape cases charged by the CPS 2010 – 2020

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>3232</td>
<td>3387</td>
<td>3213</td>
<td>2889</td>
<td>3621</td>
<td>3648</td>
<td>3910</td>
<td>3671</td>
<td>2822</td>
<td>1758</td>
<td>1867</td>
</tr>
</tbody>
</table>

Following the significant drop in the CPS charging rate in 2017-2018, the volume of police referrals of rape suspects reduced dramatically (see Table 2).

Table 5 shows the number of rape prosecutions completed annually since 2017/18. The conviction rate (percentage of cases charged by the CPS which resulted in a conviction) has increased from 58% to 68% over the three-year period, the highest ever recorded conviction rate. Yet the CPS has completed approximately 1,000 fewer prosecutions year on year. This means that the number of prosecutions for rape has declined by over 50% in the past 3 years, from 4,517 in 2017-2018 to only 2,102 in the year ending March 2020. This figure is the lowest level since annual reporting began.

Table 5 Completed rape prosecutions by outcomes 2017 – 2020

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Completed prosecutions</td>
<td>4517</td>
<td>3034</td>
<td>2102</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Convictions</td>
<td>2635</td>
<td>58.3%</td>
<td>1925</td>
</tr>
<tr>
<td>Guilty pleas</td>
<td>1522</td>
<td>33.7%</td>
<td>1092</td>
</tr>
<tr>
<td>Convictions after trial</td>
<td>1112</td>
<td>24.6%</td>
<td>833</td>
</tr>
<tr>
<td>Proved in absence</td>
<td>1</td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Non-convictions</td>
<td>1882</td>
<td>41.7%</td>
<td>1109</td>
</tr>
</tbody>
</table>

Evolution of the rights of victims of crime

England was one of the first countries to introduce a state-funded criminal injury compensation scheme in the early 1960s. This was followed with the establishment of the first victim support scheme in 1974. Perhaps given these origins, it is not surprising that victims’ rights in England and Wales have until fairly recently

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138 The End Violence Against Women (EVAW) Coalition maintains, as set out in its Judicial Review against the CPS for their failure to prosecute rape, that the collapse in cases proceeding is a result of a covert policy change in 2016-17, when prosecutors were encouraged not to charge so called “weaker cases” with the aim of improving the CPS conviction rate: see EVAW’s campaign and evidence here: https://www.endviolenceagainstwomen.org.uk/campaign/rape-justice-fail/

139 CPS VAWG data.

140 CPS VAWG data.

141 Victim Support, History https://www.victimsupport.org.uk/more-us/about-us/history
consisted mainly of service level rights which have generally developed outside of criminal proceedings and primarily include rights to information and notification about the stages of the criminal justice process.

It was not until 1990 that the Government published the Victims’ Charter. The Charter referred to four key ‘rights’ to which crime victims were entitled:

1. The right to receive information.
2. The right to make a statement about the effects of the crime.
3. The right to be treated with respect and sensitivity in court.
4. The right to emotional and practical support.

The Victims’ Charter was replaced with the Code of Practice for Victims of Crime (the Code), which came into effect in 2006. The Code set out the minimum level of services that victims of crime should receive from criminal justice agencies and other organisations in England and Wales. It was updated in 2013 and again in 2015 and is currently under review (see further below).

**Victim Compensation Scheme**

Victims of violent and sexual crimes in Great Britain may be entitled to government funded compensation under the statutory Criminal Injuries Compensation Scheme. The Criminal Injuries Compensation Authority administers the Scheme and may award compensation for mental or physical injury following a crime of violence; sexual or physical abuse; loss of earnings where the victim has no or limited capacity to work as the direct result of a criminal injury; special expenses payments to cover certain costs incurred as a direct result of an incident; and a fatality caused by a crime of violence including bereavement payments, payments for loss of financial dependency; and funeral payments.

**Criminal Procedure Rules**

The Criminal Procedure Rules 2015 govern the practice and procedure to be followed in all criminal courts, giving courts explicit powers to actively manage the preparation and hearing of criminal cases. The overriding objective of the Criminal Procedure Rules specifically recognises the interests of victims and provides that victims must be kept informed of the progress of the criminal case:

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144 The crime must have happened in England, Wales or Scotland and have been reported to the police.
145 The current Criminal Injuries Compensation Scheme 2012 (as amended) applies from 13 June 2019 onwards.
147 Ministry of Justice, Criminal Procedure Rules 2015 (as amended) (CPR 2015).
148 Including magistrates’ courts, Crown Courts, Court of Appeal (Criminal Division) and in extradition appeal cases before the High Court.
“(1) The overriding objective of this procedural code is that criminal cases be dealt with justly.

(2) Dealing with a criminal case justly includes—
   a. acquitting the innocent and convicting the guilty;
   b. dealing with the prosecution and the defence fairly;
   c. recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
   d. respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
   e. dealing with the case efficiently and expeditiously;
   f. ensuring that appropriate information is available to the court when bail and sentence are considered; and
   g. dealing with the case in ways that take into account —
      i. the gravity of the offence alleged,
      ii. the complexity of what is in issue,
      iii. the severity of the consequences for the defendant and others affected, and
      iv. the needs of other cases.”

Victims’ Commissioner for England and Wales

The Victims’ Commissioner for England and Wales is an independent statutory office holder with the following duties:

- to promote the interests of victims (defined as a victim of a criminal offence or of anti-social behaviour) and witnesses;
- encourage good practice in the treatment of victims;
- regularly review the Code of Practice for Victims and make proposals to the Minister of Justice for amending the Code.

The Victims’ Commissioner does not have powers to act on behalf of individual victims of crime or challenge the decisions of criminal justice agencies in criminal cases.

149 CPR 2015, Part 1, 1.1.
150 Established under the Domestic Violence, Crime and Victims Act, s.48.
151 Domestic Violence, Crime and Victims Act, s.52.
152 Domestic Violence, Crime and Victims Act, s.49.
153 Domestic Violence, Crime and Victims Act, s.51.
Crown Prosecution Service Victims’ Right to Review Scheme

On 29 June 2011, in *R v Killick* the Court of Appeal considered the right of a victim of crime to seek a review of a Crown Prosecution Service (CPS) decision not to prosecute and concluded that:

- a victim has a right to seek a review in such circumstances.
- a victim should not have to seek recourse to judicial review.
- the right to a review should be made the subject of a clearer procedure and guidance with time limits.

The CPS Victims’ Right to Review Scheme gives effect to the principles laid down in *R v Killick* and in Article 11 of the European Union Directive establishing minimum standards on the rights, support and protection of victims of crime. A victim’s right to review arises from the finality of the CPS decision not to prosecute. The scheme applies to all qualifying cases from 5 June 2013.

A victim for the purposes of the scheme is defined as “a person who has made an allegation that they have suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct” (CPS emphasis). The definition of a victim includes:

- close relatives of a person whose death was directly caused by criminal conduct;
- parents or guardians where the main victim is a child or youth under 18;
- police officers who are victims of crime;
- family spokespersons of victims with a disability or who are so badly injured they cannot communicate; and
- businesses, providing they give a named point of contact.

Any victim is entitled to seek a review of the following CPS decisions:

i. the decision not to bring proceedings (i.e. at the pre-charge stage);
ii. the decision to discontinue or withdraw all charges involving the victim, thereby entirely ending all proceedings relating to them;
iii. the decision to offer no evidence in all proceedings relating to the victim;
iv. the decision to ask the court to leave all charges in the proceedings to ‘lie on file’.

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156 Discussed in chapter 2.
157 Having applied the evidential and public interest tests under the Code for Crown Prosecutors. The right to review is co-extensive with the right of a victim to seek judicial review of such a decision.
158 The scheme is not retrospective and only applies to cases where the qualifying decision is made on or after the 5 June 2013.
159 Criminal conduct is behaviour constituting a criminal offence under the National Crime Recording Standard.
160 CPS Victims Rights to Review Scheme, para.15.
161 CPS Victims Rights to Review Scheme, para.14.
162 CPS Victims Rights to Review Scheme, para.9.
The Victims’ Right to Review Scheme also gives victims the right to seek a review of a police decision not to refer a case to the CPS for charge.

**Government Victims’ Strategy**

The Victims Strategy\(^{163}\) published in September 2018 defines the Government’s key overarching commitments defined as follows:

- To strengthen the Victims’ Code and consult on the detail of victim focused legislation, including strengthening the powers of the Victims’ Commissioner and delivering a Victims’ Law.
- To hold agencies to account for compliance with the Victims' Code through improved reporting, monitoring and transparency.
- To develop the role of the Independent Public Advocate for bereaved families who have lost loved ones in extraordinary and tragic events.
- To abolish the rule which denied compensation for some victims who lived with their attacker prior to 1979 and consulting on further changes to the Criminal Injuries Compensation Scheme.\(^{164}\)

The Strategy identified a number of specific changes the Government stated it intended to make to the Code of Practice for Victims of Crime (see below).

**The Code of Practice for Victims of Crime**

In July 2019, the Ministry of Justice published a consultation paper, *Proposals for revising the Code of Practice for Victims of Crime*,\(^{165}\) seeking views on proposed areas of reform of the Victims’ Code. The key principles underpinning the Government's proposed amendment of the Code were that victims should receive the information and support they need, when they need it; not be re-traumatised by their experience of the criminal justice process; and whatever the outcome, be satisfied with the treatment they received from the criminal justice system.\(^{166}\) The 2019 consultation focused on the following themes:\(^{167}\)

- Information and communication
- Victims’ voice
- Support to victims
- Specialist support for particular groups of victims
- Accountability and redress.

The 2019 consultation was intended to inform the MOJ’s statutory consultation\(^{168}\) on a draft amended Victims’ Code. The responses to the 2019 consultation made clear

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\(^{164}\) Victims’ Strategy 2018, p.8.

\(^{165}\) Ministry of Justice (July 2019), *Proposals for Revising the Code of Practice for Victims of Crime*.

\(^{166}\) Ibid., para.7.


\(^{168}\) Required under the Domestic Violence, Crime and Victims Act 2004, s.33.
that many victims did not find the Code user-friendly, that it did not contain clear, practical information to help guide victims through the criminal justice process and that due to its structure, it was difficult to understand what entitlements victims had under the Code.  

The revised Victims’ Code was published for consultation in March 2020. The Code has been substantially streamlined and shortened. The Revised Code sets out 12 (non-enforceable) ‘rights’ of victims of crime. Rights 1, 4 and 12 apply to all victims. The remainder of the rights apply when a crime has been reported to the police. The 12 rights are as follows:

- **Right 1**: to be able to understand and to be understood. This includes the right to an interpreter when reporting a criminal offence; being interviewed by the police; and when giving evidence as a witness and to obtain translations of any documents where it is essential for the purposes of the police interview or court proceedings.
- **Right 2**: to have the details of the crime recorded without unjustified delay.
- **Right 3**: to be provided with information when reporting the crime, including the basic details of the offence, a crime reference number and the contact details of the police officer dealing with the case.
- **Right 4**: to be referred to victim support services and/or specialist services, for example from an Independent Domestic Violence Advisor or an Independent Sexual Violence Advisor. When victims report a crime to the police, they have the right to a needs assessment, including an assessment of whether they are entitled to receive the enhanced rights under the Code and/or to give evidence using special measures (see below).
- **Right 5**: to be provided with information about compensation through the Criminal Injuries Compensation Scheme.
- **Right 6**: to be provided with information about key stages of the investigation and prosecution process, including decisions relating to the arrest, interview, release, bail and prosecution of a suspect. This right also includes the victim’s right to request a review of a police or CPS decision not to prosecute or otherwise to stop the case.

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172 The Youth Justice and Criminal Evidence Act 1999, ss.16-33 introduced a range of measures that can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses. The measures are collectively known as “special measures”. Special measures help to relieve some of the stress associated with giving evidence and apply to prosecution and defence witnesses, but not the defendant.
• **Right 7**: to make a Victim Personal Statement\(^{173}\) which is used by the court when determining what sentence the defendant should receive.

• **Right 8**: to be given information about the trial, trial process and the victim’s role as a witness and be referred to the Witness Service for support (see below).

• **Right 9**: to be given information about the outcome of the case and any appeals.

• **Right 10**: to be paid expenses and have property returned.

• **Right 11**: to be given information about the offender following a conviction. A victim (or bereaved family relative of a victim) of a crime in which the offender was convicted of a specified violent or sexual offence\(^{174}\) and sentenced to 12+ months in prison or detained in a hospital\(^{175}\) has the right to be referred to the National Probation Service Victim Contact Scheme and be assigned a Victim Liaison Officer. The victim also has the right to make a Victim Personal Statement when an offender’s case is due to be reviewed by the Parole Board and to request a review of a parole decision.

• **Right 12**: to make a complaint about rights not being met through a service provider’s internal complaints mechanism. If the victim remains dissatisfied, the victim can complain to the Parliamentary and Health Service Ombudsman.

### Enhanced rights for vulnerable victims

Certain victims are entitled to enhanced rights under the Code. Such support includes referral to a specialist support service, being contacted sooner after key decisions and having access to special measures.

The 3 categories of victims entitled to enhanced rights under the Code are as follows:\(^{176}\)

1. **Vulnerable or intimidated victims**: those under 18 years of age at the time of the offence, or whose evidence is likely to be affected because they suffer from a mental disorder; a significant impairment of intelligence and social functioning; or a physical disability or physical disorder. A victim is considered intimidated if the quality of their evidence will be affected because of fear or distress about testifying in court.

2. **Victims of the most serious crimes**: victims of domestic violence, hate crime, terrorism, sexual offences, human trafficking, attempted murder, kidnap, false imprisonment, arson with intent to endanger life, wounding or causing grievous bodily harm with intent, together with those who are close relatives bereaved by criminal conduct.

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\(^{173}\) The Victim Personal Statement (VPS) tells the court how the crime has affected the victim, whether physically, emotionally, financially or in any other way. The VPS was first formalised in the 2013 version of the Code of Practice for Victims of Crime.

\(^{174}\) As defined in section 45(2) of the Domestic Violence, Crime and Victims Act 2004.

\(^{175}\) Under the Mental Health Act 1983.

\(^{176}\) Ministry of Justice, Revised Victims’ Code, March 2020, p.6.
3. **Victims who are persistently targeted**: victims who are targeted repeatedly over a period of time; deliberately targeted; or are victims of a sustained campaign of harassment or stalking.

**Special measures for vulnerable and intimidated witnesses**

The special measures available to vulnerable and intimidated witnesses, with the agreement of the court, include: 177

- **Screens** to shield the witness from the defendant.
- **Live link** for the witness to give evidence during the trial from outside the courtroom. Live link is available in many areas from premises remote from the court.
- **Evidence given in private** in cases involving sexual offences or intimidation by someone other than the accused.
- **Removal of wigs and gowns**.
- **Visual recorded interview** admitted as the witness’s evidence-in-chief for adult complainants in sexual offence trials. 178
- **Pre-trial visual recorded cross-examination / re-examination** admitted as the witness’s cross-examination or re-examination evidence in the Crown Court. 179
- **Examination of a vulnerable witness through a Registered intermediary**, a self-employed communication specialist who helps vulnerable victims and witnesses to give evidence to the police and to the court in criminal trials. 180
- **Aids to communication** to enable vulnerable witnesses to give best evidence through a communicator or interpreter.

**Victim and Witness Support Services**

**Witness Care Units** manage the care of victims and witnesses who are due to attend court. The units are run by police and Crown Prosecution Service (CPS) staff. Each case that goes to court is allocated a Witness Care Officer who acts as a single point of contact between victims and witnesses and relevant agencies. The Witness Care Officer provides victims and witnesses with case updates as well as practical support if they are required to attend court to give evidence. The **Court Based Witness Service** provides free and independent support for both prosecution and defence witnesses in criminal courts in England and Wales. Trained volunteers provide practical information about the court process and support to help witnesses feel more confident when giving evidence.

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177 Youth Justice and Criminal Evidence Act 1999, ss.16-33.
178 Unless this would not be in the interests of justice or would not maximise the quality of the complainant’s evidence: YJCEA, s.27.
179 This can only be applied for where there has been a s27 direction for a visual recorded interview to be admitted as evidence and when a victim or a witness meets the vulnerable criteria: YJCEA, s.28.
180 The intermediary is allowed to explain questions or answers so far as is necessary to enable them to be understood by the witness or the questioner but without changing the substance of the evidence: YJCEA, s.29.
Police and Crime Commissioners (PCCs) are responsible for commissioning the majority of support services for victims of crime at the local level. The Ministry of Justice allocates grant funding to PCCs to deliver victim and witness support. Support services include sexual assault referral centres providing dedicated support and medical services to victims of rape and sexual assault; services for victims of sexual violence and abuse, including Independent Sexual Violence Advisors (ISVAs); services for victims of domestic abuse, including Independent Domestic Abuse Advisors (IDVAs); restorative justice services; and specialist support services for Black, Asian and minority ethnic victims; lesbian, gay, bisexual and transgender victims; child victims; and victims with disabilities and mental health needs. IDVAs and ISVAs act as a single point of contact for victims who are involved in cases going through the criminal justice process, attending court with the victim and providing personal care and support on matters ranging from the emotional impacts of domestic or sexual violence to housing and legal matters.

**Implementation of the Victims’ Code**

Evidence points to poor and inconsistent application and implementation of the Victims’ Code across criminal justice service providers. In the year ending March 2019, only 11% of victims received information, advice or support following an incident of crime and only 7.1% had the chance to talk to someone (informally or formally) after an incident. In only a tiny 3.9% of incidents of crime did a victim have contact with victims’ services, regardless of whether the police came to know about the matter, constituting a year on year decline since 2014-15. An even smaller 2.2% of victims had help with reporting the incident or dealing with the police.

In her 2018/2019 analysis on the use of Victim Personal Statements, the Victims’ Commissioner for England and Wales reported that for the sixth year running, “victims of crime are being deprived of the opportunity to make a Victim Personal Statement and make their voices heard in court,” with only one in seven victims (14%) stating that they were offered the chance by police to make a statement. Only 46% of victims felt their personal statement had been taken into account by the criminal justice system, This is the lowest level on record: 22 percentage points lower than 2017/18 and 30 percentage points lower than 2016/17.

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181 PCCs have wide ranging powers to commission or provide victims’ services under s.143 of the Anti-social Behaviour, Crime and Policing Act 2014. PCCs are required to set out the victims’ services that are planned for the year ahead in their Police and Crime Plan under s.7 of the Police, Reform and Social Responsibility Act 2011 and to produce an annual report at the end of each financial year that specifies the victims and witness services that have been commissioned and provided under s.12.


