

# DEVELOPMENT OF THE OFFICE OF COMMISSIONER OF VICTIMS' RIGHTS AS AN APPROPRIATE RESPONSE TO IMPROVING THE EXPERIENCES OF VICTIMS IN THE CRIMINAL JUSTICE SYSTEM: INTEGRITY, ACCESS AND JUSTICE FOR VICTIMS OF CRIME

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*Meeting the needs of crime victims has emerged as a significant 21<sup>st</sup> century concern. In the Australian context, various commissions of inquiry have recently considered how the interests of victims may be maintained in a system based on adversarial exchange between the accused and the state. Consensus has emerged around the further development of existing charters of victims' rights as the framework through which victims' interests may be secured. Importantly, reform of existing charter rights and the office that administers such charters, the Office of Commissioner of Victims' Rights, provides a means of addressing the recommendations of the various inquiries in a way that supports the participatory needs of victims, while maintaining the independence and integrity of criminal justice processes that provide due process to the accused. This article considers the ways in which the Office of Commissioner of Victims' Rights may be further developed to provide for the needs of victims against the need to maintain the adversarial character of criminal justice, and due process rights of the accused.*

## I INTRODUCTION

Recent inquiries including those of the Victorian Law Reform Commission ('VLRC')<sup>1</sup> and Royal Commissions into Institutional Responses to Child Sexual

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1 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) ('*The Role of Victims of Crime*').

Abuse (Commonwealth)<sup>2</sup> and Family Violence (Victoria)<sup>3</sup> focus much needed attention on the rights of crime victims.<sup>4</sup> These inquiries have shed light on the plight of crime victims but have also raised awareness of the lack of rights victims are afforded. Institutional arrangements as to who should manage, regulate or enforce the rights of victims have also been the subject of these inquiries. In particular, and following on from the VLRC report in 2016, reform is encouraged regarding the range of powers constitutive of the Office of the Commissioner of Victims' Rights in order to help consolidate victim rights under a statutory power that can protect and advance the interests of victims as important constituents in the justice system.<sup>5</sup>

The integrity of criminal prosecutions and the justice system more broadly rests upon victims' confidence that the reporting of offences will not cause further secondary harm, or exacerbate existing harm.<sup>6</sup> A question arises as to whether the existing rights framework is one that sufficiently redresses the consequences of crime for victims,<sup>7</sup> and whether current limitations ought to be addressed by enhancing rights exercisable by victims themselves, or through a third party or intermediary, such as an Office of Commissioner of Victims' Rights. Arguably, an Office of Commissioner of Victims' Rights provides an appropriate means for

- 2 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 2017) ('*Royal Commission into Child Sexual Abuse*').
- 3 *Royal Commission into Family Violence: Summary and Recommendations* (Report, March 2016) ('*Royal Commission into Family Violence*'). See also House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence: Recommendations for an Accessible, Equitable and Responsive Family Law System Which Better Prioritises Safety of Those Affected by Family Violence* (Report, December 2017). Although not directly considered in the article, such federal inquiries demonstrate a need for concerted analysis for a Federal Commissioner of Victims' Rights.
- 4 The definition of 'crime victim' varies within legal and academic discourse, and may include victims as survivors of crime. However, given that this article addresses victims in a local, domestic legal context, the definition supplied by the *Victims Rights and Support Act 2013* (NSW) ('*Victims Rights and Support Act*') will be used, which maintains that a victim of crime 'is a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence': at s 5 (definition of 'victim of crime').
- 5 See Michael O'Connell, 'The Evolution of Victims' Rights and Services in Australia' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 240; Tyrone Kirchengast, *Victimology and Victim Rights: International Comparative Perspectives* (Routledge, 2017) ('*Victimology and Victim Rights*'); Paul Rock, 'Aspects of the Social Construction of Crime Victims in Australia' (2006) 1(3) *Victims and Offenders* 289; Leslie Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press, 1996); Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20(4) *Criminal Law Forum* 395; Robyn Holder, 'Satisfied? Exploring Victims' Justice Judgments' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave Macmillan, 2015) 184; Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009); Matthew Hall, *Victims of Crime: Construction, Governance and Policy* (Palgrave Macmillan, 2017); Robyn Holder, *Just Interests: Victims, Citizens and the Potential for Justice* (Edward Elgar Publishing, 2018).
- 6 See Lorraine Wolhuter, Neil Olley and David Denham, *Victimology: Victimisation and Victims' Rights* (Routledge-Cavendish, 2009); Malini Laxminarayan, 'Psychological Effects of Criminal Proceedings through Contact with the Judge: The Moderating Effect of Legal System Structure' (2014) 20(8) *Psychology, Crime & Law* 781; Robyn L Holder, 'Victims, Legal Consciousness, and Legal Mobilisation' in Antje Deckert and Rick Sarre (eds), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, 2017) 649.
- 7 See Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Macmillan, 2016).

improving victims' experiences in the criminal justice system without jeopardising the structure of the existing adversarial system between the accused and the state.

This article considers the need to develop a comprehensive and independent Office of Commissioner of Victims' Rights, with rights and powers that allow a Commissioner to investigate any alleged departure from their state's respective Charter of Rights for Victims of Crime or like declaration (herein 'charter or declaration of rights'). Rather than be seen as a radical expansion of victim rights and interests, such reforms have precedent in South Australia ('SA') and New South Wales ('NSW'),<sup>8</sup> and model reform would recognise and draw from those rights and powers already tested across the states and territories. Indeed, the enhancement of victim rights occurs in an administrative law context, to provide rights of consultation with executive decision-making authorities, including public prosecutors and the Attorney-General, to take account of victims' views in the prosecution process. Proceeding through an Office of Commissioner of Victims' Rights thus ensures appropriate oversight is kept, and that victims do not gain unmeasured access to justice processes, so that, in line with the VLRC's recent recommendations, the victim remains a participant and not a party to proceedings.<sup>9</sup>

Ultimately, any change to the institutional capacity to represent and protect victim rights must be feasible from the perspective of a legal profession that has traditionally resisted the enhancement of victim rights. Specific considerations include any potential impact on the independence of prosecutorial decision-making, limiting the accused's right to a fair trial, and the integrity of criminal justice processes more broadly.

## II 'PARTICIPANT' AND NOT 'PARTY': VICTIM RIGHTS IN ADVERSARIAL SYSTEMS OF JUSTICE

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.<sup>10</sup> Criminal procedure thus sets out the rights of the accused, which until recently, have said very little about the rights of victims.<sup>11</sup> Even still, procedural rights protections often focus on aspects of evidence and the protective measures required to ensure that probative evidence is led from vulnerable and at-risk witnesses.<sup>12</sup> The rationale underpinning adversarial justice — which sees

<sup>8</sup> *Victims of Crime Act 2001* (SA) pt 2 div 2 ('*Victims of Crime Act* (SA)); *Victims Rights and Support Act* (n 4) s 6.

<sup>9</sup> *The Role of Victims of Crime* (n 1) xv.

<sup>10</sup> See Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008).

<sup>11</sup> See Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967. See also Kirchengast, *Victims and the Criminal Trial* (n 7); *ibid.*

<sup>12</sup> See *Criminal Procedure Act 1986* (NSW) ch 6 pt 5.

the crime as an offence against the state — therefore precludes victims from actively participating in criminal processes,<sup>13</sup> unless within ‘a passive context, [either] as police informant or as witness for the prosecution’.<sup>14</sup> As such, the victim is not considered a party to proceedings.<sup>15</sup> This has resulted in the need to consider ways of including the victim consistent with the rules and processes that accommodate the interests of other justice participants, specifically the state and the accused.

This paradigm strongly contrasts with the victim’s role in inquisitorial legal systems, whereby victims’ needs and interests are identified as independent to those of the ‘state’ (the prosecutor) and the accused.<sup>16</sup> In inquisitorial systems, the victim is empowered to participate in proceedings as an auxiliary prosecutor and has access to legal representation in court.<sup>17</sup> It has been suggested that such a framework can ‘provide important substantive rights that support the role of the victim as a stakeholder and participant of justice’.<sup>18</sup> Within an adversarial process, however, the positioning of victims as witnesses is considered crucial in order to avoid disrupting the equality of arms and the accused’s due process rights to a fair and impartial trial.<sup>19</sup> In contrast to inquisitorial systems, adversarial systems have historically denied active participation by victims, as their interests are deemed peripheral to those of the state and accused.<sup>20</sup> As Doak explains:

[A]lthough many victims may feel as though they are ‘owed’ a right to exercise a voice in decision-making processes, such as prosecution, reparation, and sentencing, the criminal justice system places such rights or interests in a firmly subservient position to the collective interests of society in prosecuting the crime and imposing a denunciatory punishment.<sup>21</sup>

This view is similarly reflected in the VLRC’s report, in which the VLRC claims that, ‘[I]legally and operationally’,<sup>22</sup> the state is considered the wronged party

13 Sam Garkawe, ‘The Role of the Victim During Criminal Court Proceedings’ (1994) 17(2) *University of New South Wales Law Journal* 595, 597–8.

