
Women Surviving as Victims in the Criminal Justice System in Queensland: Is Revictimisation Inevitable?

Susan Currie & Sally Kift*

1. Introduction

In November, 1998, a 20 member all-female¹ “Taskforce on Women and the Criminal Code” was established by the Queensland Minister for Justice and Attorney-General, Matt Foley, and the Minister for Equity and Fair Trading (including Women’s Policy), Judy Spence. The Taskforce was requested to examine, report and make recommendations on the impact of the Criminal Code (Qld) and the criminal justice system, its court practices and procedures, on women, whether as victims, defendants, or witnesses.

A total of 6 Issues Papers were released by the Taskforce, culminating in a substantial Discussion Paper issued in September 1999. The Taskforce produced its Report in February 2000. The Taskforce identified that, while changes to the law are imperative, they alone will not necessarily change women’s actual experience. In its consultations and deliberations, and finally in its Report, the Taskforce took a broad view of the law and inquired into

- The nature and culture of the legal system
- Processes and procedures used in the criminal justice system
- Services and support for people involved in the system (in any capacity); and
- Community education and prevention strategies²

The authors commend the Beattie government for its commitment to improving the position of women in the criminal justice system, and particularly for its recognition of the fact that women victims experience special problems over and above those experienced by victims generally. This paper will firstly provide an overview of the current position of women victims in the criminal justice system in Queensland. In this

* Susan Currie (BA/LLB LLM), Senior Lecturer in Justice Studies, Faculty of Law, QUT and Sally Kift (LLB (Hons) LLM), Lecturer in Law, Faculty of Law, QUT.

¹ The first author was a member of the taskforce.

² Office of Women’s Policy, Report of Taskforce on Women and the Criminal Code, Brisbane, February 2000 (the Women’s Taskforce Report) at (ii).

regard, it will look firstly 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 government departments. Incorporated in the first part of the paper will be a commentary by the authors on the deficiencies of the current system, and recommendations for reform, some of which have been made by the Womens Taskforce Report. Thirdly, it will discuss some recommendations made by the Taskforce on Women and the Criminal Code to ensure that women are not revictimised in the courtroom.³ Fourthly, it will draw attention of the need for proper funding, data collection and research in the area. Finally, it will draw attention to the need for a full-scale reconceptualisation of the criminal justice system as the primary strategy that will ensure that women victims are not revictimised by the criminal justice system.

2. 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".⁴ 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.⁵ 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".⁶

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"⁷ in connection with the apprehension, trial, sentencing, incarceration and parole of the offender. The principles so stated constitute guiding principles, "minimum standards",⁸ 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.⁹

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

³ It is beyond the scope of this paper to address all recommendations made by the Taskforce in respect of women victims. Indeed it is not possible to address all recommendations made in respect of women victims in the courtroom.

⁴ *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.

⁵ COVA, s 4(1) and see, for example, the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

⁶ COVA, s 4(2).

⁷ COVA, s 4(3).

⁸ *Criminal Offence Victims Bill 1995 (No. 54 1995)* Explanatory Notes at 2.

⁹ COVA, s 4 (4).

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).¹⁰

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.”¹¹ The privacy of victims should be respected, inconvenience should be minimised and property held for investigation should be returned promptly.¹² Of particular concern to women victims, requirements also exist to afford victims protection from violence and intimidation by an accused.¹³ It is expressed that the welfare of the victim to be considered during investigation and prosecution, without prejudice to the accused.¹⁴

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;¹⁵ that victims be advised on their role as witnesses;¹⁶ that information be provided about available welfare, health, counselling, medical and legal services and about victim-offender conferencing;¹⁷ that victims be given information about compensation or restitution;¹⁸ and that, if they request it, victims be given information about crime prevention methods.¹⁹ 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;²⁰ that prosecutors, upon request, put relevant information provided by the victim before the court in an application for compensation or restitution;²¹ 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.²²

The Declaration provides that victims should be given access to the State’s system of justice²³ and that public officials dealing with victims should develop guidelines for putting the principles into effect.²⁴

2.1 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

¹⁰ *COVA*, s 5.

