

VICTIM AND WITNESS RIGHTS

under the ACT Human Rights Act 2004

A practical guide for the justice sector on the Human Rights Act (ACT) 2004

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Introduction

Complying with the *ACT Human Rights Act 2004: Victims of Crime*

This guide has been prepared by the ACT Human Rights and Discrimination Commissioner and the Victims of Crime Commissioner to assist workers in the justice sector in the ACT to understand the rights and obligations contained in the *Victims of Crime Act 1994* (ACT) and the *Human Rights Act 2004* (ACT) (HR Act) that apply to victims of crime. Workers will be able to use information and checklists in the guide to review their policies and practices to ensure human rights are considered when dealing with victims of crime and witnesses in justice settings.

Who is a victim?

A victim is a person who suffers harm because of an offence. This includes a broad range of people who suffer harm including:

- harm suffered during or as a result of the commission of an offence;
- harm as a result of witnessing an offence;
- a family member of a primary, or a person financially or psychologically dependant on the primary victim who suffers harm because of the harm to the primary victim;
- people who fall within the *Victims of Crime (Financial Assistance) Act 1983*.

If the person is a child or legally incompetent person, a guardian of that person¹. A person can be a victim even if the offender has not been convicted of an offence.

Governing Principles for Victims of Crime

The *Victims of Crime Act 1994* clearly specifies principles for the treatment of victims of crime by all agencies involved in the administration of justice. All public authorities have an obligation under the Human Rights Act to treat all people who are the victim of a crime with respect and dignity.

In addition to the Human Rights provided to a person under the *Human Rights Act*, a person who is a victim of crime has a right to be treated in way compatible with the governing principles.

In the explanatory statement for the 2010 amendment of the Act, the Attorney General reaffirmed that it

“is important the ACT strive for best practice in the support of victims of crime in our community, particularly given the ACT was Australia’s first jurisdiction to adopt a statutory human rights framework.”²

Human Rights for Victims of Crime

People who have been victims of crime have limited influence on the course of investigation, prosecution and sentencing of crimes committed against them. They do not usually have lawyers to protect their interests and guide the prosecution process – their primary role in the criminal justice system is as witnesses. There is now recognition that vulnerable victims can be re-victimised through the trial and court processes. In particular, the vulnerability of victims of sexual assault and child victims has led to law reform in this area including:

¹ *Victims of Crime Act 1994* (ACT) s6(1).

² Victims of Crime Amendment Bill 2010; Explanatory Statement. 2010 Simon Corbell, Attorney General.

- Children may be separately represented
- allowing victims and witnesses to give evidence via audiovisual link;
- prohibiting a self-represented litigant from personally cross-examining a victim;
- allowing a support person in court;
- prohibiting cross-examination on the prior sexual activities or sexual reputation of victims of sexual assault.

These legislative changes seek to strike a balance between the interests of an accused with those of a victim. This need for balance was highlighted by Simon Corbell, ACT Attorney General:

“while the right to a fair trial is a central pillar of the criminal justice system, the too long now maintaining the balance of fairness in the prosecution of sexual assault has been heavily weighted against the complainant”³

The European Court of Human Rights observed that;

“principles of fair trial require that the interests of the defence are balanced against those of witnesses and victims called upon to testify, in particular where life, liberty or security of person is at stake”⁴

This guide includes real life case studies where human rights have been used to to ensure;

- victims’ rights with regard to a fair trial;
- vulnerable victims such as women and people from culturally and linguistically diverse backgrounds have adequate access to justice;
- victims safety is considered and acted upon in criminal justice matters;
- the protection of children and young people who are victims;
- a person’s right to access to information held about them;
- victims’ right to life are protected.

³ Australian Capital Territory, *Parliamentary Debates*, legislative assembly, 3 July 2008, 2667 (Simon Corbell, Attorney-General).

⁴ *PS v Germany* (2003) 36 EHRR 61 [22].

Part 1: Victims of Crime ACT 1994 –

Section 4: Governing Principles

Why do I need to know about the Governing Principles?

Any person who exercises a function in the administration of justice **must** have regard to these principles when dealing with someone who is a victim of crime.⁵

The Victims of Crime Commissioner monitors and promotes compliance with the governing principles. The Commissioner also deals with complaints relating to non-compliance with these principles.⁶ Agencies must provide any documentation or information required by the Commissioner to resolve a complaint.⁷ Formal complaints are referred to a relevant complaints entity by the Commissioner.⁸

What are the Governing Principles?

Section 4 stipulates that in the administration of justice, the following principles are to, as far as practicable and appropriate, govern the treatment of victims. In addition to the principles below, people who are the victim of a crime are also entitled to have their human rights considered and protected.

All Stages of the Criminal Justice Process

a) A victim should be dealt with at all times in a sympathetic, constructive and reassuring manner and with due regard to his or her personal situation, rights and dignity;

Investigation Stage

b) A victim should be informed at reasonable intervals (generally not exceeding one month) of the progress of police investigations concerning the relevant offence, except where such disclosure might jeopardise the investigation, and, in that case, the victim should be informed accordingly;

c) A victim should be informed of all the charges laid against the accused and of any modification of the charges;

Court Stage

d) A victim should be informed of any decision concerning the accused to accept a plea of guilty to a lesser charge or a guilty plea in return for a recommendation of leniency in sentencing;

e) A victim should be informed of any decision not to proceed with a charge against the accused;

f) Where any property of the victim is held by the Crown for the purposes of investigation or evidence - inconvenience to the victim should be minimised and the property returned promptly;

g) A victim should be informed about the trial process and of the rights and responsibilities of witnesses;

h) A victim should be protected from unnecessary contact with the accused and defence witnesses during the course of the trial;

5 *Victims of Crime Act 1994* (ACT) s5(1).

6 *Victims of Crime Act 1994* (ACT) s11(c) – (d).