14 Tyrone Kirchengast, ‘Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial’ (2013) 16(4) *New Criminal Law Review* 568, 569.

15 Edna Erez, Julie L Globokar and Peter R Ibarra, ‘Outsiders Inside: Victim Management in an Era of Participatory Reforms’ (2014) 20(1) *International Review of Victimology* 169, 170; *The Role of Victims of Crime* (n 1) xiii [13].

16 Kirchengast, *Victimology and Victim Rights* (n 5) 46.

17 *Ibid* 138.

18 *Ibid*.

19 Bridie McAsey, ‘Victim Participation at the International Criminal Court and Its Impact on Procedural Fairness’ (2011) 18 *Australian International Law Journal* 105, 115.

20 Jonathan Doak, ‘Victims’ Rights in Criminal Trials: Prospects for Participation’ (2005) 32(2) *Journal of Law and Society* 294, 299 (‘Victims’ Rights in Criminal Trials’).

21 *Ibid* 299–300. See also Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (Sage Publications, 1997).

22 *The Role of Victims of Crime* (n 1) 13.

— not the victim.<sup>23</sup> As such, ‘those who have actually suffered the primary consequences of the offending behaviour are viewed as awkward outsiders to the process’.<sup>24</sup> Within this context, police and ‘Crown prosecutors have not been obliged to represent the interests of victims. Instead, they have been required to exercise a broad discretion, strongly rooted in the public interest’.<sup>25</sup> And despite being directly impacted by the crime, many victims are unaware that they are classified only as complainants/witnesses to proceedings.<sup>26</sup>

Despite this reluctance to recognise the victim as anything more than a witness to proceedings, progress has been made that sees the expansion of victim rights in law and policy. This is particularly in light of the development of declarations or charters of victims’ rights across the states and territories, and the administration of those charters within the Office of Commissioner of Victims’ Rights on an individual jurisdictional level.

### **III THE OFFICE OF COMMISSIONER OF VICTIMS’ RIGHTS**

An Office of Commissioner of Victims’ Rights is presently constituted across all states and territories, except for the Northern Territory, Queensland and Tasmania, where similar powers may be exercisable under a departmental head or director of victim services.<sup>27</sup> An Office of Commissioner of Victims’ Rights may assist victims in their dealings with justice agencies, including the police or prosecution, although they do not represent victims personally. However, in order to ensure adequate assistance, such an Office must be comprised of powers that allow a Commissioner to enforce their respective state charter or declaration of rights, by resolving disputes where parties fail to maintain those rights. Disputes may arise between public officials, between victims and service providers, or between victims and officials. The Commissioner’s ability to intervene in proceedings with cognate powers to seek evidence and be represented by counsel is thus imperative, if only occasionally required.

In 2006, the South Australian Governor in Executive Council constituted the first Office of Commissioner of Victims’ Rights by renaming the South Australian

23 Ibid.

24 Jonathan Doak, Ralph Henhram and Barry Mitchell, ‘Victims and the Sentencing Process: Developing Participator Rights’ (2009) 24(4) *Legal Studies* 651, 654, citing Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 3<sup>rd</sup> ed, 2005).

25 Doak, ‘Victims’ Rights in Criminal Trials’ (n 20) 303.

26 Elisabeth McDonald, ‘The Views of Complainants and the Provision of Information, Support and Legal Advice: How Much Should a Prosecutor Do?’ (2011) 17 *Canterbury Law Review* 66, 69.

27 The Office of Commissioner of Victims’ Rights is variously described across the states and territories. In SA, the position is termed the Commissioner for Victims’ Rights, in NSW, it is the Commissioner of Victims Rights, in Victoria and the Australian Capital Territory, it is the Victims of Crime Commissioner, and in Western Australia, it is the Commissioner for Victims of Crime. The term ‘Commissioner of Victims’ Rights’ (or simply, ‘the Commissioner’) will be used throughout this article unless a specific jurisdiction or state office is referred to.

Victims of Crime Coordinator as the Commissioner for Victims' Rights. Two years later, fundamental changes were made to the Commissioner's role.<sup>28</sup> In SA, the Commissioner is an independent statutory officer whose term is up to five years (with no prohibition on reappointment); and, whose salary is paid from the Victims of Crime Fund rather than from consolidated revenue.<sup>29</sup> A Minister of government, including the Attorney-General, should not direct the Commissioner; however, if a Minister does, they must publish the direction in the *South Australian Government Gazette* and table a copy of their direction in both Houses of Parliament.<sup>30</sup> While SA was the first state to establish such a role, other states soon followed, with NSW, the Australian Capital Territory and Western Australia establishing the office in 2013, and Victoria in 2015.<sup>31</sup>

The next sections look to the development of the Office of Commissioner of Victims' Rights emerging from the recommendations of the VLRC, *Royal Commission into Family Violence* and the *Royal Commission into Child Sexual Abuse*, with a focus on the VLRC's recommendations in relation to suggested amendments to the specific powers held by the Victims of Crime Commissioner in Victoria.

#### **IV VICTIMS' RIGHTS AND REFORM OF THE OFFICE OF COMMISSIONER OF VICTIMS' RIGHTS**

Development of the Office of Commissioner of Victims' Rights must accord with rights and powers available to Commissioners across the states and territories of Australia, to provide a functional and measured response to the suite of changes contemplated by the VLRC. The charter itself may also require reform to include new powers to provide victims access to justice in order to meet their consultative and participatory requirements, as recognised by the VLRC and *Royal Commission into Child Sexual Abuse*. Reform of the Office of Commissioner of Victims' Rights may include changes that advance powers to: (a) investigate complaints under the respective declaration or charter of victims' rights; (b) request or compel production of evidence relevant to an investigation; (c) ensure that victims are consulted in relevant prosecutorial decision-making processes (such as where a decision is made not to proceed with charges, for plea negotiations, or prior to appeal); (d) intervene in proceedings where issues relevant to victim rights may arise; and (e) appoint a representative, including legal counsel, to represent victim interests in relevant court proceedings.

28 South Australia, *The South Australian Government Gazette*, No 61, 19 October 2006, 3724; South Australia, *The South Australian Government Gazette*, No 39, 17 July 2008, 3350.

29 *Victims of Crime Act* (SA) (n 8) ss 16, 16E, 31.

30 *Ibid* s 16E.

31 Michael O'Connell and Hennessey Hayes, 'Victims, Criminal Justice and Restorative Justice' in Tim Prenzler and Hennessey Hayes (eds), *An Introduction to Crime and Criminology* (Pearson, 5<sup>th</sup> ed, forthcoming).

## **A Functions of the Office of Commissioner of Victims' Rights in SA**

The Commissioner's role is likened to a crime victim ombudsperson.<sup>32</sup> The Commissioner can receive a victim's grievance about their treatment in the justice system. Following receipt of such grievance, the Commissioner may then consult any public official or public agency to resolve the issue or dispute. If the Commissioner believes that the public official or agency has violated the declaration governing the treatment of victims, they can recommend that the offending official or agency make a written apology to the aggrieved victim.<sup>33</sup> The Commissioner has also utilised other avenues to pursue systemic change when confronted with a series of like complaints. For example, the Commissioner has appointed legal counsel to represent bereaved families during coronial inquests and has successfully argued that the Commissioner is an interested person who should be heard on, for instance, issues pertaining to child protection.<sup>34</sup> Arguably, this has made victims' rights in SA both actionable and enforceable.<sup>35</sup>

The Commissioner also carries out functions that are not conventionally associated with an ombudsperson.<sup>36</sup> These include: advising the Attorney-General on how to marshal available government resources to effectively and efficiently help crime victims; assisting victims in their dealings with the criminal justice system; consulting with prosecutors in the interests of victims and in particular cases about matters including victim impact statements and plea negotiations; consulting with the judiciary about court practices and procedures and their effects on victims; monitoring the effect of the law on victims and victims' families; and making recommendations to the Attorney-General on matters arising from the performance of these functions.<sup>37</sup>

## **B Developing Representative Rights in the Office of Commissioner of Victims' Rights**

Consistent with participant (witness) status, victims have not generally taken an

32 *Victims of Crime Act* (SA) (n 8) s 16A.

