ACT DPP

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27 November 2018

Charter of Rights for Victims of Crime
Legislation, Policy and Programs
Justice and Community Safety Directorate
GPO Box 158
Canberra ACT 2601

By email: jacslpp@act.gov.au

Re: ACT DPP Response to Charter of Rights of Victims of Crime Options Paper

The ACT government has indicated it intends to introduce a Charter of Rights of Victims of Crime ("the Charter"). This letter is a response to an options paper on the Charter released by JACS in June 2018. It is noted that the options paper poses a number of questions and canvasses a number of proposals. This letter addresses those options and proposals that may involve the DPP.

The role of victims has not always been appreciated in our criminal justice system. However, over the last two decades, there has been increasing acknowledgement of the centrality of victims of crime to the criminal justice system.

As a result there have been significant changes. All Australian jurisdictions now have some form of witness assistance service and police services have specialist officers that liaise with victims of crime.

In all Australian jurisdictions special measures have been introduced to reduce the stress around giving evidence. The ACT is a leader amongst Australian jurisdictions in the application of special measures such as giving evidence from a remote location, the presence of a support, police interviews as evidence in chief and pre-trial evidence recorded prior to the trial. These special measures apply more broadly in the ACT than in all other Australian jurisdictions. I am proud to say that my Office has been the driver behind many of these special measures. This is because prosecutors are at the coalface and interact daily with victims of crime who give evidence. They are well placed to see what reforms might improve the experience of witnesses giving evidence in criminal proceedings.

Following the Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse further significant changes will be seen. The Attorney General has committed to the introduction of intermediaries for children and other vulnerable witnesses, and special measures will be further expanded.

My Office continues to innovate and explore new ways to improve the experience for victims of crime. We will soon be publishing a range of materials on the Internet for victims of crime and other witnesses, including visual presentations. We are hoping to secure funding to produce some short videos explaining the criminal justice process and going to court. My aim is to reach a broad audience and to explain the court process clearly.

One of the most traumatic and stressful parts of being a victim of crime going through the court process - cross examination - is not addressed in the options paper. Much has been done in the ACT to improve the experience of giving evidence. However, the prospect of a difficult and protracted cross examination remains, especially for victims of sexual offences where their credibility is often the central issue in the trial. Attempts to ameliorate the worst excesses of cross examination, such as the prohibition on cross examination on the sexual past of the complainant, have gone part of the way. However, cross examination of victims, especially complainants in sexual assault cases, often takes place over days, and can leave victims feeling re-victimised and very traumatised. Intermediaries have been identified as the solution for children. What might be done to improve the experience for adult victims of violence remains a seemingly intractable issue but one we should not shy away from. I explore some options below.

The role of the ACT DPP

Before addressing the particular options and proposals in the paper, some background on the role of the DPP and the interaction with victims of crime will assist in giving context to my comments below.

Prosecutors are the interface between the witness (including victims of crime) and the court process. However, it is important to note that DPPs do not represent victims of crime. The role of the DPP is to prosecute on behalf of the community and ensure criminal proceedings are conducted fairly and efficiently.

We are very fortunate in the ACT to have a number of agencies which are able to provide support to victims of crime as they interact with the criminal justice system. These services, such as Victim Support ACT, the Domestic Violence Crisis Service and Canberra Rape Crisis Centre are able to deliver comprehensive services for victims of crime. These services are appropriately delivered by other agencies allowing the DPP to do its job, which is to prosecute criminal offences in the courts.

My Office has a Witness Assistance Service (WAS) made up of two witness liaison officers, the primary focus of whom is acting as a liaison point between prosecutors and victims, particularly victims and family members in sexual offence and serious violent offence proceedings, and matters involving children. The witness liaison officers provide information to witnesses on court processes, and give information on, and referrals to, available support services.