183 Or anyone else in the victim’s household.


The Independent Victims’ Commissioner for London (London Victims’ Commissioner) recently completed a review of compliance with the Victims’ Code of Practice in London. Her March 2019 report\(^{188}\) found that many victims of crime still do not know about the Victims’ Code of Practice:\(^{189}\) only one third of participating victims had been told about the Victims’ Code and their entitlements not only when they reported, but at any stage at all in their case (emphasis added).\(^{190}\) In addition, only 20% of online respondents whose crime was reported to the police were offered the opportunity to make a Victim Personal Statement.\(^{191}\)

The London Victims’ Commissioner was unequivocal in her criticism of the application and implementation of the Victims’ Code, concluding that the only way to create the required culture shift in the criminal justice system to respect, protect and ensure the rights of victims of crime was by creating a Victims’ Law setting out legally enforceable rights for victims, defined legal obligations of criminal justice agencies and legal remedies for breaches of those rights and obligations:

“In short, the Victims’ Code of Practice is failing to deliver the improvements and sense of change required because of fundamental, systemic problems that need fundamental, systemic change to resolve. Victim needs are not being met by it and agencies are struggling to deliver it. Reform is urgently needed…

I am calling on the Government to finally act on their overdue commitment to establish a Victims’ Law, giving victims legally enforceable rights and specifying clear legal duties for agencies. It is absolutely clear from this Review that, 13 years since the Code’s creation, compliance is the exception and not the rule. It is time now that we learn the lessons of the Victims’ Code’s failings and apply them to create a law to show that victims’ rights are important…”\(^{192}\)

**Effect of non-compliance with the Code**

A serious limitation of the Victims’ Code is its lack of enforcement provisions in the event of non-compliance. If any service provider, including the police and the CPS, fails to perform their duties under the Victims’ Code, the victim has no right of action against them. The failure does not of itself make the authority liable to criminal or civil proceedings, although 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.\(^{193}\)

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\(^{189}\) London Victims’ Commissioner Review 2019, p.15.

\(^{190}\) London Victims’ Commissioner Review 2019, p.9.


\(^{192}\) London Victims’ Commissioner Review 2019, p.4

\(^{193}\) Domestic Violence Crime and Victims Act 2004, s.34.
2. AUSTRALIA

Australia has six states and two internal territories each with its own adversarial criminal justice system grounded on the English common law. Whilst the Federal Government of Australia endorsed the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Australia has no federal Victims’ Charter or Bill of Rights. The states and territories are primarily responsible for enacting and administering criminal law and for providing victims’ rights and assistance. Each state and territory has its own charter or declaration of rights and service delivery system to provide support to eligible victims of crime.

I. VICTIMS’ RIGHTS AT THE FEDERAL LEVEL

Australia’s Federal Prosecution Service, the Office of the Commonwealth Director of Public Prosecutions (CDDP) has adopted a Victims of Crime Policy. The Policy defines a victim as an identified individual who has suffered harm, including physical or mental injury, pregnancy, emotional suffering or economic loss, as a result of an offence committed against Commonwealth law or prosecuted by Commonwealth authorities. The policy recognises: “in matters where there is a victim, that person has an important role to play in the prosecution process.”

Provision of information to victim
The Policy provides that victims should be kept informed of the progress of the prosecution in a timely manner, including:

a. a decision to commence a prosecution (and the charges laid);
b. a decision not to commence a prosecution;
c. the date and place of hearing of any charges laid;
d. the outcome of any bail proceedings;
e. plea negotiations; and
f. the outcome of proceedings, including appeal proceedings.

Consideration of views of victim
The Policy notes that the Prosecution Policy of the Commonwealth requires the views of any victims “where available and appropriate” to be considered and taken into account when deciding whether it is in the public interest to:

a. commence a prosecution;
b. discontinue a prosecution;

194 The Northern Territory and the Australian Capital Territory.
195 Government of South Australia Victims’ Commissioner Letter to Chair, House of Representatives Standing Committee on Social Policy & Legal Affairs Committee, Canberra (2012).
197 The CDDP was established under the Director of Public Prosecutions Act 1983 to prosecute offences against Commonwealth law. It prosecutes a wide range of offences including importation of serious drugs; fraud on the Commonwealth; counter-terrorism; money laundering; human trafficking; slavery and servitude; child exploitation including online sexual exploitation; and offences impacting upon the environment.
198 CDDP Victims of Crime Policy, para.2.
199 Ibid., para.4.
c. agree to a plea negotiation; or

d. decline to proceed with a prosecution after a committal.\(^{200}\)

**Security of victim**
The Policy states that a victim’s views regarding a need or perceived need for security will be put before the court in determining bail where appropriate.\(^{201}\)

**Privacy of victim**
The Policy provides that a victim’s privacy and personal information will be protected as appropriate and as far as possible.\(^{202}\)

**II. VICTIMS’ RIGHTS AT STATE LEVEL**

The information, services and rights afforded to victims of crime within Australia varies across jurisdictions. Interest in victims of crime first emerged in the 1960s in the context of debates on state-funded victim compensation schemes. New South Wales was the first Australian jurisdiction to introduce a state-funded victims compensation scheme in 1967 with other states following suit in the following years. In the 1970s, victim assistance, especially for victims of sexual assault and domestic violence but later families of homicide victims, became the focus, largely as a result of activism from the women’s movement. Rape crisis centres and shelters for victims of domestic violence were established at this time, together with more general victim support services.

Focus shifted to victims’ rights and the role of victims in the criminal justice system in the 1980s.\(^{203}\) The Government for South Australia promulgated Australia’s first declaration on victims’ rights in 1985. Each state and territory now has its own charter or declaration of rights and service delivery system to provide support to eligible victims of crime. The rights or principles declared in Australian jurisdictions relate generally to access to information, respectful and dignified treatment, privacy, safety and minimising inconvenience, reflecting the themes of the UN Victims Declaration 1985. Each state also provides for some level of victim participation in sentencing, through the provision of a victim impact statement and for access to compensation or financial assistance by way of a dedicated government funded scheme.\(^{204}\) All victims' rights charters state that violation of a right does not create a civil or criminal cause of action against a public official or agency. Most jurisdictions do have a designated entity to receive, inquire into and attempt to resolve victims’ complaints. In New South Wales, Queensland, Victoria and the Australian Capital Territory, for example, a public official who breaches a guideline or right may face disciplinary proceedings within his or her own agency.\(^{205}\)

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\(^{200}\) Ibid., para.7.

\(^{201}\) Ibid., para.8.

\(^{202}\) Ibid., para.15.

\(^{203}\) Government of South Australia Victims’ Commissioner Letter to Chair, House of Representatives Standing Committee on Social Policy & Legal Affairs Committee, Canberra (2012).


In the 1990s and 2000s, restorative justice programmes, primarily to deal with youth offenders, were implemented across Australia with state attorney-generals endorsing national protocols. All states and territories have now adopted legislation on restorative justice.206

CASE STUDY: STATE OF SOUTH AUSTRALIA

Victims of Crime Act 2001

The South Australia Victims of Crime Act 2001 (as amended) sets out a non-enforceable declaration of principles governing the treatment of victims of crime in the criminal justice system and provides victims with the right to statutory compensation for injury suffered as a result of criminal offences. The objects of the Act are to:

a. give statutory recognition to victims of crime and the harm that they suffer from criminal offending;
b. establish principles governing how victims of crime are to be treated by public agencies and officials;
c. help victims of crime recover from the effects of criminal offending and to advance their welfare in other ways; and
d. provide a limited statutory scheme of compensation to victims most directly affected by criminal offending.207

Definition of victim

An “immediate victim” in relation to an offence is defined in the Act as:

a. a person who suffers physical injury as a result of the commission of the offence;
b. a person who suffers psychological injury as a result of being directly involved in the circumstances of the offence or in operations in the immediate aftermath of the offence to deal with its consequences;
c. if the offence was committed against a child—a parent or guardian of the child;
d. if the offence was committed against a person who dies as a result of the offence—a member of the immediate family of the deceased.208

Declaration of Principles Governing Treatment of Victims of Crime

The Principles state that victims are entitled to the following:209

- **Fair and dignified treatment**, taking into account particular needs of different victims of crime.
- **The right to have a perceived need for protection taken into account in bail proceedings.**

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206 Ibid., p.257.
207 Victims of Crime Act 2001, s.3.
208 Victims of Crime Act 2001, s.4.
• **The right to information** about the progress of investigations, the name of the alleged offender charged with the offence, details of bail and trial proceedings, reasons for prosecutorial decisions relating to the charge, outcomes of the criminal proceedings and any appeal, details of the sentence imposed, outcome of parole applications/reviews and terms of any supervision orders imposed. A victim is “not entitled to information that might jeopardise the investigation of an offence”.\(^{210}\)

• To be advised on their **rights and responsibilities as a witness** for the prosecution at the trial.

• **Victims of serious offences are entitled to be consulted in relation to decisions to charge an offender** with a particular offence, to amend or not to proceed with a charge, or to investigate the alleged offender's mental competence.

• **To be present in court** during proceedings.

• To have the **impact of the offence considered by the sentencing court** and to make **written submissions to the Parole Board** on the parole of the offender.

• To **request that the prosecution consider appealing a determination** relating to the criminal proceedings where the victim is dissatisfied with the ruling.

• To **information about health and welfare services** available to support the victim.

• **Return of the victim’s property** taken for investigation or for use as evidence.

• **Protection of privacy** and from unnecessary contact with the alleged offender.

A small number of the declaratory principles have been entrenched in law. The right to have a perceived need for protection taken into account in bail proceedings is reflected in the Bail Act 1985,\(^{211}\) which requires a bail authority to take into account the victims’ perceived safety concerns. The entitlement to have the impact of the offence considered by the sentencing court is entrenched in the Sentencing Act 2017 and the right to make written submissions to the Parole Board on the parole of the offender is included in the Correctional Services Act 1982.\(^{212}\)

**Exercise of victim's rights through a representative**

The Act provides that the rights granted to a victim under it and any other law, including the right to request information, the right to make a claim for compensation and the right to furnish a victim impact statement, may be exercised on behalf of the victim by an appropriate representative chosen by the victim.\(^{213}\)

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\(^{210}\) Victims of Crime Act 2001, s.8(3).

\(^{211}\) Section 10(4).

\(^{212}\) Section 77(2)(ba).

\(^{213}\) Victims of Crime Act 2001, s.32A.
Commissioner for Victims’ Rights
In 2008, the first independent, statutory Commissioner for Victims’ Rights was appointed in South Australia. The Commissioner has a broad mandate, including assisting victims in their dealings with prosecution authorities and other government agencies; monitoring compliance of public officials and agencies with the Declaration Governing Treatment of Victims of Crime; and monitoring the effect of the law and court practices and procedures on victims.\(^\text{214}\) Where the Commissioner considers a public agency or official has breached the Declaration and has not apologised to the victim or addressed the breach, the Commissioner has the power to recommend that the agency or official make a written apology to the victim.\(^\text{215}\)

The Commissioner has the right to appear in person, or through legal counsel, in certain criminal proceedings,\(^\text{216}\) a right which is unique to the South Australian office of Commissioner for Victims’ Rights. Courts have permitted legal counsel funded by the Commissioner to intervene to uphold victims’ rights to privacy. For example, the Commissioner successfully intervened to protect the privacy of a child victim of sexual assault. The court accepted the Commissioner’s argument that South Australia’s victims’ rights law gives effect to international law, including the Universal Declaration on Human Rights; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Convention on the Rights of the Child; and the Guidelines on Children as Victims and Witnesses, each of which provides for a child’s right to privacy, as does South Australia’s Declaration Governing Treatment of Victims of Crime. The Commissioner argued that disclosure of all information stored on a laptop hard drive amounted to an unnecessary intrusion on the child victim’s privacy. Rather than allow the defence access to all data on the hard drive, the court agreed and ordered disclosure of information date-marked 24 hours before the alleged offence and 48 hours after the alleged offence.\(^\text{217}\)

CASE STUDY: STATE OF VICTORIA
Victims’ Charter Act 2006
The Victoria Victims’ Charter Act 2006 (the Charter) sets out non-enforceable principles that govern the response to victims by investigatory and prosecuting agencies and victims’ services.\(^\text{218}\)

Definition of victim
A “victim” is defined under the Charter as:\(^\text{219}\)
\begin{itemize}
  \item a. a natural person who has suffered injury as a direct result of a criminal offence, whether or not that injury was reasonably foreseeable by the offender; or
  \item b. if a person has died as a direct result of a criminal offence committed against
\end{itemize}

\(^{214}\) Victims of Crime Act 2001, s.16(3).
\(^{215}\) Victims of Crime Act 2001, s.16A(2).
\(^{216}\) The Commissioner, for instance, has the authority to appear before a sentencing court to make a victim impact statement, neighbourhood impact statement or social impact statement.
\(^{218}\) Victims’ Charter Act 2006 (Vic), s.1.
\(^{219}\) Victims’ Charter Act 2006, s.3.
that person, a family member of that person; or  
c. if the person referred to in paragraph (a) is under 18 years of age or is  
incapable of managing his or her own affairs because of mental impairment, a  
family member of that person.

Charter Principles
The Principles governing the response to victims provide that investigatory,  
prosecuting and victims’ service agencies are to:220

- Treat victims with courtesy, respect and dignity, taking into account  
  particular needs of different victims of crime.

- Provide information to victims about support services; possible  
  entitlements; legal assistance; the progress of an investigation and  
  prosecution; court processes; bail applications; key prosecutorial decisions;  
  dates and times of court proceedings; outcome of criminal proceedings and  
  appeal applications.

- Minimise contact between victims and the accused, the accused’s family  
  and supporters.

- Protect a victim’s personal information from disclosure.

- Protect and return any property belonging to a victim that is in the  
  possession of an investigatory or prosecutorial agency.

- Inform a victim about the right to make a victim impact statement in  
  sentencing hearings and to have assistance in preparing the statement from  
  an appropriate victims’ service agency.

- Inform the victim of the right to apply to the court for compensation directly  
  from the offender and for eligible victims to apply for state-funded  
  compensation and financial assistance.

- Notify the victim of bail applications and that the safety and welfare of the  
  victim and their family and the victim’s views towards the granting of bail will  
  be taken into account by a court in determining whether to grant bail.

- Notify the victim of Parole Board reviews and the requirement of the Board  
  to consider any submission made by a victim about the effect of the offender’s  
  potential release on the victim.

The Charter requires that investigatory, prosecuting and victims’ service agencies  
and any person or body responsible for the development of policy or administration  
of criminal justice or victims’ services “must have regard to the Charter principles  
when dealing with a victim of crime”.221 If a victim believes that an agency or body  
has not upheld the Charter principles, the agency should inform the victim about  
available complaint processes.222

220 Victims’ Charter Act 2006, ss.6-17.  
221 Victims’ Charter Act 2006, s.18.  
222 Victims’ Charter Act 2006, ss.6-17.
The Charter Principles are reflected in victim-oriented provisions in Victorian legislation such as the Evidence Act 2008 (Vic), the Sentencing Act 1991 (Vic), the Criminal Procedure Act 2009 (Vic) and are supported by policies established by the Director of Public Prosecutions.223

**Victorian Law Reform Commission Review of Victims of Crime in the Criminal Trial Process**

In 2014, the Attorney-General asked the Victorian Law Reform Commission to review and report on the role of victims of crime in the criminal trial process.224 The Commission was tasked under its terms of reference225 to consider the following:

a. the historical development of the criminal trial process in England & Wales 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.

In August 2015, the Commission published a consultation paper that described current law and practice, surveyed alternative approaches from other jurisdictions, and listed options for reform.226 The Commission’s extensive report227 made a total of 51 recommendations. We discuss below seminal aspects of the Commission’s analysis on the role of victims of crimes in the criminal trial process and set out key recommendations made by the Commission.

1. **The victim as a participant in the criminal justice process**

The Commission analysed the nature of the crime victim’s interest in the criminal justice process and concluded:

“the role [of the victim] has evolved in a way that recognises the inherent interest that a victim of crime has in how the criminal justice system responds to that crime.”

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224 Referral by the Attorney-General to the Commission under s.5(1)(a) of the Victorian Law Reform Commission Act 2000 (Vic) on 27 October 2014.

58
This interest arises from the crime and its impact on the victim’s life. It is not confined to, nor defined by, the criminal trial process.”

The Commission characterised the role of the victim as that of a participant in the criminal trial process, but not a party.

“The victim’s interest arises from the person’s victimhood and is given effect through rights and entitlements. Understanding the role of victims in this way reflects the reality of victims’ inherent interest in the criminal trial process and the various capacities in which they may be involved...”

The Commission proposed three overarching strategies to strengthen law and practice on the role of victims within the criminal legal process:

I. Create a coherent legislative and policy framework: set out in law the rights and entitlements of victims and the obligations of criminal justice agencies. The Commission noted that the Victims’ Charter Act “is the most visible statutory reference point for victims in terms of their rights and entitlements during the criminal trial process” and it is the instrument against which compliance with obligations can be monitored.

II. Strengthen complaint processes and accountability mechanisms to improve the compliance of investigatory and prosecuting authorities and victims’ services with victims’ laws and codes of practice.

III. Provide education and training programmes for lawyers and judicial officers on the role and rights of victims within the criminal justice system.

**Setting out the role and rights of victims in statute**

The Commission made the following recommendations to entrench the role of victims as participants in the criminal trial process:

- The objects of the Victoria Victims’ Charter Act 2006 should be amended to include recognition that a victim of crime has an inherent interest in the response by the criminal justice system to that crime, which gives rise to the rights and entitlements that are conveyed in the Act and shape the victim’s role as a participant in the criminal trial process.

- Part 2 of the Victoria Charter of Human Rights and Responsibilities Act 2006 should be amended to include a right for a victim of a criminal offence that contains the following minimum guarantees:

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229 The two parties in the criminal trial are the prosecution, acting as the state’s representative, and the accused.


