



# Submission to Victorian Law Reform Commission

## Role of Victims in the Criminal Trial Process: consultation paper

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**Contact: Dr John Chesterman**

Director of Strategy  
Office of the Public Advocate

**Written by:**

**Davina Wijesinghe**

Student intern

**Tess McCarthy**

Policy and Research Officer

**Contributors:**

Rosemary Barker, Manager, Volunteer Programs

Emma Moore, Coordinator, Independent Third Person Program

Allan Elliott, Coordinator Community Guardian Program



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## Recommendations

**Recommendation 1.** The Victorian Government should adequately fund the Office of the Public Advocate's Independent Third Person Program to enable it to meet the growing demand for Independent Third Person services.

**Recommendation 2.** The Victorian Government should provide more funding for targeted and appropriate training of Independent Third Persons who attend Video Audio Recorded Evidence interviews.

**Recommendation 3.** The Victorian Government should introduce legislative reform to require Victoria Police to have an Independent Third Person present when interviewing a person with an apparent cognitive impairment or mental ill health.

**Recommendation 4.** The definition of improper questioning should be extended in the Uniform Evidence Manual to include disability specific considerations.

**Recommendation 5.**

Recommendation 10 contained in the Victorian Equal Opportunity and Human Rights Commission's *Beyond Doubt* report should be adopted:

Amend the Uniform Evidence Manual to clarify that people with communication disabilities are included in the definition of a vulnerable witness contained in section 41(4) of the *Evidence Act 2008* (Vic) and that Augmentative and Alternative Communication may be used by the courts under section 31(2) the Act.

**Recommendation 6.** The Victorian Government should introduce legislative reform to enable intermediaries to be present during criminal trials to support victims who are thought to have a cognitive impairment or mental ill health.

**Recommendation 7.** In the event that recommendation 6 is not accepted, the role of an Independent Third Person should be extended to the criminal trial process.

**Recommendation 8.** The Victorian Government should make the *Victims' Charter Act 2006* (Vic) enforceable.

**Recommendation 9.** As OPA recommended in the *Breaking the Cycle* report, OPA should be funded to establish an Independent Third Person advocacy and referral scheme for clients who have had, or who are clearly at risk of having, repeat contact with crime. This will involve establishing a two-year pilot project that assists a target of 100 clients each year.



## About the Office of the Public Advocate

The Victorian Office of the Public Advocate (OPA) is a statutory office, independent of government and government services, that works to protect and promote the rights, interests and dignity of people with disabilities in Victoria.<sup>1</sup>

OPA provides a number of services to work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairments or mental ill health. In 2013-14, OPA was involved in 1519 guardianship matters, 362 investigations and 365 cases requiring advocacy.

Under the *Guardianship and Administration Act 1986* (Vic), OPA is required to arrange, coordinate and promote informed public awareness and understanding about substitute decision making laws and any other legislation dealing with or affecting persons with disability.<sup>2</sup>

OPA provides an Advice Service which offers information and advice on a diverse range of topics affecting people with disability. The heavily utilised telephone advice line last financial year answered 13,795 calls, a substantial proportion of which relate to guardianship and administration (35%), and enduring powers of attorney and guardianship (25%). OPA coordinates a Community Education Program where staff address both professional and community audiences across Victoria on a range of topics including the role of OPA, guardianship and administration, enduring powers of attorney and medical decision making.

OPA is the coordinating body of five volunteer programs including the Community Visitors Program, the Community Guardian Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer Program (CISO).<sup>3</sup> OPA provides support to over 900 volunteers.

In regards to the Victorian Justice System in particular, OPA provides substantial support to people with a cognitive impairment and mental ill health through the ITP and CISO Programs.

An ITP must be present during Victoria Police interviews where the alleged offender, witness or victim may have a cognitive impairment or mental ill health. OPA's ITP Program trains volunteers to perform this support and facilitation role. OPA ITPs attended 2,898 interviews during 2014-2015, 315 of which were victim interviews. The operation and demand on the ITP Program constitutes a significant portion of this submission as it relates to the Victorian Law Reform Commission's (VLRC) terms of reference.

OPA also has a role to make representations on behalf of people with disability. OPA sees this inquiry as an important systemic advocacy opportunity to protect and promote the rights of people with disability.

### OPA research

OPA has undertaken significant research in relation to access to justice for people with disability, and in the area of abuse, neglect and exploitation against people with a cognitive impairment. This research, available on OPA's website, draws from OPA's unique experience derived from our various program areas in promoting and protecting the rights of people with disability.

Previous relevant research and publications include:

- *Submission to Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013)
- *Interagency Guideline for Addressing Violence, Neglect and Abuse* (2013)
- *Voices Against Violence* project (7 reports, an initiative of Women with Disabilities Victoria, in partnership with OPA and the Domestic Violence Resources Centre Victoria)<sup>4</sup>
- *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012)

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<sup>1</sup> *Guardianship and Administration Act 1986* (Vic) pt 3.

<sup>2</sup> *Guardianship and Administration Act 1986* (Vic) s 15(e).

<sup>3</sup> The Oval Project has recently been established in partnership with VALID to support people with intellectual disability with decision making in relation to NDIS matters. 30 volunteers will support 60 NDIS participants.

<sup>4</sup> The Voices Against Violence research contains a number of recommendations relevant to the VLRC's review. OPA refers in particular to pages 23-28 of Paper Three *A Review of the Legislative Protections Available to Women with Disabilities who have Experienced Violence in Victoria* (2014) available at Women with Disabilities Victoria, Voices Against Violence <<http://www.wdv.org.au/voicesagainstviolence.html>> accessed 20 September 2015.



- *Sexual assault in Supported Residential Services: Four case studies* (2012)
- *Violence against people with cognitive impairments: Report from the Advocate/Guardianship program at the Office of the Public Advocate, Victoria* (2010)
- Community Visitors annual reports 1988–2015.

OPA has also contributed submissions to other recent inquiries on the matter of abuse of people with disability. These includes submissions to the Victorian Ombudsman Investigation into Disability Abuse Reporting and the Victorian Parliamentary Inquiry into Abuse in Disability Services and the Royal Commission into Family Violence.<sup>5</sup>

## About this submission

OPA welcomes the opportunity to make a submission to the VLRC's *The Role of Victims in the Criminal Trial Process consultation paper*. OPA sees this as an opportunity to discuss the important role ITPs perform for victims of crime. Although the remit of the ITP Program is primarily during the interview phase, ITPs also provide support in Video Audio Recorded Evidence (VARE) interviews, which are used to record evidence-in-chief for cases of sexual offence and assault where the witness or victim is a child or has a cognitive impairment.<sup>6</sup> The role of the ITP Program is therefore relevant to this review, although OPA notes that neither the ITP Program, nor the role of an ITP, was referred to in the consultation paper.