7 *Victims of Crime Act 1994* (ACT) s12(2).

8 *Victims of Crime Act 1994* (ACT) s12(4).

- i) A victim's residential address should be withheld unless court directs otherwise;
- j) A victim should be relieved from appearing at preliminary hearings or committal proceedings unless the court directs otherwise;

Post Court

- k) A victim should be given an explanation of the outcome of criminal proceedings and of any sentence and its implications;
- l) A victim who is known to have expressed a concern about the need for protection from an offender should be informed of the offender's impending release from custody.







Part 2: About the Human Rights Act 2004

Why do I need to know about the Human Rights Act?

The Human Rights Act places two obligations on ACT Public Authorities, which includes ACT Government Agencies, and those doing outsourced Government work. They must:

- **Act** consistently with human rights; and
- **Consider** human rights in decision making:
Section 40B(1)(b) of the HR Act requires public authorities to give proper consideration to human rights when making decisions and a failure to do so will be unlawful. Public authorities must actively and properly incorporate human rights into decision-making processes where relevant, and should be able to provide documentary evidence of having done so.

Some example of organisations that are public authorities and who would therefore have duties under the HR Act:

	Organisation	Duties
	THE POLICE	Yes
	THE DPP	Yes
	COURTS	Yes, but only the administrative arm of the court.
	CARE AND PROTECTION	Yes
	HEALTH	Yes, but only ACT Government provided health services like the hospital. Private GPs are not included.
	YOU	Do you perform a public service on behalf of the ACT Government?

What are Human Rights?

Human rights are inherent to all of us as human beings, regardless of who we are, where we live or any other characteristic. They are intended to provide an interrelated safety net of protections that ensure we are able to reach our potential and be treated fairly by our Government. The human rights protected in the ACT Human Rights Act are drawn from internationally agreed documents about what rights must be protected by Governments.

Human Rights in the ACT

The human rights protected in the ACT HR Act are:

- Recognition and equality before the law (s.8)
- Right to Life (s.9)
- Right to Protection from Torture and cruel, inhuman or degrading treatment (s.10)
- Right to Protection of the Family and children (s.11)
- Right to Privacy and Reputation (s.12)
- Right to Freedom of Movement (s.13)
- Right to Freedom of Thought, Conscience, Religion and Belief (s.14)
- Right to Freedom of Association (s.15)
- Right to Freedom of Expression (s.16)
- Right to Take Part in Public Life (s.17)
- Right to Liberty and Security of Person (S. 18)
- Right to Humane Treatment when Deprived of Liberty (s.19)
- Rights of Children in the Criminal Process (s.20)
- Right to Fair Trial (s.21)
- Rights in Criminal Proceedings (s.22)
- Right to Compensation for Wrongful Conviction (s.23)
- Right not to be Tried or Punished more than once (s.24)
- Right against Retrospective Criminal Laws (s.25)
- Freedom from Forced Work (s.26)
- Rights of Minorities (s.27)

Are human rights absolute?

The majority of protected human rights are able to be subject to **reasonable and proportionate limitation**. Exceptions in international treaties are generally the right to freedom from torture, slavery and servitude, and the right to recognition before the law.

The human rights of victims of crime may, at times, conflict with those of defendants or other people in a legal context. When this occurs, a human rights analysis should be undertaken to consider whether reasonable limits can be placed on the human rights of either party. This analysis must be adequately documented in order to demonstrate that it has occurred.

Deciding whether a limit is reasonable and proportionate requires a consideration of:

1. the nature of the **right** affected
2. the importance of the **purpose** of the limitation
3. the nature and extent of the **limitation**
4. the **relationship** between the limitation and its purpose
5. any **less restrictive means** reasonably available to achieve the purpose the limitation seeks to achieve.

If the action or decision is not reasonable and proportionate, it may be unlawful, unless the Public Authority can rely on the defence of having no discretion in law to act in a different way.

Defence

Section 40B(2)(a) of the HR Act, provides a defence where a public authority could not have acted differently, or made a different decision because it was required under another Territory or Federal law to act that (non-human rights compliant) way. (s. 40B(2)(a) below)

Interpretation of laws and human rights

Section 30 of the *Human Rights Act 2004* says that:

so far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights

So a Court or Tribunal should adopt a “human rights consistent” interpretation within the “purpose” of the statute.

The ACT Supreme Court held, *In the Matter of an Application for Bail by Isa Islam*⁹, that the ordinary processes of statutory interpretation, including that under section 30 of the HR Act, should be applied when interpreting Territory legislation, with the aim of finding a provision that is both human rights-compatible and consistent with purpose.

9 [2010] ACTSC 147 (19 November 2010)

Part 3: Human Rights Compliance Tools

This section provides a flowchart and checklist to help public authorities apply the HR Act in their decision-making.

