ADD VICTIMS AND STIR? OR CHANGE THE RECIPE? ACHIEVING JUSTICE FOR VICTIMS OF CRIME IN QUEENSLAND

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INTRODUCTION

On 23 July 1998, barely a month into office, the new Queensland Labor Government launched a review to examine methods that would better deliver justice to Queensland victims of crime and that would advance their position in the criminal justice system. As the first part of a consultative process designed to identify measures that could be taken to strengthen the rights of victims of crime, the Department of Justice and Attorney General released a Discussion Paper, *Review of the Criminal Offence Victims Act 1995 - Implementing the Fundamental Principles of Justice for Victims of Crime*,[1] seeking comment on the "realistic, practical approaches to strengthening victim's rights"[2] therein detailed.

The authors commend the government for its commitment to improving the position of victims in the criminal justice system. This paper will firstly provide an overview of the current position of victims in the criminal justice system in Queensland. In this regard, it will look at the Declaration of Fundamental Principles of Justice for Victims of Crime contained in the *Criminal Offence Victims Act* 1995 (Qld) ("*COVA*") and their implementation; the compensation provisions of *COVA* and their implementation; and some restorative justice initiatives undertaken by the Department of Justice. Secondly, this paper will highlight what the authors see as some of the deficiencies of the current system. Thirdly, it will critique the proposals set out in the *COVA* Discussion Paper and finally, it will make recommendations for reform. In this regard, the authors not only make recommendations in specific areas but also draw attention to the need for a full-scale reconceptualisation of the criminal justice system as the primary strategy that will lead to victims' interests being mainstreamed.

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1 See *Discussion Paper: Review of the Criminal Offence Victims Act 1995 - Implementing the Fundamental Principles of Justice for Victims of Crime*, prepared by the Department of Justice and Attorney-General, July 1998. ("*COVA* Discussion Paper") Submissions closed 30 September 1998.

2 *Id.* 1.

FUNDAMENTAL PRINCIPLES.

The *Criminal Offence Victims Act* 1995 (Qld) ("*COVA*") passed into law in Queensland in late 1995 with the basic aim of ensuring that "the role of the victim in the criminal justice system is sufficiently recognised".[3] Part 1 of *COVA* provides a Declaration of Fundamental Principles of Justice for Victims of Crime. The necessity for such a Declaration, as acknowledged in the Act's explanatory provisions, arises out of national and international concern about the position of victims of criminal offences in the justice system.[4] The purpose of the declaration is said to be "to advance the interests of victims of crime by stating some fundamental principles of justice that should be observed in dealings with victims of crime".[5]

Enshrining the principles in a legislative code or charter is claimed to be "a way of informing victims of crime in an easily understood way, of the principles they can expect will underlie the treatment given to them by public officials"[6] in connection with the apprehension, trial, sentencing, incarceration and parole of the offender. The principles so stated constitute guiding principles, "minimum standards",[7] for police, prosecutors and other officials to apply in their dealings with victims of crime. The principles also make a commitment to providing the victims of violent crime with sufficient support to deal with the trauma of that crime. The principles apply whether or not an offender has been identified, arrested, prosecuted or convicted.[8]

The Declaration's definition of "victim" refers to three classes of victims: a person who has suffered harm from a violation of the State's criminal laws because a crime is committed that involves violence against the person in a direct way (a primary victim); a person who is a member of the immediate family of, or a dependant of, such a primary victim (a family victim); and a person who has directly suffered harm in intervening to help a victim of direct personal violence (a good samaritan victim).[9]

The Declaration provides that "a victim should be treated with courtesy, compassion and respect for personal dignity; and in a way that is responsive to age, gender, ethnic, cultural and linguistic differences or disability or other special need."[10] The privacy of victims should be respected, inconvenience

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3 *Criminal Offence Victims Bill* 1995 (No. 54 1995) Explanatory Notes at 1. See generally, E Barnett, "Criminal Offence Victims Act 1995 (Qld) – Some Observations" (1996) 12 *QUTLJ* 88.

4 s 4(1) *COVA* and see, for example, the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.*

5 Section 4(2) *COVA.*

6 Section 4(3) *COVA.*

7 *Criminal Offence Victims Bill* 1995 (No. 54 1995) Explanatory Notes at 2.

8 Section 4 (4) *COVA.*

9 Section 5 *COVA.*

10 Section 6 *COVA.*

should be minimised and property held for investigation should be returned promptly.[11] Requirements also exist to afford victims protection from violence and intimidation by an accused,[12] and for the welfare of the victim to be considered during investigation and prosecution, without prejudice to the accused.[13]

Many of the principles are about providing information *to* victims. For example, there are provisions requiring that victims be given information about the investigation and prosecution of the offender;[14] that victims be advised on their role as witnesses;[15] that information be provided about available welfare, health, counselling, medical and legal services and about victim-offender conferencing;[16] that victims be given information about compensation or restitution;[17] and that, if they request it, victims be given information about crime prevention methods.[18] There are also principles dealing with the provision of information *by, or on behalf of* the victim: for example, there are sections requiring investigating officers to record the victim's version of events as soon as possible after the crime;[19] that prosecutors, upon request, put relevant information provided by the victim before the court in an application for compensation or restitution;[20] and that, at the sentencing of the offender, prosecutors should inform the court of appropriate details of the harm caused to the victim by the crime.[21]

The Declaration provides that victims should be given access to the State's system of justice[22] and that public officials dealing with victims should develop guidelines for putting the principles into effect.[23]

PROBLEMS WITH THE FUNDAMENTAL PRINCIPLES THEMSELVES

The definition of "victim" in *COVA* includes only those victims who have been directly affected by the commission of an offence of personal violence. While it is desirable that this class of victims, their families and rescuers, be the obvious focus of the Fundamental Principles, there would seem to be no justifiable rationale for not extending the standards of treatment and courtesy to *all* victims of crime, whatever the circumstances. This extension is seen as integral to

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11 Section 10 *COVA*.

12 Section 12 *COVA*.

13 Section 13 *COVA*.

14 Section 15 *COVA*.

15 Section 16 *COVA*.

16 Section 17 *COVA*.

17 Section 18(1) *COVA*.

18 Section 9 *COVA*.

19 Section 11 *COVA*.

20 Section 18(2) *COVA*.

21 Section 14(1) *COVA*.

22 Section 7 *COVA*.

23 Section 8 *COVA*.

entrenching the necessary paradigm shift that will lead public officials to recognise the centrality of the victim to the criminal justice system.

A very real problem with the implementation of the Fundamental Principles is that the language used in the *COVA* legislation is not the language of statutory standards. While not undervaluing the educative effect of the Declaration, it is difficult to see how officials could be successfully prosecuted or disciplined as having breached the *COVA* principles in the absence of legislative specifics as to exactly who is required to do what and in what circumstances. For there to be any effective enforcement of the guiding principles, it would be necessary to mandate directly or by regulation the particular personnel required to comply with each of the Fundamental Principles and to specify, with some degree of certainty, what conduct would constitute compliance.

At present, all that the Act requires is that the principles "should" be observed. As set out in s 5(7):

> ...public officials and entities are *authorised to have regard* to the declaration and guidelines and are *urged* to do so to the extent that it is
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> a) within or relevant to their functions; and *practicable* for them to do so. (Emphasis added.)

The language of s 5(7) is hardly directive. For there to be any reasonable expectation of compliance, the ethos expressed in the legislation needs some serious translation into clear standards of expected conduct.

Another issue is that *COVA* puts the onus on *victims* to request that certain things be done (for example, that information be provided). Surely if the legislative purpose is to provide victims with access to quality services and to give them a stronger voice in the justice process, the onus should be on the public officials to offer each and every victim the benefit of these services. The implementation of *COVA* should not be content with advancing the position of only those victims who are sufficiently informed, are in an appropriate psychological state and are articulate enough, to make the requisite requests.

Problems also exist with determining the ambit and intent of some of the Fundamental Principles. For example, one of the Fundamental Principles is that the "welfare of the victim should be considered...[during] the investigation and prosecution of a crime, without prejudice to [the accused]".[24] What exactly does this mean? Why is the term "welfare" used? And why should the rights of defendants in *all* cases override the welfare of victims? Particularly, is it intended that the word "welfare" encompass the safety of the victim? The latter would be an extremely alarming proposition insofar as the safety of the victim is thereby said to be subservient to the interests of the accused. In legislation of this type, it is reasonable to expect that the safety of the victim should be of paramount importance and that this would be expressed clearly in the legislation.