The ACT DPP is unique amongst DPPs in Australia. Other Australian DPPs are responsible for prosecuting indictable matters in the higher courts and the respective police services prosecute summary offences in the summary courts. In the ACT the DPP is responsible for prosecuting *all* ACT offences, in the Magistrates Court and the Supreme Court. As such, the

ACT DPP is responsible for the prosecution of a much broader range of offences in both courts.

As noted in my annual report for the year 2017/2018, 5004 matters[1] were finalised. Of those matters1160 matters involved personal violence offences and a further 645 matters involved property offences such as burglary, theft, fraud and property damage (matters often with multiple victims) – were finalised. Some of these matters involve two or more victims. This Office dealt with matters involving over 2000 victims.

The Office does not have direct contact with the majority of victims of crime where charges have been laid. Rather, it is the police informant (the police officer in charge of the case), or ACT Policing victims liaison officers (VLOs) who interact directly with the majority of victims of crime. Generally, prosecutors are in contact with victims of crime only when the victim of a crime is required to attend court to give evidence as a prosecution witness in a defended hearing or trial. As the majority of criminal matters do not proceed to hearing, but rather resolve by way of plea of guilty, the victim of crime will not need to go to court to give evidence and they will therefore not have any direct interaction with my Office. If the defendant proposes to plead guilty to different charges, or seeks a variation to the proposed statement of facts, the prosecutor will let the informant know, and the informant will discuss this with the victim of crime, and then relay their views to the prosecutor. Informants will arrange to obtain a victim impact statement from the victim of crime, as well as any requests for reparation. The informant will be advised of the results of the case and pass this information onto the victim of crime.

An exception to this general rule involves victims of sexual offences. There is an engagement between prosecutors, the WAS and victims of sexual offences early on in the proceedings, and later where the victim is required to give evidence. The WAS provides regular updates to victims of crime. In matters involving a death (murder, manslaughter, culpable driving) there is contact between victims' families and this Office from time to time as required. It is noted in this regard that comprehensive support is provided by ACT Policing VLOs in such cases.

Any requirement for interaction between the DPP and victims of crime in any proposed Charter will need to take account of the structure laid out above. For example, if there were to be any proposal to require direct contact with <u>all</u> victims of crime by my Office, this would require a significant increase in resources. By way of example, the NSW DPP which deals with the serious offences at committal stage and in the District and Supreme Court, but does not deal with any summary prosecutions, had 35 witness assistants in 2015/16. While it is clearly a much larger jurisdiction, the NSW DPP has involvement in serious cases, in contrast to this Office which deals with all matters in which there is a criminal prosecution.

It is not necessary, nor is it possible, for this Office to have contact with all victims of crime. This contact currently occurs between victims of crime and informants, VLOs and other agencies. This system works well. The informant is known to the victim right from the commencement of the investigation and continues that contact as the case progresses. ACT Policing VLOs have supported police officers in their interactions with victims of crime for many years, and in my experience, this arrangement works very well. A number of other agencies such as VS ACT and the Domestic Violence Crisis Service provide in depth support to victims of crime.

<u>The three key issues</u>

The options paper identifies the three key issues as follows:

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[1] A matter refers to a defendant; one defendant may have a number of charges against them.

1. The availability and provision of information to victims of crime on justice processes generally as well as specific updates about their case;
2. Opportunities for victims of crime to participate in justice processes by being consulted on key decisions and having their voice heard; and
3. Complaint processes and accountability mechanisms to help implement the Charter and victims to access rights.

Some of these issues can be addressed through technology. For example, a victim of crime might be given an access code to access certain information straight from the courts database, such as when a matter is adjourned to, or what bail conditions have been set. A victim of crime might be able to sign up for text message updates of court dates, which are then automatically sent out each time the matter is in court. Making general information available on the internet in a user friendly format is another way technology can assist.

The Options Paper

I now address specific issues raised in the Options Paper. I will not endeavour to address every aspect, but rather will address those parts of the paper which may impact on this Office.

The right to information and participation - *what is best practice in providing information to victims of crime*

Information in this context falls into two categories:

(i) general information relevant to the expected course of criminal proceedings, and the experience of attending court to give evidence

(ii) case specific information.