Figure 1: Summary of the Public Authority Obligation

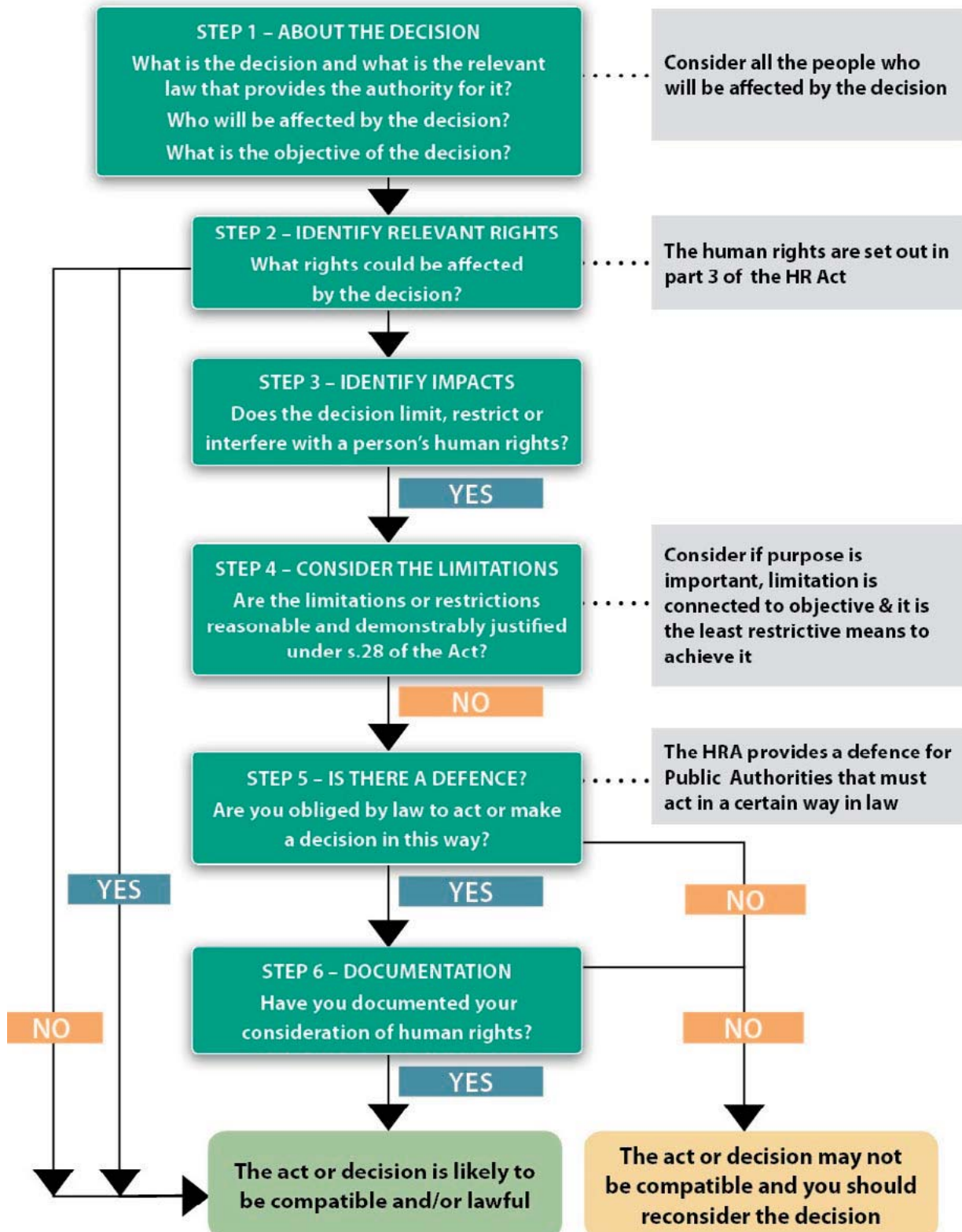
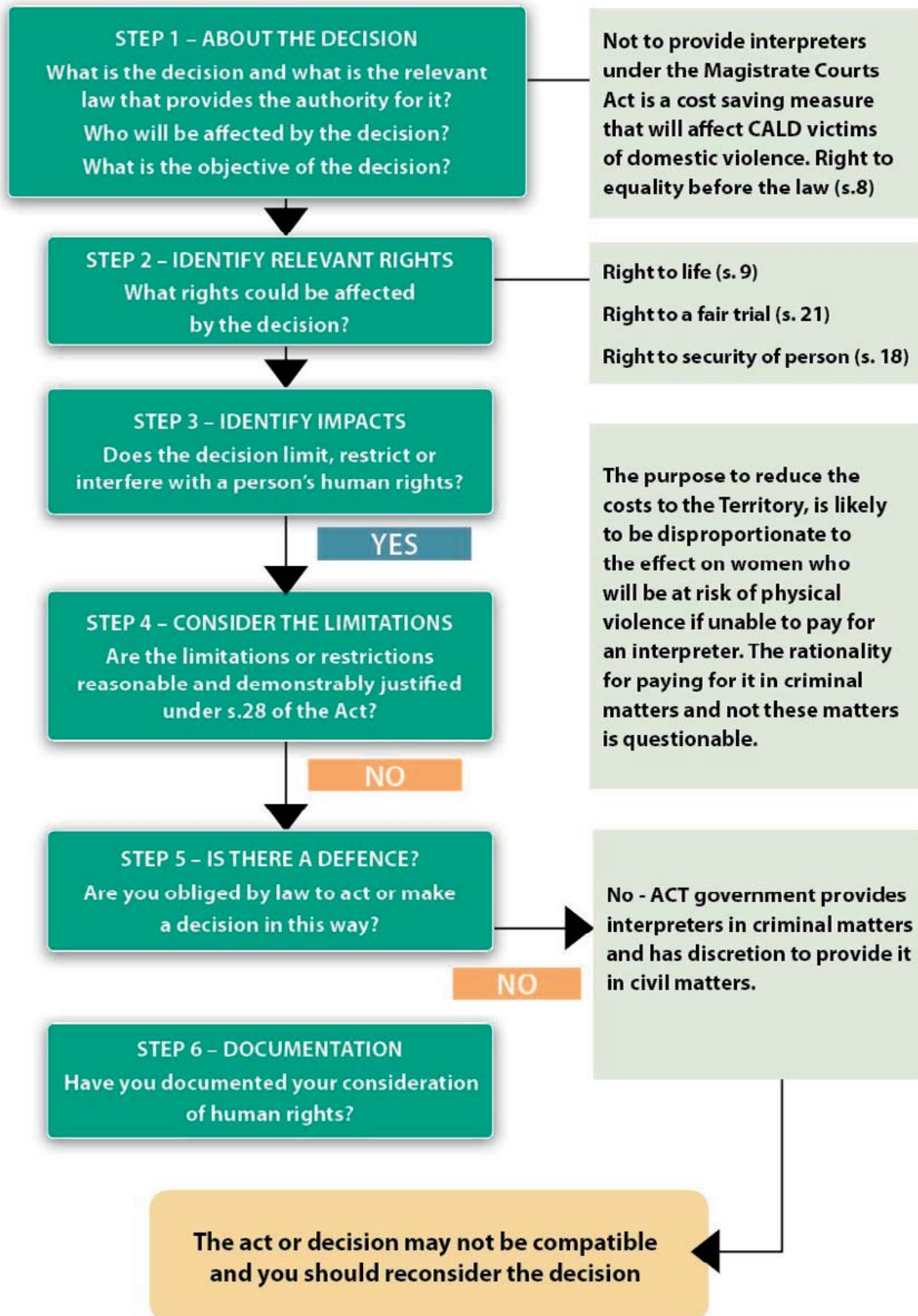