It is also problematic to ascertain how some of the Fundamental Principles

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[24] Section 13 *COVA*.

translate into practice. For example, the Declaration provides that victims should be given "access to the State's system of justice".[25] Assuming that this section is intended to have some real meaning beyond trite words of comfort, exactly how is victim access to be provided? What are the implications of this for police, for instance? Is this a formalisation of their role as victim's advocate? Providing access to the State's system of justice is not terribly valuable if, once accessed, the justice system has no place for victims, has no mechanisms available to take account of their interests and in fact marginalises them and their legitimate expectations.[26] How do victims reconcile the statement of *COVA*'s policy objectives (that the legislative purpose is to "advance the position of victims of crime by articulating in legislative form the principles by which they can expect to be treated by public officials and to improve the delivery of justice to victims of crime"[27]) with the fact that the legislation does not actually give them any legal rights? It could be argued that this sort of legislation is misleading and even potentially dangerous to victims and does nothing to assist in their recovery from the trauma experienced at the hands of their offender.

Perhaps victims will take heart from the fact that, under the legislation, "Parliament encourages victims of crime to assert the principles in ways that do not involve legal process or proceedings".[28] But how can victims assert principles governing other people's treatment of them? Exactly what methods of assertion (not involving legal process or proceedings) are realistically open to victims? The Act itself prevents victims from taking either legal action or seeking review of decisions made or not made.[29]

> Promising victims rights that are not delivered may involve a certain danger: providing rights without remedies would result in the worst of consequences, such as feelings of helplessness, lack of control and further victimisation...Ultimately, with the victims' interests in mind, it is better to confer no rights than 'rights' without remedies.[30]

COVA'S FUNDAMENTAL PRINCIPLES: IMPLEMENTATION TO DATE

The Explanatory Notes accompanying the passage of the *Criminal Offence Victims Bill* in 1995, stated that the intention was for the legislation to be

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25 Section 7 *COVA*.

26 The *Courier Mail*, Queensland's daily newspaper, reported that a man who shot his estranged wife and then killed himself had previously been fined a total of $100 for breaching a protection order 5 times, notwithstanding that the *Domestic Violence (Family Protection) Act* 1989 provides a penalty for a breach of an order of up to $3000 or 12 months jail or both. Can we seriously argue that access to the justice system assisted this woman?

27 *Criminal Offence Victims Bill* 1995 (No. 54, 1995), Explanatory Notes at 707.

28 Section 4(6) *COVA*.

29 Section 4(5) *COVA*.

30 D G Kilpatrick and R K Otto, "Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning" (1987) 34 *Wayne Law Review* 7 at 27.

complemented by "sets of guidelines issued by particular agencies, which will *cause* officers to apply the Fundamental Principles" (Emphasis added).[31] *COVA* itself did not express the legislature's intention quite as strongly, stating only that "public officials and entities are *authorised* to have regard to the declaration and guidelines, and are *urged* to do so to the extent that it is within or relevant to their functions and *practicable for them to do so*" (Emphasis added).[32] The Queensland Police Service, the Office of the Director of Public Prosecutions and the Department of Corrective Services have all, to varying degrees, incorporated aspects of the relevant principles as guidelines for their operations.[33] It is useful to examine how *COVA* has been implemented by the entities (and officials) who have the power to give the principles a beneficent interpretation and apply them in a way that will truly benefit and advance victims of crime.

The Queensland Police Service

The Queensland Police Service (QPS) does not have a separate service delivery area dedicated to providing victim services, though it is the case that there are detailed procedures for dealing with victims of sexual offences and a special unit has been established within the Service to deal specifically with sexual crimes.[34] QPS's general compliance with the Fundamental Principles has been implemented by way of the policies and procedures contained in the QPS's *Operational Procedures Manual* which makes reference to the "Declaration of the Rights of Victims of Crime in the State of Queensland". The *Operational Procedures Manual* requires all officers to

> ...become conversant with the contents of the above Declaration and whenever applicable implement and follow its requirements with respect to the rights of victims of crime.[35]

No formal structure exists within the QPS to ensure that victims have been accorded their rights in compliance with *COVA*. There is no mechanism for ensuring that victims are advised about the services and information they are entitled to receive, nor are victims advised as to how and to whom they may complain, should they wish to do so.

The Office of the Director of Public Prosecutions

The Discussion Paper records that, following the passage of *COVA* in late 1995, the Office of the Director of Public Prosecutions ("ODPP") received additional funding to meet its obligations to provide information and support to victims of

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31 *Criminal Offence Victims Bill* 1995 (No. 54, 1995), Explanatory Notes at 708.

32 Section 4(7) *COVA*.

33 See *COVA* Discussion Paper, n 1, 4-8 *supra*.

34 For example, a very useful information package has been prepared by the Sexual Offences Investigation Squad specifically to provide information to the victim of a rape and/or serious sexual assault. The package sets out information on the investigation and court processes, details of support agencies, rights as a victim of crime and information about applications for criminal compensation.

35 See generally *COVA* Discussion Paper, n 1, 8 *supra*.

crime. The ODPP had already introduced a service for victims of crime in 1994 - the Violence Against Women Unit. With the commencement of *COVA* and a 1996 change in state government, in January 1997, the ODPP amalgamated its various victim support units into a Victims Support Service ("VSS").[36] The VSS within the ODPP provides information, support and referral to all victims of personal violence as defined in *COVA*. Information is provided by way of brochures, videos and appointments with the Liaison Officers and paralegal clerks employed by the Service. Support includes telephone support and counselling, acting as an intermediary/advocate for victims in their dealings with prosecutors, and court support in a limited number of cases. The referral process provided by the VSS is that of finding an appropriate organisation or individual to assist the victim in their long-term recovery from the effects of the offences on them.

The VSS is geographically limited in the services it provides: support is available for all victims of violent crime as defined in *COVA* in Brisbane, Townsville and Maroochydore areas. In areas outside those centres, apart from brochures and a video produced by VSS, it is the ODPP prosecutors and other staff who supply victim support services and provide the information required under *COVA*. The Discussion Paper records that the annual budget for the VSS unit was $850,000 as at August 1998 and that the unit's services are extensively utilised:

> In 1996/97 VSS provided information and/or support services to about 4600 victims of violent crime, with about two-thirds of these involving violence in the family...At any one time there are about 1000 active matters being handled by VSS, many of which are comprised of multiple victims. The average monthly caseload is between 150-250 cases per clerk (comprised largely of simpler, less demanding cases) and about 50-75 cases for each liaison officer (comprised of more time intensive cases).[37]

Consistent with the *COVA* expectation that the affected agencies will issue guidelines to give effect to the Fundamental Principles, the ODPP has developed a set of *Draft Protocols for Dealing with Victims of Violent Crime* ("Draft Protocols").

> The Draft Protocols outline ...the procedures within ODPP to implement the Fundamental Principles of COVA. For instance, in the section of the Draft Protocols dealing with initial contact by the ODPP with the victim, the Draft Protocols describe the type of initial letter that is to be sent to the victim, who is to send it and when it should be sent. The Draft Protocols, which run to 23 pages (exclusive of attachments), include over 25 form letters to be sent out at various stages of the proceedings.[38]

The measures taken by the ODPP are the most extensive of those adopted by any of the three agencies that have sought to implement the *COVA* Fundamental

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36 *Id.* 6.

37 *Ibid.*

38 *Id.* 7.

Principles. While the initiative of sending victims 25 form letters is a positive step in service delivery and infinitely better than them receiving no information at all, it is legitimate to suggest that the dignity and respect with which victims can expect to be treated post-*COVA* is the dignity and respect for which funds have been provided. At a very basic level, there is no structure or process within the ODPP to ensure that victims receive any advice as to what level of services and information they can expect to receive.[39] Similarly to the QPS, there is also no formal structure within the ODPP to ensure that victims are advised as to how and to whom they may complain, should they wish to do so. The Discussion Paper notes that the ODPP is developing consultation and complaint resolution procedures in accordance with the Department of Justice and Attorney-General's Guide to the Development of Service Standards.[40]

When analysing the post-*COVA* advancement of crime victims, it is particularly instructive to observe how the Fundamental Principles have been interpreted by the ODPP with respect to two issues of critical importance to victims: victim impact statements and criminal compensation applications.

ODPP AND VICTIM IMPACT STATEMENTS[41]

Erez has described the victim impact statement as "a significant initiative which embraces concerns about the rights of victims in a manner that is consistent with existing legal principles."[42] Victim impact statements ("VISs") usually include the victim's description of the harm caused by the offender to the victim in terms of financial, social, psychological and physical consequences of the crime.

