



PG 18 Criminal law – Supporting clients who are offenders or victims of crime

Status: Approved
Date Reviewed: March 2010
Date due for review: March 2013

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1 Introduction - the issues

The Public Advocate is approached to provide support to people who have a disability involved in the criminal justice system. Involvement may be as an alleged offender or as a victim of a crime. It may be that the person already has a guardian appointed, or it may be that the person requires advocacy support from the office.

A guardian’s authority is limited to civil law. An advocate has no legal standing in relation to the criminal law. Nonetheless, a guardian and an advocate can provide valuable assistance for a person to help them negotiate the criminal justice system and to ensure that the person’s rights are exercised and respected.

A guardian or advocate may become aware that a person, whom they represent, has committed a criminal offence. There may be a dilemma whether to report the offence to the police. This issue is explored in section 3.3.

In relation to *alleged offenders*, a guardian or advocate is commonly asked to assist a person in relation to:

- Police interviews
- Obtaining legal assistance
- Attending interviews with lawyers
- Analysing the viability of proposed courses of action
- Negotiating services and accommodation
- Obtaining medical and specialist health reports
- Attending hearings
- Sentencing options
- Dealing with the Office of Corrections

In relation to *victims of crime*, guardians and advocates are asked to help the person negotiate the system regarding

- Access to health and counselling services
- Police interviews
- Applications to the Victims of Crime Assistance Tribunal
- Attending and participation in the trial of the alleged offender.

In this policy we will examine the guardian’s or advocate’s role in the light of their authority and that of other responsible persons within the criminal justice system.

2 Relevant legislation and case law

- *Guardianship and Administration Act 1986*
- *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*
- *The Decision of R (VCAT No 29837 by Member Sandra Davis)*
- *Sentencing Act 1991*
- *Victims of Crime Assistance Act 1996*
- *The Charter of Human Rights and Responsibilities Act 2006*

3 Guideline statement regarding alleged offenders

3.1 A guardian's powers

A guardian's authority is set out in the order of appointment and this may be further explained by reference to the powers set out in the *Guardianship and Administration Act 1986*. There is no power in the *Guardianship and Administration Act 1986* for a guardian to make decisions for a person in relation to that person's involvement in a criminal investigation, the process of being charged and responding to charges, instructions to lawyers or making representations to a Court about charges. Even though a plenary guardian has all the powers over a represented person as if he or she were a parent and the represented person his or her child, these powers are not sufficient to empower the guardian to make such decisions.

If a person is unable, by reason of their disability, to make decisions in relation to criminal matters, the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* applies. This Act has provisions to deal with situations where a person is

- unfit to stand trial, or
- where they are fit to stand trial, but they may be not guilty because at the time of the alleged offence they were affected by a mental impairment.

The process set out in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* has no role for a guardian.

In the Case of R (VCAT 29837) Victoria Legal Aid asked for the appointment of a guardian to make decisions for R who was to be charged with the murder of her mother. Victoria Legal Aid wanted the guardian to decide such things as whether R should

- be interviewed by the police,
- raise the issue that she was unfit to plead to the charge
- apply for bail
- decide what approach should be taken at the committal hearing (a committal hearing is to see if there is a case to be tried from looking at the evidence, but not in a completely thorough way)
- decide what approach should be taken at the inquiry into her fitness to plead
- raise the defence of mental impairment.

It was decided that the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* covered the field and that "no power is conferred on this Tribunal [VCAT] by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* to appoint a substitute decision-maker in the context of legal proceedings under that Act" (paragraph 21).

A guardian can play a role as an advocate for the represented person. The explicit authorisation for this role is found in section 28 which requires a guardian to act in the best interests of the represented person. Further, Public Advocate is empowered to "make representations on behalf of or act for a person with a disability" (section 16(1)(f)).



Accordingly, a guardian's advocacy role is not limited to those spheres of decision-making set out in the guardianship order, whether the order be plenary or limited. The advocacy role must comply with the objectives of the *Guardianship and Administration Act 1986*, namely that –

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
- (b) the best interests of a person with a disability are promoted; and
- (c) the wishes of a person with a disability are wherever possible given effect to.

3.2 An advocate's powers

An advocate draws their authority to advocate from section 16(1)(f) of the *Guardianship and Administration Act 1986* as mentioned above. Like the guardian, the advocate must exercise their role in accord with the objectives of the Act.

