



Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs

Centre for Innovative Justice

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Prosecutions, Victoria

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Thank you

The CIJ would like to express our gratitude to each victim of crime who participated in this research. These people generously gave up their time to share their personal experiences with us in order to improve the prosecution process for other victims.

We also acknowledge and thank the victim representatives of the Victims of Crime Consultative Committee for their contributions in meeting with us and providing feedback on this report.

Thank you also to the Witness Assistance Service team members and Office of Public Prosecutions lawyers who made time in their busy schedules to contribute to this research.

A note on terminology

When victims talked about the lawyers who had been involved in their cases, it was often unclear whether they meant the OPP lawyer with carriage of the file, a Crown Prosecutor or an independent barrister. The general term 'OPP lawyer' will be used throughout this document, unless the victim made it clear as to which category of legal professional they were referring to. We recognise that this makes it difficult to tell whether the behaviour of the legal professional in question is attributable to the OPP or not. Nonetheless, these findings represent victims' experiences of the lawyers working on the prosecution case they were involved in. They are therefore relevant to all lawyers who are involved in criminal prosecutions, and to those who employ them.

The term 'victim' is used throughout this report. It is acknowledged that some people who have experienced victimisation and their advocates prefer the term 'survivor' and/or 'victim/survivor', as a more empowering expression. However, we have chosen to use the term 'victim' for ease of reference and for general understanding. The term 'victim' is also used in instances where the term 'complainant' might equally apply.

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1 Executive summary

Introduction

The well-established role of the public prosecutor is to ‘...act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one.’¹ Further, the public prosecutor acts independently of all other organisations and individuals. As the *Policy of the Director of Public Prosecutions for Victoria* (the Director’s Policy) explains, the Victorian public prosecutor represents only the interests of the Director of Public Prosecutions, not ‘the government, the police, the victim, or any other person.’² Traditionally, public prosecutors had little contact with victims of crime, interacting with them only in the limited circumstances where a victim was also a witness. However, over the past few decades justice systems in common law jurisdictions have seen a shift that has created new expectations of justice sector personnel: the emergence of the role of the victim as a *participant* in criminal proceedings. Justice sector personnel, including public prosecutors, are now expected to actively include victims. Expectations of public prosecutors now include: that prosecutors take into account and respond to victims’ needs; that they treat victims with courtesy, respect and dignity; and that they provide victims with information about criminal proceedings. However, the public prosecutor’s contemporary role as a facilitator of victims’ inclusion in the criminal justice system can sit uneasily with their overarching duties to act independently, fairly and in furtherance of the public interest. Certainly, victims’ wishes may be considered as an aspect of the public interest in this context. In some cases there may be considerable overlap between a victim’s wishes and the broader public interest. However, in other cases victims’ wishes and the public interest may not coincide to a large extent.

It is clear that in their everyday work the contemporary public prosecutor is presented with the challenging task of balancing their traditional duties to act fairly and impartially with their relatively new responsibilities to victims. However, existing research indicates that public prosecutors can and do find ways of navigating these tensions.³ In the Victorian context, the Office of Public Prosecutions (OPP) has for many years carried out the traditional role and duties of a public prosecution service in addition to providing services and mechanisms that support victims’ participation in the prosecution process, which include:

- The establishment of the Witness Assistance Service (the WAS) in 1995. The WAS is part of the OPP that employs specialist social workers to assist victims of serious crime throughout the prosecution process (and a series of evaluations of this service).
- A new website specifically tailored to helping victims, witnesses and bereaved family members navigate the Victorian criminal justice system.
- The Victims Support Dog Program, a pilot that makes a trained therapy dog available to victims and witnesses while they attend meetings at the OPP or give evidence in court proceedings
- The Trial Division co-location of lawyers and social workers pilot, which involved WAS social workers being embedded in a team of lawyers in order to enhance interdisciplinary collaboration, with the aim of better addressing the OPP’s goals in relation to informing and supporting victims.

¹ *Whitehorn v The Queen* (1983) 152 CLR 657, 663.

² Director of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria*, Office of Public Prosecutions Victoria, <http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>, 7.

³ Edna Erez, Julie Globokar and Peter Ibarra, ‘Outsiders inside: Victim management in an era of participatory reforms’ (2014) 20(1) *International Review of Victimology* 169; Dan Jones & Josie Brown, ‘The Relationship between Victims and Prosecutors: Defending Victims’ Rights? A CPS Response’ (2010) 3 *Criminal Law Review* 212.

The above initiatives embody the OPP's stated commitment to 'ensuring victims are prepared for, and feel involved in, the prosecution process and to treating them with courtesy, respect, dignity and sensitivity.'⁴ A further illustration of the OPP's commitment to supporting victims' active participation in the criminal trial process is the fact that the *Director's Policy* provides for victims to be given opportunities to have input into prosecution decision-making regarding resolutions. The *Director's Policy* requires OPP lawyers to seek victims' views prior to a decision about a resolution being made. The victims' views then function as one factor that the OPP takes into account when determining whether a resolution is in the public interest.

The OPP is committed to ensuring that its policy of consulting victims regarding resolution decisions has the desired effect of facilitating victims' participation in criminal proceedings in ways that are meaningful and satisfying to them. Therefore, the OPP approached the Centre for Innovative Justice (CIJ) and commissioned the CIJ to conduct research into victims' experience of being consulted by OPP lawyers about resolution decisions. The aims of the study were to:

- identify and understand victims' experience of being told about prosecution decisions regarding resolutions
- identify areas for OPP improvement in managing these processes and communicating with victims about these processes and decisions
- propose practical solutions to improve outcomes for victims, the OPP and the community, and
- identify areas for further investigation and research.

In undertaking this study the CIJ:

- examined the legal and policy framework governing victims' involvement in resolution decisions (see part 3)
- reviewed the existing knowledge base about victims' needs and experiences of criminal prosecutions (see part 4)
- interviewed 18 victims who had participated in prosecutions by the OPP (see part 5), and
- interviewed 4 staff from the WAS (see part 6) and 5 OPP lawyers (see part 7).

Findings

The findings of our study indicate that OPP lawyers can and do consult effectively with victims about resolution decisions. Further, WAS participants noted that many OPP lawyers excelled at communicating with victims. Many victims who participated in the study reported a positive experience of the consultation process. The comments of the OPP lawyers who were interviewed showed that these professionals are committed to meeting their responsibilities to victims at the highest possible standard. In addition, lawyers' interviews indicated that they are actively engaged in trying to reconcile the conflicts between the victim's interest and the broader prosecutorial duties to act fairly and in the public interest that arise in their role, and that they have developed effective strategies to do so. However, while it is clear that best-practice consultation with victims is taking place at the OPP, our study suggests that there is nonetheless room for improvement. This assessment is based on the views expressed by some victims who reported negative experiences of being consulted about resolution decisions.

⁴ Office of Public Prosecutions Victoria, 'Victims: Information for victims of crime to understand your role, provide support, assistance and help' <https://victimsandwitnesses.opp.vic.gov.au/victims/victims>

What is most important to victims when they are consulted about resolution decisions?

According to procedural justice theory, people are more likely to see an outcome as valid if they perceive the process that led to it as being fair, even if the outcome is not reflective of what they wanted. Conversely, if people feel unfairly treated by the legal system, they will see outcomes such as court orders as less legitimate, and will be less likely to accept them.⁵ Existing research has established that victims are more likely to feel fairly treated by the criminal justice system when police and prosecutors: take an interest in them; give them an opportunity to express their wishes; and take their wishes into consideration.⁶ Further, victims are more likely to feel fairly treated by prosecutors when they are given recognition and treated with respect.⁷ Inevitably, prosecutors will at times make decisions that victims do not agree with. However, the procedural justice literature tells us that when prosecutors show victims recognition and respect in their interactions with them, victims are more likely to experience the process as fair, even when a decision has been made that does not accord with their wishes. This does not mean that if prosecutors accord victims procedural justice there is a guarantee that victims will always be accepting of the outcomes of prosecution decisions. However, the procedural justice literature suggests that if prosecutors are able to: take an interest in victims; give victims an opportunity to express their wishes; take victims' wishes into consideration; and accord victims recognition and respect, this approach has the best chance of producing the result that victims exit the prosecution process feeling fairly treated and able to accept the outcome, even if it was not what they ideally wanted.

Viewed through a procedural justice lens, the OPP's policy of consulting victims about resolution decisions presents an ideal opportunity to accord victims a sense of procedural justice. This mechanism expressly provides a way for victims to express their wishes and for victims' wishes to be taken into consideration by the prosecutors; two key aspects of procedural justice for victims according to the research. For this opportunity to be maximised, the OPP could ensure that the other aspects of procedural justice for victims also feature in the process. That is, the OPP can seek to deliver the consultation process in ways that show victims recognition and respect, and allow victims to feel that the prosecutor is taking an interest in them.

The victims we spoke with expressed views that are consistent with the procedural justice literature. They said that they wanted opportunities to express their views, and wanted these views to be genuinely taken into account by the OPP. Further, their experience of how the OPP lawyers treated them featured prominently in their interviews. The victims also clearly expressed a desire for the lawyers to take the time to understand them as people and their priorities. They wanted to feel that they mattered to the prosecution lawyers. Our findings support the contention of procedural justice because they indicate that the *process* of being consulted is very important to victims. Victims did not simply focus on the particular prosecution decision in their case, although this was significant for some. Rather, they expressed strong views on *how* the consultation process was carried out. What they said in this regard is highly significant, because read together their comments shed light on the particular aspects of the consultation process that work well or not so well, from victims' perspectives.

Consistent themes emerged from interviews with all participant groups, including victims (both those who reported positive experiences of the consultation process, and those who reported negative experiences of the consultation process), WAS team members and OPP lawyers, regarding what is important to victims when they are consulted about resolution decisions. These themes are summarised below. Read together, they paint a picture of what effective consultation looks like from victims' perspectives, and suggest practical ways to ensure that, as much as possible given the limits of the prosecutor's role, this can be delivered.

⁵ Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990).

⁶ Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler, 1996).

⁷ Jo-Anne Wemmers, 'Victim Participation and Therapeutic Jurisprudence; (2008) 3(2-3) *Victims & Offenders* 165.

Victims want a genuine opportunity to contribute their views

The victims we spoke with drew a clear distinction between being genuinely consulted about a resolution decision and being 'told' about a resolution decision. Being genuinely consulted involved:

- being given the opportunity to express their views
- OPP lawyers genuinely listening to their views
- feeling heard and understood by the OPP lawyers
- feeling that their views mattered to the OPP lawyers, and
- feeling that their views would play a role in the decision that the OPP would ultimately make.

According to the victims, being merely 'told' about a resolution decision involved:

- being informed about a resolution decision *after* it had already been made, or
- being informed that a particular resolution decision was going to be made and then:
 - OPP lawyers not engaging in a discussion about the decision, or
 - OPP lawyers asking the victims how they felt about the decision but at the same time making it clear that their views would not alter the course of action that the OPP had already committed to.

For the most part, the victims who participated in our research indicated that they did not want the power to make resolution decisions themselves. They accepted that these decisions were the OPP's to make. However, it was very important to them that their views on the matter were taken into account by the OPP when it made its decision; that they got to 'have a say' in the resolution decision.

Victims want OPP lawyers to understand and address their individual priorities

Victims of crime are not a homogenous group and their distinct characteristics and experiences shape how the crime affects them, and their interests and needs following the crime. At the same time, the literature on victims' experiences usefully identifies common themes that help us understand what victims seek when they look for a justice response to a crime. These themes have been conceptualised as encompassing the following elements: participation; voice; validation; vindication; offender accountability; and prevention. These themes are referred to in the literature as 'victims' justice needs.'

Our interviews with victims revealed that they were looking for particular outcomes and experiences from the prosecution process. The priorities of the victims we spoke to differed, but common themes emerged. These themes were consistent with the different categories of victims' justice needs, as identified in the literature. That is, the victims who participated in our study variously said that they wanted: to receive answers (participation); to tell their story before a judge and jury (voice); for the full extent of the offending to be recognised (validation); for the offender to admit to the offending (offender accountability); and to speak out in order to make things better for other victims who might come forward in the future (prevention). Some victims also said that the criminal proceedings had the potential to materially affect their safety or the safety of their children, due to factors such as the impact of the outcome on family court proceedings.

Our study suggests that it is important that prosecutors:

- understand that victims have a range of priorities or 'justice needs' that they look to the prosecution process to meet, and
- try to identify the unique 'justice needs' of each individual victim.

Victims said that it was very important to them that the lawyers truly understand what is most significant to them as individuals about the criminal proceedings, and that the lawyers acknowledge this during the consultation process. Our interviews with victims revealed that when lawyers are able to identify victims' personal justice needs and tailor their interactions with victims in ways that demonstrate this understanding, victims are likely to feel heard.

Our findings suggest that victims were satisfied with the consultation when:

- OPP lawyers demonstrated that they understood what was important to them as individuals, and
- they felt that their views mattered to the OPP lawyers.

Victims were critical of the consultation process when:

- they felt that lawyers had made assumptions about what was important to them, for example that achieving a lengthy sentence for the accused was their primary or only aim
- when lawyers tried to 'sell' the resolution decision to them by emphasising benefits that were not actually important to them personally
- when they felt that they were being consulted in a 'tokenistic' way, or as though it was a 'tick a box' exercise for the lawyers, and
- they felt like they were treated as 'just another number.'

Victims appreciate it when OPP lawyers have a personable demeanour

Victims spoke highly of lawyers who treated them in ways they experienced as:

- warm
- considerate
- sympathetic
- caring, and
- respectful, meaning that the lawyers treated them as equals and did not talk down to them.

Victims were disappointed when lawyers treated them in ways that they experienced as:

- cold
- clinical
- unapproachable
- rude, and
- patronising.

Victims want to be given enough information about the case to allow them to contribute an informed view

Victims said they appreciated it when lawyers were forthcoming with information. They wanted the lawyers to:

- answer their questions
- take the time to explain information in a clear, accessible way
- provide specific information that allows victims to understand the factors that have bearing on the proposed resolution decision, and
- be proactive in providing victims with all the necessary information.

Victims were disappointed when:

- they felt that lawyers were being ‘cagey’ with them, or deliberately withholding information
- they felt that they were only given information when they requested it, and without legal knowledge they could not be sure that they were asking the ‘right’ questions – questions that would result in the most relevant information being provided, and
- lawyers only communicated with one victim, and expected that person to relay the information to other victims or family members involved in the case.

Victims appreciate it when OPP lawyers build rapport with them

All three categories of participant in our study – victims, WAS social workers and OPP lawyers – talked about the importance of building a trusting relationship between victims and lawyers long before an issue such as a resolution arises. That way, when a consultation in relation to one of these issues is held, there will already be a level of rapport between the victims and lawyers that will ensure that the consultation process is less overwhelming and intimidating for victims. Victims said that when they had not been able to develop a rapport with the lawyers prior to being consulted about a resolution decision, it was difficult to feel comfortable enough with them to ask questions, or indeed to trust them.

Victims want a strong professional relationship with the OPP lawyer, whether or not a WAS team member is also involved

As the person responsible for the prosecution of the case, the OPP lawyer is a very important figure to the victim. No matter how supportively a WAS team member might listen to a victim, victims want to make sure that the lawyer, as the person responsible for making decisions, or at least for communicating information to the primary decision-maker, has heard and understood their views. Victims also recognise lawyers’ legal expertise and therefore seek information about the case directly from the lawyer. They place great significance on the views lawyers express about the case. Therefore, while the WAS can and do assist in the consultation process, contact with a WAS team member cannot be a substitute for direct interaction between the OPP lawyer and the victim.

Challenges

In addition to shedding light on the factors that are important to victims when they are consulted about resolution decisions, there were also themes that emerged from our research interviews that indicate a number of challenges that confront lawyers when they seek to engage with victims regarding resolution decisions.

Victims’ expectations can be a barrier to their understanding of the case

Many of the victims interviewed had formed views about the strengths and weaknesses of the case, and its likely outcome, before they had had any contact with the OPP. Many had held the view that the case was ‘open and shut’, ‘black and white’ or ‘bulletproof’, and that there was no doubt that the accused would be convicted of and sentenced for the highest charge brought. These views were frequently based on assurances that had been given by members of the police with whom they had had interactions about the case.

These factors create a complex situation for OPP lawyers when they seek to consult with victims regarding resolution decisions. In their interviews, the OPP lawyers said that the main concept they try to impart to victims is that the criminal justice system is inherently complex and uncertain, and that there are numerous risks involved in proceeding to trial. However, viewing the case as uncertain and appreciating the risks it entails means understanding it in a way that contrasts completely with the belief that the case is clear-cut and that a conviction on the highest charge is inevitable; a view that many victims seem to carry into the prosecution process.

Therefore, victims' unrealistic expectations, which police may contribute to, may make it harder for them to understand the case. It is also clear that the creation of unrealistic expectations among victims sets the conditions for a problematic dynamic between the victim and the OPP from the outset, due to OPP lawyers having to correct victims' unrealistic expectations, which can be experienced as bad news by victims.

There is a tension between a lawyer's duty to avoid coaching witnesses and their responsibility to provide information to victims

In matters where the victim is also a witness, there are circumstances in which the prosecution lawyers must withhold information from the victim lest they be accused of coaching a witness to improve their evidence. Victims can find this very difficult to understand, and sometimes believe the lawyer is being 'cagey' or dishonest with them. Several victims also expressed anger with the OPP for failing to help them to take steps to fill gaps in or otherwise improve their evidence, not understanding that prosecutors are unable to do anything that might result in a witness improving their evidence. It is clear that this misunderstanding had played a part in some victims having formed a negative view of their interactions with the OPP.

Some victims want and expect the OPP to act in their personal interests

Although most victims demonstrated an awareness that the OPP acts on behalf of the State and in the public interest, rather than on behalf of victims, many of their comments conveyed a desire for the OPP to 'fight' for them and to display the same passionate advocacy that they observed being shown by defence lawyers. They expressed disappointment about the prosecutors' more subdued advocacy, which they perceived to be indicative of an attitude that the case did not matter to the prosecutor, which in turn diminished their trust in the OPP lawyer's assessment of the benefits of a resolution. It was clear that many victims did not understand the public prosecutor's unique role as an independent officeholder who must assist the court to reach a sound decision based on the evidence rather than pursue a conviction at all costs.

Further, although victims want prosecution lawyers to convey empathy and to acknowledge the gravity of what they have experienced, many lawyers maintain that to do so would be in conflict with their role as an independent prosecutor expected to adopt a dispassionate demeanour.

Consulting with victims who may already be distressed is inherently challenging

Interviewees in all categories acknowledged that communicating with victims, who are likely already to be distressed and in some cases traumatised, about complex legal issues in circumstances where the victim is likely to feel disappointed, is challenging work. Consulting with victims can be daunting for lawyers, and they worry about saying the wrong thing that might cause further distress. Some become so anxious that this contributes to poor experiences for victims.

Collaboration between the WAS and lawyers does not occur consistently across the OPP

Both WAS and lawyer participants expressed the view that when a WAS staff member and a lawyer worked collaboratively to engage a victim, this was likely to lead to an effective consultation process. However, a number of WAS participants noted that while they enjoy positive working relationships with most OPP lawyers, there are still some lawyers within the organisation who do not appear to appreciate the WAS' role or value their skillset. They said that these lawyers tended to have minimal contact with the WAS, and were unlikely to draw on the WAS to help build rapport with victims in a proactive way. Rather, these lawyers tended to be those who only involve the WAS at the last minute, when a difficulty arises, if at all.

The courts can place the OPP under pressure to make resolution decisions quickly

While the lawyers agreed that ideally victims should be given as much time as they need to consider a plea offer and develop their own view of it, they also said that sometimes the reality of the court process meant that this was not possible. They explained that it was not uncommon for the defence to make a plea offer at court, at the start of a trial. When this occurs, the court is likely to require the parties to make a quick decision, in order to avoid wasting court time. However, some lawyers also acknowledged that even when a last minute offer is received and there is pressure to make a decision quickly, on the 'steps of the court', the consultation process can still be well-managed if the lawyer has done the ground work in building a relationship with a victim and facilitating the victim's understanding of the case.

Recommendations

The CIJ makes a number of recommendations aimed at equipping the OPP to better meet the consultation and communication needs of victims. They are set out in part 8 of the report. These recommendations recognise that the OPP already has significant capacity to meet victims' needs effectively, and therefore focus on maximising the consistent application of best-practice approaches across the organisation.

The CIJ recommends that the OPP document a best-practice guide for communicating with victims throughout the course of the prosecution, and for consulting them about resolution decisions. The CIJ has formulated a suggested best-practice guide that articulates the effective strategies and practices identified through this project. This appears at part 9 of the report. The guide, once settled, should be provided to all WAS staff and OPP lawyers, and should be supported by initiatives aimed at building the skills and capacity of all staff to consult and communicate effectively with victims. Such initiatives might include:

- conducting workshops and training sessions led by those lawyers and WAS staff who are skilled at communicating and consulting with victims, and
- conducting workshops and training sessions for lawyers and WAS staff based at both the city and regional offices on:
 - procedural justice principles and practices
 - active listening skills
 - trauma-informed communication practices
- establishing a peer-review system to inform communication and consultation skills development
- inviting team leaders and lawyers to shadow WAS staff for a day, and
- circulating this report to all OPP lawyers and WAS staff.

The CIJ also considers it would be desirable to review and update all relevant policies and practice guides to ensure they promote best-practice approaches to victim consultation and communication, and appropriately refer to victims' broad range of responses to the prospect of a resolution, and reflect and promote the OPP's expectations of how consultation about resolution decisions should be undertaken.

Noting the barrier that unrealistic expectations of the prosecution process and outcomes can represent to effective consultation about resolution decisions, the CIJ also recommends that the OPP liaise with Victoria Police to identify strategies to support police officers to communicate effectively about prosecution processes and decisions.

It is also recommended that the OPP explore further opportunities to liaise with court representatives to highlight the value of providing sufficient time to consult victims about resolution decisions.

The CIJ proposes that any changes made to improve communication with victims be monitored and evaluated to determine their success and identify what further improvements can be made. This may require the development of additional tools for capturing victims' experiences, both positive and negative, in addition to existing complaints processes.

Finally, the CIJ has identified several areas in relation to which the OPP may wish to undertake further investigation or research to enhance the experience of victims involved in prosecutions:

- the most effective methods and techniques for educating victims about the criminal justice system and prosecution process
- how victims can be supported to identify and articulate their full range of justice needs, and to have those needs met, including by making referrals to services or programs that sit outside the formal criminal justice system, and
- ongoing evaluation and documentation of the collaboration between OPP lawyers and WAS social workers, with a view to enhancing the benefits of multidisciplinary practice.

List of recommendations

Recommendation 1

The OPP should document a best-practice guide for (a) communicating with victims throughout the course of a prosecution and (b) consulting victims about resolution decisions, reflecting the principles and practices outlined in the *Best-practice guide to communicating with and consulting victims* (included at part 9 of this report).

Recommendation 2

The OPP should provide a copy of the *Best-practice guide to communicating with and consulting victims* to all lawyers and WAS staff, and identify opportunities to support them to develop their capacity to deliver a best-practice approach to communicating with victims and consulting them about resolution decisions.

Recommendation 3

All relevant policies and practice guides should be reviewed to ensure they promote best-practice communication and consultation approaches, and appropriately reflect that victims have a range of distinct needs, interests and priorities in relation to a prosecution.



Recommendation 4

The OPP should liaise with Victoria Police to identify strategies to support police officers to communicate effectively with victims about prosecution processes and decisions.

Recommendation 5

The OPP should liaise with court representatives to highlight the value of providing sufficient time to consult victims about resolutions.

2 Summary of findings and discussion

Introduction

The role of the public prosecutor is integral to the structure and integrity of the Victorian criminal justice system, as is the case in all common law jurisdictions. This role has a number of important features. First, the public prosecutor is required to act independently. Crucially, this means that the public prosecutor must acquit their duties without influence from or interference by the government. This principle upholds the separation of powers and therefore the structure of our democracy. In addition to being independent from government, the public prosecutor's status as independent also applies to their relationship with all other organisations and individuals. As the Director's Policy clarifies, the Victorian public prosecutor represents only the interests of the Director of Public Prosecutions, not 'the government, the police, the victim, or any other person.'⁸ Second, the public prosecutor must act impartially and fairly. As the High Court put it in *Whitehorn v The Queen*, the public prosecutor must '...act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.'⁹

The role of the public prosecutor, as described above, has long been a commonly understood and well-established feature of common law criminal justice systems. However, in recent times justice systems in common law jurisdictions have seen a shift that has created new expectations of the role of the public prosecutor: the emergence of the role of the victim as a *participant* in criminal proceedings. This shift is significant. Historically, if a victim had any involvement in criminal proceedings at all this was limited to being a witness for the prosecution. Now, however, there is an expectation that criminal justice agencies, including the OPP and its prosecutors, take into account and respond to victims' needs; that they treat victims with courtesy, respect and dignity; and that they provide victims with information. Obligations such as these that are owed by criminal justice and victims' support agencies to victims of crime are reflected in the *Victims' Charter Act 2006 (Vic)*.

The new role of victims in criminal proceedings, and new expectations on public prosecutors to assist with victims' participation in them have reshaped the traditional victim-prosecutor relationship. Traditionally, prosecutors 'had very little interaction with victims outside the witness box for fear of "witness tampering."¹⁰ Now, the public prosecutor is required to keep victims of crime informed about developments in the case and to consult them in certain circumstances.

It should be noted that facilitating victims' participation in justice system responses to crime is not solely the responsibility of public prosecutors. Other agencies, such as police, victim support services and courts, also have obligations towards victims. Further, some justice system responses to crime fall outside of the public prosecutor's ambit of responsibility, for example victims' compensation or redress schemes. In other words, public prosecutors are not solely responsible for victims' experiences of justice system responses to crime; their agency is one of many within the justice system that has a role to play

⁸ *Director of Public Prosecutions for Victoria*, above n 2, 7.

⁹ *Whitehorn v The Queen* (1983) 152 CLR 657, 663.

¹⁰ Matthew Hall, 'The Relationship between Victims and Prosecutors: Defending Victims' Rights?' (2010) 1 *Criminal Law Review* 31, 39.

in facilitating victims' involvement. However, public prosecutors' role regarding victims is important, and is the focus of this report.

The public prosecutor's contemporary role, which now includes helping to facilitate victims' inclusion in the criminal justice system, can sit uneasily with their overarching duties to act independently, fairly and in furtherance of the public interest, which will not always coincide with the victim's interest. The victim's interest properly forms part of a prosecutor's consideration of what is in the public interest, however there are other factors to be taken into account, which may contrast to a greater or lesser extent with an individual victim's wishes. Therefore, the task facing the contemporary public prosecutor is that of balancing their duties to act fairly and impartially with their duties to the victim, which can be difficult prospect. Nonetheless, it is clear that public prosecutors are meeting this challenge. For example, UK Crown Prosecutors Dan Jones and Josie Brown explain how the prosecutor's traditional role can accommodate addressing victims' needs:

It does not necessarily compromise the independence of the prosecutor to be fully aware of the needs and concerns of an individual victim or witness...Knowing what issues are of importance to a victim or witness and putting measures in place to assist them to understand the system is more likely to secure their informed engagement with the system. Victims or witnesses do not have to be "parties" to proceedings in the strict legal sense of the word, before they can be treated with consideration and respect, kept informed of what is happening and have some say in what level of service is best suited to their individual needs. Taking proper account of the needs of victims and witnesses is critical to persuading them they have a meaningful role in the criminal justice system and in helping them to understand better what that role is.¹¹

A recent study looking at how US legal professionals, including prosecutors, have responded to reforms designed to improve victim participation found that it was challenging for legal professionals to reconcile their new obligations to victims with their traditional duties. However, it was evident that these professionals were proactively engaging with these challenges. The researchers concluded that while there can be tensions between victims' interests and the interests of those working in the justice system, these can be managed through 'the creative strategies of dedicated legal professionals.'¹²

In the Victorian context, it is clear that for some time that the OPP has engaged in a range of activities that can accurately be described as 'creative strategies' designed to assist and support victims of crime.

These include:

- The establishment of the WAS in 1995. The WAS is part of the OPP that employs specialist social workers to assist victims of serious crime throughout the prosecution process.
- A website specifically tailored to helping victims, witnesses and bereaved family members navigate the Victorian criminal justice system.
- The *Victims Support Dog Program*, a pilot that makes a trained therapy dog available to victims and witnesses while they attend meetings at the OPP or give evidence in court proceedings.
- The Trial Division co-location of lawyers and social workers pilot, which involved WAS social workers being embedded in a team of lawyers in order to enhance interdisciplinary collaboration, with the aim of better addressing the OPP's goals in relation to informing and supporting victims.

¹¹ Dan Jones & Josie Brown, above n 3, 225.

¹² Edna Erez et al, above n 3, 185.

The above initiatives embody the OPP's stated commitment to 'ensuring victims are prepared for, and feel involved in, the prosecution process and to treating them with courtesy, respect, dignity and sensitivity.'¹³

A further illustration of the OPP's commitment to supporting victims' active participation in the criminal process is the fact that the the Director's Policy provides for victims to be given opportunities to be consulted regarding certain prosecution decisions. That is, OPP lawyers are required to seek victims' views prior to a resolution decision being made. The victim's views then function as one factor that the OPP takes into account when determining whether a resolution is in the public interest. In this respect, the Director's Policy actually goes further in providing victims a participatory role than that required under the *Victims' Charter Act 2006* (Vic) (Victims' Charter). The Victims' Charter merely requires that victims be informed 'as soon as reasonably practical' if the OPP makes a resolution decision; it does not require victims to be given the opportunity to participate in the decision-making process itself.

The OPP wished to ensure that its policy of consulting victims regarding resolution decisions was having the desired effect of facilitating victims' participation in criminal proceedings in ways that are meaningful and satisfying to them. The OPP therefore commissioned the CIJ to conduct research into victims' experience of being consulted by OPP lawyers about resolution decisions.

The project

In December 2017 the OPP commissioned the CIJ to undertake the project 'Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs.'

The project's objectives were to:

- identify and understand victims' experience of being told about prosecution decisions about resolution decisions,
- identify areas for OPP improvement in managing these processes and communicating with victims about these processes and decisions, and
- propose practical solutions to improve outcomes for victims, the OPP and the community; and
- identify areas for further investigation and research.

The CIJ commenced the project by conducting a review of the relevant literature on victims' experience of the criminal justice process, focusing in particular on victims' interactions with prosecutors. Our literature review is included at part 4 of this report.

Given that our primary interest was victims' experiences, our key priority in conducting this research was to interview victims of crime who had participated in a criminal prosecution that involved a resolution, and to ask them to reflect on the consultation process they took part in. In total, we conducted semi-structured interviews with 18 victims. For 13 of these participants, the case had resolved via a plea of guilty. In the remaining five cases there had been a discontinuance. The offences the victims had experienced included sexual offences, driving offences and other forms of homicide. In the category 'victim' we included people who had directly been offended against, and family members of people who had died.

We also conducted semi-structured interviews with two other cohorts of participants: the WAS team members, and OPP lawyers. We considered that these professionals would have useful insights to contribute given their familiarity with the consultation process and their experience of working with victims.

¹³ Office of Public Prosecutions Victoria, above n 4.

All interviews were audio-recorded and then transcribed. The transcripts were coded and analysed thematically. Our findings are summarised below. An in-depth discussion of the interview themes is included in this report at in parts 5-7.