Notwithstanding that the *COVA* declaration specifically provides that "the prosecutor should inform the sentencing court of the harm caused to the victim by the crime",[43] the ODPP has not assumed responsibility for preparing victim impact statements. That task has been left to victims themselves, though admittedly with the assistance of a brochure published by the VSS, *Making a Victim Impact Statement*.[44]

In Queensland, the legislative basis (such as it is) for the use of VISs is to be found in the Declaration in *COVA* and also in the *Penalties and Sentences Act* 1992 (Qld) (*"PSA"*). Section 9(2)(c) *PSA* provides that:

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39 *Ibid.*

40 *Ibid.*

41 As victim impact statements have been informally part of the criminal justice system in Queensland for a number of years now, we do not propose to reiterate here the arguments for and against allowing victim input via VISs. Much has been written on this subject: see, for example, E Erez, *Victim Impact Statements*, No. 33 Trends and Issues in Crime and Criminal Justice, Australian Institute of Criminology, September 1991.

42 *Ibid.*

43 Section 14(1) *COVA*.

44 Published by the Office of the Director of Public Prosecutions, Queensland Department of Justice April 1997; reproduced on the Department of Justice and Attorney General's web site at http://www.justice.qld.gov.au/pubs/impact.html

> In sentencing an offender, a court must have regard to the nature of the offence and how serious the offence was, including any physical or emotional harm done to a victim.

Although there is no specific reference in either Act to "victim impact statements",[45] it is now the practice in the District and Supreme Courts for the prosecutor to tender a VIS prepared by the victim in his or her own words, should the victim wish to have their views considered during the sentencing process. Any of the personal violence "victims" defined in s 5 *COVA* - primary victims, family or dependent victims or good samaritan victims - have the choice to make such a Statement. No guidelines have been issued dealing with the format or authorship of VIS, though the brochure published by the VSS provides some information about their purpose and limitations:

> Why should I make [a victim impact statement]?
>
> The statement will help the judge understand how you have been affected by the crime. If the person accused of the crime is found guilty, the judge can consider the effects on you when passing sentence. Having the impact of the crime described in court is a right guaranteed by law. It gives you a chance to take an active part in the criminal justice process.....
>
> Should I tell the judge what the punishment should be?
>
> No. It is not appropriate for you to comment on how the offender should be punished. The harm done to the victim is only one of many things the judge must consider when passing sentence.

The Director of Public Prosecutions has also issued a guideline to prosecutors pursuant to s 11(1)(a) of the *Director of Public Prosecutions Act* 1984 (Qld), directing that any inflammatory or inadmissible material (such as a reference to other alleged criminal conduct on the part of the person convicted which is not the subject of the charge and cannot be taken account of in sentencing) should be edited out of the statement by the prosecutor before it is tendered.[46]

The question of who may or should prepare VISs is not unproblematic, particularly given the preference expressed by courts in other jurisdictions that these reports be professionally authored.[47] The most desirable position is that specific legislation should make provision for VISs to be prepared by *either* a professionally qualified person on the victim's behalf *or* personally by the victim. In the absence of any statutory endorsement or direction in Queensland, the practice has been that VISs are prepared by the victims themselves (if they are

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[45] Cf, for example, the *Victims Rights Act* 1996 (NSW) which commenced on 2 April 1997 and inserted a new Part 6A into the *Criminal Procedure Act* 1986 (NSW) and provides for the receipt of VISs in specificed circumstances.

[46] This Guideline and other matters are discussed in M Thrower, "Victim Impact Statements: The Voice of Shattered Lives" (1996) June *Proctor* 16.

[47] See, for example, NSW Court of Appeal in *R v Muldoon* (Unrpt NSW CCA, 13 December 1990) per Hunt J at 2-4; *R v King* (Unrpt NSW CCA, 20 August 1991) at 4,5; and *R v Church* (Unrpt NSWSC, 16 July 1993) per Wood J at 7.

aware of their right to have a statement tendered *and* should they have the skills to and then choose to prepare such a statement). Some victims, especially victims of sexual assault, may be reluctant to make a statement especially after reading newspaper reports in other Australian states of them being hung on prison walls as trophies by prisoners.[48] The desirability of enacting a strong legislative basis in Queensland for VISs is discussed further below.

ODPP AND CRIMINAL COMPENSATION APPLICATIONS

As fundamentally distinct from punishment, the task of crimes compensation legislation, in general terms, is to compensate the victim for their loss or injury. Particular issues that arise in relation to the *COVA* compensation provisions and compensation practice in Queensland will also be discussed further below.

The Declaration in *COVA* specifically provides that "A victim of crime is entitled, on request, to have relevant information placed before a court by the prosecutor in an application for an order for compensation."[49] The ODPP has never assumed responsibility for this role. Legal Aid Queensland has established a criminal compensation section and it may well be that such an Office is the more appropriate and better equipped to act on behalf of victims in compensation matters. However, if there is to be a division of responsibility between agencies who assist victims, each needs to be appropriately funded and resourced, each should be required to inform victims of the respective services they provide and, equally importantly, some overall coordination of these Offices should exist.

DEPARTMENT OF CORRECTIVE SERVICES

By way of its compliance with *COVA*, the Department of Corrective Services established the Concerned Persons Register in September 1997. The Register is an automated database that provides up-to-date information on changes in the status of prisoners. These changes are conveyed to any victim of crime (or their agent) who is registered as a "concerned person". The Register can provide victims with information on security classification, location, release eligibility dates, actual release dates, deportation status, an escape from or death in custody, and details of the sentence imposed. The Queensland Corrective Services Commission's *Policy and Procedures Manual*, Chapter 13, provides policy and procedural guidance to the Adviser, Concerned Persons Register (a single officer) regarding the fulfilment of the Department's duties under *COVA* to keep victims informed of the progress of an offender through the correctional system. There is currently no mechanism for advising victims as to how and to whom they may complain in the event that they are unhappy with the services of this agency.[50]

Whilst this is an important initiative, like the VSS in the ODPP, it is not the case that the provision of information alone satisfies victim expectations that their

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48 See, for example, *Daily News (Tweed Heads)* 20 September 1997.

49 Section 18(2) *COVA*.

50 See generally *COVA* Discussion Paper, n 1, 8-9 *supra*.

concerns, particularly as regards their safety, will be given any priority by the justice system. There is also the fact that only a limited number of victims know about or can access these services.

THE DISCUSSION PAPER PROPOSALS

The *COVA* Discussion Paper, issued by Government in July 1998, usefully addresses a range of background issues in the first several pages. Unfortunately, in the substantive part that follows, discussion of the "realistic, practical approaches to strengthening victim's rights"[51] and improved implementation of the Fundamental Principles, is limited to an examination of only three possible approaches at one specific contact point for victims. Each of these approaches seeks by way of differing regulatory and management strategies to improve the way in which public officers in the justice system deal with victims of crime. The first two proposals essentially punish non-compliance through fairly mechanistic disciplinary processes, while the third seeks to incorporate positive incentives into the management systems of the relevant agencies to encourage compliance as a matter of aggregate performance rather than by way of disciplinary action. Each of the three approaches is examined in the Discussion Paper in immense detail, with particular emphasis on the benefits and costs associated with each model. Briefly the three approaches mooted in the Discussion Paper may be outlined as follows:

THE COMPLIANCE/REGULATORY APPROACH[52]

This model suggests incorporating the Fundamental Principles into Regulations under *COVA*. To ensure compliance, the Regulations would also create a disciplinary scheme providing for specific types of administrative discipline appropriate for particular breaches of the Regulations. The approach would be supported by a complaints process to ensure that Chief Executive Officers of criminal justice agencies are aware of complaints made and ensure that appropriate action is taken. The benefits of such an approach are said to be that

- maximum compliance with the fundamental principles would be likely given the "enormous incentives (loss of job, pay, chance of promotion, etc) for public servants to comply";[53]
- it has relatively small implementation costs and could be effected quickly;
- even though *COVA* prohibits civil liability for an officer's failure to comply with the Fundamental Principles, this approach would maximise victim satisfaction with the complaints process through the imposition of administrative punishment;

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51 *Id.* 1.

52 *Id.* 13-19.

53 *Id.* 15.

- the regulatory changes may assist in changing the culture within criminal justice agencies to better recognise the victim's central role.

The costs associated with the Regulatory/Complaince approach are identified as being that it:

- may lower morale of staff in the affected agencies;
- may unnecessarily restrict the flexibility of agency management in their dealing with complaints;
- may be counterproductive and lead to the adoption of inefficient and defensive behaviour and strategies on the part of public servants and police;
- may increase the number of disciplinary actions, which would be a significant financial cost;
- does not resolve any problems which may exist with the private bar's compliance with the Fundamental Principles in matters that are briefed out.