3.3 A guardian / advocate becomes aware of criminal acts by a client

If a guardian were to become aware that a represented person had committed criminal acts they should raise this with their manager.

There is no positive duty to report a crime. However, it may be that it is appropriate to report the criminal activity of a represented person to the police. In determining whether this is appropriate, the manager and the guardian will have regard to OPA's checklist document regarding making a decision in a person's best interests [G Drive in the folder "Practice Resources"].

The manager and the guardian may seek assistance in making this decision from the St James Ethics Centre (☎ 1800 672 303) who may work through the issue in a structured way engaging the issues similarly to the Best Interests Document, but in an interactive manner which may assist clarification on a course of action.

3.4 The Charter of Human Rights and Responsibilities Act 2006 ("Charter")

There are a number of rights set out in the Charter that are relevant to alleged offenders. These rights probably do not provide more protection than the existing statute and common law, but guardians and advocates may find it easier to use the rights in the Charter when advocating for a person's rights as they are codified and easily found.

Rights that could be relevant include:

- Recognition and equality before the law (s8)
- Protection from torture, cruel, inhuman or degrading treatment (s10)
- Right to liberty and security of the person (s21)
- Humane treatment when deprived of liberty (s22)
- Children in the criminal process (s23)
- Fair hearing (s24)
- Rights in criminal proceedings (s25)
- Right not to be tried or punished more than once (s26), and
- Retrospective criminal laws (s27).

3.5 The police interview

If the police suspect that a person has committed an offence or that the person could assist them with the investigation of a serious offence (for example as a witness or a victim), the police may want to speak to

them. Where a person has a cognitive disability the police procedures require the attendance of an independent third person (ITP) at the interview.

The role of the ITP is to:

- facilitate communication
- assist the person to understand their rights
- support the person throughout the process.

An advocate or guardian may advocate for the person to ensure –

- (where relevant) the person has had the opportunity to see a lawyer before attending the interview
- the police are aware that the person being interviewed has a cognitive disability
- the police will arrange for the presence of an ITP
- that the interview takes place at a time of day where the person is most alert (this may be particularly important where the person has dementia)
- (where relevant) there are support services available to attend to the person after the interview.

An advocate or guardian should be wary of discussing the circumstances of an alleged offence with the client. If the client were to confess the offence, that confession would be admissible as evidence at any trial of the person. The advocate or guardian could be called as a witness against the person. Lawyers have a special privilege that means that they do not have to disclose their discussions with their client to the court, but guardians and advocates do not have that privilege.

An advocate or guardian for a client should not act as an ITP for that client otherwise they may become a witness in the case and this may affect their ability to fulfil their other roles for the client.

3.6 Obtaining legal assistance

The guardian or advocate may assist the person to obtain legal assistance.

A guardian or advocate does not have legal authority to enter into a binding contract for legal services on behalf of the person. If the person has an administrator, the administrator would have to enter into the contract of engagement with the lawyer. Even where the lawyer is providing services ‘for the common good’ (sometimes called ‘pro bono’) there is usually a contract of engagement which sets out the terms and conditions upon which the services are to be provided.

If the person does not have an administrator but has control of their own finances the person will have to negotiate the actual terms of the contract. It may be helpful if the advocate or guardian assisted the person to understand those terms, but if the person cannot understand them it may be necessary to seek the appointment of an administrator, albeit by way of a temporary order.

An administrator has powers to bring and defend legal actions on behalf of a represented person. However, this does not extend to giving instructions in the defence of criminal proceedings. It is really limited to defending a person’s estate. Once the administrator has negotiated the contract of engagement of the lawyer, it is the represented person who gives instructions to the lawyer.

There are some free legal services that may help people in relation to criminal matters. Most local community legal centres will provide some advice and may help organise representation in court for the person. The Federation of Community Legal Centres can be contacted on 9654 2204 to find out a person’s local service. Of the specialist disability legal services, only the Mental Health Legal Centre works in the area of criminal law. This service is only available to people who have experienced a mental illness or had contact with mental health services.

Victoria Legal Aid provides legal assistance in criminal matters so long as the person meets the qualifications for its services. This involves a means test for which the person must first qualify. There are other qualifications that limit access, such as that the matter must have some merit, but these other qualifications may be overcome if the applicant has an intellectual or psychiatric disability. Victoria Legal Aid's qualifications can be found on their website at www.legalaid.vic.gov.au in the VLA Handbook.