¹¹ *COVA*, s 6.

¹² *COVA*, s 10.

¹³ *COVA*, s 12.

¹⁴ *COVA*, s 13.

¹⁵ *COVA*, s 15.

¹⁶ *COVA*, s 16.

¹⁷ *COVA*, s 17.

¹⁸ *COVA*, s 18(1).

¹⁹ *COVA*, s 9.

²⁰ *COVA*, s 11.

²¹ *COVA*, s 18(2).

²² *COVA*, s 14(1).

²³ *COVA*, s 7.

²⁴ *COVA*, s 8.

circumstances. This extension is seen as integral to 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
 (a) within or relevant to their functions; and *practicable* for them to do so. (Our emphasis)

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. The Women’s Taskforce Report expresses the importance of this issue:

In all our consultations on the criminal justice system we found that the issue women most wanted to talk about was services: services that give them information; services that give them options; services that support and assist them; and services that represent them.²⁵

It recommends the government investigate the possibility of amending the Act to provide a positive obligation on public officials to inform victims of crime of their rights.²⁶ It further recommends that government agencies with responsibilities under *COVA* be adequately funded to fulfil those obligations.²⁷

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

²⁵ The Women’s Taskforce Report, *supra* n 2 at 21.

²⁶ *Ibid* at 72.

²⁷ *Ibid* at 73.

victim should be considered...[during] the investigation and prosecution of a crime, without prejudice to [the accused]".²⁸ 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. This is an issue of particular concern to women victims.²⁹

It is also problematic to ascertain how some of the Fundamental Principles translate into practice. For example, the Declaration provides that victims should be given "access to the State's system of justice".³⁰ 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.³¹ 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"³²) 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".³³ 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.³⁴

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

²⁸ COVA, s 13.

²⁹ The Women's Taskforce Report, *supra* n 2, Chapter 3.

³⁰ COVA, s 7.

³¹ 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?

³² *Criminal Offence Victims Bill* 1995 (No. 54, 1995), Explanatory Notes at 707.

³³ COVA, s 4(6).

³⁴ COVA, s 4(5).

victimisation...Ultimately, with the victims' interests in mind, it is better to confer no rights than 'rights' without remedies.³⁵

2.2 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 complemented by "sets of guidelines issued by particular agencies, which will *cause* officers to apply the Fundamental Principles" (our emphasis).³⁶ 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*" (our emphasis).³⁷ The Queensland Police Service, the Office of the Director of Public Prosecutions and the Department of Corrective Services have all incorporated, to varying extents, aspects of the relevant principles as guidelines for their operations.³⁸ 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.

2.2.1 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.³⁹ 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.⁴⁰

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 Women Taskforce Report recommends that a Victims Advisory Unit be

³⁵ 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.

³⁶ *Criminal Offence Victims Bill* 1995 (No. 54, 1995), Explanatory Notes at 708.

³⁷ COVA, s 4(7).

³⁸ See Discussion Paper: *Review of the Criminal Offence Victims Act 1995- Implementing the Fundamental Principles of Justice for Victims of Crime*, prepared by Department of Justice and Attorney-General, July 1998 (The COVA Discussion Paper) at 4-8.

³⁹ 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.

⁴⁰ See generally COVA Discussion Paper, *supra* n 1 at 8.

established within the Queensland Police Service, with a view to enhancing police response and ongoing service delivery to victims/survivors of crimeations in this regard.

2.2.2 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 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”).⁴¹ 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 perform 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).⁴²

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.⁴³

⁴¹ *Id* at 6.

⁴² *Ibid*.

⁴³ *Id* at 7.

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 Principles. While the initiative of sending victims 25 form letters is a positive step in service delivery and infinitely better than them receiving than 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.⁴⁴ 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 *COVA* 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.⁴⁵

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.