People with cognitive impairment are overrepresented as victims of crime and underrepresented in policy and procedures. This does not result in equitable outcomes. This shows that our systems are inadequate to respond to victims of crime where the person has a cognitive impairment.

People with cognitive impairment and mental ill health represent a substantial proportion of victims of sexual assault and crimes against the person, however significant barriers exist that prevent equal access to the justice system. OPA considers a holistic approach is necessary to adequately support victims with disability in the criminal trial process, and prior to, so that they can bring their claims to court. Disability specific considerations could be added into a variety of elements of the current legislative and policy framework.

In its research on this matter, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in its important publication, *Beyond Doubt* reported:

Most crimes against people with disabilities go unreported, largely because significant and multifaceted barriers prevent people with disabilities reporting crime.<sup>7</sup>

According to *Beyond Doubt*, barriers to reporting crime include lack of information, fear of negative consequences and of not being believed. Barriers to equitable police investigation include discriminatory attitudes and culture, problems identifying disability, not knowing what adjustments to make, decisions about the credibility of the person and police concern for the person reporting the crime.<sup>8</sup>

The ability for a vulnerable witness – defined in the *Evidence Act 2008* (Vic) to include people with a cognitive impairment or an intellectual disability or any mental or physical disability<sup>9</sup> – to be easily discredited and re-traumatised at trial is a significant factor in decision making by police officers pre-trial.<sup>10</sup> It is their role to balance the risk and wellbeing of the victim against the likelihood of success at trial. As a result, many cases of crimes against people with disability do not progress to trial.

Barriers to equal access to the court system also exist. *Beyond Doubt* reported that basic adjustments are not always made to adapt court practices and facilities to meet access needs for people with disability.<sup>11</sup> Successful prosecution where the victim has a cognitive impairment is the exception, not the norm.

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<sup>5</sup> Office of the public Advocate, *Research and Advocacy* <<http://www.publicadvocate.vic.gov.au/index.php/advocacy-research>>.

<sup>6</sup> *Criminal Procedures Act 2009* (Vic) ss 367–370.

<sup>7</sup> Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The experiences of people with disabilities reporting crime – Research findings* (2014) 33 (*'Beyond Doubt'*).

<sup>8</sup> *Ibid* 46-48.

<sup>9</sup> *Evidence Act 2008* (Vic) s 41(4).

<sup>10</sup> See on this point *Beyond Doubt* 73-74: 'Various factors may prevent an investigation from proceeding, including if there is no witness, police concern for the person reporting crime or apprehension about the cost of an unsuccessful prosecution.'

<sup>11</sup> *Ibid* 112.



Given these barriers, people with cognitive impairment and mental ill health and their potential role as victims in the criminal trial process are not squarely within scope of this inquiry. By the very nature of these barriers it is not likely that people with cognitive impairment and mental ill health, where they are victims of crime, will fully benefit from those recommendations made by the VLRC. The inequities are larger than the scope of this inquiry.

OPA acknowledges that there are significant barriers to justice for people with cognitive impairment and mental ill health at all levels of the system.<sup>12</sup> OPA sees this submission as an opportunity to direct the VLRC to some important considerations in relation to victims with disability. OPA sees the VLRC playing a central role in reporting to government and recommending law reform and it is important that the particular needs of people with cognitive impairment are considered when developing recommendations.

This submission will broadly address three of the VLRC's terms of reference:

- recent innovations in relation to the role of victims in the criminal trial process in Victoria and other jurisdictions
- the role of victims in the criminal trial itself
- support for victims in relation to the criminal trial process.

Part four of the submission contains OPA's responses to selected questions contained in the consultation paper.

This submission will draw from OPA's extensive experience in supporting victims in police interviews and VARE interviews as well as anecdotal experience gathered from our various program areas. This submission focuses on people with disability who are victims of crime and examines the role of OPA's ITP Program. OPA's recommendations are contained on page 3, and are repeated where relevant throughout the submission.

## 1 Current research

### 1.1 Who are victims of crime?

The VLRC's Information Paper Two raised some significant points in relation to people with cognitive impairment and mental ill health as being particular groups who are victims of crime. OPA is concerned that the consultation paper did not identify in the same way the significance of the data. OPA wishes to refer the VLRC to some significant research in relation people with disability who are victims of crime. OPA hopes this research influences the VLRC's recommendations for reform, where necessary, to include disability specific considerations in the relevant legal and policy framework.

In its important research study, VEOHRC reported that national and international studies reveal that people with disabilities are more likely to be victims of crime than other groups in the general population.<sup>13</sup> The purpose of the research was to examine the experiences of people with disability reporting crime. The report identified that significant barriers exist that discourage people with disability from reporting crime. Significant barriers to police investigations and access to courts also exist.

*Beyond Doubt* expressed the position that:

Access to justice requires access to the legal system. Progression through the criminal justice system rests heavily on being believed and being believable at every stage. Primarily, this progress is reliant on an assessment of how successful the case is likely to be and how credible the witness is.

A successful prosecution remains the exception rather than the rule when the victim has a disability.<sup>14</sup>

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<sup>12</sup> In this submission, unless expressly stated, OPA does not differentiate between disability and cognitive impairment, including mental ill health.

<sup>13</sup> Ibid 6, see footnote 3 for a list of these studies.

<sup>14</sup> Ibid 12.





The available data tells an alarming story. In Australia, people with disability experience significantly higher levels of violence, exploitation, abuse and neglect than people without disability.<sup>15</sup> Women and girls with disability experience violence at significantly higher rates, more frequently, for longer, in more ways and by more perpetrators.<sup>16</sup> Vic Health report that 90% of women with an intellectual disability have been subjected to sexual abuse – more than two thirds before the age of 18.<sup>17</sup> People with intellectual disability are ‘twice as likely to be the victim of a crime directed against them ... and one and a half times more likely to suffer property crimes than nondisabled aged-matched cohorts.’<sup>18</sup> People with a mental illness are also more likely to be victims of crime than the general population.<sup>19</sup>

VEOHRC’s *Beyond Doubt* report stated that:

The current data on prevalence is ad hoc and there is a need to build the evidence base to understand trends on people with disabilities experiencing crime in Victoria.<sup>20</sup>

There is even less data in relation to the number of times people with disability report crime where it proceeds to trial, or where successful prosecution is achieved. One of the most comprehensive studies on this area – *Study of reported Rapes in Victoria 2000-2003* – reported that of 850 police records of rape investigations over the period 2000 to 2003, only 15% of the rape reports examined resulted in offenders being charged. Cases involving victims with a psychiatric disability or mental health issue were those least likely to result in charges being laid against the offender and twice as likely to be determined as false.<sup>21</sup> OPA notes this study was undertaken prior to the establishment of VARE interviews, a recent innovation relevant to victims with disability in the criminal trial process.

