



**Government
of South Australia**

**Commissioner for
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Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
ACT 2600 Australia

Dear

Secretary,

Re Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

I refer to the invitation to make a submission to the Committee's inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017. Please accept this letter as my submission.

By way of brief introduction, his Excellency the Governor for South Australia appointed me as Commissioner for Victims' Rights (see section 16 of the Victims of Crime Act 2001 (SA)). My role is likened to a victim-ombudsman (see section 16A of the Victims of Crime Act 2001 (SA)); however, my functions are broader than traditionally associated with an ombudsman (see sections 16 and 32A of the Victims of Crime Act 2001 (SA)). For example, I assist victims dealing with government agencies, represent either in-person or through legal counsel victims' interests in certain criminal proceedings, and I can exercise with approval either in person or via legal counsel any right a victim might hold in South Australia.

The said Bill encapsulates important amendments, in particular:

- Clarifying the functions of Australian Federal Police to enable cooperation with international organisations, and non-government organisations.
- Creating separate offence regimes for 'insiders' and 'outsiders' for the disclosure of information relating to controlled operations.
- Removing an obsolete reference to the death penalty.
- Strengthening protections for vulnerable witnesses and complainants.

Clarifying the functions of the AFP

As Commissioner for Victims' Rights and, with approval of the Attorney-General for South Australia, as Secretary-General for the World Society of Victimology, I deal with international, regional and domestic matters. I, for instance, participate as an expert with the United Nations Office of Drugs and Crime (UNODC) in Vienna, Austria. I have, for instance, contributed to the revision of the UN Handbook on Justice for Victims of Crime and Abuse of Power, and recently contributed to the UNODC enquiry on restorative justice. Furthermore, I

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have participated in the international debate on tackling trafficking in human beings but with a focus on improving practical, medical, psychological and financial assistance to victims of such despicable crime.

Regarding the Australia Federal Police, I have collaborated and/or cooperated, directly and indirectly, with the police to assist victims of terrorism and Australian citizens as victims of crime overseas as well as foreigners / visitors as victims of crime in South Australia. Such has included:

- Assisting both the families of those who died in the bombings in Bali as well as victims of these bombings.
- Repatriation of an Australian citizen from United Kingdom to Australia.
- Advocacy for the family of an Australian citizen murdered in Brunei.
- Repatriation of a non-Australian who was murdered in South Australia to Sri Lanka.

For these and like victim assistance, I rely very much on the exchange of information from the Australia Federal Police and other agencies (for example, Department of Foreign Affairs and Trade, and Department of Immigration and Border Control). In order to respond in a timely and respectful (often compassionate) manner, it is essential that the information flow is unimpeded yet also respectful of victims' right to privacy (see for instance the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the South Australia Declaration Governing Treatment of Victims of Crime).

Various matters relating to the implementation of international victims' rights instruments necessitate cooperation between authorities, such as the Australia Federal Police and an overseas police agency or victim support organisation. Governments, including Australia's federal, state and territory governments, have obligations to ensure victims of crime (including those directly harmed and their families) are:

- Told and to help access victim assistance (which should include practical help, medical and psychological treatment, and financial assistance).
- Kept informed about the progress of the criminal investigation and criminal proceedings.
- Assisted in exercising their right to access justice, including making a victim impact statement (or victim personal statement as they are known in England and Wales) and to make submissions to authorities such as the parole board.

The Australia Parliament should support measures to encourage respect and recognition of victims' rights. It should ensure that victims have access to information of relevance to their case and necessary for the exercise of such rights and the protection of their interests.

Please note that I have also dealt with the Australia Federal Police in relation to training staff on victim awareness and responding to missing persons. Thus, I am familiar with the Police victim-awareness command.

As a consequence of my experiences at United Nations' forums, the aforementioned international dealings, and my knowledge of international and domestic law on victims' rights, I know the Australia Federal Police play a central role in exchanging and sharing information, as well as honouring victims' rights obligations.

I urge the Committee to note that, while respecting the different legal systems and laws and practices throughout the world we share, a common approach in accord with victims' fundamental rights should always be followed. Australia should have a well-prepared and coordinated response (or set of responses) to situations of criminal victimisation, which will require, among other things, the exchange of information. I urge the Committee to endorse the amendment to clarify the Australia Federal Police's ability to cooperate with international

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organisations and non-government organisations in relation to the provision of police services and police support services. Furthermore, I urge that such amendment should also provide for the Australia Federal Police to cooperate with statutory authorities such as the Commissioner for Victims' Rights, South Australia, in matters like those I mentioned.

Justice for victims is not only delayed but also wantonly waylaid if the law is flawed. Flawed law impedes those charged with helping victims.