2. Establishing effective complaint mechanisms

The Commission was critical that under the Victims Charter Act, if a victim believed that an agency had not upheld the Charter principles, the agency was only expressly required to inform the victim about the processes available for making a complaint.\textsuperscript{233} The Commission referred approvingly to the model in New South Wales in the \textit{Victims Right and Support Act 2013} \textsuperscript{234} and made the following recommendations to improve the compliance of investigatory and prosecuting authorities and victims’ services with the victims’ laws and policies:

- The \textit{Victims’ Charter Act 2006} should be amended to:
  - a. provide victims of crime with a \textbf{right to make a complaint} to the relevant investigatory, prosecuting or victims’ services agency about a breach of a Victims’ Charter principle; and
  - b. impose an \textbf{obligation on investigatory, prosecuting and victims’ services agencies to provide accessible and transparent complaint-handling systems and offer fair and reasonable remedies}.\textsuperscript{235}

- The Victims of Crime Commissioner should be empowered to review the outcome of complaints regarding compliance by investigatory, prosecuting and victims’ services agencies with the \textit{Victims’ Charter Act 2006}, on application by the complainant, if the complainant is not satisfied with the agency’s response to the complaint.\textsuperscript{236}

3. Provision of information and support to victims

The Commission noted that “victims’ experiences of the criminal trial process depend in large part on how well they are prepared and supported. This is influenced by when, how and by whom information is communicated to victims and the type of support they receive. Victims need information that is specific to the various stages of the criminal trial process and responsive to their communication needs and capabilities.”\textsuperscript{237} The Commission made detailed recommendations on strengthening the relationship between prosecuting authorities and victims through the provision of information, meetings and assistance.\textsuperscript{238}

4. Equal participation of all victims in the court process

The Commission noted that certain victims face particular barriers to equal participation, including as witnesses. For example, cross-examination can be

\textsuperscript{233} VLRC Report 2016, para.4.130.
\textsuperscript{234} VLRC Report 2016, para.4.131.
\textsuperscript{235} VLRC Report 2016, Recommendation 7.
\textsuperscript{236} VLRC Report 2016, Recommendation 8.
\textsuperscript{237} VLRC Report 2016, Executive Summary, para.40.
\textsuperscript{238} VLRC Report 2016, Recommendations 20-22.
particularly challenging for children and individuals who have a disability that affects their capacity to communicate or comprehend. Victims with disabilities face multifaceted barriers in the criminal trial process: their disability may not be identified, they may not be perceived as credible or competent, and there may be inadequate or no adjustments made to accommodate their disability. To address such barriers to participation, the Commission recommended the establishment of an intermediary scheme for the appointment of professional intermediaries for child victims and for victims with disabilities likely to diminish the quality of their evidence modelled on the Witness Intermediary Scheme in England and Wales.239

5. Participation and substantive rights in court

The Commission notes that as participants, victims “are entitled to be involved throughout the criminal trial process”.240 Victim participation can take many forms, including:

- consulting with the prosecution in relation to prosecutorial decisions which have a substantial impact on the conduct or outcome of the criminal case;
- participating in court proceedings;
- obliging criminal justice agencies to seek and consider victims’ preferences and views;
- giving evidence as a witness;
- restorative justice conferencing.

Laws and policies in Victoria allow victims to participate in limited ways: they may provide their views to the prosecution about decisions to discontinue a prosecution or to agree to a plea to less serious charges; sexual offence victims may appear and make submissions about applications to subpoena, access and use confidential medical or counselling records; victims may appear as witnesses for the prosecution; and at sentencing hearings, victims can read out a victim impact statement.241

The Commission recommended that victims be given substantive rights in relation to criminal trial proceedings, including the right to substantive consultation with the prosecution on prosecutorial decisions and the right to appear in any application to subpoena, access and use the victims’ confidential communications or records.242

6. Access to legal representation

The Commission recommended that victims of violent crimes should be provided with legal aid to access legal advice and assistance in relation to their substantive legal entitlements (see above) connected with the criminal trial243 in order to ensure that they do not lose the right to protect their confidential communications in a situation where their interest conflicts with the prosecution.”244

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240 VLRC Report 2016, Chapter 7, para.7.1.
241 Ibid.
244 VLRC Report 2016, Chapter 7, para.7.81.
7. Reducing trauma and intimidation

The Commission made a number of recommendations to ensure respect for victims in the court room including:

- Amendment of the Evidence Act to disallow improper questioning in relation to all victims.\(^{245}\)
- Amendment of criminal procedure rules to include the guiding principle that courts have regard to the fact that measures should be taken that limit, to the fullest practical extent, the trauma, intimidation and distress suffered by victims when giving evidence.\(^{246}\)

8. System-wide monitoring and oversight to strengthen accountability

To entrench legal and cultural change in relation to the role and rights of victims of crime across the criminal justice system, the Commission made the recommendation that the Victims of Crime Commissioner should be required to report annually to Parliament on the implementation of the *Victims’ Charter Act 2006* by all investigatory, prosecuting and victims’ services agencies, including information about the number of complaints made and processed about compliance with the Victims’ Charter principles.\(^{247}\)

**Implementation of the Law Reform Commission’s recommendations**

Following the publication of the Commission’s report, significant changes to the rights of victims of crime were made through the introduction of legislation in 2018 to implement key recommendations.

In February 2018, the *Justice Legislation Amendment (Victims) Act 2018* established the role of witness intermediaries in the court process (Recommendations 30 and 31).

In September 2018, the *Victims and Other Legislation Amendment Act 2018* recognised that a victim of crime has an ‘inherent interest’ in the response by the criminal justice system to that crime, legally acknowledging the victim’s role as a participant in proceedings for criminal offences as per Recommendation 1 of the Commission’s report. The new Act requires all agencies to respect the rights and entitlements of victims as participants in proceedings, and to take into account the particular needs of victims in rural and regional locations (Recommendations 15 and 16). The Act also requires the Director of Public Prosecutions to take all reasonable steps to:

- Advise a victim of the details of criminal proceedings and the progress of a prosecution (Recommendation 20).
- Seek a victim’s views regarding modifying charges, discontinuing a prosecution, or an appeal (Recommendation 24).
- Provide reasons for decisions to a victim (Recommendation 9).

\(^{246}\) VLRC Report 2016, Recommendation 41.
\(^{247}\) VLRC Report 2016, Recommendation 12.
The *Justice Legislation Miscellaneous Amendment Act 2018* gave courts the power to disallow improper questions, such as those that are misleading or confusing, harassing, intimidating, humiliating or repetitive (Recommendation 18).

The *Sentencing Act 1991* was amended in relation to the contents of victim impact statements. The Act provides that:

- a victim impact statement allows the victim to tell the court about the impact of the offence on them; and
- a victim impact statement is not inadmissible (cannot be ruled out by the judge) merely because it contains subjective or emotive material.

### 3. CANADA

Canada is a federal state in which legislative jurisdiction is divided between the federal Parliament and the provincial and territorial Legislatures. The federal government has constitutional authority for the enactment of criminal law and criminal procedure, while the provinces and territories have constitutional authority over the administration of justice, including the investigation and prosecution of the majority of criminal offences.

The Canadian Charter of Rights and Freedoms (the Charter) does not specifically entrench specific rights for victims of crime. However, a number of Charter rights have been recognised as important in relation to victims and a number of Supreme Court of Canada cases have stated that fundamental justice includes consideration of the rights of victims and that victims’ rights must be balanced with the rights of the accused: “a just and proportionate balance … based on the particular case before the court.”

For example, the Supreme Court of Canada has ruled that in sexual assault prosecutions, victims must be given due notice of defence applications for disclosure of their medical and therapeutic records in recognition of their privacy and equality rights.

In 1988 and 2003, the federal, provincial and territorial Ministers of Justice endorsed the Canadian Statement of Basic Principles of Justice for Victims of Crime. This Statement is based on the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 and continues to guide the development of policies, programs and legislation for victims of crime.

### I. VICTIMS’ RIGHTS AT THE FEDERAL LEVEL

#### Rights of victims under the criminal law

The Canada Criminal Code includes provisions to recognise and facilitate the participation of victims of crime in the criminal justice system, such as the presentation of victim impact statements; consideration of victim safety at bail hearings; federal victim surcharge; publication bans; testimonial aids; and restitution orders. Witnesses under 18 years and complainants in sex offence prosecutions also have standing (in addition to the prosecutor) to apply for a range of special measures. However, the Code makes no reference to legal representation. The

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248 See, for example, *R v. NS*, 2012 SCC.


250 Canada Criminal Code, R.S.C., 1985, c C-46, (as amended), Part XV, s.486(1).
Canadian provinces of British Columbia and Manitoba specifically provide for legal representation of victims in relation to third party applications for disclosure of information relating to the personal history of the victim.  

The Corrections and Conditional Release Act (CCRA) governs the Correctional Service of Canada, which is responsible for supervising federal offenders in custody and in the community, and the Parole Board of Canada. It recognises that victims of crime are an important part of the criminal justice system and enables them to participate in the federal corrections and conditional release process. Victims are entitled to present victim impact statements; make a request to be provided with certain information about an offender who has harmed them and to be informed about decisions made by the Correctional Service and the Parole Board about that offender; to present information that may contribute to specific key decisions; and to consideration of their safety at parole hearings.

The Act defines a victim as “an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence”. When a victim is deceased or incapable of acting on their own behalf, the following individuals are able to exercise the rights of the victim:

1. The victim’s spouse or cohabiting partner;
2. A relative or dependant of the victim;
3. Anyone who has custody of the victim or is responsible for the care or support of the victim.

Canadian Victims’ Bill of Rights

The Victims’ Bill of Rights Act (the Act) came into force in Canada in April 2015. This legislation creates the Canadian Victims Bill of Rights and amends existing laws, including the Criminal Code, Canada Evidence Act and the Corrections and Conditional Release Act. The legislation was created to establish statutory rights for victims of crime and ensure a formal complaint process for victims to use if they believe their rights have been violated.

The Act sets out four clear rights of victims of crime:

1. The right to information defined as the right to information about:
   - the criminal justice system and the role of victims within the system;
   - services and programmes available to victims;
   - the process of making a complaint where a victim’s rights are violated;
   - the status and outcome of the investigation into the offence;
   - the date, location and progress of criminal trial proceedings; and
   - reviews relating to the offender’s conditional release.

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251 British Columbia: Victims of Crime Act, RSBC 1996 c.478, s.3; Manitoba: The Victims’ Rights and Consequential Amendments Act, S.M. 1998, c. 44, s.4(2).
252 Victims’ Bill of Rights Act, s.2.
253 Victims’ Bill of Rights Act, s.2.
254 The Victims’ Bill of Rights Act was introduced in the House of Commons as Bill C-32 in April 2014 and received Royal Assent on 23 April 2015.
255 Victims’ Bill of Rights Act, ss.6-8.
2. **The right to protection** defined as:

- the right to have their safety, security and privacy considered by criminal justice authorities;
- the right to have reasonable and necessary measures taken to protect the victim from intimidation and retaliation;
- right to protection of their identity where they are a complainant or a witness in proceedings relating to the offence;
- the right to request testimonial aids when appearing as a witness in proceedings relating to the offence.

3. **The right to participation** defined as:

- the right to convey their views about decisions made by criminal justice authorities that affect the victim’s rights and to have those views considered;
- the right to present a victim impact statement and to have it considered.

Victims have been provided with more meaningful participation in the criminal justice system through changes that:

a. require judges to include in records of bail proceedings that they have considered the victim’s safety and security;

b. add the acknowledgement of harm done to victims and the community as a sentencing objective under the Criminal Code;

c. allow victims to use a testimonial aid when they present their victim impact statement in court;

d. allow victims to bring a photo of a victim to court while giving their victim impact statement;

e. provide a standard form for victim and community impact statements to ensure consistency in how victims describe to the court the impact the crime had on them, including any physical or emotional harm, property damage, or financial loss; and

f. allow victims to include a picture or a drawing in their victim impact statement if this helps them to better express the impact the crime had on them.

4. **The right to restitution** defined as the right to have the court consider making a restitution order requiring the offender to pay for any financial losses incurred by the victim as a result of the offence and to have any unpaid amount enforced through a civil court judgment that is enforceable against the offender.

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256 Victims’ Bill of Rights Act, ss.9-13.
259 Including property lost due to the crime; physical injury or psychological harm suffered; physical injury due to the arrest or attempted arrest of the offender; costs for temporary housing, moving, food, childcare and transportation due to a spouse, cohabiting partner or child moving out of the offender’s household where a victim has moved because they had been physically harmed or threatened with physical harm due to the offence, arrest or attempted arrest of the offender; and/or costs that victims of identity theft had to pay to re-establish their identity or to correct their credit history and their credit rating.
260 Victims’ Bill of Rights Act, ss.16-17.
The *Canadian Victims Bill of Rights* does not grant a victim, or anyone acting on the victim’s behalf, the status of a party, intervener, or observer in any criminal proceedings.

**Remedies for infringement of rights**

Every **federal department, agency or body** involved in the criminal justice system must have a complaints mechanism that:261

a. provides for a review of complaints by victims of infringements or denials of their rights under the Act;
b. has the power to make recommendations to remedy such infringements or denials; and
c. includes an obligation to notify victims of the result of the review of the complaint and any recommendations made.

Any victim who believes that their rights under the Act have been breached by a federal department, agency or body has the right to file a complaint in accordance with the institution’s complaints mechanism. If a victim is not satisfied with the response of the federal institution, the victim may file a further complaint with the authority with jurisdiction to review complaints in relation to that federal institution.262

Any victim who believes their rights have been breached by a provincial or territorial department, agency or body may file a complaint in accordance with the laws of the province or territory.263 However, a victim has **no cause of action or right to damages** arising from an infringement or denial of their rights under the Act.264 Furthermore, no appeal lies from any decision or order solely on the grounds that a victim’s rights under the Act have been infringed or denied.265

**Limitations to exercise of rights**

The *Canadian Victims Bill of Rights* includes a limitation clause which provides that the rights are to be applied in a reasonable manner so that they do not:

- interfere with police, prosecutorial or ministerial discretion;
- interfere with the discretion that may be exercised by any person or body authorised to release an offender into the community;
- cause excessive delay, or compromise or hinder an investigation or prosecution of an offence;
- endanger the life or safety of any individual;
- or cause injury to international relations or national defence or security.266

261 Victims’ Bill of Rights Act, s.25(3).
262 Victims’ Bill of Rights Act, s.25(1), (2).
263 Victims’ Bill of Rights Act, s.26.
264 Victims’ Bill of Rights Act, s.28.
265 Victims’ Bill of Rights Act, s.29.
266 Victims’ Bill of Rights Act, s.20.
Office of the Federal Ombudsman for Victims of Crime

The Office of the Federal Ombudsman for Victims of Crime was created in 2007 by the Government of Canada as part of a package of measures to ensure the federal government meets its responsibilities to victims of crime. The mandate of the Office relates exclusively to matters of federal jurisdiction. The Office is mandated to:

- promote and facilitate access by victims to federal programmes and services for victims by providing them with information and referrals;
- address complaints made by victims about federal government departments, agencies, laws, policies, programs or services;
- promote awareness of the needs and concerns of victims and the applicable laws that benefit victims of crime among federal law and criminal justice personnel and policy makers;
- identify issues that have a negative impact on victims and make recommendations to the federal government on how to effect positive change;
- promote the principles set out in the Canadian Statement of Basic Principles of Justice for Victims of Crime 2003 with federal criminal justice and policy-makers.

II. VICTIMS’ RIGHTS AT PROVINCIAL LEVEL

All provinces and territories have legislation for victims of crime.268 In many cases, this legislation is in the form of a Victims’ Bill of Rights. In the mid-late 1980s, Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan passed provincial Bills of Rights for Victims. In the mid-late 1990s, British Colombia, Alberta and Ontario followed suit.269 Most provincial legislation reflects the approach of the UN Victims Declaration 1985 and do not provide enforceable legal rights to victims.

The legislation defines a “victim” for the purposes of access to victim services and the respective provincial victim compensation regime.270 The specific services offered to victims vary between jurisdictions but may include the provision of information; referrals to community services; short-term counselling; court preparation and accompaniment; assistance in the completion of victim impact statements; and corrections information.271

267 On 1 October 2003, Federal, Provincial and Territorial Ministers Responsible for Justice endorsed a new Canadian Statement of Basic Principles of Justice for Victims of Crime 2003 that modernised the statement of principles issued at their 1988 meeting. These basic principles continue to guide the development of policies, programs and legislation related to victims of crime. For further information refer to the Canadian Department of Justice website: https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/03/princ.html.


269 Canadian Resource Centre for Victims of Crime (February 2015), Victims’ Rights in Canada

270 All provinces and territories (except Newfoundland, Yukon and Nunavut) have some form of compensation programme for victims of crime.

The rights of victims at the provincial and territorial level have many common elements including:

- the right to information;
- the right to consideration of personal safety; and
- the right to respectful treatment.

However, the majority of provincial laws limit or exclude any remedies for breach of the victim’s rights. For example, the Nova Scotia Victims’ Rights Act states, “no order, conviction or sentence may be appealed on the grounds that a right granted by this Act has been infringed or denied.”

In 1999, two victims of violence crime in Ontario pursued an action against the Province on the basis that their rights had been violated under the Ontario Victims’ Bill of Rights. Karen Vanscoy’s young daughter had been shot and killed in 1996 and Linda Even had been violently assaulted by her former intimate partner, resulting in permanent disability. The victims argued that their rights had been violated because they were not notified of pending court dates or consulted in relation to the plea bargains of the respective offenders. The Ontario Court of Justice dismissed the case, ruling that the Ontario Victims’ Bill of Rights did not grant any legal rights to victims of crime. The judge held that the language of the Bill indicated that the legislature did not intend for the Act to create any new legal rights. The Court also rejected a challenge under the Canadian Charter of Rights and Freedoms to s.2(5) of the Bill of Rights which provided that “No new cause of action, right of appeal, claim or other remedy exists in law because of the Act.”

Manitoba is the only province which explicitly provides a remedy for breach of a victim’s rights, following the Canadian Victims’ Bill of Rights model of the establishment of a complaint mechanism for victims.

CASE STUDY: MANITOBA VICTIMS’ BILL OF RIGHTS

In 1999, Manitoba passed one of the most comprehensive pieces of victims’ rights legislation in Canada. It strengthens the legal rights of victims and provides for a robust complaints mechanism if a victim’s rights are violated. The Manitoba Victims’ Bill of Rights 1999 came into effect in 2001. Under the Bill of Rights, victims of crime have the comprehensive set of rights discussed below.

1. Right to services
   - The right to the services set out in the Victims’ Bill of Rights by requesting such services from the Department of Justice or relevant criminal justice agency.

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273 Which stated that victims “should” be kept informed, consulted, etc., rather than using mandatory language of “must” or “shall”.
276 Manitoba The Victims’ Bill of Rights, C.C.S.M. 1998 c. VS5 (as amended) (Manitoba Victims’ Bill of Rights).
277 Manitoba Victims’ Bill of Rights, s.2(1).
• The right to be interviewed by a police officer of the same gender in sexual offence cases.\textsuperscript{278}
• The right to separate waiting area at court.