2.2.2.1 *ODPP and Victim Impact Statements*⁴⁶

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."⁴⁷ 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",⁴⁸ 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*.⁴⁹

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

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ 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.

⁴⁷ *Ibid.*

⁴⁸ *COVA*, s 14(1).

⁴⁹ 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”,⁵⁰ 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 - has the choice to make such a VIS. 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.⁵¹

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.⁵² 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 aware of their right to have a statement tendered *and* should they have the skills to and then choose to prepare such a statement).

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

⁵⁰ Cf, for example, the *Victims Rights Act 1996* (NSW) which commenced on 2 April 1997 and inserted a new Pt 6A into the *Criminal Procedure Act 1986* (NSW) and provides for the receipt of VISs in specified circumstances.

⁵¹ This Guideline and other matters are discussed in M Thrower ‘Victim Impact Statements: The Voice of Shattered Lives’ (1996) June *Proctor* 16.

⁵² 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.

(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.⁵³

However, some victims, especially victims of sexual assault, may be reluctant to make a statement particularly after reading newspaper reports in other Australian states of them being hung on prison walls as trophies by prisoners.⁵⁴ The Women's Taskforce Report recommends that the Department of Justice and Attorney-General clarify the purpose of the VIS:

While members concede that the VIS is a valuable tool in giving the victim a voice in the system, in some cases the victim will not want the offender to know what damage has been caused, particularly in sexual assault cases.⁵⁵

Another potential problem relates to whether victim impact statements 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. In this situation, VISs may prove to be counter-productive. Specific legislation is long overdue in Queensland to address the formal and special requirements of VISs.

2.2.2.2 *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. 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."⁵⁶ 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.

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 table⁵⁷ and a percentage range of the scheme maximum of \$75,000 assigned to them in a way similar to workers compensation: for example, the percentage range prescribed for gun shot/stab wound (severe) is 15% to 24%;⁵⁸ the percentage

⁵³ *Ibid.*

⁵⁴ See, for example, *Daily News (Tweed Heads)* 20 September 1997.

⁵⁵ The Womens Taskforce Report *supra* n 2 at 412.

⁵⁶ *COVA*, s 18(2).

⁵⁷ *COVA*, Sch 1.

⁵⁸ *COVA*, Sch 1, Item 26.

range prescribed for severe mental or nervous shock is 20% to 34%.⁵⁹ If a person has sustained more than one injury in the table, the amounts payable and added together must not exceed a limit of \$75,000.⁶⁰ 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.⁶¹ 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.⁶²

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,⁶³ although the State has subrogation rights.⁶⁴

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:⁶⁵

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.⁶⁶ It is 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.⁶⁷

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.⁶⁸ This seems a strange requirement when the Act itself provides that a compensation order is not part of the sentence of the

⁵⁹ *COVA*, Sch 1, Item 33.

⁶⁰ *COVA*, s 25(3).

⁶¹ *COVA*, s 25(6).

⁶² *COVA*, s 25(7).

⁶³ *COVA*, s 22.

⁶⁴ *COVA*, s 38.

⁶⁵ *COVA*, s 22(3).

⁶⁶ *COVA*, s 23.

⁶⁷ *COVA*, s 31.

⁶⁸ *COVA*, s 24.

offender.⁶⁹ As the Act applies only to convictions in the Supreme and District Courts (and not in the Magistrates Court),⁷⁰ 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.⁷¹ 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 part⁷² 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.⁷³ 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 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.

Compensating victims of crime should not be a problematic or a 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. [stuff on women needed]

2.2.3 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

⁶⁹ *COVA*, s 29.

⁷⁰ *COVA*, s 24.

⁷¹ *COVA*, s 32. Under *COVA*, s 33, 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 s 34 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.

⁷² *COVA*, s 32.

⁷³ *COVA*, s 36.

victims as to how and to whom they may complain in the event that they are unhappy with the services of this agency.⁷⁴

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 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.