THE INCREASED OVERSIGHT APPROACH[54]

This approach is quite similar to the first, except that it utilises the currently available disciplinary avenues provided for under the legislation regulating each of the agencies.[55] It is hoped that increased oversight and closer monitoring by agency heads and their Ministers, coupled with an agency willingness to pursue disciplinary action in appropriate cases, will encourage greater compliance with the Fundamental Principles. This model also endorses the provision of regular information on complaint levels and trends to victim groups. While many of the costs associated with this approach are similar to those anticipated in the Regulatory/Compliance Model (such as reduced staff morale, increased investigation costs and inefficient defensive behaviour and strategies to avoid complaints), the particular benefit of this approach is stated to be that it would reinforce the commitment of agency heads and responsible Ministers to the implementation of the Fundamental Principles. This may in turn result in positive attitudinal change in staff and increased compliance by them.

THE MANAGERIALIST APPROACH[56]

This approach seeks to increase compliance, "not through increased disciplinary actions as do the first two approaches discussed, but, rather, through incorporating positive incentives within the management systems of the agencies that would act to encourage compliance."[57] This would be done by utilising

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54 *Id.* 19-21.

55 The *Public Service Act* 1996, the *Police Service Administration Act* 1990 and the *Corrective Services (Administration) Act* 1988.

56 *COVA* Discussion Paper, n 1, 21-24 *supra*.

57 *Id.* 21.

several "on-going public sector management reforms", particularly the establishing of client service standards for victims that incorporated the *COVA* principles and identified performance standards and targets for units within a particular agency (similar to the ODPP's development of the Draft Protocols, basically setting out the manner, time frame and quality standards of expected services). One of the costs of the approach, therefore, would be the administrative burden of data collection, performance reporting and monitoring. This model also envisages the establishment of a complaints mechanism that would allow for the quick resolution of victims' complaints. While it is accepted that a focus on aggregate performance may not satisfy individual victim/complaints as much as disciplinary action, the particular benefits of this model are said to be that:

- It incorporates established and on-going management reform;
- It is largely non-confrontational and does not focus on staff discipline. It will thereby avoid many of the staff costs of the compliance approaches (morale problems etc) and may encourage positive behaviour;
- May help break down cultural resistance in agencies by incorporating victim support services as a central agency function;
- May allow for better assessment of overall performance in delivery of victim services and will put (what are hopefully) isolated and individual failures into perspective.

PROBLEMS WITH THE DISCUSSION PAPER PROPOSALS

The fundamental problem with the Discussion Paper's proposals is to be found in the scope of its review:

> [This] paper does not examine approaches that create whole new service delivery schemes (such as NSW's Victims Bureau) or that would significantly expand the current service delivery schemes.[58]

As we have already stated, we commend the government for giving serious and detailed consideration to each of the three broad compliance models proposed: each in its own way, has the potential to improve the provision of services by public officials to victims of crime. However, the Discussion Paper states that the impetus for this examination is "to improve the role of the victim in the criminal justice system by examining approaches that give greater effect to the *COVA* Fundamental Principles."[59] Unfortunately, the proposals on which the Discussion Paper has focussed do not recognise the "centrality of the victim in the criminal justice system", nor do they faciliate a meaningful reintegration of victims into the criminal justice process. Rather, the three models mooted seem likely to have the effect that victims will remain the fringe dwellers of the justice system and

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58 *Ibid.*

59 *Id.* 3.

that their secondary, passive role will be further entrenched. Under two of the models it may also be that victims will be thrust into unnecessary conflict with law enforcement officials. Resorting to disciplinary action and complaints mechanisms of the various types mooted in the Discussion Paper are really end-of-the-line scenarios for disaffected victims. Once again, the focus has shifted away from victims' real needs and interests.

While it is certainly advantageous to victims to require public officials to observe, respect and implement the Fundamental Principles, much of the efficacy of this approach depends on challenging the traditional justice culture which presently sees justice and victim support as unrelated issues. A very real tension exists between the Fundamental Principles, which seek to accord victims respect and dignity, and the traditional paradigm which sees the victim's value as deriving principally from "his or her ability to provide evidence that will reveal the truth and allow a correct verdict to be made".[60] In the 1979 Queensland decision in *R v Sainty*,[61] Demack J criticised this paradigm:

> "It seems to me clear beyond argument that the community has an obligation to victims of crime.....It would be a monstrous thing if the community's only interest in [them] were as a witness to secure a conviction. Yet victims of crime would be forgiven for thinking that they are no more than necessary evils in the majestic administration of the criminal law."

We have moved beyond this stage but not all that far. The position of the victim in the criminal justice system has not been appropriately or even adequately conceptualised. We are at the 'add victims and stir' stage without addressing the question of what we are cooking. It is time for the interests of victims to become core business of the criminal justice system and for victims' input to be legitimised as a germane factor in criminal justice decision making. It is time for victims to be given legal rights instead of charity. Until they are given legal rights, it is unlikely that their position within the criminal justice system will improve in any substantive way.

Sanctioning, by disciplinary action, the non-observance or non-implementation of the Fundamental Principles (as suggested in the Discussion Paper) may have an educative effect on public officials in the way that domestic violence laws have had an educative effect on the community. However, it may also prove counter-productive. It may lead to letter of the law compliance rather than the spirit of the law. It may well make officials antagonistic towards victims' interests rather than supportive of them. Without a paradigm shift, public officials will continue to regard their work with victims as peripheral to their "real" work and resent the increased load. The Discussion Paper itself accepts this possibility when it addresses the costs of the proposals:

> The [Compliance/Regulatory] Approach may lower morale of staff in the

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60 Cf *ibid.*

61 [1979] Qd R 19 at 20.

> affected agencies. Many officers in the criminal justice agencies will view such an approach as a criticism of their work. They may well see the approach as an additional burden, when they are already facing ever increasing workloads. Many may argue that such an approach is a way of government to avoid the problems of underfunding across the criminal justice systems. Those critics would argue that the Approach wrongly suggests that public servants are reticent to comply with the Fundamental Principles – when the real problem is that government has not provided adequate resources to enable the public servants to provide the required service.[62]

Public legal officers will most certainly object to being targeted with disciplinary action (and consequent reprimand, loss of pay/chance of promotion or dismissal) for failure to comply with the Fundamental Principles, when their legal colleagues - judges, magistrates and prosecutors from the private bar - are not required to demonstrate any compliance whatsoever. It is even doubtful whether initiating disciplinary action against public officials will correlate positively with increased victim satisfaction: will it really advance *victims'* interests and move *them* towards a position of "centrality...in the criminal justice system"?

If public officers are failing to comply with or respect the Fundamental Principles, it is likely to be because they have been conditioned to believe that the function of the criminal justice system is to bring offenders to justice. In pursuing that primary objective, the role of the victim is very much secondary; relegated to one of mere witness to the offender's criminal activity. There is no assumption of responsibility in relation to victim's interests; looking after victims is not part of the law enforcement officer's job. Attitudes held by public officers in this regard are unlikely to change until there is a wholescale reconceptualisation of the criminal justice system; a reconceptualisation that makes victims' interests fundamental rather than marginal to the delivery of criminal justice. A complete paradigm shift that accepts the centrality of victims to the criminal justice system must be embraced by members of parliament, the judiciary, lawyers, the hierarchy of the Queensland Police Service, the prosecution service and the heads of government agencies before any real improvement in the treatment of victims will be achieved. The officers in these departments will not change their approach to victims in any productive way until the message filters down to them from the top that victims' interests matter.

In this context, of the three approaches that are outlined in the 1998 Discussion Paper (and accepting that each has a fairly limited vision of victims' rights), it is our view that the third, Managerialist Approach is the better of the proposals and would have the greatest prospects of making a real difference to service delivery. As Erez has said in the context of VISs:

> It seems that implementation will continue to be problematic as long as providing the VIS is dependent on officials' beliefs in the importance or utility of Victim Impact Statements, their goodwill and diligence in eliciting

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[62] *COVA* Discussion Paper, n 1, 16 *supra*.

> them, and the existence of organisational incentives for furnishing this information to the courts.[63]

So too it would seem that the implementation of the Fundamental Principles will be problematic so long as the notion of "providing services to victims" is dependent on the (largely uninformed) beliefs of the officials in the validity and utility of doing so. Further, so long as the implementation of the Principles remains contingent on the goodwill and diligence of already hard-working officials to do more for victims with less resources overall, there is a risk of failure in this regard.

THE URGENT NEED FOR A LEGISLATIVE BASIS FOR VISs IN QUEENSLAND

A more "realistic, practical approach to strengthening victims' rights" that the Discussion Paper could have focussed on would have been for it to give detailed consideration to providing a clear rationale and strong legislative basis for the use and acceptance of VISs in Queensland. One of the most important issues for victims is a desire to be heard – to be given a voice in the proceedings and the opportunity to remind those involved in the court process (judges, prosecutors, defence lawyers and juries) that behind the Crown (acting on behalf of the State) stands a real person who has been caused harm.