On the point of gathering and reporting on data to advance the social, economic and legal rights of persons with disability, the United Nations *Convention on the Rights of Persons with Disabilities* (Convention) (discussed further in the next section) obliges state parties to

...undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.

...

The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties’ obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.<sup>22</sup>

Implementing this article of the Convention requires significant advancement in data collection and reporting. Where the responsibility for this lies is likely to require a whole of government approach. OPA has recommended in the past that police improve data collection relating to people with disabilities as victims of crimes or alleged offenders.<sup>23</sup> It is also important that annual national surveys be inclusive of individuals with a disability to generate up to date and regular analysis of data.<sup>24</sup>

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<sup>15</sup> Australian Civil Society Parallel Report Group, Disability Now, *Response to the List of Issues*, CRPD Committee 10<sup>th</sup> Session, Dialogue with Australia 3-4 September 2013, Geneva, 21.

<sup>16</sup> Australian Human Rights Commission, *Equality Before the Law: Towards Disability Justice Strategies* (2014) 12. See also Susie Balderston, ‘Victimized Again? Intersectionality and Injustice in Disabled Women’s Lives after Hate Crime and Rape’ (2013) 18(A) *Gendered Perspectives on Conflict and Violence: Part A, Advances in Gender Research* 17. (10).

<sup>17</sup> Victorian Health Promotion Foundation (VicHealth), *Preventing Violence Against Women in Australia: Research Summary* (2011) 5. See also *Beyond Doubt* 6 footnote 5.

<sup>18</sup> Office of the Public Advocate, *Submission to the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2011) 7, citing Wilson and Brewer, 1992 as cited in Hayes, 2004, 2.

<sup>19</sup> A McFarlane et al, *The Prevalence of Victimization and Violent Behaviour in the Seriously Mentally Ill* (Project funded by the Criminology Research Council, University of Adelaide 2004) 3.

<sup>20</sup> *Beyond Doubt* 7. *Beyond Doubt* also reported that of the various crimes that occur against people with disability, sexual assault is the most studied, hate crime is the least understood: at 28.

<sup>21</sup> Office of Women’s Policy, Department of Victorian Communities, Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000-2003* (2006). See also Suellen Murray and Melanie Heenan, ‘Reported Rapes in Victoria: Police Responses to Victims with a Psychiatric Disability or Mental Health Issue’ *Current Issues in Criminal Justice*, March 2012, Vol. 23, No. 3, 353-368 353.

<sup>22</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 31(1)-(2).

<sup>23</sup> Office of the Public Advocate, *Submission to the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2011) 43 available on OPA’s website <<http://www.publicadvocate.vic.gov.au/index.php/advocacy-research/justice-system>>.

<sup>24</sup> Notably, the most recent ABS personal safety survey did not include individuals with a disability who had significant issues with communication or those who resided in any form of group or service provided accommodation (personal residences only).



Notwithstanding the comparative lack and sometimes contested nature of the data that is available, it is evident that people with cognitive impairment and mental ill health have heightened need for, or interaction with, the justice system.<sup>25</sup>

## 1.2 A human rights approach

Using a human rights approach to examine the role of victims of crime in the criminal trial process is an important starting point. For people with disability, specific instruments exist to promote and protect their rights. OPA considers that this existing framework promotes access to justice and disability rights at the international, national and state levels.<sup>26</sup>

OPA has argued in the past that, despite these measures:

people with cognitive disability are being denied access to justice because of systemic discrimination, which fails to recognise their status “as human rights bearers and citizens with an entitlement to opportunities and outcomes equivalent to others” (French, 2007, p. 13). One consequence of this is that people with cognitive disability are often unaware of their rights.<sup>27</sup>

On this point, *Beyond Doubt* reported that people with disabilities are not gaining equal access to justice. While access to justice and safety are basic human rights, people with disabilities are routinely denied these because police and other parts of our criminal justice system are ill-equipped to meet their needs.<sup>28</sup>

### 1.2.1 United Nations *Convention on the Rights of Persons with Disabilities*

The Convention is the most comprehensive international human rights statement on the rights of people with disability. As a party to the Convention, Australia is obliged to implement its provisions in domestic law.<sup>29</sup> OPA’s wishes to refer to the important articles in the Convention that should guide the VLRC in its development of recommendations for law reform.

#### Article 5 - Equality and non-discrimination

‘States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.’<sup>30</sup>

...

In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.<sup>31</sup>

#### Article 12 - Equal recognition before the law

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>32</sup>

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<sup>25</sup> On this point see Office of the Public Advocate, *Submission to the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2011).

<sup>26</sup> At the international level: *Convention on the Rights of Persons with Disabilities 2006* and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006*, the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1993*, the *International Covenants of Civil and Political Rights 1966* and the *International Covenant on Economic, Social and Cultural Rights 1966*. At the national level: the *Disability Discrimination Act 1992* (Cth), the *National Disability Strategy and National Disability Insurance Scheme Act 2013* (Cth). At the Victorian level: the *Charter of Human Rights and Responsibilities Act 2006* (Victoria), the *Equal Opportunity Act 2010* (Victoria), and various recent and current inquiries including the Victorian Equal Opportunity and Human Rights Commission’s *Beyond Doubt*, report, the Victorian Ombudsman’s investigation into disability reporting, the Parliamentary inquiry into abuse in disability services, and the Royal Commission into Family Violence, all of which make proposals or recommendations for law reform in the area of rights, access to justice and protection.

<sup>27</sup> Office of the Public Advocate, *Submission to the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2011) 8.

<sup>28</sup> *Beyond Doubt* 6.

<sup>29</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980): ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’.

<sup>30</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 5(1).

<sup>31</sup> *Ibid* art 5(3).

<sup>32</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12.