Victoria Legal Aid has offices in Melbourne, Bendigo, Geelong, Morwell, Frankston, Preston, Sunshine, Dandenong, Broadmeadows, Ringwood, Ballarat, Warnambool, Shepparton and Horsham.

If a person wants a private legal practitioner, this practitioner may be able to apply for legal aid to fund the person's case. Not all private lawyers do legal aid work because the pay is less, so you may have to contact the private lawyer to see if they will work for legal aid fees.

3.7 Attending interviews with lawyers

Sometimes a guardian or advocate is asked to attend the person's lawyer with the person.

Assisting the person to deal with their lawyer, to understand what their lawyer is saying, and to work through any choices the person may have, may be the best way to help a person in their criminal matter. Some lawyers may use jargon, or complicated language, or not be particularly sensitive to a person's needs during an interview (for example, the need to take regular breaks) and so leave the client feeling powerless and confused.

A lawyer's conversations with their clients are privileged from being disclosed to a court where the conversation is for "the sole purpose of enabling the lawyer to give and the client to receive legal advice or to aid the preparation and conduct of litigation" [Evidence, Proof and practice, Graham Roberts, LBC 1998, p197]. If the conversation is not confidential, there is no privilege. Before an advocate or guardian attends an interview they should ask the lawyer for advice whether their attendance will breach confidentiality and possibly harm the person's case.

If you consider that the provisions of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 may apply to the client's situation, you should raise this for consideration by the lawyer and the client. It is not for a guardian or an advocate to provide instructions to the lawyer to engage the provisions of this Act.

Many lawyers are unfamiliar with the role of the ITP during a police interview. If you note that an ITP was not used for someone who has a disability you should make the lawyer aware of this.

If the lawyer insists upon seeing the client without you, that is the lawyer's right and you have no legal right to intervene.

3.8 Analysing the viability of proposed courses of action

In criminal matters lawyers have a pretty simple approach to the outcome they want to achieve –

- get the person off the charges
- keep any financial penalty to a minimum;
- get the lowest possible sentence.

These outcomes may not necessarily be in the best interests of the person who has a disability. The advocate or guardian may wish to set out to the person and the lawyer what they consider would be an outcome that they think is in the person's best interests. If the person disagrees with this option, it is the person who instructs the lawyer as to the course of action to be pursued.

There is a developing area of the philosophy of law called “therapeutic jurisprudence”. This calls upon people in the legal system to consider the outcomes for people in terms of the psychological effect upon the person. The Dept. of Justice has adopted therapeutic jurisprudence as part of the Department’s Justice Statement (2004).

A therapeutic approach may be to draw the person into services that may, in the longer term, provide better outcomes for the person than a simple minimisation of penalties, sentences or fines. For example, the guardian may consider that a sentence that has a requirement that the person get psychiatric counselling to be more useful than a sentence that simply imposes a fine. The guardian may engage the person’s case manager about the types of services that might be most useful for the person and develop a service plan for the client to consider.

It may be difficult for some clients to think through the various choices put to them by their lawyer. A guardian may help the client to think through these. It may be that the client is unable to make a decision about what instructions s/he should give to their lawyer. Ultimately it will be up to the lawyer and the client to work out whether the lawyer proceeds by way of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 because the client is unable to give instructions.

3.9 Negotiating services and accommodation

When a person who has a cognitive disability faces the criminal justice system it may be that these offences are a culmination of various social or psychological problems that have been developing for some time. The court process may provide an opportunity to tackle various issues the client has been avoiding, but which need attention. The court may decide that, to reduce future offending, the client be required to accept services.

Where a person is homeless, accommodation is an important first step. This will be relevant where a person needs stable accommodation to obtain bail.

The guardian or advocate may play a role to consider and propose a plan of action to assist the client. If the person has a case manager, the case manager is better placed to propose a plan but the guardian or advocate should have some input.

3.10 Obtaining medical and specialist health reports

Lawyers may want to obtain medical and specialist health reports –

- to assess their client’s fitness to plead
- as evidence to be called during a hearing
- as material for the plea they will make to the court.