> [VISs are] a benign way of providing victims with the right for input and satisfying their need to be part of the process, without jeopardising the basic principles of the adversary system or compromising the rights of the accused.[64]

However, if VISs are ultimately perceived by victims to be an empty gesture, when the expectation has been created that they will have a much greater, if not substantive, effect, VISs may prove to be counter-productive. Specific legislation is long overdue in Queensland to address the formal and special requirements of VISs. Matters that should be specifically addressed include:

- whether VISs should be mandated (which may in itself be traumatic for victims and particularly so where victims may not wish their offenders to be fully informed as to the harm that has been caused by them);
- how VISs should be prepared (form and contents, what is admissible and inadmissible material, inclusion of prejudicial material, whether VISs should be sworn or not);
- who may or should prepare them;
- how and when they are to be received by a court (including whether the victim is to be granted the right to make an oral statement at the time of sentencing, additional to the written VIS);

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63 Erez, n 41, 7 *supra*.

64 *Ibid*.

- matters to which the court should have regard when exercising its discretion as to a statement's receipt;
- whether the author of a VIS may be cross-examined on its contents (if the statement is sworn); and
- the purpose to which VISs are to be put; particularly, the legislation should be clear on whether VISs are merely a mechanism to let victims "have their say" or whether they are also relevant to the imposition of sentence (and, if the latter, how is the weight of that relevance to be assessed)?

The issue of a VIS's relevance to the determination of sentence is fraught with difficulty.[65] Erez records that research on the impact of victims' input on sentencing outcome suggests that it has only a limited effect and that victims' wishes are most likely to be recognised when they were consistent with the courts' view of an appropriate sentence:[66]

> The conclusion that emerges from these combined [research] findings is that judges use their discretion and judgment in considering victims' input and requests. The VIS and the information it contains is only an additional, though relevant, item used by the judge in meting out a sentence. It by no means results in substituting the 'subjective' approach of the victim for the 'objective' one required by the law and practised by the court.

One area of particular difficulty is the question of according weight to statements outlining the effect of a victim's death on the victim's family. The courts have already recognised that it must be

> ...regarded by all thinking persons as offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another. It would therefore be wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in one case than it is in the other.[67]

Accepting that the issue is a complex one, it is nevertheless incumbent on the legislature (in dedicated legislation) to address the question of how a VIS should be taken into account in terms of its impact on the sentencing outcome. As Hunt CJ has observed, there is a fundamental difference, both in law and in common sense, between punishing the offender for his/her crime and compensating the victim and others affected by that crime for loss and/or injury suffered as a result. In the state-administered criminal justice system, it is the task of the sentencing court to punish the offender for having offended against the *state*, by its imposition of sentence. In doing so, the sentence is expected to serve a number

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65 See, for example, N Cowdery, "Assistance or Incumbrance? Victims Rights Act 1996" (1997) 9(4) *Judicial Officers Bulletin* 26.

66 Erez, n 41, 5-6 *supra*.

67 *R v Previtera* (Unrpt NSWSC, 27 May 1997, 1997 NSWSC CR 24) at 20 per Hunt CJ at CL; see also *R v Audsley* (Unrpt NSWSC, 30 May 1997) per Hidden J and R v Fernando (Unrpt NSWSC 21 August 1997) per Abadee J.

of purposes, in terms of general and specific deterrence, societal protection, denunciation of crime and rehabilitation of the offender. Retribution for the injury caused to the victim is but one of those purposes – a fact that is not presently clear to many victims or one, perhaps, they are loathe to accept. One of the roles of dedicated VIS legislation should be to make these sentencing considerations clear to victims.

At present, the Queensland *PSA* requires, inter alia, that the sentence imposed as punishment must take into account the objective circumstances of the offence, including any matters which aggravate those circumstances. In this regard, the consequences of any crime upon a victim who has been directly injured will always be relevant to sentencing as part of the objective circumstances of the crime. If this is to be the use of VISs, then so much should be plainly stated by the legislature. If the intention is that VISs are to have no effect on sentence then, again, so such should be stated in clear statutory language. It is irresponsible on the part of both the criminal justice system and the legislature to raise victims' expectations that the material they put forward in VISs will be taken into account in sentencing if, in reality, those expectations will not always be fulfilled. The effect of this sort of participation can only result in disappointment and dissatisfaction for many victims.

In New South Wales, the *Criminal Procedure Act* 1986 provides that a court "may receive and consider...[a VIS], if the court considers it appropriate to do so".[68] The NSW Act does not provide any assistance to the court regarding how its discretion should be exercised in considering the "appropriateness" of a statement's receipt. Section 23C(3) *Criminal Procedure Act* 1986 (NSW) then goes on to make special provision for family members who wish to make a VIS:

> (3) The Supreme Court or the District Court *must* receive a victim impact statement given by a family victim under this section and acknowledge its receipt and may make any comment on it that the court considers appropriate. However, the court *must not consider* the statement in connection with the determination of the punishment for the offence unless the court considers that it is appropriate to do so. (Emphasis added.)

Hunt CJ at CL has observed that the NSW legislation is "poorly drafted" citing in particular ss 23C(1) and (2) which he found to be in "stark contrast" to the mandatory requirement in s 23C(3).[69] In *R v Previtera*, Hunt CJ observed that, in his opinion, it could never be appropriate to take a VIS into account in sentencing an offender for the death of a member of the victim's family, though "[i]t may be that, in the case of a slow lingering and painful death, information from the family would be relevant, but that would be a very rare case".[70] One

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68 *Criminal Procedure Act* 1986 (NSW) s 23C(1 see also *R v Audsley* (Unrpt NSWSC, 30 May 1997) per Hidden J and R v Fernando (Unrpt NSWSC 21 August 1997) per Abadee J.).

69 *R v Previtera* (Unrpt NSWSC, 27 May 1997, 1997 NSWSC CR 24) at 20.

70 *R v Previtera* (Unrpt NSWSC, 27 May 1997, 1997 NSWSC CR 24) at 20, followed and applied in *R v Audsley* (Unrpt NSWSC, 30 May 1997) per Hidden J and R v Fernando (Unrpt NSWSC 21 August 1997) per Abadee J.

can only imagine the embittering effect having their input ignored by the sentencing court would have on a family who has suffered the loss of a loved one. These sensitive issues must be clearly addressed in VIS legislation and soon.

THE COMPENSATION PROVISIONS OF COVA

The other function of the *Queensland Criminal Offence Victims Act* 1995 is to provide victims with "compensation for personal injury from indictable offences." Under the compensation scheme established by Part 3 of *COVA*, certain injuries are specified in a compensation table[71] and a percentage range of the $75,000 maximum is assigned to injuries in a way similar to workers compensation. For example, the percentage range prescribed for gun shot/stab wound (severe) is 15% to 24%;[72] the percentage range prescribed for severe mental or nervous shock is 20% to 34%.[73] If a person has sustained more than one injury in the table, the amounts payable and added together must not exceed a limit of $75,000.[74] The Act says that, in respect of an injury that is not specified, the Court must decide the amount by comparing the injury with those specified in the table and have regard to the amounts that may be ordered for those specified injuries.[75] Further, in deciding the amount to be awarded, the court must have regard to everything relevant, including, for example, any behaviour of the applicant that directly or indirectly contributed to the injury.[76]

The Act expresses that compensation pursuant to its provisions is not in substitution for any other right, entitlement or remedy whether at common law or otherwise,[77] although the State has subrogation rights.[78]

Just as the implementation of the Fundamental Principles has proved problematic, there are also difficulties with the compensation provisions of *COVA*. There is an interesting section that provides an insight into the legislative intent:[79]

> Compensation provided to an applicant under this part is intended to help the applicant and is not intended to reflect the compensation to which the applicant may be entitled under common law or otherwise.

The legislation specifically provides that payments made by the State under *COVA* Part 3 are made even though the State has no obligation to do so.[80] It is

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71 *COVA* Schedule 1.

72 *COVA* Schedule 1, Item 26.

73 *COVA* Schedule 1, Item 33.

74 Section 25(3) *COVA*.

75 Section 25(6) *COVA*.

76 Section 25(7) *COVA*.

77 Section 22 *COVA*.

78 Section 38 *COVA*.

79 Section 22(3) *COVA*.

80 Section 23 *COVA*.

made very clear that compensation is a case of *noblesse oblige*: as an act of charity, the State will assist victims. But as we have seen in Queensland under the previous Borbidge government (discussed below), charity cannot be relied upon and charity is only given to those deemed worthy.