### Article 13 - Access to justice

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>33</sup>

### Article 16 - Freedom from exploitation, violence and abuse

States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.<sup>34</sup>

#### 1.2.2 Charter of Human Rights and Responsibilities Act 2006 (Vic)

The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Charter) establishes a legislative framework for the protection and promotion of human rights in Victoria. The Charter establishes a human rights discourse and outlines the basic rights, freedoms and responsibilities of all Victorians. The Preamble to the Charter recognises that 'human rights belong to all people without discrimination', and, although the Charter does not refer specifically to disability, discrimination is defined as having the same meaning on the basis of an attribute set out in the *Equal Opportunity Act 2010 (Vic)*, which includes disability.<sup>35</sup>

Relevant protected rights under the Charter include the right to recognition and equality before the law, to equal and effective protection against discrimination, to enjoy human rights without discrimination, and the right to a fair hearing.<sup>36</sup> This means the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.<sup>37</sup>

## 2 Current practice: ITP Program

### 2.1 Independent Third Person Program

OPA manages the Independent Third Person (ITP) Program. This involves recruitment, training and coordination of the program state-wide. The Victoria Police Manual states

An independent third person (ITP) is to be present at the interview of any person with an impaired mental state or capacity who is fit to be interviewed as a suspect, the accused, an offender, a victim or a witness.

The ITP will either be a parent, guardian, relative or close friend, or a trained volunteer from the Office of the Public Advocate.<sup>38</sup>

Over 260 trained OPA ITPs are available 24 hours, 7 days a week to attend any police station throughout Victoria.

The ITP Program trains volunteers to support alleged offenders, victims and witnesses with a cognitive impairment or mental illness of any age at a Victoria Police Interview. The Program also assists police in their interviews with people with cognitive impairment through training and co-development of resources.

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<sup>33</sup> Ibid art 13.

<sup>34</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 16.

<sup>35</sup> *Charter of Human Rights and Responsibilities' Act 2006 (Vic)* s 3(1) (definition of 'discrimination'); *Equal Opportunity Act 2010 (Vic)* s 6(e). For more on this point see Voices Against Violence, Paper Three: *A Review of the Legislative Protections Available to Women with Disabilities who have Experienced Violence in Victoria* (2014) 29.

<sup>36</sup> *Charter of Human Rights and Responsibilities' Act 2006 (Vic)* ss 8, 24.

<sup>37</sup> *Charter of Human Rights and Responsibilities' Act 2006 (Vic)* s 24. See also Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 5-6.

<sup>38</sup> Victoria Police, *Victoria Police Manual – Procedures and Guidelines*, Independent third persons, 4 [para 3.2].



In order to do this, the program provides trained volunteers to:

- facilitate communication between the person and the police
- assist the person to understand their rights
- support the person through the police interview process; this includes checking for fatigue or distress and asking for breaks.

They are independent of the police and the investigation. ITP support is a safeguard that helps ensure the person with cognitive impairment is not disadvantaged when communicating with police. The primary role of the ITP is to facilitate communication between the alleged offender and the police. It is also part of their role to ensure that the alleged offender understands and can exercise their rights if they so wish. ITPs also provide support in VARE interviews, which are used to record evidence-in-chief for cases of sexual offence and assault where the witness or victim is a child or has a cognitive impairment.<sup>39</sup>

An ITP can be an OPA volunteer, or a close friend or family member of the person being interviewed. OPA's position is that it is preferable to use a trained ITP volunteer, rather than a friend or family member. This is because trained ITPs are independent and objective, familiar with police processes, and better able to help the person understand their rights. Furthermore, OPA knows from the experience of the Advocate Guardian Program and the Community Visitors Program that family members and staff can be the perpetrator or know the perpetrator.

Training is critical to ensuring ITPs are aware of the variety of legislative requirements relevant to offenders, victims and witnesses in police interviews, including intervention orders, sex offender record keeping and VARE interview practice. OPA continues to strive to improve the quality of training of ITPs, the provision of access to debriefing for ITPs and honorariums.

During 2014-2015 the ITP Program facilitated 10 training sessions for 111 new and current ITPs. OPA is currently developing a tailored training session in relation to VARE interviews, in response to an OPA-initiated review. This review recommended removing victim and witness interview training from the induction program and offering a tailored individual session to better detail the requirements of victims and witnesses.

## 2.2 Demand and funding

Demand on the ITP Program is growing every year. However, funding for the program has not kept pace with demand, which hampers the ability of the program to ensure trained ITPs are available as required.<sup>40</sup> The strain on ITP Program staff and volunteers is so great that the adequate provision of ITPs in some regions is not sufficient. OPA is encouraged by the dramatic increase in the number of ITPs requested to attend police interviews. OPA sees this as indicative of growing disability-awareness in the police force.<sup>41</sup> Notwithstanding this, a review of ITP data shows a great disparity in the use of ITPs by police across the state.<sup>42</sup>

The ITP Program celebrated its 27-year anniversary during 2013-14 and in that year, ITPs attended 2598 police interviews. The total number of interviews the ITP program attends increases every year. The recently released figures show that ITPs attended 2898 interviews during 2014-2015, an increase of 300 interviews from 2013-2014. This is the largest number on record for the ITP Program. Next year, the program expects to surpass 3000 interviews.

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<sup>39</sup> *Criminal Procedure Act 2009 (Vic)* ss 367–370.

<sup>40</sup> Further, legal and technological requirements have changed dramatically since 2002-03, for example, the *Sex Offenders Registration Act 2004 (Vic)* changes and victim and witness interviews have moved from VATE to VARE. The ITP program has also attended 20 homicide interviews in the 2014-15 financial year, 526 Sexual Offence interviews as well as a new category of terrorism charges. This places a substantial drain on the program to meet these challenging requests as these matters are complex and may require legal advice. The support to ITPs for these interviews is also required such as preparation to meet new demands and in some instances debriefing following the interview.

<sup>41</sup> See also Office of the Public Advocate, *Submission to the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2011) 24.

<sup>42</sup> OPA notes the inaugural Public Advocate award in recognition of operational police stations use of the ITP Program was awarded to Dandenong and Mildura Police stations for their support of the program.



The demand for ITPs has increased 154% over the past 12 years. During 2014-2015, 315 of the interviews ITPs attended were victim interviews. This is an increase from 2013-2014 where ITPs attended 176 victim interviews and 2012-2013 where ITPs attended 185 victim interviews.<sup>43</sup>

Of the 315 victim interviews ITPs attended during 2014-2015, female victims accounted for 197 of the interviews, males accounted for 117 and other accounted for 1 interview. ITPs reported that 155 involved victims with an intellectual disability, 32 involved victims with an ABI, 61 involved victims with mental illness, 25 other, and 43 unknown. This equates to a larger number than individual victims because some victims may have dual disability. Of the interviews with victims, 249 related to offence against the person; 76 related to rape, 105 (non-rape) and 66 assault (sometimes also overlapping).

Without extra funding the ITP Program will struggle to maintain its state-wide service. OPA has raised the inadequacy of the funding of the ITP program with the Department of Health and Human Services a number of times, including submitting a funding bid in 2010, however no increases in funding have occurred apart from CPI. OPA believes the program is significantly under resourced. For example, ITPs with specific experience working with Koori people, or Koories themselves, are desperately needed.<sup>44</sup>

Urgent funding is needed for the ITP Program to ensure the maintenance of current volunteer levels, and improvement in the delivery of quality training and support to ITPs, and the service ITPs provide.