2. Right to protection
• The right to be warned of a threat to the victim of the victim’s family by an offender who is a subject to supervision, control or custody.\textsuperscript{279}

3. Right to information
• Right to information from the police, including information about the rights and remedies of victims; making a victim impact statement; services available for victims and crime prevention and safety planning; how to apply for court order of restitution; the release from custody of a person charged with an offence; and how to report a breach of a condition of release.\textsuperscript{280}
• Right to information about the investigation of the offence.\textsuperscript{281}
• Right to information about the person accused or guilty of the offence, including:\textsuperscript{282}
  a. whether a pre-sentence report or pre-disposition report is to be prepared in respect of the person; how the victim may comment; the name, address and telephone number of the office in charge of preparing the report;
  b. if the person is under supervision in the community, the office or agency responsible for the supervision;
  c. if the person is subject to a supervision order, the terms and conditions of the order;
  d. if the person is in custody, the name and location of the custodial facility;
  e. dates relating to the custodial status of the person, including estimated date of release and general destination of the person; and any dates of temporary absences or other types of release;
  f. the occurrence of any of the following:
     o the person’s escape from custody or otherwise being unlawfully at large, and his or her recapture,
     o the person’s breach of a term or condition of a supervision order, and action taken in response; and
     o the person’s death.
• Right to information about the prosecution of the offence, including:\textsuperscript{283}
  a. the possible use of alternative measures or restorative justice programmes;
  b. the court process, including the role of the victim, prosecutor and other persons involved in the process;
  c. the right of a witness to have an interpreter while testifying in court;

\textsuperscript{278} Manitoba Victims’ Bill of Rights, s.5.
\textsuperscript{279} Manitoba Victims’ Bill of Rights, s.20.
\textsuperscript{280} Manitoba Victims’ Bill of Rights, s.3.
\textsuperscript{281} Manitoba Victims’ Bill of Rights, s.7.
\textsuperscript{282} Manitoba Victims’ Bill of Rights, s.19(2).
\textsuperscript{283} Manitoba Victims’ Bill of Rights, s.12.
d. the right to apply for a ban on the publication or broadcast of the identity of a victim or witness;

f. the right of a prosecutor or a witness to ask the court that a support person of the witness's choice be permitted to be close to the witness while testifying;

g. the right of a prosecutor or a witness to ask the court to be allowed to testify by closed-circuit television or behind a screen or other device in the court room;

h. how to obtain the dates, times and places of proceedings relating to a prosecution;

i. the process for entering a plea of guilty or not guilty, including the possibility of discussions between the Crown attorney and an accused person, or his or her legal counsel, on a resolution of the charge;

j. the possible finding by the court that an accused person is not criminally responsible by reason of mental disorder or is unfit to stand trial;

k. the process for sentencing a person convicted of an offence;

l. the right to file a victim impact statement, and to add to it any time before the sentencing of the accused person;

m. how to obtain assistance to complete a victim impact statement;

n. the use of victim impact statements and pre-sentence reports in sentencing;

o. how a court order of restitution may be made for any loss, damage or bodily harm suffered as a result of an offence, where the amount is readily ascertainable;

p. the right of an owner of property to have it returned when it is no longer required as evidence in a prosecution;

q. the appeal process.

• Right to information about the status of prosecution of an alleged offender.

• Right to information about the role and process of review in respect of an offence concerning an accused person who is found not criminally responsible by reason of mental disorder or is unfit to stand trial.

• Right to information about legal aid services.

• Right to information about the corrections office.

• Right to information about court administration.

• Right of relative of deceased victim to receive information; if the victim is deceased, a parent or child of the victim may apply to receive the information that is to be provided to victims even though he or she does not meet the definition of "victim".

284 As provided in s.486.1 of the Canadian Criminal Code.

285 A as provided in s.486.2 of the Canadian Criminal Code.

286 Manitoba Victims' Bill of Rights, s.13.

287 Manitoba Victims' Bill of Rights, s.23.

288 Manitoba Victims' Bill of Rights, s.24.

289 Manitoba Victims' Bill of Rights, s.16.

290 Manitoba Victims' Bill of Rights, s.17.

291 Manitoba Victims' Bill of Rights, s.2.1(1).
4. Right to participate

- **Right to give opinion on alternative measures and release**: the criminal justice agency responsible for investigating an offence must ensure that, where reasonably possible and at an appropriate time, the agency consults the victim on the use of pre-charge alternative measures or restorative justice programmes to deal with a person alleged to have committed the offence and whether a person accused of the offence should be detained to ensure the safety and security of the victim or another person, and if the accused person is released, whether he or she should be subject to any conditions.²⁹²

- **Right to give views on prosecution and have views considered seriously**:²⁹³ the Director of Prosecutions must ensure that the victim is given an opportunity to provide his or her views on the following, if it is reasonably possible to do so without unreasonably delaying or prejudicing an investigation or prosecution, and to having those views considered seriously:
  a. a decision on whether to lay a charge;
  b. the use of alternative measures or restorative justice programs to deal with a person who is alleged to have committed the offence, or the accused person;
  c. staying the charge against the accused person;
  d. if the accused person is in custody, an application for release by the person;
  e. any agreement relating to a disposition of the charge;
  f. any position taken by the Crown in respect of sentencing, if the accused person is found guilty;
  g. a decision on whether to appeal, or the position of the Crown respecting any appeal by the accused person.

- **Right to discuss the release of the offender**:²⁹⁴ at the victim’s request, the Commissioner of Correctional Services must ensure that any release or unescorted absence of the offender are discussed with the victim and the victim’s opinions are considered before the release or absence occurs.

- **Right to request a meeting with the offender**:²⁹⁵ a victim who wishes to explain to the offender the impact of the offence on the victim and their family may request the Commissioner of Correctional Services to arrange a meeting of the victim with the offender. The Commissioner must arrange a meeting if he or she is satisfied that it is in the public interest to do so.

5. **Right to free and independent legal counsel** when access to personal information about the victim is sought by a third party.²⁹⁶

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²⁹² Manitoba Victims’ Bill of Rights, s.4.
²⁹³ Manitoba Victims’ Bill of Rights, s.14.
²⁹⁴ Manitoba Victims’ Bill of Rights, s.19(3).
²⁹⁵ Manitoba Victims’ Bill of Rights, s.21(1).
²⁹⁶ Manitoba Victims’ Bill of Rights, s.25.
6. **Right to privacy**: if a victim requests confidentiality, the agency investigating the offence must ensure that the residential address, telephone number and place of employment of the victim and members of his or her family are not disclosed by the agency, except to the extent is required by law or required to ensure the safety and security of any person.

7. **Right to return of property** promptly when it is no longer needed as evidence for an investigation or prosecution.

8. **Right to reparation**
   - Right to restitution for loss, damage or bodily harm.
   - Right to compensation for injury.

9. **Right to accountability**: right to complain to the Director of Victims Services where a victim believes their rights have been breached and to:
   1. Have the complaint investigated by the Director, in consultation with justice officials.
   2. Receive a report from the Director of the investigation which includes the steps taken to address the victim’s concerns and any systemic concerns raised by the complaint; and
   3. Comment on the report.
   4. Make a complaint to the Ombudsman regarding the Director of Victims Services’ investigation or report and to have that complaint investigated.

4. **NEW ZEALAND**

   Like many of the jurisdictions discussed in this report, initial recognition of victims in New Zealand came in the 1960s via attempts to compensate crime victims for personal injury through a statutory state-funded compensation scheme. Following advocacy by the women’s movement, in the 1970s the first women’s refuges for domestic violence victims and rape crisis services were established. Then in the mid-1980s, as co-sponsor of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the New Zealand government faced demands for more concerted action on victims’ rights at home. This resulted in the Victims of Offences Act 1987, which granted victims’ rights to health and welfare services, legal advice and assistance and to make a victim impact statement.

   In 2009, the Ministry of Justice commenced a review of victims’ rights and access to support services. In response to the review, the Government approved a package of statutory and operational reforms. The subsequent **Victims of Crime Reform Bill** which finally came into force in May 2014 as four amendment acts designed to

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297 Manitoba Victims' Bill of Rights, s.6.
298 Manitoba Victims' Bill of Rights, s.9.
299 Manitoba Victims' Bill of Rights, s.15.
300 Manitoba Victims' Bill of Rights, Part 5, ss.45-68
301 Manitoba Victims' Bill of Rights, s.28(1)-(5).
302 Manitoba Victims' Bill of Rights, s.30.
strengthen existing legislation to better provide for victims of crime, widen the rights of victims of serious offences, expand victim involvement in the criminal justice process and ensure victims are better informed of their rights.\textsuperscript{304}

**Victims’ Rights Act and Victims’ Code**

The Victims’ Rights Act 2002 (as amended) sets out rights of victims of crime and principles to guide the treatment of victims.

The Act defines a “victim of crime” as a person who:

- has had a crime committed against them;
- has suffered physical harm because of a crime committed by someone;
- has had property taken or damaged because of a crime committed by someone;
- is a parent or legal guardian of a victim who is a child or young person, as long as the parent or legal guardian has not been charged with the crime; or
- is an immediate family member of someone who dies, or can no longer take care of themselves because of a crime committed by someone.\textsuperscript{305}

The 2014 amendment to the 2002 Act required the Ministry of Justice to publish a Victims’ Code. *The Victims’ Code of Rights* was published in September 2015.\textsuperscript{306} The Code sets out the principles and entitlements in the Victims’ Rights Act. Part 1 of the Code sets out the 8 key principles for the treatment of victims by any person, organisation or government agency that provides services to victims. Part 2 sets out 11 rights for victims of crime in the criminal justice and youth justice systems. Part 3 explains how victims can make a complaint if they believe their rights have been breached.

**Part 1 Principles guiding treatment of victims**

The 8 principles guiding the treatment of victims by any person, organisation or government agency that provides services to victims are:

- **Principle 1**: Safety of victims and their families
- **Principle 2**: Respect for cultural, religious, ethnic or social needs, values and beliefs
- **Principle 3**: Dignity and privacy
- **Principle 4**: Fair treatment
- **Principle 5**: Informed choice for victims through honest and accurate provision of information
- **Principle 6**: Quality and culturally appropriate services
- **Principle 7**: Honest and clear communication
- **Principle 8**: How to give feedback or make a complaint


\textsuperscript{305} Victims’ Rights Act 2002 (as amended), s.4.

Part 2 Victims’ Rights
The victims’ rights only apply to victims of a crime that has been reported to the police or is before the courts. Rights 1-6 apply to all victims of crime. Rights 7-10 apply only to victims of certain serious crimes and Right 11 applies only to victims of a crime committed by a child or young person.

Rights of all victims of crimes
- **Right 1**: To information about programmes, remedies and services
- **Right 2**: To information about investigation and criminal proceedings
- **Right 3**: To make a victim impact statement
- **Right 4**: To express views on offender’s application for name suppression
- **Right 5**: To speak official languages in court
- **Right 6**: To return of property held by the state

Additional rights of victims of serious crimes
- **Right 7**: To be informed about bail and to express their views
- **Right 8**: To information and notification after sentencing
- **Right 9**: To have a representative receive notifications about the offender on your behalf
- **Right 10**: To make a submission relating to parole or extended supervision orders

Additional right of victims of youth offending
- **Right 11**: Family group conferences

Significantly, the New Zealand Code provides for no rights for victims to participate in criminal proceedings except in relation to ‘expressing views’ on the offender’s application for bail and to make a victim impact statement.

Part 3 Right to make a complaint
If a victim believes a government agency or victims’ service provider has breached their rights or not fully met their responsibilities under the Code, under Part 3 of the Code a victim can make a complaint to the agency or service provider. If the victim is dissatisfied with the agency’s internal review of the complaint, the victim can complain to the Office of the Ombudsman, the Independent Police Conduct Authority, the Privacy Commissioner, the Parole Board or the Judicial Conduct Commissioner. New Zealand has no specific Commissioner for Victims.

Criminal justice system reform
The Ministry of Justice established a Safe and Effective Justice Programme in 2018 to deliver advice to the Government on how to create a more effective criminal justice system. The Safe and Effective Justice Programme Advisory Group – Te Uepū Hāpai i te Ora (the Advisory Group) was appointed in July 2018 to engage in a public conversation about that people want from their criminal justice system and to canvass views on how to improve the criminal justice system.307

The Advisory Group published two reports. The interim report in July 2019 shared reflections on conversations and submissions received by the Advisory group from New Zealanders about the criminal justice system. The Advisory Group highlighted the following major themes emerging from their conversations: 308

- Too many people who have been harmed by crime feel unheard, misunderstood and re-victimised.
- The number of Māori in the criminal justice system is a crisis.
- Violence is an enormous problem, particularly for families and children.
- Formal justice processes fail us too often: the justice system is too focused on punishment and neglects prevention, rehabilitation, reconciliation and repair of the harm done by crime.
- Individuals, families and whānau feel unsupported and disempowered by the justice system, and the ability of iwi, hapū, communities, NGOs and others to provide support is constrained by the siloed nature of government structures and funding arrangements.
- People experiencing mental distress lack the support they need. 309

The Advisory Group’s final report set out wide-ranging recommendations for a fundamental reshaping of the criminal justice system. 310 We summarise a number of the most significant recommendations below.

**Recommendation 2 By Māori for Māori:** that the Government
- establishes a Mana Ōrite (equal power) governance model under which Māori and Crown agencies share in justice sector decision-making;
- transfers power and resources to Māori communities so they can design and develop Māori-led responses to offending, and to tamariki and whānau wellbeing;
- makes tikanga Māori and te ao Māori values central to the operation of the justice system.

**Recommendation 5 People who are harmed:**
- everyone who is harmed by criminal offending has access to an independent person who can guide and advocate for them during their contact with the justice system and other services for as long as needed;
- support for people who are harmed should be strengthened with better access to a wider range of therapeutic services, and more financial support for victims, families and whānau;
- victims’ rights should be strengthened, including rights to have input into criminal justice decisions and rights to privacy;
- streamlining of protection order and name suppression processes, changes to courtroom layout and review of reparations.

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**Recommendation 12 Justice processes:** that criminal investigation and court procedures be redesigned to make them consistent with transformative justice values and principles. This means ensuring everyone is treated fairly and equitably, with humanity, dignity, respect and compassion; those who cause harm are held accountable; and restoration of mana to all is supported. The following interim reforms were recommended:

- review youth, specialist and therapeutic courts and applying learnings across the court system;
- review laws and guidelines for sentencing, the pre-trial period (whether in custody or on bail) and post-release reintegration (parole), to ensure consistency with our values and principles;
- strengthen and increase access to alternative justice processes. These changes will lead to a positive and fair justice system which prevents further harm wherever possible.

In his response to the reports in December 2019, the Minister of Justice indicated his commitment to strengthening the role of victims in the criminal justice system:

> “It is possible to do so without compromising the important protections we have for the innocent… We recently changed the law to improve how victims of sexual violence give evidence in court and how they are treated at trial. The aim is to make the experience of giving evidence and being the subject of questioning less traumatising. But there is more we can do for victims generally, so that all victims are given due consideration throughout. We are committed to making these changes over time.”

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5. UNITED STATES OF AMERICA

Criminal jurisdiction is divided in the United States between individual states and the federal level. Federal courts deal with crimes extending across state borders. The US Code is the substantive criminal statute at the federal level, while each state can enact its own criminal provisions. The US Constitution Article 3(2) provides that federal courts have the power to adjudicate “all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority” while State courts hear cases relating to the interests of the individual state.

At the federal level, while there has been no amendment to the U.S. Constitution granting rights to crime victims,\(^{312}\) the Crime Victims’ Rights Act, enacted as part of the Justice for All Act 2004, establishes the rights of crime victims in federal criminal justice proceedings. At State level, nearly two-thirds of states have adopted amendments to their state constitutions guaranteeing rights to victims of crime.

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312 In 1982, President Ronald Reagan’s Task Force on Victims of Crime recommended the amendment of the U.S. Constitution to incorporate victims’ rights and a number of subsequent Presidents have also called for such an amendment, but there has been no such amendment to date.
Every U.S. state, the District of Columbia and several territories have enacted crime victims' rights laws within their statutory codes.

I. VICTIMS’ RIGHTS AT THE FEDERAL LEVEL

The victims of federal crimes have statutory rights in federal criminal proceedings. A crime victim is defined as:

“a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights... but in no event shall the defendant be named as such guardian or representative.”

Crime Victims’ Rights Act

The Crime Victims’ Rights Act (18 U.S.C. section 3771) created the following rights for victims of crime in federal criminal cases:

1. The right to be protection from the accused.
2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
3. The right not to be excluded from any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
5. The reasonable right to confer with the attorney for the Government in the case. The right recognizes that although prosecutors may not be able to

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315 18 U.S.C. s.3771(e).


317 Public court proceedings include arraignments, bail hearings, hearings on pretrial motions, plea proceedings, motions to quash subpoenas, trials, sentencing hearings, appellate arguments and post-judgment hearings.

318 18 U.S.C. s.3771(a) does not state whether the victim’s right to be heard should be exercised in writing or orally. Senator Kyl, a sponsor of the Justice For All Act stated, “[t]he very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if the court determined that written, rather than oral communication, could generally satisfy this right”: US Attorney's Office, District of New Hampshire https://www.justice.gov/usao-nh/programs/victim-witness-assistance-program/justice-all-act-2004.
share non-public information, they should be reasonably available to consult with victims about major case decisions.

6. The right to full and timely restitution as provided in law.

7. The right to proceedings free from unreasonable delay.

8. The right to be treated with fairness and with respect for the victim's dignity and privacy.

9. The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.\(^\text{319}\)

10. The right to be informed of their rights and the services provided to victims\(^\text{320}\) and to be provided with contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.\(^\text{321}\)

**Enforcement of rights**

Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime are required to make their “best efforts” to ensure that crime victims are notified of, and accorded, their rights.\(^\text{322}\)

Crime victims have a right to consult with a lawyer with respect to their rights and may assert their rights in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall decide any motion asserting a victim's right immediately. If the district court denies the relief sought by the victim, the victim may petition the court of appeals for a writ of mandamus.\(^\text{323}\)

However, the Crime Victims' Rights Act does not provide a victim with a cause of action for damages or create, enlarge or imply any duty or obligation to any victim or other person for the breach of which the US or any of its officers or employees could be held liable in damages. The Act does not impair the prosecutorial discretion of the Attorney General or any officer under his direction.\(^\text{324}\) Victims can make an administrative complaint to the Office of the Victims' Rights Ombudsman if they believe that an employee of the US Attorney's Office has failed to provide them with one or more of their rights.

**Victims’ entitlement to services**

Under U.S. federal law, crime victims are also entitled to a range of services. The head of each department and agency of the United States engaged in the detection,


\(^{320}\) Services set out in s.503(c) of the Victims’ Rights and restitution Act 1990 34 U.S.C. 20141(c) (formerly cited as 42 U.S.C. 10607(c).

\(^{321}\) Ibid.

\(^{322}\) 18 U.S.C. s.3771(c)(1).

\(^{323}\) 18 U.S.C. s.3771(d)(3).