Providing **general information** should not be difficult to achieve. A number of agencies provide this information online. Providing general information to victims of crime is something we have always done and are in the process of improving, utilising the DPP website. We are in the process of developing materials for victims of crime and other witnesses. We envisage providing both written and visual material that will be available online. Ideally, I would like to have a series of short videos explaining the different aspects of going to court available online. This of course will require appropriate resources.

Providing **case specific information** to victims of crime is more challenging given that my Office deals with matters that would involve in excess of 2000 victims a year. Each of those matters may have multiple court appearances. Each victim of crime has different needs and expectations in relation to contact. As referred to above, my Office does not have direct contact with the majority of those 2000 plus victims of crime that the Office deals with each year. It is ACT Policing who have the direct contact with the majority of victims of crime.

While providing case specific information to victims of crime is more challenging, there is no doubt improvements can be made to the way that victims of crime are updated about the progress of court matters once charges have been laid. Technology can be harnessed to achieve this. The courts are moving on to a new database (ICMS). This will provide an opportunity for enhancing communication between agencies and has great potential to improve communication with victims of crime. At the moment, when a defendant is dealt with at court, court staff enter the results into a database and where relevant, type out bail conditions. Following this, this Office again types in the result, this time into the DPP database, and an email is sent to the informant with the results, including bail conditions. This is a

significant doubling up of what is in effect data entry. There is a delay of up to a day, sometimes more, before the DPP can update following court. In contrast, the court update is done after the court appearance where bail is involved.

An automated notification system

The ACT should move to an automated notification system. I note there are automated notification systems operating in the majority of US states, and in England and Wales.[2] I am very supportive of this approach. We should not reinvent the wheel, but rather look at innovative approaches in other jurisdictions. This approach is simple and effective. As stated on the UK Police website, it doesn't replace talking to the officer in charge of the case, but it means that victims of crime can get timely, accurate information without having to wait until a particular police officer is on duty.

An automated notification system to advise victims of court dates and bail conditions should be rolled out in the ACT. Any automated notification system should be linked to the court data base and allow for victims to provide the preferred method of notification, presumably by text or email.

Right to legal information and advice and representation of victims of crime

This area is complex and raises a number of issues. A number of options have been set out in the options paper.

In the discussion of option three (providing victims with access to legal representation) I note the South Australian example is referred to indicating that victims have received funding for legal representation in matters including applications for restitution, apprehended violence orders and in relation to privacy issues including subpoenas. I now address each of those options.

Representation in relation to privacy issues including subpoenas

While I support victims being advised when subpoenas are issued by the court requiring production of personal information, I do not support separate legal representation. In a criminal prosecution if a subpoena is issued at the request of the accused a copy must be served on my Office. Prosecutors have the right to appear on the return of subpoena, or indeed can apply to have the subpoena set aside, or otherwise limited.[3] Prosecutors are in a position to obtain the views of the person whose personal records are sought. Once those views are obtained, it is a matter for the prosecutor whether an application should be made to set aside the subpoena or whether the prosecutor should apply to limit its scope, taking into account the issues of fact likely to arise at the trial.

If the right to appear were extended to a person affected by a subpoena, presumably they would be permitted to argue that the subpoena should be set aside. Should that be argued successfully, this might result in an application for the proceedings to be stayed on the basis that the trial would not be fair. It would then be a matter for the court to determine if the proceedings should be stayed. To give a concrete example, an accused person in a sexual assault trial might subpoena medical records of the complainant. If the complainant successfully argued against the production, the accused might apply for a stay of the criminal

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[2] https://trackmycrime.police.uk/about/

[3] See for example *WR v The Queen* where the prosecutor successfully argued that the subpoena should be significantly limited.

proceedings (meaning the prosecution could not continue until the stay is lifted) on the basis that the accused cannot get a fair trial without the medical records being produced.