Lack of adequate funding challenges OPA's mission to protect and promote the rights of persons with disability, who are alleged perpetrators, victims and witnesses.

OPA notes that a comparable program, the Youth Referral and Independent Person Program (YRIPP), trains adult volunteers to attend police interviews with young people in police custody when a parent or guardian is not available. YRIPP also seeks to divert young people from future offending through early intervention at the point of police contact. YRIPP has 12 staff and attends 3,500 police interviews per year. This equates to only 20% more interviews attended, but with substantially more funding. Provision of an independent person for children who are alleged offenders is provided for in the *Crimes Act 1958* (Vic).<sup>45</sup>

**Recommendation 1.** The Victorian Government should adequately fund the Office of the Public Advocate's Independent Third Person Program to enable it to meet the growing demand for Independent Third Person services.

**Recommendation 2.** The Victorian Government should provide more funding for targeted and appropriate training of Independent Third Persons who attend Video Audio Recorded Evidence interviews.

In addition to ongoing requests to secure sufficient funding, OPA has consistently argued that the right of people with cognitive impairment to use an ITP in police interviews should be legislatively articulated.

OPA's comprehensive report *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012) reported that:

not involving an ITP could compromise the integrity of the evidence raised in the interview. On this point, case law recognises the importance of ITPs in protecting the rights of people with disabilities during the police interview. For example, the Supreme Court of Victoria has held that the failure of police to use an ITP when one is required may diminish the credibility of any evidence obtained in that interview. This is because the absence of an ITP raises serious questions regarding the "propriety, reliability and fairness" of the police interview. Accordingly, Victoria Police policy requires that members arrange for an ITP to be present during the interview with any person whom they believe may have a cognitive impairment or mental illness.<sup>46</sup>

<sup>43</sup> Office of the Public Advocate, *Annual report 2013-2014* (2014) 39; Office of the Public Advocate, *Annual Report 2012-2013* (2013) 36.

<sup>44</sup> In 2010, the ITP Program launched its Koori Strategy to address the under-utilisation of the program by Indigenous people. As part of the Koori Strategy, the ITP Program has developed culturally appropriate promotional materials for Indigenous people with disabilities, and has cultivated relationships with key members of Indigenous communities: Office of the Public Advocate, *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012) 19. ('*Breaking the Cycle*')

<sup>45</sup> Section 464E of the *Crimes Act 1958* (Vic) requires that if a person in custody is under 18, a parent/guardian or independent person (YRIPP manage independent persons) must be present before any interview is conducted and that they must be given an opportunity to speak in private with the child before the interview.

<sup>46</sup> *Breaking the Cycle* 19.



OPA considers it necessary that legislative reform requiring police to have an ITP present when interviewing a person with an apparent cognitive impairment or mental ill health would result in consistent application of the use of ITPs across Victoria.

Although failing to implement OPA's recommendation on this point, amongst a number of relevant recommendations contained in the Victorian Parliament Law Reform Committee's *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2011) recommendation 17 read:

That the Victorian Government promote the Independent Third Person program, and review incentives for participation in the program to ensure that enough suitably qualified people are able to perform the duties of an Independent Third Person.<sup>47</sup>

OPA also shares this view and considers legislative articulation would ensure appropriate resourcing is secured for the ITP Program.

OPA believes that the ability of victims with cognitive impairment or mental ill health to communicate their experience and understand their rights increases with the assistance of an ITP. The possibility of extending the role of an ITP to trial, or introducing an intermediary scheme, is addressed later in this submission.

**Recommendation 3.** The Victorian Government should introduce legislative reform to require Victoria Police to have an Independent Third Person present when interviewing a person with an apparent cognitive impairment or mental ill health.

On this recommendation, OPA suggests this be worded carefully in legislation, most likely in the *Crimes Act 1958* (Vic).

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<sup>47</sup> Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2011) recommendation 17.





## 3 Recent Innovations in relation to the role of victims in the criminal trial process in Victoria and other jurisdictions

### 3.1 Victoria

OPA is aware and applauds a number of recent innovations in relation to the role of victims where the person has cognitive impairment or mental ill health. OPA agrees with the VLRC that some of these significant reforms have focussed on vulnerable victims, including where the victim has a cognitive impairment. Noting comments made earlier in this submission – that matters involving victims with cognitive impairment often do not make it to trial – the innovations may be failing to make the remarkable change in outcome that is required.

Introduction of the VARE in 2009 and the creation of Victoria Police Sexual Offences and Child Abuse Investigation Team's (SOCIT) are two recent innovations which relate to the role of an ITP.

Broadly, the ITP Program has had a positive involvement in VARE interviews, the purpose of which is to render equal access to justice for vulnerable witnesses and reduce the need for repetition of testimony. OPA notes however that in VARE interviews victims are required to give evidence in chronological order. The standard of proof may still be problematic where the person has a disability and telling their story in chronological order may not be a feasible expectation. The credibility of a victim is often judged by whether they can tell their story in chronological order.

OPA appreciate the skill and dedication of those officers in SOCITs. OPA and Victoria Police have a constructive working relationship, and OPA considers it necessary to build on this in order to promote the use of the ITP Program and achieve just outcomes for people with disability. Additions to the Victoria Police *Code of Practice for the Investigation of Family Violence* and the *Code of Practice for the Investigation of Sexual Assault* recognise people with disability as a particularly vulnerable group<sup>48</sup> and that some victims of sexual assault may require 'additional support and consideration', including people who are living with a disability or cognitive impairment.<sup>49</sup> OPA considers these significant advances in the policies of Victoria Police and we wish to continue to work with Victoria Police in this area.

The ITP Program is very positive about the large number of initiatives across government in regards to responding to the needs of people with a cognitive impairment in the criminal justice system.<sup>50</sup> The program will continue to support the development of these resources and seeks to contribute further in the future. Making a submission to this inquiry is one such way the ITP Program contributes to systemic advocacy drawing from the experience of volunteers and people with disability.

## 4 Responses to questions

### Q 1: Should the role of Victims in the Criminal Trial Process be that of Protected Witnesses, Participating Witnesses or Prosecuting Witnesses?

OPA believes that a shift in conception of the role of victims in the criminal trial process is necessary. In relation to victims with a cognitive impairment it is crucial that their testimony is viewed as an important source of evidence.<sup>51</sup> Legal frameworks, standards of policy and procedure have been established in the Victorian justice system in order to preserve the integrity of the evidence provided. This contributes to the achievement of a fair trial. The relevant systemic and cultural reform requires an understanding that victims with cognitive impairment comprise an important source of evidence. OPA's preference would be the protected witness be applied where the victim has a cognitive impairment.