33 *Ibid.*

34 See, eg, Mark Frederick Johns, State Coroner, *Finding of Inquest* (Coroner's Court of South Australia, 7 July 2014); Mark Johns, State Coroner, *Inquest into the Death of Chloe Lee Valentine* (Coroner's Court of South Australia, 9 April 2015).

35 O'Connell, 'The Evolution of Victims' Rights and Services in Australia' (n 5) 240. See also Edwards (n 11).

36 *Victims of Crime Act* (SA) (n 8) s 16.

37 *Ibid* ss 16, 32A. See also Michael O'Connell, 'Commissioner for Victims' Rights: Strengthening Victims' Rights?' in Hidemichi Morosawa, John JP Dussich and Gerd Ferdinand Kirchhoff (eds), *Victimology and Human Security: New Horizons* (Wolf Legal Publishers, 2012) 191.

active role in criminal proceedings.<sup>38</sup> However, the Commissioner's authority to intervene, either in person or through counsel, enables court-based intervention in the interests of the victim.<sup>39</sup> Although contentious, and despite not litigating for victims personally, the Commissioner has the power to raise concerns where the rights afforded to victims under the declaration or charter may not have been upheld or met.<sup>40</sup> The ability to represent victims and intervene in proceedings is thus a major development insofar as the requirements of adversarial justice is concerned.<sup>41</sup> Section 32A of the *Victims of Crime Act 2001* (SA) (*Victims of Crime Act* (SA)) authorises the Commissioner, with the victim's approval, to either in-person or through legal counsel, exercise any right that the victim is entitled to under the *Declaration of Principles Governing Treatment of Victims*.<sup>42</sup> Once leave is granted and the Commissioner is able to represent the victim in court, the victim gains de facto standing in proceedings from which they would otherwise be excluded. Through representation, the interests of the victim thus shift from peripheral to integral, despite the victim not gaining personal party status to proceedings.

Although the NSW Commissioner of Victims' Rights lacks any specific power to represent victims, ss 11–12 of the *Victims Rights and Support Act 2013* (NSW) do provide the Commissioner the power to make enquiries and conduct investigations, and to compel evidence, respectively. While such powers may be conventionally used to seek discovery of evidence required to determine routine compensation claims, the joint powers to investigate and compel evidence provide the Commissioner with the capacity to look into complaints where charter rights have been denied to victims, including, potentially, the right to be kept informed and consulted as to pre-trial prosecutorial decisions, such as those provided in support of victims of sexual violence under s 6.5(2) of the *Charter of Rights of Victims of Crime*.<sup>43</sup> Such powers arguably allow the Commissioner in NSW to take up a victim's case, where they decide to investigate a failure to maintain a right provided under the charter.

38 Cf Kerstin Braun, 'Legal Representation for Sexual Assault Victims: Possibilities for Law Reform?' (2014) 25(3) *Current Issues in Criminal Justice* 819, 827; Fiona E Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' [2013] (9) *Criminal Law Review* 729, 741.

39 Cf the similarities between victim participant representation in the International Criminal Court: see Sam Garkawe, 'Victims and the International Criminal Court: Three Major Issues' (2003) 3(4) *International Criminal Law Review* 345; Michael J Kelly, 'The Status of Victims Under the Rome Statute of the International Criminal Court' in Thorsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (Asser Press, 2013) 47.

40 *Victims of Crime Act* (SA) (n 8) s 16A.

41 South Australia, *Parliamentary Debates*, House of Assembly, 12 September 2007, 755–6 (Isobel Redmond).

42 *Victims of Crime Act* (SA) (n 8) s 32A, pt 2 div 2.

43 *Victims Rights and Support Act* (n 4) s 6.5(2):

A victim will be consulted before a decision referred to in paragraph (b) above is taken if the accused has been charged with a serious crime that involves sexual violence or that results in actual bodily harm or psychological or psychiatric harm to the victim, unless:

- (a) the victim has indicated that he or she does not wish to be so consulted, or
- (b) the whereabouts of the victim cannot be ascertained after reasonable inquiry.

Further reforms may also hold value, specifically that state Commissioners have input (through legal representation) where a Court of Criminal Appeal promulgates sentencing guidelines for particular types of crimes in its jurisdiction.

### **C Changes to Victims' Rights and the Role of the Commissioner: Policy Issues**

Over the past several decades, there has been a shift towards victim interests being considered and incorporated within adversarial justice systems. These changes emerged in large part from growing concerns around the role and treatment of victims, and have manifested in improving the “social” or “service” rights of the victim,<sup>44</sup> through the introduction of victim impact statements, compensation schemes, improved access to information and victim protective measures, such as limitations on the types of questions that can be asked of victims when testifying in sexual offence trials and the use of video testimony to obstruct the offender from the victim’s view during the trial.<sup>45</sup> These reforms are considered to reduce the onset of secondary victimisation and enhance the victim’s sense of achieving procedural justice through the prosecution process, providing them with the opportunity to feel like ‘integral players ... rather than mere bystanders’<sup>46</sup> in the legal process. The emergence of victim-focused reforms has thus been regarded as a better way to recognise and include victim interests, alongside those of the accused and the state — a perspective Lord Steyn describes as a ‘triangulation of interests’.<sup>47</sup>

More recently, in Victoria, the movement towards being more attentive to, and inclusive of, victims’ needs and interests can be seen through various reports, such as those of the VLRC and the *Royal Commission into Family Violence*.<sup>48</sup> These reports shed light on the challenges experienced by victims in the criminal justice system and recommend ways to improve victims’ procedural justice experiences. The VLRC report, for example, drew attention to the victim’s limited involvement in the prosecution process; the insensitive treatment victims can receive from authorities, particularly the police, prosecution and defence counsel; and a lack of understanding of and disregard for victim needs more generally.<sup>49</sup> Such concerns have also been consistently identified in the extant literature exploring victims’

44 Doak, ‘Victims’ Rights in Criminal Trials’ (n 20) 294.

45 Kirchengast, *Victims and the Criminal Trial* (n 7) 3–5; Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2001) 8.

46 Michael O’Connell, ‘Victims’ Rights: Integrating Victims in Criminal Proceedings’ (Speech, 2011) 1 <[www.voc.sa.gov.au/sites/default/files/OConnell\\_Integrating%20Victims.pdf](http://www.voc.sa.gov.au/sites/default/files/OConnell_Integrating%20Victims.pdf)>.

47 *The Role of Victims of Crime* (n 1) 27, quoting *A-G’s Reference (No 3 of 1999)* [2001] 2 AC 91, 118 (Lord Steyn). See also *R v A [No 2]* [2002] 1 AC 45.

48 *The Role of Victims of Crime* (n 1); *Royal Commission into Family Violence* (n 3).

49 See *The Role of Victims of Crime* (n 1). See also *Royal Commission into Child Sexual Abuse* (n 2).

needs and experiences within adversarial justice systems.<sup>50</sup>

The *Royal Commission into Child Sexual Abuse*'s report similarly highlighted the need for improved responses to victims of child sexual abuse through the timely provision of support and recommended that 'the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused'<sup>51</sup> — thus reinforcing the need to balance the competing triangulation of interests. Significantly, both reports recognised the 'interrelationship of the three — victim, accused and community — [a]s mutual and complementary, not exclusory',<sup>52</sup> and acknowledged that there is scope to consider all three perspectives without compromising the principles upon which the adversarial system is based.<sup>53</sup>

Another prominent theme emerging from these reports revolves around the victim's sense of exclusion and procedural injustice from the prosecution process, despite attempts to improve the victim's rights and role. As observed by the VLRC, 'the cumulative effect of these [victim-focused] reforms ... [has] not been driven by a vision of what the [victim's] role should be' and this has 'fostered inconsistencies in how victims are perceived, how they see themselves, their expectations and how they are treated'.<sup>54</sup> For these reasons, and as O'Connell argues, victims' rights and interests remain a secondary consideration in the criminal justice system. This demonstrates the need for a greater investment in the powers of the Victorian Victims of Crime Commissioner to enable victims to feel more like *insiders* (active participants), rather than *outsiders* (mere witnesses) within the adversarial process.<sup>55</sup> A more established Office of the Victorian Victims of Crime Commissioner can also increase the likelihood that victims will experience enhanced procedural and substantive justice outcomes.

