



## Victims' Rights and the Right to Review: A Corollary of the Victim's Pre-Trial Rights to Justice

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### Abstract

In *R v Christopher Killick* [2011] EWCA Crim 1608, the Criminal Division of the Court of Appeal for England and Wales gave a decision setting out the rights of a crime victim to seek review of a Crown Prosecution Service (CPS) decision not to prosecute and concluded that victims have the right to seek review in such circumstances. This included a recommendation that the right to review should be made the subject of clearer procedures and guidance. This paper discusses article 10 of the *Proposal for a Directive of the European Parliament and of the Council, (2011) 2011/0129 (COD) 18 May 2011 establishing minimum standards on the rights, support and protection of victims of crime* (see article 11 Final Directive) as applied in the Killick case. The paper further discusses the implementation of *Killick* in prosecution policy, namely in the CPS guideline on the victims' right to review (Director of Public Prosecutions for England and Wales 2014). The right to review will be canvassed in light the existing framework of victim rights available during the pre-trial phase and, in particular, the right to private prosecution, access to counsel, and adjunctive and extra-curial rights from declarations or charters of victim rights.

### Keywords

Victims of crime; prosecution; pre-trial processes; international law and procedure.

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## Introduction

The integration of the victim into adversarial systems of justice has tended to occur at the periphery of criminal law and procedure. Most common law jurisdictions began the process of integration in the 1960s and 1970s, in so far as broad-based compensation was made available for injuries caused by a range of criminal offences (see generally Miers 1985). Support services followed, providing victims with a range of welfare-based options largely supported by executive government or rights-based, not-for-profit movements, or later as combined by agency agreements. Access to counselling, medical treatment and workplace support tended to be provided by the not-for-profits while court and witness support tended to be provided by the state. The dynamics of who provided these services changed in the 1980s and 1990s as most governments were keen to utilise not-for-profits to provide services otherwise funded by the state (Miers 2007). The 1985 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* also provided impetus for the staging of crime victims which influenced the emergence of declarations or charters of victim rights on a local level (see Sumner 1987). While these tended to be declaratory and not enforceable, such charters did lead to the reconsideration of the plight of victims and placed them in a firmer public policy context. Indeed, by the advent of the twenty-first century, governments were addressing victims as the priority group (Doak 2008; Hall 2009). Arguably, boundaries which once separated the victim from substantive participation in adversarial systems of justice are now being eroded and dismantled in favour of rights and powers that can be enforced against the state or the accused, albeit in an unconventional, fragmented and at times controversial way.

This paper examines the continuation of the trend toward the provision of enforceable rights for victims of crime by examining the ratification of the victim's right to challenge and seek review of a prosecutor's decision not to proceed with a charge. The case of *R v Killick* [2011] EWCA Crim 1608 provided the means by which the Court of Appeal of England and Wales considered the *Proposal for a Directive of the European Parliament and of the Council, establishing minimum standards on the rights, support and protection of victims of crime* ((2011) 2011/0129(COD) [Draft Directive]) (now finalised as the *Directive of the European Parliament and of the Council, (2012) 2012/29/EU, 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision [2012] 2001/220/JHA [Final Directive]*), which provides a range of victim rights to be ratified in the domestic criminal procedure of member states. Although limited circumstances exist that do not allow for the challenging of a prosecutor's decision not to proceed, such as where the police refuse to investigate, or where charges are downgraded or subject to a plea deal, *R v Killick* suggests that the consideration of human rights declarations and instruments on the domestic level is a key way victims are being granted significant access to justice in an unprecedented manner. The ratification of victim rights through domestic processes means that such rights are made compatible and consistent with local rules regarding criminal law and procedure. This maintains the foundational right of the accused to a fair trial and ensures that the integration of victim interests occurs in a way that is consistent with the accused's right to due process and procedural fairness. Complementary processes of private prosecution are also considered as supporting developments to increase the victim's right to pre-trial review processes.