The guardian for the client may have access to many medical and specialist reports that would provide important background material for the lawyer and the court. However, the guardian must be careful about release of this information having regard to –

- the guardian’s powers;
- the status of the document in the guardian’s possession (for example, a document may be marked “confidential”);
- the best interests of the represented person (especially in regard to taking into account the wishes of the represented person);
- the requirements of the *Health Records Act 2001*; and
- the requirements of the *Information Privacy Act 2000*.

The guardian may be asked to authorise the obtaining of specialist reports for the represented person as this person is unable to give informed consent. It is beyond the powers of a guardian to give this authorisation as the guardian's powers relate only to civil matters. If a person is unable to provide such authorisation themselves, this may indicate that they are unable to instruct their lawyer and so should be dealt with under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (see section 6).

3.10.1 The guardian's powers

The guardian's powers are set out in the order of appointment. The usual health care power states:

Except as otherwise provided in Part 4A [of the GAA], to make decisions concerning medical or dental treatment or other health care matters.

The health care power does not include the obtaining or release of reports for use in court. Accordingly, this power, of itself, does not enable a guardian to obtain or release reports and information.

3.10.2 The status of the document in the guardian's possession

Documents in an OPA file sometimes vary in relation to the rules of privacy, secrecy or confidentiality. The Public Advocate takes an oath of office that she will not, except in accordance with the *Guardianship and Administration Act 1986*, divulge information received or obtained under this Act. Thus use of information is determined by this oath. (See sections 3.1 and 3.2 above on the provisions of the Act relevant to the work performed by a guardian or advocate)

A guardian or advocate may have to find out the source of the document to see how the document can be treated.

3.10.2.1 Privacy Laws

As well as the Public Advocate's oath of office, OPA is governed by the two Acts of Parliament regarding privacy – the *Information Privacy Act 2000* and the *Health Records Act 2001*. Information Privacy Principle 2 (IPP 2) and Health Privacy Principle 2 (HPP2) govern the disclosure of information.

These Acts set up a distinction between the primary purpose for which information is collected and secondary purposes. For example, a primary purpose of a medical report to the Tribunal about a person's disability is that the document is to provide evidence of disability. It is not the purpose of such a document that it could be used as evidence in a plea in criminal proceedings.

The Acts permit the release of information where the release is directly related to the primary purpose for which the document was created or obtained.

The Acts permit release of the information for various secondary purposes. You may wish to look at the various secondary purposes in IPP 2 and HPP 2 to see if these can help you.

The Acts permit the release of the information where the person, to whom the information relates, consents to the release.

Advocates and guardians are recommended to speak to the Legal Unit about the use and disclosure of documents to ensure that this is consistent with the oath of office and these Acts.

3.10.2.2 Confidentiality

Information may be provided to OPA confidentially. This information

1. must have a quality of confidence about it, for example when a person phones us to report an allegation of abuse; and

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2. must have been disclosed in circumstances where secrecy or confidentiality was assumed by the person providing the information; and
3. would cause damage to the person or body conveying the information.

An example of this would be a report from a psychiatrist that indicated that if the patient knew what was written in the report it might harm the therapeutic relationship between the psychiatrist and the patient. If a request were made to release this report, it would be necessary to contact the psychiatrist (as well as the patient) to obtain consent.

3.10.3 The best interests of the represented person

The guardian or advocate must have regard to this fundamental principle when determining whether to release information. If there is no law that prevents the release of information or requires the release of the information but the guardian or advocate does not see that the release is in the best interests of the person, there is no obligation to make the disclosure.

3.10.4 The Information Privacy Act 2000 and the Health Records Act 2001

The effect of these laws is set out in section 3.8.2.2 above. You should discuss these matters with the OPA legal unit.

3.10.5 Subpoena of OPA information

It would be open to any party to criminal proceedings to subpoena our file to the Court. If this occurred the matter should be raised with the legal unit to discuss how to respond to the subpoena. Our response to the subpoena will be governed by our determination as to what is in the best interests of the person.

3.11 Attending hearings

A guardian or advocate may attend a hearing for a client to give evidence or to provide support.

It may be very helpful to a person, their legal counsel and the court if a guardian or advocate were able to give evidence regarding the accused's "person and circumstances". The guardian may be able to give evidence of decisions made in relation to accommodation, the provision of services or the lack of suitable services, the health of the person, future prospects and goals (or lack thereof).

The guardian or advocate should not be called as an expert witness regarding –

- the person's disability;
- an assessment of the impact of the person's disability on their decision-making;
- the trajectory of a person's disability (for example, Huntington's Chorea).