Figure 2: Example of Assessing Compliance

Example: this example considers whether courts not paying for interpreters for women who are victims of domestic violence in a hearing application for a civil domestic violence order is compatible with human rights.



Further information on how the flowchart works

Step 1 : The decision

Who will be affected by the decision?/What is the objective of the decision?

- consider why this decision is being made and what the decision is intending to achieve;
- think broadly about all people who are likely to be affected by the decision;
- identify the legislative basis for the decision.

Example:

The people who would be affected by a decision to grant bail under the Bail Act 1992 (ACT) would be:

- the defendant
- any victims
- witnesses that may be involved
- family, including children of both parties
- the general community.

Step 2: Identify Relevant Rights

What rights could be affected by the decision? Identify the rights.

Consider all the rights contained in the HR Act and consider whether the decision could affect any of those rights. It is possible that a number of rights will be relevant.

Consider who could claim protection of those rights. It is possible that two people may claim the same right, or that different rights might seem to conflict.

Step 3: Identify impacts

Does the decision limit, restrict or interfere with a person's human rights?

This step requires you to consider the impact of your decision. It is important to note both whether the decision will protect or restrict rights.

Look at who might claim a right using your rights to step 2 above. It is possible that one person's right will be restricted in order to protect another person's rights, or the rights of the wider community.

If the decision does affect one or more human rights, consider whether it protects, limits, interferes with or restricts a human right.

Example: the decision whether to grant a defendant bail impacts on a number of rights of both the defendant and a victim. Not granting bail impacts on the defendant's right to liberty (s 18), but it may also impact on a victim or witness's right to security of person (s 18). Refusing bail may impact on a defendant's right to the protection of the family and children (s 11) if he/she is the primary carer of children. If there is a risk of violence, a decision to grant bail may also affect a victim's right to life (s 9).

Step 4: Consider the limitations

Are the limitations or restrictions reasonable and demonstrably justified under s.28 of the Act?

If the decision limits, restricts or interferes with human rights you must ask whether the limitation is reasonable and demonstrably justified under the HR Act.

Part 4: Key HR Act rights for victims and witnesses

Overview

The key human rights relevant to the justice system at all stages of the process including investigation, court and post-court are outlined in this section.

Section 8: Recognition and Equality before the Law

S 8 of the HR Act provides the right to enjoy human rights ‘without distinction of discrimination of any kind.’

S 8(3) provides:

Everyone is equal before the law and is entitled to the equal protection of the law without discrimination

Everyone has the same rights and deserves the same level of respect. This means that laws, policies and programs should not be discriminatory. It also means that public authorities should not apply or enforce laws, policies and programs in a discriminatory way. These include discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

Human rights law recognises that just treating everybody in exactly the same way (formal equality) can lead to unequal outcomes and to achieve substantive equality sometimes differences of treatment may be necessary for example measures intended to achieve equality under s. 27 of the Discrimination Act 1991.

Investigation stage

Some relevant considerations for victims when considering the concept of recognition and equality before the law during the investigation stage include:

- women have the right to be safe from domestic violence and should therefore have the same access to domestic violence services and police assistance
- police investigators ensuring they provide appropriate support and assistance to people with disabilities to provide statements and to participate in taped records of conversations. Police may need some training to better understand what a person with a disability may require to participate in a formal interview, for example, whether the person may benefit from support during the interview, and whether any technical or other support is needed
- some examples of extra supports a person with a disability may need are:
 - an AUSLAN interpreter, for a person who is deaf;
 - access to large print documents, for a witness with vision impairment;
 - regular breaks during an interview, for a person with intellectual disability;
 - providing for a support person to be with a person with a disability or an Aboriginal or Torres Strait Islander person to assist them to give a witness statement. This role may include the person asking for breaks and helping the person understand what is being asked or pointing out to police if a person may not understand the questions asked.

- providing for an interpreter to assist a person to make a statement to police when that person does not speak English or for whom English is not their primary language.

At Court

Some relevant considerations for victims when considering the concept of recognition and equality before the law during the court stage include:

- courts providing appropriate adjustments for victims/witnesses with disabilities such as the availability of support persons, audiovisual link, frequent breaks in proceedings, and other adjustments;
- providing updates on preparation of cases and information about court processes in accessible formats for people with disabilities;
- giving consideration to limiting the amount of times people with disabilities and other vulnerable witnesses are required to give their evidence – the number of times proofing occurs should be kept to a strict minimum, especially if evidence has been pre-recorded. Asking a witness to recount their story multiple times may create inconsistencies in their evidence and can cause secondary victimisation.¹⁰

Example: A witness in a serious criminal matter is a man who has an intellectual disability. He is very anxious about giving evidence, and has significant difficulty concentrating for extended periods of time. A human rights approach to assist him to give the best evidence he can give, would involve allowing him to have a support person sit with him whilst he is giving evidence, taking frequent breaks in proceedings and avoiding the use of long or confusing questions. It may also involve allowing him to give evidence via audiovisual link.