The statutory maximum of $75,000 is generous by Australian standards for criminal compensation but certainly not generous when compared with common law damages that may be awarded for motor vehicle accidents or industrial accidents. Further, the statutory table of injuries makes no provision for compensating for pain and suffering, no provision to claim for past or future economic loss nor for loss of the amenities of life. The Act also expressly states that the court cannot make an order for costs.[81]

This last factor is of particular concern given the likely expense of a compensation application, an expense which is exacerbated under *COVA* by the unnecessary two-tiered process set out in the Act. First a victim has to apply to the court before which the offender was sentenced for a compensation order.[82] This seems a strange requirement when the Act itself provides that a compensation order is not part of the sentence of the offender.[83] As the Act applies only to convictions in the Supreme and District Courts (and not in the Magistrates Court),[84] the expense incurred is one commensurate with instituting proceedings at the higher end of the court scales. Generally, it would seem more efficient and cost effective to establish a Tribunal to determine the amount of compensation to be paid by offenders. It would also seem appropriate to extend the legislation to convictions in the Magistrates Court.

If the offender does not pay the compensation ordered by the court, the victim may apply to the State to pay all or part of the amount.[85] In other Australian states, there is no administrative discretion in this regard. In Queensland, however, Cabinet or the Minister for Justice, has a discretion whether to pay the amount ordered by the court in whole or part[86] and, indeed, may approve payment "*only* if satisfied that it is justified in all the circumstances", having regard to anything it or s/he considers appropriate.[87] One wonders at the appropriateness of Cabinet or the Minister re-canvassing issues that have already been canvassed (and more appropriately so) by a court. As experience has

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81 Section 31 *COVA*.

82 Section 24 *COVA*.

83 Section 29 *COVA*.

84 Section 24 *COVA*.

85 Section 32 *COVA*. Under s33 *COVA*, application can be made directly to the State for an ex gratia payment in limited circumstances such as where the crime was reported but the perpetrator never found, or where the perpetrator was of unsound mind or under the age of capacity. Under s34 application may be made directly to the State for injury suffered when helping a police officer. Section 35 allows for applications to be made directly to the State about someone's murder or manslaughter.

86 Section 32 *COVA*.

87 Section 36 *COVA*.

shown, there is nothing to prevent the State coming to a different conclusion in relation to the relevant facts and to the appropriate amount payable. Not only has this scenario transpired in Queensland, but, in at least one case, the bureaucracy has determined that a judge's rulings on the law were also incorrect. Admittedly, this latter instance occurred under a previous government, however, no amendment has as yet been made to the two-tiered system by the current government to eliminate the unnecessary duplication. Neither were these issues canvassed in the *COVA* Discussion Paper, a suprising omission given that the Fundamental Principles talk of treating victims with "courtesy, compassion and respect for personal dignity".[88] Even a cursory examination of some of the criminal compensation decisions made by the State in recent times indicates a serious disregard for victims' welfare and a lack of concern for courteous and compassionate treatment.

CRIMINAL COMPENSATION IN PRACTICE

On 6 December 1996, Judge Helen O'Sullivan of the Queensland District Court awarded a rape victim $60,000 compensation.[89] Her Honour ruled that the woman should be compensated for post-traumatic stress under the injury item 'mental or nervous shock.' She also ruled that the woman should be further compensated for physical problems associated with the rape and for the rape itself under the injury item 'severe gun shot or stab wound' saying that this equated to penetration of the body. She said that the victim had suffered dreadful degradation, physical bullying and fear at the time of the rape. The judge was very critical of *COVA* for not automatically entitling rape victims to compensation by including rape as an injury and said that there should be a public outcry about this.[90] She also criticised the legislation for its approach in denying victims the right to be reimbursed for a range of expenses.

It was not until 21 October 1997 that the Justice Department advised the victim that her $60,000 compensation award had been reduced to $29,500. Contrary to her Honour's ruling, the Minister decided that rape should not be recognised as an injury under the legislation. Further, payment to the victim (a social worker, former university lecturer and mother of two) was made conditional on her submitting to a urine test to establish that she was drug-free (this on the basis that she had a prior conviction for possessing a marijuana pipe and three plants 16 years before). The letter from the Department to the woman's solicitors stated: "Where an applicant has been involved with illicit drugs, and there is a possibility that any monies received will be used to acquire drugs, as a matter of policy, proof is required that the applicant is no longer using drugs before any recommendation of a payment can be considered."

The local newspaper, the *Courier Mail*, took up the issue and reported that more

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88 Section 6 *COVA*.

89 There was a suppression order made in relation to this case and the decision itself is unreported.

90 This is a good example of the hidden gender of law which Graycar and Morgan describe so well in their book of that name.

than 100 cases of bureaucrats rejecting or delaying court-ordered payouts to victims of crime had been identified.[91] Three cases were specifically mentioned:

- a woman raped by several men while she was drunk and asleep was refused her compensation because she was deemed to have provoked the incident;
- a three year old child who was raped and assaulted was required to wait 14 months for the compensation payment; and
- a 29 year old woman whose father was convicted of sexually abusing her when she was aged 3 to 15, was still waiting at the end of 1997 for compensation awarded to her in 1995. In her case, the presiding judge initially awarded her $20,000 but the Justice Department reduced it to $5000. After she had spent $8000 seeking compensation, the case was referred to the Governor in Council where it was still under consideration.

The following day,[92] the *Courier Mail* reported that it had been contacted by dozens of lawyers and victims who had had compensation orders rejected or reduced by the Attorney-General. In a subsequent report, the newspaper detailed eight cases in which Aboriginal women victims had had their court-ordered compensation payments challenged by the Justice Department and another case where the $65,000 award of a male victim was challenged on the basis that he may have provoked the incident, notwithstanding that the court had specifically ruled that he had not.[93]

The Ombudsman, in his annual report to Parliament, stated that criminal injury compensation was generating a great number of complaints. He said that it appeared that court awards of $40,000 or $50,000 were routinely paid by the State to the extent of only $10,000 or $15,000. Compensation victims were aggrieved when they received letters from the Department beginning "I am pleased to advise that the Department has agreed to pay [the reduced amount]." The Ombudsman said that some victims believed that the Department had mistakenly or unfairly taken into account allegations of wrongdoing by victims or had not given victims the chance to comment on adverse information. He said that the Department was aware of these concerns but was bound by cabinet and ministerial determinations when assessing awards.

A letter then appeared in the *Courier Mail*[94] from a 20 year old university student who had been brutally raped. Her court-awarded compensation order had been reduced by $28,000. Her letter concluded: "If one unfortunately becomes a victim of crime under our current government, they must unfortunately bear the pain of becoming a victim of compensation. If this is the case, then please take the 'Justice' out of the name of your department as you are purposely deceiving

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91 7 November 1997.

92 8 November 1997.

93 15 November 1997.

94 6 December 1997.

the public." *COVA* was amended by regulation two weeks later[95] making the totality of the "adverse impacts" of a sexual offence suffered by a person, to the extent that they were not already an injury under the Act, a prescribed injury.[96]

Compensating victims of crime should not be a problematic or stressful experience for victims. Courtesy and compassion alone dictate that this should be so and, also, that the issue of compensation should be resolved in as timely a manner as is reasonably possible. This has clearly not been the experience of many crime victims in Queensland. At the time of writing, though a new government is in power, the two-tiered compensation system remains in place and no information is forthcoming from the bureaucracy as to whether court-ordered compensation payments are still being reduced.

OTHER QUEENSLAND INITIATIVES FOR VICTIMS: VICTIM/OFFENDER MEDIATION AND COMMUNITY CONFERENCES

The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the United Nations in 1985[97] provides, in Principle 7, that victims of crime should have access to mechanisms facilitating redress:

> Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilised where appropriate to facilitate conciliation and redress for victims.

Victim offender mediation and reconcilation programs have been in existence in various forms both overseas and in Australia for many years. In 1992 in Queensland, the Alternative Dispute Resolution branch of the Department of Justice trialed the "Crime Reparation Project", initially in one regional Magistrates Court and subsequently in other regions. Under this program, magistrates could refer certain adult and juvenile offenders to mediation with victims of crime who consented to be involved. Under the Project, the victim offender mediation took place after conviction and prior to sentencing. The model is obviously heavily reliant on the willingness of individual Magistrates to refer offenders and the agreement of victims consenting to meet with their offenders. Although the scheme resulted in relatively few referrals, according to the ADR branch, the mediations that were conducted yielded high satisfaction levels for both the victims and offenders who attended. The Reparation Project option is still

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95 19 December 1997: *Criminal Offence Victims Regulation* 1995 Regulation 1A.

96 Adverse impact is expressed to include " a sense of violation, reduced self-worth or perception; post-traumatic stress disorder; disease; lost or reduced physical immunity; lost or reduced physical capacity (including the capacity to have children) whether temporary or permanent; increased fear or increased feelings of insecurity; adverse effect on the reactions of others; adverse impact on lawful sexual relations; adverse impact on feelings; anything the court considers is an adverse impact of a sexual offence."