## Victim rights and adversarial justice

The international literature on the emergence and growth of victim rights contends with the integration of victims in adversarial systems of justice. These systems tend to exclude the victim, yet much work has been done to consider the extent to which victims are compatible with such systems. Lessons have been taken from inquisitorial systems (see Braun 2014; Kirchengast 2017), although these may not always be compatible with the adversative nature of common law justice. Rather, the literature has recognised that specific phases of the adversarial criminal trial may be better suited to the inclusion of victims as trial participants. This literature has tended to identify sentencing (see Erez 2000) or parole (see Black 2003) as the main phases

in which victim participation may be possible. Nuanced perspectives have since emerged regarding the victim's right to participate in the pre-trial phase, specifically regarding access to counsel to contest the subpoenaing of confidential counselling communications in sex offences cases (Braun 2014). However, despite the attempt to integrate victims into the phases of the trial, those phases which involve adversative contestation between state and accused still tend to exclude victim participation. The trial proper, or jury trial as commonly understood, still excludes the victim out of adherence to a system of justice that positions the testing of state evidence over the victim's ability to present evidence, including their narrative of the criminal incident. The continental European system presents such possibilities at trial (see Braun 2014). In adversarial countries, however, victim participation is limited to the pre-trial, sentencing and post-sentencing phases, which do not always adhere to the strict requirements of a bifurcated process between state and accused. This is not to say that the inclusion of victim rights to justice in the pre-trial, sentencing and post-sentencing phases stands on a footing equal to that of the state and accused. The right of the accused to due process and procedural fairness continues to restrict victim's access to justice even in these pre- and post-trial phases. To protect the accused's right to have key decisions made by an independent state authority, and as adjudged by an independent judiciary, victims are required to proceed by submission to the state or court. The state or court may take account of such submissions but, invariably, they will not be bound by such submissions. The literature on victims and sentencing may be instructive as to how such submissions may be made without allowing the victim to take over proceedings (see Zedner 2003).

A range of public policies now support the inclusion of the victim as a participant of justice generally (see Booth and Carrington 2007; Mawby 2007). These policies support the victim by granting access to welfare assistance, information and counselling, and compensation and restitution, and form important adjunctive rights that promote the standing of victims outside of the trial process. Nevertheless, the provision of rights of a substantive character in the pre-trial phase provide an opportunity to reconsider the capacity of the victim to contribute to important decision-making processes of the police and prosecution that may have a determinative effect upon the charges brought, or indictment proceeded with, in court. This provides a basis for victim participation that grants rights to justice that are arguably more compatible with the existing adversarial framework that otherwise excludes victims until sentencing.

### **The significance of international law and procedure**

The development of victim rights in international law and procedure has readily informed the growth and development of such rights in domestic states, including the common law states of England and Wales, Canada, Australia, the United States and New Zealand, all adversarial countries that have a limited historical record of granting rights to victims. Elias (1985) argued that the expression of the rights of victims as 'third wave' human rights would emerge out of a history of the treatment of the victim as a welfare subject. *R v Killick* demonstrates how pre-trial rights to justice may be informed by international and regional frameworks that borrow from inquisitorial systems that empower the victim to act alongside the state prosecution (see van Dijk and Groenhuijsen 2007).

The Framework Directives of the Council of Europe allow for the integration of victim rights into the domestic laws of member states through policy transfer and law reform. International and regional frameworks therefore provide a basis for the modification of criminal law and procedure as including the victim under an adversarial model of justice, as influenced by alternative justice traditions. The pre-trial phase of the adversarial trial has been substantially reformed by reference to such international norms and standards. These reforms have sought to include new rights, including the victim's right to review, alongside existing pre-trial rights, including the right to private prosecution and to counsel for pre-trial discovery. Adjunctive

rights offered by declarations of rights that support the rights of the victim are also considered as supporting such initiatives.