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<sup>48</sup> Victoria Police, *Code of Practice for the Investigation of Family Violence* (Victoria Police, 2nd ed, 2010) 12 [2.5.3].

<sup>49</sup> Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (Victoria Police, 2005) [16].

<sup>50</sup> The ITP program has contributed to the following resources in the 2014-15 financial year: 'Reporting Crime: Your Rights' Easy English Resource from Victoria Police; Disability Access Benchbook for Judicial Offices – Judicial College of Victoria in conjunction with Victorian Equal Opportunity and Human Rights Commission College Criminal Justice Forecasting Model – Department of Justice; Criminal Law Review - Criminal Investigation Powers Bill Exposure Draft – review by Department of Justice and Regulation.

<sup>51</sup> This was raised in the Criminal Bar Association of England and Wales produced film entitled 'A Question of Practice' <<https://www.criminabarc.org/e-shop/a-question-of-practice/>>.





**Q: 28 Are the Protective Procedures for the Taking of Evidence from Vulnerable Victims Appropriate and Effective?**

OPA refers the VLRC to the Criminal Bar Association of England and Wales film 'A Question of Practice'.<sup>52</sup> The purpose of this film was to demonstrate to the legal profession (lawyers and judges), the manner in which questioning of vulnerable witnesses can be altered so as to become developmentally appropriate. Exploring the function of intermediaries, this resource asserts the credibility of vulnerable victims (particularly those with disability) as viable sources of evidence. A 'Question of Practice' endorses the avoidance of tag, closed choice and leading questions as well as the duty to speak slowly, clearly and present one idea at a time.

The Evidence Act states that a judge must disallow an improper question posed to a vulnerable witness.<sup>53</sup> Currently, the *Victims' Charter Act 2006* (Vic) requires investigatory, prosecuting and victim services agencies to take into account and be responsive to the particular needs of individuals adversely affected by crime.<sup>54</sup> The detection and appropriate treatment of disability within the trial process requires the implementation of adequate procedure.

By virtue of practice and procedural development, the *ITP manual: Supporting People with a cognitive disability or mental illness in interviews with Victoria Police* is an accurate representation of the 'particular needs'<sup>55</sup> of victims with disability in the criminal trial process. Within police and VARE interviews, ITPs functionally operate with an extended disability specific definition of 'improper questioning.' According to the Evidence Act an improper question is defined as a question or a sequence of questions put to a witness that—

- (a) is misleading or confusing; or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).<sup>56</sup>

Police are requested to carefully word questions so as to ensure they ask open ended questions, use short words, break down information into smaller parts, speak slowly and allow sufficient time for an answer.<sup>57</sup> These procedures are necessary for ensuring the accuracy of evidence rendered by people with a disability.<sup>58</sup> The current definition of improper question under the Evidence Act does not provide adequate protection for individuals with a disability.

While the current relevant legislative framework requires attention to the specific needs of individuals with a disability, it does not provide examples of what those needs may be.<sup>59</sup> It is crucial that individuals with disability who are victims of crime are provided the right to express what has occurred to them first in narrative form, devoid of interruption. This has comprised an essential aspect of common practice for ITPs in police and VARE interviews. While the initial evidence may not be in a time ordered sequence, issues of chronology can be verified through subsequent questions, after the victim has been allowed the proper opportunity to tell their story uninterrupted. Hence, through enlisting the appropriate procedure, it can be seen that the inability of the victim to relay events in sequential order does not speak to the credibility of the victim. The Victims' Charter Act as it stands, also fails to mention the right of an individual reasonably suspected of having a disability to have an ITP present in police or VARE interviews.

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<sup>52</sup> Ibid.

<sup>53</sup> *Evidence Act 2008* (Vic) s 41(3).

<sup>54</sup> *Victims' Charter Act 2006* (Vic) s 6(2).

<sup>55</sup> *Victims' Charter Act 2006* (Vic) s 6(2).

<sup>56</sup> Ibid.

<sup>57</sup> Victoria Police and Office of the Public Advocate, *Responding to a person who may have a cognitive impairment* (Ready Rekoner).

<sup>58</sup> Criminal Bar Association of England and Wales produced film entitled 'A Question of Practice' <<https://www.criminalbar.com/e-shop/a-question-of-practice/>>.

<sup>59</sup> *Victims' Charter Act 2006* (Vic); *Criminal Procedure Act 2009* (Vic); *Evidence Act 2008* (Vic).



While amendment to the Evidence Act would produce the most effective result in relation to cultural change within the profession, OPA notes the concern raised within *Beyond Doubt* regarding the complexities around amending a uniform act.<sup>60</sup> This would require consensus between Australian jurisdictions and may result in difficulties and delays in achieving the desired outcome. It is therefore recommended that the relevant changes are made to the Uniform Evidence Manual.<sup>61</sup> This is to be read in combination with our response to question 30.

**Recommendation 4.** The definition of improper questioning should be extended in the Uniform Evidence Manual to include disability specific considerations.

**Q 29: Should the Current Protective Measures for Vulnerable Witnesses be Extended to other Categories of Victim, or to Victims of Other Types of Offences?**

The Evidence Act stipulates that a judge must disallow an improper question put to a vulnerable witness in the context of cross-examination.<sup>62</sup> As it currently stands, the definition of vulnerable witness does not include victims with a communication disability. VEOHRC's *Beyond Doubt* identified people with a communication disability as particularly disadvantaged when reporting crime, greatly affecting their opportunity to have their matter heard in court.<sup>63</sup>

**Recommendation 5.**

Recommendation 10 contained in the Victorian Equal Opportunity and Human Rights Commission's *Beyond Doubt* report should be adopted:

Amend the Uniform Evidence Manual to clarify that people with communication disabilities are included in the definition of a vulnerable witness contained in section 41(4) of the *Evidence Act 2008* (Vic) and that Augmentative and Alternative Communication may be used by the courts under section 31(2) the Act.

**Q 30: Are the Existing Evidentiary Provisions Being Used or Enforced by Judges, to Prevent Inappropriate Questioning or to Allow Victims to Give Evidence in Narrative Form? Are there Any Further Evidentiary reforms which might Reduce Victim Re-traumatisation?**

The level of protection afforded to victims with a disability remains dependant on its incorporation in to legal culture.