An alternative position that might be considered is one where the party issuing the subpoena is required to serve a copy of the subpoena on an interested party (for example, where the records or documents relate to a person), and an opportunity could be provided for the interested person to provide their views to the DPP. Those views would then be taken into account in deciding whether to seek an order that the subpoenaed be set aside, or otherwise limited. However, this raises issues in relation to service. Who will serve the copy of the subpoena on the victim? Accused persons do not have access to the victim's address, nor should they. Subpoenas on prosecution witnesses are not served by my Office but rather are served by ACT Policing and there are already considerable resourcing issues in this area. If this change is made, the practicalities will have to be considered.

Representation in relation to restitution

In our view separate representation is not required for applications for what is referred to in the options paper as 'restitution'. Section 19 of the Crimes (Sentencing) Act allows the court to make a reparation order. The prosecutor would normally tender a document supporting the claim for reparation. Police informants are responsible for providing information to prosecutors supporting a claim for reparation. When information is provided, the prosecutor will make an application.

Representation in legal proceedings

Five options are set out in the options paper (page 25 and following) under the heading victim/lawyer interaction. Option four suggests allowing vulnerable victims to be represented in legal proceedings, and option five suggests victims being parties to the proceedings. Either of these options would require a complete rethinking of the adversarial criminal justice system which operates in Australian jurisdictions. I am aware that in civil law jurisdictions (as opposed to common-law jurisdictions – being all Australian jurisdictions, the UK, Canada and the US for example) some victims have a right to legal representation. But such representation does not fit within our adversarial system of criminal justice.

The real issue seeking to be addressed in this option (and this is apparent from the discussion in the options paper) is how to protect victims of crime and vulnerable witnesses from further trauma which arises from participating in the court process. In the ACT a number of legislative amendments have been made in the past 10 years to improve the experience of victims of crime, children and other vulnerable witnesses when giving evidence in court. For example vulnerable witnesses and all children give evidence via an AV link. Some witness's evidence is pre-recorded. For some categories of witness, their evidence in chief can be given by way of the police interview.[4] A support person is able to be with the witness in the remote location. These measures significantly ameliorate the negative experience of giving evidence in court. Extending these provisions to more victims would be a positive change.

<u>The main issue – cross-examination</u>

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[4] This applies to victims of family violence, children, and victims of sexual offences and violent offences. However the interview must be carried out by a police officer who is a "prescribed person" (except in family violence cases). There are a limited number of officers who are prescribed persons in the ACT. Ensuring more officers are prescribed persons will increase the coverage of this provision. Alternatively, not requiring police officers to be "prescribed persons" (as is currently the case with victims of family violence) will significantly increase the number of interviews used as evidence in chief.

But none of this deals with the major source of trauma for victims: cross examination in which harsh, repeated and overly robust questioning may occur over extended hours or days. How do we ensure that cross examination occurs respectfully without turning into a war of attrition that exhausts a vulnerable witness physically and emotionally, and may have the effect of significantly compounding the trauma experienced as a victim of crime?

Cross examination is a very important part of the criminal trial process. However, there is no doubt that cross-examination of a witness can be a very traumatic experience. The current mechanisms are not working. Judges and magistrates have at their disposal s41 of the Evidence Act 2011 to temper offensive and humiliating cross-examination. However, this section is rarely invoked, and has not provided the circuit breaker to unfair cross-examination that might have been hoped. Further exploration as to how the judiciary can be encouraged to utilise section 41 could be considered, but clearly, more extensive reform is needed.[5]

Following the recommendation of the Royal Commission that intermediaries be introduced into all Australian jurisdictions, there has been in principle agreement on the part of the ACT government to introduce intermediaries. The introduction of intermediaries should be given priority. Use of intermediaries in court where child witnesses are involved will significantly ameliorate the negative impacts of the court experience for child witnesses. However, for adult witnesses, the problem will remain unaddressed.