### **The right to review, *R v Killick* and the draft European Union directive**

The questioning of a decision of the police or prosecution to charge or proceed on indictment has long been identified as a question to be resolved in the public interest alone. The personal views of the victim are not part of the public interest. Although prosecution guidelines increasingly require victims to be kept informed of, or even consulted about, charges brought – this includes charge bargaining or plea deals reached – the decision to settle on a final charge or to not proceed with a charge has been preserved as that of the prosecution, acting alone. However, the Final Directive provides that member states be able to set a process to allow victims to seek review of decisions not to proceed with a prosecution. This falls against a background of the consultative rights of the victim in plea-bargaining (Verdun-Jones and Yijerino 2002).

The Criminal Division of the Court of Appeal of England and Wales dealt with the victim's right to review under the Draft Directive in the case of *R v Killick*. In 2006, two men suffering from cerebral palsy informed police of anal rape and sexual assault by the accused, Christopher Killick. Information was also received on a third complaint of non-consensual buggery. Due to their disabilities, the complainants required assistance when providing evidence. Killick also suffered from cerebral palsy, though to an extent considered to be less than the complainants. Killick was arrested and interviewed in 2006. He denied any form of sexual activity with the two complainants, and asserted that the anal intercourse with the third complainant was consensual. The Crown Prosecution Service (CPS) made the decision in 2007 not to prosecute. The victims then complained about the decision not to proceed against Killick, which resulted in an internal review pursuant to the CPS complaints procedure. The review determined that Killick could be prosecuted, although he had since been informed in writing that he would not be proceeded against. As the complaints procedure resulted in a favourable outcome for the victims there was no need to continue the matter to judicial review, although this option would be available had their complaint been denied. Killick appeared in the Central Criminal Court in 2010. The defence requested that proceedings ought to be stayed as an abuse of process, but this was rejected by the court. The trial continued and Killick was convicted of buggery and sexual assault but acquitted of anal rape. Killick was sentenced to three years' imprisonment. Killick then appealed his conviction and the Court of Appeal (Criminal Division) took the opportunity to review the extent to which the Draft European Union Directive modified English criminal procedure.

Considering the Draft Directive, the Court of Appeal of England and Wales (Criminal Division) held that the 'decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance' (*R v Killick* [2011] EWCA Crim 1608 [48]). The Crown contention was that the victims had no right to request a review of a decision not to prosecute, but could utilise the existing CPS complaints procedure.<sup>2</sup> In the context of existing internal CPS procedures this was a correct statement of the power available to the victim, although the victim always retains the power to seek review of an executive decision where made contrary to law. However, in the context of the obligation to consider, and where possible ratify, instruments of the European Union (EU), the Court of Appeal held that:

[w]e can discern no reason why what these complainants were doing was other than exercising their right to seek a review about the prosecutor's decision. That right under the law and procedure of England and Wales is in essence the same as the right expressed in Article 10 of the Draft European Union Directive on establishing minimum standards on the rights, support and protection of victims

of crime dated 18 May 2011 which provides: 'Member States shall ensure that victims have the right to have any decision not to prosecute reviewed'. (*R v Killick* [2011] EWCA Crim 1608 [49])

The only other alternative, other than existing CPS policy as to complaints, was for the victims to rely on the individual's right to seek judicial review in the High Court. High Court procedures make judicial review of a decision not to proceed with a charge difficult, with judicial reluctance to get involved in processes leading to the charging of suspects, a process widely accepted as an executive function. Relief would only be granted in the most exceptional cases where the internal policies of the executive (policies mandating a requirement by law) were not followed or defeated by a clear abuse of process. Seeking such relief would be expensive and thus prohibitive for many victims.