## V LAW REFORM RECOMMENDATIONS AND THE OFFICE OF COMMISSIONER OF VICTIMS' RIGHTS

Although victims are recognised as participants and not parties to a criminal prosecution, the VLRC, *Royal Commission into Child Sexual Abuse* and *Royal Commission into Family Violence* each recommended enhancements to victims' rights as part of their respective final reports and recommendations. These inquiries

50 See, eg, Kirchengast, *Victims and the Criminal Trial* (n 7); Haley Clark, "'What is the Justice System Willing to Offer?': Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' [2010] (85) *Family Matters* 28, 31–2; Judith Lewis Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571.

51 *Royal Commission into Child Sexual Abuse* (n 2) pts I–II, 114.

52 *The Role of Victims of Crime* (n 1) xiv [24].

53 *Ibid.* See also *Royal Commission into Child Sexual Abuse* (n 2).

54 *The Role of Victims of Crime* (n 1) xiv.

55 O'Connell, 'Victims' Rights: Integrating Victims in Criminal Proceedings' (n 46).

considered existing criminal procedure as well as models of victim-oriented reforms operating within comparative jurisdictions, including those that utilise inquisitorial processes. While there was marked support for the consideration of inquisitorial models of justice, particularly the notion of appointing legal representation for victims, the *Royal Commission into Child Sexual Abuse* maintained the view that reforms should only be contemplated within existing adversarial frameworks so as not to '[encroach] on ... the adversarial system'.<sup>56</sup>

The VLRC similarly proposed that victims should not be made a party to criminal proceedings because this 'would significantly alter the adversarial system and would have very significant cost and resource implications'.<sup>57</sup> To this end, these inquiries recommended other models of victim-oriented reform that would fit within adversarial systems and still recognise the victim as a 'participant, but not a party, with an inherent interest in the criminal trial process'.<sup>58</sup> The VLRC for example, recommended that the *Victims' Charter Act 2006* (Vic) be amended to 'establish a right for victims to seek internal review of a decision by the Director of Public Prosecutions to discontinue a prosecution or to proceed with a guilty plea to lesser charges'.<sup>59</sup> A similar legislative scheme, titled, Victims' Right to Review, exists in England and Wales whereby victims have a statutory right to request an independent review of prosecutorial decisions.<sup>60</sup> However, the Victorian Government has yet to respond to this recommendation.

Further, in relation to the Victorian victims' charter, the VLRC recommended that not only should victims be provided with 'a right to make a complaint ... about a breach of a Victims' Charter principle' but there should also be 'an obligation on investigatory, prosecuting and victims' services agencies to provide accessible and transparent complaint-handling systems and offer fair and reasonable remedies'.<sup>61</sup> The *Royal Commission into Child Sexual Abuse* similarly criticised victims' charter frameworks across Australia more broadly for being 'largely unenforceable', except for in NSW and SA whereby the Office of Commissioner for Victims' Rights can 'receive, and attempt to resolve, complaints about breaches of their charters'.<sup>62</sup> In making its recommendations, the *Royal Commission into Child Sexual Abuse* thus pointed to the need for each Australian Director of Public Prosecutions to revise their complaint-handling systems by way of:

56 *Royal Commission into Child Sexual Abuse* (n 2) pts I–II, 15.

57 *The Role of Victims of Crime* (n 1) 30.

58 *Ibid* xv.

59 *Ibid* xxii.

60 See Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims' Right to Review Reform' (2018) 58(3) *British Journal of Criminology* 550, 550–1; Tyrone Kirchengast, 'Victims' Rights and the Right to Review: A Corollary of the Victim's Pre-Trial Rights to Justice' (2016) 5(4) *International Journal for Crime, Justice and Social Democracy* 103.

61 *The Role of Victims of Crime* (n 1) xxii.

62 *Royal Commission into Child Sexual Abuse* (n 2) pts I–II, 200.

1. Establishing a ‘robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions’;<sup>63</sup>
2. Establishing ‘robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police’;<sup>64</sup> and
3. Publishing ‘the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports’.<sup>65</sup>

Such recommendations also align with the *Royal Commission into Child Sexual Abuse*’s broader objectives of ensuring that:

- 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; and
- victims and survivors are supported in seeking criminal justice responses.<sup>66</sup>

In relation to Victoria specifically, the VLRC’s report recommended that the Victims of Crime Commissioner should:

1. ‘[B]e empowered to review the outcome of complaints regarding compliance by investigatory, prosecuting and victims’ services agencies with the *Victims’ Charter Act 2006* (Vic) principles, on application by the complainant, if the complainant is not satisfied with the agency’s response to the complaint’;<sup>67</sup>
2. Be ‘require[d] to report annually to Parliament on the implementation of the *Victims’ Charter Act 2006* (Vic) 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’;<sup>68</sup>
3. ‘[E]stablish arrangements with the Supreme Court, County Court, Magistrates’ Court, Office of Public Prosecutions, Victoria Police and Department of Justice and Regulation to collect data about implementation of the *Victims’ Charter Act 2006* (Vic) to enable the preparation of annual

63 Ibid 65.

64 Ibid.

65 Ibid.

66 Ibid 3.

67 *The Role of Victims of Crime* (n 1) xxii.

68 Ibid.

reports to Parliament<sup>69</sup>;

4. '[L]ead a comprehensive review of the *Victims' Charter Act 2006* (Vic) not later than five years after the commencement of reforms recommended in this report<sup>70</sup> and
5. Be empowered 'to refer a matter to the Victorian Legal Services Commissioner<sup>71</sup> by way of amending s 27(1) of the *Victims of Crime Commissioner Act 2015* (Vic).

These inquiries thus identified the imperative to formalise victims' rights through changes to victims' charters, and to the independence of powers held by Victims' Rights Commissioners. Although the *Royal Commission into Family Violence* did not address changes to the Office of Commissioner of Victims' Rights specifically, it did consider associated reforms, including the representation of victims in the criminal justice system. Such reforms went to the extent to which victims ought to be provided with a range of specialist support services across Victorian Magistrates' Courts and specialist family violence courts. It was recommended that the courts should therefore implement the following within two years:

1. '[S]pecialist magistrates, registrars, applicant and respondent workers to assist parties in applications for family violence intervention orders and any subsequent contravention proceedings<sup>72</sup>;
2. '[D]edicated police prosecutors and civil advocates<sup>73</sup>;
3. '[F]acilities for access to specialist family violence service providers and legal representation for applicants and respondents<sup>74</sup>; and
4. '[R]emote witness facilities for applicants<sup>75</sup>.

The *Royal Commission into Family Violence* also identified a range of recommendations in relation to police responses to victims of family violence. This included the need to have Victoria Police's Professional Standards Command review Victoria Police policies and procedures in relation to how police deal with, and respond to, family violence. The *Royal Commission into Family Violence* thus recommended a review of 'the adequacy of and any necessary improvements to current policies and procedures' and 'best-practice approaches and model

69 Ibid.

70 Ibid.

71 Ibid.

72 *Royal Commission into Family Violence* (n 3) 62.

73 Ibid.

74 Ibid.

75 Ibid.

policies developed in other Australian jurisdictions and internationally.<sup>76</sup>

Albeit such recommendations emerge from the need to better respond to crime victims, they still reflect a measured approach to justice that does not grant victims exclusive party and participation rights to proceedings, and thus ensure that the adversarial character of the justice system is maintained.

The next section will consider options for reform for the Office of the Victorian Victims of Crime Commissioner following the VLRC inquiry, followed by an assessment of the operation of existing rights and powers in SA, as a basis for model reform in other Australian jurisdictions.

## **VI REFORM OF THE OFFICE OF THE VICTORIAN VICTIMS OF CRIME COMMISSIONER**

Victoria's recently appointed Victims of Crime Commissioner represents a significant and much needed shift toward consolidating victims' rights and interests.<sup>77</sup> Under s 13(1) of the *Victims of Crime Commissioner Act 2015* (Vic), the Commissioner has the following functions:

- (a) to advocate for the recognition, inclusion, participation and respect of victims of crime by government departments, bodies responsible for conducting public prosecutions and Victoria Police;
- (b) to carry out inquiries on systemic victim of crime matters;
- (c) to report to the Attorney-General on any systemic victim of crime matter; [and]
- (d) to provide advice to the Attorney-General and government departments and agencies regarding improvements to the justice system to meet the needs of victims of crime.