Summary of findings

The findings of our study indicate that OPP lawyers can and do consult effectively with victims about resolution decisions. Many victims who participated in the study reported a positive experience of the consultation process. Further, WAS participants noted that many OPP lawyers excelled at communicating with victims. The comments of the OPP lawyers who were interviewed imply that these lawyers accepted that it was part of their role to facilitate victims' involvement in the criminal justice process. They all appeared to take their duty to consult with victims very seriously. Their comments shed light on how they go about trying to reconcile the conflicts between the victim's interest and their broader prosecutorial duties to act fairly and in the public interest. For example, one lawyer distinguished cases where the public interest and the victim's interest might overlap significantly from those where they are not aligned. It was clear that this lawyer constantly considered these tensions in their daily practice and found ways of managing them. Other lawyers also described various strategies they used in consultations to try to ensure that the experience was as positive as possible for the victim. For example, one lawyer explained that it was their practice to create a summary of the views that the victim had expressed and read this summary back to the victim, so that they could check that the victim had understood them properly. This lawyer would then let the victim know that the summary would be passed on to the Crown Prosecutor or the DPP, who would consider it as part of their decision making. In this way, the victim would be assured that their views would be taken into account.

However, while it is evident that best-practice consultation with victims is widely practised at the OPP, our study suggests that there is nonetheless room for improvement. Some victims who participated in the research reported negative experiences of being consulted about resolution decisions. Our interviews with WAS team members and with OPP lawyers also suggest that across the organisation there is some inconsistency in lawyers' approach to consulting victims. In this respect, the OPP may share similarities with public prosecution agencies in other jurisdictions that have implemented sound policies and procedures governing prosecutors' duties towards victims, but have found ensuring that these policies and procedures are consistently applied in practice to be challenging.¹⁴ It is hoped that the findings of our research assist in this process by helping OPP lawyers build on their knowledge of how to effectively consult victims.

What is most important to victims when they are consulted about resolution decisions?

According to procedural justice theory, people are more likely to see an outcome as valid if they perceive the process that led to it as being fair, even if the outcome does not reflect what they were seeking. Conversely, if people feel unfairly treated by the legal system, they will see outcomes such as court orders as less legitimate, and will be less likely to accept them.¹⁵ Existing research has established that victims are more likely to feel fairly treated by the criminal justice system when police and prosecutors: take an interest in them; give them an opportunity to express their wishes; and take their wishes into consideration.¹⁶ Further, victims are more likely to feel fairly treated by prosecutors when they are given recognition and treated with respect.¹⁷ Inevitably, prosecutors will sometimes make decisions that victims do not agree with. However, the procedural justice literature tells us that when prosecutors show victims

¹⁴ Dan Jones & Josie Brown, above n 3, 229.

¹⁵ Tom Tyler, above n 5.

¹⁶ Jo-Anne Wemmers, above n 6.

¹⁷ Jo-Anne Wemmers, above n 7.

recognition and respect in their interactions with them, victims are more likely to experience the process as fair, even when a decision has been made that does not accord with their wishes. This does not mean that if prosecutors accord victims procedural justice there is a guarantee that victims will always accept their decisions. However, if prosecutors are able to: take an interest in victims; give victims an opportunity to express their wishes; take victims' wishes into consideration; and accord victims recognition and respect, this approach has the best chance of producing the result that victims exit the prosecution process feeling fairly treated and able to accept the outcome, even if it was not what they ideally wanted.

The fact that the OPP has a policy of consulting victims about resolution decisions is in itself consistent with the ideals of procedural justice. This policy expressly provides a way for victims to express their wishes and for those wishes to be taken into consideration by the prosecutors, two key aspects of procedural justice. There may be other opportunities for the OPP to enhance victims' sense of procedural justice, such as by conducting the consultation process in ways that show victims recognition and respect, and allow them to feel that the prosecutor is taking an interest in them.

The victims we interviewed made observations that are consistent with the procedural justice literature. They said that they wanted opportunities to express their views, and wanted these views to be genuinely taken into account by the OPP. Further, their experience of how the OPP lawyers treated them featured prominently in their interviews. The victims also clearly expressed a desire for the lawyers to take the time to understand them as people and their individual priorities. They wanted to feel that they 'mattered' to the prosecution lawyers. Our findings support the theory of procedural justice because they indicate that the *process* of being consulted is very important to victims. Victims did not simply focus on the particular prosecution decision in their case, although this remained significant for some. Rather, they expressed strong views about *how* the consultation process was carried out. Read together, their comments shed light on the particular aspects of the consultation process that work well or not so well, from the victims' perspective. This information allows us to construct a picture of what best-practice consultation with victims might look like. The following section seeks to document the elements of a best-practice approach to consulting with victims. It outlines the themes that emerged from participant interviews about what is important to victims when they are consulted about resolution decisions.

Victims want a genuine opportunity to contribute their views

The victims we spoke with drew a clear distinction between being genuinely consulted about a resolution decision and being 'told' about a resolution decision. According to victims, being genuinely consulted involved:

- being given the opportunity to express their views
- OPP lawyers genuinely listening to their views
- feeling heard and understood by the OPP lawyers
- feeling that their views mattered to the OPP lawyers, and
- feeling that their views would play a role in the decision that the OPP would ultimately make.

According to the victims, being merely 'told' about a resolution decision involved:

- being informed about a resolution decision *after* it had already been made, or
- being informed that a particular resolution decision was going to be made and then:
 - o OPP lawyers refusing to engage in a discussion about the decision, or
 - o OPP lawyers asking the victims how they felt about the decision but at the same time making it clear that their views would not alter the course of action that the OPP had already committed to.

In these scenarios victims reported feeling that they had not been heard by the OPP lawyers, and felt that they had been denied the opportunity to ‘have a say’ in the resolution decision.

It is important to note that the majority of the victims who participated in our research indicated that they did not want the power to make resolution decisions themselves. They accepted that these decisions were the OPP’s to make. However, it was very important to them that their views on the matter were taken into account by the OPP when it made its decision. In this respect our findings are consistent with those of the Victorian Law Reform Commission, which in its recent report on victims’ role in the criminal trial process noted that, for the most part, victims did not want their wishes to determine prosecution decisions and did not seek ultimate decision-making responsibility. Rather, what most victims wanted were:

...opportunities to meaningfully communicate and contribute to decision-making processes, without carrying the burden of responsibility that comes with prosecutorial decision making.¹⁸

For victims, genuine consultation means that their views play a role—not necessarily a determinative role—in the OPP’s decision-making process. As such, what most victims want is consistent with the existing Director’s Policy which provides that OPP lawyers are to seek victims’ views *prior* to a resolution decision being made. The Director’s Policy also provides that the OPP must have regard to the victim’s views, in addition to other factors, when making resolution decisions.

Comments made by WAS team members and lawyers offered insights into how to consult victims in ways that are likely to result in them feeling heard. WAS participants emphasised that an essential part of effective consultation is listening to the victim and giving them enough time to fully express their views. They said that victims need to feel that their views are important to the OPP and they need confirmation that the decision-maker will take them into account. WAS participants said that the least effective consultations that they had observed involved lawyers talking ‘at’ victims, not listening to them, not asking them any questions and not providing them with the opportunity to express their views.

Likewise, the OPP lawyers said that victims must be given an opportunity to speak, and that lawyers need to listen to them properly. They also noted that including a WAS social worker in the consultation process is extremely helpful in this regard; they saw the WAS as assisting victims to express themselves, and assisting the lawyer to understand victims’ perspectives. The OPP lawyers we interviewed described various strategies they used in their own practice to ensure that victims feel heard. For example, one lawyer said that during conferences he has a practice of writing down a brief summary of what the victim has expressed to him, and then reading it back to them and asking whether it accurately reflects their views, and whether he has understood them. Once the victim is happy with the summary, he lets them know that he will be passing it on to the Crown Prosecutor or the Director of Public Prosecutions, as the case may be, who will make the decision. In doing so, he said he hopes to ensure that the victim knows that he has understood them, and knows their views will be taken into account.

¹⁸ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Final report* (Victorian Law Reform Commission, report 34, 2016), 133.

Victims want OPP lawyers to understand and address their individual priorities

Victims of crime are not a homogenous group and their distinct characteristics and experiences shape how the crime affects them and their interests and needs following the crime. At the same time, the literature on victims' experiences usefully identifies common themes that help us understand what victims seek when they look for a justice response to a crime. These themes have been conceptualised as encompassing the following elements: participation; voice; validation; vindication; offender accountability and prevention. These themes are referred to in the literature as 'victims' justice needs.'

Our interviews with victims revealed that they were looking for particular outcomes and experiences from the prosecution process. The priorities of the victims we spoke to differed, but common themes emerged. These themes were consistent with the different categories of victims' justice needs identified in the literature. The victims who participated in our study variously said that they wanted: to receive answers (participation); to tell their story before a judge and jury (voice); for the full extent of the offending to be recognised (validation); for the offender to admit to the offending (offender accountability); and to speak out in order to make things better for other victims who might come forward in the future (prevention). Some victims also said that the criminal proceedings had the potential to materially affect their safety or the safety of their children, due to factors such as the impact of the outcome on family court proceedings.

Victims said that it was very important to them for the OPP lawyers to truly understand what aspect or aspects of the prosecution are most significant to them as individuals, and that for the lawyers to acknowledge this during the consultation process. Our interviews with victims revealed that when lawyers are able to identify victims' personal justice needs and tailor their interactions with victims in ways that demonstrate this understanding, victims are likely to feel heard.

Victims were critical of consultation processes in which they felt that lawyers had made assumptions about what was important to them, for example that achieving a lengthy sentence for the accused was their primary or sole aim. They also reported being dissatisfied when lawyers tried to 'sell' the resolution decision to them by emphasising benefits that were not actually important to them. Some victims said that they did not appreciate being told by a lawyer that the fact that the matter would not proceed to trial was positive because they would be spared the trauma of having to give evidence and be cross-examined. A number of victims explained that they had held a strong desire to give evidence at a trial, and did not appreciate being told that being denied the opportunity they wanted more than anything was a positive outcome. Some victims also said that consultation processes were unsatisfying if lawyers conducted them in ways that they experienced as perfunctory. Victims did not want to feel that they were being consulted in a 'tokenistic' way, or as though it was a 'tick a box' exercise for the lawyers. They did not want to feel like 'just another number.' Victims who felt that they had been consulted in a tokenistic way felt that their views did not 'matter' to the lawyers, and that that their opinions would not play a meaningful role in the OPP's decision making.

The WAS participants expressed similar views. They said that consultations are effective when the lawyer is able to tailor the process around what the victim wants from the justice system, and therefore is able to explain the benefits and shortcomings of the proposed resolution as they relate to that particular victim's interests. They said that examples of poor consultation practice by lawyers included instances when a lawyer delivered a routine speech or 'spiel' to the victim about the merits of the proposed resolution. Several also commented that some lawyers emphasised points that they assumed were important to the victim that did not actually match the victim's priorities. WAS participants commented that this type of delivery did not have the desired effect; it 'fell flat' or did not 'sit well' with victims. Some WAS participants also said that explanations of resolution decisions that emphasised the costs that would be saved by the legal system and the community were generally not well received by victims. WAS participants also explained that their involvement in the consultation process can assist lawyers to understand the individual victim's needs and concerns.

The OPP lawyer participants agreed that a best-practice approach to consultation is demonstrated when lawyers tailor the process to the victim's specific aims, and acknowledged that victims have differing needs. The lawyers also recognised that ascertaining the needs of the individual victim is a crucial component of the consultation process. Some said that knowing what was important to the particular victim guided their entire approach to the consultation process.

Victims appreciate it when OPP lawyers adopt a personable demeanour

Victims' comments indicated that the interpersonal style of the lawyers who had handled the case was significant to them. Victims spoke highly of lawyers who they had experienced as 'warm', 'considerate', 'sympathetic,' and 'caring.' Conversely, they were disappointed when lawyers treated them in ways that they experienced as 'cold', 'clinical', 'unapproachable', or 'rude.' Some victims said that they appreciated it when lawyers treated them as equals, which, they explained, meant that they had not talked down to them or been patronising. Victims' comments illustrated that they read the way that lawyers interacted with them as indicative of whether the lawyers cared about them and their experience.

WAS participants expressed the view that it was very important for lawyers to address victims on a human or personal level, in addition to covering the legal issues. They offered practical suggestions for achieving this. One WAS participant said that when the victims are bereaved family members, acknowledging the family's loss should ideally be the first thing the lawyer does in the consultation process. A number of WAS participants said that in sexual offence cases it is helpful for the lawyer to let the victim know that they believe them. They explained that these victims' biggest fear is that they will not be believed. WAS participants said that the most striking examples of poor communication by lawyers towards victims occurred when the lawyers failed to demonstrate empathy. One WAS participant described a particularly stark example of this in which a lawyer failed to make eye contact with a bereaved mother throughout the consultation. The victim was extremely upset by this, and later complained to the WAS social worker.

Lawyers' comments indicated that they viewed the manner in which they engaged with victims as an important aspect of their role. A number of these participants said that they consciously tried to avoid being 'impersonal' or 'overly formal and detached' when they interacted with victims. Consistent with the observations of the WAS participants, some lawyers said that it was particularly important to give victims of sexual offences a sense of validation. For one lawyer, this meant telling the victim that they were believed. Another said that he tried to impart validation by making it clear to the victim that whether or not the case succeeded was a matter of what could be proven, rather than being determined by whether they were believed. A strong theme that emerged from the lawyers' interviews was that they highly valued the WAS social workers, whom they said were invaluable in ensuring victims felt well treated. A number of lawyers said that during consultations they would be heavily guided by the WAS as to how to proceed in a sensitive way. Some also reported having learned helpful practical skills from observing the way that WAS staff interacted with victims.

Victims appreciate it when OPP lawyers build rapport with them

All three categories of participant in our study—victims, WAS social workers and OPP lawyers—talked about the importance of building a trusting relationship between victims and lawyers long before an issue such as a resolution arises. That way, when a consultation in relation to one of these issues is held, there will already be a level of rapport between the victims and lawyers that will ensure that the consultation process is less overwhelming and intimidating for victims. Victims said that when they had not been able to develop a rapport with the lawyers prior to being consulted about a resolution decision it was difficult to feel comfortable enough with them to ask questions, or indeed to trust them. Lawyers and WAS participants said that a number of the factors that are needed for effective consultation, such as lawyers understanding the victim's individual needs, and victims understanding the legal issues in a case, are best built up over time, via multiple conferences. Lawyers also stressed that victim engagement should be proactive. One said that ideally, as soon as an OPP lawyer is allocated a file, a preliminary face-to-face meeting between the lawyer, WAS social worker and victim should be held.

A number of WAS participants also explained that the least effective use of their role is when lawyers do not include them in the prosecution process unless and until a difficult situation arises. Lawyers sometimes only ask the WAS team to attend a meeting with a victim if they predict that a proposed resolution is likely to be disappointing for the victim. WAS participants said that when they are brought into the process at the last minute they are not able to add much of value. WAS participants explained that they are most useful in establishing a relationship with victims, building rapport with them and learning what is important to them. This takes time and cannot be achieved in a single conference when they are meeting victims for the first time.

Victims want to be given enough information about the case to allow them to contribute an informed view

Victims said they appreciated it when lawyers were forthcoming with information. Some victims praised the OPP lawyers for having answered all their questions, and having done so in a way that was not dismissive or that made them feel as though they were being overly demanding for asking. Victims appreciated it when lawyers took time to explain information in a clear, accessible way. They were frustrated when they felt that the OPP lawyers had not clearly explained why they decided to discontinue the matter or accept the plea offer. Indeed, some victims said that they still did not understand why the matter had concluded in the way it had, which was a source of ongoing consternation for them. A number of victims expressed a desire to be provided with very specific information that allowed them to understand the factors that had a bearing on the proposed resolution decision. They expressed a preference to receive tailored information of this nature, as opposed to via more generic forms of information such as that provided by brochures or websites. Victims said that the general information contained in brochures or websites was a useful starting point, but that to understand the issues that arose in their particular case they really needed an in-depth discussion with the lawyer. Victims also valued feeling that the OPP lawyers were upfront and honest with them about the strengths and weaknesses of the case, as opposed to being selective or 'cagey' with the information they were prepared to divulge.

Some victims suggested that lawyers need to be proactive in providing victims with all the necessary information *without* the victim having to ask for it. A number of victims indicated that they felt intimidated during consultation meetings, and said that as a result they struggled to ask questions. One victim said that it is unfair to rely on the victim to prompt the lawyer to provide the relevant information because, as a non-legally trained person, 'you don't know what you don't know.' Victims also said that the OPP needed to make sure they did not assume that communicating with one victim was a sufficient way of acquitting their duties towards all the victims involved in a matter. Some victims also explained that they had ended up, involuntarily, playing a liaison role between the OPP lawyers and the other family members or victims because the lawyers only contacted them, and seemed to expect that they would then disseminate the information amongst the other people involved. These victims resented being placed in this position, and explained that it was very difficult for them to try to explain what the lawyers had told them, especially when they did not necessarily understand it themselves.

The WAS participants also reflected on how OPP lawyers communicate information to victims. In their view, successful consultations require lawyers to provide victims with information that is as comprehensive as possible. They said that in the context of plea resolutions, lawyers need to go into detail regarding the current charges, and explain exactly what would remain and what would be withdrawn under the proposed resolution. Reflecting observations from those victims who appreciated feeling that the lawyers were being honest and frank with them, some WAS participants said that lawyers need to be upfront with victims about any aspects of the plea resolution that victims may be likely to view negatively, particularly the fact that the accused is entitled to receive a sentencing discount on the basis of pleading guilty. One WAS participant said that there is a particular team within the OPP who, in her opinion, observe best-practice standards in informing the victim. She said that lawyers from this team sit down with the victim and take them step-by-step through the entire file, allowing the victim to ask questions throughout. In addition to being thorough, WAS participants said that lawyers who conduct effective consultations deliver

information to victims in ways that allow them to understand it. This involves repeating key messages, taking enough time for the victim to digest what is being said, and allowing the victim to take breaks if necessary. WAS participants also commented that the WAS can play a useful role in assisting victims to understand legal information. WAS participants commonly described themselves as ‘translators’; they said that when lawyers slip into using legal ‘jargon’ during consultations they will intervene and assist the lawyer to explain the concepts in plain language that the victim is more likely to be able to follow.

The lawyers in our study all indicated that they take their duty to facilitate the victim’s understanding of the case very seriously. One lawyer said that for a consultation to be effective, the victim must be given enough information to enable them to provide an informed view of the relevant issues. Several lawyers commented that the main concept that they try to convey to victims is that criminal proceedings are inherently complex and uncertain. They want the victim to understand that proceeding to trial involves risks, and these risks are what the option of a plea resolution must be weighed against. Some lawyers said that when they felt confident that the victim understood these risks, and was able to give a truly informed view, they were usually comfortable in adopting the victim’s position as the basis for their own recommendation to the Crown Prosecutor, or the Director of Public Prosecutions, who would make the ultimate decision.

Lawyers, like the WAS participants, noted that while the content of the information they give to victims is important, the manner in which it is delivered also matters. A number of lawyers said that ideally victims should be given time to consider a plea offer or resolution, rather than being expected to provide their views on the spot. The lawyers also viewed WAS staff members as useful ‘translators’, and they valued the WAS’ ability to intervene in consultations and remind lawyers to use accessible language.

Victims want a strong professional relationship with the OPP lawyer, whether or not a WAS team member is also involved

Victims expressed high praise for the WAS. However they drew a distinction between the WAS’ role—providing emotional support—and the lawyers’ role—running the case. As the person responsible for the conduct of the prosecution, the OPP lawyer is a very important figure to the victim. There are certain functions that only the lawyer can deliver to victims. No matter how supportively a WAS team member might listen to a victim, victims want to make sure that the lawyer, as the person responsible for making decisions, or at least for making a recommendation to the primary decision-maker, has heard and understood their views. Victims also recognise lawyers’ legal expertise and therefore seek information about the case directly from the lawyer. They place great significance on the views lawyers express about the case. Therefore, while the WAS can and do assist in the consultation process, contact with a WAS team member cannot be a substitute for direct interaction between the OPP lawyer and the victim.

Indeed, both WAS and lawyer interviewees expressed the view that lawyers and WAS staff perform complementary roles. They said that consultation with victims worked well when the respective skillsets of each profession could be drawn upon and combined. This approach might be conceptualised as the WAS team members supporting the lawyers to communicate effectively with victims. The interaction at the heart of this process is that between the lawyer and the victim.

Challenges involved in conducting consultations

The preceding section summarises participants’ views on what is important to victims of crime when they are consulted about resolution decisions. The following section discusses themes that emerged from the research interviews that highlight challenges that confront lawyers when they seek to engage with victims about resolution decisions.

Victims' expectations can be a barrier to their understanding of the case and can complicate the victim/prosecutor relationship

All three categories of participant in our study – victims, WAS social workers and OPP lawyers – shared the view that victims should be given as much information about the case as possible. Further, a number of lawyer participants said that it was their practice to try to put the victim in the position of being able to provide an informed view about the proposed resolution. However, the findings from our study suggest that the ideas and expectations victims hold about criminal proceedings can stand in the way of their being able to develop a realistic understanding of the case. Many victim participants indicated that they had formed clear ideas about the strengths and weaknesses of the case, and its likely outcome, before they had any contact with the OPP. Many of these victims had formed the belief that the case was very strong, making comments such as ‘we had an open and shut case’, ‘the facts are all overwhelming,’ and ‘it was black and white.’ In many cases it was apparent such beliefs were based on what police had told them, as the following comments by victims illustrate:

 Well, the message I got from the cops was this is a really strong case.¹⁹

...we were told [by the police] in the very early days that the police had a very strong case.²⁰

...she [the informant] said that ‘You’ve got so much evidence here, it’s bulletproof...’²¹

...[the informant] said after the incident that [the accused]’s been charged with murder and that’s what it [the charge] would stay as.²²

This last comment is significant. Here, the victim says that the police assured them that the highest charge brought – murder - would be the charge that ultimately proceeded. This victim’s account, as was the case with many of the victims we spoke with, indicated that not only did they believe—based on what police told them—that the highest charge would continue throughout the prosecution, they also believed that a conviction on the highest charge was a certainty. In this instance, this meant that the victim believed that because the accused had been charged with murder, a murder conviction would inevitably be achieved.

These expectations do not accord with the reality of criminal prosecutions. The vast majority of criminal proceedings resolve via a plea of guilty. In many cases the plea will be to a lesser charge. There are various reasons for this—these are discussed further in part 3. One reason is the police practice of ‘overcharging’ whereby all possible charges that could apply to the facts are laid even though the evidence does not necessarily support all of them. Once the matter reaches the OPP, the OPP negotiates with the defence to attempt to resolve the matter to a charge or charges that both sides consider to be an appropriate reflection of the evidence. The OPP may or may not consider the highest charge brought to be the most appropriate—this will depend on the available evidence and other relevant considerations.

Despite overcharging being common, and plea negotiations being an equally common response to the practice, these practices do not seem to be well understood by victims: ‘Overcharging...can create false hope for victims who may struggle to understand how and why the charges are altered.’²³ If, as our study suggests, victims believe that the case is unassailably strong, the news that the OPP is considering a resolution based on lesser charges must come as a shock. If the OPP lawyers tell them there are

¹⁹ V8

²⁰ V12

²¹ V9

²² V13

²³ Asher Flynn & Arie Freiberg, ‘Plea negotiations’ (Report to the Criminology Advisory Council, 2018) 85.

problems with the evidence, this may contradict opinions that police might have already conveyed to the victim. In such circumstances, the consultation process requires victims to reconcile opposing assessments of the case, an exercise made challenging by the fact that it can be very difficult for people without any legal training or experience to make sense of legal concepts and processes.

These factors create a complex situation for OPP lawyers when they consult with victims about discontinuance decisions. The OPP lawyers told us that the main concept they try to impart to victims is that the criminal justice system is inherently complex and uncertain. Several lawyers said that in order for them to be satisfied that the victim has developed an 'informed' view of the proposed resolution they need to know that the victim understands the risks involved in proceeding to trial. However, viewing the case as uncertain and appreciating the risks it entails means understanding it in a way that contrasts with the belief that the case is clear-cut and that a conviction on the highest charge is inevitable, which, as we have seen, is the view that victims may bring into the process.

Unrealistic expectations make it harder for victims to understand the case, and set the conditions for a problematic dynamic between the victim and the OPP from the outset. When victims have unrealistic expectations, the OPP lawyers are tasked with correcting them. Essentially, OPP lawyers must deliver what is experienced by victims as bad, perhaps devastating, news. Our study suggests that victims sometimes become closely aligned with police, who may assure them that the case is very strong. When the OPP lawyers contradict the police view and try to provide a more realistic assessment of the prospects of a conviction, this can cause victims to feel that, unlike police, the OPP lawyers are 'not on their side' or are 'against them.' One victim commented that after each meeting with the OPP lawyers they felt as if 'something was being taken away' from them.

These circumstances put OPP lawyers in a difficult position. Individual lawyers cannot control the expectations that victims develop before the OPP becomes involved in a case. However, it is important for OPP lawyers to be aware that victims may carry unrealistic expectations with them into the criminal prosecution process, and to take steps to address them. This knowledge may also assist OPP lawyers to understand why some victims can find it difficult to understand and/or accept resolution decisions.

There is a tension between lawyers' duty to avoid coaching witnesses and their responsibility to provide information to victims

OPP lawyers are responsible for facilitating victims' understanding of the prosecution case. However, our study suggests that this duty can sit in tension with prosecutors' overarching duty to act in the interests of justice. An important tenet of this duty is that OPP lawyers must refrain from coaching witnesses. The Director's Policy provides that OPP lawyers must not: 'advise or suggest to a witness that false or misleading evidence should be given; or coach a witness by advising what answers the witness should give to questions that might be asked.' Both lawyers and WAS participants said that when the victim is also a witness, it is very challenging for the lawyer to give the victim the information they need in order to understand what is happening, and at the same time uphold their strict duty to refrain from coaching the witness. Lawyers reported that they often have to withhold information from victims. They acknowledged that this can be very difficult for victims, who can feel that the lawyer is being 'cagey' or dishonest with them. Interviews with victims revealed many of them still did not understand OPP lawyers' strict duty to refrain from doing anything that would result in a witness improving their evidence. Indeed, some of them were angry with the OPP lawyers for failing to help them to do so. It was clear that this misunderstanding had played a part in some victims having formed a negative view of the OPP.

This issue illustrates a clear tension between OPP lawyers' responsibility to provide victims with information about a case, and with their duty to avoid coaching witnesses. In this instance, OPP lawyers' duty to avoid coaching witnesses must prevail—the fairness of our justice system requires this. However,

while OPP lawyers must limit the information they provide to victims who are also witnesses, they can nonetheless be upfront with victims that they are required to do this, and clearly explain that they will not be able to provide all the information victims may seek. Victims may still feel frustrated, but it is preferable that they understand that an OPP lawyer is withholding information for valid reasons, rather than being dishonest with them or trying to ‘dupe’ them.

Some victims want the OPP to ‘fight’ for them and their personal interests

Consistent with findings from existing research, most victims who participated in our study (although not all) were aware that the OPP lawyer was not their personal lawyer, and demonstrated an understanding of why it was important that the prosecution act in the broader public interest. However, despite this, many of their comments conveyed a desire for the OPP to act in ways that would in effect constitute the OPP lawyers being the victim’s legal representative and advancing the victim’s personal position rather than upholding the prosecutor’s duty to act in the interests of justice and in furtherance of the public interest. For example, several victims said that they were disappointed that the OPP lawyers had not ‘fought’ for them. A number compared the prosecution lawyers unfavourably with the defence lawyers they had observed; they saw the latter as passionate advocates for the accused, and wanted the OPP lawyers to be passionate advocates for *them*.

These expectations are inconsistent with the role of a public prosecutor, who must act impartially and fairly. It is expressly *not* the public prosecutor’s role to seek a conviction of the accused at all cost or by any means necessary.²⁴ Rather, the public prosecutor’s role is to present cases fairly and in an even-handed manner,²⁵ in order to assist the court to arrive at the truth.²⁶ Under our adversarial system the prosecution is the accused person’s adversary. However the public prosecutor is not entitled to behave as a private litigant; they have a special role as a ‘minister of justice’ which means that although the public prosecutor is entitled to present the case firmly and vigorously and to test or attack the case for the accused, their overarching duty is to act fairly.²⁷ As the High Court put it in *Whitehorn v The Queen*, the public prosecutor must ‘...act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one.’²⁸

The findings of our study indicate that many victims do not understand the distinct role of the public prosecutor. This knowledge is fundamental to understanding the basic structure of our justice system. It is regrettable that this does not appear to be common knowledge within the Victorian community. Nevertheless, whether or not the general population has a foundational knowledge of the legal system is something that is well beyond the control of individual OPP lawyers. However, being aware that victims are unlikely to understand the role of the public prosecutor may assist OPP lawyers to recognise when victims are making incorrect assumptions and to take steps to correct them.

Consulting with distressed victims is an inherently challenging task

Research participants from each category – victims, WAS social workers and lawyers – including some victims who had expressed dissatisfaction with their interactions with the lawyers, all recognised that communicating with victims, who are already likely to be distressed or traumatised, about complex legal issues in circumstances where the victim is likely to feel disappointed, is challenging work. Many WAS

²⁴ *R v Puddick* (1865) 176 ER 662; *McCullough v R* [1982] Tas R 43; *R v Beydag*, Unreported, Vic CA, 25 November 1996; *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38; *R v Livermore* (2006) 67 NSWLR 659; [2006] NSWCCA 334; *Bugeja & Johnson v R* (2010) 30 VR 493; [2010] VSCA 321.

²⁵ *R v Tait and Bartley* (1979) 46 ALR 473, 477.

²⁶ *Livermore v R* [2006] NSWCCA 334.

²⁷ *R v McCullough* [1982] Tas R 43; *R v Lyons* (1992) 64 A Crim R 101; *R v Livermore* (2006) 67 NSWLR 659; [2006] NSWCCA 334; *R v DDR* [1998] 3 VR 580; *R v Beydag*, Unreported, Vic CA, 25 November 1996).

²⁸ *Whitehorn v The Queen* (1983) 152 CLR 657, 663.

participants observed that consulting with victims can be daunting for lawyers, particularly new lawyers. In fact, one WAS participant commented that some lawyers are 'terrified' of speaking to victims. WAS participants said that some lawyers are acutely conscious of the trauma that victims have experienced, and some lawyers worry that they will say the wrong thing and cause further distress. WAS participants said that unfortunately some lawyers become so anxious about speaking with victims that they behave strangely during meetings, which in turn can contribute to poor experiences for victims. These themes also emerged from our interviews with OPP lawyers. The lawyers admitted that they found managing the emotional dimension of victim consultations challenging, and that they worried about saying the wrong thing to victims. Both the lawyers and the WAS participants noted that law schools do not offer training on how to communicate with people who are grieving or traumatised, and therefore these capabilities are not part of lawyers' core skillset. It should also be noted that interacting with victims was not traditionally part of the prosecutor's role. Doing so is a relatively new task that is now being asked of them.

Collaboration between the WAS and lawyers does not occur consistently across the OPP

Both WAS and lawyer participants expressed the view that when a WAS staff member and a lawyer worked collaboratively to engage a victim, this was likely to lead to an effective consultation process. However, a number of WAS participants noted that while they enjoy positive working relationships with most OPP lawyers, there are still pockets of lawyers within the organisation (some WAS participants suggested that there were particular teams) who do not appreciate the WAS' role or value their skillset. They said that these lawyers tended to have minimal contact with the WAS, and were unlikely to draw on the WAS to help build rapport with victims in a proactive way. Rather, it was the participants view that these lawyers tended only to involve the WAS at the last minute, when a difficulty arises, if at all. WAS participants commented that it could be difficult to provide feedback to these lawyers about how their communication with victims could improve. They suggested that in some cases this difficulty might be the result of lawyers having a low regard for the WAS' role and skillset, and therefore not valuing their input.