97 United Nations, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, United Nations, New York, 1992 at 211: Resolution 40/34, adopted 29 November 1985.

available to courts but has not been used as often as some of the subsequent programs run by the Department.[98]

Under the *Juvenile Justice Act* 1992 (Qld),[99] one of the sentencing options available is an "Immediate Release Order". Pursuant to this disposition, young offenders (usually repeat property offenders in the 15-17 age group) may also be referred to the ADR branch for the purposes of victim offender mediation, if both victim and offender consent.

The *Juvenile Justice Act* 1992 (Qld) was amended in 1997 to allow referral by both police officers and the courts to community conferences.[100] The offender does not have to consent to this type of referral. Community conferencing is similar to victim offender mediation except that both parties have support people in attendance who play an active role in the process. Trial programs were established in three regions and, given the high satisfaction levels indicated by participants, the ADR Branch is presently considering extending the scheme throughout the state.

Victim offender mediation and conferencing programs are not new and have been enthusiastically embraced in many jurisdictions at almost all stages of the criminal justice process: pre-court, pre-adjudication, pre-sentence, as a sentencing option, post-sentence and even prison-based.[101] However, that enthusiasm should be tempered by two specific criticisms that are made of mediation in the victim offender setting: first, that it inevitably serves the interests of one party at the expense of the other; and secondly, that it benefits the justice system more than either.[102] It is important, therefore, that external evaluations be carried out on these programs to determine whether the restorative justice approach – the move away from punishment of the offender by the state towards restoration by the offender to the victim - is as beneficial for victims, offenders and the community as those involved with the programs proclaim. It is true that there is evidence to suggest that victim offender mediation has the potential to be effective and beneficial for both parties and that high levels of participant satisfaction may be generated. But it is important also to keep in mind that there are real conflicts of interest and tensions between offenders and victims.

In this latter regard, it has been asserted that many programs, while claiming to be victim oriented, are simply incapable of delivering on their promises to

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98 See generally, S Kift, "Victims and Offenders: Beyond the Mediation Paradigm?" (1996) 7 *Australian Dispute Resolution Journal* 71.

99 Section 176 *Juvenile Justice Act* 1992 (Qld).

100 Section 18C *Juvenile Justice Act* 1992 (Qld).

101 See Alternative Dispute Resolution Division, Queensland Department of Justice and Attorney General, *The Crime Reparation Project Advisory Committee Report*, November 1992, at 26; G Murray, *Mediation and Reparation Within the Criminal Justice System*, Department of Justice and Attorney General, Brisbane, 1991, at 23-29; J David, "Mediation: A Viable Alternative" (1985) *Crim LJ* 86 at 91-92.

102 M Wright, *Justice for Victims and Offenders: A Restorative Approach to Crime*, Open University Press, Philadelphia, 1991 at 68.

victims, particularly in terms of reparation, (how many offenders are really in a position to make reparation) and that the simple truth is that the benefits of the process flow more freely to offenders.[103] If the evaluations show that these programs are beneficial for offenders, will there be a temptation to value that outcome more highly than any outcome for victims? The charge is also commonly made that these programs are really designed to alleviate pressure on the criminal justice system. We should be cautious about accepting them as a simple (but inappropriate) solution to the justice system's inadequate addressing of victims' issues.

SOME SUGGESTIONS FOR NEW INITIATIVES

In New South Wales, a Victims of Crime Bureau has been established by s 9 of the *Victims Rights Act* 1996 (NSW). Section 10 of that Act sets out the functions of the Bureau as follows:

a) to provide information to victims of crime about support services and compensation for victims of crime, and to assist victims of crime in the exercise of their rights,

b) to co-ordinate the delivery of support services for victims of crime and to encourage the effective and efficient delivery of those services,

c) to promote and oversee the implementation of the Charter of Victims Rights,

d) to receive complaints from victims of crime about alleged breaches of the Charter of Victims Rights and to use its best endeavours to resolve the complaints.

As suggested by Sam Garkawe on the Bureau's inception in 1996,[104]

> ...the setting up of the Bureau may well mean that the NSW version of the Charter of Victims Rights will have a better chance of success than equivalent legislation in other jurisdictions that have not provided for a body such as the Bureau.

It is easy to see how a Victims of Crime Bureau could provide the necessary and concrete assistance of a "one-stop-shop" for victims - an obvious central point of contact - that could inform them of their rights, act on their behalf in dealings with the criminal justice system and provide, for example, information on and assistance with preparing VISs. In Queensland, such a Bureau could assist in, or be made responsible for, the drawing up of guidelines to implement the *COVA* Fundamental Principles, thereby promoting and oversighting a unified approach across the criminal justice agencies. As Garkawe suggests, this body should be given sufficient resources both to deal with the day-to-day problems of victims

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[103] B Mason, "Reparation and Mediation Programmes: The Perspective of the Victim of Crime" (1992) 16 *Crim LJ* 402 at 414.

[104] S Garkawe, "Is this a better deal for victims of crime? The Victims Right Bill 1996" (1996) 34(8) *LSJ* 70.

and to discharge an on-going role in research, policy development and community education.

The NSW Act also set up a Victims Advisory Board in s 12. The main function of the Board is to advise government on issues and policies in relation to victims of crime. The broad-based membership of the NSW Board is set out in s 13:

1. The Victims Advisory Board is to consist of not more than 10 members appointed by the Minister, including:
    a) 4 members representing the general community, and
    b) a member representing the Police Service, and
    c) a member representing the Attorney General's Department, and
    d) members representing other relevant Government agencies.

The specific functions of the NSW Board are set out in s14:

1. The Victims Advisory Board has the following functions:
    a) to advise the Minister on policies and administrative arrangements relating to support services and compensation for victims of crime,
    b) to consult victims of crime, community victim support groups and Government agencies on issues and policies concerning victims of crime,
    c) to promote legislative, administrative or other reforms to meet the needs of victims of crime.
2. Any advice given to the Minister may be given either at the request of the Minister or without any such request.

The issue here, which the *COVA* Discussion Paper has simply ignored, is the implementation of a holistic, proactive strategy that will make a real difference in addressing victims' needs: a reconceptualisation of approach that recognises victims' rights to participate in what is, essentially, a social conflict between individuals that has been appropriated by the State.[105] To date, there has been no attempt to reconceptualise the criminal act as something that encompasses not only an offence against the state, but also a community conflict. Rather, what we have seen in recent times is a series of ad hoc reactive efforts at being "seen to be do something" for victims, against a background of escalating law and order debates: the release of the *COVA* Discussion Paper is a good example of this ad hocary. The advocating of various discipline/compliance measures may be contrasted with the establishment and appropriate funding of a Victims Bureau operating in conjunction with a Victims Advisory Board. The latter would be a real breakthrough for Queensland crime victims and a positive step in the direction of mainstreaming victim interests in the criminal justice system.

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[105] N Christie, "Conflicts as Property" (1977) 17 *British Journal of Criminology* 1

A similar service to the NSW Victims Bureau has also been established in Victoria. Following an inquiry undertaken by the Victims' Task Force of the Victorian Community Council Against Violence in 1994-1995, which examined the services available to victims of crime, a Victims Referral Assistance Service ("VRAS") was established in Victoria in November 1996. The VRAS provides various forms of assistance to both direct and indirect victims of crime, including a telephone referral service, counselling scheme, services to regional areas, assistance for Aboriginal people and people from non-English speaking backgrounds, court support, services for bereaved family and special services for child witnesses of family violence.[106]

It should also not be forgotten in all of this that the needs of victims in regional Queensland must also be met. One of the ways of addressing this issue, additional to the expansion of the proposed Bureau's services throughout the state, is to provide information and access to support services via a web site as does, for example, the West Australian Ministry for Justice with its Victim Support Service site.[107] Information available on that site includes details of the various victim services and their locations, details of court proceedings, witness preparation (including the provision of a Child Witness Service to support children under 18 who are required to give evidence in criminal proceedings) and a victims' rights page. Amongst other valuable resources, a link from the Ministry of Justice homepage is provided to the American service "Victim-Assistance Online", a resource for victim-assistance providers, related professionals and other interested persons.[108]

THE NEED FOR ADEQUATE FUNDING

The provision of a Victims Advisory Service/Bureau and a dedicated web site are two obvious initiatives that could be undertaken by a government truly committed to making a difference for victims of crime. Any measure in this area, even the compliance/disciplinary models proposed in the *COVA* Discussions Paper, requires an injection of funds into the criminal justice system. However, it would appear that this is the real stumbling block. Even in this era of economic rationalism, issues of cost are rarely raised in criminal justice expenditure until it comes to victims: announcements by government of increased expenditure on police and prisons are generally seen to be politically popular and the criminal justice system rarely has to prove that it is cost-effective. Calls for money to be spent on victims however are met with the response that the public purse is not unlimited.