Having regard to victim interests also aligns with the recommendations emerging from the VLRC's report, which included the need to reconceptualise crime victims as participants (but not a party) to proceedings,<sup>78</sup> and to have this reflected in the *Victims' Charter Act 2006* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>79</sup> This essentially means requiring that more prominence be given to the victim's inherent interests by government agencies,

<sup>76</sup> Ibid 58.

<sup>77</sup> Mr Greg Davis APM was formally appointed as Victoria's first Victims of Crime Commissioner on 8 March 2016: see 'The Victims of Crime Commissioner', *Victims of Crime Commissioner* (Web Page, 12 October 2018) <[www.victimsofcrimecommissioner.vic.gov.au/about-us/the-victims-of-crime-commissioner](http://www.victimsofcrimecommissioner.vic.gov.au/about-us/the-victims-of-crime-commissioner)>.

<sup>78</sup> *The Role of Victims of Crime* (n 1) xiv–xv.

<sup>79</sup> Ibid xxi.

and ensuring that victims' existing rights are respected and upheld. While this acknowledgement 'departs from the idea that a[n] ... equality of arms between the accused and the community is sufficient to ensure fairness in criminal proceedings',<sup>80</sup> it does not alter the structural position of victims in the criminal justice system, but rather, acknowledges the need to conceive justice within a triangulation of interests framework.

Drawing from a broader study titled, *Adversarial Justice: 'A Triangulation of Interests?' Reconceptualising the Role of Sexual Assault Victims*,<sup>81</sup> participants<sup>82</sup> identified that granting powers to a Commissioner of Victims' Rights helps to ensure that victim interests are represented, while still maintaining the adversarial character of the justice system. As Julie, a manager within Victoria's Witness Assistance Service, explained, a Commissioner of Victims' Rights 'still has to rely on either common law principles or what exists in the legislation'<sup>83</sup> to assist crime victims. Therefore, the integrity of the justice system is protected, as it is the Commissioner who retains the power, not the victim. In reflecting on the representative capacity of the Commissioner for Victims' Rights in SA, Robert (Manager, Witness Assistance Service, Office of the Director of Public Prosecutions (SA)) stated:

[The Commissioner] provides victims with an avenue to address their concerns, issues, grievances, their need to change the law ... He can have a good insight into policy and practice ... of a prosecution office and about where that works for victims and where it doesn't. Some states don't have any of that ... So, in some ways ... he is ... a very good public voice ... who provides lots of practical financial assistance and other assistance to victims to make sure their rights are [upheld] ... Certainly I think other states [outside SA] have far less than we have as a state in relation to a Commissioner of Victims' Rights.<sup>84</sup>

Robert's observations thus demonstrate the potential benefits that can arise from expanding the powers held by the Commissioner in Victoria. It could help to address victim concerns relating to the criminal justice process, for example, the desire to be represented, but does not grant victims 'party status' to proceedings.<sup>85</sup>

80 Ibid 27.

81 Ethics approval was granted by the Monash University Human Research Ethics Committee. Approval Number: CF15/106 — 2015000050.

82 Participants were interviewed in relation to victim-focused reforms across Australia (n=13), England and Wales (n=10), and Ireland (n=3), in which 26 interviews were conducted with victim support workers (n=9), criminal justice professionals (judges, prosecutors and lawyers) (n=10) and key policy and government stakeholders (n=7).

83 Interview with Julie, Manager, Witness Assistance Service, Office of Public Prosecutions (Vic) (August 2016).

84 Interview with Robert, Manager, Witness Assistance Service, Office of the Director of Public Prosecutions (SA) (December 2015).

85 See Department of Justice and Community Safety (Vic), 'Victorian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse' (Report, 11 July 2018).

In this way, expanding the rights of the Victorian Victims of Crime Commissioner provides a measured response to upholding victim rights and interests. On 7 May 2017, the Victorian Government announced several initiatives in response to the recommendations of the VLRC.<sup>86</sup> This included ‘\$6 million to strengthen the role of the Victims of Crime Commissioner to better identify and investigate any systemic issues that victims experience when in contact with the justice system’.<sup>87</sup>

As we argue throughout this article, reform of the Office of Commissioner of Victims’ Rights must align with those tested rights and powers available to Commissioners across other Australian states and territories, such as SA as discussed below, to provide a suitable response to the suite of changes contemplated by the VLRC. Using the following case studies derived from the South Australian Commissioner for Victims’ Rights as a basis for analysis, we argue that consolidation of power held by the Commissioners of Victims’ Rights can potentially improve victims’ procedural justice experiences. Working to improve victim experiences through such an office will also help to ensure that victims’ interests are conceptualised within a triangulation of interests framework that balances the interests of the state and those of the accused.

## **VII LEARNING FROM THE SOUTH AUSTRALIAN EXPERIENCE: SOME PRACTICAL EXAMPLES**

The South Australian Commissioner for Victims’ Rights provides a basis for model reform given the established history of the Office, and the progressive work undertaken by the Commissioner since 2006. This includes work with existing stakeholders of justice, in addition to intervention in legal proceedings where specific victim interests arise. The Commissioner or legal counsel engaged by them provides for victim participation in a variety of ways. Section 32A of the *Victims of Crime Act* (SA) provides that ‘[r]ights granted to a victim under this, or any other, Act may be exercised on behalf of the victim by an appropriate representative chosen by the victim for that purpose’. SA is presently the only state where such rights to representation are explicit in statute.

Where appropriate, the Commissioner consults with a victim to determine whether intervention is warranted, and if so, makes an independent determination to exercise representative rights to:

1. Determine if criminal proceedings should commence;
2. Attend plea negotiation meetings with prosecutors;

<sup>86</sup> Daniel Andrews, ‘Supporting Victims of Crime in The Justice System’ (Media Release, Victoria State Government, 7 May 2017).

<sup>87</sup> *Royal Commission into Child Sexual Abuse* (n 2) pts I–II, 206, citing *ibid*.

3. Request a review of plea negotiation decisions;
4. Submit individual victim impact statements; and
5. Draft and submit neighbourhood impact statements for collectives of victims or social impact statements for the public at large.<sup>88</sup>

The Commissioner may appoint counsel to assist victims during criminal proceedings, for example, to apply for a suppression order, to express views on protected communications, and to respond to a defence request for access to a transcript of evidence given at a Royal Commission.<sup>89</sup> In addition, the Commissioner can appear in sentencing proceedings before the District Court to answer questions of the judge, such as if there was a chance for reconciliation between victims and defendants. The Commissioner is also able to participate in Aboriginal (Circle) Sentencing Hearings to make submissions on the victim's behalf.<sup>90</sup>

Provision of legal counsel has also resulted in court decisions and interpretations of law that have favoured victims' interests without unduly impacting the rights of accused people. This can be seen through the following cases:<sup>91</sup>

### **Case A**

A parent and children were unlawfully killed. Shortly after the suspect was arrested, the Commissioner became aware that a child of that parent had survived the ordeal because they were not present. To protect the identity of that child, the Commissioner applied through legal counsel to the Magistrates' Court for a suppression order to prevent undue hardship on that child and secondary victimisation to other family members. After the suspect was convicted for murder, the Commissioner made submissions on the suppression of information about the child that the Supreme Court upheld. As such, there was no unnecessary intrusion on the child's privacy.

### **Case B**

A victim with a disability was required to attend a pre-trial meeting to determine whether the criminal proceedings would continue and, if so, whether to amend the charge to a lesser offence. Contrary to the prosecutor's preference, legal counsel for the victim asserted that the victim was capable of giving evidence

<sup>88</sup> *Sentencing Act 2017* (SA) s 15 ('*Sentencing Act* (SA)').

<sup>89</sup> *Victims of Crime Act* (SA) (n 8) s 32A.

<sup>90</sup> *Sentencing Act* (SA) (n 88) s 22.

<sup>91</sup> These cases have been anonymised to protect the identity of the actual victims in each matter. The details of each matter lie with the South Australian Commissioner for Victims' Rights. All cases (A–H) are based on actual matters in which the Commissioner intervened based on their statutory power under s 32A of the *Victims of Crimes Act* (SA) (n 8).

if appropriately assisted and that the more serious charge should proceed. The prosecutor subsequently relented and criminal proceedings continued to trial, where the court found the accused guilty of the serious violent offence.

### **Case C**

A parent of two children accused the other parent of assaulting one of their children. The children were the only competent witnesses. The prosecutor received submissions from the accused parent's counsel demanding the charge be withdrawn, but was also confronted by strong advocacy (coupled with the threat of a complaint to the Police Ombudsman) from the other parent. Worried about the children's wellbeing, the prosecutor invited the Commissioner to appoint legal counsel as an independent advocate for the children. The Commissioner obliged, and the legal counsel ensured that the children voiced their views on the charge decision, and assisted the children on issues pertaining to competence and compellability.