If a guardian is asked to provide support for a person, it may be that this could be better done by a person's case manager or another agency that provides on-going emotional support to the person.

Sometimes, when the court is considering various sentencing options, it may ask that the person see a corrections officer at the court for an assessment. A guardian or advocate should not attend that assessment as you do not have any authority in relation to criminal matters. If you attend you may find yourself in a difficult situation. For example, if the person tells a version of their life story you consider to be wrong. Do you correct that? If you do, how will that affect the assessment? What happens if the person challenges you about what you have told the corrections officer, how will you prove your version of events is right?

3.12 Sentencing options.

There are specific sentencing options for people who have a disability, as well as mainstream sentencing options.

3.12.1 Mainstream orders

The mainstream options are set out in section 7(1) of the Sentencing Act 1991 (in the order of the most serious penalty first)

- (a) record a conviction and order that the offender serve a term of imprisonment; or
- (ab) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community (a combined custody and treatment order); or
- (aab) subject to Part 5 of the Sentencing Act, record a conviction and order that the offender be detained and treated in an approved mental health service as a security patient (a hospital security order); or
- (ac) record a conviction and make a drug treatment order in respect of the offender; or
- (b) record a conviction and order that the offender serve a term of imprisonment by way of intensive correction in the community (an intensive correction order); or
- (c) record a conviction and order that the offender serve a term of imprisonment that is suspended by it wholly or partly; or
- (d) in the case of a young offender, record a conviction and order that the young offender be detained in a youth justice centre; or
- (da) in the case of a young offender, record a conviction and order that the young offender be detained in a youth residential centre; or
- (e) with or without recording a conviction, make a community-based order in respect of the offender; or
- (f) with or without recording a conviction, order the offender to pay a fine; or
- (g) record a conviction and order the release of the offender on the adjournment of the hearing on conditions; or
- (h) record a conviction and order the discharge of the offender; or
- (i) without recording a conviction, order the release of the offender on the adjournment of the hearing on conditions; or
- (j) without recording a conviction, order the dismissal of the charge for the offence;
- (k) impose any other sentence or make any order that is authorised by this or any other Act.

The Magistrates' Court may also divert the person to a diversion program (see the Magistrates' Court Act s.128A and the *Criminal Procedure Act 2009*¹).

3.12.2 Hospital Orders for people who have a mental illness

The Sentencing Act 1991 also has a cluster of orders called "Hospital Orders" –

1. an assessment order under section 90;
 - a. a court makes an assessment order where a person is found guilty and the court needs a psychiatric report to assess the need for hospital orders;
2. a diagnosis, assessment and treatment order under section 91;
 - a. where a court has received a psychiatric report it may order a person to be admitted and detained under an involuntary treatment order for not longer than three months;
3. a hospital order under section 93;
 - a. instead of passing sentence, a court may order that a person be admitted and detained as an involuntary patient.
 - b. there is no provision for the return of the person to the court.
4. a hospital security order under section 93A.

¹ At the time this guideline was adopted this Act was not yet fully in operation. Please consult the Legal Unit for an update.
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- a. the court may make an order for a specified period where the person is admitted and detained as a security patient.
- b. a court cannot make a hospital security order unless, but for the mental illness, the person would have been sentenced to imprisonment.

3.12.3 Justice Plans for people who have an intellectual disability

If a person has an intellectual disability they may be eligible for a justice plan as part of a community based order where the court decides to adjourn the matter (with or without recording a conviction). The provisions relating to justice plans are set out in sections 80 to 83 of the Sentencing Act 1991. To be eligible for a justice plan the person must be a person with an intellectual disability as defined in the *Disability Act 2006*.

DHS will prepare the justice plan for the hearing. DHS has a “Criminal Justice Practice Manual 2007²” which sets out basic information for its workers. The Manual advises –
The services recommended in the Justice Plan must be specific, measurable and easy to account for so that:

- The court can understand exactly what services Disability Services recommends to reduce the likelihood of re-offending.
- The client of Disability Services can understand exactly what services they must participate in to comply with the Justice Plan.
- The client service worker can understand exactly what services they have a responsibility to monitor the client’s participation in.

The plan should comply with the planning principles set out in s52 of the *Disability Act 2006*.

A guardian or advocate may wish to contact DHS regarding the content of the plan. DHS is under no obligation to advise the guardian or advocate of the plan’s content or to provide a copy to the guardian or advocate prior to the hearing.