3. 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 1985⁷⁵ 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 reconciliation 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 available to courts but has not been used as often as some of the subsequent programs run by the Department particularly those for young offenders.⁷⁶

Victim offender mediation and conferencing programs 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.⁷⁷ However, that enthusiasm should be tempered by two specific criticisms that are made of mediation in the victim offender setting: first, that it

⁷⁴ See generally COVA Discussion Paper, *supra* n 1 at 8-9.

⁷⁵ 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.

⁷⁶ See generally, S Kift 'Victims and Offenders: Beyond the Mediation Paradigm?' (1996) 7 *Australian Dispute Resolution Journal* 71.

⁷⁷ 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.

inevitably serves the interests of one party at the expense of the other; and secondly, that it benefits the justice system more than either.⁷⁸ 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 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.⁷⁹ 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.

The Womens Taskforce Report expresses the same concerns and recommends firstly that victim-offender mediation should not replace the traditional criminal justice system for adult offenders, and, secondly, that as a matter of principle, offences of violence should result in prosecution of an offence where evidence supports the charge.⁸⁰

4. Recommendations of the Women's Taskforce Report on Women Victims and the Courtroom.

What we will do here is focus on some recommendations made by the taskforce with a view to ensuring that women are not revictimised in court. The Taskforce makes the following recommendation in respect of providing support to victims in court which is likely to assist women who have been raped or beaten:

Government adequately address the issue of court support for all victims of violent crime with responsibility for it to be taken up by an appropriate agency and coordinated across the state. The necessity for specialist services and the importance of continuity of care should be recognised.⁸¹

The Report also recommends to the government that when it is developing designs for courthouses, it should consult with representatives of court support workers.⁸² This part of the paper will however focus on issues facing women victims in giving evidence in court.

⁷⁸ M Wright *Justice for Victims and Offenders: A Restorative Approach to Crime* (Open University Press, Philadelphia, 1991) at 68.

⁷⁹ B Mason 'Reparation and Mediation Programmes: The Perspective of the Victim of Crime' (1992) 16 *Crim LJ* 402 at 414.

⁸⁰ Womens Taskforce Report, *supra* n 2 at 69.

⁸¹ *Ibid* at 78.

⁸² *Ibid* at 80.

A significant problem arises from the fact that victims report not meeting the prosecutor until the day before and sometimes on the day of the trial.⁸³ It is hard to see how this can lead to adequate case preparation or the perception of adequate preparation. It is suggested that the government address the problems caused by lack of funding and also by having a running list of cases over which the Director of Public Prosecutions (DPP) has no control. The authors also suggest that if prosecutors are focused on getting on top of the issues at trial, they are likely to be less confident about objecting to inappropriate cross-examination. This situation is likely, further, to be exacerbated by the fact, that prosecutors are not victim advocates. We believe that it may be necessary to provide separate representation for some victims to protect them from revictimisation. This issue is pursued further in part 6 of this article.

The Taskforce Report states that the presumption of the innocence of the accused can operate in practice in sexual assault cases as a presumption that the victim is lying.⁸⁴ This position has been reinforced by the decision of the High Court in *Palmer v R*⁸⁵ which held that it is permissible to cross-examine a complainant about motives to lie but it is not permissible to cross-examine the accused to suggest a motive to lie by asking "Why would the complainant lie?" It is the respectful view of the authors of this article that this approach lies at the heart of the revictimisation of women by the criminal justice system, and that it misconceives the purpose of the presumption of innocence. The presumption of innocence is a due process protection for the accused. It leads to the right to a fair trial. However if it leads to the victim being on trial rather than the accused, we say that it is operating inappropriately. The Taskforce Report argues that:

...we must also acknowledge the community's interest in the criminal justice system. The community has an interest in the detection and effective prosecution of offences. A witness giving evidence is performing a public duty, and should be encouraged to report crime and give evidence.

We agree with this proposition, but would add that victims should not be considered merely as witnesses giving evidence. In the 1979 Queensland decision in *R v Sainty*,⁸⁶ 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.

Again, we will pursue this issue further in part 6.