\(^{324}\) 18 U.S.C. s.3771(d)(6).
investigation, or prosecution of crime is required to designate persons responsible for identifying victims of crime and providing the following services: 325

1. Inform a victim of the place where the victim may receive emergency medical and social services; any compensation or relief which the victim is entitled to and how to obtain such relief; the public and private programmes available to provide counselling, treatment, and other support to the victim and assistance to contact persons responsible for providing the relief and services outlined above.

2. Arrange for a victim to receive reasonable protection from a suspected offender and persons acting with or on behalf of the suspected offender.

3. During the investigation and prosecution of a crime, provide a victim the earliest possible notice of:
   a. the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;
   b. the arrest of a suspected offender;
   c. the filing of charges against a suspected offender;
   d. the scheduling of each court proceeding that the witness is either required to attend or entitled to attend;
   e. the release or detention status of an offender or suspected offender;
   f. the acceptance of a plea of guilty or a no contest plea326 or the rendering of a verdict after trial; and
   g. the sentence imposed on an offender, including the date on which the offender will be eligible for parole.

4. During court proceedings, ensure that a victim is provided a waiting area removed from and out of the sight and hearing of the defendant and defence witnesses.

5. After trial, provide a victim the earliest possible notice of:
   a. the scheduling of a parole hearing for the offender;
   b. the escape, work release, furlough or any other form of release from custody of the offender; and
   c. the death of the offender, if the offender dies while in custody.

6. At all times, ensure that any property of a victim that is being held for evidentiary purposes is maintained in good condition and returned to the victim as soon as it is no longer needed for evidentiary purposes.

7. Provide the victim with general information regarding the corrections process, including information about work release, furlough, probation and eligibility of the offender for each.

325 34 U.S.C. section 20141(a) and (c).
326 A no contest plea means the defendant does not accept or deny responsibility for the charges but agrees to accept punishment.
Again, there is no cause of action or defence in favour of any person arising out of the failure to provide a victim with the services set out above.\textsuperscript{327}

**Specific rights of victims of federal sexual violence crimes**

A victim of a federal sexual violence crime has the following additional rights:

- the right to payment of a physical examination which an investigating officer determines is necessary or useful for evidentiary purposes.\textsuperscript{328}
- The right to notice and payment for testing and counselling for sexually transmitted diseases.\textsuperscript{329}
- The right of victims of a federal crime of violence or sexual abuse to speak at the sentencing of the offender.\textsuperscript{330}
- The right to mandatory restitution where practicable for victims of federal domestic violence crimes, sexual abuse, sexual exploitation and other abuse of children offences and telemarketing fraud.\textsuperscript{331}

**II. VICTIMS’ RIGHTS AT STATE LEVEL**

In the United States, the majority of crimes are prosecuted under the law of the state in which the crime occurred. Every U.S. state, the District of Columbia and several territories have enacted crime victims’ rights laws within their statutory codes and nearly two-thirds of states have adopted amendments to their state constitutions guaranteeing rights to victims of crime. Specific, enumerated rights for the victim to attend or be heard at release and parole proceedings are less common. Less than half of the states grant victims both the right to be present and the right to be heard in release proceedings.

The State of California has some of the most progressive legislation on victims’ rights in the United States. We consider these below.

**CASE STUDY: STATE OF CALIFORNIA**

**Constitution of California**

The Constitution of California specifically recognises victims of crime in its Declaration of Rights:

> "[c]riminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of grave state-wide concern. Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California. The enactment of comprehensive provisions and laws ensuring a bill of rights for

\begin{footnotes}
\footnotetext{327}{42 U.S.C. section 20141(d).}
\footnotetext{328}{34 U.S.C. s.20141(c)(7).}
\footnotetext{329}{34 U.S.C. s.20141(c)(7).}
\footnotetext{331}{18 U.S.C. s.3663A.}
\end{footnotes}
victims of crime, including safeguards in the criminal justice system fully protecting those rights and ensuring that crime victims are treated with respect and dignity, is a matter of high public importance...

(3) The rights of victims pervade the criminal justice system. These rights include personally held and enforceable rights…” 332

The Constitution defines 16 personal, enforceable rights of victims of crime: 333

1. To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.
2. To be reasonably protected from the defendant.
3. To have the safety of the victim and the victim’s family considered in bail and release conditions for the defendant.
4. To prevent the disclosure of confidential information or records to the defendant which could be used to locate or harass the victim or the victim’s family or which disclose confidential communications made in the course of medical or counselling treatment, or which are otherwise privileged or confidential by law.
5. To refuse an interview or discovery request by the defendant or to set reasonable conditions on the conduct of any interview.
6. To reasonably confer with the prosecution, upon request, regarding the arrest of the defendant, charges filed, determination whether to extradite, and to be notified of any pretrial disposition.
7. To be present at all public trial proceedings and parole proceedings.
8. To be heard, upon request, at any proceeding involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.
9. To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.
10. To provide information concerning the impact of the offence on the victim and the victim’s family and any sentencing recommendations before the sentencing of the defendant.
11. To receive, upon request, the pre-sentence report when available to the defendant, except for those portions made confidential by law.
12. To be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant, and the release of or the escape by the defendant from custody.
13. To restitution from the convicted offender for losses suffered.
14. To the prompt return of property when no longer needed as evidence.
15. To be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.

332 California Constitution, Article 1, Declaration of Rights, s.28(a)(1)-(3).
333 California Constitution, Article 1, s.28(b)(1)-(16).
16. To have the safety of the victim, the victim’s family, and the general public considered before any parole decision is made.

17. To be informed of the rights of a victim [as set out above].

The victim, the victim’s lawyer, a lawful representative of the victim or the prosecuting attorney at the victim’s request may enforce the victim’s rights in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request. However, the victim does not have any cause of action for compensation or damages against the State or agent of the State as a result of these legal rights.334

California Penal Code

The California Penal Code also recognizes the rights of victims and witnesses of crime. The Code defines a ‘victim’ as “a person against whom a crime has been committed”. The Code states:

“In recognition of the civil and moral duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the Legislature declares its intent, in the enactment of this title, to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity. It is the further intent that the rights enumerated in Section 679.02 relating to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.”335

The Code sets out the following statutory rights of victims and witnesses of crimes:336

1. To be notified if a court proceeding in which the victim is a witness will not proceed as scheduled.
2. Upon request, to be informed by the prosecutor of the outcome of the case.
3. To be notified of all sentencing proceedings and the right of the victim to appear and express their views and to have those views preserved by audio or video means or to have the court consider the victim’s statements.
4. Upon request, to be notified of any parole eligibility hearing and of the right to appear, either personally or by other means, to reasonably express the victim’s views, and to have his or her statements considered.
5. Upon request, to be notified of an offender’s placement in a re-entry or work furlough program, or notified of the inmate’s escape.
6. To be notified that he or she may be entitled to witness fees and mileage.
7. To be provided with information concerning the victim’s right to civil recovery and the opportunity to be compensated from the Restitution Fund.
8. To the prompt return of the victim’s property when it is no longer needed as evidence.
9. To a prompt hearing of the criminal action.

334 California Constitution, Article 1, s.28(c).
335 California Penal Code, Title 17, Rights of Victims and Witnesses of Crime, s.679.
336 California Penal Code, s.679.02(a)(1)-(14).
10. To be notified if the offender is placed on parole.
11. Upon request, to be notified of any pretrial disposition on the case.
12. To be notified by the district attorney’s office of the right to request and receive notice if the defendant is convicted of any sexual offences.

In addition to these rights, victims of sexual assault and domestic violence have the right to a sexual assault counsellor or domestic violence counsellor and a support person to be present during any interviews by police or prosecutors.\(^{337}\) Victims of sexual assault also have defined rights in relation to the handling, retention and timely DNA testing of rape kit evidence or other crime scene evidence.\(^{338}\)

\(^{337}\) California Penal Code, s.679.04(a) and s.679.05(a).
\(^{338}\) California Penal Code, s.680, *Sexual Assault Victims’ DNA Bill of Rights.*
Table 6: Comparative review of the rights of victims of crime in five adversarial criminal justice systems

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1. Interaction rights

- Fair & dignified treatment

2. Information rights

- Info on criminal justice process
- Info on victim’s rights and remedies
- Updates on progress of investigation
- Info on alleged offender
- Updates on decisions to charge
- Details of court hearings
- Outcome of proceedings

3. Support rights

- Info about health and welfare services
- Access to victim/ witness support services

4. Protective and privacy rights

- Victim’s security needs to be considered
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5. Procedural rights

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<td>Right to review of police/prosecutor decision</td>
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<td>Right to be present during court hearings</td>
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<td>Witness intermediaries/testimonial aids</td>
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6. Substantive participatory rights

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<td>Federal</td>
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<tr>
<td>Right to make victim impact statement</td>
<td>●</td>
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<tr>
<td>Victim’s views taken into account by prosecutor</td>
<td>●</td>
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<td>Right to exercise rights through a representative</td>
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<td>Right to assert rights in court through lawyer</td>
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<td>Right to be heard in release, plea, sentencing + parole hearings</td>
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<tr>
<td>Right to be heard in disclosure applications</td>
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Sexual offences only
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<td>Right to legal representation in disclosure applications</td>
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<td>Right to discuss release of offender</td>
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<td>Only victims of serious crimes</td>
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<td>Right to request meeting with offender</td>
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<td>Right to request prosecution consider appeal</td>
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<td>Right to make submissions to parole board</td>
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<td>Only victims of serious crimes</td>
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**Reparative rights**

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<td>Claim for compensation</td>
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<td>Reparation from the offender</td>
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**Complaint mechanism for victims**

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<td>Internal agency complaint mechanism</td>
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<td>Remedy for breach of rights</td>
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Can enforce rights in trial court
Analysis

Our comparative review of the rights of victims of crime in the adversarial criminal justice systems of England & Wales, Australia, Canada, New Zealand and the United States identifies a number of discernible trends and findings:

1. All jurisdictions recognise the interests of victims in the criminal trial process and their right to fair and dignified treatment by the criminal justice system.

2. **All jurisdictions** except England & Wales have a victims’ charter or law guaranteeing varying levels of rights for victims of crime. Victims of crime in England and Wales are currently accorded rights to information and support and procedural-level rights in the revised Victims’ Code.

3. All jurisdictions accord victims similar **service level rights**, including access to information, support services and a minimum level of fair treatment.

4. All jurisdictions require criminal justice services engaged in the investigation or prosecution of crime, or providing support to victims, to ensure that crime victims are notified of, and accorded, their rights.

5. Whilst all jurisdictions grant victims the procedural right to be present during criminal trial proceedings, there are marked differences in the level of substantive participatory rights accorded to victims of crime.

6. The majority of jurisdictions recognise crime victims' rights to privacy and protection. All jurisdictions provide victims of sexual offences with a number of additional rights.

7. While providing victims with some of the most developed procedural rights, including the rights of victims to witness intermediaries, to make a victim impact statement and to request a review of police and prosecution decisions, **England & Wales is far behind in providing substantive participatory rights to victims of crime**. These rights entitle victims to make submissions to the police, prosecutors, the court and parole bodies, and to have those submissions taken into account with a view to influencing the outcome of decision-making or criminal proceedings.

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339 Australia has no federal Victims’ Charter or Bill of Rights, but each state and territory has its own charter or declaration of rights to provide support to victims of crime.
8. The State of California has some of the most progressive legislation on victims’ rights, with the Californian Constitution defining 16 personal, enforceable rights of victims of crime, including the right to be heard at any proceeding involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.

9. The majority of jurisdictions have established some form of administrative complaints mechanisms for victims to make complaints of breaches or denials of their rights. However, only Manitoba and California have provided victims with enforceable legal remedies if their rights are breached.
4 – Additional rights and protections for specific groups of victims

Summary

- Part 4 examines the special protections and rights that should be afforded to specific groups of victims, including victims of sexual offences, childhood sexual abuse and victims of intimate partner or family violence through consideration of three national reviews and inquiries recently conducted in the United Kingdom and Australia.

- In April 2018, the Northern Ireland Criminal Justice Board commissioned a review of the law and procedure in prosecutions of serious sexual offences. The purpose of the Review was to determine whether current arrangements deliver the best outcomes for victims, defendants and justice, and to make recommendations for improvements. The former Lord Justice of Appeal, the Right Honourable Sir John Gillen, led the review. His 2019 report made a total of 253 recommendations for reform.

- In January 2013, the Australian Commonwealth Royal Commission was established to conduct a five-year examination into the criminal justice responses to child sexual abuse in institutions. The Commission’s final report was published in 17 volumes and contained 409 recommendations. Three reports were published earlier, including a specific report on criminal justice in 2017. The Commission’s Criminal Justice Report 2017 contained 85 recommendations aimed at reforming the Australian criminal justice system’s response to child sexual abuse, including institutional child sexual abuse.

- In February 2015, the Australian State of Victoria Royal Commission on Family Violence was established following a series of family violence-related deaths. The Commission identified key limitations relating to responses to victims and treatment of victims in the justice system. The Commission’s 2016 report set out primary priorities for reform and the principles that should underpin future strategies, policies and programs aimed at dealing with family violence.

Introduction

Our research relates to all victims of crime but recognises that certain groups of victims suffer a particular imbalance in their rights and how those rights are applied in criminal justice processes. Over recent years, criminal justice responses to victims of domestic abuse, rape and child sexual abuse and exploitation in England & Wales have been the subject of particularly fierce criticism, as we discussed in chapter 3. Part 4 considers the special protections and rights that should be afforded to specific groups of victims, including victims of sexual offences, childhood sexual abuse and victims of intimate partner or family violence through consideration of three national reviews and inquiries recently conducted in the United Kingdom and Australia.

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A. UNITED KINGDOM – NORTHERN IRELAND

Gillen Review into the law and procedures in serious sexual offences in Northern Ireland

In April 2018, the Northern Ireland Criminal Justice Board commissioned a review of the law and procedure in prosecutions of serious sexual offences. For the purposes of the review, serious sexual offences were defined as those offences tried in the Crown Court on indictment. The Review was led by a former Lord Justice of Appeal, the Right Honourable Sir John Gillen, and operated under the following terms of reference:

“The Review will investigate the law and procedure covering the prosecution of serious sexual offences in Northern Ireland. In conducting its work, the Review will have regard to the practice and procedure for progressing such cases in other jurisdictions.

The purpose of the Review is to determine whether current arrangements deliver the best outcomes for victims, defendants and justice, and to make recommendations for improvements.

The Review will consider the ‘victim’s journey’, from the initial complaint through to the point of court disposal. It will take appropriate account of the views of individual victims and victims’ organisations, legal practitioners, and the criminal justice organisations involved in the conduct of such cases.”

In the preface to his report, Sir John noted that public concern over issues raised by sexual offending “has never been higher. The problems we face in this jurisdiction are not unique. Interestingly, the demand for a review of the law and procedure of serious sexual crimes and ancillary issues has surfaced for some time now not only in Northern Ireland but, as our research has shown, in neighbouring jurisdictions and countries worldwide.”

The scope of the Review included the following areas:

- disclosure of evidence;
- support for complainants, victims and witnesses — from the time of the initial complaint through to post-trial support;
- measures to ensure the anonymity of the complainant;
- the arguments for defendant anonymity;
- pre-recorded cross-examination;
- the impact of social media on the conduct of court hearings;
- provisions for restrictions on reporting; and
- restrictions on public attendance at court hearings.

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Guiding principles

Sir John set out four beliefs central to his review and recommendations:344

1. The degree of under-reporting of these crimes and the high attrition rate are unacceptable in a society that lays claim to the rule of law. The criminal justice system in Northern Ireland must provide an outlet for such persons.

2. The pathway from initial complaint through to trial is too steep, too long and too unwieldy for both complainant and accused. It needs urgent reform.

3. The current trial process is too daunting and uncompromising for complainants and needs radical revision.

4. Many of the problems in the present law and procedures adversely affecting both complainants and accused spring from the culture within which we all currently live.

International human rights standards

Serious sexual offences engage a range of rights under international standards, including the prohibition on torture, inhuman and degrading treatment and the right to private and family life (including the inherent dignity of the person). The Gillen Review Report summarises the key human rights instruments defining the obligations of States in responding to serious sexual offences:345

- **The Council for Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention)**346 applies to all forms of violence against women, in particular gender-based violence. The Convention states that measures to provide protection and support to victims should be made with the aim of preventing secondary victimisation.347

- **The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention)** ratified by the UK in 2018, requires States to adopt specific legislation and take measures to prevent sexual violence, to protect child victims, “ensuring that the investigators and criminal proceedings do not aggregate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate,”348 and to prosecute perpetrators.

- Where an allegation of torture, inhuman and degrading treatment is made, there is a requirement for an effective investigation: such an investigation must be prompt, impartial, have hierarchical independence from those implicated, provide sufficient involvement of next of kin and have the ability to hold those responsible to account.349

- Victims whose rights have been violated have the right to a remedy. The UN Human Rights Committee has stated “such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children.”350

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345 Gillen Review Report, pp.51-54, para.s 1.3-1.17.
346 The UK Government has signed but not ratified the Istanbul Convention.
347 Istanbul Convention, Article 18(3).
349 See, for example, Jordan v the United Kingdom (2001) ECHR 327.
350 UN Human Rights Committee (29 March 2004), General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para.15.
• States must take the necessary measures to avoid “re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation”. 351

KEY RECOMMENDATIONS

Sir John’s final report was published in May 2019. He made a total of 253 recommendations but highlighted 16 key recommendations have emerged “around which perhaps the others revolve.” 352 We discuss the seminal recommendations relevant to victims of serious sexual offences below.

Restricted access to trials of serious sexual offences

Sir John stated that in order to challenge the under-reporting, high dropout rates and an unacceptably daunting trial process, the arguments in favour of restricted access measures “carry convincing weight” provided the press, as the eyes and ears of the public, are admitted. He noted that the public response to the Preliminary Report in their online survey was overwhelmingly in favour of this restriction. 353

Recommendation 1
Access of the public to trials involving serious sexual offences to be largely confined to close family members of the complainant and the defendant and such others as the judge shall permit. Access for bona fide press members should be maintained as the eyes and ears of the public.

Improving the treatment of victims in the criminal justice process

Sir John recognised that attempting to navigate a system designed for police and professional lawyers at probably the most vulnerable point in their lives “can prove insuperable” for victims of serious sexual offences: “For those who do complain to police, the path from complaint is harrowing and the attrition rate is high.” 354

The report made 18 specific recommendations to improve the treatment of victims of serious sexual offences in the criminal justice process, noting his intention that these act as “steps to reduce the trauma of this process”. 355 We set out below those recommendations which have application beyond Northern Ireland.

Recommendations to improve the experience of victims of serious sexual offences356

All publicly funded advocates should have to undergo specialist training on working with children and vulnerable victims and witnesses before being allowed to take on serious sexual offence cases.