### **Case D**

The prosecutor notified several adult victim-survivors of child sex offences that the charges were unlikely to proceed. Some of the victims felt that they were merely told the decision and given reasons for it, rather than genuinely consulted before the decision was made. The Commissioner appointed legal counsel to assist the victims to attain a review of a prosecutor's decision to withdraw charges. Although one of the victim's cases proceeded to trial and the court acquitted the accused, the victim did not regret pursuing the criminal prosecution. The legal counsel stated in a report to the Commissioner that the review process is an important and just means to hold prosecutors accountable for their charge decisions.

### **Case E**

The parents of an adolescent separated, and the adolescent lived mostly with their mother. On one occasion, the mother left the adolescent in the care of her partner at the family home. The partner used a laptop to show the adolescent pornographic video before sexually assaulting them. Pre-trial, counsel for the accused applied for a copy of all of the material stored on the laptop's hard drive. The stored material included private information belonging to the mother, the adolescent and several other people who had used the device. The Commissioner, through legal counsel, asked to be heard on the defence application. Counsel for the Commissioner argued that international and domestic law afforded all people, especially the adolescent victim, the right to privacy; and, although that right was not absolute, the court should be mindful of it in its decision on what material

should be disclosed to the accused. Rather than order the prosecution to hand over a complete copy of the hard drive, the court ordered that the prosecution only pass on material (including e-records) saved onto, or recorded on the hard drive, for the 24-hour period prior to, and 48 hours following, the alleged offence.

### **Case F**

An adult victim of an alleged sex offence struggled due to differences of opinion between police investigators and the prosecution staff on whether criminal charges should proceed. The Commissioner employed legal counsel with whom the victim consulted, then the counsel accompanied them to the adjudication meeting to discuss the evidence and likelihood of securing a conviction. Counsel helped the victim to articulate their views but also to negotiate access to information to assist with a private application for an intervention (protection) order. After the meeting, the victim, although disappointed with the decision to withdraw all charges, still believed they had been heard, which was a belief they did not hold prior to retaining counsel. Legal counsel also successfully applied for an intervention order to protect the victim from the accused person, which further enhanced the victim's sense of justice.

### **Case G**

The Magistrates' Court found the accused guilty of various dishonesty offences that had been uncovered after an investigation by the Independent Commissioner against Corruption.<sup>92</sup> Many people were impacted by the offender's crimes and each person was entitled to make a victim impact statement. Rather than have multiple victim impact statements, the Commissioner interviewed each affected person then compiled a 'neighbourhood impact statement'.<sup>93</sup> Afterwards, the Commissioner instructed legal counsel to furnish the Court with the effects of the crimes and the personal circumstances of the victims. The magistrate later referred to the neighbourhood impact statement in her remarks on sentence. She stated:

Your disregard for all of those involved undermines the confidence of the community and indeed ... the very structure and processes of the system. Your offending ... comes compounded by the fact that it occurred in a rural community and the impact on a rural community is of course far more visible. It has left that community damaged, emotionally and financially.

As such personal and significantly general deterrence must be reflected in the

92 *DPP (SA) v Templeton* (Magistrates Court of South Australia, Magistrate McGrath, 2 November 2017) ('*Templeton*').

93 *Cf Western Australia v DAL [No 3]* [2017] WASC 260, [187]–[192] (Archer J).

penalty that I impose.<sup>94</sup>

## Case H

A family bereaved by the unlawful death of an elderly member asked to be heard on the mentally incompetent offender's application to vary a licence order (which is similar to a custodial or non-custodial order imposed on a competent offender). Section 269P of the *Criminal Law Consolidation Act 1935* (SA) at that time stated that a 'person with a proper interest' could apply to the court to be heard on the application to vary or revoke such an order. The Commissioner instructed legal counsel to assist the bereaved family. Gray J in *R v Steele [No 2]* ('*Steele [No 2]*')<sup>95</sup> held that the family of a deceased person (who under South Australian law are crime victims) could be represented by legal counsel on the offender's application to vary the licence order. Gray J also permitted counsel for the bereaved family to cross-examine witnesses. Since then, the Supreme Court and District Court have followed *Steele [No 2]*.<sup>96</sup> In one of these cases,<sup>97</sup> the lawyer representing the victim's family reported that he witnessed a transformation in the bereaved wife of the deceased. The lawyer had not previously believed in the 'restorative value'<sup>98</sup> of giving a victim the right to be heard in criminal proceedings (beyond giving evidence as a witness). Vanstone J, among other references made to the lawyer's submissions, observed, '[the bereaved family] showed great maturity in their response to the plan and in finding, as a fallback position, some common ground'.<sup>99</sup>

The *Steele [No 2]* case and others thereafter are significant because they served as the impetus for the Parliament of SA to enact an amendment to s 269P of the *Criminal Law Consolidation Act 1935* (SA), that empowers the Commissioner to apply to vary or revoke a 'licence order' as well as make submissions whenever an application is made by another party.<sup>100</sup>

The Commissioner has also engaged counsel to assist victims dealing with the police prosecution on matters involving applications for intervention orders. A test case has commenced on the right of the 'protected person' (the victim) to be heard on an application to vary or revoke an intervention order (that is, an anti-

94 *Templeton* (n 92) 4.

95 [2012] SASC 162 ('*Steel [No 2]*').

96 See *R v Bowen* [2015] SASCFC 111 ('*Bowen* (2015)'): 'such right of appearance as victims may have pursuant to s 269P of the Act does not make a prescribed person a party to the proceedings': at [12] (Kourakis CJ).

97 *R v Bowen* [2014] SASC 81 ('*Bowen* (2014)'). Cf *Bowen* (2015) (n 96).

98 Conversation with Anthony Kerin, Commissioner for Victims' Rights (SA) (2014).

99 *Bowen* (2014) (n 97) [14].

100 See *Criminal Law Consolidation Act 1935* (SA) ss 296A, 269O, 269P(1). See also Order of Bampton J in *Commissioner for Victims' Rights v Simper* (Supreme Court of South Australia, SCCRM-17-256, 14 May 2018), for the first application under this new law.

violence or restraining order).<sup>101</sup>

Additionally, the Commissioner, through counsel, has intervened in family law cases. One such example of this involved a situation where a mother, a permanent resident of Australia, wanted to visit her family overseas. She was separated at the time due to domestic violence related incidents and the Family Court had yet to resolve the divorce and property settlement. The mother had asked her estranged husband to sign a passport application made in their young child's name. The husband-father refused, so the Commissioner funded counsel to apply to the Family Court for approval to attain a passport for the child, which was granted.<sup>102</sup>

On another occasion, the victim of domestic violence had been paid state-funded victim compensation for an injury perpetrated by her former spouse. During the Family Court proceedings, the former spouse demanded half of the family assets, including half of the money paid as compensation for the injury he caused. The Commissioner paid legal counsel to intervene in the out-of-court exchange, which resulted in the former spouse-perpetrator withdrawing his demand for the proportion of the victim compensation.<sup>103</sup>

The Commissioner has engaged legal counsel on over 200 occasions between 1 July 2008 and 31 December 2017, to assist victims post-investigation in either the criminal justice process or related systems, such as in the Coroner's Court and Family Court.<sup>104</sup> The presence of victims' lawyers has indeed drawn greater attention to victims' rights.<sup>105</sup> Police officers, prosecutors, magistrates and judges, as well as defence counsel, despite their initial wariness, and even opposition, have recognised the potential to improve the administration of justice by having a 'third voice' actively involved in decisions that affect victims.<sup>106</sup> The Commissioner, through legal counsel, has empowered victims by providing access to procedural justice, and arguably, by giving victims an equitable voice, while reducing the likelihood of secondary victimisation. The use of legal counsel has also helped to remove the problematic subjective and emotional attribution that often limits

101 See *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 26(5).

102 This case has been anonymised to protect the identity of the mother and the child. The details of the matter lie with the South Australian Commissioner for Victims' Rights on an archived Legal Funding file held in State Records.

103 This case has been anonymised to protect the identity of the victim. The details of the matter lie with the South Australian Commissioner for Victims' Rights on an archived Legal Funding file held in State Records.