Despite the existence of current protective frameworks, the VLRC raised concern for the manner in which victims of crime with disability are cross-examined.<sup>64</sup> This suggests a need for further cultural change regarding the role of judges and the conduct of the defence counsel.<sup>65</sup> In discussion and referring to various literature, the VLRC noted that this would be unattainable devoid of an enforceable Victims' Charter Act.<sup>66</sup> Rendering the Charter enforceable would mean that a breach of the Victims' Charter Act would provide potential avenues for legal action in the case of a breach of these rights. The potential for a breach to result in a course of action has been deemed by some to be necessary to effect the necessary cultural change.

On this point however, OPA notes the VLRC's important discussion around general issues with making victims' rights enforceable on page 159-160 of the consultation paper. We discuss this further in response to question 57.

<sup>60</sup> *Beyond Doubt* 115.

<sup>61</sup> Judicial College of Victoria, *Uniform Evidence Manual* (12 March 2014) <<http://www.judicialcollege.vic.edu.au/publications/uniform-evidence-resources>>.

<sup>62</sup> *Evidence Act 2008* (Vic) s 41.

<sup>63</sup> Over 1 million Australians have a communication disability of some kind. The spectrum of this disability can range from slight to complex. In its most subtle form, it can affect an individual's ability to understand the question put to them. In its more complex form, it can require the use of a communication aid or device. The presence of a communication disability is often not overt and can be misinterpreted as behavioural or other issues: *Beyond doubt* 115. See also Speech Pathology Australia, Submission No 3 to Victorian Equal Opportunity and Human Rights Commission, Experiences of people with disabilities reporting crime project, 12 September 2013, 3.

<sup>64</sup> Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process: Consultation paper* (2015) 98, footnote 86.

<sup>65</sup> OPA understands that VEOHRC and the Judicial College of Victoria are currently updating the Judge's Bench Book to include more disability specific considerations.

<sup>66</sup> *Ibid* 159.



OPA considers that the insertion of disability specific considerations into a binding framework can be seen to be essential in rendering their protection a matter of practical reality. A more effective approach could be the insertion of disability specific considerations into the *Criminal Procedure Act 2009* (Vic). For example, section 360 currently requires the presence of a 'support person;' this could contain an additional requirement that an individual reasonably suspected of having a disability must have an ITP or intermediary present (depending on the procedure). This would not only ensure procedural justice for the victim but would establish a clear, viable form of communication between the victim and all necessary parties.

Sections 340-343 refer to particular restrictions on the types of questions that can be asked of victims of sexual crimes. OPA suggests that disability specific considerations could be inserted here restricting the use of tag questions, leading questions, closed choice questions. Alternatively these disability specific considerations could be inserted into Division 6 of the Act, which pertains to rules for children and cognitively impaired complainants (sections 369, 371, 373 and 377 in particular).

There are well-founded concerns for individuals with disability needing to experience cross-examination. OPA stresses the importance of initial assessment and the need for a statutory requirement for an ITP when a person with an apparent cognitive impairment in a VARE interview.

Re-traumatisation is a viable concern for victims of crime, particularly for individuals with disability who may not be able to clearly communicate the level of distress they are experiencing. OPA considers that cultural change within the legal system, embodying the presumption of credibility and vigilant compliance with the disability specific considerations will serve to practically minimise re-traumatisation. This is because the victim is allowed to tell their story devoid of encumbrances and is protected from forms of questioning which cause confusion, and distress, and unfair or intimidating tactics.

**Q 31: Should Victoria Introduce an Intermediary Scheme? If so, for which victims? What Functions should an Intermediary Perform?**

Discrepancies between victimisation and representation at trial and concerns relating to cross-examination of victims with disability can be mitigated through the introduction of an intermediary scheme. It is OPA's view that intermediaries should be provided to vulnerable witnesses for the trial process. This would operate under the extended definition of improper questioning as contained in recommendation 4.

OPA is aware that other Australian jurisdictions do not incorporate the grounds rule hearing. Functionally speaking, the ground rules hearing as practised in the United Kingdom should be prioritised in Victorian procedure. Regulation relevant to the form of questioning is crucial for victims with disability. The ground rules hearing also ensures that the defence can ask questions in an effective way and thus the presumption of innocence is duly upheld.

Additionally, an intermediary should operate with the functions attributed to ITPs. Namely, ensuring that the victim understands the question (and clarifying where necessary), ensuring that the victim is aware of their rights (not necessarily that they invoke them), and is given a break when necessary. In line with ITP procedure, intermediaries should actively check for signs of distress. The intermediary must be independent and must not know to the victim. This ensures the unbiased nature of the service provided.

OPA is also aware that other jurisdictions within Australia where intermediaries are employed to different degrees in Western Australia and New South Wales.<sup>67</sup> It is OPA's view that intermediary schemes should be required to support people with cognitive impairment during the criminal trial process.

Introduction of an intermediary scheme would require significant resource allocation in order for the scheme to operate effectively, particularly in the event of prolonged trials, and state-wide.

**Recommendation 6.** The Victorian Government should introduce legislative reform to enable intermediaries to be present during criminal trials to support victims who are thought to have a cognitive impairment or mental ill health.

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<sup>67</sup> Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process: Consultation paper* (2015) 99.





In the alternative, OPA suggests that the role of ITPs could be extended to trial. Operating within an existing framework, additional funding would be required to train volunteers for the idiosyncrasies of the court process. The ITP Program has been requested in the past to provide the service of ITPs to court, however resources have prohibited this from occurring. OPA would be hesitant to provide ITPs to extend their service to trial given they do not have trial-specific training and it would cause further stress on the already under-resourced program.

The benefit of operating within an existing framework is the possibility of a sense of continuity for the victim between the VARE interview, for example, and the court appearance. Ensuring the same individual assists the victim for the duration of their trial experience would render a greater ability to understand the victim and necessary modes of adjustment to communication.

Extension of the ITP role to trial would require substantial additional resources. The specific considerations regarding extension of the ITP role would be the necessity to meet the high demand across the state, advertising for new recruits and reimbursement of lost wages for volunteers or the full time employment of ITPs for this role. Additional trial-specific training would also require resourcing.

**Recommendation 7.** In the event that recommendation 6 is not accepted, the role of an Independent Third Person should be extended to the criminal trial process.

**Q 57: Should Victims have a legal right to enforce some or all of the rights contained in the Victim's Charter Act 2006 (Vic)? If so how might this be achieved and in what circumstances?**

OPA notes the discussion contained in the VLRC's consultation paper:

The absence of procedures for enforcement and remedies for non-compliance has been described as rendering victims' rights 'illusory'... and unlikely to lead to change ... Matthew Hall has suggested that the actors in the criminal justice system would be more likely to give legitimacy to victims' rights and interests if these rights were enforced within the justice system.<sup>68</sup>

OPA considers that cultural change within the legal system necessitates the creation of a binding charter of rights, the breach of which would result in recourse. OPA is of the view that disability specific considerations are required within the Victims' Charter Act. OPA notes that the VLRC discussed points of potential hesitancy in the inclusion of a binding charter and OPA wishes to respond to these concerns.