The Final Directive now sets out the process by which such tests ought to be now made.<sup>3</sup> Following the release of an interim guidance, the Director of Public Prosecutions for England and Wales released the *Victims' Right to Review Guidance* in July 2014 (Director of Public Prosecutions for England and Wales (DPP) 2014). This guide explains the circumstances and procedures by which victims may seek review of a decision not to prosecute. The emergence of the victim's right to review is thus in policy guiding the CPS practice of complaints revision, rather than as a statutory directive of Parliament. The CPS guidance makes clear those circumstances that now give rise to the review mechanisms:

The right to request a review arises where the CPS:

- (i) makes the decision not to bring proceedings (i.e. at the pre-charge stage);  
or
- (ii) decides to discontinue (or withdraw in the Magistrates' Court) all charges involving the victim, thereby entirely ending all proceedings relating to them;
- (iii) offers no evidence in all proceedings relating to the victim; or
- (iv) decides to leave all charges in the proceedings to 'lie on file'. (DPP 2014: 3)

Where a decision not to proceed with a charge is made by the CPS, they will inform the victim of their decision to do so. This information will also specify whether the decision not to proceed is a qualifying decision, in that it is a decision which, with the victim's election, gives rise to the review mechanisms. The victim only need indicate that they seek review to initiate the review process. Once initiated, the CPS will conduct a local review. This will be conducted by a new prosecutor who will be assigned to the case. Where the victim's dissatisfaction with the original decision has not been resolved at the local level by a new prosecutor reviewing the original decision, they may complain further. This further complaint will initiate an independent review by the Appeal and Review Unit or by a Chief Crown Prosecutor, as appropriate. This review will consider the case *de novo* or as new, and will not use the original decision as a starting point. Only information available to the original decision-maker will be used in the appeals process. New information will need to be raised with the police. Where a decision not to charge is overturned, the matter may be reinitiated in court. Where no evidence was offered to the court, and the review process realised that this should not have happened, redress is limited to an explanation and an apology. This is because the court has already discontinued proceedings. Alternatively, the original decision may be upheld and the matter concluded. Should the victim continue to be dissatisfied, the only option open to them is to seek judicial review in court.

### **Private prosecution**

Victims enjoy the right of private prosecution that, although rarely exercised, supports the victim's right to participate in decision-making processes. The power of the victim to initiate a

private prosecution resides at common law as the power of the common informant. Technically, it may be exercised by any person informed of an offence. The power is exercised by informing a court, usually a court of first instance such as a Local or Magistrates' Court, of an offence. Technically, the ability to initiate a prosecution can be exercised by anyone, despite the common misconception that it is a police or state power to the exclusion of all others. Although any person may initiate a prosecution, a prosecution initiated by a non-state informant is usually subject to the scrutiny of a magistrate or court registrar prior to the listing of the charge and issuance of a summons or court attendance notice (see, for example, s 6(1) *Prosecution of Offences Act 1985* (UK); s 49 *Criminal Procedure Act 1986* (NSW)). This is to ensure that there is a basis for bringing the charge, and that it not been brought vexatiously, or as an abuse of process (see generally, Stark 2013).

Although the power to initiate a private prosecution is a necessary complement to the right to review protocols of the CPS – in that such a right underpins the prosecution in the first instance – the power to take over proceedings ultimately lies with the Director of Public Prosecutions. The CPS exercises this right in England and Wales. All that is required to take over a prosecution is the appearance of a CPS prosecutor in court. Once taken over, the victim loses the power to continue the matter, subject to the right to review process discussed herein, requiring the CPS to continue to prosecute the matter in the public interest (see *R (on the application of Gujra) v CPS* [2012] UKSC 52). Where the CPS takes over a prosecution, it will ordinarily write to the victim to inform them of the reason for doing so. Victims may also be entitled to press their rights under the *Victims' Right to Review Guidance* (DPP 2014) once the CPS takes over a matter, demonstrating further connections between existing common law rights to prosecution and the new review process informed by the EU draft and final instruments.