This Office is conducting a specialist Sexual Offences training program for prosecutors. There is no equivalent in the ACT for the private profession. Consideration could be given to requiring legal professionals appearing in matters involving children, sexual assault complainants and other vulnerable witnesses to undertake training such as that provided by the Australian Advocacy Institute (AAI) Vulnerable Witness Program. Defence barristers and NSW DPP prosecutors participating in the NSW pilot Child Sexual Offences court have participated in the AAI program. Enlisting the ACT Bar Association to encourage local barristers to engage in some sort of specialist training may see positive changes to the court experience, as has been seen in NSW in the specialist court. Moving towards a requirement for mandatory training will ensure that all legal professionals (including prosecutors) interacting with vulnerable victims of crime are properly trained.

The cultural changes brought about by these sorts of training programs are important, but there must be a more effective enforcement mechanism to prevent unfair cross-examination.

<u>Targeted support for victims with special needs</u>

The Options Paper at 3.1 suggests specialist support officers be available for specific victim population groups. Such specialist officers could be located within ACT Policing or Victims Support ACT.

Interpreter scheme

The Options Paper at 3.2 raises the issue of interpreters. In other jurisdictions courts arrange interpreters. This recognises that access to the court system is a right for everybody and is properly administered by the courts. For curious historical reasons, which are not immediately obvious, interpreters for ACT criminal proceedings are organised by ACT Policing in the Magistrates Court, and by my Office in the Supreme Court. The ACT is an anomaly amongst

[5] This issue is discussed in the VLRC report The Role of Victims of Crime in the Criminal Trial Process, Report no 34, November 2016 at 96.

Australian jurisdictions. Interpreters for court proceedings should be arranged for and administered by the courts.[6]

Providing information and consulting with victims through justice processes

4.1 Rights to consultation and provision of information

The right to the provision of information differs from the right to consultation. The right to the provision of information is the right to be informed about the proceedings. Consultation infers a right to be consulted on views in relation to the criminal proceeding.

Bail and the right of victims to be informed of applications for bail, bail variations or revocation

The current process is that informants from ACT Policing liaise between prosecutors and victims in relation to bail applications. Bail applications arise in one of two ways:

(i) when a defendant first appears in court, in which case my Office will have very little notice of the bail application. The informant will provide information on which the prosecutor decides to oppose bail or agree to bail on conditions. The views of the victim are provided in writing by the informant to the prosecutor.

(ii) On 48 hours' notice to my Office. In this case my Office emails the informant and advises that a bail application is listed. The informant then contacts the victim and lets them know of the bail application and ascertain their views.

Prosecutors sometimes have difficulty getting in touch with the informant due to the fact that informants often work outside the standard work day hours. A centralised bail notification address may address this issue.

Once bail applications are dealt with in court, the prosecutor with carriage of the matter will have other matters in court for some hours afterwards. There is therefore no opportunity for the bail conditions to be immediately communicated to the informant who is usually by this stage not on shift having worked through the night before. Updating the informant might take some time (one or two days) due to the files coming back later in the day and other work pressures. Ideally, a notification from the court straight to ACT Policing of the results of all bail applications would ensure that ACT Policing are able to notify victims straight away. The court is required to enter the bail conditions to allow the defendant to sign them. This data is being entered already by the court and it would seem sensible to have that information relayed directly to ACT Policing.

An automated notification system emanating from the court as referred to above would ensure victims of crime are notified of bail conditions shortly after bail is granted.

A question posed in the Options Paper (p38) is whether victims should have the right to provide a submission or be consulted when an offender is applying for bail. Section 23A of the Bail Act requires the prosecutor to tell the court about any concern of which the prosecutor is aware expressed by a victim about the need for protection from violence or harassment by the accused person. This information is normally provided to the prosecutor by the informant.

I note that the options paper states that stakeholder feedback indicates that victim safety concerns are rarely taken into consideration in practice. If that indeed is the perception, then

[6] Section 55 of the Court Procedures Act 2004 would require amendment.

it is quite incorrect. Prosecutors routinely advise the court of victims concerns in bail applications.