- providing adjustments to the way in which evidence is given in court, and recognition of the effects of delay. This includes allowing witnesses to give evidence via audiovisual link, as well as allowing an audiovisual recording of a police interview to be admissible as evidence;
- allowing a right of access to alternative dispute resolution processes – e.g. if referral made to restorative justice, victims have the ability to decide whether they would like to participate in the process and meet face to face with the offender. This may include consideration of whether mediation is a suitable option, taking into account any disabilities or vulnerabilities that may affect this;
- providing interpreter services for civil matters, including domestic violence and personal protection order applications and hearings, which are currently not usually provided by the ACT court and must be organised by the applicant at their own cost;
- ensuring early allocation to the prosecutor who will deal with the matter at trial to provide continuity of support.



Case example (right to equality)

A 17 year old girl living in the Philippines who was mute and hearing-impaired alleged that she was raped by a neighbour. She reported the incident to police with her sister interpreting for her using sign language. The affidavit drawn up was in Filipino. However, the education system for the deaf was in English and the complainant could not understand the affidavit, and she was not given an interpreter.

It took almost 5 years for the case to be heard and finalised. Reasons for the delay included: the court's failure to provide an interpreter, leaving it up to the complainant to arrange, placing the case after the other cases scheduled for the day were heard, leading to many adjournments. The accused was acquitted due to insufficient evidence. The court stated that an ordinary Filipina female rape victim

¹⁰ Attorney-General's Department South Australia, *Supporting vulnerable witnesses in the giving of evidence: Guidelines for securing best evidence*, 11.

would try to escape or resist and call out, and that the complainant's demeanour was inconsistent with this casting doubt on her credibility.

The UN Committee on the Elimination of Racial Discrimination found that the court's treatment amounted to a violation of the State's obligation to end discrimination in the legal process, and that its attitude towards the complainant and towards women and rape in general revealed gender stereotyping. The Committee noted that the State's obligations included an obligation to consider the complainant's disability and age. It found that providing a sign language interpreter was essential to ensure the complainant's full and equal participation in proceedings to ensure protection against discrimination.

Source: *RPB v The Philippines*, Committee on the Elimination of Discrimination against Women, Communication No 34/2011 (21 February 2014)

Post Court

Some relevant considerations for victims in the concept of recognition and equality before the law post-court would include:

- ensuring that the outcome of a matter is explained clearly in an understandable format to victims with disabilities, or people who are culturally and linguistically diverse.

Section 9: Right to Life

The right to life is one of the most fundamental human rights, and has two main aspects. Public authorities must:

- not take away anyone's life, except in a very few limited circumstances and only when absolutely necessary;
- take reasonable steps to protect life, including taking steps to protect someone whose life is at risk from another person, where the authorities know or should know of this risk.

Investigation stage

Some relevant considerations for victims when considering the concept of the right to life during the investigation stage would include:

- ACT Policing taking appropriate steps to protect a person when they know there is a real and immediate risk to the life of that individual, including through domestic violence. Police may have a duty to do all that can be reasonably expected of them to prevent a real and immediate risk to life, which they knew or ought to have known;¹¹
- ACT Policing taking steps to protect witnesses, including a duty to warn persons who may be at risk of a life-threatening situation.¹²

11 *Osman v United Kingdom* (1998) 29 EHRR 245.

12 *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50.



Case example (right to life)

The applicants employed the defendant in their optical shop in England. When the police found optical equipment at the defendant's house they charged him with theft. The defendant then threatened the applicant's son on a number of occasions, including that he would kill him if he did not withdraw charges. This was reported to police. The applicant's car and business premises were set alight, however this was not linked to the defendant. The defendant shot dead the applicant's son as he was leaving work.

While the court found there was no violation of the right to life (article 2) in this case, it found that there is a positive obligation on authorities to take preventative measures to protect an individual whose life is at risk from the criminal acts of another.

Source: *Van Colle v United Kingdom* [2012] ECHR, Application No 7678/09 (13 November 2012)

Post court

Some relevant considerations for victims when considering this right post-court would include:

- a positive obligation to protect life and a right to the basic necessities of life. This may involve police taking appropriate steps to protect a person they know is at risk of violence, including a risk of violence once an offender is released from custody.

Section 10: Right to protection from torture and cruel, inhuman or degrading treatment

Section 10 of the HR Act provides that:

No-one may be –

- (a) tortured; or
- (b) treated or punished in a cruel, inhuman or degrading way.

Investigation stage

Some relevant considerations for victims when considering the concept of this right during the investigation stage would include:

- police have an obligation to take complaints seriously and conduct investigations in a timely and efficient manner;¹³
- DPP must adequately investigate the possibility of taking the matter to trial if there is sufficient information that a crime has been committed.¹⁴



Case example (prevention of degrading treatment or punishment)

The so-called 'black cab rapist' committed more than 100 drug and alcohol assisted rapes and sexual assaults on women he had been carrying his cab between 2002 and 2008 in London.

The fact that the women had been drugged reduced the likelihood of his apprehension and arrest as he left his victims confused and disorientated, frequently with only a partial memory of their ordeal.

¹³ *Black Cab Rapist (DSD and Anor v Commissioner of Police)* [2015] 1 WLR 1833.

¹⁴ *Valiuliene v Lithuania* [2013] ECHR (application no. 33234/07) (26 March 2013).

The police had guidelines on how to deal with this type of crime. However the guidelines were largely ignored and officers did not receive any training on them. As a result, there was a series of systematic failures in this case which led to the failure to apprehend the attacker at an earlier date.

The police service was found liable to the claimants for a breach of the *Human Rights Act* which imposed a duty upon police to conduct investigations into particularly severe violent acts perpetrated by private parties in a timely and efficient manner.