Justice requires that victims receive an equitable share of public monies. Perhaps the government may wish to consider a tax or levy on the media that relies so heavily on crime for material to publish. Government might also consider the issue of a levy on the remuneration of prisoners, as occurs in some other

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106 See J Dixon, "The new Victims Referral and Assistance Service (VRAS) Explained" (1997) Winter/Spring *Vocal Voice* 7.

107 See http://www.moj.wa.gov.au/

108 See http://www.vaonline.org/

jurisdictions.

It is, of course, the inadequate provision of funding that hinders victim re-integration at all levels: for example, police must be funded adequately to facilitate the provision of victim information to the courts. In 1988, South Australia passed the *Criminal Law (Sentencing) Act* 1988 (SA) which allowed written statements concerning the impact of the crime on victims to be put before the court by prosecutors or in a pre-sentence report prepared by probation departments. When this law took effect in January 1989, it became part of the normal duties of the investigating police officer to collect, summarise and update information on the crime's effect on the victim.[109] This is an important step in the integration of victims into the criminal justice system, arguably just as important as the existence of a complaints mechanism and disciplinary procedures. Sumner and Sutton found in their research that when information for the VIS was collected and updated by a person who could reasonably verify its credibility and was given to defence counsel on a routine basis, challenges from the defence were likely to be minimal, if any.[110]

THE NEED FOR A PARADIGM SHIFT: MAINSTREAMING VICTIM INTERESTS

Currently in Queensland, (as elsewhere), any move to improve the way victims of crime are treated by the criminal justice system are met with the fundamental problem that victims' interests are not considered core business of the criminal justice system. Exacerbating this situation, victim initiatives have been introduced on an ad hoc basis. There is no representative of victim interests on the Criminal Justice Steering Committee. Until recently, there was no overarching body and no unit within the bureaucracy oversighting what was being done. An interdepartmental committee on victim issues has recently been established, which is encouraging. Nevertheless, victims' interests are, at best, of marginal concern to the criminal justice process and it is largely left to non-governmental bodies to pursue an agenda of victims' reforms. Even these groups find it difficult to agree on optimal strategy: the recently instituted Victims of Crime Reference Group, with representation from both government and non-government sectors, was established at the behest of the local Victims of Crime Association and is a working example of the diversity of interests and needs that exist. Victims' interests are also advocated in a piecemeal fashion by other influential players in the community (such as lawyers and members of the media) in response to specific situations rather than in the promotion of an agreed blueprint for consolidating victim interests within the criminal justice system. Worse still, there is little to no informed debate taking place in the community about these issues.

While the government is to be commended for seeking to improve in any way the treatment victims receive at the hands of the criminal justice system, as we

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109 See South Australia Police 1990, *Report on Victim Impact Statements*.

110 CJ Sumner and AC Sutton, "Implementing Victims' Rights – An Australian Perspective" (1990) 1(2) *Journal of Australian Society of Victimology* 4.

have suggested, what is missing from the *COVA* Discussion Paper is any statement of an overarching, holistic strategy. A number of other jurisdictions have commissioned official inquiries to specifically consider the role of victims in the criminal justice system,[111] while the role of victims has also been considered during the course of sentencing inquires.[112] Queensland has lagged behind in this regard. It is time for Queensland to give detailed consideration to its position on victim issues. As the Discussion Paper recognises:

> To change the victim's role in the system does require a paradigm shift, however, that recognises the centrality of the victim in the criminal justice system. [113]

A whole-hearted inquiry is mandated because discussions generally about the criminal justice system tend to be pragmatic and issue-focused. The system has no clear aims when it comes to dealing with victims' interests and concerns: it is insightful, for example, that criminal compensation payments made by government are characterised as *ex gratia* - a gift. Would compensation to victims be characterised in this way if safeguarding victims' interests was seen to be core business of the criminal justice system?

The criminal justice system is offender-oriented, a situation that is assumed, especially by lawyers, to be appropriate. But is this just? It is not suggested that it is inappropriate to have in place due process protections for defendants – those protections are imperative - but why does the system focus on the interests of defendants to the exclusion of victims? Is it assumed that increased victim involvement will jeopardise the interests of defendants? And if so, why? Isn't it the task of the law to balance competing claims and interests?

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111 These various reports have been collected together in the latest consideration of the topic, New South Wales Law Reform Commission, *DP 33: Sentencing*, 1996 esp Chapter 11: Victims. See USA, President's Task Force on Victims of Crime, *Final Report* (US Government Printing Office, Washington DC, 1982; Canada, Federal-Provincial Task Force on Justice for the Victims of Crime, *Report* (Canadian Government Publishing Centre, Ottawa, 1983).; South Australia, Committee of Inquiry on Victims of Crime, *Report* (Attorney-General's Department, Adelaide, January 1981); New South Wales Task Force on Services for the Victims of Crime, *Report and Recommendations* (Sydney, February 1987); Parliament of Victoria, Legal and Constitutional Committee, *Report to Parliament Upon Support Services for Victims of Crime* (Government Printer, Melbourne, 1987); Tasmania, Department of Justice, *Report of the Inter-Departmental Committee on Victims of Crime* (Hobart, December 1989); Australian Capital Territory, Community Law Reform Committee, *Victims of Crime* (CLRC 6, August 1993).

112 See New South Wales Law Reform Commission, *DP 33: Sentencing*, 1996 esp Chapter 11: Victims identifying: Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980) para 458; Australian Law Reform Commission, *Sentencing: Procedure* (DP 29, 1987) paras 68-74; Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) paras 191-192; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, 1987) at 68-69, 114, 415-417; Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, April 1988) Volume 2 at Ch 13; Ireland, Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, March 1993) at 329-337.

113 *COVA* Discussion Paper, n 1, 3 *supra*.

Can we argue that the Crown really represents the interests of the victim? Certainly it is not considered appropriate for the Crown to prosecute a criminal matter with the same vigour and quest for private vengeance that a victim might. The Crown does not stand in the shoes of the victim: there is no argument that the victim lacks capacity. The Crown does not act on the instructions of the victim and, in fact, would view such a proposal as impertinent. For victims, this is surely a key source of frustration: they are accorded no rights and no recognition as necessary participants in the criminal justice process –

> Victims have no power to compel prosecutions, nor "standing" to contest decisions to dismiss or reduce charges, to plea bargain (reduce charges or sentence in return for a plea of guilty by the offender), or to challenge the sentence imposed on their offender.[114]

Kelly points out that, as plea bargains are the most common way to dispose of cases, many jurisdictions have passed laws that allow, and even mandate, victim participation and input into plea-bargaining.[115] Government should also give consideration to the appropriateness of giving victims rights to make submissions to inform a Parole Board's deliberations before an offender is released on parole.

It seems to us that victims' interests will not be greatly advanced within the criminal justice system until victims are given these types of legal rights. We can also draw on approaches that have worked in other contexts. In Australia, in the Family Court arena, we have come to realise that children may need separate representation to advocate their best interests, considered paramount, before the court. It may be that, in the criminal justice context, separate legal representation is necessary for some victims (especially in domestic violence and sexual assault cases) and that the safety of the victim should be one of the criminal process's paramount considerations. Such a principle should be legislated and be applicable to all stages of the criminal process: the decision to investigate, the decision to charge, the decision about bail, the decision to prosecute, sentencing and release from custody. Further, review on decision-making should be allowable on the basis that the safety of the victim has not been sufficiently addressed.

It is undeniable that even with its current confused philosophy, the criminal justice system could provide better outcomes for victims. In relation to the crime of rape, for example, the law needs to be redrafted and the rules of evidence need to be changed so that prosecution is not made excessively difficult. Another important issue which requires immediate attention is for justice system personnel - police, courts, lawyers and corrections – to be educated about victim issues so that these key stakeholders are in an informed position to implement meaningful change.

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[114] Erez, n 41, 2 *supra*.

[115] D P Kelly, "Victim Participation in the Criminal Justice Systems" in AJ Lurigio, WA Skogan and RC Davis (eds), *Victims of Crime: Problems, Policies and Programs*, Sage, Newbury Park California, at 172-187.

CONCLUSION

The release of the *COVA* Discussion Paper is a welcome indication from government that it is willing to examine strategies for advancing the interests of victims in the criminal justice process. However, as this article highlights, there are many complex issues that need addressing in relation to crime victims and we have suggested some improvements and issues for consideration. However, underlying any meaningful change is the need for a paradigm shift that will not happen easily or cheaply. What is certain is that a critical transformation in thinking will have to occur before we will have a criminal *justice* system in more than name.