The Prosecution Service should make use of counsel who are considered to have the most appropriate experience and skills for handling the complex and sensitive nature of sexual offence cases, particularly in dealing with victims who may have significant vulnerabilities or children or young people.

The Department of Justice should set up a complainants’ information service to ensure better information and support. That service should offer a one-stop shop, enabling victims to submit

351 UN Committee against Torture CAT/C/GC/3 (13 December 2012), General Comment 3 on the implementation of Article 14 by States Parties (CAT GC 3).
352 Gillen Review Report, p.29.
353 Gillen Review Report, p.29.
355 Gillen Review Report, Executive Summary, p.3.
complaints and feedback about their experience. Complainants should be enabled to track the progress of their case throughout the criminal justice system.

All Crown Court buildings, no matter how old, should be given separate waiting areas and separate entrances for complainants in serious sexual offences. Remote Evidence Centres should be made available in serious sexual offence cases. All vulnerable victims and witnesses should be given the opportunity to give evidence remotely from the court building.

Availability of victim personal statements should be more carefully explained to victims. Judges should carefully scrutinise at preliminary hearings the admissibility of cross-examination on the subject of criminal compensation claims made by complainants. Judges should be more interventionist to ensure complainants and other witnesses are treated in a courteous and dignified manner.

Complainants, at the end of their role in the criminal justice process in serious sexual offences, should be invited in all cases to give feedback to the Prosecution Service of their experience of the system.

Prosecuting Counsel, at the end of their role in unsuccessful prosecutions for serious sexual offences in court, should be requested in all such cases to give feedback to the Prosecution Service on the reasons for the acquittal and the trial process itself.

The Court Observer’s Project should be carefully analysed and future developments considered as a means of building public confidence in the criminal justice system. Such ‘Scrutiny Panels’ should be extended to allow members of the local community to examine details of anonymised cases.

Pre-recorded cross-examination of victims

Sir John considered that pre-recorded cross-examination, away from the courtroom, should be available for children and vulnerable complainants initially, moving to all complainants over time.357

**Recommendation 2**

Introduction of early pre-recorded cross-examination, initially of children and vulnerable adults, to be conducted away from the court setting. In time, consideration should be given to extending this to include all complainants in serious sexual offences.358

Separate legal representation for victims

Sir John endorsed publicly funded provision of legal representation for all complainants for the following: 359

- To explain the complexities of, and the legal developments occurring in, the legal process from the time the matter is first reported to the police up until the commencement of the trial although not during the trial.”
- To oppose cross-examination on previous sexual history.
- To oppose disclosure of personal medical records.

**Recommendation 3**

A measure of publicly funded independent legal representation should be offered to complainants from the outset up to but not including the trial.360

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357 Gillen Review Report, Executive Summary, p.12.
358 Sir John made 18 further detailed recommendations relating to this key recommendation in Chapter 4 of his report.
360 Sir John made 5 further specific recommendations in Chapter 5 of the report.
Measures to combat myths surrounding serious sexual offences

Sir John supported introducing educational material for jury and beyond this, a well-funding public and schools’ campaign to debunk myths and address the consequences.

**Recommendation 4**
Measures should be introduced at the outset of the trial to combat rape myths for example, jury educational material, a short video and written judicial directions. In the wider context there is a need for an extensive public awareness and school education campaign.\(^{361}\)

Restricting cross-examination on a victim’s previous sexual history

Sir John made clear his commitment to enforcing the law prohibiting cross-examination of a victim’s sexual history\(^{362}\) and made a series of recommendations intended to encourage “a more robust judicial attitude to restricting cross-examination on previous sexual history”\(^{363}\) including the right for the complainant to be legally represented.

**Recommendation 6**
A more robust judicial attitude and case management approach to prevent improper cross-examination about previous sexual history.\(^{364}\)

Reform of the disclosure process

Sir John noted that disclosure was fundamental to a fair trial but that the current system is outmoded, inadequate and inefficient. He gave the stark warning,

\[\text{If the seemingly immutable problem of disclosure is not addressed in Northern Ireland, delay in the system will remain endemic, innocent people may be convicted, complainants may be deterred and justice will be irreparably damaged...}\] \(^{365}\)

Sir John drew heavily on the report of the Attorney General of England and Wales on the effectiveness of disclosure in the criminal justice system\(^{366}\) in developing his recommendations.

**Recommendation 8**
A restructuring of the disclosure process with greater and earlier trained [police] specialists, prosecutorial guidance from the [Prosecution Service] from the outset, early defence engagement, firm time-limited and early judicial management, and resource-led development of relevant digital technology.\(^{367}\)

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\(^{361}\) Sir John made 12 further specific recommendations in Chapter 6 of the report.

\(^{362}\) Subject to the exemptions given under the Criminal Evidence (Northern Ireland) Order 1999.

\(^{363}\) Gillen Review Report, Executive Summary, p.16.

\(^{364}\) Sir John made a further 16 specific recommendations in Chapter 8 of the report.

\(^{365}\) Gillen Review Report, Executive Summary, p.18.

\(^{366}\) Attorney General’s Office (November 2018), Review of the efficiency and effectiveness of disclosure in the criminal justice system.

\(^{367}\) Sir John made a further 24 specific recommendations relating to this key recommendation in Chapter 10 of the report.
Responding to marginalised victims

The Gillen Review noted that the law and procedures in serious sexual offences must apply fairly to all our citizens but that there was a current lack of research on the prevalence, nature and experiences of serious sexual offences amongst certain groups, including Black, Asian and minority ethnic groups; those with physical, sensory and learning disabilities or mental ill health; LGBT+ persons; older people; Traveller communities and sex workers.\(^{368}\)

**Recommendation 11**

The Department of Justice should commission individual research projects to gather knowledge and data in Northern Ireland on the prevalence, extent, nature and experiences of serious sexual offences. This should include identifying how current law and procedures impact on black, Asian and minority ethnic groups, immigrants, LGBT+ groups, Traveller communities, sex workers, older people, males and those people with a physical, sensory and learning disability or mental ill health.\(^{369}\)

Responding to child victims

The Gillen Review identified a range of areas of “weaknesses in the system” (P23) that required “new and creative procedures.”\(^{370}\) Sir John set out a raft of recommendations to address each.

**Recommendation 12**

Introduction of a radical departure from the traditional style of advocacy when dealing with children and vulnerable adults in order to address the potential traumatisation of children and vulnerable adults. In particular the Department of Justice should give serious consideration to introducing the Barnahus system of child investigation and treatment. New advocacy skills are required by the legal professions to match this new culture.\(^{371}\)

Measures complementing the criminal justice system

Sir John supported the concept of restorative practice and alternative provision of facilitator services as an additional aspect within the criminal justice system but emphasised that this should only be invoked,

“in those cases where complainants have specifically requested to engage this process and, of course, where the perpetrator not only agrees but has admitted guilt. Absent the express wish of the victim and the unequivocal admission of the perpetrator, it cannot and should not be used.”\(^{372}\)

**Recommendation 15**

Alternative mechanisms, including an entirely victim-led concept of restorative practice, should be considered both inside the criminal justice system and parallel to it.\(^{373}\)

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\(^{368}\) Gillen Review Report, Executive Summary, p.22.
\(^{369}\) Sir John made a further 22 specific recommendations relating to this key recommendation in Chapter 13 of the report.
\(^{370}\) Gillen Review Report, Executive Summary, p.23.
\(^{371}\) Sir John made a further 35 specific recommendations relating to this key recommendation in Chapter 14 of the report.
\(^{373}\) Sir John made 4 further specific recommendations in Chapter 17 of the report.
B. AUSTRALIA

Australian Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse

The Australian Commonwealth Royal Commission was established in January 2013 to conduct a five-year examination into the criminal justice responses to child sexual abuse in institutions. Recommendations contained within the report focus on:

- Making institutions safer for children, including the adoption of 10 Child Safe Standards
- Advocacy, support and treatment services for survivors
- Responding to children with harmful sexual behaviours
- Improving the response of different types of institutions
- Improving survivors’ access to justice and on-going support.

The Commission’s final report was published in 17 volumes and contained 409 recommendations. Its focus was on care institutions rather than other public institutions. Three reports were published earlier, including a specific report on criminal justice in 2017. We discuss the Commission’s Criminal Justice Report 2017 below given the specific focus of our report.

Royal Commission Criminal Justice Report

The report contained 85 recommendations aimed at reforming the Australian criminal justice system’s response to child sexual abuse, including institutional child sexual abuse. The recommendations were directed to reforms of the criminal justice system to ensure the following objectives:

- the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused
- criminal justice responses are available for victims and survivors
- victims and survivors are supported in seeking criminal justice responses.

The report recommended a series of sweeping legislative and policy changes, including reform to police and prosecution responses, evidence of complainants, sentences and appeals, and grooming offences. It also recommended new offences, including ‘failure to report’ and ‘failure to protect’.

The Commission recognised the adversarial criminal justice system was problematic for child sexual abuse – and adult sexual abuse – cases but considered,

“our recommendations in this report, if implemented, will make a significant positive difference to the experience of many survivors in the criminal justice system and will reduce the extent to which they might feel marginalised, vulnerable, attacked or traumatised... We also consider that our recommendations, if implemented, will not in any way undermine the fairness of the trial for an accused. Rather, they will promote

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the conduct of trials with fairness to all interested parties – the accused, the complainant and the public – and the determination of the issues on the basis of the best relevant evidence.”

The Royal Commission’s findings and recommendations relevant to victims of crime are discussed below.

**The role of victims in the criminal justice system**

The Royal Commission noted that changing role of the victim in the adversarial criminal justice system over the last 50 years:

“Recognition of victims has increased over the last 50 years. States and territories introduced victims’ compensation schemes from 1967 onwards. In the 1990s, emphasis shifted towards providing greater support services for victims. Victim impact statements were also introduced, and Director of Public Prosecutions guidelines required prosecutors to consult with victims. In 2013, Australia’s Attorneys-General endorsed the National Framework for Rights and Services for Victims of Crime. In November 2016, the Victorian Law Reform Commission published the final report of its review of the role of victims of crime in the criminal trial process in Victoria.”

**Police investigations**

The Royal Commission emphasised that continuity of staffing in the police response and regular and appropriate communication are “critical aspects of the police response for many victims and survivors”. It also noted that “police being non-judgmental and focusing on the credibility of the complaint rather than focusing only on the credibility of the survivor is important for building and maintaining trust. This approach is likely to encourage more survivors to report to police and will be important in ensuring that survivors… are not denied the opportunity to pursue a criminal justice response”.

**Recommendation 9**

Each Australian government should ensure that its policing agency conducts investigative interviewing in relation to reports of child sexual abuse, including institutional child sexual abuse, in accordance with the following principles:

a. All police who provide an investigative response (whether specialist or generalist) to child sexual abuse should receive at least basic training in understanding sexual offending, including the nature of child sexual abuse and institutional child sexual abuse offending.

b. All police who provide an investigative response (whether specialist or generalist) to child sexual abuse should be trained to interview the complainant in accordance with current research and learning about how memory works in order to obtain the complainant’s memory of the events.

c. The importance of video recorded interviews for children and other vulnerable witnesses should be recognised, as these interviews usually form all, or most, of the complainant’s and other relevant witnesses’ evidence in chief in any prosecution.

d. Investigative interviewing of children and other vulnerable witnesses should be undertaken by police with specialist training. The specialist training should focus on:
   i. a specialist understanding of child sexual abuse, including institutional child sexual abuse, and the developmental and communication needs of children and other vulnerable witnesses

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375 Criminal Justice Report, p.12.
376 Criminal Justice Report, p.15.
377 Criminal Justice Report, p.23.
... skill development in planning and conducting interviews, including use of appropriate questioning techniques.

j. Intermediaries should be available to assist in police investigative interviews of children and other vulnerable witnesses.

Police responses to reports of historical child sexual abuse

The Commission noted that one of the areas in which police responses differ is in responses to child sexual abuse that is reported when the victim is a child and to child sexual abuse reported by an adult complainant. It recorded that apart from the State of Victoria, states and territories generally focus their specialist response on children who report child sexual abuse while adult reports of historical child sexual abuse are more often dealt with through general police responses. The Commission concluded,

“It is clear to us that many adult survivors of child sexual abuse in an institutional context have particular needs for information, reassurance and support in relation to police responses. It seems likely that many adult survivors of child sexual abuse in other contexts may share some or all of these needs.”

Recommendation 12

Each Australian government should ensure that, if its policing agency does not provide a specialist response to victims and survivors reporting historical child sexual abuse, its policing agency develops and implements a document in the nature of a ‘guarantee of service’ which sets out for the benefit of victims and survivors – and as a reminder to the police involved – what victims and survivors are entitled to expect in the police response to their report of child sexual abuse. The document should include information to the effect that victims and survivors are entitled to:

a. be treated by police with consideration and respect, taking account of any relevant cultural safety issues
b. have their views about whether they wish to participate in the police investigation respected
c. be referred to appropriate support services
d. contact police through a support person or organisation rather than contacting police directly if they prefer
e. have the assistance of a support person of their choice throughout their dealings with police unless this will interfere with the police investigation or risk contaminating evidence
f. have their statement taken by police even if the alleged perpetrator is dead
g. be provided with the details of a nominated person within the police service for them to contact
h. be kept informed of the status of their report and any investigation unless they do not wish to be kept informed
i. have the police focus on the credibility of the complaint or allegations rather than focusing only on the credibility of the complainant, recognising that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record.

Principles for prosecution responses

The Commission recorded that in responses to its Consultation Paper, there was support for the general principles the Commission outlined which “focus on general

378 Criminal Justice Report, p.28.
aspects of the prosecution response that are of particular importance or concern to victims and survivors.”

Recommendation 37

All Australian Directors of Public Prosecutions, with assistance from the relevant government in relation to funding, should ensure that prosecution responses to child sexual abuse are guided by the following principles:

a. All prosecution staff who may have professional contact with victims of institutional child sexual abuse should be trained to have a basic understanding of the nature and impact of child sexual abuse – and institutional child sexual abuse in particular – and how it can affect people who are involved in a prosecution process, including those who may have difficulties dealing with institutions or person in positions of authority.

b. While recognising the complexity of prosecution staffing and court timetables, prosecution agencies should recognise the benefit to victims and their families and survivors of continuity in prosecution team staffing and should take steps to facilitate, to the extent possible, continuity in staffing of the prosecution team involved in a prosecution.

c. Prosecution agencies should continue to recognise the importance to victims and their families and survivors of the prosecution agency maintaining regular communication with them to keep them informed of the status of the prosecution unless they have asked not to be kept informed.

d. Witness Assistance Services should be funded and staffed to ensure that they can perform their task of keeping victims and their families and survivors informed and ensuring that they are put in contact with relevant support services, including staff trained to provide a culturally appropriate service for Aboriginal and Torres Strait Islander victims and survivors. Specialist services for children should also be considered.

e. Particularly in relation to historical allegations of institutional child sexual abuse, prosecution staff who are involved in giving early charge advice or in prosecuting child sexual abuse matters should be trained to: i. be non-judgmental and recognise that many victims of child sexual abuse will go on to develop substance abuse and mental health problems, and some may have a criminal record; and ii. Focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant.

f. Prosecution agencies should recognise that children with disabilities are at a significantly increased risk of abuse, including child sexual abuse. Prosecutors should take this increased risk into account in any decisions they make in relation to prosecuting child sexual abuse offences.

Recommendation 38

Each state and territory government should facilitate the development of standard material to provide to complainants or other witnesses in child sexual abuse trials to better inform them about giving evidence. The development of the standard material should be led by Directors of Public Prosecutions in consultation with Witness Assistance Services, public defenders (where available), legal aid services and representatives of the courts to ensure that it:

a. is likely to be of adequate assistance for complainants who are not familiar with criminal trials and giving evidence

b. is fair to the accused as well as to the prosecution

c. does not risk rehearsing or coaching the witness.

Charging and plea decisions

The Commission noted that the most significant decisions that prosecutors make for victims and survivors – as well as for the accused – are decisions:

- whether or not to commence a prosecution
- to discontinue a prosecution

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to reduce the charges against an accused
• to accept a plea of guilty to a lesser charge.\textsuperscript{380}

The Commission recommended a number of general principles in relation to charging and plea decisions, including:

Recommendation 39
All Australian Directors of Public Prosecutions should ensure that \textit{prosecution charging and plea decisions in prosecutions for child sexual abuse offences} are guided by the following principles:

\begin{itemize}
  \item Prosecutors should recognise the importance to complainants of the correct charges being laid as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial. Prosecutors should provide early advice to police on appropriate charges to lay when such advice is sought.
  \item Regardless of whether such advice has been sought, prosecutors should confirm the appropriateness of the charges as early as possible once they are allocated the prosecution to ensure that the correct charges have been laid and to recognise the risk that charges will have to be downgraded or withdrawn closer to the trial date.
  \item While recognising the benefit of securing guilty pleas, prosecution agencies should also recognise that it is important to complainants – and to the criminal justice system – that the charges for which a guilty plea is accepted reasonably reflect the true criminality of the abuse they suffered.
  \item Prosecutors must endeavour to ensure that they allow adequate time to consult the complainant and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea and that the complainant is given the opportunity to consult their carer or parents unless the child does not wish to do so.
\end{itemize}

Prosecutorial complaints and oversight mechanisms

The Royal Commission recognised that as public prosecutors’ decisions have significant impacts on victims, public prosecutors should establish internal complaints mechanism which victims can access.\textsuperscript{381}

Recommendation 40
Each Australian Director of Public Prosecutions should:

\begin{itemize}
  \item have \textit{comprehensive written policies for decision-making and consultation with victims and police}
  \item publish all policies online and ensure that they are publicly available
  \item provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.
\end{itemize}

Recommendation 41
Each Australian Director of Public Prosecutions should establish \textit{a robust and effective complaints mechanism to allow victims to seek an internal merits review of key decisions}.

Recommendation 42
Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.

\textsuperscript{380} Criminal Justice Report, p.61.
\textsuperscript{381} Criminal Justice Report, p.63.
Recommendation 43
Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.

Evidence of victims and survivors

The Royal Commission’s chapter on evidence of victims and survivors focuses on reforms to ensure the complainant is given the opportunity to give their ‘best evidence’, meaning the most complete and accurate evidence the complainant is able to give. The Commission specifically considered the needs of young victims and victims with disabilities, whilst also recognising that many complainants of child sexual abuse, including adult survivors without disabilities, are likely to be vulnerable witnesses. The Commission concluded that special measures should be expanded for witnesses in child sexual abuse cases to give their best evidence. The Commission’s key recommendations are set out below:

Pre-recording of evidence

Recommendation 52
State and territory governments should ensure that the necessary legislative provisions and physical resources are in place to allow for the prerecording of the entirety of a witness’s evidence in child sexual abuse prosecutions. This should include both:

a. in summary and indictable matters, the use of a prerecorded investigative interview as some or all of the witness’s evidence in chief; and

b. in matters tried on indictment, the availability of pre-trial hearings to record all of a witness’s evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the witness need not participate in the trial itself.