These findings are consistent with the research on multidisciplinary practices, or legal practices that employ both lawyers and social workers. This scholarship, discussed in more depth in the literature review included in this report, indicates that less effective multidisciplinary practice occurs when social workers feel that they are not respected or valued by lawyers; and when there is a limited degree of genuine collaboration between lawyers and social workers.

The courts can put the OPP under pressure to make decisions quickly

While the lawyers agreed that ideally victims should be given as much time as they need to consider a plea offer and develop their own view of it, they also said that sometimes the reality of the court process meant that this was not possible. They explained that it was not uncommon for the defence to make a plea offer at court, at the start of a trial. When this occurs, the court is likely to require the parties to make a quick decision, in order to avoid wasting court time. However, some lawyers also acknowledged that even when a last-minute offer is received and there is pressure to make a decision quickly, on the 'steps of the court', the consultation process can still be well-managed if the lawyer has done the groundwork in building a relationship with a victim and facilitating the victim's understanding of the case.

3 Victims' involvement in resolution decisions: Legal and policy framework

Introduction

In the Victorian criminal justice system, as is the case in all common law jurisdictions, there are two parties to criminal proceedings: the accused and the prosecution. The OPP prosecutes on behalf of the public. They do not represent the victim. The victim is not formally a party to the proceedings. Accordingly, decisions relating to the direction of the prosecution are made by the OPP, not the victim. However, there is a growing expectation in the community, which is reflected in legislation and OPP policy, that victims of crime be enabled to participate in criminal proceedings. In the context of prosecution decisions regarding resolutions, while victims' views do not determine the outcome, victims are consulted and their views are taken into account.

This section of the report provides a brief explanation of how two forms of resolution - plea resolutions and discontinuances - operate in the Victorian context. It then outlines the legal and policy framework that governs victims' participation in these processes. Finally, it gives a summary of the findings of the Victorian Law Reform Commission's recent inquiry into victims' role in the criminal trial that relate to how these processes are working in practice from victims' perspectives.

Plea resolutions

Plea resolutions occur when, instead of pleading 'not guilty' and proceeding with a trial, the accused person agrees to plead guilty. This generally involves a negotiation process between the defence and prosecution lawyers. Sometimes the prosecution will agree to substitute the initial charge with a less serious one. When there are multiple charges, the prosecution may agree to withdraw some. As part of this process, the defence and prosecution lawyers will also seek to negotiate an agreed version of the facts, which is presented to the court for the purpose of sentencing.

In Victoria, the vast majority of criminal cases resolve via a guilty plea. In the higher courts, where most of the matters prosecuted by the OPP are heard, the most recent figures show that in the Supreme Court, 72.4 per cent of proven charges resolved through a plea of guilty, and in the County Court, 84.6 per cent of proven charges resolved through a plea of guilty.²⁹ However, sexual offence matters heard in the County Court had a markedly different rate of resolution via plea compared to the general figure: only 45 per cent of these matters resolved through a plea of guilty.³⁰ This disparity is understood as relating to the high acquittal rate for sexual offences, which is seen as creating an incentive for the accused person to take the risk of proceeding to a trial.³¹ Proven matters in the County Court usually resolve to a plea at an early stage of the proceedings. 57.1 per cent of proven cases in that jurisdiction resolve prior to the matter being committed for trial.³²

²⁹ Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (2015) 11.

³⁰ Asher Flynn and Arie Freiberg, 'Plea negotiations: An empirical analysis' (Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, 2018) 6.

³¹ *Ibid.*

³² Sentencing Advisory Council, above n 29, 19.

The commonly understood benefits of plea resolutions include:

- witnesses/victims are spared the trauma of having to give evidence and be cross-examined at a trial
- the community is saved the expense of a trial
- court backlogs and delays are alleviated, and
- the certainty of a conviction is secured (there is a risk that the accused may be acquitted of all charges if the matter proceeds to a trial, however if a plea resolution is reached this ensures a guilty finding on at least some of the charges).³³

The Director's Policy explains the importance of plea resolutions in this way:

Resolution is necessary for the effective and efficient conduct of prosecutions. It relieves victims and witnesses of the burden of having to give evidence and may help victims put their experience behind them. It provides certainty of outcome and saves the community the cost of trials.³⁴

The Sentencing Advisory Council has described plea negotiations as being a 'vital element' of criminal proceedings in Victoria.³⁵ Even critics of negotiated pleas recognise that this method of resolution is necessary—that without this process 'our justice systems would grind to a halt.'³⁶

As the Sentencing Advisory Council has recognised, plea negotiations address the fact that sometimes the highest charge brought in a matter is not the most appropriate:

Even when a person intends to plead guilty from the outset, there are many reasons why the person may not be in a position to indicate or enter a plea at the earliest stage in proceedings. For example, there may be genuine issues to resolve in relation to the charge that is most appropriate to the offence and in relation to the summary of the offence by the prosecution.³⁷

It is recognised that a regular practice of Victoria Police is to 'charge every possible offence that fits the offending conduct.'³⁸ Thus, multiple alternative charges are often brought. This is sometimes referred to as 'overcharging.' The evidence will not necessarily support the highest charge that has been filed. Therefore, the prosecution and defence will engage in negotiations to attempt to resolve the matter to a charge or charges that both sides consider to be an appropriate reflection of the evidence:

³³ Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 52.

³⁴ Director of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria*, Office of Public Prosecutions Victoria, <http://www.opp.vic.gov.au/getattachment/b5cd48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>, 20.

³⁵ Sentencing Advisory Council (Vic), *Sentence Indication and Specified Sentence Discounts: Final Report (2007)* 69.

³⁶ Asher Flynn, 'Plea bargains and the efficiencies of justice' *The Conversation* 26 July 2012.

³⁷ Sentencing Advisory Council, above n 29, 24.

³⁸ Asher Flynn & Arie Freiberg, above n 23, 81-82.

The process [of plea negotiation] is designed to establish the appropriate charge, that is to say, the charge which the prosecutor believes can be proved beyond reasonable doubt, which adequately reflects the criminality, which those facts reveal and which provides for the sentencer an adequate range of penalty.³⁹

Despite overcharging being common, and plea negotiations being an equally common response to the practice, these processes do not seem to be well understood by victims: 'Overcharging...can create false hope for victims who may struggle to understand how and why the charges are altered.'⁴⁰

As articulated by John Champion, former Director of Public Prosecutions, the key factor for the OPP when considering a plea resolution is the strength of the evidence; prosecutors assess the likelihood that the major charge can be proven beyond reasonable doubt based on the available evidence. Champion also points out that the nature of the evidence in any given case is something that is beyond the prosecution's control: 'a prosecution is generally only as good as the evidence presented to us by the investigating agency.'⁴¹ A recent study by Flynn and Freiberg supports Champion's assertion that the strength of the evidence is the primary factor that influences plea negotiations.⁴² The complete range of factors that Victorian prosecutors are required to consider when contemplating a plea resolution is as follows:

- (a)** whether there is a reasonable prospect of a conviction on each charge. If there is no reasonable prospect of a conviction on a charge, then that charge must not proceed. It is improper for such a charge to proceed to committal with a view to the prospects of conviction being reassessed after the committal
- (b)** the strength of the evidence on each charge
- (c)** any defences
- (d)** the likelihood of an acquittal on any of the charges
- (e)** whether the charge or charges to which the accused will plead guilty:
 - i. adequately reflect the accused's criminality
 - ii. allow for the imposition of an appropriate sentence
 - iii. allow for the making of all appropriate ancillary orders.
- (f)** the views of the victims and the informant
- (g)** the need to minimise inconvenience and stress to witnesses, particularly those who may find it onerous to give evidence
- (h)** the likely length of a trial.⁴³

³⁹ Gordon Samuels, *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (May 2002) p.9.

⁴⁰ Asher Flynn & Arie Freiberg, above n 23, 85.

⁴¹ John Champion, 'The importance of plea agreements: Our approach and accountability', paper presented at the 14th International Criminal Law Congress, Melbourne, 12 October 2014, 2.

⁴² *Ibid*, 31.

⁴³ Director of Public Prosecutions Victoria, above n 2, 21.

It is important to note that OPP lawyers are required to try to reach resolution of matters through discussion with the accused's lawyers at all stages of proceedings.⁴⁴ This duty is an express component of the OPP lawyer's role, and applies in every case handled by the OPP, which is a fact that does not seem to be well understood by victims.

Discontinuances

Prosecutors have a duty to ensure that prosecutions that have no reasonable chance of success do not proceed. This duty plays an important role in safeguarding the fairness of the justice system. If there were no prohibitions on conducting prosecutions when the Crown case is so weak that no reasonable decision-maker could convict the accused person on the available evidence, spurious or malicious cases could be run. This would result in unfairness to those charged, who could be subjected to the stress, expense and damage to reputation that criminal proceedings involve, in circumstances where the evidence against them was never strong enough to produce a reliable conviction. Further, it would harm the integrity of the justice system, as the system would be susceptible to being used for improper purposes.

The OPP's duty to ensure that a prosecution only proceeds when there is a reasonable prospect of a conviction is reflected in the Director's Policy. The Director's Policy requires that the following be considered when assessing a matter's prospects of resulting in a conviction:

- all the admissible evidence
- the possibility of evidence being excluded
- any possible defence
- whether the prosecution witnesses are available, competent and compellable
- the credibility and reliability of the prosecution witnesses
- any substantive conflict between eye-witnesses
- whether there is any reason to suspect that evidence may have been concocted
- how the witnesses are likely to stand up to giving evidence in court
- any possible contamination of evidence
- the reliability of any admissions
- the reliability of any forensic or medical evidence
- the reliability of any identification evidence
- in the case of a child witness, whether the child will give sworn evidence, and if not, whether there is any evidence that corroborates the child's evidence (a child who is not competent to give sworn evidence can give unsworn evidence and so this should also be taken into account (see *Evidence Act 2008* s 13(5)), and
- any other matter relevant to whether a jury or magistrate would find the person guilty.⁴⁵

The Director's Policy states that this list is not exhaustive and that the applicability of each factor, and weight to be given to it, will depend on the circumstances of each case.

When the OPP has considered these factors and if it has concluded that there is no reasonable prospect of a conviction, it cannot proceed with a prosecution. Doing so would never be in the public interest. However, when the OPP has formed the view that there is a reasonable chance of conviction, it is also required to consider whether prosecuting the case is in the public interest. A detailed list of factors that the OPP must consider when assessing whether the case is in the public interest can be found in the Director's Policy.⁴⁶ Former DPP John Champion explained these provisions as follows:

⁴⁴ Director of Public Prosecutions Victoria, above n 2, 21

⁴⁵ Ibid, 1-2.

⁴⁶ Ibid, 2-4.

...not all offences brought to the attention of the authorities, that may be found to possess a reasonable prospect of conviction, must then be prosecuted. The factors that can be properly taken into account in deciding whether the public interest requires a prosecution vary from case to case. On the one hand, many public interest factors operate in favour of proceeding with a prosecution, for example, the seriousness of offending, and the need for general deterrence. The more serious the offence, the more likely it will be that the public interest will be served by the continuation of the proposed prosecution...the Director's Policy lists those matters which may arise for consideration, either alone or in combination, in determining whether the public interest requires a prosecution to continue. Frequently, these factors involve considerations of the seriousness or possible triviality of the alleged offending, whether it may be of a technical nature, whether there are any significant mitigating or aggravating circumstances, any issues as to the youth, old-age, intelligence, physical health, mental health or other particular infirmity of the alleged offender, victim or witness.⁴⁷

The Director's Policy makes it clear that most of the time if there is a reasonable prospect of conviction it will be in the public interest to proceed with a prosecution:

Most prosecutions will proceed if there is a reasonable prospect of a conviction. While there may be public interest factors tending against a prosecution, in most cases the appropriate course will be to proceed with the prosecution and for those factors to be put to the court in mitigation of sentence. Nevertheless, a prosecution may only proceed if it is in the public interest, and particular consideration must be given to this where the offence is not so serious as to plainly require a prosecution.⁴⁸

Discontinuances are relatively infrequent outcomes: during the 2016/2017 period discontinuances were entered in 142 cases.⁴⁹ By comparison, in the same period there were 349 trials completed and 2,529 matters resolved via pleas of guilty.⁵⁰

Victims' Charter Act 2006 (Vic)

The *Victims' Charter Act 2006 (Vic)* ('Victims' Charter') sets out the obligations that legal system and victim support agencies hold towards victims of crime, and enshrines the principles that apply to interactions between these agencies and victims. The Victims Charter is based on the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.⁵¹ Its stated objects include recognising the harm caused to victims by crime; recognising that victims are entitled to be treated with respect by legal system actors and to be provided with information and support; and reducing secondary victimisation by the legal system.⁵²

⁴⁷ John Champion, 'Plea offers and discontinuances', paper presented at the Law Institute of Victoria Annual Criminal Law Conference, Melbourne, 2012, 3.

⁴⁸ Director of Public Prosecutions Victoria, above n 2, 4.

⁴⁹ Director of Public Prosecutions & Office of Public Prosecutions *Annual Report 2016/2017* (2017) 77.

⁵⁰ *Ibid*, 81.

⁵¹ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34, 96th plen mtg, UN Doc A/RES/40/34 (29 November 1985); *Victims' Charter Act 2006 (Vic)* s 4 (2).

⁵² *Victims' Charter Act 2006 (Vic)* s 4.

The Victims Charter includes provisions that apply to prosecution decisions to accept plea resolutions and to discontinue proceedings. Section 9 requires prosecuting agencies to inform victims 'as soon as reasonably practical' if they make the following decisions:

- to substantially modify the charges that have been laid
- not to proceed with some or all of those charges, or
- to accept a plea of guilty to a lesser charge.⁵³

Policy of the Director of Public Prosecutions for Victoria

The Director's Policy goes further than the Victims' Charter in that it requires prosecutors to seek the victim's views prior to a decision to discontinue or to accept a plea resolution being made. The victim's views then function as one factor that the OPP takes into account when determining whether the resolution is in the public interest. The Director's Policy also clearly explains that decision making in these matters is solely the responsibility of the prosecution. The victim may have input if he or she wishes, but does not have decision-making power.

Victims and Plea resolutions

The Director's Policy states that the OPP lawyer with carriage of the file must seek the victim's views prior to a plea resolution decision, unless the victim does not want to be involved, or is not able to be contacted. It confirms that plea resolution decisions remain the responsibility of the OPP. Reference is made to the broader principle that governs plea resolution decisions: plea resolutions may only be made if this is in the public interest. The victim's views are one factor among others that the OPP is to take into account in determining whether a prosecution is in the public interest. When a plea resolution has been agreed to, the OPP lawyer is required to tell the victim before this is announced in court.⁵⁴

Victims and Discontinuances

As is the case for plea resolutions, the OPP lawyer must seek the victim's views prior to a discontinuance decision, unless the victim does not want to be involved, or is not able to be contacted. In the case of discontinuances, there is a further exception: when 'the circumstances do not allow sufficient time for the victim to be contacted'.⁵⁵ The Director's Policy confirms that discontinuance decisions are the responsibility of the OPP. It explains the OPP's obligation in this regard, namely to ensure that a prosecution only proceeds when there is both a reasonable prospect of a conviction and the prosecution is in the public interest. It notes that when the OPP has formed the view that there is insufficient evidence on which to proceed, the victim's view will not carry any weight. In these circumstances, the OPP lawyer is to give an explanation to the victim about why the case is not proceeding. If there is a reasonable prospect of a conviction, the victim's views are one factor that the OPP considers in assessing whether the prosecution is in the public interest. The OPP lawyer must inform the victim of a discontinuance decision before this is announced in court.

⁵³ *Victims' Charter Act 2006* (Vic) s 9(c).

⁵⁴ Director of Public Prosecutions Victoria, above n 2, 17.

⁵⁵ *Ibid.*

Interactions with victims – general

In addition to the provisions that specifically governs victims' involvement in resolutions, the Director's Policy sets out general principles that apply to the prosecutor/victim relationship:

- victims are to be treated with courtesy, respect, dignity and sensitivity
- victims are to be given timely information and assistance, and
- the OPP does not represent victims. Rather, the OPP acts independently, on behalf of the entire Victorian community.⁵⁶

The Director's Policy also contains guidelines for communicating with victims, which provide that victims' individual preferences around communication are to be respected, and that potential barriers to communication such as language and cognitive capacity are to be taken into account. The policy states that when victims have indicated that they want to receive information about the legal proceedings, the lawyer with carriage of the matter must provide them with '[i]nformation about the court process, the victim's role as a witness, support services, possible entitlement to compensation, legal assistance and the victims' register.'⁵⁷ According to the policy, the solicitor acquits this duty by providing the victim with various OPP-produced brochures, which contain this information.

The Director's Policy also provides that OPP lawyers are to 'use temperate and dispassionate language.'⁵⁸

⁵⁶ Ibid, 14.

⁵⁷ Ibid.

⁵⁸ Ibid, 8.

4 Literature review

What do victims want from the criminal justice system?

Despite the significant reform efforts undertaken in Victoria and other jurisdictions over the past few decades to improve the criminal justice system from the victims' perspectives, Australian and international research on victims' experiences of criminal justice processes consistently reveals high levels of dissatisfaction.⁵⁹ In order to understand why this is so, it is important to understand what victims are seeking from the criminal justice system, and then examine why many victims feel that they do not receive what they need or expect.

Victims of crime are not a homogenous group and their distinct characteristics and experiences shape how the crime affects them and their interests and needs following the crime. Nonetheless, the literature about victims' experiences usefully identifies common themes that help us understand what victims seek when they look for a justice response to a crime. Kathleen Daly, a leading scholar in this area, conceptualises these themes as encompassing five elements: participation; voice; validation; vindication; and offender accountability.⁶⁰ She explains each element as follows:

Participation Being informed of options and developments in one's case, including different types of justice mechanisms available; discussing ways to address offending and victimization in meetings with admitted offenders and others; and asking questions and receiving information about crimes (e.g. the location of bodies, the motivations for an admitted offender's actions).

Voice Telling the story of what happened and its impact in a significant setting, where a victim can receive public recognition and acknowledgement. Voice is also termed truth-telling and can be related to participation in having a speaking or other type of physical presence in a justice process.

Validation Affirming that the victim is believed (i.e. acknowledging that offending occurred and the victim was harmed) and is not blamed or thought to be deserving of what happened. It reflects a victim's desire to be believed and shift the weight of the accusation from their shoulders to others (family members, a wider social group, or legal officials). Admissions by a perpetrator, although perhaps desirable to a victim, may not be necessary to validate a victim's claim.

Vindication Having two aspects of the vindication of the law (affirming *the act* was wrong, morally and legally) and the vindication of the victim (affirming *this perpetrator's actions* against the victim were wrong). It requires that others (family members, a wider social group, legal officials) do something to show that an act (or actions) were wrong by, for example, censuring the offence and affirming their solidarity with the victim. It can be expressed by symbolic and material forms of reparation (e.g. apologies, memorialization, financial assistance) and standard forms of state punishment.

Offender accountability Requiring that certain individuals or entities 'give accounts' for their actions. It refers to perpetrators of offences taking active responsibility for the wrong caused, to give sincere expressions of regret and remorse, and to receive censure or sanction that may vindicate the law and a victim.⁶¹

⁵⁹ Joanna Shapland et al, *Victims in the Criminal Justice System* (Gower Publishing, 1985); Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler 1996); Victorian Law Reform Commission, *Sex Offences: Final Report* (2004), 81; VLRC info paper 2, 13.

⁶⁰ Kathleen Daly, 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton & Felix Mukwiza (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Taylor & Francis, 2014) 387.

⁶¹ *Ibid*, 388.

In the CIJ's work with victims of crime we have found that an additional need that victims often express is to ensure that the offending does not happen again. We refer to this as the **prevention** need.

In the above passages Daly is specifically referring to the experiences of victims of sexual offences, however her findings are consistent with the research on victim experiences more broadly,⁶² and offer a useful template for understanding what victims seek from a criminal justice process. Daly refers to these themes collectively as 'victims' justice interests.' She prefers the term 'justice interests' to 'justice needs,' in recognition that the victim is a citizen as well as someone who may have experienced psychological harm.⁶³ However, other researchers have found the term 'justice needs' to be a closer fit with victims' own narratives.⁶⁴ The CIJ uses the term 'justice needs'. Put simply, 'justice needs' refers to what victims seek in response to crime that allows them to feel that justice has been done.

Upon examination, it is clear that the formal justice system has a limited capacity to address the above list of victims' justice needs. For example, some victims may have a strong participation need which means that they want to be centrally involved in a response to the crime. While measures to enhance victims' inclusion in the criminal justice system continue to be made, the victim cannot become a central protagonist in a criminal proceeding without fundamentally altering the foundations of our justice system. Other needs relate to victims' desire to engage directly with the offender, a process which the Victorian criminal justice system does not currently provide in the adult jurisdiction. It is generally recognised that the traditional justice system cannot meet all of victims' justice needs, that other complementary options, such as restorative justice processes, should also be made available to victims.

Procedural Justice

In addition to the concept of victims' justice needs, procedural justice is another useful lens through which to better understand victims' experiences of the justice system. As we have seen, the notion of justice needs is a broad concept that refers to what victims seek in response to crime that allows them to feel that justice has been done. This may include a legal system process, but may also encompass other processes and events. The concept of procedural justice, on the other hand, generally refers to what occurs within the boundaries of the traditional justice system. As will become apparent, there is a degree of overlap between justice needs and elements of procedural justice. Indeed, some scholars see procedural justice as being a justice need itself.⁶⁵

We might expect that people who have been involved in or impacted by a justice process will tend to see this process as fair or unfair to the extent to which the outcome was favourable to them. However, since the 1980s a body of work known as procedural justice theory has emerged that argues that this is not so. Through a procedural justice lens, the way in which a legal outcome is reached is central to the experience of the person affected by it. In fact, the process is more important to people than the outcome. According to procedural justice theory, people are more likely to accept an outcome as valid if they perceive the process that led to it as being fair, even if the outcome is not reflective of what they were seeking. Conversely, if people feel unfairly treated by the justice system, they will see outcomes such as court orders as less legitimate, and will be less likely to accept them.⁶⁶

⁶² Victorian Law Reform Commission, above n 18.

⁶³ Kathleen Daly, above n 60.

⁶⁴ Jane Bolitho, 'Putting justice needs first: A case study of best practice in restorative justice' (2015) 3(2) *Restorative Justice* 256, 267.

⁶⁵ Bernard Mayer *Beyond neutrality: confronting the crisis in conflict resolution* (Jossey-Bass, 2004).

⁶⁶ Tom Tyler, above n 5.

There is now a solid base of empirical research that supports the contentions of procedural justice theory. A wide range of studies in different contexts have established a clear connection between people's experience of justice processes and their perception of the legitimacy of a legal outcome.⁶⁷ While early procedural justice studies concentrated on the experience of people encountering the legal system in the role of the accused, later research has established that these principles also apply to the experiences of victims of crime. This research has demonstrated that, in particular, victims' interactions with police and prosecutors determine the degree to which they experience procedural justice. In her influential work, Jo-Anne Wemmers found that victims are more likely to feel fairly treated by the criminal justice system when police and prosecutors: take an interest in them; give them an opportunity to express their wishes; and take their wishes into consideration.⁶⁸ In a recent study, Wemmers identified that victims' experience of their interactions with prosecutors is primarily shaped by whether they feel recognised and treated with respect.⁶⁹ For Wemmer's interviewees, 'recognition and respect' involved a victim receiving recognition of their status as *the victim*, feeling believed, being treated courteously, being consulted and being listened to. Conversely, treatment involving a lack of recognition and respect correlated with victims not feeling heard, not feeling believed, not being consulted, not having things properly explained to them and being treated with indifference. These findings suggest that for victims to feel fairly treated by prosecutors they need to feel as though they *matter* in the eyes of the prosecutors.

The procedural justice literature as it applies to victims of crime is pertinent to the issue of how prosecutors go about communicating with victims about important decisions. Inevitably, prosecutors will sometimes make decisions that victims do not agree with. However, the procedural justice literature tells us that when prosecutors show victims recognition and respect in their interactions with them, victims are more likely to experience the process as fair, even when a decision has been made that does not accord with their wishes. As Wemmers puts it, '...if a prosecutor treats the victim with dignity and respect and is able to gain the victim's confidence, then the victim will still feel fairly treated even when the prosecutor makes an unpopular decision.'⁷⁰

Victims, prosecutors and procedural justice

The discussion above suggests that victims' interactions with prosecutors are critical in determining whether they experience procedural justice. Research findings indicate that, in particular, plea resolution decisions can strongly shape victims' experience of the prosecution overall. A 2009 survey of 107 Australian victims of crime found that their satisfaction with the prosecution was significantly influenced by whether the offender was convicted on lesser or only some of the original charges.⁷¹ Consistent with procedural justice research, this study found that the source of victims' dissatisfaction in these cases in the way in which the prosecutors conducted the plea negotiation process, and not with the sentence that the offender ultimately received.⁷² This suggests that whether or not victims experience procedural justice during the consultation process about plea negotiations has the capacity to determine their overall level of satisfaction with the criminal proceedings.

There is very little research that looks directly at victims' experience of engaging in consultation with prosecutors. However, this issue was addressed by the Victorian Law Reform Commission in its recent report on the role of victims of crime in the criminal trial process. The Commission looked specifically at the issue of victim participation in prosecution decisions, including those concerning resolutions. The relevant aspects of what the Commission's review revealed about these issues are summarised below.

⁶⁷ For an overview, see Deborah Epstein, 'Procedural Justice: Tempering the State's Response to Domestic Violence' (2002) 43 *William and Mary Law Review* 1843, 1878-1882.

⁶⁸ Jo-Anne Wemmers, above n 6.

⁶⁹ Jo-Anne Wemmers, above n 7.

⁷⁰ *Ibid*, 186.

⁷¹ Stuart Ross et al, *Fairness and Equity for Victims of Crime: What Do They Want and Why Don't They Get It? Final Report* (ARC Discovery Project DP0665417, December 2009) 144.

⁷² *Ibid*.

Victorian Law Reform Commission inquiry into the role of victims in the criminal trial process

In its consultation paper the Commission sought submissions on the question of whether victims' wishes should be given greater weight in prosecution decision making. Ultimately, the Commission did not recommend this, finding that doing so would be incompatible with the fundamental structure of Victoria's criminal justice system. Further, it found that for the most part victims themselves did not want further responsibility for these types of decisions. Rather, what most victims wanted were:

...opportunities to meaningfully communicate and contribute to decision-making processes, without carrying the burden of responsibility that comes with prosecutorial decision making.⁷³

The Commission looked at whether victims were being afforded these opportunities. It reported that prosecutors were increasingly taking their obligations to inform, support and consult with victims more seriously.⁷⁴ This was particularly true in the case of victims of sexual offences. The Commission noted that during consultations a number of victims reported feeling adequately informed and consulted by prosecutors, and feeling that prosecutors were approachable and responsive. However, other victims, when describing their relationship with the prosecution, said that they felt like a 'passive receiver of information', an 'observer', and an 'outsider'.⁷⁵

Victims' experiences of the specific issues of prosecution consultation about resolutions also varied. The Commission noted that while some victims reported satisfaction with the process, others did not. The experiences of those who felt dissatisfied included not being consulted at all, not learning about the decision until after it had been made and feeling that the consultation was inadequate for one or more of the following reasons:

- insufficient time was allowed, for example consultation occurred on the morning of court
- the offending was minimised to obtain a more expedient resolution
- they were informed about a decision already made, rather than having been truly consulted about it
- consultation took place in an inappropriate environment, for example a crowded court foyer, and
- consultation took place prior to the victim establishing a relationship with the prosecutor.⁷⁶

The Commission concluded that the consultation process could be improved and called on prosecutors to engage in 'consistent and meaningful' consultation with victims. To achieve 'consistent and meaningful' consultation practices, the Commission suggested that prosecutors:

- practice good communication skills
- establish good relationships early with victims and maintain them throughout the entire trial process, and
- be willing to spend time with victims.⁷⁷

The Commission reported that the victims said that they valued honesty and empathy in their dealings with the OPP. Victims 'acknowledged that some conversations are hard, but stated that they still want to have them'.⁷⁸

⁷³ Victorian Law Reform Commission, above n 18, 133.

⁷⁴ Ibid, 114.

⁷⁵ Ibid, 36.

⁷⁶ Ibid, 136.

⁷⁷ Ibid.

⁷⁸ Ibid, 113.

The Commission also suggested that some prosecutors may benefit from additional training, particularly around supporting victims who face additional barriers such as those in regional Victoria, Aboriginal victims, victims with disabilities, victims facing barriers related to culture or language, and victims not able to access the Witness Assistance Service.⁷⁹

Victims' experiences of prosecutors

The few studies that have explored victims' relationships with prosecutors in common law jurisdictions have indicated that victims often report having a positive relationship with prosecutors.⁸⁰ Christine Englebrecht's work in the US context found that victims were likely to feel satisfied with their interactions with prosecutors when the prosecutors' behaviour included: keeping the victim informed; helping the victim to understand the legal process; listening to the victim; and treating the victim in a welcoming manner. A minority of victims who participated in Englebrecht's study were unhappy with their experience of the prosecutor. These participants commonly reported having had little to no contact from the prosecution and receiving limited information throughout the legal process. They reported feeling excluded.⁸¹ Englebrecht's study also found that victims place great significance on their interactions with justice system personnel, particularly prosecutors and victim support workers. These interactions were very important to victims' overall sense of justice.

In 2010 Dan Jones and Josie Brown, two UK Crown Prosecutors, reviewed the relevant UK literature on victims' interactions with prosecutors. They identified a common theme, which was that victims wanted the following from prosecutors: to be treated with respect and courtesy; to be provided with information; and to receive explanations for decisions. They also found that while there were sound policies and procedures in place governing prosecutors' duties towards victims, these policies and procedures were inconsistently applied in practice. Further, an important dimension of the victim-prosecutor relationship was found to be ongoing contact throughout the criminal proceedings: 'the key is to support the victim and witness through the process from beginning to end.'⁸²

Victims seek a personalised interaction with prosecutors

One of the publications examined by Jones and Brown was the House of Commons Justice Committee's report on the role of the Crown Prosecution Service. This report observed that '[v]ictims want to be treated as people, which often does not happen in a criminal justice system that is driven by process.'⁸³ This notion correlates with the research findings of Sarah Goodrum. Working in the US, Goodrum interviewed victims of crime about their encounters with prosecutors. Her results indicate that victims seek personal connections with prosecutors. The participants in Goodrum's study were described as wanting prosecutors not only to express compassion for them, but to do so in ways that were interpreted by the victim as indicating that the prosecutor sincerely felt their pain. Goodrum described this as a victim desire for 'shared sadness' with the prosecutor. Victims also wanted the prosecutor to express anger, for example in response to disappointing developments in the case such as an acquittal. Victims interpreted displays of anger as demonstrating that the prosecutor was invested in the case. Goodrum referred to this as victims' desire for 'shared anger' with the prosecutor.⁸⁴ Goodrum concluded that a prosecutor's '...openness to shared sadness and shared anger with victims may serve as critical emotional tools for establishing rapport and building trust in the victim-prosecutor relationship...A compassionate connection

⁷⁹ Ibid, 115

⁸⁰ Christine Englebrecht 'The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System' (2011) 36(2) *Criminal Justice Review* 129.

⁸¹ Ibid.

⁸² Dan Jones & Josie Brown, above n 3, 225.

⁸³ House of Commons Justice Committee, Parliament of the United Kingdom, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (2008 – 2009) 40.