104 Commissioner for Victims' Rights (SA) (2008–18) Legal Funding. 07/1061; 08/0311; 14/0310; 16/0438; 17/0768. These files are confidential. Each victim has a right to privacy: *Victims of Crime Act* (SA) (n 8) s 14. Some of the information on these files is legally privileged. Furthermore, the Commissioner for Victims' Rights is an exempt agency under the *Freedom of Information Act 1991* (SA) sch 2 para (k). These files are archived in accordance with the Commissioner's Record Disposal Schedule, as approved by State Records.

105 Kirchengast, 'Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial' (n 14) 571.

106 See also Douglas E Beloof, 'The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review' [2005] (2) *Brigham Young University Law Review* 255.

victim participation.<sup>107</sup>

The South Australian Commissioner has thus become a significant point of reference for reform of law and practice, and has increasingly been cited as influencing like reforms throughout Australia.<sup>108</sup> SA's experience rejects the notion that victims ought to be relegated as witnesses for the prosecution and instead suggests a significant step toward victims gaining more comprehensive participatory rights in that state's criminal justice system.

## **VIII REFORM TO THE OFFICE OF COMMISSIONER OF VICTIMS' RIGHTS**

Arguments for the reform of the Office of Commissioner of Victims' Rights support the suggestion that such an office must have statutory independence. This is required for state Commissioners to make enquiries and, where relevant, seek information or production of evidence in order to fairly represent the victim with a view to resolving the issue and subject of enquiry. Independence of office is thus an essential aspect of the full and proper exercise of powers given the contentious nature of investigations made by the Commissioner, as shown in the South Australian experience. Cases A–H set out above demonstrate that such independence is imperative, not only from the point of view of government offices and departments of the subject of enquiry, but also from the victim seeking access to justice. At times, the Commissioner will have to confront victims seeking access to justice or questioning a process, or have an executive decision made,<sup>109</sup> with a determination that the right which the victim is seeking to enforce is either not possible under current legal arrangements, or substantially detracts from the accused's right to a fair trial.

However, Cases A–H demonstrate how certain requisite powers ought to comprise the Office of Commissioner of Victims' Rights, for that office to be established with a view that the Commissioner exercises in a legitimate and not placatory dispute resolving capacity. This means that the Commissioner requires power to:

1. Investigate complaints (Cases A–H);
2. Assist victims with special needs and vulnerabilities (Case B);
3. Independently advocate for child victims, especially where courts enquire into competence and compellability (Case C);

<sup>107</sup> See Tracey Booth, 'Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom' in Dean Wilson and Stuart Ross (eds), *Crime, Victims and Policy: International Contexts and Local Experiences* (Palgrave Macmillan, 2015).

<sup>108</sup> See *The Role of Victims of Crime* (n 1).

<sup>109</sup> For instance, a plea negotiation reached by the prosecution, where all expectations of victim consultation are fairly met.

4. Protect a victim's right to privacy in cases where excessive discovery of evidence is sought by the accused (Case E);
5. Liaise with government officials where victims' rights to information or consultation with relevant decision-makers are not upheld, including where charges are withdrawn (Cases D and F);
6. Represent victims during plea negotiations or enquire into how plea negotiations were reached (Case B);
7. Apply for victim protection orders (Case F);
8. Raise matters with prosecutors where decisions reached have adverse (and perhaps unintended) consequences for victims (Case E);
9. Intervene in court proceedings (Cases A–H);
10. Submit a victim impact statement or neighbourhood impact statement (Case G);
11. Vary or revoke a licence order where the accused is deemed mentally incompetent (Case G); and
12. Compel production of evidence, or seek an order for such production (Case E).

The VLRC's recommendations in relation to enhancing the powers of the Victorian Victims of Crime Commissioner provide a framework through which reforms to the Office of Commissioner of Victims' Rights may proceed. Based upon the powers of the South Australian Commissioner for Victims' Rights, an Office of Commissioner of Victims' Rights ought to comprise five interconnected rights and powers to:

1. Have statutory independence from other government officials, including the Attorney-General;
2. Represent the victim where enforcement or maintenance of the rights provided under the charter or declaration of victims' rights is questioned;
3. Initiate an investigation in order to resolve disputes;
4. Compel production of evidence related to the dispute; and
5. Represent the victim in court, as intervenor, in limited circumstances.

The Commissioner should also establish arrangements with the Supreme Court, District or County Court, Magistrates' Court, Office of Public Prosecutions, police and Department of Justice and/or Attorney-General, to collect data about the implementation of the charter or declaration of victims' rights and be required to present that data in the form of an annual report to Parliament.

Such a report ought to provide information on all investigatory, prosecuting and victims' services agencies, including information about the number of complaints made and processed about compliance with the victims' charter principles.<sup>110</sup> Comprehensive review ought to occur within five years after the commencement of any reform, as noted by the VLRC.<sup>111</sup>

## IX LIMITING RIGHTS TO THE OFFICE OF COMMISSIONER OF VICTIMS' RIGHTS: ADDRESSING CONCERNS AND CONSEQUENCES

The developed Office of Commissioner of Victims' Rights considered by and informed through various law reform inquiries and Royal Commissions sets out a progressive yet conservative agenda for the development of victim rights in Australia. The proposed reforms, many of which develop out of, or by reference to, the longstanding Commissioner for Victims' Rights in SA, provide a functional way forward for the development of a victim rights framework because they seek to advance victim rights by addressing competing interests of justice. Essentially, such proposals would be premised off model reform, as already established in the South Australian context, from which the Office of Commissioner of Victims' Rights may be developed across other Australian states and territories. Cases A–H demonstrate how the representative rights of the Commissioner may assist the court without unduly impacting the right of the accused to access justice. Cases A–H suggest that defence counsel may welcome such intervention where it supports ancillary rights to protection or privacy and does not interfere with the accused's access to justice, or to a fair trial.<sup>112</sup>

Furthermore, the development of victim rights and remedies within the Office of Commissioner of Victims' Rights provides a safe environment for the meeting of policy imperatives that now see victims' access to justice as a significant social

110 More personable data collection may also be desirable, and Commissioners may seek to meet regularly, in person, with relevant government and non-government agencies for which there is a reporting relationship. Such meetings may form part of the Commissioners' overall educative remit, and to deal with issues and concerns in a more direct manner, establishing routine presence within those agencies.

111 *The Role of Victims of Crime* (n 1) xviii [46]. The South Australian Commissioner already produces an annual report to be tabled in Parliament under s 16F of the *Victims of Crime Act* (SA) (n 8). Any suggested expansion of content covered by such a report must follow an appropriate increase in resources and expenditure to allow for the collection, organisation and analysis of such data. See Commissioner for Victims' Rights (SA), *Commissioner for Victims Rights 2016–17 Annual Report* (Report, 15 November 2017).

112 See Cases A and H. The requirements of a fair trial and the accused's entitlement to them are foundational, pursuant to *Barton v The Queen* (1980) 147 CLR 75, as affirmed in *Jago v The District Court of New South Wales* (1989) 168 CLR 23, such that fair trial rights 'commonly manifested in rules of law and of practice designed to regulate the course of the trial': at 29 (Mason CJ). Such rules allow the accused to challenge the case against them, and commonly draw from elements as set out under *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14. See also United Nations Office on Drugs and Crime, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, GA Res 67/187, UN Doc A/RES/67/458 (28 March 2013, adopted 20 December 2012).

policy concern. Most importantly, the Office of Commissioner of Victims' Rights allows for the development of rights, including representative rights, and the power to intervene in court proceedings in a way that neither limits nor precludes the accused's due process rights or the requirements of a fair trial. Providing victims the general power to appoint private counsel to intervene in criminal proceedings, despite some limited power to already do so,<sup>113</sup> has been criticised on the basis of introducing a third party into the criminal justice process that is unknown to adversarial practice and procedure. Such power, if generally held by victims, may unduly interfere with the criminal trial process and will likely impact on the rights of the accused. Even where such intervention is supervised by the court, adding a third party to adversarial proceedings is likely to cause unforeseen delays, excessive charges, and possible sentencing inconsistency. The suggestion of adding victims as an independent third party with the right to general standing in criminal proceedings has been rejected by the VLRC and *Royal Commission into Child Sexual Abuse*, considered in this paper.<sup>114</sup>

The accused's access to justice and the need for the state to determine criminal matters in the public interest will continue to provide the central rationale of criminal justice in the Australian adversarial context. As such, a Commissioner should only take victim concerns forward in pressing circumstances to provide redress/remedy, where needed. Such determinations ought to be left to the Commissioner and their department, and not the victim personally. Expanding the powers of the Victorian Commissioner in this direction, for example, is an arguable 'next step' for victim inclusion, but it is also an incremental and mindful step.