Recommendation 53
Full prerecording should be made available for:

a. all complainants in child sexual abuse prosecutions
b. any other witnesses who are children or vulnerable adults
c. any other prosecution witness that the prosecution considers necessary.

Recommendation 54
Where the prerecording of cross-examination is used, it should be accompanied by ground rules hearings to maximise the benefits of such a procedure.

Audio-visual recording of evidence

Recommendation 56
State and territory governments should introduce legislation to require the audiovisual recording of evidence given by complainants and other witnesses that the prosecution considers necessary in child sexual abuse prosecutions, whether tried on indictment or summarily, and to allow these recordings to be tendered and relied on as the relevant witness’s evidence in any subsequent trial or retrial. The legislation should apply regardless of whether the relevant witness gives evidence live in court, via closed circuit television or in a prerecorded hearing.

Recommendation 58
If it is not practical to record evidence given live in court in a way that is suitable for use in any subsequent trial or retrial, prosecution guidelines should require that the fact that a witness may be required to give evidence again in the event of a retrial be discussed with witnesses when they make any choice as to whether to give evidence via prerecording, closed circuit television or in person.

382 Criminal Justice Report, p.75.
Intermediaries

Recommendation 59
State and territory governments should establish intermediary schemes similar to the Registered Intermediary Scheme in England & Wales which are available to any prosecution witness with a communication difficulty in a child sexual abuse prosecution. Governments should ensure that the scheme:

- requires intermediaries to have relevant professional qualifications to assist in communicating with vulnerable witnesses
- provides intermediaries with training on their role and in understanding that their duty is to assist the court to communicate with the witness and to be impartial
- makes intermediaries available at both the police interview stage and trial stage
- enables intermediaries to provide recommendations to police and the court on how best to communicate with the witness and to intervene in an interview or examination where they observe a communication breakdown.

Recommendation 60
State and territory governments should work with their courts administration to ensure that ground rules hearings are able to be held – and are in fact held – in child sexual abuse prosecutions to discuss the questioning of prosecution witnesses with specific communication needs, whether the questioning is to take place via a prerecorded hearing or during the trial. This should be essential where a witness intermediary scheme is in place and should allow, at a minimum, a report from an intermediary to be considered.

Other special measures generally used for vulnerable witnesses

Recommendation 61
The following special measures should be available in child sexual abuse prosecutions for complainants, vulnerable witnesses and other prosecution witnesses where the prosecution considers it necessary:

- giving evidence via closed circuit television or audiovisual link so that the witness is able to give evidence from a room away from the courtroom
- allowing the witness to be supported when giving evidence, whether in the courtroom or remotely, including, for example, through the presence of a support person or a support animal or by otherwise creating a more child-friendly environment
- if the witness is giving evidence in court, using screens, partitions or one-way glass so that the witness cannot see the accused while giving evidence
- clearing the public gallery of a courtroom during the witness’s evidence
- the judge and counsel removing their wigs and gowns.

Use of interpreters in court

Recommendation 63
State and territory governments should provide adequate interpreting services such that any witness in a child sexual abuse prosecution who needs an interpreter is entitled to an interpreter who has sufficient expertise in their primary language, including sign language, to provide an accurate and impartial translation.

Victim impact statements

The Commission noted that victims are able to participate in the sentencing process through victim impact statements and acknowledged the difficulties victims face in preparing statements. The Commission concluded that the information provided to victims and survivors should be improved to better prepare them for the process of making a victim impact statement and give them a better understanding of its role in the sentencing process. The Commission also supported extending all relevant special measures used to assist victims in giving evidence in criminal matters to
victims when they are giving their victim impact statements.\textsuperscript{383}

\textbf{Recommendation 77}

State and territory governments, in consultation with their respective Directors of Public Prosecutions, should improve the information provided to victims and survivors of child sexual abuse offences to:

a. give them a better understanding of the role of the victim impact statement in the sentencing process

b. better prepare them for making a victim impact statement, including in relation to understanding the sort of content that may result in objection being taken to the statement or parts of it.

\textbf{Recommendation 78}

State and territory governments should ensure that, as far as reasonably practicable, special measures to assist victims of child sexual abuse offences to give evidence in prosecutions are available for victims when they give a victim impact statement, if they wish to use them.

\section*{C. AUSTRALIA: STATE OF VICTORIA}

\textbf{Victoria Royal Commission into Family Violence}

The Australian State of Victoria Royal Commission on Family Violence was established in February 2015 following a series of family violence-related deaths. As set out in its terms of reference, the Commission’s task was to identify the most effective ways to:\textsuperscript{384}

- prevent family violence
- improve early intervention so as to identify and protect those at risk
- support victims—particularly women and children—and address the impacts of violence on them
- make perpetrators accountable
- develop and refine systemic responses to family violence—including in the legal system and by police, corrections, child protection, legal and family violence support services
- better coordinate community and government responses to family violence
- evaluate and measure the success of strategies, frameworks, policies, programs and services introduced to put a stop family violence.

The Commission’s report published in March 2016 described the primary priorities for reform and the principles that should underpin future strategies, policies and programs aimed at dealing with family violence.\textsuperscript{385} The Commission recognised that Victoria has been at the forefront of family violence policy development and reform in Australia for the past 15 years and has strong foundations on which to build its

\textsuperscript{383} Criminal Justice Report, p.102.  
\textsuperscript{385} RCFV Summary Report, p.3.
future response. Nevertheless, the Commission identified key limitations relating to responses to victims and treatment of victims in the justice system:

“All parts of the system—support services, police, courts—are overwhelmed by the number of family violence incidents now reported. Services are not currently equipped to meet this high level of demand, which undermines the safety of those experiencing family violence and their potential for recovery.

... The range of services a victim might need at different times, including at points of crisis and beyond, are not as well coordinated as they should be, particularly when these services are located in different systems—for example, the health and justice systems. Gaining access to support can be difficult for victims, and service responses remain inconsistent and hard to navigate.

... The safety of victims is undermined by inadequate methods for sharing information between agencies about perpetrator risk. This is exacerbated by outdated information technology systems.”

The Commission made a total of 227 recommendations which were all adopted by the Government of Victoria. Those recommendations relating to the treatment of the victim in the justice system are discussed below.

Court-based responses to family violence in Victoria

The Commission recorded that many court users and court-based professionals and services expressed concern about the complexity of applying for an intervention order, access to court-based services, court safety, delays before and between hearings (which sometimes lead to serious risks to the applicant’s safety and wellbeing), unevenness in magistrates’ understanding of family violence, and consistency of procedures and outcomes in the courts.

The Commission recommended that magistrates’ courts continue to move to a more therapeutic and specialised approach to family violence that supports victims and promotes perpetrators’ compliance with court orders and proposed that within five years family violence matters should be heard in specialised courts, which should also have the ability to hear related matters involving the same family.

The Commission sought to reduce the trauma, delay and complexity of court proceedings through such initiatives as streamlining the application process and improving list management strategies; improving court infrastructure to make the court experience safer and less traumatic; increasing the use of remote witness facilities; and improving information technology so that courts are more efficient.

Restorative Justice

The Commission recorded that “some victims of family violence are dissatisfied with current court processes or find them traumatic, often because the processes fail to
adequately meet victims' needs for participation, having a voice, validation, offender accountability and restoration.”

The Commission noted that a number of organisations working with family violence victims had urged it to consider whether a restorative justice approach to family violence should be introduced in Victoria, in addition to making essential reforms to the court system. The Commission noted a number of potential benefits associated with a restorative justice approach, including:

- its potential to deliver better outcomes for victims than the adversarial justice system because it is able to provide a forum for victims to be heard on their own terms and offers a process that is tailored to individual women’s needs, and informed by their own choices
- its particular relevance in those cases where the victim does not wish to separate from the perpetrator but wants the abuse to stop, or where violence has been used by an adolescent against their parents
- the prospect of encouraging perpetrators to acknowledge the impacts of their behaviour and to recognise its effects on the victim.

The Commission examined the matter carefully, particularly in light of concerns that such an approach might be manipulated by perpetrators and could undermine the important gains that have been made in ensuring that family violence is treated as a public concern rather than simply a private matter between individuals. However, the Commission was persuaded that, with robust safeguards in place and as an additional option for (not a substitute or precondition for) pursuing action through the courts, a restorative justice process should be made available to victims who wish to pursue such an option.

The Commission cautioned that development of a restorative justice approach should proceed cautiously and made the following recommendation:

**Recommendation 122**
The Department of Justice and Regulation, in consultation with victims' representatives and experts in restorative justice, develop a framework and pilot program for the delivery of restorative justice options for victims of family violence. The framework and pilot program should have victims at their centre, incorporate strong safeguards, be based on international best practice, and be delivered by appropriately skilled and qualified facilitators [within two years].

**Family violence and the family law system**

The Commission recorded difficulties faced by family violence victims who sometimes had to go to a magistrates’ court to obtain a family violence intervention order and then go to a federal family court to resolve disputes about their children:

“The fragmentation between state courts and the federal family law courts was a source of considerable concern: many people commented that their experience of family violence is given insufficient weight and consideration in the federal family law courts. Some people also feel conflicted by a desire to protect children from the harmful behaviour of the other parent, without wanting to appear unfavourable or

392 RCFV Summary Report, p.31.
Building on the findings of a number of previous inquiries examining the intersection of family violence and family law, the Commission made a number of recommendations aimed at encouraging and supporting state magistrates to exercise their family law jurisdiction and helping parties and their representatives understand the interaction between the state courts and the family law system, including the following:

**Recommendation 70**
The Victorian Government fund and complete works to ensure all Magistrates’ Court of Victoria headquarter courts [within five years]:
- provide safe waiting areas and rooms for co-located service providers
- provide accessibility for people with disabilities
- provide proper security staffing and equipment
- provide separate entry and exit points for applicants and respondents
- provide private interview rooms for use by registrars and service providers
- provide remote witness facilities, to allow witnesses to give evidence off site and from court-based interview rooms
- provide adequate facilities for children and ensure that courts are ‘child-friendly’
- use multi-lingual and multi-format signage
- use pre-existing local facilities and structures to accommodate proceedings or associated aspects of court business – for example, for use as safe waiting areas

**Recommendation 71**
The Victorian Government amend section 69 of the *Family Violence Protection Act 2008* (Vic) and section 363 of the *Criminal Procedure Act 2009* (Vic) [within three years] to provide that the court must permit a family violence victim to give evidence from a place other than the courtroom by means of remote technology that enables communication with the courtroom, unless the victim wishes to give evidence from the courtroom.

**Recommendation 72**
The Victorian Government consider legislative amendments to permit the use of video- and audio-recorded evidence in family violence-related criminal proceedings involving either adults or children [within 12 months].

**Governance framework**

The Commission made a series of recommendations aimed at building and ensuring accessible, inclusive and non-discriminatory service delivery and expanding understanding of the complexity of family violence in a range of communities. The Commission recommended “a governance framework that makes family violence—particularly victims’ views and experiences—a central consideration for all levels of government, including local councils, provides strong leadership and supports effective and coordinated strategies to address family violence.”

**Recommendation 201**
The Victorian Government and agencies that respond to family violence should identify and develop safe and constructive ways to ensure that the voices of victims are heard and inform policy development and service delivery [within two years].

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393 RCFV Summary Report, p.32.
394 RCFV Summary Report, p.32-38.
5 – Strengthening the role of victims in the criminal justice system in England & Wales

Conclusions and recommendations

This report has analysed the development of international and regional standards on the rights of victims of crime and provides an international comparative review of different legislative models for the protection of victims’ rights across 5 adversarial jurisdictions – our own, England & Wales, together with Australia, Canada, New Zealand and the United States – in order to identify effective legislative and policy measures that promote the role of victims within the criminal trial process whilst not undermining the status of the adversarial justice system. Our research relates to all victims of crime but recognises that certain groups of victims suffer a particular imbalance in their rights and how those rights are applied in criminal justice processes.

We set out our conclusions and recommendations under the following headings:

A. Legal recognition of victims as participants in the criminal justice process.
B. Enhancing procedural justice for victims of crime: giving victims a voice.
C. Independent legal representation for victims in applications for disclosure of confidential information.
D. Strengthening enforcement of victims’ rights.
E. Accountability for victims’ rights: independent oversight to monitor compliance.

A. Legal recognition of victims as participants in the criminal justice process

Data released in January 2020 indicated that almost a quarter (23%) of criminal cases in England & Wales last year were dropped because the victim did not support further action, compared with only 8.7% in 2015. As our examination of the treatment of victims of crime by the criminal justice system in England and Wales in chapter 3 demonstrates, confidence in the criminal justice system in England & Wales and in securing justice outcomes for victims of crime is the lowest it has been for decades as a result of central government cuts to justice funding and legal aid, unaddressed complaints of institutional racism; failings in the criminal justice response to historical sexual abuse cases, child sexual exploitation and domestic abuse; and rape prosecutions falling to a record low.

It is time to recognise victims as participants in the criminal justice process, with their rights and interests protected in law and respected by all criminal justice agencies. This is the only way to bring the system-wide culture change necessary if the confidence of victims – and the wider public – in the criminal justice system is to be restored and the criminal justice system to be successful in delivering justice to all parties.

396 The Observer, 26 January 2020, Call for new law to protect victims in the justice system.
As long ago as 2001, the House of Lords stated that paying due regard to the interest of victims is both a matter of fairness and consistent with the purposes of the criminal justice system, requiring the court to consider the ‘triangulation of interests’ of the accused, the victim and society. The Court recognised that the legitimate rights of victims do not undermine the legitimate rights of the accused or the prosecution – the interrelationship of the three is complementary, not exclusionary.

As this report demonstrates, law and policy reforms in common law jurisdictions with adversarial criminal justice systems have progressively created rights and opportunities for victims to engage with the criminal trial process in varying degrees and capacities. Increasingly, it is recognised that the public interest is served by safeguarding not only the rights of the accused and the independence of the prosecution, but by recognising the victim as a participant in the criminal justice process. Procedures and rights that regulate the contest between the prosecution and defence have been amended and supplemented in jurisdictions including Australia, Canada and the United States by reforms requiring victims’ interests to be taken into consideration.

The introduction of the Victims’ Charter in England and Wales in 1990 and its evolution into the Code of Practice for Victims of Crime in 2006 marked an important milestone in recognising the role of the victim in the criminal justice system and defining the minimum level of service that victims of crime should receive from criminal justice agencies. Over the years, there have been improvements in the provision of information and support services available to victims and in the main, criminal justice agencies are more responsive to the needs of victims. Nevertheless, as our analysis in chapter 3 has shown, victims continue to feel marginalised and peripheral to the criminal trial process.

In its review on the role of victims of crime in the criminal trial process, the Victoria Law Reform Commission proposed three overarching strategies to strengthen the role of victims within the criminal justice process in law and practice:

I. Set out in law the rights and entitlements of victims and the obligations of criminal justice agencies.

II. Strengthen complaint processes and accountability mechanisms.

III. Provide education and training programmes for lawyers and judicial officers on the role and rights of victims within the criminal justice system.

We endorse the three overarching strategies proposed by the Victoria Law Reform Commission and suggest that the Ministry of Justice employ these strategies to underpin its development of a Victims’ Law for England & Wales.

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399 VLRC Report 2016, Executive Summary, para.25.

400 VLRC Report 2016, para.42.
In relation to strategy I, the Victoria Law Reform Commission made its first two recommendations that the role and rights of the victim as a participant in the criminal trial process should be articulated in law. The Commission did not recommend changing the adversarial trial process itself but instead proposed the following:

10.1… the role of the victim should be conceptualised, understood and implemented in accordance with modern jurisprudence. The jurisprudence is that, in the modern trial, there is a triangulation of interests: those of the public, the accused and the victim. Within that triangulation, the interest of the victim in the criminal trial is not that of a party; but it is that of a participant.

… 10.12 Being recognised as a participant does not mean that the victim is a party to the criminal proceedings or takes on any of the functions that are traditionally associated with the role of a public prosecutor. Nor does it diminish the right of the accused to a fair trial. The Commission intends it to mean that the criminal trial process will accommodate the triangulation of interests of the accused, the victim and the community. The requirement of a fair trial will be enhanced, not diminished, by properly accommodating that triangulation.401

Following the publication of the Commission’s report, the State of Victoria amended the Victoria Victims’ Charter Act 2006402 to legally recognise the victim as a participant in criminal proceedings, as per the Commission’s Recommendation. The amended objects of the Victims’ Charter Act now provide as follows:

“4 Objects

(1) The objects of this Act are—

(a) to recognise the impact of crime on the victims of that crime, including the impact on members of victims’ families, witnesses to the crime and in some cases, the broader community;

(b) to recognise that all persons adversely affected by crime, regardless of whether they report the offence, should be treated with respect by all investigatory agencies, prosecuting agencies and victims’ services agencies and should be offered information to enable them to access appropriate services to help with the recovery process;

(ba) to recognise that a victim of crime has an inherent interest in the response by the criminal justice system to that crime, giving rise to the rights and entitlements set out in this Act, and to acknowledge the victim’s role as a participant, but not a party, in proceedings for criminal offences;

(c) to help reduce the likelihood of secondary victimisation by the criminal justice system.”

Two additional amendments were made to the Victims’ Charter Act 2006 requiring (i) investigatory and prosecuting agencies and victims’ services to respect the rights and entitlements of victims as participants in criminal proceedings;403 and (ii) the Director of Public Prosecutions to take all reasonable steps to advise a victim of the details of criminal proceedings and the progress of a prosecution; to seek a victim’s

402 By the Victims and Other Legislation Amendment Act 2018.
403 Victoria Victims Charter Act 2006 (as amended), s.7A.
views regarding modifying charges, discontinuing a prosecution, or an appeal; and
to provide reasons for decisions to a victim.\textsuperscript{404}

We support the legislative model proposed by the Victoria Law Reform Commission
and enacted by the State of Victoria and commend this model to the Ministry of
Justice in relation to its revision of the Victims’ Code and development of a Victims’
Law.