⁸⁴ Sarah Goodrum, 'Bridging the Gap Between Prosecutors' Cases and Victims' Biographies in the Criminal Justice System Through Shared Emotions' (2013) 38(2) *Law & Social Inquiry* 257, 268.

with the prosecutor proved an important element of victims' satisfaction with the system.'⁸⁵ Goodrum's study is relevant from a procedural justice perspective, as she also found that when a victim felt a compassionate connection they were likely to view the prosecutor and the legal process positively, even if there was an unfavourable outcome such as an acquittal or a plea resolution not to the victim's liking. A further finding was that even if a victim support person was involved in the case, the victim still sought an emotional connection with the prosecutor.

Some victims expect public prosecutors to act in their personal interests

The victims who participated in Goodrum's study expected the prosecutor to act for them, as their own lawyer:

Victims expected the prosecutor to represent their *personal* interests, even when those personal interests were not guaranteed by current victims' rights legislation and were not necessarily in the best interest of the criminal justice system.⁸⁶

Goodrum noted that this expectation persisted even though the victims were aware that the prosecutor's formal role was to act for the state and not the victim:

...while many victims held a technical understanding of the prosecutor's official position as a legal representative of the state in the case and not their personal attorney, their responses revealed an underlying expectation for informal legal representation. The bereaved victims participating in this study repeatedly contested the legal definition of prosecutor as a representative of the state. Victims wanted veto power over plea agreements, wanted to offer a suggestion on prison sentence for the defendant, wanted a close personal relationship with the prosecutor, and wanted the prosecutor to act as their personal ally.⁸⁷

It is important to remember that these findings are based on a US study, and the extent to which they also apply to the Australian context is unclear, absent further research into the experiences of Australian victims of crime. One aspect of the results described above – that victims wanted decision making power with respect to plea agreements – contrasts with the Victorian Law Reform Commission's conclusions discussed earlier, that for the most part Victorian victims did not want the responsibility of exercising this power, although they did want to have input into these decisions.

There are tensions between prosecutors' duties to act in the public interest and their responsibilities to victims

In recent decades there has been a shift in common law jurisdictions, including Victoria, giving victims of crime, historically the 'forgotten actors'⁸⁸ in the criminal justice system, a recognised place within it, due to a series of reforms designed to promote victim inclusion. The new role of victims has necessitated a reshaping of the victim-prosecutor relationship. This has constituted 'a significant change in culture amongst prosecutors, who traditionally had very little interaction with victims outside the witness box

⁸⁵ Ibid, 275.

⁸⁶ Ibid, 279.

⁸⁷ Ibid, 284.

⁸⁸ Andrew Sanders, 'Victim Participation in an Exclusionary Criminal Justice System' in C. Hoyle, R. Young, editor(s). *New Visions of Crime Victims*. Hart Publishing; 2002, 200.

for fear of “witness tampering.”⁸⁹ Prosecutors’ contemporary role as facilitators of victims’ inclusion in the criminal justice system can sit uneasily with their overarching duties to act independently and in furtherance of the public interest, which will not always coincide with the victim’s interests.

Victims can hold misunderstandings and unrealistic expectations

The existing research makes it clear that reforms designed to enhance victims’ participation do not always result in an increase in victim satisfaction with the justice system.⁹⁰ In some cases, such efforts can raise victims’ expectations but then fail to meet them, leaving victims more dissatisfied with the justice system than they would otherwise have been.⁹¹ Providing victims with opportunities to have input into prosecution decisions also has this risk. Englebrecht’s research indicated that some victims assumed that having the opportunity to express their views meant that they would have the power to influence the decision-making process, and felt let down when they learnt that they did not have the ultimate decision-making power.⁹²

Reforms designed to promote victim inclusion and/or the messaging accompanying them can also lead to victims forming unrealistic expectations of the prosecution’s role. For example, the House of Commons Justice Committee was critical of the then UK government for promoting policies that sent the message that victims of crime should be ‘at the heart of the justice system’ and that it was the prosecutor’s role to champion victims’ rights and interests.⁹³ The Committee said that these messages created false expectations and confusion for victims:

Telling a victim that their views are central to the criminal justice system, or that the prosecutor is their champion, is a damaging misrepresentation of reality. Expectations have been raised that will inevitably be disappointed. Furthermore, the criminal justice system is set up to represent the public rather than individuals, and there are good reasons for this. The CPS’s role as independent arbiter of decisions about prosecution is critical. Explaining this role clearly to victims such that their expectations are managed realistically, rather than raised then disappointed, is vital.⁹⁴

Obviously, the desire expressed by some victims for prosecution lawyers to function as their personal lawyers, discussed in the previous section, is fundamentally incompatible with the role of the prosecution within the criminal justice system. Victims’ apparent desire for a personal connection with the prosecutor also sits uneasily with prosecutors’ duty to act impartially and fairly. Indeed, the Director’s Policy provides that OPP lawyers must use ‘temperate and dispassionate language’ when conducting themselves.⁹⁵ Goodrum’s research with US prosecutors found that their sense of professionalism was closely connected to maintaining composure in their professional interactions.⁹⁶ Goodrum also notes that requiring prosecutors to connect emotionally with victims in the way sought by some victims may lead to professional burn out.⁹⁷

⁸⁹ Matthew Hall, ‘The Relationship between Victims and Prosecutors: Defending Victims’ Rights?’ (2010) 1 *Criminal Law Review* 31, 39.

⁹⁰ For e.g. see Edna Erez et al, above n 3.

⁹¹ Andrew Sanders, ‘Victim impact statements: Don’t work, can’t work’ (2001) *Criminal Law Review* 447.

⁹² Christine Englebrecht, above n 80, 145.

⁹³ House of Commons Justice Committee, Parliament of the United Kingdom, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (2008 – 2009) 34.

⁹⁴ *Ibid*, 36.

⁹⁵ *Ibid*, 8.

⁹⁶ *Ibid*, 261.

⁹⁷ *Ibid*, 283.

How prosecutors balance their competing obligations

As the above discussion indicates, the task facing the contemporary prosecutor involves balancing their obligations to the state, their duty to act fairly and impartially and their duties to the victim—a difficult prospect. However, the literature indicates that prosecutors do manage to negotiate these different aspects of their role. In their paper, UK Crown Prosecutors Dan Jones and Josie Brown make the case that, ‘...the provision of information and support to victims of crime is an essential function of the modern prosecutor and is not incompatible with independent prosecution decision making.’⁹⁸ Jones and Brown explain how they reconcile their duties to the victim with the prosecutor’s traditional role:

It does not necessarily compromise the independence of the prosecutor to be fully aware of the needs and concerns of an individual victim or witness...Knowing what issues are of importance to a victim or witness and putting measures in place to assist them to understand the system is more likely to secure their informed engagement with the system. Victims or witnesses do not have to be “parties” to proceedings in the strict legal sense of the word, before they can be treated with consideration and respect, kept informed of what is happening and have some say in what level of service is best suited to their individual needs. Taking proper account of the needs of victims and witnesses is critical to persuading them they have a meaningful role in the criminal justice system and in helping them to understand better what that role is.⁹⁹

In the Victorian context, former Supreme Court judge and former Director of Public Prosecutions Geoffrey Flatman and academic Mirko Bagaric have argued that the prosecutor’s established duty of fairness should be conceptualised as extending to a duty to the victim:

The reason that the prosecutor has an overriding duty of fairness to the accused stems from the central role of the accused in the criminal justice process and from the important interests which they have at stake. Similar considerations apply in relation to victims. While their liberty is not at peril, they have other recognisable interests which are affected by the criminal justice process.¹⁰⁰

Edna Erez and her colleagues have examined how US legal professionals, including prosecutors, have responded to reforms designed to improve victim participation. They found that it was challenging for legal professionals to reconcile their new obligations to victims with their pre-existing duties to the justice system, but that they were attempting to meet these challenges. Erez and her colleagues identified four strategies that the legal professionals had adopted:

1. **Demystification:** recognising that victims are ‘outsiders’ to the legal system and that they may find it bewildering and intimidating. Explaining legal terms in plain language. Explaining the process. Preparing victims for the courtroom and what to expect throughout the process. Preparing victims for possible outcomes, particularly those that may be disappointing such as plea agreements not to the victim’s liking or an acquittal.

⁹⁸ Ibid, 212.

⁹⁹ Ibid, 225.

¹⁰⁰ Geoffrey Flatman and Mirko Bagaric, ‘The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making’ (2001) 6(2) *Deakin Law Review* 238, 250.

Addressing unrealistic expectations. A crucial aspect is to convey the inherent uncertainty of proceedings and emphasise that a particular outcome can never be guaranteed.

2. **Management of emotions:** addressing the victim's emotions and displaying compassion. Attempting to direct how much emotion the victim expresses during court proceedings.
3. **'Victim-shielding':** protecting the victim from the accused and addressing the potential for the court process to re-traumatise the victim.
4. **Strategic exclusion:** discouraging vulnerable victims from attending court events in order to protect them. Entering into a plea agreement rather than proceeding to trial due to concerns about the victim's wellbeing.¹⁰¹

A number of pertinent points emerge from this study:

- Simply increasing the amount of contact between victims and legal professionals will not necessarily result in positive outcomes for victims: 'incomplete or inaccurate communications, and rushed or insensitive interactions with victims, can do more harm than good.'¹⁰²
- Formal participation mechanisms for victims do not necessarily equate to greater victim satisfaction. A victim-responsive culture within the justice system needs to be developed in order for victims to feel included.
- While there are tensions between victims' interests and those of the wider justice system, these can be managed through 'the creative strategies of dedicated legal professionals.'¹⁰³

Multidisciplinary practice: social workers and lawyers working together

There is an increasing recognition that an effective way to enhance access to justice and deliver client-centred legal services is to combine the skills of lawyers and social workers.¹⁰⁴ The benefits of this approach include enhancing problem-solving; effective teamwork; expanded content knowledge; and bringing a wider perspective to a client's issues.¹⁰⁵ Recent analysis has shown that the involvement of social workers can improve the quality of legal communication because social workers can 'translate' legal jargon into plain language, helping clients understand lawyers, and helping lawyers to understand clients' needs.¹⁰⁶

Clearly, the OPP has been aware of the benefits of multidisciplinary practice for some time, given that it has employed in-house social workers since 1995. However, until recently there was little scholarship that focused on multidisciplinary practices in any in-depth way. The emerging research suggests that the factors that contribute to effective multidisciplinary practices include:

- the social workers and lawyers share mutual respect and trust
- each professional group understands the role of the other
- each professional group values the skillset that the other can offer in service delivery to clients, and
- there is a high level of collaboration between the lawyers and social workers.¹⁰⁷

¹⁰¹ Edna Erez et al, above n 3.

¹⁰² Ibid, 185.

¹⁰³ Ibid.

¹⁰⁴ Chris Maylea, Nareeda Lewers, Elissa Scott, Penelope Weller and Stan Winford, 'Socialising the law: Multidisciplinary practice with lawyers and social workers' in Simon Rice, Andrew Day and Linda Briskman (eds) *Social Work in the Shadow of the Law* (Federation Press, 2018, 5th ed).

¹⁰⁵ Richard Foster, 'Multi-disciplinary Practice in a Community Law Environment: Clinical Legal Education Combined with Holistic Service Provision' (2014) 23 *Journal of Law and Social Policy* 169.

¹⁰⁶ Chris Maylea et al, above n 104, 27.

¹⁰⁷ Tamara Walsh, 'Lawyers and social workers working together: Ethic of care and feminist legal practice in community law' (2012) 21(3) *Griffith Law Review* 752.

Factors that are associated with less effective multidisciplinary practice include:

- the social workers feel that they that they are not respected or valued by the lawyers, and
- there is a limited degree of genuine collaboration between the lawyers and social workers, even though they are employed by the same legal practice.¹⁰⁸

The OPP recently conducted a pilot which saw WAS social workers co-located with a trial division of OPP lawyers. The aim of the pilot was to encourage lawyers and social workers to work collaboratively in order to better meet the support and information needs of victims. An evaluation of the pilot was positive, and recommended that the pilot approach be extended to all trial divisions of the OPP.¹⁰⁹

¹⁰⁸ Ibid.

¹⁰⁹ Bernadette Saunders, 'Office of Public Prosecutions Trial Division/Witness Assistance Service (WAS) Post-Pilot Final Report (May 2018).

5 Victims' interviews

Summary

A number of common themes emerged from victims' interviews about their experiences of being consulted about resolution decisions. Read together, these themes indicate that there are identifiable expectations or requirements that victims have of the consultation process. The presence or absence of these factors seems to have the capacity to determine whether or not victims have a positive experience of being consulted.

Victims want a genuine opportunity to contribute their views

The victims we spoke with drew a clear distinction between being genuinely consulted about a resolution decision and being 'told' about a resolution decision. According to victims, being genuinely consulted involved:

- being given the opportunity to express their views
- OPP lawyers genuinely listening to their views
- feeling heard and understood by the OPP lawyers
- feeling that their views mattered to the OPP lawyers, and
- feeling that their views would play a role in the decision that the OPP would ultimately make.

According to the victims, being merely 'told' about a resolution decision involved:

- being informed about a resolution decision *after* it had already been made, or
- being informed that a particular resolution decision was going to be made and then:
 - o OPP lawyers refusing to engage in a discussion about the decision, or
 - o OPP lawyers asking the victims how they felt about the decision but at the same time making it clear that their views would not alter the course of action that the OPP had already committed to.

For the most part, the victims who participated in our research indicated that they did not want the power to make resolution decisions themselves. They accepted that these decisions were the OPP's to make. However, it was very important to them that their views on the matter were taken into account by the OPP when it made its decision; that they got to 'have a say' in the resolution decision.

Victims want OPP lawyers to understand and address their individual priorities

Victims said that it was important to them that the lawyers truly understand what was most important to them as individuals about the criminal proceedings. The priorities of the victims we spoke to differed, but common themes emerged. These were: wanting to receive answers (participation); wanting to tell their story before a judge and jury (voice); wanting the full extent of the offending to be recognised (validation); wanting the offender to admit to the offending and/or wanting the offender to be convicted (offender accountability); and wanting to speak out in order to make things better for other victims who might come forward in the future (prevention). Some victims also said that the criminal proceedings had the potential to materially affect their safety or the safety of the children, due to factors such as the impact of the outcome on family court proceedings.

Victims were satisfied with the consultation when:

- OPP lawyers demonstrated that they understood what was important to them as individuals, and
- they felt that their views mattered to the OPP lawyers.

Victims were critical of the consultation process when:

- they felt that lawyers had made assumptions about what was important to them, for example that achieving a lengthy sentence for the accused was their primary aim
- lawyers tried to ‘sell’ the resolution decision to them by emphasising benefits that were not in fact important to them personally
- they felt that they were being consulted in a ‘tokenistic’ way, or as though it was a ‘tick a box’ exercise for the lawyers, and
- they felt treated like they were ‘just another number.’

Victims appreciate it when OPP lawyers have a personable demeanour

Victims spoke highly of lawyers who treated them in ways they experienced as:

- warm
- considerate
- sympathetic
- caring, and
- respectful, meaning that the lawyers treated them as equals and did not talk down to them.

Victims were disappointed when lawyers treated them in ways that they experienced as:

- cold
- clinical
- unapproachable
- rude, and
- patronising.

Victims want to be given enough information about the case to allow them to contribute an informed view

Victims said they appreciated it when lawyers were forthcoming with information. They wanted the lawyers to:

- answer their questions
- take the time to explain information in a clear, accessible way
- provide specific information that allows victims to understand the factors that have a bearing on the proposed resolution decision
- be proactive in providing victims with all the necessary information *without* the victim having to ask for it, and
- make sure they communicated information to all victims involved in a matter rather than assuming that communicating with one victim was sufficient.

Victims appreciate it when OPP lawyers build rapport with them

All three categories of participant in our study – victims, WAS social workers and OPP lawyers – cited the importance of building a trusting relationship between victims and lawyers long before an issue such as a potential resolution arises. That way, when a consultation in relation to one of these issues is held, there will already be a level of rapport between the victims and lawyers, making the consultation process less overwhelming and intimidating for victims. Victims said that when they had not been able to develop a rapport with the lawyers prior to being consulted about a resolution decision it was difficult to feel comfortable enough with them to ask questions, or indeed to trust them.

Victims want a strong professional relationship with the OPP lawyer, whether or not a WAS team member is also involved

As the person responsible for the prosecution of the case, the OPP lawyer is a very important figure to the victim. There are certain functions that only the lawyer can carry out with respect to victims. No matter how supportively a WAS team member might listen to a victim, victims want to make sure that the lawyer, being the person responsible for making decisions, or at least for making recommendations to the primary decision-maker, has heard and understood their views. Victims also recognise lawyers' legal expertise and therefore seek information about the case directly from the lawyer. They place great significance on the views lawyers express about the case. Therefore, while the WAS staff can and do assist in the consultation process, contact with a WAS team member cannot be a substitute for direct interaction between the OPP lawyer and the victim.

Challenges

A number of other themes emerged that did not relate specifically to how the consultation process was conducted, but which provide important context for how victims experience this process. One such theme was that most victims had come to the criminal justice process with strong expectations about how the case would progress and what the outcome would be. Many reported that, at the start, they had believed that the case was very strong; 'black and white' and 'open and shut' were terms they used. It was clear that the police had often played a role in victims developing these beliefs. However, once the OPP became involved these beliefs were challenged because the OPP lawyers tended to see the case as less strong and less certain. As such, some victims experienced their contact with the OPP as a series of disappointments; each meeting seemed to result in their expectations being further lowered. The gap between victims' expectations and the OPP's view of the case tended to have an impact on victims' experience of the consultation process. Victims struggled to reconcile the OPP's 'advice' about the risks of proceeding to trial with their own ideas about how strong the case was.

Further, victims' accounts demonstrated that some of them were fundamentally confused about the OPP lawyers' role in the justice system. For example, some victims believed that it was the OPP lawyers' role to conduct further investigations into the case. Accordingly, when the OPP lawyers told the victims that there were evidentiary weaknesses, some victims did not understand why the OPP lawyers did not seek to obtain evidence to strengthen the case. In cases when the victim's own evidence was seen as problematic, some victims were angry with the OPP lawyers for failing to assist them to improve it. These views coloured their assessments of resolution decisions. Because they thought that it was within the OPP lawyers' power to improve evidence, these victims did not understand why evidentiary weaknesses would cause the OPP to discontinue a case or to accept a plea to lesser charges.

This section of the report concludes by explaining that a number of victims, even some who were disappointed with the consultation process, acknowledged that the task of consulting victims about plea resolutions or discontinuances was a very difficult task for OPP lawyers.

The consultation process: what matters to victims?

Our interviews with victims revealed that there were common themes regarding the elements of the consultation process that were important to them. These themes are described below.

Victims want to be genuinely consulted rather than 'told'

Participants who spoke positively about the consultation process reported that they had been given the space they needed to express themselves, and that they had been genuinely listened to by the lawyers, as the following comments demonstrate:

FF *The positive thing I did get from it was that they gave me enough time that I felt like I could get everything off my chest, I did get to say all the points that I wanted to say.¹¹⁰*

... the solicitor...he knew how important it was to me...he said, 'well, how do you feel about that [the plea offer that the defence had made]?' And I said, 'well, no I really want the incest charges, my father got away with it.' And he said, 'no, I'll bring them back and I'll just say to him, no, we're not willing to accept that.' So, I felt I was heard. It was so important to feel that. I thought, 'he's heard me.'¹¹¹

So [the OPP lawyer] asked me how I felt about it and so did [the informant]. You know and '... if we can get some more charges you know would you be happy with that?' Like at no point did I actually feel like they were just making a decision based only on what you know they wanted to do.¹¹²

Crucially, victims wanted to feel that their views had been taken into account by the OPP. For the most part victims accepted that the ultimate decision was the OPP's to make and that their views were simply one factor that the OPP took into account. However, even if their wishes were not determinative of the outcome, it was nonetheless extremely important to victims that their views were genuinely heard and considered.

In contrast to the experience of having their views taken into account by the decision-maker, some victims' experience was that they had been simply 'told' about the resolution. That is, their experience was that the decision had already been made, or definitely would be made, and their views would have no effect. In some cases, they felt that they were not invited to engage in a discussion. In others they said they were offered a discussion but felt that it was pointless for them to express their views because doing so would make no difference to the outcome:

FF *Because they called us in to discuss it so I thought there would be a discussion but there was no discussion. He said, 'the prosecutor's office has accepted it, that's it.'¹¹³*

...they said she'd agreed to the manslaughter. Me and my wife weren't happy but they said, "well, it doesn't matter, that's what we're going to do," we didn't have any say in it.¹¹⁴

¹¹⁰ V1

¹¹¹ V4

¹¹² V6

¹¹³ V13

¹¹⁴ V16

There's no doubt we were told [as opposed to consulted], is what I'd say. They will say they consulted but ultimately we had no say. So did they try to sugar coat a shit sandwich? Yep, they did. ...I don't know how you do it any other way. That would be my comment there because their job is to prosecute the law so when we're sitting there and [my wife]'s in a meeting, screaming, 'it's murder, it's murder, it's murder,' and they're saying, 'well, it's not,' how do you change that?'¹¹⁵

One participant reported feeling silenced by the lawyer in her case. This victim said the the lawyer made her feel that she was expected to 'just sit there and shut-up and be a good girl.'¹¹⁶ Her experience of this was that the lawyer's behaviour mirrored that of the accused man. She said, 'I'd been silenced enough for a long time by a bully,' and she was shocked to experience this behaviour during a process that was intended to address the harm she had suffered.

Victims want their individual priorities to be understood and addressed

The victims who participated in the research said that they highly valued interactions with OPP lawyers in which the lawyers indicated that they were genuinely interested in the victim's individual aims for the prosecution. Some expressed high praise for lawyers who they felt had understood what was important to them, and had conducted the resolution process with their priorities in mind. For example, one victim said that the lawyer she had dealt with had correctly understood that one aspect of the agreed summary of facts was particularly important to her, and had successfully negotiated to achieve a version that was acceptable to her.

Conversely, participants who reported a negative experience of the consultation process tended to explain that the lawyers had not understood them. They said that the lawyers did not comprehend what was important to them about the legal proceedings; what they were hoping would be achieved. A number of significant themes emerged from participants' comments on this topic. First, many participants said that the lawyers had particular aims for the outcome of the matter, and that these aims were different to their own. Their experience was that the lawyers had failed to acknowledge this difference in priorities. Instead, the lawyers had assumed that the participant's aims were identical to their own and therefore had not paid attention to the participant's distinct objectives.

Some participants felt that the lawyers had made an incorrect assumption about what was important to them. Often this assumption was that achieving a lengthy sentence was the participant's key objective, when in fact this was not the case. Again, the result was that the participant felt that their true aim was neither understood nor acknowledged by the lawyers. Some participants also reported that during the consultation process the lawyers told them that avoiding a trial was desirable, as this would relieve the participant from being further traumatised. Participants found these comments patronising. They resented the lawyers for believing they knew what was good for them. Some also surmised, probably accurately, that the decision to accept the plea offer had been based on other considerations. In this context they resented the plea resolution being 'sold' to them, as they perceived it, on the false premise that their wellbeing had been determinative.

The interviews also revealed that each participant had distinct central aims and priorities. This is consistent with research findings, which show that victims have a range of different needs from, or interests in, a justice process. While each victim's needs or interests are unique, there are common themes in what victims seek in response to crime: participation; voice; validation; vindication; offender accountability and prevention. The aims that participants in this project expressed correlated closely to these themes, as the following section illustrates.

¹¹⁵ V15

¹¹⁶ V4

Participation: receiving answers

Some participants said that getting answers to their questions about the crime was centrally important to them. They expressed disappointment that their matter had not proceeded to trial because they had expected that the trial process would deliver the answers they were seeking. Indeed, one participant stated that when she had pushed for answers early on in the process she had been told, first by police, and then by the OPP, that these answers would come out during the trial. However, because the matter had resolved she had never received the answers she wanted. She said:

FF *It would be good to see what stuff they had, the answers [at the trial] they said, 'Ah, you'll hear ... everything that happened from start to finish'. Well, how are we ever going to hear that now because there's no frigging trial?*¹¹⁷

This participant said in her matter that the lawyers had told her that it was a good thing the she and her family were spared the ordeal of going through a trial. This did not accord with how she felt. She said she was quite prepared to endure a trial in order to get the answers that were of crucial importance to her. She said:

FF *...[the OPP lawyers] explained that it's good for us because we don't have to go through a trial; that they don't have to put the family through a trial because he'd made a plea. But I'd sooner have gone through the trial because then we would have got the answers because it's different today, I don't have answers. I would have sooner have had the trial and known but they seemed to think that it's better for us that we don't go, that they're saving us pain from not going through a trial. Well, hello, no, that's not right because I'd sooner have gone through a trial and heard everything that happened and at least I know and would have some closure where today I'm still wondering what happened.*¹¹⁸

This participant was also frustrated that it had been suggested to her that she should feel grateful to the accused man for entering a plea of guilty:

FF *...[the lawyer] had the audacity to say, "you don't have to go through that trial, he's done you a favour." Oh, my God, I was so angry because we didn't get no answers...and the worst was when they said it was good of the bloke that killed my son not to put me through a trial.*¹¹⁹

Voice/truth telling

Other participants, many of whom were victims of sexual offences, said that they had hoped the matter would go to trial because they wanted the opportunity to tell their story. For example, one participant said:

FF *I can only talk in terms of historical sexual abuse cases, not other cases. But we've put our hand up, we want something done. So, we've taken that first critical step. So, I think we all have the strength to go that next step and let us go into the witness box and let us talk to the jury, give us that opportunity. And I feel like by pleading down you're not given the opportunity.*¹²⁰

This participant explained that even though she knew it would be challenging, she wanted to 'stand in front of a jury and convince a jury what happened.' She said that she felt that she had been 'robbed' of this opportunity because the matter resolved.

¹¹⁷ V17

¹¹⁸ V17

¹¹⁹ V17

¹²⁰ V4

Other participants also talked about wanting a trial to go ahead because they believed that a trial would have ensured that the full story of what had occurred would be revealed, that the ‘truth’ as they understood it would be spoken and known, even if they personally did not do the telling. For example, one participant said:

FF *I'm still angry. I wish [the accused] had gone to trial, I really do because then witnesses would have been called and people would have known the truth. I feel at the moment the truth is not out there... it was a violent relationship but it was on both sides. [The accused] was actually the more violent one in the relationship but none of that came out in court.*¹²¹

Likewise, another participant said that she wanted the opportunity to tell her story, and to denounce the offending as wrong. She was clear that the length of the offender’s sentence was not her priority; having her voice heard was:

FF *I just felt like I should have had that opportunity to have that trial and to share what happened to me and it just didn't feel like that at all. Like in the end it was like he got sentenced to seven months [but for me] it wasn't about the sentencing that he got. It was about me being able to have that like chance to say what you did is not right, and I didn't get that.*¹²²

Validation: Recognition of the full extent of the offending

Some participants said that the lawyers told them that the plea resolution was positive because it guaranteed a finding of guilt against the accused. Participants reported feeling that the OPP’s attitude was that any form of conviction was a good outcome. However, this was not how they themselves felt. For them, it was important that the full extent of the offending, and of what they had suffered, was reflected in the charges that proceeded:

FF *... to me I felt like for them it was if they could get a win on anything that was good enough for them. A win was better than having a loss which, yes, and I cared about, I cared about what he did, but to me the most damaging thing was being raped. And that wasn't heard. So, it was a bit like I wasn't heard. So, yes, I did feel like yet again I was silenced by the system, so it was pretty disappointing.*¹²³

The participant said that the lawyers had told her that there was a risk that if they went to trial the accused would be acquitted on all charges. She understood this, however, she was willing to take the risk. For her it was more important that the court hear about the rape than that the accused be convicted on more minor charges and the rape be left unacknowledged. Another participant recalled that when she expressed dissatisfaction with a plea resolution, the lawyers tried to reassure her by telling her that the accused was still likely to go to jail. However, she wanted the offender to be held responsible for exactly what had transpired, not the portion of it he was proposing to admit to. Compared with this priority, a sentence of imprisonment was not significant to her. She explained:

FF *I shouldn't have said this but I said, 'jail isn't important to me...for me it's important that he pleads guilty to what he actually did.'*¹²⁴

Similarly, other participants said that they had strongly preferred one charge over another because it was a better fit with their understanding of the offender’s moral culpability, as the following comments indicate:

¹²¹ V13

¹²² V3

¹²³ V3

¹²⁴ V4

FF *I just said I thought she was being charged with murder and not manslaughter because manslaughter, in my opinion, was like an accidental murder.¹²⁵*

So, the higher charge was a culpable driving charge, and so the real crux of it for us was the culpability - that this person had an awareness - well, we felt like they had an awareness that if they had have driven and something had have happened that they would be culpable, that they understood what they were doing was dangerous; they were morally culpable for the crime. Whereas the dangerous driving charge brings that culpability down, so it just says, 'You did something dangerous.' It had nothing to do with the sentence; it was really about the charge, the admission that 'Yeah, I really did a stupid thing that resulted in the death of somebody and the serious injury of another.' So, the way that the charge is laid out it almost sounds like the driving, the poor driving resulted in a death because someone made a mistake rather than being culpable.[...] I knew that at that time that was the most important thing. I don't know if the prosecutors knew that was the most important thing to us. I honestly think that they had thought that we had a concern with the length of the sentence.¹²⁶

The last part of this participant's comments indicate that she felt that the lawyers assumed that she and her family were unhappy with the plea resolution because of the lesser sentence that would flow from it. She did not think that they understood that the family felt that the lesser charge did not reflect the true extent of the wrong that had been committed.

Offender accountability

A number of victims said that what they had hoped for most of all from the criminal process was an admission of guilt by the offender, as the following comments illustrate:

FF *I thought, I just want you to own up to what you've done, that's all.¹²⁷*

[W]hat I want is for the offender to realise what he did is wrong. It's not a matter of how long he's going to get punishment; it's about as long as he realises that he did something wrong. I mean he can do ten years in prison but still think that he's not guilty or what he did is the right thing... maybe the OPP thinks that 'Well, the punishment is waiting for him and it should be the right thing for him to be in jail.'¹²⁸

This last comment indicates that this participant wanted something more than a formal legal acknowledgment of guilt from the offender. She wanted him to genuinely understand that his actions were wrong. In her view, even a lengthy jail sentence would not necessarily deliver this outcome. However, in her view, a jail sentence was the OPP's idea of what justice would entail in this case. She also said:

FF *...for me, personally, I'm actually a soft person so if I say, 'Oh, I want him to be punished like really bad' I'm feeling pretty bad as well, but I know that the justice has to be given and I mean as long as he gets the right punishment, a fair one, I think, yeah, it will be good.¹²⁹*

In contrast to some of the other participants' views, this participant felt that she would be upset if the offender received a harsh punishment. It was important to her that any punishment imposed was fair, and not too harsh.