Source: *DSD and Anor v Commissioner of Police* [2015] 1 WLR 1833.

Court Stage

Some relevant considerations for victims when considering this right during the court stage would include:

- restricting the ability of counsel to cross-examine vulnerable witnesses in certain circumstances including children and victims of sexual assault, for example; to only asking necessary questions
- assisting witnesses to give evidence to the court through the use of intermediaries.

Section 11: Protection of the Family

The term 'family' has a broad meaning that recognises the many different types of families who live in the ACT. Family life covers close and personal ties of a family kind. It does not just cover blood ties or formal relationships and goes beyond the so-called 'nuclear family'. It includes a right to develop normal family relationships and the right to ongoing contact if a family separates.

This right is a qualified right, which can be limited or restricted in certain circumstances to protect the rights of others or the interests of the wider community. For example, a child may be separated from their parents if there is evidence of child abuse. Any interference with this right must be lawful, necessary and proportionate.

Investigation Stage

Some relevant considerations for victims when considering the concept of protection of family during the investigation stage would include:

- ACT Policing must ensure they consider the victim when making a decision about whether police bail should be granted to a defendant. They must consider the likelihood of the defendant harassing or endangering the safety or welfare of anyone,¹⁵ and take into account any concerns the victim has about their need for protection.¹⁶
- in situations where a victim has expressed concern about their need for protection from violence or harassment from a defendant, the police informant is required to inform the victim liaison officer about any bail decisions by police. The liaison officer is required to take all reasonable steps to tell the victim of bail decisions as soon as practicable.

¹⁵ *Bail Act 1992* (ACT) s 22

¹⁶ *Ibid*, s 23A.

Court stage

Some relevant considerations for victims when considering the concept of protection of family during the court stage would include:

- in Childrens Court – when making decisions about whether a child needs to be removed from the care of a parent, and in considerations of suitable out-of-home care for that child;

Example: A woman living in a domestic violence situation, and Care and Protection Services (CPS) are concerned about the impact of violence on the children. Her children are removed from her care because she is unwilling or unable to guarantee the children will not have contact with the alleged perpetrator. A human rights approach would consider examining the supports and services that would be needed for her to enable the children to remain in her care in a manner that would protect their rights to be safe, and if this is not possible finding a carer placement as close as possible to the family e.g. a grandparent. It would also involve ensuring appropriate resourcing for agencies to provide ongoing services after the “crisis” event to ensure trauma is not exacerbated. Lack of resources post-crisis can lead to victims of domestic violence situation deteriorating, for example becoming homeless.

- in Childrens Court – when making decisions about the child’s contact with family members and significant people in their lives. The *Children & Young People Act 2008* acknowledges that a child’s best interests may involve maintaining contact with a person outside their immediate family;
- when considering whether bail should be granted to a defendant – the Court must consider the likelihood of the person harassing or endangering the safety or welfare of anyone,¹⁷ and to take into account any concerns the victim has about their need for protection;¹⁸
- when a decision has been made about the grant of bail or review of bail by a court, if the victim has expressed concern about the need for protection from violence or harassment, the police informant must tell the ACT Policing victim liaison officer and that officer must take all reasonable steps to tell the victim about the bail decision as soon as practicable.¹⁹



Case example (right to equality, rights to family)

A single mother in Victoria, living with cerebral palsy was at risk of having her daughter taken from her by Child Protection. She needed to demonstrate that with the appropriate assistance she would be competent, both emotionally and physically, to care for her daughter. The advocate in this case used the Victorian Charter of Human Rights to communicate the woman’s rights through mediation in the Children’s Court with Care and Protection. These rights included recognition and equality before the law, and protection of families and children. The woman was provided the opportunity to demonstrate that she had adequate supports in place to ensure the safety of her child and to give her the full recognition of her capability of mothering her child, so that Child Protection are no longer involved.

Source: Leadership Plus: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

17 *Bail Act 1992* (ACT) s 22

18 *Ibid*, s 23A.

19 *Bail Act 1992* (ACT) s 47A.

Section 11(2): Right to protection of children and young people

This protection extends to any person aged under 18 years of age. The right to protection of children and young people could be interpreted to include a broader range of children's rights recognised in the Convention on the Rights of the Child, including the right to participation. Public Authorities must adopt special measures to protect children and young people, and the best interests of the child must be taken into account in all actions affecting a child.

Investigation stage

Some relevant considerations for victims when considering the concept of the right to protection of children during the investigation stage would include:

- children who are victims have a right to give statements to police if they are mature enough. This should be done in a way that supports them to give the best possible evidence, including having a support person present and asking questions in an age appropriate way.
- public authorities (e.g. ACT policing and Care and Protection Services) may have a positive duty to protect children from physical harm.



Case example (prevention from degrading treatment or punishment, right to respect for private and family life, rights of the child)

The applicant alleged that she was raped by two men when she was 14 yrs old. The police investigated the allegation and referred it to an investigator, but no action was taken until one year later when an investigator proposed that the case be closed. The main reason for this was the lack of resistance on the applicant in response to the alleged rape and that, based on the statements of the alleged perpetrators, the applicant had not shown any signs of distress after having sex.

The European Court of Human Rights found a violation of obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, as the authorities failed to fully investigate all the surrounding circumstances of the allegation, and did not sufficiently assess the credibility of conflicting statements made by different witnesses. It also found that little was done to test the credibility of the version of events of the accused.

The Court criticised authorities for attaching little weight to the particular vulnerability of young persons, and the special psychological factors involved in cases concerning the rape of minors.