The Taskforce gave consideration to the fact that certain witnesses might be at particular risk of being intimidated or traumatised by the criminal justice system. Currently, s 21A of the *Evidence Act 1977* (Qld) gives the court a discretion to allow certain "special witnesses" to give videotaped evidence or evidence via a closed circuit TV link, or to give evidence in the absence of the accused or other persons or obscured

⁸³ *Ibid* at 16.

⁸⁴ *Ibid* at 301.

⁸⁵ (1998) 193 CLR 1.

⁸⁶ [1979] Qd R 19 at 20.

from the accused, or to have a support person present. An order cannot be made if any party would be "unfairly prejudiced". Special witnesses are restricted to:

- children under 12
- a person who, in the courts opinion would
 - as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness
 - be likely to suffer severe emotional trauma
 - be likely to be so intimidated as to be disadvantaged as a witness.

In its consultations, the Taskforce was informed that these provisions are rarely used in Queensland.⁸⁷ The Report recommends that the category of "special witnesses" in section 21A should be expanded to include people who:

by reason of age, cultural background, relationship to the accused, the nature of the subject matter of the evidence or any other relevant factor, would be likely to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily.⁸⁸

The Taskforce also makes the important recommendation that there should be a rebuttable presumption that alleged victims of rape and sexual assault are special witnesses. If this recommendation is taken up,⁸⁹ it should lead to greater use of the special witness provisions. It will be interesting to see if this leads to greater willingness on the part of victims of sexual assaults to give evidence in court. We doubt that it will do so unless something is done about inappropriate cross-examination of victims.

One of the most common complaints to the Taskforce was the process of cross-examination, some rape victims describing it as "secondary rape":

Cross-examination involves a scrutiny of a woman's person life, with intrusive questions about her lifestyle (for example, being a single mother, use of alcohol and drugs, being divorced, whether she has had an abortion, who looks after the children when she goes to work). These are all questions directed at discrediting the complainant in the eyes of the jury rather than eliciting relevant evidence. The complainant has the experience of being forced into proving her innocence.⁹⁰

We find it very concerning that some defence lawyers talk of "breaking a witness."⁹¹ (This is done without a hint of irony, and yet if police attempt to "break" the accused in a pre-trial interview, defence lawyers are outraged, and appropriately so.) We believe that such tactics feed the public perception that the criminal justice system is not interested in the truth, and bring the system into disrepute. Part 4 of the Taskforce Report deals with the issue of Education and Access to Justice and makes recommendations (inter alia) for the education of the legal profession in relation to

⁸⁷ Womens Taskforce Report, *supra* n 2 at 304.

⁸⁸ *Ibid* at 310.

⁸⁹ At the time of writing, the Queensland Department of Justice and Attorney-General had prepared draft legislative amendments responding to the Taskforce recommendations.

⁹⁰ Womens Taskforce Report, *supra* n 2 at 311.

⁹¹ *Ibid*.

gender and other equity issues.⁹² There is obviously a need also for further or better education on issues of ethics and professional conduct by law schools and by the Queensland Law Society and the Queensland Bar Association. Indeed the issue of treatment of victims in rape and sexual assault cases by Queensland Counsel is unlikely to improve until the Queensland Bar Association resiles from the position adopted in its brief submission to the Taskforce that an allegation of rape is easy to fabricate and difficult to refute.⁹³ As a considerable body of research has documented, this is demonstrably not true in either respect.

There are provisions in the Evidence Act⁹⁴ giving courts a discretion to restrict cross-examination as to credit and to disallow indecent and insulting questions. The Taskforce Report makes recommendations that these provisions be amended to give the court the power

- to disallow a question as to credit, if the matter is of such a nature that an admission of its truth would not materially impair confidence in the reliability of the evidence of the witness.
- To disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered if the question is:
 - Misleading, or
 - Unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

In determining these issues, the court is at least required to take into account any relevant condition or characteristic of the witness, including age, personality and education, and any mental, intellectual or physical disability to which the witness is or appears to be subject.⁹⁵

Whilst the authors agree that the terminology of the current sections needs amendment, they doubt that any serious change is likely to occur until these provisions are made mandatory rather than discretionary. We do not believe that there should be any discretion to allow questioning that is problematic in the terms mentioned above.