Where a charge is brought by the police, but not taken over by the CPS, and the police choose not to continue to prosecute the matter, the victim may seek to continue the prosecution, although this does not involve a 'take over' power as exercised by the CPS. Where the CPS has the power to take over the prosecution, including access to the case-file and evidence of the police, the victim brings a new charge and presents their own evidence in court. Essentially, where the victim brings a private prosecution, the charging process and issuance of a summons would commence again, where the police decide not to proceed and where the matter is not taken over by the CPS. Where the CPS takes over the prosecution from either the police or victim and then decide not to proceed with the matter, the victim may avail themselves of the CPS rights to review process. The ability to bring a new charge where an investigation is discontinued by the police may be complicated where a charge is brought to court and withdrawn, discontinued, or otherwise 'left on the books', although the police have their own review mechanisms where victims are not satisfied with the outcome of an investigation (see Metropolitan Police 2015) A magistrate or registrar would be less likely to issue a summons or court attendance notice at the behest of the victim where the charge is potentially still under police investigation.

### **Victims' access to counsel**

The victims' right to review and the foundational rights of private prosecution demonstrate how the pre-trial rights of victims are potentially expansive, providing victims some degree of choice as to their ability to influence pre-trial decisions of the police and prosecution. However, victims also possess a power articulated in statute in certain states to challenge certain pre-trial decisions that affect their dignity or privacy. This includes situations where the accused seeks discovery of information or evidence from the victim that would be of questionable probative value to the court. While this right stands apart from the victims' right to review and the right of private prosecution, access to counsel to challenge certain invasive pre-trial decision regarding discover of evidence does support the general proposition that the pre-trial phase is one of substantive victim rights and powers.

Access to confidential counselling notes provides one situation where victims may appoint counsel to oppose discovery, which usually occurs during the pre-trial phase. They may do this on the basis that the information contained in such notes would be of little use to the Crown or accused, and would otherwise exacerbate trauma to the victim. For instance, s 299A of the *Criminal Procedure Act 1986* (NSW) makes specific reference to the protections afforded to victims of sexual offences and their standing in criminal proceedings. A protected confider is defined as a victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made. A protected confidence refers to a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence. Section 299A provides:

A protected confider who is not a party may appear in criminal proceedings or preliminary criminal proceedings if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider.

The power to compel production of confidential counselling notes is made under s 298 of the *Criminal Procedure Act 1986* (NSW) and provides that 'except with the leave of the court, a person cannot seek to compel (whether by subpoena or any other procedure) any other person to produce a document recording a protected confidence in, or in connection with, any criminal proceedings'. *KS v Veitch (No. 2)* [2012] NSWCCA 266 (also see *PPC v Williams* [2013] NSWCCA 286) provides a clear case example where private counsel was engaged to challenge the discovery of counselling communications that should otherwise be protected. In such cases private counsel are included as third parties, with the Director of Public Prosecutions watching the brief and the Attorney General intervening but otherwise not participating in the hearing. Basten JA refers to the rights of the victim in the context of such challenges:

The person being counselled, if the victim of the alleged offence, is referred to as the 'principal protected confider' and, though not a party to the criminal proceedings, may appear in those proceedings 'if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider': s 299A (*KS v Veitch (No 2)* [2012] NSWCCA 266 [22]).

In *Veitch (No. 2)* the issuing of the subpoena was found to be in contravention of the substantive tests under s 299D and leave to grant the subpoena was not granted. The court determined that the requested materials could not be used as evidence at trial, ordering that the documents already handed to the trial judge, though not passed on to the defence, be returned to the hospital caring for the victim.

Braun (2014) has argued that legal representation for sexual assault victims need not compromise the accused by aligning with the prosecution, requiring the accused to then answer against multiple adversaries. Rather, the victim's right to substantive relief is qualified as a private right that need not affect the Crown case nor the accused's ability to answer the Crown case at trial (other than potentially failing to secure the counselling notes of the victim) due to the motion being heard interlocutory. Braun (2014) argues:

... the suggested narrow form of legal representation for sexual assault victims does not infringe upon the procedural rights of the defendant. The legal representative of a sexual assault victim in the suggested form cannot exercise the same rights the parties can, but is limited to exercising some rights in relation to the protection of the victim witness at trial. For this reason, the defendant does not face the risk of a victim's legal representative aligning with the prosecutor and having to confront two adversaries. (Braun 2014: 829)

Since 2011, where confidential records are subject to subpoena, NSW has provided victims access to publically funded legal representation. Legal Aid NSW hosts the Sexual Assault Communication Privilege Service granting victims access to counsel and advice when their confidential records are subject to a discovery action.