3.12.4 Residential Treatment Orders for people who have an intellectual disability

If a person with an intellectual disability has committed a serious offence the Court may sentence them for a period of up to 5 years at a residential treatment facility by making a Residential Treatment Order (RTO). The only residential treatment facility is the Disability Forensic Assessment and Treatment Service (formerly Statewide Forensic Service) situated in Fairfield.

The DHS Criminal Justice Practice Manual 2007 sets out information relevant to the preparation of material for the court.

3.13 Corrections Victoria

Corrections Victoria consists of

- strategic and guideline functions (e.g. planning, research and evaluation, standards and program development, policy and service development),
- statewide services (sentence management, central records, Adult Parole Board) and
- operational functions including the management of 50 Community Correctional Services locations across the state, Victoria's 11 public prisons and overseeing the contracts relating to the management of two privately operated prisons.

Reference should be made to the OPA guideline on Correctional Services & Advocacy (Guideline 03). This guideline covers –

² This can be obtained from the DHS website – look under “Publications”.

- People with disabilities should have the same opportunities as non disabled people to access the full range of community based sentencing options.
 - People with disabilities are vulnerable and at risk in custodial environments. They should be afforded adequate protection from self harm and from harm by others when in custody in either a police lock up or a prison.
 - Prisoners with disabilities have special needs. Programs, supports and services should be available which ensure that the special needs of these prisoners are adequately addressed.
 - Prisoners with disabilities should have the same opportunities as non-disabled prisoners to engage in productive work and education programs.
 - Access by the Office of the Public Advocate to prisoners.
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4 Guideline for people who are victims of a crime

People for whom we are advocate or guardian may be a victim of a crime.

Immediately after the crime, the priority will be to get care for the person and to ameliorate the effects of the violence perpetrated against them. The police may need to speak to the person and so an ITP will have to be present.

The person is likely to need ongoing counselling, support and care.

The person may have suffered financial loss as a result of the crime and may have to apply for compensation.

If the alleged perpetrator of the crime is prosecuted for the offence, the victim may be required to provide evidence to the court. If the perpetrator is found guilty, the court may seek a “victim impact statement” prior to passing sentence on the offender. The court may also consider an award of damages to the victim as part of the sentence.

A guardian or advocate may assist the person to access services, provide support and direction and advocate for a just outcome for the person.

4.1 Victims of crime

A person’s response as a victim of a crime will be unique. For some, the realisation of any trauma may take time, for others it may be immediate. For some, there will be conflicting emotions, possibly some sense of guilt or responsibility for what has happened. For some the violation of their person is difficult to feel, articulate or share.

Often the person will experience overwhelming emotions regarding the violation done to them.

It is important that people in this situation receive support from those who are empathetic, respectful and trained professionals.

Whilst it is not common that staff at OPA will be at the front line when a person with a disability is the victim of a crime, this can happen. An example is a call to the Advice Service that a woman does not want to report a sexual assault to the police. Should a report be made anyway? Should the person be required to undergo a forensic examination? Can a guardian be appointed to consent to such examination on the person’s behalf?

There are no answers to such questions that can be given in the abstract. The person should be referred to a professional person who is able to work through these decisions with the person as to what she wants to do.

In relation to sexual assaults, OPA has a protocol with CASA that can be found on the G Drive in the “Protocols” folder.

4.1.1 Forensic procedures

A forensic procedure is defined in the *Crimes Act 1958* as

the taking of a sample from any part of the body, whether an intimate or nonintimate sample or any other type of sample, or the conduct of any procedure on or physical examination of the body but does not include the taking of a fingerprint.

It is OPA’s view that forensic procedures are not medical treatment as defined in the *Guardianship and Administration Act 1986*. This is because forensic procedures are performed for the purpose of collecting evidence of a crime, not for treatment of the person.

Sometimes a person will be unable to consent to a forensic procedure. Because the procedure is not medical treatment, a person responsible is not authorised to consent to it. The police, CASA or the hospital may seek the appointment of a guardian to provide such consent. The power sought is not health care but should relate specifically to the consent to the forensic procedure.

In relation to sexual assaults, a forensic procedure for the purposes of collecting DNA material must take place within 72 hours.