In light of the critical findings of the Lammy Review 2017 and \textit{Sisters For Change}
reports\textsuperscript{405} on the treatment of Black and minoritised people by the criminal justice
system, it is critical that the Government ensures the Victims’ Code, Victims’ Law
and any amendments made to criminal justice procedures treat all victims of crime
equally \textit{without discrimination on any ground} including race, religion, language or
migrant or refugee status. This reflects the Government’s obligations under the
Human Rights Act 1998 and mirrors the practice of other common law jurisdictions.
For example, the Victoria Victims’ Charter Act 2006 requires investigatory and
prosecuting agencies and victims’ services to take into account, and be responsive
to, the particular needs of persons adversely affected by crime, particularly needs
relating to differences such as (a) race or indigenous background; (b) sex or gender
identity; (c) cultural or linguistic diversity; (d) sexual orientation; (e) disability; (f)
religion; (g) age.\textsuperscript{406}

Recommendation 1
The Ministry of Justice should provide statutory recognition of the interest of
victims in the criminal justice process and their role as a participant in
criminal proceedings and set out in a Victims’ Law the rights of victims of
crime and the obligations of criminal justice agencies to ensure those rights
without discrimination on any ground including sex, race, religion or belief,
language, migrant or refugee status, sexual orientation, disability or age.

Recommendation 2
The Victims’ Law should include a set of enforceable minimum guarantees for
victims in criminal proceedings, including the right to be acknowledged as a
participant with an interest in the proceedings; to be treated with respect at all
times; to be protected from unnecessary trauma, intimidation and distress
when giving evidence; and to have their views on investigatory and
prosecuting decision-making taken into consideration.

Recommendation 3
The Ministry of Justice should provide education and training programmes for
lawyers, judicial officers and criminal justice professionals on the role and
rights of victims within the criminal justice system.

\textsuperscript{404} Victoria Victims Charter Act 2006 (as amended), ss.9A, 9B and 9C.
\textsuperscript{405} Sisters For Change (November 2017), \textit{Unequal Regard, Unequal Protection. Public authority responses to}
\textsuperscript{406} Victoria Victims’ Charter Act 2006 (as amended), s.6(2).
B. Enhancing procedural justice for victims of crime: giving victims a voice

The former Commissioner for Victims’ Rights of South Australia, Michael O’Connell, has highlighted the importance of procedural justice for victims. In an analysis of a series of studies on victim satisfaction with the criminal justice system, he found:

“victim satisfaction with each element of the criminal justice system is ‘primarily determined by the quality of procedural experiences’ in the respective element... [studies investigating] the concept of procedural justice for both sexual assault victims and non-sexual assault victims... found that procedural justice comprising respectful police treatment, accurate and timely information and a voice impacted the psychological effects of criminal proceedings... giving victims a voice... appears to contribute to higher confidence levels among victims, so long as such a voice is listened to and responded to appropriately. For some victims, the right to voice their views might be adequate, but others might exercise their right to voice to influence decision outcomes.” (Citations in text removed for ease of reading).407

In a 2016, the Victims’ Commissioner for England and Wales published a report bringing together the best available international evidence on what works to support victims of crime in their journey through the criminal justice system and beyond, both for victims who report the crimes committed against them and those who do not.408 The report also emphasised the important of procedural justice for victims, concluding that (i) the quality of service that victims get from criminal justice agencies is often a more important factor in victim satisfaction than the final outcome of their case and (ii) perceptions of fair treatment, including knowledge of and access to entitlements, increases victims’ perceptions of legitimacy and aids compliance.409

Standards of fairness in administrative decision-making: the victim’s right to make representations

Case law of the UK’s highest courts and the European Court of Human Rights410 makes clear that it is possible to enhance procedural justice for victims of crime without encroaching on procedural justice for the accused or convicted persons. In an important House of Lords case411 in the 1990s concerning the rights of prisoners serving mandatory life sentences to make representations, Lord Mustill summarised the standards of fairness relevant to administrative decision-making in general terms as follows:

“1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.


409 Ibid., Executive Summary.

410 Discussed in chapter 2.

2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.

3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.

4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.”

In a very recent case, the High Court was asked to consider the question of what right, if any, victims have to make representations under the Crown Prosecution Service (CPS) Victims’ Right to Review Scheme (the CPS VRR Scheme). The Claimant in the case sought to challenge to the decision of the Director of Public Prosecutions (DPP) not to prosecute a suspect for the offences of rape, sexual assault against a child and/or any other offence (“the Decision”). The Decision followed the Claimant’s exercise of her right to a review under the VRR Scheme.

The Claimant argued that she had a right to make representations, which included:
   a. an entitlement to a fair opportunity to make submissions to the decision-maker, seeking to procure a favourable result, before the decision is made; and
   b. an obligation on the decision-maker to consider those representations in the decision.

The DPP argued that the VRR Scheme did not create a right on the part of the Claimant to make representations. The right conferred was to request a review, not to seek to influence its outcome.

The High Court held that the VRR Scheme grants a victim “a fair opportunity to make representations and to have them taken into account by the decision-maker.” However, the Court held that there is no duty on the DPP to invite representations from victims seeking a review.

The police and CPS Victim Right to Review Schemes are an important first step in giving victims a voice in the criminal trial process and enhancing procedural justice and accountability in criminal justice decision-making. In light of the alarming decline in police referrals of suspects of rape and domestic abuse to the CPS and the reduction in the prosecutions of rape cases in 2019/2020 to an all-time low, the

412 Ibid., at p.14.
413 R (FNM) v Director of Public Prosecutions [2020] EWHC 870 (Admin).
414 The CPS VRR Scheme is discussed in detail in chapter 3.
415 R (FNM) v Director of Public Prosecutions [2020] EWHC 870 (Admin), para.45.
Government should take steps to rebuild confidence in the criminal justice system by formalising in law the victims’ rights to review police and prosecution decisions and to have those views taken into account and to give victims to legal right be heard in relation to charge, sentencing and parole decisions relating to the offender.

**Recommendation 4**
The Ministry of Justice should make statutory the victims’ right to review decisions by the police and the Crown Prosecution Service, including the right to receive reasons for decisions, the right to make representations and the right have those representations taken into account by the decision-maker.

Currently, although not implemented well, the Victims’ Code entitles victims of crime in England & Wales to make a Victim Personal Statement telling the court how the crime has affected the victim. And in 2019, following a government review of the reconsideration mechanism for parole decisions, victims have the right to submit concerns regarding a decision of the Parole Board to the Protection Casework Section (PPCS) in Her Majesty’s Prison & Probation Service and ask the PPCS to examine the case and consider the possibility of making an application for reconsideration.416 We recommend that that the Victims’ Law should go further and reflect international good practice by granting victims the right to be heard in any court or administrative proceedings relating to charge, sentencing or parole decisions relating to the offender.

**Recommendation 5**
The victims’ law should include the right of victims of crimes to be heard in any court or administrative proceedings relating to charge, sentencing or parole decisions relating to the offender.

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416 Only the parties to the parole process, i.e. the prisoner and the Secretary of State, are entitled to formally to apply to the Parole Board for reconsideration of its decision but where a victim has concerns about a parole decision, they can make a case for a decision to be reconsidered by submitting their concerns to the Public Protection Casework Section (PPCS) in Her Majesty’s Prison & Probation Service. A victim can ask the PPCS to examine the case and consider the possibility of making an application for reconsideration.
C. Independent legal representation for victims in response to requests for access to or disclosure of private or confidential information, communications or records

Victims’ rights to privacy

Some of the most serious recent criticism of the criminal justice system relates to procedures for dealing with police requests for access to victims’ private communications, notably mobile phone data, and third party applications for disclosure of a victim’s private or confidential records, including health, social services, counselling and education records. Requests for access to, and applications for disclosure of, private and confidential information, communications or records undoubtedly engages a victim’s rights to privacy under ECHR Article 8, which guarantees the right to respect for private life, family life, home and correspondence.

ECHR Article 8 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 wellbeing 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.

In relation to information about a person’s health and treatment records, Baroness Hale of Richmond underlined the crucial importance of respecting and maintaining the privacy of the patient in a seminal House of Lords case on privacy in 2004:417

“It has always been accepted that information about a person’s health and treatment for ill health is both private and confidential. This stems not only from the confidentiality of the doctor-patient relationship but from the nature of the information itself. As the European Court of Human Rights put it in Z v Finland (1997) 25 EHRR 371, para 95: “Respecting the confidentiality of health data is a vital principle in the legal system of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of the patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community.”

Police requests for access to victims’ personal communications

In response to concerns about the potential for excessive processing of personal data extracted from mobile phones (a process known as mobile phone extraction) by police forces when conducting criminal investigations in England and Wales, the Information Commissioner established an inquiry to investigate the privacy and data

The Information Commissioner found evidence of inconsistent approaches and standards of compliance by police forces and concluded:

“This raises concerns that there is no systematic approach to justifying privacy intrusion and demonstrating that it is balanced against legitimate law enforcement purposes. Given the sensitive data processing involved, the observed police practices increase the risk of arbitrary intrusion and impact standards of compliance when processing personal data extracted from mobile devices.”

The investigation by the Office of the Information Commissioner questioned the appropriateness of some of the current police practices in mobile phone extraction. The Information Commissioner recommended a number of measures to be implemented across law enforcement “in order to improve compliance with data protection law and regain some public confidence that may have been lost.” Recognising that this is a complex area, engaging not only data protection law but also criminal justice and human rights legislation, the Commissioner’s first recommendation called for “the introduction of better rules, ideally set out in a statutory code of practice, that will provide greater clarity and foreseeability about when, why and how the police and other law enforcement agencies use mobile phone extraction.”

The Commissioner directed a number of further recommendations to criminal justice authorities in order to improve confidence in the criminal justice process. These included the following:

**Recommendation 3**: The police, the Crown Prosecution Service and the Attorney General’s Office should collaborate to improve the consistency of authorising data extracts. This should be implemented across England and Wales, to increase public confidence in the accountability of the police and the criminal justice process when undertaking these intrusive actions.

**Recommendation 5**: Police forces should put in place more robust policies and procedures to ensure the appropriate handling and deletion of data that has been extracted but that is not relevant to a particular investigation.

**Recommendation 6**: Early engagement between the police and the Crown Prosecution Service should be improved as envisaged in the Attorney General’s report in order to allow the extraction, further processing and disclosure of mobile phone data to be more targeted such that privacy intrusion is minimised.

**Recommendation 8**: To meet the standards required for fair processing, police forces should make improvements to their engagement with individuals whose phones are to be examined, to ensure they fully inform those individuals about what is being proposed and what their rights are.

**Recommendation 9**: A national training standard should be introduced to ensure all those involved in mobile phone extraction are aware of their legal obligations.

**Recommendation 13**: Wider work being undertaken across criminal justice, including revisions to the Victims’ Code, the Attorney General’s Guidelines on Disclosure and the Criminal Procedure and Investigations Act 1996 Code of Practice, should incorporate measures that address data protection and privacy concerns.

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418 Information Commissioner’s Office (June 2020), Mobile phone data extraction by police forces in England and Wales, Investigation report (ICO Report 2020).
Applications for disclosure of victims’ private and confidential information

The Judicial Protocol on disclosure recognises that applications for disclosure of private and confidential information engages the victim’s rights to privacy under ECHR Article 8:

“Applications for third party disclosure must identify the documents that are sought and provide full details of why they are disclosable. This is particularly relevant when access is sought to the medical records of those who allege they are victims of crime. It should be appreciated that a duty to assert confidentiality may arise when a third party receives a request for disclosure, or the right to privacy may be claimed under article 8 of the ECHR… Victims do not waive the confidentiality of their medical records, or their right to privacy under article 8 of the ECHR, by making a complaint against the accused. The court, as a public authority, must ensure that any interference with the right to privacy under article 8 is in accordance with the law, and is necessary in pursuit of a legitimate public interest. General and unspecified requests to trawl through such records should be refused. Confidentiality rests with the subject of the material, not with the authority holding it. The subject is entitled to service of the application and has the right to make representations.”

Under the Criminal Procedure Rules, a victim of crime must be notified of an application for disclosure of records relating to them but the victim has no right to legal representation.

It is noteworthy that as long ago as 2006, in an application for judicial review of proceedings in the Crown Court where a child victim of sexual abuse case was brought before the Court unrepresented and without notice to decide whether her medical records should be disclosed, the High Court stated:

“TB [the child victim and witness] should have been given notice of the application and given the opportunity to make representations, orally if she had wished. It was not sufficient for the court to delegate her representation to the NHS Trust alone. In fact, her independent views were not received in any form before the order was made. There was an oral hearing, but she was not given the opportunity to attend it.”

In 2005, the then Labour Government announced its intention to introduce legally-aided representation for victims in homicide, rape and domestic violence cases and in March 2014, the Ministry of Justice again raised the idea of independent legal representation in a review of the treatment of victims in sexual offence cases.

The public prosecutor is not the representative of the victim but the representative of the state and the public interest. Failing to provide a victim with recourse to legal representation to protect their interests and rights in applications for disclosure of information and material of which they are the primary subject is a form of secondary victimisation which returns the victim to a passive bystander in the criminal justice process.

422 R (on the application of TB) v The Combined Court at Stafford [2006] EWHC 1645 (Admin).
In his review of the law and procedure in prosecutions of serious sexual offences in Northern Ireland, Sir John Gillen endorsed publicly funded provision of legal representation for all complainants to explain the complexities of, and the legal developments occurring in the legal process from the time the matter is first reported to the police up until the commencement of the trial, to oppose cross-examination on previous sexual history and to oppose disclosure of personal medical records. 424

In light of the recommendations made by the High Court, in the Gillen Review 2019 and in the recent report by the Information Commissioner, we recommend that all victims of crime be given the right to publicly funded independent legal advice and representation in relation to requests by the police for access to, and applications by third parties for disclosure of or digital downloads of their private or confidential records or communications, including mobile phone data and all health, social services, mental health, counselling and education records.

In addition, in accordance with earlier recommendations made on the duty of criminal justice authorities to give reasons for their decisions to victims of crime, in cases where a decision is made that there should be disclosure of private or confidential material or records, including a victim’s previous sexual history, the victim should be told the material that will be disclosed and the reasons for the disclosure.

Recommendation 6
The Ministry of Justice should include in the Victims’ Law the right of all victims to free and independent legal advice and representation in relation to requests by the police for access to, or applications by a third party for disclosure of, their private or confidential information, communications or records.

Recommendation 7
In cases where a decision is made to disclose a victim’s private or confidential information or records, including a victim’s previous sexual history, the victim should be informed of the material that will be disclosed and the reasons for the disclosure.

D. Strengthening enforcement of victims’ rights

The absence of procedures for enforcement of victims’ rights and remedies for breaches of the Victims’ Code undermines victims’ rights and hampers substantive change in criminal justice culture and practice in England & Wales. Granting victims a right to pursue a legal cause of action for breach of their rights gives victims a much stronger position when making a complaint and provides a direct route both for remedying breaches that are not satisfactorily addressed through internal complaint processes and for holding criminal justice authorities more effectively to account for breaching victims’ rights. Nevertheless, as our comparative review in chapter 4 demonstrates, most common law adversarial criminal justice systems have been slow to include enforcement mechanisms giving victims a cause of action for a

424 Gillen Review Report, Chapter 5.
breach. In Australia, Canada and the UK, victims’ rights instruments typically contain a section stating that breach of a victims’ right or principle does not establish a legal right or provide grounds for a cause of action. The US Crime Victims’ Rights Act is one of the few victims’ rights laws to provide victims with any form of legal recourse.

In its consultation paper on victims of crime, the Victoria Law Reform Commission concluded:

“Making victims’ rights enforceable raises a number of issues:

- Victims’ rights relate to an individual’s private interest in the criminal proceedings, which can directly challenge the public interest underpinnings of the adversarial criminal justice process.
- Related to this, the two-party contest between the state prosecutor, representing the harmed society, and the accused, does not easily create space for a third party.
- Attempts to enforce rights through legal proceedings may disrupt and delay criminal proceedings.
- If new legal causes of action are created for victims whose rights are violated, legal aid funding may be needed to ensure equity in the realisation of victims’ rights.
- Different rights might apply differently at different stages of proceedings, requiring various approaches to enforcement.”

However, the Commission was critical of the approach in Victoria that provided that if a victim believed that a criminal justice agency or victims’ service (criminal justice service) had not upheld their rights, the service was only expressly required to inform the victim about the processes available for making a complaint. The Commission referred approvingly to the model in New South Wales in the Victims Right and Support Act 2013. To improve the compliance of criminal justice services with victims’ laws and policies, the Law Reform Commission recommended that victims of crime should have a right to make a complaint to the relevant criminal justice service about a breach of their rights and that all criminal justice services should have a duty to provide accessible and transparent complaint-handling systems and offer fair and reasonable remedies.

The majority of jurisdictions reviewed in this report have opted for a complaints resolution process as the pathway for victims to raise complaints of breaches of their rights. In England & Wales, each criminal justice agency has its own separate complaints system. Whilst victims can take a complaint to the Parliamentary Ombudsman through their local MP, this option is little known about or used.

Robust complaints processes have the potential to provide victims with fairness, transparency and accountability, especially where a mechanism for independent review exists. The complaints system for victims of crime needs to be both simplified and strengthened, with an effective independent complaints review mechanism for

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426 VLRC Report 2016, para.4.130.
427 VLRC Report 2016, para.4.131.
victims dissatisfied with the internal complaints process of a criminal justice agency or victims’ service.

Recommendation 8
The Ministry of Justice should include in the new Victims’ Law a duty on all criminal justice agencies and victims’ services to provide accessible and transparent complaints-handling systems for victims who allege a breach or denial of their rights under the Victims’ Code or forthcoming Victims’ Law.

Recommendation 9
The Ministry of Justice should establish an effective independent complaints review mechanism for victims dissatisfied with the internal complaints process of a criminal justice agency or victims’ service.

E. Accountability for victims’ rights: independent oversight to monitor compliance

Hand in hand with more robust complaints processes, it is vital to develop a framework for monitoring the compliance of criminal justice agencies and victims’ services with the Victims’ Code and to review implementation of the new Victims’ Law once it is enacted. In 2018, Police and Crime Commissioners (PCCs) took responsibility for compiling performance data for their local area on criminal justice services’ compliance with the Victims’ Code. These new monitoring arrangements have been significantly challenged due to inconsistent levels of data and variable responses from criminal justice services to PCC requests.429 In light of detailed proposals submitted by the Victims’ Commissioner for England and Wales to the Ministry of Justice on the scope of an effective compliance framework,430 we make the following recommendation:

Recommendation 10
The Victims’ Commissioner for England & Wales should be given the statutory function and powers to monitor compliance with the Victims’ Code and implementation of the Victims’ Law and make recommendations to the Ministry of Justice to improve implementation and enforcement, reporting annually to Parliament.

430 Victims’ Commissioner for England and Wales Letter dated 22 May 2020 to the Ministry of Justice responding to the Victims’ Code Consultation.
Comparative legal review of the role and rights of victims of crime in adversarial criminal justice systems

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