### **Adjunctive and extra-curial rights**

Charters or Codes of Victim Rights were ratified on a domestic basis following the previously mentioned 1985 United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. In England and Wales, the *Domestic Violence, Crime and Victims Act 2004* (UK) creates the office of the Commissioner for Witnesses and Victims, otherwise known as the Victims' Commissioner. The powers of the Victims' Commissioner are contained under s 48 and can be summarised as promoting the interests of victims and witnesses; encouraging good practice in the treatment of victims and witnesses; and reviewing the *Code of Practice for Victims of Crime*, or 'Victims' Code'. The Victims' Code is made pursuant to s 32 of the *Domestic Violence, Crime and Victims Act 2004* (UK). It does not extend to judicial officers or to officers of the CPS when exercising duties involving discretion. Further, s 51 provides that the Victims' Commissioner is unable to represent a particular victim or witness; bring individual proceedings in court; or do anything otherwise performed by a judicial officer. The Victims' Code provides rights for the respectful treatment of victims; and for information to be kept updated as to key developments regarding arrest, court dates, sentencing outcomes and when leave to appeal is granted. Witness Care Units are also established to ensure victims gain access to the advice and information sought. Although there are limitations to the office as constituted in England and Wales, the Victims' Code does provide standards of treatment and access to information that build upon the pre-trial rights of the accused. In the pre-trial context, the most important of these rights include access to information during the police investigation and regarding pre-trial charging and bail determinations. Rights are prescribed for victims and duties are also declared for service providers making contact with the victim. (see Ministry of Justice 2015: 19-24, 40-46).

The establishing of a Commissioner for Victims' Rights in South Australia (SA), however, provides for a broader basis for pre-trial rights for victims. The *Victims of Crime Act 2001* (SA) establishes a declaration of victims' rights as well as the office of Commissioner. Section 16A allows the Commissioner for Victims' Rights to represent an individual victim where they complain that a right afforded to them under Part 2 has not been maintained or upheld. This section prescribes that the remedy is limited to a written apology to the victim from the infracting party. However, s 32A allows the victim to appoint a representative to exercise their rights under Part 2. Representation may include an officer of a court, the Commissioner for Victims' Rights or a person acting on behalf of the Commissioner for Victims' Rights, an officer or employee of an organisation whose functions consist of, or include, the provision of support or services to victims of crime, a relative of the victim, or another person who, in the opinion of the Commissioner for Victims' Rights, would be suitable to act as an appropriate representative. It is this section which allows the victim to seek counsel, from the Commissioner, a personal representative or lawyer. Notes attached to s 32A provide some guidance on the ambit of the scope of representational rights, specifically '[s]uch rights would include (without limitation) the right to request information under this or any other Act, the right to make a claim for compensation under this or any other Act and the right to furnish a victim impact statement under the *Criminal Law (Sentencing) Act 1988*'. However, such representation may be necessary where certain rights under Part 2 have not been extended to the victim or where the Crown has neglected to consult with the victim in the pre-trial phase as required under s 9A.

Section 9A requires that the victim of a serious offence be consulted before any decision is made:



- a. to charge the alleged offender with a particular offence; or
- b. to amend a charge; or
- c. to not proceed with a charge; or
- d. to apply under Part 8A of the *Criminal Law Consolidation Act 1935* for an investigation into the alleged offender's mental competence to commit an offence or mental fitness to stand trial.