It will be necessary for a guardian to consider whether undergoing the forensic procedure is in the best interests of the person. When acting in the best interests of the person regard should be had to –

- Section 28 of the *Guardianship and Administration Act 1986*;
- The Best Interests Check List; and
- Practice Guideline 23 on the Charter of Human Rights and Responsibilities Act.

There are some unique features to forensic procedures that guardians should be mindful of –

1. As the person has suffered violation, concern should be given to the person’s likely response to the forensic procedure.
 - a. In evaluating how the person is likely to respond, information should be sought from people in their local community, such as family, friends or professionals (although regard must be had to issues of confidentiality and privacy);
2. Giving effect to the person’s wishes wherever possible will be a paramount consideration. If the person is objecting, is frightened, there may be a serious risk of re-traumatising the person if the forensic procedure were to proceed. Even if the person isn’t objecting, it will be necessary to find some way of gauging the person’s response to such a procedure in order to minimise any further harm to the person;
3. The risk that the person will be the subject of further criminal activity if the perpetrator is not made accountable. For example, where it is necessary to identify who is sexually assaulting a person where the survivor is unable to identify them personally.
4. The person’s dignity which has been violated by the criminal act. The community has a role in asserting that dignity by making the perpetrator accountable for their actions.
5. Once the forensic procedure has taken place the police may use that evidence to prosecute a defendant and may call the represented person as a witness. This can occur even where the represented person may not seek any further involvement in the case. Thus, in making a decision to consent to the forensic procedure the guardian should consider the involvement of the represented person as a witness in any criminal prosecution.

4.1.2 “Victims of crime” as defined in the Victims of Crime Assistance Act 1996

It may be important for the person, in order to get the assistance that they need (such as counselling), to meet the requirements of the *Victims of Crime Assessment Act 1996* (“VOCA Act”).

The VOCA Act mentions two types of victims, primary and secondary.

- Primary victims are those who are injured or who die as a direct result of an act of violence committed against them. This could also include a person who is injured by an act of violence when
 - trying to arrest a person whom they believe has committed an act of violence or
 - trying to prevent the commission of an act of violence, or
 - trying to aid or rescue someone they believe is a victim of an act of violence.
- Secondary victims are those who are present at the scene of an act of violence and who are injured as a direct result of witnessing that act. A secondary victim may be a parent or guardian of a child under 18 who becomes aware that their child was injured as a direct result of an act of violence.

4.2 Services available to people who are victims of crime

- **Victims Support Agency** (03 8684 6700)– represents victims of crime and coordinates a whole-of-government approach to services for victims.
- **Victims of Crime Helpline** (1800 819 817) – staff can provide information advice and referrals by phone, there is also an after hours service.
- **Victims Assistance and Counselling Program** (1300 884 284) – trained team can help with:
 - Crisis response
 - Help in making a formal police report and liaising with police
 - Assistance to find accommodation
 - Short-term counselling (up to five one hour sessions) for eligible people. If you require assistance to pay for longer-term counselling, you can apply to the Victims of Crime Assistance Tribunal (VOCAT).
 - Access to support groups and help to locate services such as lawyers or legal aid, for example
 - Information about what happens in court and support with processes, such as completing victim impact statements
 - Applying to the Victims of Crime Assistance Tribunal for counselling and financial assistance.
- **Court Network** (1800 681 614) - personal support, information and referral for victims of crime, their families and others preparing to attend court. It has onsite services in the Supreme, County, Coroner's, Family, Children's and Melbourne and district Magistrates' courts.
- **Witness Assistance Service** (03 9603 7523) - available to all prosecution witnesses and victims of crime involved in cases handled by the Office of Public Prosecutions. The service provides information and support and is free of charge.

4.3 Compensation that is available to people who are a victim of crime

A person who is a victim of crime may be entitled to financial assistance from the Victims of Crime Assistance Tribunal or to compensation from the offender.

Claims for financial assistance may be made through the Victims of Crime Assistance Tribunal (VOCAT). If you are the parent or guardian of a child who has been a victim of a violent crime, you can make an application to VOCAT on their behalf and you may also be eligible to make an application for yourself (as a "secondary victim").

The maximum total financial assistance awarded by VOCAT is \$60,000 to a primary victim, and \$50,000 to a secondary or related victim. These totals may include:

- medical
- counselling

- funeral expenses
- other expenses in exceptional circumstances.