The Taskforce Report also discusses the problems caused by cross-examination

- At committal hearings⁹⁶
- By the accused in person⁹⁷

It recommends a prohibition on calling child complainants and complainants in sexual assaults and offences involving violence, to give evidence at committal hearings unless special reasons exist to do so. It further recommends prohibiting an unrepresented accused from cross-examining such complainants in person. The authors support these recommendations as having the potential to reduce harassment and intimidation of these victims. Likewise we support the Taskforce recommendations for better provision of

⁹² *Ibid* at 89.

⁹³ *Ibid* at 213.

⁹⁴ *Evidence Act* 1977, ss 20, 21.

⁹⁵ Womens Taskforce Report, *supra* n 2 at 320.

⁹⁶ *Ibid*.

⁹⁷ *Ibid* at 324.

interpreters (including more female interpreters)⁹⁸ and for ensuring that expert evidence about culture includes women's perspectives.⁹⁹ Again they are likely encourage more women victims to testify. Again, however, they need to be accompanied by mandatory restrictions on inappropriate cross-examination.

5. The need for adequate funding, coordinated data collection, and ongoing monitoring.

It is not possible in this article to do justice to the comprehensive way in which the Taskforce canvassed the problems women victims in Queensland face in obtaining justice through the criminal justice system. It is also beyond the scope of this article to address the taskforce recommendations for reform of the substantive law. We would however like to make reference to some factors which have the potential to derail any reform initiatives if they are not addressed, namely, funding, data collection and monitoring.

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 jurisdictions.

The Taskforce expressed disappointment at the lack of the primary research materials on the operation of the criminal justice system.¹⁰⁰ Where data is collected, it is collected for the purposes of the agency collecting it, and it is unlikely to factor in issues such as gender, race, and disability. Further there is no consistent methodology employed which enables cases to be tracked from first point of contact with the criminal justice system through to finalisation of outcomes.

This has the result that it is very difficult to carry out empirical research on how well the system works for women victims of crime. It has the further result of making it near impossible to monitor the effectiveness of reform measures. The Taskforce calls for a coordinated, consistent and refined approach to data collection, as well as encouraging the government "to invest in research as part of its investment in women."¹⁰¹ We endorse the fundamental importance of these issues.

⁹⁸ *Ibid* at 337-8.

⁹⁹ *Ibid* at 342.

¹⁰⁰ *Ibid* at iv.

¹⁰¹ *Ibid* at vii.

6. The need for a shift in mindset

To effect substantive justice for female victims requires a paradigm shift that recognises the centrality of the victim in the criminal justice system. In Queensland (as elsewhere) any moves 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.

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 job of the law to balance competing claims and interests?

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.

It seems to us that victims' interests will not be greatly advanced within the criminal justice system until the system is reconceptualised. In this regard, we can draw on approaches that have worked in other contexts. In Australia, in the Family Court context, provision has been made for some children to have separate legal representation to advocate their interests, which are expressed to be paramount under the relevant legislation, before the court. We believe that, in the criminal justice context, separate legal representation may be necessary for some victims (especially in domestic violence and sexual assault cases) and that the safety of the victim should be of paramount consideration. Such a principle should be spelt out in legislation and should 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, decision-making should be able to be reviewed on the basis that the safety of the victim has not been sufficiently addressed.

A very real tension exists between the Fundamental Principles in COVA which seek to accord victims respect and dignity, and the traditional paradigm which sees the victim's role as restricted to being a witness for the prosecution. 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.

The authors are of the view that implementation of the recommendations made by the Womens Taskforce Report will improve the position of women victims in Queensland

but that change on a major scale will not occur without a shift in mindset. To guarantee that women are not revictimised by the criminal justice system requires no less than this.