¹²⁵ V13

¹²⁶ V11

¹²⁷ V12

¹²⁸ V10

¹²⁹ V10

Some victims experienced the plea resolution as the accused person admitting responsibility for the offending, and said that this had been their main hope for what could be achieved through a prosecution. One participant said that when she found out there had been a plea offer, she was 'elated' and 'ecstatic.' She said:

FF *Obviously that meant reducing the charges. But I guess for me it was about him admitting it as opposed to anything else, so him admitting it was a much better resolution for me. And I needed to hear that.*¹³⁰

Prevention

Some participants said that part of what motivated them to participate in the criminal justice process was a desire to do what they could to make sure that other people would not experience the same victimisation that they had. In particular, participants who were victims of sexual offences talked about feeling a responsibility to report the crime in order to do their part in breaking the silence the can surround sexual crimes. The hoped that their actions might assist future victims, as the following extract illustrates:

FF *Interviewer: And you said for you it was never about the sentence?*

*Victim: No. it was just having my voice heard. In this society rape is not spoken about especially when it's in a domestic relationship, and I think until that starts to happen it's going to continue. And I mean if they found him not guilty at least maybe it might make society start going, 'hang on, this does actually happen.' So if another woman comes forward and says 'this happened to me,' society and jurors might not question it so much. They might actually understand these awful things do happen and a woman's not going to just say it's happened for no apparent reason. And I think when you look at his record and everything else that he's going to be found guilty of, it's not a far stretch to go this guy's actually capable of that. But until these things are set down in a trial and heard it's always going to be brushed under the carpet. A resolution's not going to be found and more people will just continue to suffer in silence and I don't think that's good enough.*¹³¹

Safety concerns

For some participants the outcome of the criminal proceedings had the potential to materially impact their safety or the safety of their children. One participant stated that the fact that her case was discontinued had resulted in concrete and ongoing consequences for her and her child. She explained that both she and her child had reported that her ex-partner, the child's father, had perpetrated sexual violence against each of them. Charges in relation to the alleged offences against the child were never brought, and all charges relating to the alleged rape of the participant were discontinued. This outcome affected proceedings that were being run in parallel in the Family Court. This participant said that she was not so concerned with abstract notions of 'justice,' but rather with her own and her child's safety:

FF *I was hopeful that it would continue especially because I felt like there's a real risk if he doesn't get charged and everything, you know, there's a good chance the Family Court are going to give him contact, which they have, so for me it's not just justice but there's a fear factor there and so having that chance, like the more chances you have of getting him, the better so to say it's not worthwhile, like, for the taxpayers' money kind of thing, you know, because it's not beyond reasonable doubt or whatever ...*¹³²

¹³⁰ V6

¹³¹ V3

¹³² V1

The participant said that in the absence of a finding of guilt the Family Court subsequently made an order that the alleged offender have ongoing contact with the child. She said that she tried to raise this concern with the lawyers. However, her view was that the lawyers did not seem to understand family law, and further, seemed unwilling to engage with the possible consequences of the discontinuance that would flow in the family law jurisdiction:

FF *And I think when I actually came in to the interview, so I had the social worker there but I was mainly talking to the OPP [lawyer] that was in charge and she seemed surprised that the Family Courts were now allowing contact with [alleged perpetrator] for the kids and everything. It was like this ... she didn't even recognise that there'd be further consequences for me down the track so there was that big gap in not only empathy but the logical effects in life for that person, if that person gets away with it.¹³³*

Another participant said that her main concern when she heard that the most serious charges would not proceed was that this would result in a shorter sentence for the accused. She was upset about this not because she wanted greater punishment for him, but because she feared for her own safety once he was released, and had hoped that she would get a longer period of respite from this fear:

FF *Like for them, it was a win for them, but for me I've got to sit there with this paranoia that I am the one that sent him to jail, on his release what is he thinking? What is he going to come do? For them they get to like move onto the next one but for me it's almost like, is it worth it? Yes, I don't know, yes, right now I'm not sure whether or not it was, not when there's no moving on from it anyway. Like I always, I will forever live in fear and like on his release it's, yes, I will live in fear that he will come for revenge and they said, I said the same thing to them. They said that wouldn't happen, that's been pretty silly, but for men like these that do all these awful things...they just said like it won't, that wouldn't happen. He would have already gone to jail, and you've got your AVO, and that AVO doesn't do anything. You try and explain like, well, they, he's going to come out fairly pissed off. That how do you, like they must see it enough to warrant a woman's fear like that and for them to understand where it comes from. They must see this enough that, but they don't seem to think it happens so, but that's my greatest fear that he comes back for his revenge because I put him in jail.¹³⁴*

Financial redress

One participant reported that the lawyers' assessment was that they had achieved a 'win' in the case because the offender had been convicted. However, he did not experience this outcome as a win because it did not involve the money that had been stolen from him being returned. He said:

FF *You know they're just saying, 'Look, you know we just want to get it over the line so that she gets a conviction against her and she's going to not be able to work in aged care like she was and she's got to do the Community Service. So, you've had a win of sorts.' That's what their words are.... Well, you know it was just like another punch in the face. You know, like I mean I'm thinking that a win, that's ... you know, even now, you know I was - I don't know what the word is - awarded the \$58,000 to be returned. I still haven't even got that, you know.¹³⁵*

¹³³ V1

¹³⁴ V3

¹³⁵ V9

Punishment of the offender

Some participants said that they had hoped that the accused person would receive a lengthy jail sentence, as the following comment illustrates:

☐☐ *We hoped that we ... well, I guess when it was sitting at murder we had high hopes for ... probably didn't expect that he'd get 20 years. I mean, I think it's 25 for murder, isn't it, but we knew that that's not how it goes but on a murder charge we probably thought ... I don't know what we thought because you don't think of it in figures but it's a good case, he's charged with this and he'll get a decent sentence, a lengthy sentence.*¹³⁶

Consequences of lawyers failing to understand victims' individual priorities

A number of participants said that when the lawyers raised the subject of a plea resolution with them, the lawyers had suggested that avoiding a trial was a positive development because this meant that they, the victims, would be spared the further trauma that a trial entailed. As discussed above, many participants specifically wanted to participate in a trial. They did not appreciate being told that the case not proceeding in the way they wanted it to was good for them:

☐☐ *...[the lawyers] also said it now won't retraumatise you going to trial...And I said to her like that should be my choice whether or not it's going to retraumatise me or not.*¹³⁷

*...we had something said to us along the lines of 'you don't have to go through a trial now,' and we'd prepared ourselves to go through that. We didn't want it but we were prepared, and then to hear it being said by the defence in court we've saved the [...] family from having to go through a trial, just things like that you just want to say, well, who cares. Don't try and get brownie points for that. Or OPP don't try and get brownie points for that, that you're saving us going through this. We're going through hell.*¹³⁸

Lawyers' demeanour affects victims

Our interviews with victims revealed that the interpersonal style with which lawyers interacted with them significantly affected their experiences of the consultation process. Victims expressed strong desire to be treated warmly and compassionately by OPP lawyers. When they were treated in this way by lawyers, they tended to experience the process very positively. For example, referring to one of the lawyers who had been involved in her case, one participant said:

☐☐ *...his demeanour was quite different. I felt some warmth with him that's the difference. I just felt I was listened to. I felt there was some compassion and some understanding there...He was very warm, very compassionate, he shook my hand. He said 'I understand' a lot. He said 'I understand.' He talked a bit about, I know he has to be careful what he says, but these cases are of particular importance to him. I understood that because he told me that. He's very experienced in this field. He just made me feel I was in safe hands.*¹³⁹

The same participant also made observations about the demeanour of another lawyer who appeared in the matter on a later occasion:

☐☐ *I felt there's some warmth there. She was a very jovial character actually. She dropped an F bomb and I thought, uh, okay. There are formalities but that's all right I'm okay. So, but I did feel comfortable around her.*¹⁴⁰

¹³⁶ V18

¹³⁷ V3

¹³⁸ V18

¹³⁹ V4

¹⁴⁰ V4

Another participant said of the OPP lawyer who worked on the case:

FF *She was really good...I felt she was sort of sympathetic to us.*¹⁴¹

Another said:

FF *I think my experience overall was they seem fairly caring, in a genuine way.*¹⁴²

For one participant, the fact that the lawyers had, in her view, treated her with consideration conveyed respect; she felt that they saw her as someone who ‘mattered’:

FF *I felt like they were quite respectful. I don't know, maybe the true, the right words that maybe, let's say from the Director or from anyone else may be a bit more harsh. Like they can say like to the point 'Oh, maybe it's best for you to not continue with your case but like maybe that's wasting time' or whatever it is. But no, they are trying to find the soft way to tell that to me and to explain what the situation, what the consideration, of course, to just use the right words to not hurt my feelings or to [avoid making me] feel like I'm not important at all... like trying to speak with me gently.*¹⁴³

Another participant said that the lawyer talked to her in a way that made her feel that she was on an even footing with him, rather than being talked down to or patronised:

FF *I felt like he treated me as an equal whereas I felt the other one was condescending to me. I think that's really important that I felt like an equal. I know he's got his own job of course I can't do what he's doing, but he did treat me as an equal.*¹⁴⁴

Conversely, victims who reported having a negative experience of the consultation process described the lawyers as being cold and uncaring in their manner, as the following comments illustrate:

FF *It is, well, the first [lawyer I dealt with] just came in very business-like, she just waltzed into the room dragging her bag behind her and sat down and it wasn't even, good morning, and introduce herself straight up, [the WAS social worker] eventually did that. But I just thought you would immediately go to the person who was obviously the victim and introduce yourself before you sit down, get yourself sorted at the table. I just think the human interaction's the first thing you should take care of. Not sorting yourself out at the table at the very first meeting. And I think you need to speak with some compassion and show some understanding, like you're [the interviewer] doing now, some eye contact, looking me in the eye it tells me you're listening to me that's really important whereas she felt very cold and clinical and very business-like. And when she was done with her bit you just felt dismissed.*¹⁴⁵

*I just walked away. I just left the meeting. I just thought there was no talking to her. There was no getting through to her. Yes, I mean she didn't care. She's very blunt and unapproachable and I was just, yes. I just thought that was bullshit.*¹⁴⁶

¹⁴¹ V13

¹⁴² V8

¹⁴³ V10

¹⁴⁴ V4

¹⁴⁵ V4

¹⁴⁶ V3

... she was just so cold. She wasn't sympathetic. She was just in one tone... it was just dealing with somebody who was just really rude. That's how it came across,... she could have said it in a nicer way and, you know, a bit soothing or whatever but she was just blunt and that was it.¹⁴⁷

The participant quoted immediately above also said that she felt that this lawyer treated her as though she was a criminal, rather than a victim:

FF *I've worked all my life. I've never done anything wrong. Yes, my son wasn't perfect, like, but I'm not the criminal here and the way she was, was, like, okay, yes, obviously I know my son had a long history of stealing cars but... don't look at me like I'm a criminal; I ain't no bloody criminal. I've worked all my life. I work six days a week. I run a business... I didn't like how she was at all. I just found her really ... I can only say cold. She was just so cold, like, didn't show any emotion, didn't worry about how we felt.*¹⁴⁸

A number of participants also said that when the prosecutors communicated with them it felt rudimentary; they felt that the prosecutors were talking to them simply to acquit a task rather than because they cared about them as people and what they thought. Some described feeling that the lawyers delivered information in a rote way, rather than talking to them as individuals:

FF *...at least make it feel like when they do communicate with you make it individualised, make it to the person.*¹⁴⁹

*...it did make it feel somewhat tokenistic, and certainly in that meeting there was that sense of it being a token 'Okay, we have to tick this box, like we have to tell the victims about this and try and explain it and it doesn't matter what you say because I'm the expert here.' Which is - I mean I get it from both perspectives because victims really shouldn't be parties to it, but at the same time there should be that acknowledgment and involvement with victims in the court process should they wish to be involved.*¹⁵⁰

*...you can't help but feel like you're just another number who's been put through the wringer.*¹⁵¹

*Well, [the lawyers] were removed. I only saw them on a couple of occasions, once in the room here next door I think it was and once in the room over there. They were pretty clinical about it. Just '[V9's name], this is what you've got to face and you know we hope we're going to get her on the theft, and just get on with your life.' You know, it was very, very clinical. Like you go to the supermarket and they say, 'Hello, how are you today?' They don't give a damn how you are today, you know. And you say, 'Oh, good thank you' as if you - you don't even know the person; you know I'm just buying a bottle of milk. So, they're being polite and they're doing the right thing but they don't know the nitty-gritty gut-wrenching, the pain that you're going through, and the way that your whole life is caught up in a whirlwind.*¹⁵²

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However, in another part of his interview the participant quoted immediately above also said of the lawyers, '[t]hey're here doing a job, which you know I respect.'¹⁵³

Some victims who felt that the lawyers had been 'going through the motions' in their interactions with them also felt that the lawyers had a similar attitude to the case in general; that it was a merely routine matter for them, something they were 'just ticking off'¹⁵⁴ rather than something they approached with dedication and passion.

One participant described a lawyer who had worked on her case as discourteous. She said that she and the other witnesses had been at court for an hour and a half, waiting for the trial to start, when the lawyer came to speak with them:

FF *[the lawyer] just stood at the door and she said to all the witnesses, 'you can all go home now. You and you come into the room with me,' that was my sister and myself, we were the complainants, that's how we were spoken to. We had no idea what was going on. The other witnesses were, in fact, they felt bemused all of them. I think they felt really quite shocked. It wasn't even explained to them why. It was like 'you can all go home now. You and you come with me.' And you can see I'm still upset about it. I do not think that's how you treat people. These witnesses had come forward and been through an awful lot. One of them was my aunt 81 years of age and she was beside herself with nerves, and she'd gone out of her way to come and help me. I just think people should have been treated with more respect. Another witness was a main witness she'd come down from Melbourne to Warrnambool, made the trip, missed work. I just think you should speak to people in a different manner. [The lawyer] should have explained what was happened... So, we sort of all went out and all the other people still there, "what's happened, what's happened?" We had to explain it to them all, that was my job. When I didn't fully understand it and I was in shock.*

Finally, one participant reported feeling belittled by the lawyers and treated as though he was irrelevant:

FF *It was like I was a flute maker. They just had gave me no credit for being anything, you know.¹⁵⁵*

Victims want enough information to allow them to understand the proposed resolution

Victims who reported feeling satisfied with the way in which the OPP had gone about providing them with information said that they were given enough information to understand the issues, and that the lawyers had been prepared to answer their questions:

FF *...[the OPP lawyers and I] had a Skype, and they answered all my questions. They were fantastic. I did have a lot of questions and I was very anxious by this stage. It had been going on such a long time and I was really anxious. I hadn't slept well at all. I really wasn't going to perform my best, and they answered all of my questions. I can't ask any more than that so, yes, that's what I was pleased with that they were happy to answer my questions. They didn't just dismiss me. I felt like a bit of a pest but no, they were fantastic. They were really great.¹⁵⁶*

They basically went through everything. Because this was shortly before we were supposed to go to trial, and they just basically explained the whole court procedure, and where I'd be sitting, where he'd be sitting, when I gave evidence. They said you could have a screen there if you wanted to, or you could do it remotely, you know, things like that...there's only so much time they can devote to you. Obviously, they're pretty busy, but they always said, 'if you've got any

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¹⁵⁶ V4

questions, if there's anything we haven't explained well enough, and you've got any questions, just feel free to contact us, tell me what information you want, and we'll go through anything with you'. So, I think they did their best to explain the process to me, and anything that I might have concerns about. ¹⁵⁷

A number of participants felt that the lawyers had been open with them and had been forthcoming with information, which was important to them:

FF ...the solicitor I'd spoken to numerous times he was in the office in Geelong, I'd spoken with him and I felt he was quite respectful. I asked a lot of questions and he was always willing to give me very honest answers. So, I really quite liked his demeanour. So, I found him very helpful. He didn't pull wool over my eyes and he told me the truth. He didn't lead me up the garden path and he told me very honest things. So, I thought okay, I can deal with anything if I know what's going on. ¹⁵⁸

However, a number of victims said that during the consultation process they were not given enough information to allow them to understand the issues. Some said that they still did not understand the reasons for the decision that had been made:

FF ...basically the prosecutor presented where they were at with the case and had said that they were in a position now to accept the plea. And I am still baffled and confused as to why they would accept that plea; I don't feel like it was explained succinctly enough. We all as a family are still very cheated and sometimes inflammatory statements were presented to me from my family members for example, 'Oh, it's just costing the state too much so they're just rolling over' and 'The defence lawyer's just making it really hard so they're just rubbing their hands of it' because no-one actually walked away from that meeting actually understanding 'Is there a legal reason for this or is it just because it's an easy thing to do?' ¹⁵⁹

Similarly, another participant said:

FF [The OPP lawyers] need to explain why they are pleading, why they are allowing people to plead down, why it is they're pleading down, I still to this day I don't understand. My belief is it must have something to do with money and time because I just can't see why you don't give people the opportunity to go to a jury.[...] I thought if the OPP has decided the evidence is good enough to go to trial then why are they allowed to plea? That needs to be explained to people. I still don't have the answer by the way. I don't have the answer. The OPP has decided the evidence is good enough. They've put it up. It can go to trial, then to me when you've reached that stage, why are deals allowed after that part of the process? [I] felt like I was in an eBay auction I really did, that's what it felt like to me. I thought, gosh, if he's getting to call all the shots then they need to explain to you why that's allowed. And still no one has given me a satisfactory answer other than I just kept thinking they're just trying to speed things up because I know the courts are full, and I understand the courts are full. The money's not there. ¹⁶⁰

The above comments illustrate how a lack of information can lead victims to make assumptions about the basis for prosecution decisions, and that this can in turn lead to victims concluding that cost-cutting is driving these decisions.

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¹⁶⁰ V4

Some participants suggested that it would be helpful for the lawyers to be more proactive in explaining key aspects of the proceedings, rather than relying on victims to ask questions:

FF *Because you haven't come from this background you don't know what to ask, so what other questions should we be asking, what is possible?*¹⁶¹

*Just more interaction. That'd be something I'd do going forward; I would seek that information... Probably the prosecutors more than anything. Like [the WAS social worker] was great and she was there if we needed any questions. But like I said, you don't know what you don't know, so it'd be good for them to tell us more.*¹⁶²

The participant quoted immediately above explained that he is not 'a very outgoing person.' Therefore, he struggled to ask questions during the consultation meeting. His reflections imply that he was somewhat intimidated by the situation: 'I didn't know how it all worked; I was just trying to sit nicely and take it all in.' As a consequence, he was left with unanswered questions and uncertainty. Similarly, another participant said that there was a lot of information she had wanted during the process, however, she felt that she had to be patient and not interfere with the professionals going about their work:

FF *...I never ever called them. I kind of just let them do their job to get the best outcome they could and then, because I didn't want to bug them – let them deal with their case and they told me they had to dot their Is and cross their Ts and everything like that.*¹⁶³

Her comments later in the interview implied that she now regretted this approach and wished she had been more assertive.

A number of participants emphasised that information was much more likely to be useful to them if it was specific to the case, rather than generic information. Some expressed the view that general information such as that available on websites and in brochures had a limited capacity to help victims truly understand the core issues in their particular matter:

FF *... [the new website is] a better resource but I feel it's very impersonal because each circumstance, as I've learned, is very different, so one person's experience can be different from the next. So, talking about things in general terms can sometimes - you just glaze over; it's like another pamphlet or another piece of information. Whereas if you've got some personal contact, a conversation; a conversation is better because the information flow happens organically and then it gives you that chance to ask those questions and unpick things. So, the website, while it is a good foundation resource it's probably not the resource that answers all the questions that are required. It is much better than what was there before though, so I applaud them for doing that. Yeah, it looks nice and it's really well-read and it still has legal jargon in it which makes it difficult to ... it's that thing 'Oh, we're handing evidence up.' It's like 'What does that mean?' Yeah, so it is a good resource but it's not enough. Something needs to happen in between.*¹⁶⁴

*... with some of the material that was sent to us it may well be that that's in there in a booklet but that's not the same as someone sitting down with you and saying, 'I want to take you through this; this is what you're going to have.' ... There's plenty of glossy brochures that end up just gathering dust and really are they useful or not?*¹⁶⁵

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Similarly, another participant felt that he and his family had been ‘spoon fed’ information by the lawyers because, in his view, they were trying to shield them from the knowledge of what was in fact happening with the case. He would have preferred them to have been more upfront.

A number of participants said that, willingly or not, they ended up playing a liaison role between the lawyers and other victims, witnesses or family members, which could be burdensome:

FF *And I've got those notes they're in my bag and I can go back, and I can read those sentencing remarks whenever I want to, and it is comforting because you have to explain to everybody else, that's the hard part explaining to everyone else, people who weren't in the room, family and friends. And they're all angry, 'that's nothing he only got a year,' and you have to explain it to everybody over and over again and that's exhausting.*¹⁶⁶

Another participant described how difficult it was to be the conduit of information she did not herself fully understand:

FF *... in this situation where the OPP is liaising with me there was a great burden upon me to then go and inform my whole family, try and answer their questions, I'm no legal expert. I'm probably a legal expert now because I've been through this process... certain members of my family had great difficulty in understanding the process ...[a certain family member's] was never really supported in the way she probably should have and therefore she's coming to me because I'm the only person who seems to know something and then that becomes a burden on me. Later in the piece I actually said to the WAS 'I need support in dealing with that particular family member because it's a burden upon me.'*¹⁶⁷

Victims appreciate it when rapport is built between them and the OPP lawyer

A clear theme to emerge from the interviews with victims was that victims tended to feel better about consultation processes that had been conducted after the OPP lawyer had already established a degree of rapport with them. Indeed, some participants said that they had multiple meetings with OPP personnel long before the issue of resolution was raised. For example, one participant said she met with the lawyer who had carriage of the file three times prior to the committal and that the lawyer maintained contact with her throughout the process. This matter resolved to a plea in the early stages of the trial, and the participant said that by this stage she had grown very comfortable with the lawyer, which enabled her to have the confidence to ask questions and express her views.

Other victims said that they had limited contact with the lawyers, but had communicated frequently with the WAS. For example, a participant said:

FF *And I want to say that my WAS worker, even though she didn't attend a lot of hearings because she couldn't, was incredible and she went above and beyond. She didn't have to do the breadth of stuff that she did in consulting with me. She was our main communicator. So, the prosecutors never rang to tell us what was happening; it was always her. There were times when I was really angry and I yelled at her and she just copped it. So, that particular WAS worker was life-changing knowing her; without her we would be a complete mess.*¹⁶⁸

Another participant said:

FF *...[WAS worker] was ... very supportive, she would come to court, she'd ask if we were alright, they were very good in that way, excellent...*¹⁶⁹

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Some participants reported having very little interaction with the lawyers prior to the consultation. For example, one participant said she met the OPP lawyer and the Crown Prosecutor for the first time at court on the morning of the committal:

FF *They came down to the safety room the morning of [the committal], and they go over a few details, and then they basically say that they're not going to speak that much. As much speaking that they're going to do to you is they're just going to, they just introduce you. They will say, is this your statement? Is it all true and correct? Is there anything you want to change? And then that's it. That was [my entire] meeting.¹⁷⁰*

Similarly, others talked about a lack of interaction with the lawyers throughout the process:

FF *And certainly that's where the failings were for us. We didn't feel that proximity to the team who were prosecuting the case enough to be able to ask questions and understand their motivations and for them to understand ours....I feel like [it would have helped if there had have been] a stronger relationship with the prosecution's team including the lawyers, not just the prosecutor, because often if the prosecutor's really busy -and I get it; they've got a lot of things to do - that lawyer becomes more of a central point for communication, and because we had so many changes all the way through we had built no rapport with them.¹⁷¹*

This participant explained that there had been multiple changes in the prosecution legal team throughout the proceedings:

FF *At the start we had two lawyers, just lawyers in the Magistrates' Court, and then the first day of the County Court we met the prosecutor briefly and there was a different lawyer again. And then later down the track that lawyer left, so we got another lawyer. And then our plea hearing took three sittings over a year and we had two more OPP lawyers in that time. So, that led to that confusion like 'Who is this person?' I found often those lawyers gave us opinions with little thought. Like 'Oh, well, it's over now so you can start to move on.' Things like that. And that stuff's not helpful because 'I don't know who you are; I've never met you before. And you're telling me that.' It's pretty full-on.¹⁷²*

These comments illustrate that, for this participant, having to discuss matters that were deeply traumatic for her with someone she had never met before was a jarring experience. In another part of her interview, this participant said that as a person without legal training with little understanding of the legal system there is little option but to trust that the prosecutors are doing the right thing. However, she is still not sure whether the prosecutors who handled her case were deserving of this trust:

FF *You have to trust in the people who are trained to prosecute these things, but I guess there is still a real lack of trust that the right care was taken to make sure that it was prosecuted effectively.¹⁷³*

Read together, her comments raise the issue of the difficulty victims must face in being able to place their trust in the lawyers without having had enough contact with them to build a rapport.

It should be noted that not all victims who expressed disappointment with the consultation process had experienced limited prior contact with the OPP lawyers. Two participants, who were members of the same family, reported having multiple meetings with the OPP lawyer and the different Crown Prosecutors

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¹⁷² V11

¹⁷³ V11

who handled the case. They also stated that they met with the Solicitor for Public Prosecutions and the then Director of Public Prosecutions. Incidentally, they had also met with their local MP and the Victorian Attorney-General to discuss the case. Further, they said that a former head of the Victoria Police homicide squad had facilitated a meeting between their family and the police working on the case. However, neither of these participants saw their relationship with the OPP as positive and one commented, ‘we really just felt totally powerless all the way through, and as I said, no-one was there for us.’¹⁷⁴

Other factors influencing victims’ experience of the consultation process

In this section of the report we will discuss two themes that emerged from the victims’ interviews that did not relate specifically to the consultation process, but nonetheless seemed to have influenced victims’ experience of it. These themes are victims’ expectations, and victims’ misunderstandings of the OPP lawyers’ role.

Victims’ expectations about the legal process and the likely outcome of the case

Interviews with victims revealed that many had formed strong ideas about the strengths and weaknesses of the case and about the likely outcome before they had met with any OPP personnel. In their accounts, it was clear that one factor that caused victims to experience the consultation process as difficult was that it involved their previously held expectations about the case being challenged by the OPP. It was clear that many participants had initially believed that the case was very strong. For example, one participant stated;

FF *So, you see, along the journey, well, we got all these, these messages, little things [that indicated] this is a really strong case, and [we thought] great, and I’m just going through the process and she’ll be charged [convicted], and that’s when it’s a let-down that it didn’t happen.*¹⁷⁵

Indeed, some participants thought that the strength of the case had been beyond dispute, as the following comments illustrate:

FF *We had an open and shut case.*¹⁷⁶

*I thought right, hallelujah! She’s been caught red-handed. The facts are all overwhelming. Like it’s theft, that’s all it is, black and white.*¹⁷⁷

*...[the case] seemed pretty black and white to a common person.*¹⁷⁸

Another participant, who had been a victim of theft, recounted that he had believed that because he had engaged with the justice system the wrongs he had experienced would be swiftly rectified by ‘the authorities’; the offender would be punished to his satisfaction and his money would be returned to him:

FF *I thought that the system would take its course and that it would be resolved by authorities much more superior than me who would sort of take it on board and sort it out and deliver the punishment that it needed and return the money as it should have been, et cetera, et cetera. You know that’s what the law system should be doing.*¹⁷⁹

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Only one participant talked about having had fairly low expectations of what the legal process was likely to deliver in her case:

☐☐ *Look because I had read a lot, I actually in my mind I go, 'he's probably not even going to go to jail' because realistically it is a historical [child sexual abuse] case.*¹⁸⁰

Victoria Police's role in influencing victims' expectations

It was clear that in many cases participants' belief that their case was strong had been influenced by what the police had told them in the early stages:

☐☐ *Well, the message I got from the cops was this is a really strong case.*¹⁸¹

*...we were told [by the police] in the very early days that the police had a very strong case.*¹⁸²

*...[the informant] said after the incident that [the accused]'s been charged with murder and that's what it [the charge] would stay as.*¹⁸³

*...she [the informant] said that "You've got so much evidence here, it's bulletproof..."*¹⁸⁴

Victims' relationships with the police

Although the focus of this research was victims' interactions with the OPP, many participants also referred to their interactions with police. Most participants seemed to be+ very satisfied with the police who had been involved in their case. One participant described having developed a warm and trusting relationship with the informant, and stated that they were still in contact from time to time, even though the legal proceedings had been finalised for some time, 'she [the informant] contacts us every now and again to see how things are going.'¹⁸⁵ Another participant, who had been the victim of a sexual offence, said:

☐☐ *The detective that was on the case was amazing. He was brilliant. I've always said that I think some detectives aren't so approachable and some women do have that first meeting and go, 'no, I'm not going to bother.' But from the beginning he was very approachable, and he was understanding, and he made you feel like you were believed. He even said that he and Victoria Police believe me, and he said he was just as disappointed [with the resolution]. And he said that it's just as disappointing for them that they do all this work, and they get all this evidence, and they charge them for it to get to that point where, it's out of their hands, but he was really wonderful.*¹⁸⁶

In the above passage the participant praises the informant for treating her in a way that indicated that he believed her. This is important to note, and is a theme that will be discussed further below. Another significant aspect of this participant's comments is that she speaks positively of the fact that, in her view, this police officer was personally invested in the case, and that he had an emotional response when the matter resolved to a plea to lesser charges. Other participants were similarly pleased when the police involved in their case displayed emotional reactions. For example, one participant talked about a police officer becoming so affected when he learned that the accused man was applying for bail and that he had good prospects of being granted it, that he was unable to give evidence during the bail application:

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¹⁸⁶ V3

FF ...on the morning of the bail hearing as we got here one of the homicide detectives was basically, we just sort of saw him storm out and he looked quite upset, and I thought, 'okay, that seemed a bit strange'.... he couldn't look at us and ultimately he couldn't take the stand that day in court, he was that upset by it.¹⁸⁷

This participant was pleased that the police officer had responded in this way. He and many other participants felt that when police displayed emotion and seemed passionate this meant that they really cared about the case, in the same way that they themselves did. This made the victims feel that the police were 'on their side,' as many put it. Indeed, the participant quoted immediately above described the informant as having acted as an advocate for him and his family. He described this in the context of the discussion about the plea resolution proposal:

FF And the only person who was in that room, let's say as our advocate, was the person I turned to, to say, 'what do you think?' and that was [the informant] who's the homicide detective. So I said to [informant's name], 'What do you think, [informant's name]' and he said, 'I agree with what they're saying' and I said, 'Okay, it's done' so we accepted it at that point. But I was asking him more as a friend/advocate because the one thing that I guess we'd probably come to understand through the whole process is that the homicide guys were totally invested in the case. They're looking for justice for [the victim].

This participant went on to contrast, somewhat unfavourably, the police attitude to the case with that of the OPP lawyers. Another participant described the police as having 'fought' for her and her family:

FF We felt that they [the police] were fighting for us. We felt that they wanted this to happen, they wanted it and they were fighting as hard as they could...¹⁸⁸

Only one participant reported having had a negative experience of the police. She said,

FF I think homicide [police] are the worst, like really the worst...¹⁸⁹

She told us that after she learned that the victim in the case, her son, had been harmed, she attended the scene and tried to go to him. She said that she was very upset, and that in response the police at the scene handcuffed her. This interaction with police stands in stark contrast to the support other participants reported having received from police. This participant said that she feels that the way police treated her was shaped by the fact that her son had a criminal record:

FF ...my son, wasn't no angel, but we've had lots of bad dealings with police, and then my son also had been to prison, but it doesn't mean he deserved to die.¹⁹⁰

She also said that she felt that the police treated her like she was a criminal throughout the investigation, even though she does not have a criminal record and has worked hard all her life.

It is worth noting that this participant was also the only one in the cohort who indicated that she was Aboriginal. We did not collect demographic information for this research, so it is possible that other participants may also have identified as Aboriginal or Torres Strait Islander but that this information was not revealed. This participant herself did not assert that her poor treatment by police was because she

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and her family were Aboriginal. However, given what we know about the overrepresentation of Aboriginal people in the criminal justice system and the ongoing discrimination they experience at the hands of police, a possible connection between this woman's Aboriginality and her poor treatment by police is worth noting here.