The maximum cumulative amount available to all related victims, in respect of one death, is \$100,000, less any amount awarded for funeral expenses.

Primary victims of crimes committed after 1 July 2000 (and certain pre-July 2000 childhood sexual assault offences) may be able to apply for special financial assistance. The amount of special financial assistance awarded depends on the seriousness of the crime and its impact on the victim, ranging from \$130 to \$10,000. Where the victim sustains an injury, special financial assistance is payable over and above the \$60,000 limit.

Interim awards are available if you require urgent assistance as a result of a violent crime. This could be where you need to pay for urgent counseling, immediate safety needs or medical expenses. This funding is limited.

4.4 The trial of the alleged offender

The person accused of committing the crime is referred to as the ‘alleged offender’ because they are considered innocent until proven guilty in a court. After the police have investigated the crime and laid charges, a prosecutor will present the case in court against the accused person.

The Victims’ Charter is a law in Victoria that sets out the rights of victims of crime. Victims of crime have the right to have the court process explained to them.

The court process can be quite complex. Essentially, how the case is handled - and what court hears the case - depends on how serious the criminal charges are. The person who is the victim of crime may be required to:

- attend the Magistrates’ Court and give evidence at a hearing
- attend the trial to give evidence and to be cross-examined on that evidence.

It is important that the person understands the process of witness examination that they may be subject to.

Victims of crime will be informed whether they need to give evidence by letter (a subpoena or witness summons). At court the person will either need to swear an oath on the Bible or make a non-religious affirmation. They will need to answer questions asked during examination in chief by the prosecution and afterwards answer questions during cross-examination by the defence. After cross-examination they may also be subject to re-examination by the prosecution.

The person who is the victim of crime may be nervous or fearful about undergoing cross-examination. The objects of cross-examination are to gain evidence from the witness to support the cross-examiner’s case and to undermine the evidence the witness gave during examination in chief. The purpose is not necessarily to *destroy* evidence given in chief and often this is not possible. Contrary to the depiction in the media, it is not necessary to cross-examine crossly and to do so may breach ethical and professional standards. Counsel cross-examining can only challenge a witness if the counsel’s instructions contain material that would justify such a challenge.

The rule in *Browne v Dunn* says that if one of the cross-examiner’s witnesses is going to give evidence that conflicts with the evidence of the victim of the crime, the substance of that evidence must be presented to the victim to give them a chance to respond to it. This may mean the victim is presented with evidence in cross-examination that, for example, portrays them as a liar. It is important the victim understands that the cross-examiner does this to satisfy the rule in *Browne v Dunn*, which is a rule to give the victim a chance to rebut negative evidence.

If the victim of crime is considered a vulnerable witness under the *Evidence Act 1958 (Vic)* there are special provisions available which include:

- having a friend or relative in court while you give evidence, provided they are not also appearing as a witness
- having a screen in the court, so you do not have to see the accused person while you give evidence
- having the court closed to the public while you give evidence
- giving your evidence on closed circuit television.

Upon application, the Judge will determine permission for the use of these.

In relation to charges for sexual offences, the *Evidence Act 1958 (Vic)* prohibits certain types of evidence being presented and prohibits cross-examination about the victim's sexual activities. The *Evidence Act 1958 (Vic)* states that a court may declare a complainant in a sexual offence case to be a protected witness. A protected witness must not be personally cross-examined by the accused person, so the accused must have legal representation to do so. The *Magistrates' Court Act 1989* established the Sexual Offences List (SOL) which recognises the unique features of sexual offence cases. As part of the operation of the SOL, remote witness facilities are available at the Magistrates' Court for use by witnesses who do not wish to come face to face with the defendant in the courtroom.

Many of the Victorian courts and tribunals have information on their websites to help people understand and prepare for what will happen on the day in court or at a tribunal hearing. For example, the Magistrates' Court has a virtual tour to show the person where they will sit and where other people will sit in the room. There are also support services available through the courts.

4.4.1 Victim impact statements

As the victim, the person is entitled to submit a Victim Impact Statement to the Court if the accused person is found guilty. The Magistrate or Judge may consider this statement in deciding the offender's sentence.

5 Other relevant policies

C03 – Advocacy and Correctional Services

OPA's checklist document on making a decision in a person's Best Interests

6 References

Evidence, Proof and practice, Graham Roberts, LBC 1998

Victims of Crime website - <http://victimsofcrime.com.au>

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