*Five Stated Objections to Creating Victim Rights which Give Rise to Legal Causes of Action*

- 1. Victims' rights relate to an individual's private interest in the criminal proceedings, which can directly challenge the public interest underpinnings of the adversarial criminal justice process.**

By using the same logic, the alleged offender also possesses a private interest in the justice system, that is, to be found not guilty. This interest does not always accord with the public interest. Crucially, the justice system protects the interest of obtaining a fair trial, not the interest of obtaining a particular outcome.

Frameworks must exist to ensure evidence submitted by both sides is of equal priority and quality in order for the trial to be fair. OPA considers that there is an enforceable framework protecting the rights of the alleged offender (often the primary source of evidence for the defence) and a lack of such a framework for the alleged victim (often the primary source of evidence for the prosecution). This fairness is not only fundamental to the underpinnings of the adversarial system but is unequivocally necessary to uphold public interest.

It is in the public interest to ensure that, in line with adversarial principles of justice, evidence submitted by both parties to the trial is accurate. This ensures a fair trial and best enables a correct decision necessary for the protection of society.

The Criminal Bar Association of England and Wales in 'A Question of Practice' expressed that victim rights pertaining to improper questioning and the obligation to change methods of questioning produces reliable evidence from vulnerable witnesses. Further, it renders a freedom for the victim to say what they wish, to the best of their ability with an increased confidence that what they are saying is accurate. Accordingly, cultural change is necessary.

<sup>68</sup> Ibid 159.



Threat of sanction, as adopted by an enforceable Victims' Charter Act, encourages a culture of compliance.<sup>69</sup>

**2. Related to this, the two-party contest between the state prosecutor, representing the harmed society, and the accused, does not easily create space for a third party.**

In order to determine whether society has been harmed or not, the evidence of both parties needs to be carefully examined. As stated above, procedural fairness gives rise to good quality evidence. Evidence can come in many forms, for example: medical analysis, security or other footage and written or oral accounts from witnesses or the alleged offender or victim.

The introduction of rights does not signify the creation of a new party but the interest in preserving the quality of evidence necessary for the adequate operation of adversarial principles.

The two parties are the defendant (represented by the defence) and the society (represented by the prosecution). The defence lawyer is the means by which the defendant is represented and can present evidence in court; the two are conceived of as one party not separate entities. The account of the alleged victim is one of the means by which society is represented by the prosecution. Again, they should not be seen as separate entities.

The defendant and the prosecution (who represents the interests of society) deserve a fair trial.

**3. Attempts to enforce rights through legal proceedings may disrupt and delay criminal proceedings.**

The current rights of the alleged offender pertain to the right to a fair trial. Using the above definition of fair trial (equal chance of both sides to present evidence) there is no reason why a delay should not be endured if evidence from the prosecution has been unduly hindered and thus a fair trial not achieved.

**4. If new legal causes of action are created for victims whose rights are violated, legal aid funding may be needed to ensure equity in the realisation of victims' rights.**

There is undeniably a monetary cost required to extend the function of legal aid. To deny enforceable victim rights on this ground is to allow a lack of procedural fairness to continue, the cost of which would arguably be far greater upon society.

**5. Different rights might apply differently at different stages of proceedings, requiring various approaches to enforcement.**

Current complexities such as these are currently managed by the constant presence of a presiding judge who is adequately educated on the relevant policies and procedures.

Noting these arguments, OPA makes the following recommendation and notes that the legal right to recourse should arise if the disability specific considerations (once added to the Victims' Charter Act) were not followed in trial.

**Recommendation 8.** The Victorian Government should make the *Victims' Charter Act 2006 (Vic)* enforceable.

**Q 60: Are there Gaps in the Provision of Victim Support Service?**

OPA notes with concern the current lack of cohesion between victim support services for individuals with a disability. While the current victim support framework is complex, individuals with disability have unique needs and added difficulty in accessing the services vital to their continued inclusion in the trial process.

One identified gap rests with ITPs not having a role in referring victims (and alleged offenders and witness) to appropriate support services.

<sup>69</sup> Ibid.





OPA's *Breaking the Cycle* reported that:

Police have identified the need to offer referrals to people who are believed to have cognitive impairments and mental illnesses. Most of the police who took part in this research indicated that volunteers should make referrals following an interview for ITP clients, rather than police. This is because ITP volunteers are perceived by clients to be independent and objective, and because they operate outside of the criminal investigation.<sup>70</sup>

OPA directs the VLRC to a recommendation contained in the *Breaking the Cycle* report that supported the creation of a referral officer:

Subject to OPA securing appropriate funding, the ITP Program should develop an advocacy and referral scheme for clients who have had, or who are clearly at risk of having, repeat contact with crime. This will involve establishing a two-year pilot project that assists a target of 100 clients each year. The pilot will require:

- one full-time ITP Advocate at Victorian Public Service (VPS) at level four
- one part time (0.2) Administration Support Officer at VPS level two
- additional costs associated with training ITP volunteers to make referrals, developing and updating referral toolkits for volunteers, and funding to enable an ITP client to attend committee meetings.<sup>71</sup>

**Recommendation 9.** As OPA recommended in the *Breaking the Cycle* report, OPA should be funded to establish an Independent Third Person advocacy and referral scheme for clients who have had, or who are clearly at risk of having, repeat contact with crime. This will involve establishing a two year pilot project that assists a target of 100 clients each year.

OPA has considered other possible changes to the ITP Program to ensure greater access to people with disability and to meet the demand for ITPs and address some of the current gaps in the provision of victim support, including to the Koori community.

#### **Q 64: What Role could the Victorian Victims of Crime Commissioner have in Relation to Victim Support Services?**

Should the Victims' Charter Act become binding, and a source of subsequent rights in the form of legal action, it is envisioned that victims will need support in navigating the process of attaining such rights. OPA suggests that the Victims of Crime Commissioner could function as a means of practically assisting victims in realising their claims. OPA notes the mandate of the Victims of Crime Commissioner is still somewhat under consideration. OPA understands that without further resourcing from the current level it would be difficult for the Victims of Crime Commissioner to take on any more than a systemic advocacy function, an important role nonetheless. OPA is hesitant to make a recommendation on this point and suggests the VLRC consult with the Victims of Crime Commissioner on this matter.

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<sup>70</sup> *Breaking the cycle* 7.

<sup>71</sup> *Breaking the cycle* 8.