Many participants said that the outcome of the case was ultimately very different to that which the police had predicted. For example, one participant stated:

FF *You learn to lower your expectations. Over a two-year period I learnt to lower my expectations. The first detective was indicating 'I'm thinking he'll [the accused] probably get a good ten years or so.' However...he got three years and 15 months non-parole...*¹⁹¹

Some participants associated a gradual lowering of their expectations with their contact with the OPP. One participant commented:

FF *From early on, from being such normal people who knew nothing about criminal law or anything, from being told very early on that it was a solid case, there was good evidence ... things just seemed to get taken away from us. I know at one point, and we had many meetings here with the OPP that involved often the two lawyers, and then on the several occasions, the barristers, as well, and every time we came it became ... horrible. Something more seemed to be taken from us every time so we're pretty disillusioned with the whole process.*¹⁹²

Another participant said that he felt devastated when the outcome of the case was not what he had been led to believe it would be:

FF *Unfortunately, I've had my voice heard but they got off on a technicality. That was really a crushing blow. Because the police had been telling us they've got a very strong case, and I believe that they did have.*¹⁹³

In another participant's account, the police and the OPP are described as having taken very different views of the key piece of evidence in the case. According to this participant, police viewed the evidence as constituting an admission by the accused, however the OPP did not agree. When the OPP lawyer told the participant that they were considering discontinuing the case, the participant voiced her understanding of the case, which was that the police viewed the evidence as strong, and therefore the case as strong:

FF *...the police officer felt we had some evidence there because we had him admitting to my rape on a recording, and there was ... I can't remember what she said; I'm assuming it was the OPP that said it, not a social worker but it was something like 'oh, he shouldn't have' or 'I don't know what he was thinking' or something like that and she cut herself off because I think she realised she shouldn't be saying that to me.*¹⁹⁴

The participant recounted feeling angry with the lawyer for criticising the police, as she interpreted this as 'telling off a police officer for doing the right thing...the police are doing the right thing when they're pushing through, not the wrong thing; they're doing the right thing.' Similarly to other participants, she felt that the police were fighting for her, while the OPP were failing to do so.

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¹⁹² V18

¹⁹³ V12

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Interestingly, one participant, the only one who said she had low expectations about what the legal process would deliver, also stated that the informant in her case had played a role in setting these expectations. She said:

FF *...the police officer that I first gave my statement to, [informant's name], she told me that straight up. She said, "you know, just so you are aware that only five percent of cases, historical cases will actually even lead to arrest or get to court."*¹⁹⁵

This participant, like most of the others, had high praise for the informant in her case. The fact that this police officer had sought to set realistic expectations for her at the start, rather than building them up, did not diminish the respect and admiration the participant held for her.

Victims' misunderstandings about the OPP lawyers' role

Some victims wanted the OPP lawyers to act for them

Some participants said that they were disappointed because it felt like the lawyers had not 'fought' for them as victims:

FF *We had a much better relationship with the police than we did with the OPP. We felt that they [the police] were fighting for us. We felt that they wanted this to happen, they wanted it and they were fighting as hard as they could...*¹⁹⁶

*...[I wanted to] feel more like they [the lawyers] were fighting for you. That would be my biggest criticism of them. I don't mean them personally, I mean the process.*¹⁹⁷

*I guess at the end of the day lawyers are going to go home, they're not going to lose a night's sleep over this, but for us it's a family thing. So, when this is happening we're all passionate, angry and frustrated, but [the lawyer] just didn't seem like he had that energy.*¹⁹⁸

*...you want to see that our side's fighting hard.*¹⁹⁹

Some participants said that they would have liked the lawyers to behave more in the way they saw the defence lawyers conducting themselves:

FF *My family wasn't happy with the defence lawyer, because they said, 'oh, how's he sleep at night?' I said to my wife, 'if I ever get in trouble that's the guy I'd like to defend me,' because he was doing a better job than [lawyers' name], the prosecutor, was, and that's exactly what I said to them, 'if I get in trouble one day that guy can defend me because he's doing a better job of it, he's doing a really good job.'*²⁰⁰

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²⁰⁰ V16

If you compare how the defence handles themselves in court versus the prosecution, it is, on one hand you've got the defence really driving home messages, and on the other hand, you seem to have this very meek and mild and sort of not argumentative approach from the prosecution.²⁰¹

I never felt like we had someone 100 per cent in our corner fighting for us...He [the accused] had someone in his corner, fighting tooth and nail that would do anything. I never felt that we had that in any way because they [the OPP] just want to see the law upheld...I don't know, it sounds terrible to say but there are dirty lawyers and good lawyers. You want a good lawyer I guess but you want them ... I don't know, you just want getting the best outcome for you to matter more than getting the right outcome for the law... I never felt that. Ever.²⁰²

One participant reported that during the court proceedings she saw the lawyer standing up to the defence lawyer in an impassioned way, and that she appreciated this because in her view it indicated that he cared about the case:

FF *...certainly we appreciated the passion from the prosecutor; it showed that he cared...there were times when the judge would leave and he would give the defence lawyer a real serving.²⁰³*

As we saw above, many participants said that they appreciated it when police showed emotion and passion, because they felt that this indicated that they were fully committed to the case. Some participants contrasted the passion and commitment they saw in the police with the demeanour of the prosecution lawyers, whom they saw as detached and disinterested:

FF *...the homicide guys were totally invested in the case. They're looking for justice for [the deceased]. The prosecution team were looking to prosecute to the law and there's a subtle difference, I reckon it's that the homicide guys were about justice; the prosecution team was about... prosecuting to the law.²⁰⁴*

Victims thought the OPP lawyers should have challenged the material the defence raised at the plea hearing

A number of participants had expected that the OPP lawyer would challenge the material put by the defence at the plea hearing, and were disappointed that this did not occur. Some participants took this as further evidence that the lawyers were uninterested in the case:

FF *And none of this was disputed, like what I said, the prosecution, they told us they had 80 witnesses, and not one was called...the prosecutor never disputed half of this, I could dispute half of it and do a better job than he did.²⁰⁵*

I mean I probably watch too much TV and I thought her defence lawyer would say something that wasn't true and he would then object or whatever but there was none of that...I felt like in the plea hearing case, like, the prosecutor read out the charges and then that probably took, I don't know, 15 minutes or something, and the next hour and a half was all about 'poor [accused's name]' and there was no dispute. There were lies in...her defence.²⁰⁶

²⁰¹ V15

²⁰² V18

²⁰³ V11

²⁰⁴ V15

²⁰⁵ V16

²⁰⁶ V13

*I don't think our QC interjected once or asked any questions. He was, he was asleep at the wheel because he didn't want the case to continue past lunch.*²⁰⁷

The above comments indicate that some participants were not clear about the purpose of a plea hearing, or about the lawyers' role within these court events. Indeed, participants' interviews generally reflected widespread confusion about the different roles of professionals involved in criminal proceedings. One victim said that so many different people had been involved in the case that it all became a blur, and it was hard to understand who was who and what role everyone played:

FF *...the current way that victims of crime navigate through the system involves too many different organisations and parties and it was only after proceedings I actually understood what each person was meant to do...who is meant to be doing what and what is each party's role, and therefore because there's that and then there's a prosecutor and then there's the police and then there's you as victims, how do you navigate all of those people and know who's meant to be providing you with what?*²⁰⁸

Victims thought that the OPP should conduct further investigations

Interviews with victims revealed high levels of confusion about the prosecution lawyers' role. Perhaps the most striking example of this confusion was the fact that one participant referred to the OPP as 'my lawyers' throughout the interview. This did not seem to merely be a term of convenience; she seemed to believe that the OPP had acted for her. A more common example was a belief, expressed by a number of participants, that it was the prosecution lawyers' job to conduct further investigations into the case. Some stated that they had possessed relevant information about the case that had not been followed up on, and they blamed the OPP for this. As one participant said, 'I felt like maybe they could've done their homework a bit more.'²⁰⁹ Another was angry with the fact that the OPP lawyers had not tried to extract further evidence from him and his family: 'Do you think they would have come to us as well as the police to see what we knew within the case?'²¹⁰

Victims did not understand the OPP lawyers' duty to avoid causing witnesses to improve their evidence

Many comments made by participants indicated that they still did not appreciate prosecution lawyers' strict duty not to coach witnesses. Indeed, a number seemed to feel that the lawyers had been negligent by failing to help them to improve their evidence:

FF *...another thing that annoyed me was when she [lawyer] said, 'there're a couple of gaps [in the evidence],' and I said to her when she said it was not going ahead, 'but you never had a meeting with me, you've never sat down before now and telling me you're not going ahead, I could fill you in... I can go into detail with it.' If she wanted more details I can give you more details... if she [lawyer] actually did more of her job and had an interview or sat down and got more information or something then maybe [they would not have agreed to drop the rape charges].*²¹¹

I understand it's probably a really tricky one for the prosecution, it's probably a tricky area for them to go - I felt like I needed a bit of coaching, or 'this is what they're possibly going to throw up.' I felt like maybe my team - do you call it the prosecution team... They could say to me 'we need you to try and be clear about dates' and stuff like that. The emphasis on that could have probably been a bit stronger, I think.

²⁰⁷ V7

²⁰⁸ V11

²⁰⁹ V12

²¹⁰ V7

²¹¹ V3

Victims recognised that OPP lawyers have a difficult job

A number of participants, even some who expressed dissatisfaction with their interactions with the OPP lawyers, acknowledged that communicating with victims in the context of complex decisions was a difficult exercise:

FF *Public Prosecutions, said ‘we’d like you come into the office to talk about the case,’ and I just had a feeling something was wrong, so I questioned them on the phone and they obviously were, I could understand their position, they were trying to be as sensitive as they could, how do you give someone news like that? It’s not easy.²¹²*

It seemed pretty good to me [the interactions with the OPP]. I understand they have a hard job. As you were basically saying before, get a better explanation of the sentencing and that; that’d be good, but as I said, how much time can they devote to doing stuff like that, to people who may not understand anything about it?²¹³

...they’re just doing their job and you know they’re not going to come over with a Band-Aid and a bottle of Scotch and say, ‘You know, let’s fix this.’²¹⁴

One participant thought that the lawyers had genuinely tried to communicate in the most sensitive way possible:

FF *I could see that they were trying their best to deliver bad news in the best way possible, I could sort of feel that was their intention.²¹⁵*

²¹² V12

²¹³ V5

²¹⁴ V9

²¹⁵ V10

6 WAS Interviews

Summary

WAS interview participants expressed views similar to those of victim participants about what constitutes best-practice consultation with victims. They said that good practice involved ensuring victims feel heard, and letting them know that their views will genuinely be taken into account. If this occurs, WAS participants said that victims are more likely to feel that they have contributed to the decision making, even though the ultimate decision-making power resides with the OPP. The WAS interviewees observed that ineffective consultation involves lawyers failing to listen to victims and simply telling them about a decision that has been made or will be made, without providing them with the opportunity to provide genuine input. The WAS participants also said that the process tends to go well when the lawyer understands the individual victim's priorities, and has thought through how the proposed resolution would meet or fail to meet their aims. They contrasted this approach with those in which a lawyer makes assumptions about what is important to victims and delivers a 'spiel' about the benefits of the resolution that has little relevance to that particular victim. They also noted that the lawyers' demeanour has a significant impact on victims, and that it is very important for lawyers to convey empathy in the way they relate to victims. Further, the WAS participants said that in successful consultations the lawyer is as comprehensive as possible when providing information to the victim. WAS participants also commented that creating rapport with victims prior to a consultation being held contributes to an effective process, because in best-practice examples of consultation there will be a pre-existing relationship of trust between the victim and the lawyer.

These participants observed that OPP lawyers' capacity to manage victim consultations varied across the organisation. They observed that some lawyers handled these interactions with commendable sensitivity. However, they said that there was a need for others to improve their communication skills. Several commented that some lawyers appear to find consulting victims nerve-wracking. They said that some lawyers are so anxious in these circumstances that their behaviour is negatively affected, which means that they struggle to engage victims effectively. WAS participants suggested that lawyers should receive more training and support to enable them to communicate effectively with victims.

One WAS participant said that the standard of victim consultation varies between the city and regional offices. She expressed concern about victims whose matters are dealt with via regional circuit hearings, as she believed that the treatment these victims received did not match the level of support provided to victims in the city.

WAS participants also said that consultations with victims tend to work well when the lawyer and the social worker involved in the case work collaboratively and strategically; when they plan out the approach ahead of time, and think through how the skillset of each profession can be most effectively used to support the victim. The WAS participants said that their role in the consultation process is often to act as 'translators.' That is, when lawyers slip into using legal jargon in conferences with victims, WAS social workers intervene and ask the lawyers to rephrase or break down the information. They also prompt victims to ask questions or voice their opinions, thus helping the lawyers to 'hear' the victims.

In general, the WAS participants reported that they had positive working relationships with OPP lawyers. However, all of them said that some lawyers in the organisation did not appear to value the WAS or the work they did. WAS participants saw these attitudes as a barrier to successful teamwork and as a potential factor in cases when victim consultations are poorly handled.

WAS participants also suggested that it is useful for OPP staff, both WAS and lawyers, to be aware that a victim might have unrealistic expectations of the criminal justice system. They commented that in some cases, police have played a role in victims developing an (inaccurate) belief that the case is very strong. It is therefore important for OPP staff to try to ascertain victims' expectations about the prosecution and actively manage these from the start of the process.

What do victims want from a consultation process?

Victims want to feel heard and want their views taken into account

The WAS participants drew a distinction, as did the victims themselves, between consultation processes in which victims felt heard by the lawyers and felt that their views would contribute to the decision that the OPP was going to make, and processes where lawyers simply 'told' victims that a particular decision had been or would be made:

FF *I think where they're just not listening, they're just telling, telling the victim pretty much what's going to happen without actually asking for their view. And we would normally advocate for that and say, 'You know your view is important and it's the Director who makes the final decision or a Senior Crown Prosecutor, but you know your view is important so we can pass that on.' But it's when that hasn't happened and they're just, pretty much told what's going to be good for them and without properly explaining everything and just without hearing them out and asking them, and just talking at them. I've had people come in and just talk at the victim...and the victim's just sitting there, not even asked anything, if they understand anything or what they think about it, what's important to them.²¹⁶*

Victims want lawyers to understand what is important to them

WAS participants expressed the view that listening to a victim means getting a sense of what is most important to that person. Consistent with the themes that emerged from the victim participants' interviews, and with the literature on victims' justice needs, WAS participants emphasised that victims differ in their hopes and aims for the prosecution. WAS participants described these priorities as including: preventing further offending; punishment of the accused; the accused taking responsibility for the crime; telling their story; and 'having their day in court'. Some WAS participants stressed that lengthy punishments were not the priority for all victims, 'some people, for them what's most important is them perhaps being on the [Sex Offenders] Register or them having a conviction; not everyone's out for them to spend 20 years in jail.'²¹⁷ One WAS participant observed that when a victim primarily wants the accused to acknowledge the offending, it will also be important to the victim that the offending is not minimised. Therefore, where a plea offer might constitute an admission by the accused, if it does not include the full extent of the offending as the victim sees it, the victim will nonetheless be unhappy with the offer. This was seen to be particularly relevant in sexual offence cases:

FF *...very often, what a victim will want is an acknowledgement by a plea of guilty, and a non-minimisation of the offending. So, if for example, there were penetrative offences that they were accused of, and they offer an indecent assault, then the victim will be very upset about that, because it's minimising ... it's putting up their hand, but it's also a minimisation, so they'll be very upset about that, and that's an offer that a victim would want us to reject.²¹⁸*

This WAS participant also commented that consultations need to be tailored to the individual victim and their distinct priorities:

²¹⁶ WAS 1

²¹⁷ WAS 1

²¹⁸ WAS 2

FF *I think it is around that tailoring, so it's about building that ... relationship early, and the trust and openness, and then planning how a conference might go beforehand for each individual. So, not going in with your one spiel about the time and cost for the court, and not having to put you through this terrible experience of giving evidence, so tailoring to each person what they want to get out of the court process, and then looking at how we can deliver that message in a way that might resonate for them.*²¹⁹

Again echoing the experience of victim participants, the WAS participants said that consultations could be problematic when lawyers assumed what was important to the individual victim, rather than finding out what their actual priorities were:

FF *...and I think where things fall down is when they think that things that'll be important to a victim are emphasised, but they're actually not important to the victim, like, 'oh, well, it's really going to save you giving evidence.' Well, that person's been geared up, that's a really important process for them, and so that message is just not going to sit well. Or, around saving court money ... So, those messages just fall flat. Really, you're missing the mark.*²²⁰

A number of WAS participants noted that consultations tended to go badly when the lawyer delivered a 'spiel' rather than being responsive to the individual victim.

The importance of empathy

Many WAS participants expressed the view that it was important for lawyers to demonstrate empathy when they converse with victims. Some noted that an effective way to do this is for lawyers to acknowledge the harm the person has experienced before dealing with the legal issues:

FF *My favourite prosecutors are the ones that come in and actually acknowledge the loss for that family before starting talking about anything else.*²²¹

In sexual offence cases, WAS participants thought it was important for lawyers to let the victims know that they believed them:

FF *There's one prosecutor I like who - well, I like a lot of them but I like his style in conferences. One of the first things he says to a victim when he comes in for the conference is something like "I believe you and you know I'm here to do the best job that I can. I just want to acknowledge that you've got so much courage and I'm honoured to be doing this case" and it's just really beautiful... You know it's such a good way to start the conference, and they're like, 'Oh, amazing.' Yeah, full trust in him... it's so lovely for people to hear that. Yeah. Because people's biggest fear is that they're not going to be believed, and that's how the system can make you feel as well particularly in those cases.*²²²

*Say the words. Always say the words. So, if I've got a junior solicitor sitting with me, I will start the conversation pretty much with, 'you're believed. You wouldn't be here if you weren't. It's all about proof, not truth. We have to prove this case beyond a reasonable doubt, which is a high test, so if you put yourself in the seat of one of those 12 jurors, and they see what they see, they make a judgement about that. So, it's really important that we talk to you openly about how this might be perceived or judged. We're not judging you. You're here so that we consult you about what you feel, what you believe, what you think, about this offer'.*²²³

²¹⁹ WAS 4

²²⁰ WAS 4

²²¹ WAS 1

²²² WAS 1

²²³ WAS 2

Another participant commented that lawyers need to be conscious of the power imbalance that exists between them and the victim. She said that good consultations are those where the lawyer takes steps to address this power imbalance by letting the victim know that they are important and respected, no matter what walk of life they come from:

FF *...there's always a power imbalance because someone's coming along and they're a victim, so, just trying as much to lessen that power gap and not to be so superior and to just get on people's level...eye contact and not talking down to someone, making them feel important and validating what's happened to them as well. And just being respectful, respectful for their right, whatever issues they've got going on, because some people can come in and just judge someone if they have mental health issues or if they're a sex worker... So, I try to be the same with everyone.²²⁴*

In the views of the WAS participants, the most problematic examples of poor communication by lawyers were when lawyers failed to demonstrate empathy:

FF *No empathy, that's something that, is the worst communication. People in conferences where they just struggle to have empathy. They just come in with this really clinical ... with what they need to talk about.²²⁵*

As the above comment illustrates, WAS participants viewed empathetic communication as requiring something other than a 'clinical' or 'generic' mode of communication.

Lawyers need to provide victims with comprehensive information

Several WAS participants said that they thought it was important for lawyers to be as thorough as possible when informing victims about the case:

FF *For example, [lawyer's name], he's in that group of people where, the whole folder comes down, and step by step, they talk about the process, and what's happened every step of the way, and whether that person understands it completely at that point, or it's just taking a little bit in, and we can go back to it – those are really successful conferences.²²⁶*

Those that get it take the time to really talk about the charges, because I think when they try and skim over going into the detail of what these charges are, what he's going to plead to, and these are what he's not, I think that's dangerous, and can end up a bit of a mess, because people aren't silly, and they kind of get whiff of, 'well, hang on a minute, what about these other charges?' so they'll eventually ask that question. So I think being upfront is very important, including giving the message around the fact that an accused would get a discount, and what that means, because again, I think if you try to not highlight the possible downside of taking a plea, it's not being fair on the victim themselves, so they're making a decision without all that information. Again, often they'll ask that question themselves, and then the answer has to be given, but I think it's better to be offered all that information from the start.²²⁷

Some WAS participants commented that being proactive in providing information about the likely course of the proceedings well in advance aided effective consultation:

²²⁴ WAS 1

²²⁵ WAS 1

²²⁶ WAS 3

²²⁷ WAS 4



I think it's important to be upfront about any legal issues that could potentially arise but not all solicitors agree with me on this. Like around committal, for example, if you've got a case and there's more than one victim you know that when we get to trial a year down the track those trials could all be separated and a lot of solicitors don't want to even start on legal argument around the committal process and let them know. And I learned early on this job where someone said to me when it got severed at trial 'It would have been really good if I'd known that that was a possibility around committal' so I always remember that from when I started here and so I always try and forewarn people of that possibility. But yeah, solicitors often don't just want them to know; 'Well, that's legal argument; that'll happen later down the track.' And it's like 'No.' For a victim to be fully informed about all the different possibilities is what's important and that's why I try and ascertain people's expectations and inform them that the case is constantly being reviewed; it'll be reviewed before the committal, it'll be reviewed after depending on how the evidence goes, just so that they're aware of it that we then could have the conversations with them at any time later on.²²⁸

In addition to how much information the lawyers conveyed to victims, the WAS participants also commented on the manner in which information was delivered, noting that taking time to explain things well, repeating points if necessary, and offering people breaks were important:



But I think the majority of people - I mean when you've got someone with a disability; it's a bit of an extra challenge with some disabilities, and children and young people. But I think most people tend to get it if they have things properly explained to them, you know. But there's a lot of repetition and there's a lot of time needed so that people really understand what's going on.²²⁹

I think it's around spacing it right, and giving them that breathing space. Some good [lawyers] even say, 'do you want to have a break and step outside for five minutes, and we can come back and go on from there?' I think that's a really useful tool around checking in.²³⁰

At the same time, WAS participants demonstrated a clear understanding of the challenges that lawyers face when providing information about a case to a victim who is also a witness:



We can't give a victim an opportunity to fill in the gaps in their evidence based on a conference that we have with them around accepting a plea offer because the evidence in a particular part of their case isn't strong, and we don't want them to know that or feel that and therefore try and plug up the holes if you like. So, it can be quite tricky because it looks like we're being deceitful, and I'm sure that that's how they feel at times that we are hiding things from them. And in a sense we are... We dance around it a little bit because we have to. So, we're sort of having the discussion with one hand tied behind our back in a sense because, you just can't have that evidentiary discussion with people. And that's where I think people think that we might be sailing them up the river and feel very dishonoured and disrespected in those conversations because, we can't be honest.²³¹

Sometimes it's really an awkward conversation to have, because ... the lawyer is treading really cautiously because they don't want to provide the victim with too much information in case the matter proceeds to trial, and the lawyers' biggest fear is around their integrity, and how that conversation they're having around a plea offer, or charges, or their views, may or may not come up in a courtroom setting.²³²

²²⁸ WAS 1

²²⁹ WAS 1

²³⁰ WAS 4

²³¹ WAS 2

²³² WAS 3

A number of WAS participants gave the view that some lawyers deliver information in a way that makes it difficult for the victim to understand:

FF *...they can just drop it on someone, and then just keep talking, and you just see that person and you think, 'how can they possibly take all that in?' Like it's a shock, for the start of it, and then you can tell that, anything from there on, they're probably not even really taking in ...*²³³

WAS participants also felt that some lawyers treat victims in dismissive or patronising ways when victims ask questions or request more information:

FF *Some lawyers feel a bit threatened when people ask legal questions as well; I've seen that happen in manslaughter - murder/manslaughter cases where we're considering a manslaughter and the family have done their research and appear to understand it, so some lawyers can feel sometimes a bit threatened by that, 'Well, we're the lawyers here.' ...they'll be dismissive, a bit dismissive of people having done a bit of research, and yeah, not really acknowledging it, just again taking that superior kind of stance that, you know, 'We know what's best here.' ... 'We're the ones working on this case and you're merely a witness in this case, so it's not your case.'*²³⁴

*'Yes, yes, look, we don't want to overload you, and this is complex legal issue,' and it's like, well, actually, if you just break it down a bit, anyone could understand it. So, dismissive around wanting to not provide them with all the information they should be getting, or covering it up in that way by talking down to people as though, 'we won't give it to you because you're not going to understand, and we don't want to overload you,' and people ... some people have said, 'well, actually, I want to know',*²³⁵

WAS participants also noted that if victims do not receive sufficient information they tend to make assumptions about the basis for the proposed resolution, frequently concluding that a desire to save money was the primary reason for the resolution decision.

Rapport between lawyers and victims must be created prior to the consultation

WAS participants said that when consultations with victims had gone well this was often a product of the OPP having put time and effort into establishing rapport with the person long before the issue of resolution arose. In their view, building rapport over time made it more likely that the victim would feel comfortable with the OPP personnel involved in the case and develop trust in them:

FF *...[when] we've had a lot to do with them in the lead-up to that conference...we're in that situation where they do trust us and they do have a relationship already with us and so they're in a situation where 'Okay, well, let's leave it to the experts. You know what you're doing. I trust you. I understand that you wouldn't be having this conversation with me if there weren't issues. I didn't really love being cross-examined at the committal. I know it's going to be longer and harder at a trial. I get where you're coming from.' You know that kind of thing. But the relationship is really important, that rapport-building that happens leading up to that ultimate conversation.*²³⁶

WAS participants said that when consultations had not gone well, often this was because rapport had not been established with the victim prior to the conversation:

²³³ WAS 4

²³⁴ WAS 1

²³⁵ WAS 4

²³⁶ WAS 2

FF *Yeah, they're more trusting of that person if they can meet with them more...Feeling like they're part of the process, an important part of the process rather than just a barrister flying in for 20 minutes and talking at them and then running off.*²³⁷

In worst-case scenarios, according to WAS participants, the consultation about the resolution constituted the first contact between the victim and the OPP.

Variation between lawyers – different approaches

WAS participants reported observing considerable variation in how OPP lawyers in conduct victim consultations:

FF *Some are fantastic. Some are mediocre, and some are terrible.*²³⁸

*...there's a lot of lawyers here who do that quite well, but there's a lot of lawyers who don't.*²³⁹

WAS participants said the factors including the lawyers' individual personalities, communication skills and level of understanding of victims' experience impacted their capacity to conduct successful victim consultations. Some also referred to the differing cultures between internal teams:

FF *I think it really depends on who the team leader is, and the culture within their group. I think there are some really strong team leaders at this office, and you can see that strength filter down to their team, but there are some really jarring team leaders.*²⁴⁰

Some lawyers are highly anxious about communicating with victims

As noted above, WAS participants said that there was significant variation between lawyers' skill levels in dealing with victims, and that they viewed some lawyers as highly skilled in this regard. Referring to those who they perceived as less skilled, WAS participants commented that some lawyers genuinely cared about doing the right thing by victims but struggled to communicate with them effectively. The WAS participants acknowledged that, by their nature, resolution conversations were challenging interactions:

FF *...it's really hard working with grieving families.*²⁴¹

*Plea conferences can have the potential to be so uncomfortable, and I think lawyers are humans, like anybody else, and uncomfortable having conflict negotiation kind of conversations.*²⁴²

Some WAS participants said that lawyers could find the prospect of these conversations anxiety-provoking, as the following account illustrates:

FF *She's an experienced solicitor... she's come out of the lift and she's texted me, and I'm in here with the family, and she's texted me, '[WAS participant's name], can you come out and get me. I'm at the lifts.' So, I go out to get her. Well, she's nearly in tears. Her mouth's all dry; she said, 'I'm terrified. I'm terrified'. I said, 'why? They're just people. They're a family. Their daughter's been hurt. Imagine if one of your kids got hurt – you'd want answers'. 'Oh, I heard he's a real ball-breaker.' 'He's not*

²³⁷ WAS 1

²³⁸ WAS 4

²³⁹ WAS 3

²⁴⁰ WAS 3

²⁴¹ WAS 1

²⁴² WAS 3

– he’s just a very concerned father, just like your husband would be if something happened to your kid, yes? He’s very intelligent; he’s very articulate. So are you. He’ll ask you questions. If I can’t answer them, you can. You’re the lawyer. You know your stuff. You’re the expert in the room. It’ll be fine. It’ll be fine. Just breathe.’ So, I felt like I was dealing with a witness.²⁴³

WAS participants said that some lawyers became so nervous about speaking with victims that they could behave strangely, which made it more difficult for victims to feel at ease, and generally impeded effective communication:

FF *...they’re terrified...I think they’re so terrified of making a mistake and upsetting someone, that that’s ultimately what they end up doing.²⁴⁴*

Straight away, through tone and body language, [victims are] making assessment of what’s going on here. They’re not feeling that it’s a transparent interaction, so they’re getting elevated themselves. You can see it. Every victim is different, depending on where they’re at and who they are, but I certainly think it’s something that victims and family members attach, that victims can see, and I think that they would naturally go into, ‘what’s wrong with what’s happening now? What aren’t we being told? Why is this like this?’...in knowing some of the lawyers, I can see it’s just their anxiety, but I think a victim might interpret that as, perhaps, as a lack of trust, “what’s actually going on here,” and they can’t work out what’s going on.²⁴⁵

One WAS participant recalled a conference with a victim whose son had died, in which the lawyer avoided making eye contact with the victim throughout the meeting. This was readily apparent to the victim, who later told the WAS social worker how upset she was about it. The WAS participant said she raised the issue with the lawyer:

FF *She [the lawyer] did try and make eye contact after that, but she just really struggled. Some people just really struggle with grief and loss and some solicitors shouldn’t have those cases in my opinion because it’s hard.²⁴⁶*

Another WAS participant suggested that lawyers, particularly new lawyers, could benefit from more extensive training around communicating with victims, in order to ensure that they do not end up making mistakes that permanently damage their own confidence:

FF *I would rather that these things be put in place before they end up in a crisis, end up in tears, thinking they’re hopeless, can’t do the job, you know, and they come crashing down – I would rather that all that guidance and orientation, if you like, is set up so that that doesn’t happen, because you see people just never come back from that. That turns into, ‘I’m never going to speak to a witness again, because look what I did.’ So they avoid conferencing, avoid, avoid, avoid, avoid, avoid, avoid. And, that’s not helpful to anyone, particularly not victims.²⁴⁷*

²⁴³ WAS 2

²⁴⁴ WAS 2

²⁴⁵ WAS 3

²⁴⁶ WAS 1

²⁴⁷ WAS 2

Some lawyers are uncomfortable when victims display strong emotion

Some WAS participants remarked that many lawyers became uncomfortable if victims demonstrated strong emotion during conferences, and could struggle to know how to respond. WAS participants said that they felt that in these situations lawyers expected them to step in:

☐☐ *...[if] the complainant starts to get angry or show tears of emotion or whatever, the lawyer looks to you as in, 'do something,' and you're like, 'my role isn't to stop people from crying.' That's fine. It's okay for people to cry. It's okay for people to get angry, you know, but... I get that look...like, 'make them stop,' ...I can't make them stop.²⁴⁸*

...as soon as a victim cries, you get the whole table of people staring at you like, 'fix this problem,' and how, as social workers, we'll often just sit back, and then ... the level of discomfort in the room just hits, and they're looking at you like, "do something about this."²⁴⁹

The WAS participant quoted directly above noted that, from a social work perspective, someone crying is not necessarily understood to be a bad thing or a problem that needs to be solved. She described talking about this with a lawyer, and suggesting to him that if a victim starts to cry in a conference they simply be given some space to cry, and then when they are ready, the conversation can continue. She described the lawyer as being 'blown away' by this information; that it is ok to let someone cry. She said that he exclaimed to her, 'I can't believe something so simple, and yet, I had no idea, and I would've been that person who just kept talking...this is fantastic.'