This section refers directly to pre-trial decision-making involving public prosecuting authorities. The then Attorney-General for South Australia, the Hon MJ Atkinson, said in his second reading speech on the Statutes Amendment (Victims of Crime) Bill 2007 (SA):

Victims of some serious crimes will have the right to be consulted before the Director of Public Prosecutions enters into a charge bargain with the accused or decides to modify or not proceed with the charges. Victims of crime will also have the right to more information about the prosecution and correction of offenders.... (Atkinson 2007)

Section 9A thus provides a basis for substantive pre-trial rights for crime victims. Rights to consultation, and what counts as meaningful consultation with victims in the pre-trial phase, has a developed history in United States Federal Courts. The United States Code provides for the right for victims to confer with the state attorney pursuant to 18 USC s 3771. In *re Dean* (2008) 527 F 3d 39 is authority for the granting of relief by way of mandamus requiring the prosecutor to consult with the victim prior to making key decisions in the pre-trial process, including plea deals, in Federal District Courts (see generally, Belooof 2005).

The Commissioner of Victims Rights is established in New South Wales (NSW) under the *Victims Rights and Support Act 2013* (NSW). The office of the Commissioner of Victims Rights in NSW is prescribe under Part 3 but was developed out of the former office of the Director of Victims Services and thus is required to co-ordinate the department of Victims Services, NSW, as well as enforce, to the extent permitted, those aspects of the Act that afford victims some degree of redress. Specifically, the Commissioner must oversee support services for victims (as well as family of missing persons), promote and oversee the implementation of the Charter of Victims' Rights (s 6 of the *Victims Rights and Support Act 2013* (NSW)), to make recommendations to assist agencies to improve their compliance with the Charter of Victims Rights, receive complaints from victims of crime (and family members of missing persons) about alleged breaches of the charter, recommend that agencies apologise to victims of crime for breaches of the Charter, and must determine applications for compensation and support for victims and prescribed family members. Part 2 provides the Charter of Victims Rights and prescribes its implementation across those officials, other than judicial officers, who administer the affairs of the state. This includes those involved in the administration of justice, the police, and persons involved in the administration of any department of the state, in addition to any agency funded by the state that provides services to victims. Pre-trial rights are provided under the Charter of Victims Rights as follows:

6.2 Information about services and remedies: A victim will be informed at the earliest practical opportunity, by relevant agencies and officials, of the services and remedies available to the victim.

6.3 Access to services: A victim will have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim's needs.

6.4 Information about investigation of the crime: A victim will, on request, be informed of the progress of the investigation of the crime, unless the disclosure

might jeopardise the investigation. In that case, the victim will be informed accordingly.

#### 6.5 Information about prosecution of accused:

- (1) A victim will be informed in a timely manner of the following:
  - (a) the charges laid against the accused or the reasons for not laying charges,
  - (b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision to accept a plea of guilty by the accused to a less serious charge in return for a full discharge with respect to the other charges,
  - (c) the date and place of hearing of any charge laid against the accused,
  - (d) the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed.
- (2) A victim will be consulted before a decision referred to in paragraph (b) above is taken if the accused has been charged with a serious crime that involves sexual violence or that results in actual bodily harm or psychological or psychiatric harm to the victim, unless:
  - (a) the victim has indicated that he or she does not wish to be so consulted, or
  - (b) the whereabouts of the victim cannot be ascertained after reasonable inquiry.

Victims in NSW are thus entitled to information regarding the police investigation and to be consulted as to charge bargaining where a serious crime has occurred that results in actual bodily harm or psychological or psychiatric harm to the victim (also see s 35A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)).

In Queensland, Part 2, Chapter 2 of the *Victim of Crime Assistance Act 2009* (Qld) provides for the Declaration of Fundamental Principles for victims of crime. These principles include rights in the pre-trial phase that complement the existing framework of rights otherwise available to victims. These include the s 10 information about services, s 11 information about investigation of offender, and s 12 information about prosecution of offender.