Source: *M.C. v Bulgaria* (Application no. 39272/98) European Court of Human Rights (Date of decision: 4 December 2003)

Court stage

Some relevant considerations for victims who are children would include:

- children who are victims have a right to give instructions to a legal representative if mature enough (*A & B v Children's Court of Victoria*)
- this right may also be relevant when considering whether children can be compelled to give evidence in court: *R v YL*²⁰
- application of section 10 of the Evidence (Miscellaneous Provisions) Act 1991 (ACT) may be a relevant human rights consideration, which applies if a child is not separately represented by someone else, and the court considers that the child should be represented by someone else, the court may:
 - order that the child be separately represented by someone else; and
 - make any other order it considers necessary to arrange the separate representation.



Case example (right of children and young people)

Fitzroy Legal Service (FLS) has protected a young girl from having to testify against her alleged perpetrators in a criminal trial. The young girl and her family believed that testifying and being cross-examined would cause her serious harm. FLS advocated in favour of her choice not to testify and was successful in doing so. They achieved this by raising section 17 of the Charter, which enshrines the protection of families and children. They argued that protection of her rights as a child and protection of the family should be given due regard when determining whether or not the young girl would be required to provide witness testimony. The Tribunal agreed that she should not testify, and consequently provided her with financial assistance in recognition of the trauma suffered by her.

Source: Fitzroy Legal Service, Submission to the Inquiry into the Charter of Human Rights and Responsibilities Act 2006, 15 June 2011

Post Court

- public authorities may have a positive duty to protect children from physical harm; this duty would extend beyond the conclusion of the court process, and may be relevant when an offender is being released from custody after serving their sentence.

Section 12: Privacy and home

Section 12 of the HR Act says that:

Everyone has the right;

(a) not to have his or her privacy, family, home correspondence interfered with unlawfully or arbitrarily; and

(b) not to have his or her reputation unlawfully attacked.

This right includes a right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily. Private life includes privacy, personal choices, relationships, physical and mental well-being, and access to personal information. Generally this right has been interpreted as the right to live free from interference, and so includes the right to autonomy.

Arbitrary interference in the right to privacy is interference that may be lawful, but is unreasonable, unnecessary and the degree of interference is not proportionate to the need.

²⁰ [2004] ACTSC 115

Investigation Stage

Some relevant considerations for victims when considering the concept of the right to privacy and home during the investigation stage would include:

- Taking measures to protect the privacy of a victim to ensure that information is not unnecessarily given to other parties involved in the investigation.²¹

Example: Police prepare a brief of evidence for a criminal investigation and provide it to the DPP. The DPP serve this material on the defendant. These documents need to be carefully reviewed and any personal information about a victim or witness (such as home address) should be redacted if this information is provided to the person who is alleged to have committed the offence.

Court stage

Some relevant considerations for victims when considering the concept of the right to privacy and home during the court stage would include:

- when considering subpoenas for the health records of victims. Only the records that are directly relevant to the proceedings, not the entire medical history of the victim, should be able to be subject to a subpoena requiring the production of documents. This could also include a right that persons with sufficient interest be notified of any subpoena issued; and
- suppression of the victim's name may be a relevant consideration if the person is vulnerable or does not wish to be identified.

Example: A criminal defence team issue a subpoena requiring the production of the entire health record of the victim from a medical practitioner. The victim was unaware that their personal medical records had been subpoenaed. The entire medical file, which detailed childhood sexual abuse, suicidal thoughts, and major depression was provided to all the parties without the victim's knowledge. A human rights approach would require the party seeking the subpoena and/or the Court to notify the person that their personal records were being subpoenaed, and provide them with first access to inspect the documents. The prosecution could also support this right by notifying the victim of the documentation that has been subpoenaed, and either making the application themselves, or advising the victim how they can go about challenging the subpoena.



Case example (right to privacy and from torture and inhuman treatment)

The Republic of Moldova's failure to adequately protect a woman and her two daughters from a husband's attacks amounted to a breach of the European Convention on Human Rights. The woman and her daughters have been victims of domestic violence for at least 10 years when she began reporting assaults to the police. After the fifth assault she took out a protection order, which was never enforced and that was breached on a number of occasions. The police pressured the applicant to drop her criminal complaint against her husband. The prosecutor decided not to initiate a criminal investigation. Social workers advised her to reconcile with her husband.

Criminal charges were finally laid with the husband admitting he physically and psychologically abused his wife and daughters. A plea bargain was entered into with the prosecutor defining the offence as "a less

21 *Victims of Crime Act 1994*, s 4(i)

serious offence” and suspending the investigation. An appeal was unsuccessful with the senior prosecutor holding that suspending the investigation would afford better protection to the applicants.

The court held that the failure of the system to provide an adequate response to serious domestic violence amounted to a breach of obligations regarding respect for private life, and gender discrimination.

Source: *Eremia v Republic of Moldova* [2013] ECHR, Application no. 3564/11 (28 May 2013)

Section 18: Right to security of person

Section 18 of the HR Act states that everyone has the right to liberty and security of person.

The right to security requires the ACT to provide reasonable measures to protect a person’s physical security through the work of the police and emergency service for example.

Investigation stage

Some relevant considerations for victims when considering the concept of the right to the security of the person during the investigation stage would include:

- victims have a right to know about whether an offender is being released from custody on bail.²² This should include police custody, and mental health facilities. This may not extend to providing information about the whereabouts of that person if there was a risk of retributive violence to them.²³

Court Stage

Some relevant considerations for victims when considering the concept of the right to security of the person during the court stage would include:

- victims have a right to know about whether an offender is being released from custody.²⁴ This should include both police and correctional custody, and from a mental health facility. This may not however extend to providing information about the whereabouts of that person if there was a risk of retributive violence to them.²⁵
- a victim should be informed about the trial process and the identity of the defendant in situations where they do not know the defendant. This information is public information and, unless the proceedings involve a closed court, it should not be withheld from a victim who wishes to be informed.
- this right could be enlivened in relation to allowing evidence to be given via audiovisual link.