Lawyers vary in their willingness to disclose information

WAS participants said that, just as lawyers' communication styles varied across the organisation, there was also variance in their willingness to divulge information to victims:

☐☐ *...in that case they wanted to know the summary of what happened because they didn't know much. And that solicitor was like 'Oh, no, no, no, we can't give you that, we can't give you that.' And I had to do a lot of advocating around that. And then we had a Crown Prosecutor come on-board and she was like 'Yeah, they can read it; I'll get it for you now and they can read it here.' So, we sat in a room and they read through the summary. So, there was no need for her to be so cagey around all that material. None of them were witnesses; they were family.²⁵⁰*

I find that the most professional, empathetic lawyers actually are really confident in their way of delivering comprehensive information, knowing that it's not going to impact down the track of a trial. I think sometimes it's really inconsistent between lawyers, of what they feel like they can and can't disclose in those conferences. It's really inconsistent.²⁵¹

There are differences in approach between the city OPP office and regional offices

One WAS participant talked at length about the different standards of victim consultation that, in her view, exist between the practice at the Melbourne office, and those at regional offices. She said:

²⁴⁸ WAS 3

²⁴⁹ WAS 4

²⁵⁰ WAS 1

²⁵¹ WAS 3

FF ...[in circuit matters] there's no real preparation. We don't travel up there to have a face-to-face conference and do face-to-face rapport building, and do court tours and remote witness facility tours with them; it all just happens on the day, on the morning that they're scheduled to give evidence.

So, I think it's probably really easy for the prosecution to make decisions on their behalf, because they're quite detached from the case and the person... Everything's just really on paper, versus in Melbourne, when you do have pre-committal meetings, sometimes post-hearing debrief, and things that happen in the middle – once that connection and rapport is established, you really have to treat conferences, and these plea conferences, with a lot of etiquette and respect. You don't necessarily have to do that if you've got no rapport with the person. It's quite easy, I think. Must be quite easy if you're a legal professional making these decisions in the courtroom that's quite removed from where they are. They're downstairs; you're upstairs; you may have met them that morning for the first time ever for five minutes.²⁵²

This WAS participant said that in her opinion, a particular region of Victoria where she regularly works has a court culture that is not inclusive of victims. The area she described is known to have a high concentration of social and economic disadvantage. She described a case heard in that area that involved a plea resolution being entered into without the victim being consulted at all:

FF ...the complainant doesn't even mind [that she was not consulted], because when you're from a disadvantaged, marginalised group of people, systems don't work for you. You've got no expectations of the systems at all. Employment structures, Centrelink, educations, nothing really works in your favour; your whole town is folding because of all the systems not working for you, all the public and private organisations folding. So, they say, 'thank you, see you later', and you think, it wouldn't happen in the city. When you're dealing with really, really marginalised and vulnerable people, it's a different process... you kind of get away with it, because that group of people ... aren't the ones who get on the Google machine and find a complaints drop-down box, and go on an Office of Public Prosecutions website, and make a complaint.

This WAS participant's comments raise an important point: a lack of complaint from a particular victim or particular demographic of victim does not necessarily indicate that a satisfactory level of service has been delivered.

The role of the WAS

WAS participants described their role in the consultation process as supporting victims to exercise their voice:

FF Lawyers don't like us to use the advocacy word because advocacy in social work is very different to advocacy in the legal area, but we, as social workers, we sometimes advocate for the victim or the family just around if they need more time to process something, if they have any questions. You know they might have explained something to us before but then they're suddenly in this room with, Crown Prosecutors and feeling a bit worried about voicing some things that they voiced to us before. So, we could reflect that and say, 'You know, such and such mentioned to me; she was wondering about this.' So, we'll kind of feed some of the victim's concerns to the legal team as well.²⁵³

²⁵² WAS 3

²⁵³ WAS 1

A number of WAS participants saw themselves as ‘translators’ between the victims and the lawyers, commenting that they ‘translate some of the legal jargon; we do a lot of that.... When lawyers use legal terms, so we will simplify it and help people to understand it layman terms.’²⁵⁴ The translation went both ways: they also saw themselves as helping the lawyers to understand victims’ individual perspectives.

Team work

A strong theme to emerge from the WAS participants’ interviews was their view that the consultation process tends to work well when the lawyers and WAS social workers work collaboratively:

FF *I think one of the things that I find really helpful is asking a solicitor, before one of those hard conversations, asking a solicitor to come down, spend ten minutes with me beforehand so we can work out a strategy, and those conversations then tend to be much more fruitful, much easier.*²⁵⁵

As this comment also shows, WAS participants found that the best approach to consultation involved lawyers and WAS social workers planning out their approach in advance. They suggested that when WAS social workers were pulled in at the last minute, consultations were less successful:

FF *When we don’t get notified until the last minute, and we don’t get a chance to sit down with the lawyers and have a pre-meeting without the victim and talk about ‘How can we communicate this?’ and for them to explain to us the reasons. And then we can assist them with doing that in a way that somebody’s going to understand. They’re not always going to be happy but at least we can try to explain in a bit more detail about why we’re not continuing.*²⁵⁶

*...it can be a bit of a mayday call from a solicitor that you [usually] don’t work with, or that you don’t know much about the file, or it’s new, or you’ve had no contact with the family, and they’re thinking, ‘I’m going to have a discussion around a plea resolution that’s not going to be to the complainant’s liking; I’ll just in the last minute bring in a social worker just to placate the group of people, to do something, whatever that might be.’ I don’t think they’ve even worked out what that could look like yet, but the most difficult conferences involving a plea are those last minute ones, where there’s no rapport ... As a social worker, you don’t even really have much of a role in those conferences anyway. Yes, because we don’t have the magic wand or the magic words at the last minute to fix things.*²⁵⁷

The participant quoted immediately above also said that these last-minute referrals tended to come from teams within the OPP that do not have consistent or regular contact with the WAS:

FF *...those team leaders ... They’ve been entrenched; they don’t understand the role of social workers; they kind of get it, but they don’t. It’s this really archaic view that we’re just there to make someone feel okay. So, you’re not included in the prosecution process until there’s a glitch, and that’s a plea offer that you’re probably going to accept, and it’s probably most likely going to be lesser charges, and the person’s probably going to be disappointed, then you get pulled in at the last minute. So, you get pulled in at the last minute, and there’s nothing you can really do, so*

²⁵⁴ WAS 1

²⁵⁵ WAS 2

²⁵⁶ WAS 1

²⁵⁷ WAS 3

you validate their idea that you don't really offer much, and it's a circle. It's really validating [of their view of social workers], and it's just horrible things to be part of, but you are not included from the get-go because [the lawyers think] there's no value in your service, and that view still exists.²⁵⁸

Some WAS participants thought that lawyers' negative attitudes towards social workers constituted a barrier to effective team work within the organisation:

FF *...there are 12 social workers and 300 lawyers here, so we are in the unenviable position of being the underdog, and not having a recognised skillset. So, you have to be very, very careful around how you deal with a lawyer, in relation to how they've handled or mishandled something, because you're dealing with ego; you're dealing with a profession that has a very clear understanding of where they fit into the food chain, and we have people ask us, people who've worked in this office for many years, ask us if we've got a degree to do what we do.²⁵⁹*

Conversely a WAS participant described a lawyer who, of her own volition, asked to shadow her for a day in order to learn more about the WAS' work. As a result, the lawyer went back to her team with a high level of respect for the WAS workers:

FF *I had a little junior soli shadow me for the day a month or so ago, and she just, off her own back said, 'oh, I haven't had a conference yet with a victim, and I haven't done this, and I haven't done that, and I'd really like to watch you do a court tour, and I'd like to just come down and play with you for the day, have a play date'. So, she went back, and it was a really busy day, like crazy, and we were just running all day, and she just, took my lead, and anyway, at the end of the day she went back up to her team leader and she said, 'oh, my God, I learnt so much today. Every single solicitor in this office should do that just for the day, one day ... I couldn't have learnt that in a million years without doing what I did today'. It should be mandatory.²⁶⁰*

Managing victims' expectations

Some WAS participants commented that victims can come into the prosecution process with unrealistic expectations about the strengths of the case. They said that in some cases victims' prior contact with the police can 'fuel' these expectations. Police were described as sometimes giving victims 'false hope' and being 'gung-ho' about the charges, which resulted in victims believing that the case was very strong. WAS participants noted that some informants do not have much experience of the court process, and as such the information they give victims about the likely outcome can be inaccurate. As a consequence, once the OPP review the case, the OPP lawyers may take a very different view, concluding that the case is much weaker than the informant had judged. Thus, from the outset, the OPP is in the position of having to deliver bad news and to try to rein in victims' expectations. Often, the victims will have developed a trusting relationship with the police, and an alignment of victims and police against the OPP can develop. One WAS participant observed that sometimes the informant will agree with the OPP when the victim is not present, but will keep up a façade of taking the victim's side when they are:

FF *...one of the things that we do find is that police will align themselves with a victim in a conference, but outside the conference, they will agree with us, and so that's very non-genuine, and we never call them out on it, and I don't know why. I think we should, but then that would destroy the relationship [police/victims], so that's probably why we don't do it.²⁶¹*

²⁵⁸ WAS 3

²⁵⁹ WAS 2

²⁶⁰ WAS 2

²⁶¹ WAS 2

This comment also illustrates a broader theme, which was that WAS participants suggested that the lawyers and social workers were reluctant to jeopardise the trusting relationship between victims and police. Some recognised how important the support of police was to victims. A number also noted that because victims often trust police, it can be very helpful to have the police involved in the consultation process about resolution decisions because their involvement can minimise victims' distress:

☐☐ *I find it really important to have the informant in the room, because the informant has had the initial relationship, taken the statement, been there at the really pointy end, when it was raw, and so there's quite a trust, usually... Sometimes those conferences are dealt with by the informant collecting the victim and bringing them in in the car, and having a chat to them about what this conference might be about, even though they know full well what it's about, but just warming them up, and sometimes that's a conversation that I'll have with the police officer. 'Look, this isn't going to go well. Can you pick her up? Can you have a chat to her about what this conference might be about? Not the detail, but just warm her up to the idea that ... because I don't want her coming in here and being shocked and distressed.' And, they'll do it, mostly, they'll do it, so by the time we get here, the victim's often well aware of why they're here, and then we take the discussion from there.²⁶²*

WAS participants explained that it is important to start addressing victims' expectations from the beginning of their contact with the OPP:

☐☐ *I try to ascertain people's expectations from the start and see where they're at when I first meet someone pre-committal mention or pre-committal because often then you can gauge what their expectations are. Sometimes what's been said by the informant, how much they know about the system and so on. And it's really hard because you don't want to be a dampener on the process really early on but you really have to explain to people early on that things are constantly being reviewed, everyone's going to do their best but we can never guarantee that we're going to get that "guilty" at the end of the process.²⁶³*

²⁶² WAS 2

²⁶³ WAS 1

7 Interviews with lawyers

Summary

The OPP lawyers who participated in this study observed that in their experience most victims accept the OPP's decisions. However, they acknowledged that in a small number of cases victims do not accept them. The lawyers also gave their views as to the factors that effective consultation requires. These included: that the victim feels heard and understands that their views will genuinely be taken into account by the decision-maker; that the victim's individual priorities are acknowledged; that the lawyer interacts with the victim in a personable way; that the lawyer gives the victim enough information to enable them to develop an informed view; and that there is proactive contact made with the victim prior to the consultation process. The lawyers gave many examples of how they attempt to implement these elements of effective consultation in their own practice.

All the lawyers interviewed expressed admiration for the WAS social workers. They conveyed that they valued the WAS team members' skills which they recognised as different from, and complementary to, lawyers' skillset. Echoing comments made by the WAS participants, these lawyers said that the ideal way to approach consultations with victims was for the lawyer and WAS social worker to work together as a team.

Consistent with what was revealed by the victim and WAS interviews, the lawyers recognised that victims can often come into the process with unrealistic expectations about what outcomes the prosecution could ultimately achieve. Some lawyers said that they tried to address these expectations from their first contact with a victim.

One lawyer said that there appears to be a different standard of consultation practice in the city compared with the regions, a point also made by one of the WAS participants.

When asked to identify any potential barriers to effective consultation with victims, some lawyers said that, while ideally victims should be given sufficient time to consider a plea offer and develop their own view, sometimes the reality of the court process means that this is not possible. However, they said that even if a plea resolution is made at the last minute and the court is putting pressure on the parties to make a decision, the consultation process can still be well-managed if the lawyer has done the groundwork in building a relationship with a victim and facilitating the victim's understanding of the case.

Many of the lawyers were open about the fact that they found consulting with victims challenging, and explained that managing the emotional dimension of these interactions was a difficult task. The themes that emerged from the lawyers' interviews are described in more detail below.

Victims usually accept the OPP's decision

The lawyers said that in most cases victims seemed to accept the OPP's decision, even if it was not what they ideally wanted to see happen:

FF *...like I can only think of, off the top of my head, two times where discontinuance has been, like we've gone to the point where we maybe recommended discontinuance against the views of the victims. Most of the time the victims are brought along and often there's, even if they're against discontinuance at the start of the process, they're not unhappy. Unhappy's not necessarily the right word; they're understanding of the outcome by the end of it.²⁶⁴*

²⁶⁴ L1

However, this lawyer acknowledged that it was difficult to know whether the most vulnerable victims had felt adequately supported through the process, as they were likely to have faced barriers that prevented them from voicing their views:

FF *...we do quite well at looking after the most vulnerable people but probably they also don't have the strongest voice so they don't complain as much either.*²⁶⁵

A small number of victims are dissatisfied

Many of the lawyers reported that in a minority of cases the victim will be unable to understand or accept the OPP's position in relation to a resolution decision. In these situations they said that the victim could remain extremely dissatisfied with the outcome. One lawyer described a case involving an accused person who had a significant cognitive impairment. The OPP took the view that a discontinuance was appropriate, given the issue of the accused's capacity, but the victim in the matter strongly disagreed:

FF *...the only outcome that we assessed as a possible outcome would be an unconditional discharge if all of the evidence was accepted after a trial and it didn't seem to be in the public interest to run a trial for an unconditional discharge and the victim in that matter couldn't understand; I wasn't able to explain to that particular victim the fact that that was going to be the only outcome available under the legal system. She wanted him to go to jail or do community work but that wasn't an option.*²⁶⁶

The lawyer explained that the psychiatric report obtained by the defence and the one obtained by the OPP both confirmed that the accused's intellectual disability was such that he would be unfit to stand trial. However, the victim did not accept this evidence, and was convinced that the accused was 'faking it.'

Other lawyers talked about victims being so distressed that it becomes difficult to explain the full legal dimensions of the case to them:

FF *Explaining to them my view based on the law and if it seems like, to them it's an unfair law or it's a technicality [they have a] perception that they're basically ... they're jumping through this loophole that is an unfair loophole in law, that kind of thing, that's often really hard to try and explain even though, you know, the law there is generally perfectly rational and there are reasonable reasons for why we have the laws that we have, trying to explain that to someone who is upset and is being told news they might not want to hear, that the rationale for that kind of law and I guess the bigger picture thinking isn't something that is going to be necessarily well received.*²⁶⁷

There have been ... emotional, fragile reactions. And some are angry. They're furious. They hate you and everyone else, no matter what you say and do.²⁶⁸

Features of consultation processes that are experienced positively by victims

Interviews with the OPP lawyers revealed a number of common themes in how lawyers described an effective consultation process.

²⁶⁵ L1

²⁶⁶ L1

²⁶⁷ L2

²⁶⁸ L5

Victims feel heard

The lawyers who participated in the study agreed that it was crucial to ensure that victims felt heard:

FF *Generally, I seem to think that if we explain it well enough in an understanding manner, and answer their questions as much as we can, then generally my perception is - I hope it's not wrong - that they do come away feeling that it's okay. It's when it's done badly that it all falls down, where they feel like they haven't been heard. We've got to give them a chance to be heard. So they've got to say all the reasons why they think it should go ahead, or what the problems are. So they need to be heard. We need to be sympathetic and listen properly, not just say well this is the law and that's it. So if they feel they've been heard, I think it helps. If they feel we've explained it to a standard that they can understand that there might be a reason - even if it seems unfair at times, which the law can be - I think that makes a difference.²⁶⁹*

Obviously, when there's disagreement, at the end of the day this is going to be a decision made by someone above me and saying, 'I want to make sure that when I talk to them that I put your view to them in a fair and proper way' and so I try and put together a sentence, a paragraph, whatever's appropriate depending on what their view is and say, 'this is what I intend to tell them is your view; are you content with me putting it in that way?' and letting them know that their voice will be heard through the process and that I will be putting their voice to the ultimate decision-maker, being the Crown Prosecutor or Director, whoever, in hopefully what they feel is a fair and proper way...When I disagree with an argument I'd want to make sure that I'm putting that argument fairly and not in any way tarnishing that argument with my subjective disagreement with that argument, so whether I write it out or whether I just kind of repeat something to them and say, 'look, this is how I understand what you're saying and this is what I intend to tell the Crown Prosecutor about what you had to say. Have I understood you?' Maybe if it's a long one I might write down some dot points but basically, 'have I understood you and is what I'm saying now sounding like what your views are?' Yeah, and I guess through that also, that makes them feel understood as well so it's not in one ear and out the other but, 'I've taken on what you said and running with it.'²⁷⁰

While the lawyers made it very clear that the decision to discontinue or accept a plea offer remains the responsibility of the OPP, many emphasised that victims' views nonetheless carry weight. Indeed, some said that in certain circumstances, especially in sexual offence cases, a victim's views might actually be the determinative factor in whether a matter resolves or not:

FF *... often where I find that I've been successful in communicating the risk to them and they've really understood that, I'm very comfortable almost adopting their view as my ultimate recommendation because for us, each individual case is not so important whether we get a guilty outcome or a not guilty outcome; we're really there, providing a service to the victims and the broader community and if a victim's expressed a strong view, understanding the risks, it's my view that it's usually in the community's interest to go ahead with the case or to resolve the case depending on what the victim has to say so actually they're pretty influential in most cases...I feel I've become quite good at explaining the process to them and I feel that when I explain the process to them and they give me an informed view it's pretty hard to go against that view most of the time.²⁷¹*

²⁶⁹ L5

²⁷⁰ L2

²⁷¹ L1

... I've had some times where I've thought if the victim wants to pull this I'm happy to pull it; if they want to run it I can't see any reason why I wouldn't run it so I think where I've been kind of sitting on the fence and kind of just where I've really gone into a conference and just thought I'll do whatever you want so there are times where I haven't necessarily taken a view and could see the merit in both views so, yeah, each conference really is quite different.²⁷²

Lawyers aim to provide victims with an individualised response

A number of lawyers commented that they tried to tailor their approach to the consultation according to the specific needs of the individual victim:

FF *Sometimes tailoring it to what you know [about them]. You mightn't know that much, but tailoring it to what you think their specific needs might be. Obviously I talk very fast, so I try and slow it down and make it more simple, if I think they might need that. Or if you have a complainant or victim that's very well educated, then not dumbing it down, because then they'll feel patronised.²⁷³*

The lawyers also said that they tried to get a sense of victims' individual priorities, and to address these in the consultation process:

FF *... everything's kind of case by case, when you go in to see a victim, hopefully you've got some idea of where on that spectrum they sit so you can tailor your advice, I call it, for want of a better word or your conferencing of them to suit what they're kind of looking for in terms of what, to them, is going to be a positive outcome so, just very much case by case and I guess trying to have some understanding of what, hopefully from early conferencing what your complainant is looking for in terms of an outcome.²⁷⁴*

Lawyers also demonstrated an awareness that victims can seek a range of different outcomes from a prosecution. Their comments are consistent with the research findings about victims' justice needs or interests, as well as themes that emerged from the victim interviews in this study revealed. For example, one lawyer noted that prevention is a key aim for some victims:

FF *With [sexual offence] victims, often it's important to them to know that in coming forward - it's not just what happened to them; they're trying to prevent it happening to someone else. And it's very brave of them to come forward in the first place. So you can say to them, 'it's very brave of you to come forward in the first place, and I know we haven't got the outcome that you wanted for yourself, but you've probably prevented this happening to someone else down the track because they will have a conviction against their record; everyone will be able to see forevermore that they did this,' even though it may not be the whole thing that they wanted... You get a lot of women that just want to stop it from happening to someone else.²⁷⁵*

Another noted that many victims primarily want to see the offender acknowledge the offending:

FF *There're a significant amount of sex cases where they don't really mind what happens with the sentence; they just want acknowledgement and so you might say, 'look, he's probably going to get a fine or a bond or something.' [the victim will say] 'No, that's fine, he put his hand up, he pleaded guilty, I walked away happy.' So in terms of working, discussing a plea offer, you say, 'look, he's offering to plea to something less but he's putting his hand up, he's acknowledging he's done something,' and if you know that that's something, that's really what your victim's looking for then I think that's important to know when having that conference with them.²⁷⁶*

²⁷² L2

²⁷³ L5

²⁷⁴ L2

²⁷⁵ L5

²⁷⁶ L2

It was also acknowledged that, for some victims, seeing the offender punished was a key priority:

FF *But then you have people that want justice in the form of for them to be locked away.*²⁷⁷

Lawyers aim to adopt a personable demeanour

Both victim and WAS participants raised the issue of OPP lawyers' demeanour; that is, whether they were warm towards victims or whether they were more clinical and detached. The lawyers also talked about this issue. One lawyer stated that he tried not to be impersonal:

FF *I don't know how others do it but I try not to be impersonal with my victims and I try and make an effort in cases where there's family violence or sexual abuse or severe trauma to not resolve matters without meeting the victim and talking to them face-to-face.*²⁷⁸

Similarly, another lawyer said, 'I hope I'm never super formal and detached. I try not to be.'²⁷⁹ However, she also said that she felt that, as lawyers, they need to retain a level of detachment in their demeanour:

FF *...we have to present the legal side of it, and we have to be a bit more detached... Because we are the person presenting the worst bit. We're the ones having to say we've looked at this case and we say that there's not reasonable prospect - we don't put it that way, but we can't proceed because of the law.*

She said that in this respect the lawyers and the WAS social workers play different and complementary roles (a theme that is explored in more detail in below):

FF *So they [the WAS] are able to text them and be a bit more informal, and feel that they've got - while we absolutely work together, they're slightly different roles. So they can fill the gaps in if we are a bit 'so we've got to talk about the law here, and unfortunately this is where we're at with this and that.' They can be far more on the emotional side all the time. So they can ring them just to check how they're going. We won't ring them - I mean sometimes I will check to see how they're going, but generally we won't ring them for that reason. We'll say "we're ringing because we just want to tell you about court, and this is what's happening next. You know, just want to make sure you're travelling okay because we've got court soon." But WAS can call them just to see how they're going. So I think that's important, to have both of that. Otherwise it just seems - because **we're not their lawyers**, as such. I don't try and emphasise that, but I think that can be difficult. But I think WAS helps breach that gap. So it at least feels like we're for them. [emphasis added]*

Interestingly, part of the reason that this lawyer felt that it was appropriate to maintain a level of emotional detachment from victims was the fact that OPP lawyers do not act for the victims. She implied that it is important to maintain this distinction when lawyers interact with victims.

Another lawyer commented that sometimes victims expect a level of emotional support from the lawyers that exceeds the limits of their role:

FF *And it's hard for us because you know at the end of the day we're lawyers, we're not there to emotionally support them so to speak... And sometimes I've actually said, 'I'm not a social worker. That's why we have our social workers here to support that side with you. I am here to explain the legal side of things and how it goes through the court system.' And I guess I've had to explain that sometimes because they do treat you sometimes as a counsellor and offload everything which necessarily is not information I require.*²⁸⁰

²⁷⁷ L5

²⁷⁸ L1

²⁷⁹ L5

²⁸⁰ L3

As we saw, a number of WAS participants thought that, particularly in sexual offence matters, it was important for lawyers to tell victims that they believed them. One lawyer shared this view:

FF *I think it helps to say, 'we're here because the police believed you, and we're here because we believe you. But, having said that, we have to prove to a very high standard - beyond reasonable doubt,' and talk about all of that. To keep reassuring that we're here because we know this happened to you. Not just that we believe your story, but that we know this happened to you. But we have to prove it, and that's where the problem lies. So that validation, maybe. So we keep reiterating that. It's not that we don't believe you, or not that it didn't happen. We know it did, and that's what makes it hard. But we can't prove it.'*²⁸¹

However, another lawyer said that he was uncomfortable using the words 'I believe you':

FF *Well, I suppose whether or not we believe someone's really got nothing to do with it ... sometimes victims will be comforted by us saying we believe you and I know some of the social workers use that phrase, 'we believe you'... I don't say 'we believe you' to a victim. I think that's a bit misleading. I think we would say that we've come to a view that there's no prospect of a conviction and even though the case looks quite strong there's evidence that it's likely to be ruled out.'*²⁸²

Lawyers differed in whether they thought it was appropriate to offer an apology to a victim who was unhappy with an OPP decision:

FF *I never apologise for a matter being discontinued because I feel it's going against what the Office - the decision the Office has made and the Director has made. And acknowledging that would mean that we're apologising for the decision of the Director.'*²⁸³

*I always do. I say, 'look I'm really sorry, but this is the decision that's been made, and this is why. I can understand that it's really hard'. Because in the end, even though we agree with the decision, we're sorry we had to make it. So I see no problem with saying, 'I'm really sorry that this is the outcome. But unfortunately, this is the outcome we have to have, because of the law and all these factors.' I think it's important to say sorry. Not that it changes what our decision is, but we're sorry that there isn't enough evidence that we can proceed. We just say, 'look, I'm really sorry that this is what we've had to do and where it's come to, and we know that's really hard for you. We wish it was otherwise.' I think that's not - I hope that's right. I think there's no problem in saying that.'*²⁸⁴

Lawyers give victims enough information to allow the victims to develop an informed view on the issues at stake

Lawyers' comments revealed that they take their responsibility to provide victims with information and, to the best of their ability, to ensure that they understand it, very seriously. Some talked about the importance of putting the victim in the position where they can provide an informed view:

²⁸¹ L5

²⁸² L1

²⁸³ L3

²⁸⁴ L5

FF *'Usually at that conference I do my best to allow the victim to give me not just their view but their informed view so we spend a lot of time talking to them about the process that's involved in a trial, how long things are going to take, try and give them a bit of an understanding as to what will be involved if the matter goes ahead and what the difficulties are if the matter goes ahead.'*²⁸⁵

*... it's hard to get someone to give you a view about something unless you kind of give them enough information to form a view, right? Otherwise it doesn't really mean anything to them.'*²⁸⁶

However, a number of lawyers commented that this task could be very challenging. They explained that it is not easy to explain complex areas of law to people who do not have legal knowledge or experience:

FF *...where we come into conflict with victims on that point is that we bring a lot more experience to the table as to what tends to work and we have a lot more knowledge about things like the rules of evidence and what matters are going to be allowed to be brought in in front of the jury and the victims. They don't have that legal knowledge and when we fall into conflict ... it's when they've got a different view ... they don't have an accurate view as to how the court's going to treat their evidence and sometimes it's just impossible to get that point across in the conference. Because, when you're consulting them you want them to have an informed view and you try and get that across to them, but sometimes that's a very hard thing to communicate to people... Victims don't know the process. Usually it's their only time being a victim.'*²⁸⁷

*...in most circumstances victims or families aren't going to have a very good understanding of the charges that we're going through so in some instances you'd be explaining the differences between charges or explaining with reference to maximum penalties or trying to pick out the element that is in issue.'*²⁸⁸

A number of lawyers said that the main concept they try to emphasise in conferences with victims is the notion of risk. They want victims to understand that there are few certainties in a trial process, and that therefore the task of considering a plea offer involves weighing the certainty that a plea represents against the inherent risk of a trial:

FF *...trials are about, as much as anything, a risk management process and if we run a trial to completion we could always lose the case completely, and if we accept a plea to a lesser charge...we might be sacrificing what could ultimately be a stronger penalty at the end of the case. So the conferences are a lot about trying to explain that risk to the victims and then trying to get as informed view from them as possible as to what they want to do, making sure that they understand the risk.'*²⁸⁹

*I think the uncertainty of what the outcome will be, even when you think the case is reasonably strong, it is something that is worth telling people. In relation to a plea, it's a big, big part of why a plea might be desirable.'*²⁹⁰

²⁸⁵ L1

²⁸⁶ L4

²⁸⁷ L1

²⁸⁸ L2

²⁸⁹ L1

²⁹⁰ L4

The lawyers' view that trials are inherently uncertain sits in stark contrast with the views expressed by some victim participants who believed that their cases were unassailably strong or 'black and white'. This contrast may help explain the difficulties lawyers face in trying to assist victims to form a more nuanced view of the strengths and weaknesses of the case, and with the risks of proceeding with a trial.

Another lawyer commented that the duty to inform victims does not end after the decision is made. She thought that it was important to give victims the opportunity to keep asking questions beyond this point, to ensure they are able to fully comprehend the reasons as to why the matter has progressed in the way it has:

FF *Give them time. And to follow up, and not say, "that's just the end of it." So if we have a conference, say, about a plea offer or a discontinuance, that's not just the end of it. You see them again and because always we're getting their opinion first, then it goes to the Crown Prosecutor or director and a decision is made, then it goes back to them. So you need to go back again and say, 'unfortunately, this is the decision that's been made, like we talked about. And these are the reasons.' Have that follow up, 'you can call us again if you need to. I understand there will be more questions, because we're giving you a lot of information all at once and it's hard to process; feel free to call us again straight away, or if you process, in a day or two.' That doesn't have to be the end of it.²⁹¹*

This lawyer also talked about the importance of not taking the fact that a victim has not asked questions as an indication that they have understood:

FF *...if they have got a cognitive impairment, low IQ, English isn't their first language, cultural differences - any of those sorts of things that might make it harder for them to understand. Or that they mightn't ask you questions because of cultural differences. So they might go away not understanding. It's in their culture not to ask someone in authority questions. You want to try and be aware of that, so you can give more explanations or let them know that they can call you and talk to you.²⁹²*

A number of lawyers commented that when consulting victims it was important to allow them to have enough time to consider the information, to form their own view and to have the opportunity to ask questions, as the following comment illustrates:

FF *I'd be hesitant to get someone in here and force them to make a decision on the spot. It might be that they have an immediate reaction and go 'this is what I want' because they've been thinking about the case a lot and they're wishing it would go away and the prospect that that might happen is fantastic, but it might also be that they aren't really sure and in that case I'd be more than happy to say, 'well, I'm happy if you want to have a bit of a think about it, if you've got more questions, if you think about it afterwards and think that you should ask something or there's something you're not sure about and you need to clarify, we can talk to you again, but if you just want to have a think about it, you can take over the weekend or call me next week.'²⁹³*

There are limitations in disclosing information to victims who are also witnesses

All the lawyers who participated in this study said that when the victim was also a witness they had to be very careful when providing them information with about the strengths and weaknesses of the case to ensure that they did not improperly influence their evidence. They said this could be a difficult exercise:

²⁹¹ L5

²⁹² L5

²⁹³ L4

FF *That can be a bit tricky sometimes because sometimes the problems with the case are evidentiary and if you bring those to the victim's attention then you'll end up coaching their evidence. Where possible we can go into some detail but sometimes you have to withhold a bit of detail and get their views as best as we can. Because our first duty is not to tell the victims. The best way to handle it is to have a conference with them afterwards, after the decision has been made and then go through the reasons for discontinuance with them or plea resolution. There is a lot you can talk to people about evidence but you can't talk to them about anything that will affect their own evidence or anything that will cause them to improve upon their evidence so, yeah, it is tricky.²⁹⁴*

I think the difficulty for solicitors is you're dealing with someone who's a complainant and potentially a victim, but you're also dealing with someone who's a witness and that leaves you with a really fuzzy line between telling your witness about evidence and ensuring they have enough information that they can make an informed decision about what you're putting before them...Yeah, it's a constant minefield, I think this is the greatest area for disaster or that's the greatest risk for us.²⁹⁵

... there's a tension between their role as a victim, having some interest in the proceeding and their role as a witness...you've got to be conscious that when you're speaking to them you're also speaking to them as a witness so you don't want to be influencing or coming even close to influencing what their evidence is going to be.²⁹⁶

Some lawyers also said that when a victim's credibility was an issue they tended to withhold this assessment to avoid causing distress:

FF *I guess in relation to nollies, you mightn't tell them the whole reason why it's not proceeding, because that might damage them further...I've had cases where material has been released in their medical records. I had one in particular I remember the material that was released from her treating psych said that she exaggerates and is a compulsive liar. So the minute a jury hears that, you've got no reasonable prospect of conviction. But you don't want to put it in those direct terms: 'you're treating psych said you're a liar.' Or you exaggerate... They might feel pretty bad too, if they feel like they've brought down their own case...But as I said, usually there are other factors that you can point to and be a bit vague in, while still hopefully giving them enough of an explanation that they understand where it is. So sometimes it's not those reasons; it's limitations in the law, or the evidence itself. But sometimes you do have to be a little bit vague to protect them.²⁹⁷*

Early, proactive contact between lawyers and victims is important

Echoing comments made by WAS participants, the lawyers commented that consultations with victims over difficult decisions such as discontinuances or plea resolutions tended to be more successful when they occurred in the context of rapport having already been established with the victim. Therefore, they suggested that best practice was to initiate contact with a victim early on, long before these issues arose:

FF *I think in an ideal world, with every case as soon as a solicitor's allocated a file it would be useful just to have a quick 20-minute face-to-face discussion with a solicitor and a social worker. I think*

²⁹⁴ L1

²⁹⁵ L2

²⁹⁶ L4

²⁹⁷ L5

*that would be the best practice just to build that contact in. We've got it in our practice guide that we'll send a letter off but a letter's useless really, I think, a letter and a brochure and that really is a 'tick box' way to contact the victim.*²⁹⁸

These comments also align with those of the victims, who expressed a preference for telephone and face-to-face contact rather than written communication alone.