### Conclusions

The movement towards a more formalised policy of the right to review is consistent with promulgation of victim rights and interests through human rights instruments and frameworks. This is what Elias (1985) identified as the third wave of victim rights: the expression of the rights of victims not as a manifestation of welfare policy on the local level but as rights available to all persons, everywhere. While *R v Killick* demonstrates that such rights may not become meaningful for the victim until they are given local context by consideration by the courts (or parliament), the case does show how international norms for the treatment of victims may come to modify criminal law and procedure identified as excluding the victim under an adversarial model (see Verdun-Jones and Yijerino 2002). Although the right to request a review of a prosecution decision is limited in terms of the *Victims' Right to Review Guidance* (DPP 2014), the articulation of a policy that now guides CPS decision-making in the first instance is an important milestone for victims in their integration into a system of justice that otherwise ill affords victims' rights that can be enforced against the state.

The careful integration of victim rights and interests has resulted in policy reconsiderations that challenge the state's exclusive access to crime and justice. Importantly, the right to review reforms is provided in a broader context of a framework of pre-trial rights that afford the victim substantive access to justice. While these rights are not necessarily complete nor comprehensive, and vary between jurisdictions, they do phrase the *Killick* reforms in a movement toward substantive and enforceable rights for victims. The existent framework of

rights regarding private prosecution, access to counsel and adjunctive and extra-curial rights indicates the scope of this framework. Recognition of this framework, and the relevance of international instruments and an awareness of precedents such as *Killick*, has resulted in the reconsideration of the way victims may be better integrated into proceedings in light of the state's need to prosecute crime, and accused person's needs to access a trial process that lets them fairly test the state case against them. *R v Killick*, the Final Directive, and the *Victims' Right to Review Guidance* (DPP 2014) provide an apt case study of the way in which victim rights may be appropriately considered against the state's need to continue to prosecute offences in the public interest. While the views of victims are considered, those views do not determine the outcome and must be weighed against the public interest at all times. As such, although the victim is given substantive rights of participation that may be enforced against the state, those rights never become determinative of an outcome nor usurp the state's right to prosecute. The removal of the process of review from the courts also ensures that the rights of the victim are not conflated with the rights of the accused in the trial context. The accused retains the right to challenge the Crown case without the victim acting as a third party to proceedings, should the matter be brought to court. The right to review is also consistent with the existing power of the victim to bring a private prosecution and, where taken over by the CPS, to have the decision to not continue a prosecution reviewed at the request of the victim.

Enforceable rights can be grouped according to the phases of the criminal trial and most are developed in response to discrete concerns for victim rights and interests as they become relevant during the different phases of the criminal trial process. This reasoning has increasingly influenced domestic law by statutory reform or, where permitted, the consideration of human rights decisions in common law courts. This process of the slow inclusion of discourses of human rights as a basis for procedural and substantive legal change has resulted in the uneven and fragmented integration of victim interests and explains how different jurisdictions have worked in different ways, and with different levels of urgency, to modify statutory and common law processes that otherwise afforded the victim few rights and privileges.

The processes traced in this paper demonstrate that the movement of victims towards enforceable rights is occurring on a local level through the ratification of human rights instruments and directives, complementing existing rights and powers as dispersed through the pre-trial process. As such, the integration of victims, especially where victim rights are enforceable and determinative against the state, must work around existing powers available to victims and other powers that grant the accused a fair trial and the state the power to administer the criminal justice process. The *Victims' Right to Review Guidance* (DPP 2014) process now establishes a precedent of policy transfer and change through the consideration of human rights instruments on the local level to build upon an existing rights framework of substantive pre-trial rights.

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<sup>2</sup> Although characterised as a complaints procedure, the CPS process does not need to involve dissatisfaction with any particular prosecutor, but may be invoked where a questionable decision has been reached.

<sup>3</sup> See article 11 of the Final Directive. Also see clause 43 of the preamble: 'The right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law

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enforcement authorities such as police officers, but not to the decisions taken by courts. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority. The right to a review of a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position'.

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