The right of victims to information about charges laid or not proceeded with in the case and how do they receive this information

Victims of crime should have information in relation to the charges laid, proceeded with or discontinued. In sexual offence proceedings where the WAS is involved, that information will be relayed to the victim by the WAS. Where prosecutors have had contact with a victim of crime the prosecutor will make contact. Otherwise, as noted above, this information is generally provided to victims of crime by the informant.

There may be cases proceeding by way of defended hearing or trial in which it may be inappropriate for the victim to be told the charges that are proceeding, for example where it is necessary to ensure the victim gives evidence that is not tainted. However, in other cases, it will be appropriate. This needs to be considered on a case-by-case basis with the overriding consideration being to ensure the best evidence is given and the trial is fair.

The right to be consulted when charges are modified or not proceeded with, or where there are discussions about pleas of guilty

Generally where consideration is being given to amending charges or not proceeding with some or all of the charges, or there is a significant change to the statement of facts, the informant will be consulted, and requested to provide the views of the victim. For sexual offence matters prosecutors and the WAS have direct contact with victims of crime, and the views of the victim sought. The decision is always ultimately to be made by this Office, but consultation is an important part of the process.

The right to be consulted when accessing special measures

Any witness who is entitled to access special measures is able to access them. Prosecutors are across the special measures and ensure they are utilised.

Providing information to witnesses in relation to special measures is usually best done when meeting the prosecutor prior to the hearing or trial. The provisions are complicated. While general information can be provided online, the specific special measures that might be available will depend on the category of witness, and in the case of evidence in chief interviews, whether the interview has been carried out by a prescribed person.

Other victim's rights matters

One of the issues raised in the options paper (p58) is that of victims not having to appear at preliminary hearings or committal proceedings unless the court directs otherwise. As noted in the options paper, no prosecution witness can be called at a committal hearing except with leave of the court and any further legislative reform is unnecessary.[7] Consideration might be given to precluding the calling of victims of crime in bail proceedings except with leave of the court.

What should not be in a Victims Charter

A requirement that the DPP contact every victim in every court matter at specified intervals or after each court appearance should **not** be included in any proposed victims charter. This

[7] Magistrates Court Act, s90AA.

Office is simply not set up to provide this service. Currently updating information is provided to the informant (the ACT policing police officer in charge of the investigation) and that information is passed on to the victim. Our prosecutors have direct contact with victims of crime in sexual offence matters, and otherwise in matters where victims and other witnesses are required to attend court to give evidence because the defendant has pleaded not guilty. This Office is simply not resourced to contact in excess of 2000 victims of crime on multiple occasions. To require my Office to take on this role would require at the least the addition of six to eight additional full-time staff. It is clear from the options paper that there are other ways to provide this important information to victims. The current system is to provide this information through the informant and it is not clear from the Options Paper that this system is not working, or if it is not working, why it is not working.

I support the following changes not referred to in the Options Paper:

- Better protections for victims of crime from unduly lengthy or aggressive cross examination
- The introduction of specially trained dogs to sit with victims while they are giving evidence. These are currently used in the New South Wales Child sexual assault court pilot and by the Victorian DPP
- Legislation protecting claims for financial assistance being subject to subpoena by accused persons
- Legislation protecting draft victim impact statements from being subject to subpoena by accused persons
- Introducing intermediaries for police interviews and for hearings in trials involving child witnesses and other vulnerable witnesses
- Requiring all lawyers dealing in family violence or sexual violence matters or matters involving child witnesses to undertake compulsory training (such as the Australian Advocacy Institute Training for Vulnerable Witnesses)
- requiring judicial officers to take part in CLEs (continuing legal education) about dealing with and communicating with vulnerable witnesses
- broadening the right of the DPP to appeal interlocutory decisions
- removing the requirement for a police officer to be a prescribed person when recording interviews with adult victims of crime.

Margaret Jones
for
Jon White SC
Director