The WAS

All of the lawyers interviewed expressed high praise for the WAS, saying that they were 'invaluable' and 'fantastic'. A number of lawyers said that it was their strong preference always to involve a WAS staff member when consulting victims. A strong theme that emerged from the lawyers' comments was that they saw the WAS as playing a different and complementary role to their own. In particular, they recognised that the WAS were skilled in addressing the emotional component of an interaction with a victim, a skill that, in their view, lawyers could struggle with:

FF *And also helping deal with the emotional aspect as well. Invaluable in - especially when you're talking to at-risk victims that you know are very fragile. So you want to be sure that they're safe. It's helpful too because we're not experienced in that sort of area. Over the years, I've had some very fragile complainants and victims. So when you're dealing with them, it's reassuring to know that you've got the social workers there who are able to pick up on cues you mightn't, and to know how to put some safety things in place.*²⁹⁹

*They're assisting us with building a rapport with the victims. They're taking a bit of tension out of the conferences as well ... it's almost in their training and part of their skillset but like if a victim starts to get emotional or angry they've got the skills to try and get the conference back on track, point them in the right direction if they've been unhappy in a conference.*³⁰⁰

*... I can use them as somewhat of an emotional guide. I think that if things are going badly or if people are particularly upset I often rely on them to have a better understanding of how to guide a conversation or whether silence is perhaps the most appropriate response, so I guess I use them as somewhat of an emotional signpost of appropriate ways to react and appropriate ways for me to respond, and I mean obviously we all have some level of human empathy and will try to respond and react in ways that we think are appropriate but in these particular types of things, having someone who's been trained in being able to deal with grief and...trauma's the word I was looking for, going through this trauma and kind of reliving it all, having that expertise to help guide me through that is something that I lean on a lot so I think that's probably the most important.*³⁰¹

A number of lawyers also saw the WAS as playing a 'translation' role: helping the victim understand what the lawyers are saying, and helping the lawyers understand victims' individual perspectives:

FF *...they're the interpreters; they are someone who's sitting in the room without a legal background. They are very good, the ones here, at slowing us down and stopping us and turning to the victim and saying, "Did you understand what was said?" They play a very important role for us as solicitors, in making sure that we have understood what the victim's had to say and vice versa.*³⁰²

²⁹⁸ L1

²⁹⁹ L5

³⁰⁰ L1

³⁰¹ L2

³⁰² L1

*I think for me it's really helpful to keep my jargon in check and to slow me down and to kind of signpost to me what I've done, what I've explained in lay person terms well and what I maybe haven't.*³⁰³

*I've always found that useful, because they can help in so many ways, but also cut down the lawyer speak. So when we are being unapproachable and saying things too much in lawyer terms, they can really break it down and go, 'what they mean to say is,' and put it in really simple terms. I mean we try and do that, but of course, social workers are better at doing that.*³⁰⁴

One lawyer said that the presence of WAS staff members in a conference helps the victim to feel that they have been genuinely heard, rather than listened to in a merely perfunctory way:

☐☐ *The risk with the whole system for a victim I always think is you're a bit like a tick box exercise – 'I've consulted you and now we've had your views and we've taken them into account and now we'll go off and do whatever it is that we want to do and we just listen to you.' I think the social workers help ensure that the victims leave the conference feeling they've been listened to and their views are going to be taken into account.*³⁰⁵

The lawyers also said that they had learned a lot about effective communication from the WAS:

☐☐ *I think I've learned a lot from being around the social workers and seeing how they do things and even socially discussing things with them and kind of picking up some tips and tricks.*³⁰⁶

*I've been working with [WAS social worker] for a really long time. She is brilliant at this. And [second WAS social worker]. I think I've learnt a lot from [WAS social worker], in doing this.*³⁰⁷

One lawyer said that something helpful he had learned from the WAS was the value of allowing silences during conferences to take their course:

☐☐ *...the biggest thing in not necessarily just staring at them and waiting for a response but kind of understanding that if they don't think a response is necessary at that point in time, just allowing silence to kind of hang and sometimes that that's okay, and I think that these are the things from working with them much more closely on the floor and more socially and kind of discussing these aspects of their role with me even just around the lunch table, that's been really eye-opening I think.*³⁰⁸

Team work

As mentioned above, some lawyers expressed the view that best practice involved making contact with victims early. That way, if a consultation about a resolution was required down the track, a level of rapport would already exist. Lawyers tended to see that involving the WAS in this process of early intervention and rapport building was essential:

³⁰³ L2

³⁰⁴ L5

³⁰⁵ L1

³⁰⁶ L2

³⁰⁷ L5

³⁰⁸ L2

FF ...making sure that everyone's together and we're all a team and we're all working off the same sheet in terms of how we're going to help these people through the process and all involved in that early contact so we're all known to the complainant and developing trust between us as a team rather than everyone, new people popping up all the time I guess.³⁰⁹

Victims' expectations

Lawyers commented that some victims come into the process with unrealistic expectations about their own role and the OPP's role:

FF ...my gut is that they've seen TV and in American TV shows the victims pull it and that's the end of it and I think in a lot of cases victims think that they can, that it's their case to pull rather than it now being really out of their hands and we can do whatever we want, to some extent... I think when they come in to see us...a significant number of victims would be of the understanding that this is their case and we are their lawyers and I think that that distinction in terms of our role and who is running the case, so to speak, is something that it think victims will come in with a very different idea compared to what the reality is.³¹⁰

Some lawyers said that they tried to manage victims' expectations from the start of the process:

FF And I tend to, with my victims, plant the seed early on. Whenever I meet with them I say, 'This case will be reviewed at every step of the process so it's reviewed by the Director as to whether it continues from each point'... it's all about managing their expectations...So, on that note I also manage that we may get all through the process and then not get their outcome they want, so they need to be managed in relation to that as well.³¹¹

The police did not feature as much in the lawyers' interviews as they did in those of the victim and WAS participants. However, one lawyer did comment that victims and the police will sometimes be aligned in their views, which can make consultations particularly challenging:

FF ...one of the other factors that can add to it is what side Victoria Police fall on as well and what if you're sitting in a conference and you're saying one thing and then you've got an informant saying to the victim, "no victim, you're right, don't listen to that OPP bloke, he's really soft. He's just buckling under pressure," or whatever. That can add another layer of complexity.³¹²

Differences between the OPP's city and regional offices

Echoing the comments of one of the WAS participants, one of the lawyers wondered whether victims whose matters are dealt with at regional courts via circuit listing may receive a different standard of service from the OPP compared with those whose matters are heard in the city. She stated:

FF ... things often resolve at circuit at the last minute and the people that are there are the solicitor who's probably not got conduct of the file, they're someone who's just there to help run the circuit. It will be a barrister who hasn't looked at it until quite close to the circuit as well because they're briefed for the whole block...I just don't see how you can offer that same level of like support and service for those kind of matters, I think it would be quite difficult. And where I have had a regional matter that resolved...it was even difficult resolving that one in some ways

³⁰⁹ L2

³¹⁰ L2

³¹¹ L3

³¹² L2

because we'd spoken at the committal and explained, 'well this is what the committal involves and here's what you'll learn to do and this is the kind of procedural stuff,' but then there was a plea offer on the day of the committal and so – I wasn't there for it, I was in Melbourne and there was a barrister calling me to say 'hey, we've got an offer, can you speak to a Crown Prosecutor' and then me going to a Crown Prosecutor, getting the barrister on speaker phone and then us having a chat about it, but really that left it up to the barrister and a social worker who wasn't from WAS, it was a local social worker who did know that complainant quite well... it was much more thrown together than it would have been if it had been here I think.³¹³

External pressures

While the lawyers agreed that ideally victims should be given enough time to consider a plea offer and develop their own view, they also said that sometimes the reality of the court process meant that this was not possible:

FF *In the court process there's often long delays and then everyone's there and everyone's at court and we're about to bounce the ball and run the case and then a last minute offer comes in, like a lot of offers come in at the court door and that's when there's pressure to do things more quickly. Often we'll have a judge who wants to start a trial and who won't give the parties time to go through the process of consulting the victims as thoroughly as you'd like to so that's where, I guess, there can be problems.³¹⁴*

However, this lawyer also said that even when a last minute offer is received and there is pressure to make a decision, this can still be well-managed if the lawyer has done the ground work in building a relationship with a victim and facilitating the victim's understanding of the case:

FF *If a solicitor has prepared properly it shouldn't be a problem because if they conferenced the victim and met with them and discussed what was involved in the trial it shouldn't be too hard to then get the victim along.³¹⁵*

Another lawyer commented that the courts are now more willing to allow time for the victim to be consulted:

FF *...these days, the courts are much better in knowing that we have a process where the victim is involved. Previously, it was much harder because you knew you wanted to conference the complainant, but there was no way to say the court, like we can now, 'we have this system and we have to speak to the victim, and that may take some time.' Because you can't get them instantly the minute you want them. So having that in the Victims' Charter now, and the courts knowing that, and defence knowing that, makes it a bit easier. Before you were trying to do it, and you couldn't say to them - if the court wanted to know straight away, you had to do what the court wanted, and still try and speak to the complainant.³¹⁶*

Consulting with victims is an inherently challenging task

Some lawyers said that they found the process of consulting victims about discontinuances and plea resolutions very difficult. One stated, 'it's probably one of the hardest things we have to do.'³¹⁷ Another said that the process was particularly hard in cases of discontinuances:

³¹³ L4

³¹⁴ L1

³¹⁵ L1

³¹⁶ L5

³¹⁷ L3

FF *So there's always some positives that can come out of a plea, in which case it's a bit easier. As opposed to a nolle or a discontinuance. That's always difficult. Because they're getting nothing out of that. They've gone through a lot already, and you're telling them that the person is going to walk free, and there will be no record of it.*³¹⁸

Another lawyer admitted that she found managing the emotional dimension of the consultation process challenging:

FF *It's difficult for us. We don't specifically get any training in relation to managing that kind of situation. At the end of the day we're lawyers, we're not social workers, so it's definitely a difficult part of the job and that's why we have our Witness Assistance Service. But it's hard managing that kind of emotional side of things and I guess it's more of an experience thing; the more conferences that you do the more you work out what works and what doesn't.*³¹⁹

The same lawyer went on to explain that she can be scared of saying the wrong thing to victims, a theme that also emerged in the WAS participants' interviews. She said:

FF *I think you're always at risk of saying the wrong thing... You're dealing with different people with different personalities. You only know them briefly; you haven't known them for long. And the risk of saying something wrong is high and that happens all the time.*³²⁰

Another lawyer's comments conveyed that he was acutely conscious of the trauma that victims can experience throughout a criminal proceeding. He said that he feels deeply affected on a personal level when a victim endures the process and the result is an acquittal:

FF *...the court process is really traumatic for victims. I can't overemphasise how hard it is to give evidence and to talk about really traumatic experiences that they've had, whether it involves losing a loved one in a violent attack or something that's happened and there was a child or being a victim of violence or sexual abuse it's really hard for them to relive it, and it's also quite traumatising for the people who have to try to walk them through it as well and most of the time when we would settle cases for lesser charges we're trying to do the best thing by them taking into account what is likely to happen to them throughout the court process. It's devastating to lose some of these cases. It's not ... nobody walks away from them feeling like it's another day at the office so we try and get an outcome for them if we can.*³²¹

This reflection contrasts highly with the comments of some victim participants, who felt that OPP lawyers were not personally invested in their cases.

³¹⁸ L5

³¹⁹ L3

³²⁰ L3

³²¹ L1

8 Recommendations

This section of the report outlines the key issues impacting on OPP lawyers' ability to communicate effectively with victims, as identified by the findings of our research, and sets out the CIJ's recommendations in response to these issues.

Identifying best-practice for communicating with victims throughout the course of a prosecution and during consultations about resolution decisions

Previous inquiries have called on OPP lawyers to 'practice good communication skills' in their interactions with victims.³²² However, as far as we are aware, exactly what constitutes good communication skills in this context has not previously been articulated. The findings of this project provide a basis for identifying the elements of best-practice communication with victims throughout the course of a prosecution as well as in the specific context of consultations about resolution decisions. We have drawn on these findings to create a proposed best-practice guide to communicating with and consulting victims, which is set out in part 9 of the report. The purpose of the best-practice guide would be to set internal standards regarding communicating with victims, and to provide practical guidance to staff on how to meet those standards. It would be desirable for the OPP to consult with victims and OPP staff on the CIJ's proposed guide before finalising the document.

Recommendation 1

The OPP should document a best-practice guide for (a) communicating with victims throughout the course of a prosecution and (b) consulting victims about resolution decisions, reflecting the principles and practices outlined in the *Best-practice guide to communicating with and consulting victims* (included at part 9 of this report)

Building a consistent best-practice standard across the OPP

The findings of this project make it clear that the OPP can and does consult effectively with victims of crime. However, while there are OPP lawyers who are extremely skilled practitioners who conduct consultation processes very well, our findings also suggest that some lawyers within the organisation do not communicate with victims with a high level of skill. In this respect our project confirms the findings from previous studies, suggesting that the challenge for legal sector organisations in becoming victim-inclusive lies in creating consistency of practice.³²³

Participants in our research all acknowledged that consulting victims, who may already be experiencing trauma, grief, distress and other difficult emotions, about potential decisions that victims may not agree with, is a difficult task for lawyers. Unlike social workers, lawyers do not receive the type of training that is designed to equip them to manage this type of interaction during their studies. Our findings suggest that some lawyers have nonetheless managed to develop the skills they need to communicate well with victims. However, some OPP lawyers feel anxious about interacting with victims, and this anxiety can contribute to their failing to communicate in an effective way.

³²² Victorian Law Reform Commission, above n 18, 136.

³²³ Dan Jones & Josie Brown, above n 3.

Therefore, the OPP should take steps to ensure that all its lawyers are given the information, training and support they need to confidently manage the process of communicating with and consulting victims.

Further, the victims who participated in our study expressed a strong preference for lawyers to relate to them in an authentic, rather than a generic or clinical way. OPP lawyers should therefore be supported and encouraged to develop their own style of relating to victims, albeit still based on the principles and practices outlined in the 'Best-practice guide to communicating with and consulting victims'.

The findings of our study also indicate that the WAS team has considerable expertise in communicating effectively with victims. The WAS staff are therefore a valuable resource that OPP lawyers can draw on to improve their communication skills. Indeed, many OPP lawyers recognise the value of the WAS team's skillset, and actively seek out their assistance. This practice should be encouraged by the OPP, given that strong collaboration between OPP lawyers and WAS staff is an important factor in achieving consultation processes that victims find satisfying. Steps should be taken to promote OPP lawyer and WAS collaboration throughout the OPP.

On this issue it is important to acknowledge that the OPP has recently undertaken a pilot involving the co-location of WAS social workers with OPP lawyers in two of the OPP's trial divisions. This initiative was designed to facilitate enhanced interdisciplinary collaboration between lawyers and the WAS. An evaluation of the pilot was positive, and recommended that the pilot approach be extended to all trial divisions of the OPP. The CIJ endorses this recommendation, and believes its implementation is likely to further enhance collaboration between OPP lawyers and WAS staff.³²⁴

Other opportunities to encourage a consistent application of a best practice-approach to victim consultation could include:

- conducting workshops and training sessions led by those lawyers and WAS staff who are skilled at communicating and consulting with victims, and
- conducting workshops and training sessions for lawyers and WAS staff based at both the city and regional offices on:
 - procedural justice principles and practices
 - active listening skills, and
 - trauma-informed communication practices.
- establishing a peer-review system to inform communication and consultation skills development
- inviting team leaders and lawyers to shadow WAS staff for a day, and
- circulating this report to all OPP lawyers and WAS staff.

Recommendation 2

The OPP should provide a copy of the 'Best-practice guide to communicating with and consulting victims' to all lawyers and WAS staff, and identify opportunities to support them to develop their capacity to deliver a best-practice approach to communicating with victims and consulting them about resolution decisions.

Ensuring that policies reflect and promote best-practice

There are aspects of the current the Director's Policy that may operate in tension with the findings of this research. These aspects are discussed below.

³²⁴ Bernadette Saunders, above n 109.

Section titled 'Why is resolution important?'

This section gives the following explanation of the importance of plea resolutions:

Resolution is necessary for the effective and efficient conduct of prosecutions. It relieves victims and witnesses of the burden of having to give evidence and may help victims put their experience behind them. It provides certainty of outcome and saves the community the cost of trials.³²⁵

Our findings indicate that some victims expressly seek the opportunity of giving evidence at a trial. Victims for whom this is true may not feel that giving evidence is a burden. Therefore, the above section of the Director's policy may not reflect the experience of all victims. Further, our research indicates that some victims who do not understand why a matter was discontinued or why it resolved to a plea may assume that the decision was made solely for the purpose of saving money. In these circumstances some victims may feel aggrieved, and may take the view that cost-saving is taking precedence over achieving justice. We therefore suggest that when communicating with victims about the benefits of resolution, care should be taken to avoid over-emphasising the issue of cost-saving.³²⁶

Section titled 'What information must the solicitor provide to victims?'

Under this section, the Director's Policy provides that if a victim wishes to be contacted about the prosecution, the OPP lawyer must provide them with the following information: information about the court process, the victim's role as a witness, support services, possible entitlement to compensation, legal assistance and the victims' register. The policy states that an OPP lawyer acquits this duty by providing victims with one or more of the following OPP brochures, depending on which are relevant:

- Pathways to Justice and Financial Assistance – Financial assistance, compensation and restitution for victims of crime
- Taking the Next Step: A guide to the Victorian court system for bereaved families, and
- Prosecuting Mental Impairment Matters.³²⁷

It would be desirable to review this approach. The victims who participated in our study said that while information contained in brochures and on websites could be a helpful starting point, this type of information was not sufficient to allow them to truly understand the issues in the case. They expressed a strong preference to receive detailed information specific to their particular matter via face-to-face meetings with the OPP lawyer responsible for the case. The WAS staff members and OPP lawyers who participated in the study agreed that victims should be provided with as much information as possible. The provision of brochures alone is an insufficient way of fulfilling this objective.

Requirement to 'use temperate and dispassionate language'

Under a list of general principles that apply to the role of the prosecutor, the Director's Policy provides that OPP lawyers should 'use temperate and dispassionate language'. Without doubt, encouraging people who work in the justice system to conduct themselves in a calm, considered and professional manner is beneficial for everyone who comes into contact with them. However, it might be helpful to clarify that the requirement to 'use temperate and dispassionate language' should not prevent OPP

³²⁵ Director of Public Prosecutions Victoria, above n 2, 20.

³²⁶ We have been advised by the OPP that the Director of Public Prosecutions has recently determined to amend this Director's Policy. We understand that the amended Director's Policy is aligned with these findings and recommendations.

³²⁷ Ibid, 13-14.

lawyers from demonstrating empathy in their interactions with victims, and should not prevent them from acknowledging victims' experience of crime. The findings of our study indicate that OPP lawyers' demeanour can have a significant impact on victims. When OPP lawyers treat victims with warmth and compassion, the victims were highly appreciative. Conversely, victims who were dissatisfied with the consultation process frequently described the OPP lawyers they dealt with as cold, clinical and uninterested.

Recommendation 3

All relevant policies and practice guides should be reviewed to ensure they promote best-practice communication and consultation approaches, and appropriately reflect that victims have a range of distinct needs, interests and priorities in relation to a prosecution.

Managing victims' expectations

The OPP lawyers who participated in our study said that the most important concept for victims to understand is that the criminal justice system is inherently complex and uncertain. However, many victim participants indicated that they had formed strong ideas about the strengths and weaknesses of the case, and its likely outcome, before they had any contact with the OPP. Many of these victims had formed the belief that the case was unassailably strong. Because of these beliefs, victims had assumed that the accused would be convicted of the highest charge that was brought; for example if the accused had been charged with murder, the victim thought that it was a conviction for murder was inevitable. The victims' accounts made it clear that in many cases their interactions with police had contributed to the beliefs they had formed about the case. Many said that the police had assured them that the case was very strong. 'Bulletproof' was the word one informant had used, according to a victim.

Victims' expectations may contribute to the barriers they face in understanding the issues at stake in a proposed resolution. The OPP lawyers who participated in this research said that the essential component of a victim developing an 'informed' view' of a proposed plea resolution was understanding the risks inherent in proceeding to trial. Appreciating that all trials involve risk, and that a trial in their particular case is no exception, is a view that contrasts starkly to that of viewing a case as 'open and shut'.

The 'Best-practice guide to communicating with and consulting victims' encourages lawyers to appreciate the expectations victims are likely to hold, and to proactively address them throughout the prosecution. In addition, it would be helpful for the OPP to work with Victoria Police to support their members to provide victims with realistic expectations about prosecution processes and outcomes, and that they do not contribute to victims developing unrealistic expectations.

Recommendation 4

The OPP should liaise with Victoria Police to identify strategies to support police officers to communicate effectively with victims about prosecution processes and decisions.

Managing time pressure created by court requirements

Our findings indicate that best-practice consultation processes are those that allow victims to have time to consider the issues, ask questions and formulate their views. When the process is rushed, victims do not have these opportunities. However, as noted by the OPP lawyers who participated in this study, sometimes plea offers are received at the last minute, on the ‘steps of the courthouse,’ according to the expression. When this happens, the courts can sometimes put pressure on the parties to make a decision very quickly. In these situations, consultations with victims need to occur rapidly. However, the OPP lawyers who participated in our study noted that even in these circumstances the consultation process can be positive for victims if the lawyer has spent time building rapport with the victim and preparing them prior to that event. Reflecting this point, the ‘Best-practice guide to communicating with and consulting victims’ encourages OPP lawyers to establish contact with victims early in the prosecution. In addition, it would be helpful to remind the courts that victims have a legitimate expectation of being involved in prosecution decision making and that therefore the courts need to allow sufficient time for victims to be consulted about resolutions.

Recommendation 5

The OPP should liaise with court representatives to highlight the value of providing sufficient time to consult victims about resolutions.

Issues for further research and consideration

During this project it was proposed that a mechanism designed to obtain victims’ feedback on their experience of the OPP might be developed and implemented. Such a mechanism would differ significantly from existing formal complaint processes. It would be designed to capture a range of victims’ experiences, both positive and negative, and could provide a useful way of allowing the OPP to be appraised, on an ongoing basis, of how it is meeting its responsibilities to victims, and where improvements might be made. A feedback mechanism also has the capacity to address victims’ prevention need. As explained at part 4 of this report, many victims seek opportunities to use their own experience to contribute to social change. This can include seeking changes to the ways that victims encounter the criminal justice system. Providing an avenue for victims to make suggestions to the OPP as to how it might better support victims is likely to be welcomed by them.

In addition to this proposal, the CIJ has identified the following areas in relation to which the OPP may wish to undertake further investigation or research:

- the most effective methods and techniques for educating victims about the criminal justice system and prosecution process
- how victims can be supported to identify and articulate their full range of justice needs, and to have those needs met, including by making referrals to services or programs that sit outside the formal criminal justice system, and
- ongoing evaluation and documentation of the collaboration between OPP lawyers and WAS social workers, with a view to enhancing the benefits of multidisciplinary practice.

9 Best-practice guide to communicating with and consulting victims

Introduction

The role of the contemporary prosecutor involves both acting independently, fairly and impartially in the furtherance of the public interest, and facilitating the participation of victims in the criminal justice system. Although there is an inherent tension in pursuing these dual objectives, they need not be seen as incompatible with one another. In fact, supporting and communicating effectively with victims helps the prosecution acquit its duty to act in the public interest, and builds community confidence in the prosecution service. Navigating the tensions involved requires creativity, skill and collaboration on the part of prosecution agencies and their staff.

Communicating with victims - general

Building a relationship of trust with victims

Prosecution lawyers should:

- Arrange early and regular face-to-face meetings with victims to listen to their views and provide them with information about the prosecution.
- If possible, work collaboratively with a WAS team member to develop a strategy to engage the victim that draws on the strengths of both lawyer and social worker.
- Explain the nature of the prosecutor's role and duties, what they can and cannot do and why, what the decision making processes about the prosecution are.
- Acknowledge that the relationship with victim-witnesses is particularly challenging to navigate, and define the boundaries of the relationship.
- Explain the prosecution process and what to expect throughout the process: prepare them for possible outcomes, address unrealistic expectations, convey the inherent uncertainty of proceedings, emphasise that a particular outcome can never be guaranteed and explain the focus on trying to resolve matters.
- Invite victims to identify and express their needs and priorities in relation to the prosecution, and where appropriate work with WAS to help victims to identify any other options for meeting their individual 'justice needs'.

Communicating effectively

When communicating with victims, prosecution lawyers should:

- Feel confident to acknowledge the harm the victim has experienced and the significance of that experience to the prosecution, and to express empathy towards them. This can be done without undermining the prosecution's duty to act independently, and the requirement to use temperate and dispassionate language.

- Take an interest in the victim’s experience and wishes: provide them with opportunities to express how they feel about the offence and prosecution, and be open to their expressions of emotion.
- Invite victims to ask questions about the prosecution, and provide plain English explanations of legal terms.
- Treat victims as equals, and avoid making assumptions about their needs and priorities or level of understanding of or interest in the prosecution process.
- Ensure all communications are tailored to the victim’s individual circumstances, and avoid generic responses.
- Seek advice and input from WAS staff on how best to tailor communications in individual cases.

Managing victims’ expectations and misunderstandings

Expectations about the strength of the case and the likelihood of a conviction on the highest charge

Prosecution lawyers should be aware that at the start of the prosecution process victims may expect that:

- the prosecution case is extremely strong
- the highest charge brought will proceed, and
- a conviction on the highest charge is a certainty.

Prosecution lawyers should be proactive in addressing victims’ expectations by reinforcing messages that:

- The merits of a case are constantly being reviewed. Circumstances change during a prosecution, which impact the prosecution’s assessment of the case.
- A criminal prosecution is inherently uncertain. Criminal trials can take unexpected courses and can be hard to predict.
- It is usual practice for multiple charges to be filed in respect of the same offence. The highest charge brought may not be the one that most appropriately reflect the evidence. It is usual for the prosecution and defence to engage in discussions about which charge is the most appropriate.
- Resolutions are common practice. In Victoria, the vast majority of criminal proceedings resolve via a plea of guilty.

Victims’ interpretation of committal proceedings

Prosecution lawyers should be aware that victims can assume that because a matter has been committed for trial this means that:

- a trial will certainly run, and
- a conviction is highly likely/is a certainty.

Prosecution lawyers should ensure that they clarify that:

- In committing the matter, the Magistrate has decided that a conviction is *possible* on the available evidence.
- The Magistrate is not offering a view on whether or not there will be a conviction. Trials are inherently uncertain.
- The Magistrate’s decision makes it possible for a trial to be run. This might not be what actually happens. Many matters resolve after the committal and before the trial.
- The standard of proof the Magistrate relied on when making the decision to commit the matter is much lower than the standard of proof (beyond reasonable doubt) that applies at trial.

Expectations about the OPP lawyer's role

Prosecution lawyers should be aware that victims might think that the OPP lawyer should:

- behave with the same degree of zealousness as the defence lawyer
- help victims who are also witnesses to construct their evidence in ways that will be most favourable to the prosecution case
- provide victims with all the relevant information about the case, and
- seek to fill any gaps in the existing evidence by conducting further investigations.

Prosecution lawyers should ensure that they clarify that the prosecutor:

- Has a very different role to the defence lawyer. The defence lawyer must zealously defend their client. The public prosecutor must act impartially and fairly, and must assist the court to arrive at the truth. It is not their role to seek a conviction at all costs.
- Is under a strict duty to avoid coaching witnesses, which may affect their capacity to disclose information to victim who are also witnesses.
- Cannot conduct further investigations or gather further evidence. This is the role of the police.

Consulting victims about possible resolutions

Timing

- Prosecution lawyers should strive to provide sufficient time for meaningful consultation with the victim about possible resolution of the matter, and not present a resolution as a *fait accompli*. Victims should be forewarned that a plea offer may be made in circumstances where a quick decision has to be made.

Preparation

- Have a pre-meeting with WAS to discuss the best approach to consultation with the victim.
- Involve the police informant in the consultation process and meeting if appropriate.
- Tailor the meeting to the individual victim and their distinct priorities.
- Make any necessary arrangements for vulnerable victims.

Consultation meetings – Do's and Don'ts

- Do's:
 - Do conduct the consultation face-to-face in a private room.
 - Do involve WAS in the consultation meeting.
 - Do explain the nature of the decision making process, what weight the victim's views have, what the other relevant considerations are, what factors are not relevant.
 - Do take the time to explain the reasons for considering the plea offer or prospect of discontinuance.
 - Do explain the difficulties of answering all questions if the victim is also a witness.
 - Do invite the victim to say how they feel about the resolution, and to reiterate their needs and priorities in relation to the prosecution.
 - Do take the time to answer questions, repeat key points and offer victims a break.
 - Do capture the victim's views for submission to the Crown Prosecutor or DPP, and read it back to them to confirm their views have been accurately heard and understood.
 - Do acknowledge that it is difficult for victims when the Crown Prosecutor or DPP agrees to a resolution when the victim does not want that to happen, and acknowledge that the outcome can seem unfair.

- Do help all victims to understand, not just those who are taking a lead for the rest of the family/group of victims.
- Don'ts:
 - Don't try to 'sell' the resolution.
 - Don't make assumptions about what is in the victim's interests or what the victim needs or wants.
 - Don't assume victims do not understand or do not want to understand the legal issues relevant to the plea resolution offer or prospect of discontinuance.

After the consultation meeting

- Let the victim know when the decision has been made and before it is announced in court.
- Let the victim know that they may be able to receive written reasons for the decision.
- Invite victims to ask follow-up questions after the decision is made so that they can come to a proper understanding.
- Seek feedback from victims on the consultation process as a continuous improvement exercise.



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The Centre for Innovative Justice researches, translates, advocates and applies innovative/alternative ways to improve the justice system, locally, nationally and internationally, with a particular focus on appropriate/non-adversarial dispute resolution, therapeutic jurisprudence and restorative justice.

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