Nevertheless, developing the Office of Commissioner of Victims' Rights and providing expanded powers to intervene in legal proceedings to represent discrete interests, including those of specific victims otherwise unable to access justice, could also prolong the legal process.<sup>115</sup> Other risks include increased fiscal constraints on the state, the potential withdrawal of state support services to the victim if the Commissioner becomes too involved, and restoring non-enforceable rights should the Commissioner become overly invested in matters of public justice in instances where that involvement begins to pervert the public character of criminal law and procedure.

The potential impact on individual victims is also noted. Although not all victims seek to contest decisions made during the criminal charging and prosecution

113 Kirchengast, *Victims and the Criminal Trial* (n 7) 12, 76–80.

114 *The Role of Victims of Crime* (n 1) 30 [3.53]; *Royal Commission into Child Sexual Abuse* (n 2) pts I–II, 228.

115 Interview with Robert, Manager, Witness Assistance Service, Office of the Director of Public Prosecutions (SA) (December 2015).

process,<sup>116</sup> some victims will seek higher levels of participation.<sup>117</sup> This may be out of necessity, because an ultimate decision can affect the integrity of the victim or their family in a material way, for example, undue interference with the victim's privacy, or because the victim seeks to participate for therapeutic reasons.<sup>118</sup> In either event, a victim may be critical of the expansion of victim rights through an Office of Commissioner of Victims' Rights, because it may limit a victim's personal access to justice, requiring a victim to proceed through an executive office, in order to access the courts.

Research on victim participation in court indicates, however, that victims rarely seek to intervene in proceedings personally, and generally do not do so out of vengeance or revenge.<sup>119</sup> While there is evidence to suggest that victims want to formalise their right to access justice, including participatory rights in court, there is little evidence to indicate that victims seek to do this themselves. Requiring that victims access criminal justice as individual or private participants invariably comes with great financial cost, and requires a high level of knowledge and expertise unless a victim has the capacity to afford private counsel. Indeed, private counsel may also have limited experience dealing with the numerous justice agencies across the entirety of the pre-trial, trial and sentencing process, otherwise familiar to the Commissioner. The desire to formalise victim rights around an enhanced Office of Commissioner of Victims' Rights is thus a compromise for both the victim and the state — it is a right to provide measured access to justice, to provide enhanced 'participation' but not 'party' rights, and to preserve the adversarial character of the justice system. Enhancing the Office of Commissioner of Victims' Rights as outlined herein does not change the structural position of victims within the justice system. It is the Commissioner who has the power, not the victim. The benefits for victims arguably outweigh any criticism levelled by those seeking enhanced private redress, and access to victim's compensation and the civil law system would be preserved.

Further benefits may also accrue where the representative capacity of the Office of

116 Tyrone Kirchengast, 'Participation of Victims of Crime in New South Wales Court Processes' (Final Report, November 2014) 115.

117 Ibid 125–7.

118 See generally Edna Erez, Michael Kilchling and Jo-Anne Wemmers, *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2011).

119 Kirchengast, 'Participation of Victims of Crime in New South Wales Court Processes' (n 116) 35–9. Jordan also highlights how proceeding through the legal process does not always align with victims' expectations of justice: see Jan Jordan, *Serial Survivors: Women's Narratives of Surviving Rape* (Federation Press, 2008). This is because, upon reporting, victims do not always expect that the offender will be caught and convicted; rather, they may be seeking 'to regain a sense of personal safety, and to have their experience validated': at 29. However, research challenges the view that victims merely seek vengeance by way of securing a conviction and punitive punishment: see Deborah P Kelly, 'Victims' Perceptions of Criminal Justice' (1984) 11(5) *Pepperdine Law Review* 15; Susan E Gegan and Nicholas Ernesto Rodriguez, 'Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?' (1992) 8(1) *Journal of Civil Rights and Economic Development* 225. Despite rhetoric to the contrary, victims most often approach the criminal justice system not to take over proceedings in their interest, but to validate their victimisation experience(s), and/or for altruistic reasons, to keep others safe from potential harm: see Clark (n 50).

Commissioner of Victims' Rights extends to educating victims, victims' services, the legal profession, the judiciary and society at large, as to the rights and standing of victims in the criminal justice system more generally. An enhanced Office of Commissioner of Victims' Rights, with independent and active oversight of victims' rights, will likely secure public confidence in the justice system rather than thwart it. In order to achieve this, a Commissioner will need to do more than intervene in individual cases, but will also need to identify gaps and lead law reform to assist victims, provide a complaints mechanism for victims, and take victim concerns forward to redress.

The integrity of justice concerns around the independence of the prosecution and due process rights of the accused are better maintained through a system that vests power in the Office of Commissioner of Victims' Rights. Under such a model, victims do not gain party standing, and the Commissioner remains the intermediary between traditional stakeholders of justice and victims.

## X CONCLUSIONS

In 2016, the VLRC set out an ambitious reform agenda, substantially unrealised as of 2019. Reforms centred around developing a formal complaints mechanism to allow victims to seek internal merits review of key decisions — to establish robust and effective internal audit processes to review compliance with policies for decision-making and consultation with victims and police, and to render such complaints mechanisms publicly accessible. Various discrete reforms were recommended to address inadequacies, although the charter was identified as the source through which such reforms ought to take effect.<sup>120</sup> Developing the Office of Victims' Rights Commissioners was identified as a sufficient outcome of the VLRC inquiry.<sup>121</sup> The *Royal Commission into Child Sexual Abuse* similarly criticised victims' charter frameworks across Australia more broadly for being 'largely unenforceable',<sup>122</sup> except for in NSW and SA whereby the Office of Commissioner for Victims' Rights can 'receive, and attempt to resolve, complaints about breaches of their charters'.<sup>123</sup> Although the *Royal Commission into Family Violence* did not address changes to the Office of Commissioner of Victims' Rights specifically, it did consider associated reforms, including the representation of victims in the criminal justice system. Such reforms include the need for a dedicated victim's advocate in support of victim rights and interests.<sup>124</sup>

Collectively, these inquiries thus identified the imperative to formalise victims'

120 *The Role of Victims of Crime* (n 1) xv.

121 *Ibid* xvi.

122 *Royal Commission into Child Sexual Abuse* (n 2) pts I–II, 200.

123 *Ibid*.

124 *Royal Commission into Family Violence* (n 3) 64, 100.

rights through changes to the powers held by the Office of Commissioner of Victims' Rights. While such recommendations emerge from the need to better respond to crime victims, they still reflect a measured approach to justice that does not grant victims exclusive party and participation rights to proceedings, thus ensuring that the adversarial character of the justice system is maintained.

Progress towards the ratification of the recommendations of the three inquiries considered in this article is likely to stall should an institutional context not be found that brings victim rights to bear amicably on the criminal trial and associated processes. The inquiries considered herein provide an opportunity for real incremental progress for victims should a rights framework and mode of enforcement be established that is satisfactory to a range of stakeholders, including those accused of crime and the lawyers that represent them. The suggestion that the Office of Commissioner of Victims' Rights is a safe place for the implementation of the recommendations of the various inquiries considered will also mean that victims will less likely have to deal with an array of government agencies, leading to increased satisfaction with their justice experience, while reducing the likelihood that they will seek out direct party-based advocacy in court.

This article has considered the outcomes of three major law reform inquiries focused on the development of victim rights in Australia. It has assessed recommendations to further develop the Office of Commissioner of Victims' Rights and has argued that such an option presents a measured, conservative and trusted response to the call for increased victim rights and powers, including the right to be represented in court. Drawing on the established Office of Commissioner for Victims' Rights for SA and reforms contemplated in Victoria, this paper has argued that the expansion of representative rights and the right to intervene in proceedings best proceeds through an independent Office of Commissioner of Victims' Rights to meet the, at times but albeit not exclusively, competing needs of victim rights, independent prosecution interests of the state, and the due process concerns of the accused. Housing such powers in an Office of Commissioner of Victims' Rights provides a measured response that limits victims' private access to the criminal trial, yet extends their ability to participate in criminal justice. Importantly, further developing the Office of Commissioner of Victims' Rights does not grant victims standing in a criminal court, yet does not detract from those few instances where this is already provided by law.<sup>125</sup> Indeed, such an approach would facilitate the competing triangulation of interests between the state, the accused and victims, and warrants further consideration as we now move to develop into law and policy the recommendations of the inquiries set out in this article.

125 Kirchengast, *Victims and the Criminal Trial* (n 7) 76–80; Braun (n 38); Raitt (n 38).