Example: A victim’s right to security may sometimes conflict with an accused’s right to liberty. If there are no less restrictive means to ensure a victim or witness’ security that included giving the accused his or her liberty, then a human rights approach would provide for the accused’s liberty to be curtailed.

Post Court

A person has the right to security under the HR Act.

- victims and witnesses should be provided information about the outcome of court proceedings as soon as possible. This should include situations where a not guilty verdict is handed down and the other party is released from custody;

²² Victims of Crime Act 1994, S4(l)

²³ *Venables v New Group Newspapers Ltd* [2001] 2 WLR 1038.

²⁴ Victims of Crime Act 1994, S4(l)

²⁵ *Venables v New Group Newspapers Ltd* [2001] 2 WLR 1038.

- victims have a right to know about whether an offender is being released from custody.²⁶ Victims should be advised when an offender might be eligible for parole, the outcome of any parole hearings, and the date an offender will be released from custody or a mental health facility. This may not extend to providing information about the whereabouts of that person if there was a risk of retributive violence to them.²⁷



Case example (right to life, prevention from degrading treatment or punishment, right to freedom from discrimination based on gender)

The applicant and her mother were victims of domestic violence perpetrated by the applicant's partner over a number of years, including numerous death threats. Despite a number of complaints being made to police, the behaviour continued, ultimately resulting in the murder of the applicant's mother by the applicant's partner.

The European Court of Human Rights found that the violence in this case was foreseeable. It ruled that the right to life extended in appropriate circumstances to a positive obligation on authorities to take preventative measures to protect an individual whose life is at risk from the criminal acts of another individual.

For a positive obligation to be present the authorities must have known, or ought to have known, at the relevant time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party. An authority is in breach of this obligation if they have failed to take measures within the scope of their powers which might have been expected to avoid that risk.

Source: *Opuz v Turkey* (Application no. 33401/02) European Court of Human Rights (Date of decision: 9 June 2009)

Section 21: Fair Trial

S 21(1) of the HR Act provides for the right to a fair trial. It states:

Everyone has a right to have criminal charges and rights and obligations recognised by law, decided by competent, independent and impartial court or tribunal after a fair and public hearing.

The right to a fair trial has been found in other human rights jurisdictions to include a 'triangulation of interests' which include those of the accused, the victim and his or her family, and the public.²⁸

Investigation stage

Some relevant considerations for victims when considering the concept of fair trial during the investigation stage would include:

- avoiding unnecessary/unreasonable delay in laying charges or investigating a matter if it would be unfair to the victim. A long delay in investigating an incident could impact on the victim's ability to give accurate evidence and negatively affect their credibility as a witness;

Example: The owner of a petrol station is held up by an armed assailant wearing a mask. Police investigated and attempted to identify the offender. There is a significant delay in receiving material back from the forensic lab. The Governing Principles require an officer to inform the victim of the progress of the investigation at regular intervals (generally not more than 1 month) s4(b).

²⁶ *Victims of Crime Act 1994*, S4(l)

²⁷ *Venables v News Group Newspapers Ltd and others; Thompson v News Group Newspapers Ltd and others* [2001] 2 WLR 1038.

²⁸ *Bowden et al*, 558; *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1 (24 January 2008) (Bell J).

- giving consideration to informal resolution mechanisms such as alternative dispute resolution if a young person or an Aboriginal or Torres Strait Islander person.

At Court

Some relevant considerations for victims when considering the concept of fair trial would include:

- avoiding unnecessary/unreasonable delay if that would be unfair to the victim, if the delay impacts upon their ability to give evidence. This may affect the victim's credibility as a witness;
- the DPP ensuring they allow views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected;
- prohibiting alleged offenders from personally cross-examining the victim in a domestic violence order or protection order applications as is current practice in criminal matters;
- providing the same right for vulnerable witnesses to give evidence via audiovisual link in civil proceedings as they have in criminal proceedings, particularly for family violence matters;
- consideration of any other matters concurrently occurring in another court.

Example: A man is arrested and charged with seriously assaulting his ex-partner. The victim attended the ACT Magistrates Court on the following day and obtained an interim domestic violence order. The domestic violence order application went to hearing; the woman was cross-examined extensively by her ex-partner's lawyer. The domestic violence order was ultimately granted. The criminal matter went to trial seven months later and the woman was very distressed that she was again cross-examined extensively about the same incident. It would be preferable not to allow a full hearing for a domestic violence order application until the related criminal matter has been completed, to avoid unnecessary trauma for the victim. Legislative amendments should be made allowing an interim order to be put in place during this time to ensure protection for the victim.



Case example (right to a fair trial)

The UK Supreme Court considered two cases where witness statements had been admitted into evidence when the witness was not available for cross examination.

In the first case the victim of an assault died before trial. This statement to police was admitted into evidence. The second case involved a case of kidnapping, where the victim disappeared one day before the trial citing her fear of attending court. Her statement to police was admitted into evidence.

The defendants appealed claiming that they did not receive a fair trial contrary to art 6 of the European Convention on Human Rights.

The Court dismissed the appeal concluding that, provided safeguards and appropriate counter-balancing measures are adhered to, there will be no breach of art 6 of the Convention if the conviction is based solely or decisively on evidence of a statement of a witness without the witness giving evidence.

Source: R v Horncastle & Ors [2009] UKSC 14 (9 December 2009) R v Horncastle & Ors [2009] UKSC 14 (9 December 2009)

Post Court

Some relevant considerations for victims when considering the concept of fair trial post-court would include:

- providing proper assistance to victims and witnesses to understand the legal process and the outcome;
- ensuring adequate restitution and compensation for victims as outlined in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This includes restitution from offenders where appropriate, financial compensation provided to victims who have suffered bodily injury or physical or mental health impairment, and assistance such as medical, psychological and social assistance.²⁹

²⁹ United Nations General Assembly Resolution 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985.