Creating separate offence regimes for disclosure of information

I have privately pointed out that in anti-terrorism activities there should be greater collaboration with victims' rights and victim assistance agencies and organisations, and for such purpose disclosure of information is necessary.

If a police officer, other government official or non-government staff 'inadvertently' disclose information on a joint operation, for instance, tackling a terrorist incident or a clandestine drug laboratory, and the intended purpose was to help innocent people affected by the crime I would argue there is a 'strong' pressing need. For such circumstances, there should be a safeguard, such as an apt restriction on prosecution or a suitable defence, so officials and others are not impeded if their act or omission is directly linked to a legitimate aim. Of course, such safeguard must be proportionate to the potential harm, or actual harm, to the rule of law, to others involved in the operation and so on.

Removing an obsolete reference to the death penalty

The death penalty should not be revived for any crime under any Australian jurisdiction. The imposition of the death penalty does not solve criminality, including heinous crime such as mass violence (including terrorism) or illicit drug dealing (such as in the ICE menace).

Hopefully, this amendment will put the death penalty irretrievably into the past. It is unfortunate, however, that debate on this amendment will happen at a time when the horror of terrorism is so fresh on the minds and in the hearts of so many. That terrorists and other murderers desecrate the right to life is not justification for the state to resort to executing criminals.

Strengthening protections for vulnerable witnesses and complainants

The amendment is a vital reform. International and domestic victims' rights law stipulate that there should be no unnecessary intrusion on a victim's privacy. Thus, victims do not have an absolute right to privacy. Such said, the protection of a victim's privacy should be ensured when the crime is the focus of media coverage. Moreover, the Australia Parliament should take appropriate steps to avoid as far as possible undermining respect for the privacy of victims and their families.

The Australia Parliament should ensure the protection of victims' physical and psychological integrity at all stages of the criminal justice system. It must, it seems to me, ensure the safety and protection of victims in ways that give proper consideration to their personal situation, their rights and their dignity. Furthermore, the Parliament should ensure 'special measures' are designed to suit the personal circumstances or situation of victims considered vulnerable either by virtue of their personal circumstances or of the type of crime.

When affected by a particular issue before a court or other competent tribunal, the victim should have the right to access to that court or tribunal. Legal advice and representation should be made available where appropriate.

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Mindful of above, I point to several case examples.

Case A — Victim of domestic violence attends a trial court only to discover that the defendant's counsel, unbeknown to her, has by subpoena copies of 'private' papers from an organisation with which the victim dealt. The victim was denied the right to be heard on the application of the subpoena (which is permitted in common law) because there was no obligation on the defendant or his counsel to 'take reasonable steps' to notify the victim, and further no obligation on the prosecutor or the court to notify the victim. By the time I became aware of the victim's situation, her privacy had been unnecessarily compromised.

Case B — Three people are allegedly murdered and a fourth family member, who is a young child, survives because he was residing in another place at the time of the killings. The media became aware of criminal proceedings involving that child as a victim of crime allegedly perpetrated by one of the murdered victims, and several media intended to report on the victimisation of the child and in so doing identify him as family of the murder victims. To protect the child and ensure his psychological well-being, I instructed legal counsel to apply for a suppression order covering the identity of the child-victim, the identity of the alleged assailant and the particulars of the alleged crime. The court approved and the victim-victim's interests were protected.

Case C — Victim of sexual assault shortly before giving evidence is alerted to an application by defence counsel for access to her Medicare Records. The law on whether such are records of private-protected communications is unclear on the matter, so a 'special' hearing before the presiding judge is convened. On becoming aware of the victim's plight, I engaged a lawyer to represent her as a 'best friend' intermediary, which the judge approves. After taking argument, the judge holds that the Medicare Records are not protected and allows defence access to them. As a consequence, the victim's privacy is compromised, so the judge allows the victim's lawyer to remain as an 'observer' during the cross-examination on the content of the said records.

In all these examples, there was no obligation on the 'party' seeking to use information about the 'victim' to inform the victim on the application so he or she might put his or her view to the competent court or tribunal. Such is an awful omission in law and practice that might have dreadful consequences for victim-witnesses as well as erode public confidence in our criminal justice systems.

To the extent that the proposed amendment endeavours to ensure procedural justice for the victim (or other affected person) as a 'party' and to reduce the 'possible' injustice, I applaud it and urge the Committee to support it.

Victims should not be by-standers in Australia's criminal justice systems. Rather, victims should have access to justice and, whenever practical to protect their rights, access to legal counsel. A purpose of the law must be to protect vulnerable people's human dignity and equality. It should be a means to achieve a just, fair and equitable criminal justice system.

Yours faithfully

Michael O'Connell AM APM
Commissioner for Victims' Rights